Neutral Citation Number: [2021] EWCA Civ 957

Case No: B2/2020/0436

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT OXFORD
(HER HONOUR JUDGE MELISSA CLARKE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2021

Before :

LORD JUSTICE BEAN
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between :

John Goodinson	**Appellant**
- and -	
PRA Group (UK) Limited	**Respondent**

- -
- -

Thomas Brennan-Banks and Joanna Connolly (Solicitor-Advocate) (instructed by **Joanna Connolly Solicitors**) for the **Appellant**
Richard Jones QC and Philip Mantle (instructed by **Howell Jones Solicitors**) for the **Respondent**

Hearing date: 27 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on 25 June 2021

Lord Justice Warby:-

1. The appellant, John Goodinson, entered into a credit agreement with MBNA International Bank Ltd ("MBNA"). This was a "regulated agreement" within the meaning of the Consumer Credit Act 1974 ("CCA"). Later, the respondent ("PRA"). sued Mr Goodinson for the outstanding balance on the account, said to be £18,415.66, and interest. Its case was that it was the assignee of MBNA's rights and that, before the assignment, Mr Goodinson had failed to pay the monthly instalments as required by the agreement; he had failed to remedy the breach following service by MBNA of a default notice pursuant to s 87(1) of the CCA; and MBNA had terminated the agreement, with the result that the entire balance fell due.

2. The issues raised by Mr Goodinson's Defence included whether any default notice had been served and, if it had, whether it was in the form required by the statute. Deputy District Judge Simpson tried those issues and found in favour of PRA on both of them. Her Honour Judge Melissa Clarke dismissed Mr Goodinson's appeal against the finding that the notice was in the prescribed form. She held that such a finding was open to DDJ Simpson on the evidence before him. On this second appeal, Mr Goodinson challenges that conclusion. His case is that the claimant's cause of action depends upon service and expiry of a notice in a form prescribed by statute, and in such a case a Judge is not entitled to find that the notice was compliant with the formal requirements of the statute without having a copy of the notice.

3. As that formulation indicates, there is no longer an issue about service. But PRA did not disclose or put in evidence the exact notice that, on its case, MBNA had served on Mr Goodinson, or any exact facsimile copy of that notice. It produced a document in the form of a default notice, which has been referred to as a "reconstitution", and which was said to contain all the information required by s 87(1). And it adduced evidence from which the Deputy District Judge inferred that the notice sent by MBNA was, so far as relevant, in the form of the "reconstitution". The question of principle or practice raised by the appeal is whether it is possible for a creditor to establish compliance with the statutory requirements in this fashion.

The statutory provisions

4. Sections 87 and 88 of the CCA provide, so far as relevant, as follows:

> **"87.— 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, …
>
> …
>
> **88.— Contents and effect of default notice.**
>
> (1) The default notice must be in the prescribed form and specify—

> (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.
>
> …
>
> (4) The default notice must contain information in the prescribed terms about the consequences of failure to comply with it and any other prescribed matters relating to the agreement.
>
> (4A) The default notice must also include a copy of the current default information sheet under section 86A."

5. The prescribed form, terms, and matters referred to in s 88(1) and (4) are set out in the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 ("the Default Notice Regulations"). Regulation 2 contains the following provisions:-

> "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 **…** 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 paragraphs 1 to 3, 6 and 8 of Schedule 2 to these Regulations; and
>
> (c) statements in the form specified in [paragraphs 4, 5, 7, 8A and 9 to 11] of that Schedule.
>
> …
>
> (5) Where any statement is required to be in a form specified in a Schedule to these Regulations and is reproduced in the notice, then apart from any heading to the notice, trade names or names of parties to the agreement—
>
> (a) the lettering in the statement shall be afforded more prominence (whether by capital letters, underlining, large or bold print or otherwise) than any other lettering in the notice; and

> (b) where words are both shown in capital letters and underlined in any statement specified in a Schedule to these Regulations, they shall be afforded yet more prominence.
>
> (6) The wording in any such statement shall be reproduced in the notice without any alteration or addition, and in relation to any statement to be contained in the notice the requirements of any note shall be complied with, except that the words "the creditor" may be replaced by the name of the creditor, by the expression by which he is referred to in the agreement or by an appropriate pronoun, and any consequential changes to pronouns and verbs may be used."

6. Schedule 2 to the Default Notice Regulations contains very detailed requirements as to the form and content of a default notice. It requires such a notice to give, among other things, a description of the agreement, the names and postal addresses of the parties, details of the alleged breach and how (if at all) it can be remedied, the consequences of failure to comply with the notice, where and from whom the debtor may get help and advice, and the debtor's right to seek an order from the Court for time to pay. In many of these respects it prescribes the exact wording to be used.

7. The default information sheet referred to in s 88(4A) of the CCA is a document which the Financial Conduct Authority ("FCA") is required by s 86A to prepare and issue, containing information to help debtors and hirers who receive default notices.

8. The creditor under a regulated agreement is not entitled to treat the agreement as at an end or to make a demand for accelerated payment of outstanding amounts unless and until it has served a default notice pursuant to s 87(1) and the period prescribed by or under s 88(2) has elapsed: *Doyle v PRA Group (UK) Ltd* [2019] EWCA Civ 12. If, in the meantime, the debtor remedies the breach or pays compensation for it as specified in the default notice "the breach shall be treated as not having occurred": s 89 CCA.

The procedural history

9. In its Particulars of Claim, PRA set out details of the agreement between Mr Goodinson and MBNA, made on 7 November 1999, and of the alleged assignment of MBNA's rights. It alleged that in breach of his obligations under the agreement Mr Goodinson had failed to maintain the required minimum payments. It went on to allege as follows:-

> "21. Accordingly on 3rd December 2012 MBNA served on the Defendant a Default Notice under s 87 (1) of the Consumer Credit Act 1974 identifying certain breaches of the terms of the agreement including but not limited to non-payment of monthly instalments by way of repayment and demanding these breaches be remedied by 22nd December 2012. The Default Notice made clear that in the absence of remedial action being taken by the Defendant that the Agreement would be terminated and that as a consequence thereof the Defendant would be required to repay the balance outstanding under the Credit Agreement on such termination.

> 22. A copy of the default notice sent by MBNA to the Defendant is exhibited at Appendix 10 to these Particulars of Claim."
>
> **Termination**
>
> 23. As the Defendant failed to remedy the breached identified within the Default Notice by the date specified in that notice, MBNA terminated the Agreement."

PRA further alleged that the agreement provided that upon termination Mr Goodinson was obliged immediately to pay MBNA the balance outstanding; that he failed to do so; and that PRA was entitled as assignee to recover that sum and interest.

10. In his Defence, Mr Goodinson admitted that there had been an agreement, but took a variety of points. These included a challenge to the validity of the assignment. Pertinently for present purposes, he pointed out that service of a notice compliant with ss 87 and 88 of the CCA is necessary before the creditor under a regulated agreement can become entitled to terminate the agreement or to demand earlier payment of any sum. He went on:-

> "12. It is denied that the default notice exhibited to the particulars of claim is compliant with S. 88 CCA. The defendant denies receipt of same.
>
> 13. In the premises in the absence of a S.88 CCA 1974 compliant notice, predating the acceleration of payment for default, or termination for default, the alleged debt of £18,415.66 was and is unenforceable against the defendant."

11. PRA's Reply averred that "in circumstances where the notice was produced and addressed to the Defendant's home address" the evidential presumption of regularity should apply, such that the court should presume "that the notice was, (a) having been produced, sent and (b) having been sent, received." PRA sought details of Mr Goodinson's bare denial that the form of notice complied with s 88. In Further Information, Mr Goodinson alleged non-compliance with s 88(1)(a) and s 88(4A). His case was, therefore, that the notice did not identify the alleged breach or include a copy of the current default information sheet.

12. Appendix 10 to the Particulars of Claim was, or appeared to be, a copy of a one-page letter on the headed notepaper of MBNA Ltd, dated 3 December 2012. It was captioned "IMPORTANT – YOU SHOULD READ THIS CAREFULLY" and headed "Default Notice Served Under Section 87(1) of the Consumer Credit Act 1974. It was addressed to Mr Goodinson, identified his account number, and set out details of an alleged breach by failure to make a minimum payment when due. It said that to remedy the breach MBNA "must receive a payment of £2904.79 by 22 December 2012". It identified the current account balance as £17,480.71. The letter set out the consequences of taking or not taking the action required by the notice. It referred to the current information sheet on default. The letter bore the signature of Brian Jackson, Head of Collections and Recovery at MBNA's Customer Assistance Department in Chester.

13. When PRA gave standard disclosure by list on 15 November 2018, it identified a "Default Notice from MBNA to Defendant" dated 3.12.12 as one of the documents it had in its control. Thus far, Mr Goodinson and his advisers could have been forgiven

for thinking that PRA's case was that it was in possession of a photocopy or facsimile of the very document which MBNA had served on Mr Goodinson, and that it had appended that copy (or a copy of it) to its Particulars of Claim. But that was not the position. This was made clear in a witness statement made on 13 December 2018 by Stephen Glassborow, PRA's Legal and Compliance Officer.

14. Mr Glassborow explained the Notice of Default attached at Appendix 10 of the Particulars of Claim. He said that PRA had "obtained this copy from MBNA pursuant to the … assignment", describing it as "a reprint of the document that was stored electronically by MBNA". The company name on the document was not the one used by MBNA in December 2012. The printed footer referred to the company being regulated by the FCA, a body which was not in existence at that time. Mr Glassborow's statement highlighted these features of the letter, acknowledging that they "do not correspond with the era that this letter originated". His explanation was that when providing copies to PRA, MBNA had reprinted data drawn from the electronic record onto a present-day letterhead.

The hearing before DDJ Simpson

15. The hearing was to have been the trial of the action, but a procedural dispute about the admission of a witness statement from Colin Quinn of Mr Goodinson's solicitors left insufficient time for that. It was decided to try two preliminary issues, on each of which PRA bore the burden of proof. The issues were not defined in writing, but stated broadly they were: (1) did MBNA produce a notice of default that complied with the CCA and, if so, (2) was that notice served on Mr Goodinson? If PRA failed on one or both of those issues the claim would be dismissed.

16. Mr Brennan-Banks, appearing for Mr Goodinson, took objection to the admissibility of Mr Glassborow's statement. There was a statement from Mr Goodinson in which he admitted entering into the agreement and running up substantial debts. His last payment to MBNA was said to have been in the sum of £536.85 on 7 June 2012. The statement denied receipt of a default notice, but it did so in bald terms that added nothing of substance to his pleaded case on that point. By agreement, neither witness was called, and the preliminary issues were tried on the basis of the documents in the trial bundle. Mr Brennan-Banks took up the Court's invitation to speak first.

17. The bundle included, at page 284, the document at Appendix 10 to Particulars of Claim. Unsurprisingly, given Mr Glassborow's statement, nobody was under any illusions as to the nature of that document. Mr Brennan-Banks sought to turn its status to his client's advantage, submitting that PRA could not prove its pleaded case because the document was not a "copy" of the default notice, as alleged in the Particulars of Claim. That did not find favour with the Judge, but his judgment mentioned the anachronistic references to MBNA Ltd and the FCA in the document dated 3 December 2012, which he described as "a reconstituted letter".

18. The argument presented by Mr Brennan-Banks on behalf of Mr Goodinson went beyond the issues pleaded in the Further Information. He analysed other documentary records in the agreed trial bundle, submitting that these amounted to positive evidence that MBNA had *not* created or sent any such notice as alleged in the Particulars of Claim. For this purpose he relied on four categories of MBNA document: (i) credit card statements, (ii) correspondence, (iii) customer information system log, and (iv) the

archived comment log. This last document was identified in the records as showing "additional comments which have been archived from the main account notes", that is to say the customer information system log.

19. DDJ Simpson adopted a similar approach. Taking the matter chronologically he noted that, according to the monthly statements, Mr Goodinson had failed to make the minimum payment of £554.55 that was due on 7 July 2012, and made no further payments after that. Monthly statements for July to September 2012 recorded a series of escalating demands, warnings and measures: MBNA called for payment, eliminated Mr Goodinson's credit, told him not to use his card, and then – on 19 October 2012 – it asked for the return of all cards in his possession. On the same day, the customer information log recorded that notice of sums in arrears was sent out. A copy of that letter was before the Deputy District Judge. On 17 November 2012, the monthly statement warned that a default would soon be entered on Mr Goodinson's credit file. Then came the "reconstituted" letter dated 3 December 2012 and the default notice "purportedly attached and enclosed", identifying the sum required to remedy the breach as "a payment of £2,904.79 by 22 December 2012."

20. DDJ Simpson noted that (as Mr Brennan-Banks had pointed out) there were no entries for 3 December 2012 in the customer information log; but there was such an entry in the archive comment log. It read as follows: "NOD 150 BL17480.71 AR2904.79 SD0312 DD0512 EXP2212". The documents indicated that this entry was made by an operator who had been at MBNA since 2008, who had made no entries on the customer information log. By a process of comparison between this string of letters and numbers and the purported default notice, and applying general knowledge, the Judge interpreted the log entries. The letters "NOD" in the log appeared on the left-hand corner of the notice. (I interpose to add that it had been Mr Brennan-Banks' submission that those letters stood for Notice of Default). The Judge concluded that the log entry "BL17480.71" reflected the outstanding balance. "AR 2904.79" was a reference to the arrears. "SD 0312" was a reference to a sent date. And "EXP 2212" was a reference to the expiry date of the default notice. At [21], the Judge set out his conclusion: "I find that the entry in the [comment] log on 3 December 2012 is the source of the information that then appeared in the default notice itself".

21. The DDJ reminded himself that the issue was whether there was evidence, direct or indirect, of the creation of a default notice. The document relied on in the Particulars of Claim was not a copy of the original but reconstituted, and there was no direct evidence in the form of a witness statement; but there were the two logs. It was improbable that MBNA would have sought to recreate such records to shore up deficiencies in its other documentation. In the circumstances the logs were to be treated as a reliable contemporaneous record. The DDJ was satisfied on the balance of probabilities that the document at page 284 of the bundle "as to its content, leaving aside the more recent references to MBNA and the FSA, was created on that date and contains the information which appears in the log of 3 December 2012."

22. Having reached that conclusion the DDJ, referring to observations of this Court in *Gregory v MBNA Europe Bank Ltd* [2013] EWCA Civ 716 [5], applied the common-sense presumption that the document was posted. He went on to consider whether it was valid. He identified two errors. The first consisted of wrongly numbering the clauses of the agreement which required the debtor to make the minimum payment. He concluded, following *Rankine v American Express Services Europe Ltd* [2008] CTLC

195, that this was not a breach of s 88 or, if it was, it was *de minimis.* The second error identified by the Deputy District Judge was an understatement of the arrears at the date of the notice, which he found to be £3,497.50. He held that although an overstatement might have invalidated the notice, an understatement did not do so. In consequence, the Deputy District Judge found, "we have a valid default notice dated 3 December 2012."

23. The formal order recorded that "Upon the court determining that a [CCA] compliant Default Notice in the form set out at page 284 of the trial bundle was created on 3 December 2012 and posted to the Defendant" the trial should be adjourned part heard.

The appeal to HHJ Melissa Clarke

24. Mr Goodinson sought permission to appeal on four grounds, and applied to adduce fresh evidence. The fresh evidence application was refused, and Mr Goodinson was given permission to argue one ground only: that DDJ Simpson was wrong to infer that the Notice he found had been created and sent on 3 December 2012 was compliant with the statute, notwithstanding errors on its face.

25. In support of that ground of appeal, Mr Brennan-Banks advanced two main submissions. First, that it was not possible for DDJ Simpson properly to assess and make findings on the validity of the default notice which he found had been created and sent on 3 December 2012, because he had no such notice before him. The "reconstitution" was entirely inadequate for that purpose. There was no positive evidence before the Court from any witness from MBNA, in particular as to the procedure of creation of the logs, and their meaning. Mr Brennan-Banks' secondary submission was that each of the errors identified by DDJ Simpson was, in itself, sufficient in law to invalidate the notice. PRA defended the DDJ's decision save in one respect: by a respondent's notice, it contended that the notice correctly identified the sum due at the date of its service, and thus did not contain the second error identified by the DDJ.

26. HHJ Clarke accepted PRA's case on this last point, noting that as of 3 December 2012 Mr Goodinson's default consisted of a failure to make the minimum payment that fell due on 5 November 2012. That was in the sum of £2,904.79 which was – according to DDJ Simpson – the sum specified in the notice. The higher minimum payment referred to by the Deputy District Judge did not fall due until 6 December 2012, three days after the date of the notice. The Judge also upheld DDJ Simpson's conclusion that it was not fatal to misidentify the relevant clauses of the agreement. On the main issue, she held as follows:-

> "17. This is the claimant's claim to prove, and they have to prove it on the balance of probabilities. The question before Deputy District Judge Simpson was, on the balance of probabilities and without any positive evidence of the format and content of the default notice, including the 'boilerplate' provisions and warnings of the notice of default: was it more likely than not that the notice of default complied with the prescribed requirements which were required by the statutory framework at the time? Part of the circumstances include that the reconstituted version … had a number of mistakes in it, of which Deputy District Judge

> Simpson was well aware (I put to one side the figures, which I find were not a mistake).
>
> 18. It seems to me the requirements of the CCA were well known at this stage. The prescribed warnings had been needed for very many years. MBNA were a large credit card provider at the time with many customers and the same prescribed wording would have been required on every default notice. It seems to me that it was open to the Deputy District Judge to draw an inference that the notice of default that was created and sent on 3 December 2012 was on the balance of probabilities otherwise compliant with the Consumer Credit Act, given the evidence before him. It is not an inference that every judge would take, but that is not the test. The test is whether his decision to draw that inference was, in all the circumstances, within the ambit within which reasonable disagreement is possible, and I am satisfied that it was. But it was a decision which he was entitled to make."

Accordingly, the appeal was dismissed.

The appeal to this Court

27. Mr Goodinson's case in this Court reflects the first main submission advanced to HHJ Clarke. The Grounds of Appeal contend that "in the absence of any copy of the Default Notice which was sent in 2012, and absent any evidence from MBNA … the Judge was wrong to dismiss [Mr Goodinson's] appeal against the DJ's decision to *infer* the compliance of the Default Notice with the 1974 Act and the 1983 Regulations." Elaborating that point, the Grounds point out that compliance is an essential part of the claimant's cause of action. The comments log on which the DDJ relied is characterised as "an unexplained record which states … letters and numbers". It is said that "as a matter of principle" it is not open to a Judge to infer the necessary compliance from such a document.

28. Granting permission to appeal on this ground, Arnold LJ invited the parties to consider the "best evidence rule" if and to the extent it still survives. An application was then made by Mr Goodinson for permission to adduce fresh evidence before us. The evidence consisted of a witness statement and exhibits prepared by Mr Quinn, who is a Team Leader - Litigation Executive. His statement suggested that Arnold LJ's reference to the best evidence rule had "significantly widened" the scope of the appeal, so that it was now relevant to consider the products of his review of the firm's ongoing and archived records of consumer credit cases. This was said to give "a transparent snapshot of the state of the consumer credit industry, insofar as the reliability of the evidence produced by debt purchasers when seeking to invite the Courts to infer service of statutory notices upon consumers" (sic). The evidence was voluminous, comprising a 27-page witness statement with a 154-page exhibit, dealing with 18 other consumer credit cases. We declined to admit it, having concluded that the application failed the tests laid down by this Court in *Ladd v Marshall* [1954] 1 WLR 1489.

29. In summary, the evidence comprises selective illustrations of the proposition that credit companies, not limited to PRA, are not always able to produce primary evidence of the

service of compliant default notices, and do not always comply with the statutory requirements. Such evidence could with reasonable diligence have been obtained for use below. It was drawn from the solicitors' own files. Some of it had indeed been obtained by the time of the hearing before DDJ Simpson, and much of it was the subject of the fresh evidence application made to HHJ Clarke. She dismissed that application, by an order against which Mr Goodinson has not sought to appeal, concluding that the evidence was available at the time of the trial. We therefore saw real force in the complaint of Mr Jones QC, on behalf of PRA, that the application is an illegitimate collateral attack on that decision. In any event, we did not consider it could be said that this evidence would probably have had an important influence on the result below.

30. There is no need for evidence to establish that the issue of principle raised by Mr Goodinson has potentially important ramifications. That is self-evident. The resolution of that issue cannot turn on what has or has not happened in other cases, still less on the details of cases involving financial institutions other than PRA. Arnold LJ's reference to the best evidence rule does not affect this point. In our judgment, nothing he said justified the preparation or introduction of this evidence. Nor did we accept the further submission of Mr Brennan-Banks and Ms Connolly that the evidence was relevant because PRA had raised a new point about "reconstitution" for the first time in this Court. We found that submission hard to follow. As I have shown, PRA's case as to the nature of the notice annexed to the Particulars of Claim was made clear before the trial, and nobody was under any misapprehension about it at the hearing before DDJ Simpson. The same is true of the appeal to HHJ Clarke, as is clear from her judgment, and a passage in the transcript of proceedings which was drawn to our attention. PRA served no respondent's notice and we did not understand it to be raising the issue identified by Counsel, namely "whether statutory notices can or should be reconstituted". Nor could we see how the "fresh" evidence could assist with such an issue.

31. Mr Brennan-Banks further argued that the evidence was relevant to rebut a false assumption which HHJ Clarke was said to have made, that MBNA could be relied on to include the prescribed "boilerplate" rubric in notices of default. But that issue was not before her. No such issue had been pleaded, and none had been raised before DDJ Simpson, as he expressly recorded in his judgment at [23]. For good measure, we would also agree with the submission on behalf of PRA that the fresh evidence application would fall to be refused on case management grounds. The exercise cost more than the sum at stake in the proceedings and was grossly disproportionate to any modest significance the evidence might have had.

32. We therefore approach the appeal by reference to the evidence and argument that were before DDJ Simpson and HHJ Clarke - so far as these are relevant to the single issue for our decision - and in the light of the further submissions made to us.

The best evidence rule

33. This is the label for a legal maxim that used to hold sway, to the effect that "the best evidence must be given of which the nature of the case permits". One consequence was that where a party had possession or control of an original document, they would not be permitted to adduce secondary evidence of its contents, in the form of a copy. At one time this may have been a rule of law but, analysing the history in *Masquerade Music Ltd v Springsteen* [2001] EWCA Civ 563, [2001] EMLR 25, Jonathan Parker LJ

concluded that it had probably reduced to nothing more than a rule of practice by the mid-nineteenth century. At any rate, it is clear law that no such rule exists today, at least in civil actions. The rule against the admission of hearsay in civil proceedings was abolished long ago. Section 8 of the Civil Evidence Act 1995 makes clear that a party may produce secondary evidence of a statement contained in a document, "whether or not that document is still in existence". The approach to admissibility generally has changed. And in *Springsteen* this Court held that the best evidence rule was no longer part of our law. As Jonathan Parker LJ put it at [85]:-

> "… the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence."

34. In the same paragraph, Jonathan Parker LJ made clear that it is all a question of what if any weight should be attached to the secondary evidence. The circumstances will include whether the party seeking to adduce that evidence can readily produce the document. If so, the court might decline to admit the evidence on the ground that it was worthless. At the other extreme, where the party seeking to adduce secondary evidence genuinely could not produce the original, it might be expected that (absent some special circumstances) the court would admit the evidence and attach such weight to it as it considered appropriate in all the circumstances. In a case between the two extremes, it is for the court to make a judgment as to whether any and if so what weight should be attached to the secondary evidence. Laws and Waller LJ agreed with the judgment of Jonathan Parker LJ.

35. This much is common ground between the parties to this appeal. Mr Brennan-Banks has nonetheless sought to persuade us that it was not open to DDJ Simpson to rely upon the archived comment records of MBNA. His argument is that it was wrong to attach any weight to those records "when the claimant should have provided the primary evidence namely the default notice", and failed to explain why it had not done so. In support of this submission, Counsel asserts that PRA had that notice in its possession "according to its disclosure list". He points to the observations of Jonathan Parker LJ in *Springsteen* at [80]:

> "… the 'obligation' of a party who has a document to produce the original in evidence is founded not on any rule of law but is simply a reflection of the fact that a party to whom a document is available will by reason of that very fact be unable to account to the satisfaction of the court for his non-production off it when inviting the court to admit secondary evidence of its contents, with the practical consequence that the court will attach no weight to the secondary evidence."

36. I would reject this submission, without hesitation. The observations of Jonathan Parker LJ cannot be applied to the facts and circumstances of the present case. The starting point for the reasoning in the passage cited is that the party in question has a document "available" to it. In this case the reality, or at least the footing on which the proceedings have been conducted since at least late 2018, is that PRA did *not* have a complete

facsimile copy of the original default notice available to it. That, indeed, was an essential building block of the case advanced by Mr Brennan-Banks to DDJ Simpson, as well as to HHJ Clarke and this Court. It follows, as Mr Jones QC readily conceded, that PRA's statements of case were not satisfactory and its disclosure list was defective. But those are procedural defaults. They cannot be relied on by Mr Goodinson as founding some form of estoppel. Mr Goodinson's team were not misled.

37. I would add two observations. First, even in the absence of the evidence contained in Mr Glassborow's statement, it would in my judgment be unreasonable to infer that the reason for the state of the evidence before DDJ Simpson was that PRA had a facsimile copy of the original notice available to it, but chose not to produce it. PRA's evidence suggested the opposite, and in any event the more natural inference would be that PRA did not have such a document available. That might be because no such notice was ever created or served, or because any documentary or other copy was lost, or because it was created but not passed on by the original creditor to PRA, an assignee. These would be matters for the trial court to consider and weigh up. Secondly, it is appropriate to recall that Mr Brennan-Banks' own argument before DDJ Simpson relied on the contextual documentation, including the logs, as admissible evidence that was probative of the existence or (as he submitted) non-existence of the alleged default notice. The submission that I am now addressing therefore represents a considerable change of position. In my judgment, Counsel's original stance was the correct one.

Assessment

38. It cannot, in my opinion, be laid down as a rule of law or practice that the creditor under a regulated agreement which bears the burden of proving, on the balance of probabilities, the service and expiry of a notice which complies with ss 87 and 88 of the CCA can only achieve this by production of the original notice. No justification has been put forward for the adoption of any such rule, which seems to me to be contrary to authority, insupportable in principle, hard to apply, and calculated to generate unjust results.

39. *Springsteen* is binding authority that the best evidence rule no longer applies; secondary evidence may be admitted and relied on, and the weight to be attributed to it will depend on all the circumstances of the case. That is all consistent with the modern approach to evidence. Yet it seems to me that the approach advocated by Mr Brennan-Banks would reintroduce and go beyond the rigidity of the best evidence rule.

40. The rule contended for would clearly apply to a case where the creditor admits, or it is established to the satisfaction of the court, that it has the original notice available. The creditor's case could not be established. So far so good, it might be said, although even this seems to me to row back on the approach identified in *Springsteen*. But the problems become obvious when one considers the application of the rule to a case at the other extreme. A claim advanced without production of the original notice would fail, where (for example) the creditor is an assignee which is able to establish that it does not and never did have the original, but has compelling evidence that the document was created and served, in full compliance with every one of the statutory requirements. The debtor would escape in every case where the original was not produced, however good the explanation for failure to produce it, and however compelling the secondary evidence.

41. I put one hypothetical scenario to Mr Brennan-Banks in the course of argument: the debtor would escape even if the creditor had a convincing witness of impeccable character who could say from his own experience or observation that the document was completed with scrupulous adherence to all the prescribed requirements, and personally delivered to the debtor. Other hypothetical examples of injustice are easy to conjure up. What if it is proved beyond doubt that the server holding the original digital document was destroyed by fire, but it happens that secondary evidence can be produced in the form of photographs of a hard copy document put together in impeccable form, taken before and during its delivery to the debtor? This example illustrates a difficulty that did not arise in *Springsteen*, namely that in the digital age it may be hard clearly to identify and draw rigid distinctions between an "original" document and "secondary" evidence. It is common knowledge that computer systems commonly generate a range of different documents from the same digital information. How would the rule apply? Complex questions could arise.

42. Points such as these carry still more weight when one considers that there are many forms of legal proceeding that require the service of a statutory notice in a prescribed form. It has not been submitted that the CCA, or proceedings under the CCA, have any special or distinctive characteristics that place them in a category that is all their own, or limited in scope. Accordingly, the implications of adopting a rule such as that proposed would seem to be very far-reaching indeed.

43. Mr Brennan-Banks has sought support for his submission in *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB), [2010] Bus. L. R 1142, a decision of HHJ Waksman QC (as he then was) sitting as a High Court Judge. That case was about the requirement, imposed on a creditor by ss 78 and 180 of the CCA and the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 ("the Copies Regulations"), to provide the debtor on request with "a copy" of a regulated agreement. The Judge, having considered the statute and the Copies Regulations, held that this obligation, imposed to ensure the debtor was provided with information, can be complied with by the provision of an honest and accurate version of the executed agreement reconstructed from sources other than the actual signed agreement. Mr Brennan-Banks has sought to distinguish the nature and purposes of the statutory regime with which we are concerned. His argument is that it follows that PRA's production of a reconstituted default notice in this case cannot be justified as compliant with the CCA. I have failed to follow the logic of this submission. I can see that the two regimes are not the same. It follows that *Carey* is not authority that the appellant is wrong on the point of principle raised by this appeal. But it certainly cannot be said to follow from the fact that reliance on a reconstituted document *is* permissible for one purpose under the CCA that it is *not* acceptable in in the present, different context. I cannot see how *Carey* assists the appellant on the issue of principle.

44. Turning to the judgments in the present case, DDJ Simpson correctly identified the primary issue as whether the evidence before him was sufficient to establish inferentially that MBNA produced a default notice dated 3 December 2012 which complied with the statutory requirements in the particular respects that were put in issue before him. The main issue argued before him was whether it had been proved that MBNA produced any notice at all. The other issues raised went beyond the confines of the pleaded case for Mr Goodinson, but they did not include whether the notice, if there was one, included the "boilerplate" wording prescribed by the regulations.

45. As I have noted, the Deputy Judge's approach to the evidence before him was similar to that adopted by Mr Brennan-Banks in submissions. He had regard to the same circumstantial documentation, the authenticity of which was undisputed. He focused attention on what the records indicated about the issue of a default notice, and the information it contained. The key questions as to the content were whether the notice contained accurate information as to the default, the steps required to remedy it, and the due date. He approached these issues in a rational manner, having regard to the evidence as a whole. His conclusion differed from that which was urged upon him by Mr Goodinson. But he did not make any error of principle. Nor was his decision irrational. Far from it. The Deputy Judge took a critical and analytical look at the MBNA documentation, and produced a carefully reasoned assessment of it. Viewed as it should be, as an evaluation of the weight to be attributed to relevant and admissible evidence, and the inferences that should be drawn from that evidence, I cannot fault the judgment of DDJ Simpson, save in one respect that is immaterial on this appeal.

46. The Deputy District Judge made one mistake, but that was in favour of Mr Goodinson. It is now clear that, as HHJ Clarke concluded, the archived comments log accurately recorded the minimum payment due from Mr Goodinson as at 3 December 2012. It followed, if the DDJ's overall approach was correct, that the only error in the notice was the incorrect numbering of the contractual clauses. DDJ Simpson held that this was immaterial, HHJ Clarke upheld him on that point, and there is no appeal against that aspect of her decision. On the single issue before us, HHJ Clarke was correct: the conclusion arrived at by the Deputy District Judge was one that was open to him on the evidence. He was not wrong. In my opinion this appeal should be dismissed.

47. Bearing in mind the concerns that seem to have lain behind the production of the "fresh" evidence in this case, I should perhaps say this. None of the above is intended to lay down or even suggest any rule to the opposite effect of that for which Mr Brennan-Banks has argued. I am far from saying that District Judges should always find secondary evidence sufficient to establish the creation and service of a compliant statutory notice. Nor would I suggest that, as a rule, it is acceptable for creditors suing under regulated agreements to rely on secondary evidence. The point is illustrated by the case relied on before DDJ Simpson and HHJ Clarke, in which a Recorder concluded on the evidence before the Court in that case that the creditor had failed to prove the production and service of a compliant notice. The case (*PRA v Segal* (2017)) is distinguishable from ours, as the claim relied on a reprinted document and there was "no evidence of the record or type of record from which" the reprinting was done. No doubt District Judges, who deal with cases of this kind every day in courts across the land, will demonstrate a healthy common-sense approach to the specific evidence adduced by the party bearing the burden of proof, and the inferences that can properly be drawn in all the circumstances of the particular case.

Lady Justice Elisabeth Laing:-

48. I agree.

Lord Justice Bean:-

49. I also agree.