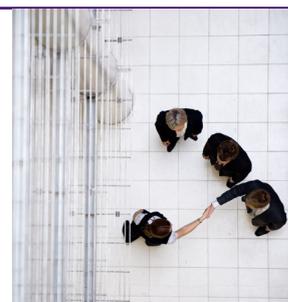


# Review

## Commercial & Dispute Resolution



## Section 77 and 78 of the Consumer Credit Act 1974: More Welcome Guidance from the Court

### INTRODUCTION

The raft of consumer credit decisions shows no sign of slowing down with another extremely welcome decision for lenders on various issues arising out of Section 78 (and, by analogy, Section 77) of the Consumer Credit Act 1974 (the “**CCA 1974**”) in *Carey & Others v HSBC Bank plc & Others* [2009] EWHC 3417 (QB) (“*Carey*”).

### THE ISSUES

The Court was asked to determine six preliminary issues, some of which were broken down into sub-issues, on matters arising out of Section 78 of the CCA 1974. Because of the similarity between Section 78 (which applies to running-account credit like credit cards) and Section 77 (which applies to fixed sum loan agreements like personal loans), the decision in *Carey* is equally applicable to disputes on the nature and effect of Section 77.

The issues for the Court were (assuming a Section 78 request had been made):

(i) Whether a lender had to provide:

- a photocopy of the original agreement (or, at least, provide a copy derived directly from the original) or a reconstituted copy which may be produced from sources other than the original signed agreement;
- a document which would (if signed) comply with the Consumer Credit (Agreements) Regulations 1983 (the “**CCAR 1983**”); and
- a copy of the agreement including the debtor’s name and address at the date when the agreement was made.

(ii) If an agreement has been varied, what the lender has to provide.

- Whether a breach of Section 78(1) on its own gives rise to an unfair relationship.
- If there is a breach of Section 78(1), whether the Court can make a declaration of non-compliance:
- if the lender admits the breach but did not admit it before proceedings were issued; and
- if the lender denies or does not admit a breach.

(iii) Whether a document signed by the debtor contains the prescribed terms if:

- they are on a sheet which is referred to on the piece of paper signed by the debtor;
- where that sheet is attached to the piece of paper signed by the debtor; or
- where that sheet is separate from but was supplied with the piece of paper signed by the debtor.
- If the lender fails to establish, at trial, that there was a document signed by the debtor and containing the prescribed terms, whether that (on its own) amounts to an unfair relationship.

The decision in *Carey & Others v HSBC Bank plc & Others* provides welcome clarification for lenders on various issues arising out of Section 78 (and, by analogy, Section 77) of the Consumer Credit Act 1974.



## THE DECISION

In a fairly lengthy judgment, His Honour Judge Waksman QC decided that:

- There was no need to keep the original signed agreement: Lenders can satisfy Section 78 (and, it follows, Section 77) by providing a reconstituted version of the executed agreement which may be from sources other than the actual signed agreement.
- Lenders need not, when responding to a Section 78 or 77 request, provide a document which would comply (if signed) with the requirements of the CCAR 1983 over the form of the agreement.
- The copy provided must contain the debtor's name and address at the time of entering into the agreement. Lenders can, however, insert this information from sources other than the actual signed agreement.
- If an agreement has been varied, lenders must provide a copy of the original agreement and the terms in place at the date of the request.
- Breaching Section 78 does not, on its own, create an unfair relationship within the meaning of Section 140A.
- The Court has the power to make a declaration that there has been a breach of Section 78 (and also Section 77) but whether it will exercise its discretion to make such a declaration will depend on the facts of each case. The Court will not make a declaration if the lender admits in the proceedings that it has not complied with Section 78.
- If a debtor signs a form saying the "terms and conditions are attached" and that form does not include the prescribed terms but there are, attached by a staple, further terms (including the prescribed terms) then the document "contains" the prescribed terms.
- If the Court decides, following a trial, that there is no signed agreement containing the prescribed terms then this does not, on its own, create an unfair relationship within the meaning of Section 140A. Similarly, reporting to credit reference agencies (after *McGuffick*) does not create an unfair relationship.

## POINTS TO NOTE

The following points arise out of the judgment:

- The purpose of Section 78 is "informational": it is not there to allow claims management companies or their panel solicitors to obtain a copy of the agreement to see whether it complies with the CCA 1974 and the CCAR 1983.
- Reconstituting of documents is plainly acceptable and there is no need to keep the original agreement or, indeed, an electronic copy. Reconstituting must be "honest and accurate" but is not foolproof: data may be overwritten or lost so procedures need to be in place to ensure the information required to reconstitute documents is retained.
- Lenders should consider telling debtors that the reconstituted document is just that and not a copy of the original document. Indeed, the judge suggested it was good practice to do so.
- Whilst the reconstituted copy of the agreement need not be in the form required by the CCAR 1983, it is probably good practice to reproduce it in a similar form to the original.
- Courts will robustly review claims issued by claims management companies and their panel solicitors and require debtors to make out their claims: it is not enough for a debtor to issue proceedings and either reverse the burden of proof or say that the agreement provided in response to a request under Section 77 or 78 does not comply.



- Declarations for non-compliance with Section 77 or 78 are likely to diminish: after *McGuffick* the underlying rights and liabilities are not affected. To use the judge's words: a "debtor may wish to take a risk if the Court held that there was no s.78 copy, and not pay his bills. It might be foolish but that is a matter for him."
- Whilst an allegation of an unfair relationship reverses the evidential burden of proof onto the lender, the debtor has the legal or persuasive burden of proof.
- Lenders pursuing claims based upon reconstituted agreements will similarly need to provide robust evidence that it is "honest and accurate". Difficulties may arise, however, if there are allegations of fraud.

## SUMMARY

This is an important decision and provides welcome justification for the stances adopted by many lenders. It is often argued by lenders that they need not retain the original executed agreement (and some lenders do not keep the original or even a photocopy as a matter of course). This approach has been fully endorsed by the Court and it seems that, in the future, claims based upon Section 77 and 78 will be rare. In the meantime, claims already brought by claims management companies and their panel solicitors are likely to be subject to applications for summary judgment and/or strike-out. With so many claims currently working their way through the Court, and the likelihood of adverse costs orders, it is questionable whether the leading players (particularly the after the event insurers) will remain in the market. 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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