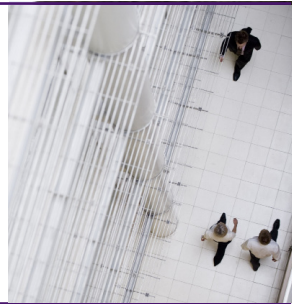


Review

Commercial & Dispute Resolution



Brokers Fees and Prescribed Terms under the Consumer Credit (Agreements) Regulations 1983: Further Good News for Lenders

INTRODUCTION

Hot on the heels of the recent and emphatic judgments in *McGuffick*¹ and *Heath*² comes another Court of Appeal decision on issues arising out of the Consumer Credit Act 1974 (the 'CCA 1974'), the Consumer Credit (Total Charge for Credit) Regulations 1980 (the 'CCTCCR 1980') and the Consumer Credit (Agreements) Regulations 1983 (the 'CCAR 1983'): *Southern Pacific Personal Loans Limited v Michael Walker & Suzanne Walker* [2009] EWCA Civ 1176 ('*Walker*'). Lenders will be pleased to note that the Court dismissed both points raised by the borrowers, found the agreement to be wholly enforceable and adopted a common sense approach to the issues.

THE FACTS

Mr & Mrs Walker owned a property in Winsford. They applied for, and obtained, a fixed sum credit agreement with Southern Pacific Personal Loans Limited ('**Southern Pacific**'). The agreement was regulated by the CCA 1974 and subject to the CCTCCR 1980 and the CCAR 1983. The advance was for £17,500 and, because Mr & Mrs Walker obtained the loan using a broker (which was only discovered on appeal to the Court of Appeal), there was a broker fee of £875. The agreement described the loan of £17,500 as the "Amount of Credit" and the broker fee, in a separate box, as the "Broker Administration Fee." The two figures were combined in another box described as "Total Amount Financed" and interest was applied to this joint figure.

THE PROCEEDINGS

After defaulting on the instalments, Southern Pacific served a default notice and terminated the agreement. It later obtained a suspended possession order. Mr & Mrs Walker sought to appeal the order and raised (for the first time) arguments of enforceability. Before His Honour Judge Halbert, sitting in Chester County Court, Mr & Mrs Walker succeeded and the agreement was declared wholly unenforceable.

THE ISSUES

Giving the leading judgment, Lord Justice Mummery said the Court had to decide the following points:

- whether the agreement correctly stated the "amount of credit" as required by Paragraph 2 of Schedule 6 to the CCAR; and
- if it did, whether the agreement correctly stated the total amount of other charges included in the total charge for credit provided under the agreement as required by Paragraph 10(2) of Schedule 1 to the CCAR.

1 If you want to know more about the Court's decision in *McGuffick*, please see our Review dated 8 October 2009 entitled 'First Consumer Credit Test Case decided in Bank's Favour' available from our website: <http://www.hammonds.com> or by contacting Russell Kelsall by e-mail at russell.kelsall@hammonds.com.

2 If you want to know more about the Court's decision in *Heath*, please see our Review dated 6 November 2009 entitled 'Multiple Agreements under the Consumer Credit Act 1974: More Good News for Lenders' available from our website: <http://www.hammonds.com> or by contacting Russell Kelsall by e-mail at russell.kelsall@hammonds.com.

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THE DECISION

The Court of Appeal unanimously decided in Southern Pacific's favour on both issues meaning the Agreement was wholly enforceable. It decided that:

- the nub of this case was the proper construction of Section 9(1) and 9(4) of the CCA 1974;
- it could not accept the submissions from Mr & Mrs Walker's barrister or HHJ Halbert's judgment that Section 9(4) stopped interest being charged on any "charge for credit" (as defined by the CCTCCR 1980);
- this submission and the judgment was flawed because: (a) it treats interest as a necessary feature or indicator of credit: this is not the case; and (b) there is no mention of interest at all in Section 9(4) and certainly no exclusion of it;
- the function of Section 9 was not to exclude anything but, by contrast, to supply a special statutory meaning to the word "credit": it does not prevent interest being charged on the broker's fee during the period allowed for re-payment;
- the combined amount of £18,375 was not the "amount of credit";
- the wording of the agreement was clear: the "amount of credit" was £17,500 (as plainly recorded on the agreement);
- although HHJ Halbert did not have to decide the point in light of his findings under Schedule 6, his judgment that there was a breach of Schedule 1 and his decision not to grant an enforcement order under Section 127 was wrong: he had misapplied the provisions of Paragraph 10(2);
- the provisions of Paragraph 10(2) required Southern Pacific to state the total amount of other charges included in the total charge for credit: because the agreement stated the broker's fee, this had been complied with.

SUMMARY

Coming after two extremely welcome decisions in *McGuffick* and *Heath*, the decision in *Walker* is a further and considerable blow to borrowers looking to evade their responsibilities, their solicitors and claims management companies. Tellingly, the Court of Appeal placed considerable reliance upon what was recorded on the agreement: the "amount of credit" was recorded as £17,500. Such a decision will give considerable comfort to lenders facing similar allegations including, for example, allegations that the payments, charge for credit, total amount payable and rate of interest are, either in whole or part, wrongly recorded.

It is also noteworthy that Southern Pacific's costs were, by the time of the appeal, around £100,000 compared to the outstanding liability of around £40,000. No doubt these costs will be picked up by the after the event insurer who may also be responsible for Mr & Mrs Walker's disbursements (including their own Counsel's fees). With such a significant liability for the after the event insurer, one questions whether further claims will be issued. It is also questionable whether Mr & Mrs Walker's solicitors, (who were acting under a conditional fee agreement and will therefore have no reward for their time spent bringing this case), and other firms will continue to bring such claims with seemingly limited or no reward. No doubt time will tell.



FURTHER INFORMATION

For further information on this article, or for advice with any of the matters raised or any other issue arising out of consumer credit law, please contact:

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