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Review

Commercial & Dispute Resolution

Charges for Credit under the Consumer Credit (Agreements) Regulations 1983: Guidance from the Supreme Court

INTRODUCTION

The Supreme Court yesterday handed down its opinion on the borrowers' appeal against the Court of Appeal's judgment. In short, the issue before the Supreme Court was whether a regulated consumer credit agreement correctly recorded the amount of credit for the purposes 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**"). Lenders will be pleased to note that the Supreme Court dismissed the appeal and agreed with the Court of Appeal that the agreement was wholly enforceable.

THE FACTS

Those who have read our note on the Court of Appeal's decision[1] will be familiar with the facts. In short, Mr & Mrs Walker took out a second charge with Southern Pacific Personal Loans Limited ("***Southern Pacific***") which was regulated by the CCA 1974 and subject to the CCTCCR 1980 and the CCAR 1983. The loan was £17,500. A broker fee of £875 was paid. 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 ISSUE

Giving the only judgment by the Supreme Court, Lord Clarke said that the Court had to decide whether the agreement correctly stated the "amount of credit" as required by Paragraph 2 of Schedule 6 to the CCAR 1983. If it was not correctly stated, the agreement was irredeemably unenforceable as it pre-dated the repeal of Section 127(3) of the CCA 1974.

THE DECISION

The Supreme Court unanimously decided in Southern Pacific's favour. In particular, it decided that:

- if an item is part of the total charge for credit then it cannot form part of the credit even if it would otherwise be considered "credit";
- the provisions of Section 9(4) did not stop interest being charged on any "charge for credit" (as defined by the CCTCCR 1980);
- the borrowers' argument that:
  - the amount of credit is £1,000 where a loan of £1,000 is repayable with interest and a document fee of £50 is repayable without interest;
  - the amount of credit is £1,050 where a loan of £1,000 is repayable with interest and a document fee of £50 is repayable with interest,

"Lenders will be pleased to note that the Supreme Court dismissed the appeal and agreed with the Court of Appeal that the agreement was wholly enforceable. This will be a considerable blow to borrowers looking to evade their responsibilities, their solicitors and claims management companies.".

1 If you want to know more about the Court of Appeal's decision in Walker, please see our Review dated 13 November 2009 entitled "Brokers Fees and Prescribed Terms under the Consumer Credit (Agreements) Regulations 1983: Further 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

was nonsensical;

- the borrowers' argument, if successful, would involve the Court adding to Section 9(4) the following wording: "*unless interest is charged in which case it shall be treated as credit*". There was, in the Supreme Court's view, no reason for this addition;
- the Court of Appeal correctly decided that the borrowers' argument 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 agreement clearly set out the amount of credit, namely £17,500.

SUMMARY

The Supreme Court's decision is a further blow to borrowers looking to evade their responsibilities, their solicitors and claims management companies. Its decision that the borrowers' argument was "nonsensical" and the warning at the end of the judgment that Section 127(3) of the CCA 1974 does not apply to agreements made after 5 April 2007 may be an indication of the Supreme Court's view on the merit of many consumer credit challenges that are currently proceeding through the Courts.

Lenders can, however, take great comfort from the Supreme Court's decision. Plainly, it cannot be clearer that interest may be charged on charges for credit like broker's fees and document fees. This decision may also help lenders facing challenges on similar points. For example, there are a number of challenges to loans with payment protection insurance. In these cases, the premium for the policy is credit if it is optional but a charge for credit if it is compulsory. Where a lender has separately documented the premium from the loan then it seems open to the lender to say that, if the Court decides the premium was compulsory or vice versa, the agreement still separately and clearly records the amount of credit (ie the loan) as required by Paragraph 2 of Schedule 6 to the CCAR 1983.

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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