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Review

Commercial & Dispute Resolution

Rates of Interest and Enforceability of Consumer Credit Agreements: An "Interesting" Decision for Lenders

INTRODUCTION

Lenders will breathe a huge sigh of relief after His Honour Judge Tetlow's important decision in *Brooks v Northern Rock (Asset Management) plc (formerly Northern Rock plc)* [2010] was handed down earlier today. The main issues determined by the Court, under CPR 24.2, were whether an agreement regulated by the Consumer Credit Act 1974 (the "CCA 1974") must state the "nominal" (as the "Checker Report" prepared by claims management companies argued) or the "effective" rate of interest (which is used by the majority of lenders) and, if it did not state the correct rate of interest, whether that rendered the agreement irredeemably unenforceable. The Court's decision, put shortly, was that a lender may use and record any rate of interest.

Northern Rock is a long standing client of Hammonds and we provided tactical and strategic advice throughout the life of this dispute and were delighted to bring it to such a satisfactory conclusion.

THE FACTS

Mrs Brooks entered into a fixed sum loan agreement (with a fixed rate of interest) in September 2006. The agreement, which was regulated by the CCA 1974 and therefore subject to the Consumer Credit (Agreements) Regulations 1983 (the "CCAR 1983"), recorded the amount of credit as £15,000.00, the charges (which were made up of interest alone) of £4,713.60 and the total amount payable as £19,713.60. Mrs Brooks agreed to repay the total amount payable by 120 monthly instalments of £164.28. The APR was recorded as 5.8% and the rate of interest (because there were no charges other than interest) was also recorded as 5.8%. This was the "effective rate of interest" and calculated in a similar way to the APR.

Mrs Brooks stopped paying her instalments and, through her solicitors Eastleys, argued that her agreement was irredeemably unenforceable. To support her allegation, she relied upon a computer programme, provided by a claims management company called the "Checker Report", to check her agreement for compliance. The Checker Report works by assuming the rate of interest recorded on the agreement is the "nominal" (which is the rate of interest (a month in this case) multiplied by the number of instalments in a year (twelve in this case)). Assuming a nominal rate of interest as 5.8%, the Checker Report said that all of the other (agreed) figures on the agreement were wrong making the agreement irredeemably unenforceable.

After issuing proceedings for a declaration of unenforceability (and a claim for harassment), Northern Rock terminated her agreement and counterclaimed for the balance due of £16,457.00.

THE ISSUES

Mrs Brooks' Re-Amended Particulars of Claim raised the following issues:

1. Whether the agreement must state the effective rate of interest (as the agreement did) or the "nominal" rate of interest.
2. If the agreement must state the "nominal" rate of interest, whether that was the driver for the other figures.

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3 Whether the rate of interest (and not the APR) had to be rounded to a certain number of decimal places.

4 Whether the agreement failed to specify the date upon which the first repayment would be made or failed to contain a statement indicating the manner in which the date of the first repayment would be determined.

5 Whether the agreement failed to include a statement explaining how and when interest charges were calculated and applied under the agreement.

6 Whether Mrs Brooks was entitled to an injunction preventing Northern Rock , from referring her non-payment to credit reference agencies. if the agreement is irredeemably unenforceable.

7 Whether Northern Rock was entitled to an enforcement order if any of the provisions of the CCAR 1983 were breached.

Northern Rock took the view that the issues raised by Mrs Brooks failed to disclose a real prospect of success. On Northern Rock's behalf, we applied for summary judgment and/or strike-out of the claim and sought summary judgment on the counterclaim. Many other claims, raising the same or similar issues, were stayed pending determination of this case.

THE DECISION

After hearing Counsel for both parties, His Honour Judge Tetlow handed down the following decision in Manchester on 16 April 2010:

- The Checker Report's method was (to use the judge's words) "looking through the wrong end of the telescope." The parties had agreed the monthly repayment and, from this, the APR had been calculated.
- Parliament had not provided any guidance on what the phrase "interest" (used in Paragraph 9(2) of Schedule 1 to the CCAR 1983) meant and it was not the Court's function to try and fill the gap and make an agreement which would otherwise be enforceable, unenforceable.
- The sole dissenting voice on what the phrase "rate of interest" meant came from the new editors of Goode: Consumer Credit Law and Practice (appearing at paragraph 30.185). Such a view was wrong. Lenders can use either the "nominal" or "effective" rate of interest without the agreement becoming non-compliant.
- There is no logical reason why rounding of the "rate of interest" (as opposed to the APR) should be prevented. In fact, a lender may round the "rate of interest" or go to any number of decimal places without making the agreement non-compliant.
- The agreement stated that on completion the debtor would be told of her first payment due date and later payments would be due on the same date of each following month. This was plainly a statement indicating the manner in which the date of the first repayment would be determined, as required by Paragraph 12 of Schedule 1 to the CCAR 1983.
- Because the repayments and interest rate were fixed, interest charges were "not calculated and applied under the agreement". They were, in fact, already included in the repayments. Stating that "the interest payment under this agreement will be debited to the account at the commencement of the loan" therefore satisfied Paragraph 9(3) of the CCAR 1983.
- Even if His Honour Judge Tetlow was wrong on the Schedule 1 issues, Northern Rock had sought an enforcement order in its Defence & Counterclaim. By contrast, Mrs Brooks had not filed any evidence, except for a statement on technical issues given by her solicitor. If the Court had needed to consider this point, it would have been just to award Northern Rock an enforcement order.

The only issue the Court did not decide was whether Mrs Brooks was entitled to an injunction. During the course of the summary judgment hearing, Mrs Brooks' Counsel conceded that, after the High Court's decision in *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm), such a claim was bound to fail even if the agreement was irredeemably unenforceable.

POINTS TO NOTE

The following points arise out of the judgment:

- Agreements for running-account credit (like credit cards) or variable rate fixed-sum loan agreements require, as part of the prescribed terms under Schedule 6 of the CCAR 1983, a statement of the rate of interest on the agreement.
- Other agreements require a statement of the rate of interest as part of the prescribed information under Schedule 1 (in the case of credit agreements) or Schedule 3 (in the case of hire agreements) to the CCAR 1983.
- Lenders may breathe a sigh of relief given the Court's finding that it is permissible to record, as the rate of interest, either the "nominal" or "effective" rate of interest.
- Lenders facing claims from claims management companies relying upon the Checker Report (or similar reports) may consider applying, as Northern Rock did, for summary judgment or strike-out.
- Following this decision (and subject to any appeal by Mrs Brooks), it is likely that claims brought on similar points will either be discontinued or struck-out by the Court. Many of these claims are insured by ATE Insurers who will, no doubt, be even more reluctant to provide cover. Indeed, we have recent experience of insurance being cancelled.
- The Court has, once again, adopted a pragmatic and sensible approach to claims brought by claims management companies on novel, but ultimately unmeritorious, points.

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SUMMARY

For many lenders, this will be a very important and welcome judgment. Lenders often argue that many computer programmes like the Checker Report, which seek to undermine a lender's documentation, are wholly misconceived. His Honour Judge Tetlow's decision in *Brooks v Northern Rock (Asset Management) plc (formerly Northern Rock plc)* [2010], 16 April 2010 confirms this view. Lenders offering running-account credit or fixed-sum credit with variable rates of interest will also take great comfort from such a decision: if Mrs Brooks' arguments had succeeded it could have meant that a substantial number of credit card agreements, and the sizeable outstanding balances, would have been irredeemably unenforceable given the rate of interest's appearance in Schedule 6. Fortunately, such agreements are likely to be compliant (and therefore enforceable) on the rate of interest issue.

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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