August 2010

Review

Commercial & Dispute Resolution

Stern Judgment from the High Court: Sternlight & Others v Barclays Bank plc & Others

INTRODUCTION

His Honour Judge Waksman QC, sitting in the High Court, handed down judgment on 22 July 2010 in *Joseph Sternlight & Others v Barclays Bank plc & Others* [2010] EWHC 1865 (QB) on the enforceability of regulated running-account consumer credit agreements and other ancillary issues arising out of the Consumer Credit Act 1974 (the "**CCA 1974**") and the Consumer Credit (Agreements) Regulations 1983 (the "**CCAR 1983**"). This emphatic decision is further justification for the robust approaches taken by lenders defending unmeritorious enforceability challenges.

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BACKGROUND

Five test cases came before the High Court in July 2010 concerning credit card agreements. Because the rate of interest was variable, the lenders were required to state (as a prescribed term) the "rate of interest on the credit to be provided under the agreement" by Paragraph 4 of Schedule 6 to the CCAR 1983. If this was mis-stated then, because the agreements pre-dated the repeal of Section 127(3) of the CCA 1974, all the agreements would be irredeemably unenforceable.

Each agreement stated a rate of interest (either monthly or annually) and the annual percentage rate (the "**APR**"). The borrowers obtained an expert report from Neil Young, a mathematician and computer expert, who calculated the rate of interest on the assumption that the APR was the "driver" for the rate of interest. After undertaking his calculation, Mr Young expressed the view that each agreement had wrongly stated the "rate of interest" as required by Paragraph 4. It therefore followed, said the borrowers, that the agreements were irredeemably unenforceable.

The lenders, which were Barclays Bank plc, Bank of Scotland plc, Royal Bank of Scotland plc, Capital One Bank (Europe) plc and HSBC Bank plc, applied for summary judgment arguing that the claims failed to disclose a real prospect of success.

THE ISSUES

The Court had to determine the following issues:

1 Whether the borrowers' approach, of treating the APR as the "driver" for the rate of interest, led to this rate being wrongly stated and therefore rendering the agreements irredeemably unenforceable.

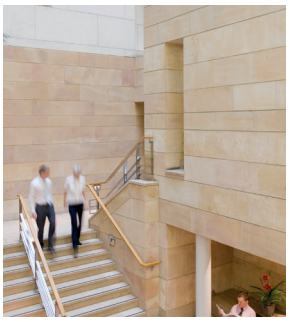
2 Whether the agreements were irredeemably unenforceable where they stated the monthly rather than the annual rate of interest.

3 Whether there was a failure to state the total charge for credit.

4 Whether the borrowers were entitled to a pre-emptive order under Section 142 preventing the lenders for applying to the Court for a enforcement orders under Section 127 of the CCA 1974.

5 Whether an improperly executed agreement created an unfair relationship within the meaning of Section 140A of the CCA 1974.

6 If the Court decided that the agreements were irredeemably unenforceable, whether the lenders were prevented from registering adverse credit entries, requesting payment, issuing proceedings to recover monies due or taking steps before issuing proceedings.



RATE OF INTEREST & APR

Readers of our earlier review discussing His Honour Judge Tetlow's decision in *Jessica Catherine Brooks v Northern Rock (Asset Management) plc (formerly Northern Rock plc)* [2010], Oldham County Court, 16 April 2010, where we acted for the successful lender, will be familiar with the issues raised in this case. In short, the Court dismissed in *Brooks* (again on an application for summary judgment) the borrower's claims that the rate of interest stated on a consumer credit agreement must be the "nominal" rate of interest. Northern Rock had used the "effective" rate of interest meaning, after recalculating the figures, every other figure was wrong so the agreement was irredeemably unenforceable. HHJ Tetlow said, justifiably, that such an approach was "looking through the wrong end of the telescope."

In a very robust judgment in *Sternlight*, HHJ Waksman QC rejected the borrowers' argument that the APR was the "driver" for the rate of interest and decided that the rate of interest was the rate stated on the agreement. His reasons were:

- the borrowers' proposition had a "surreal quality to it" as it led to the position that the borrower had agreed Mr Young's re-calculated rate and not the contractually agreed rate of interest;
- there was a very clear difference between the nature and function of the APR and the rate of interest: indeed, the CCAR 1983 treats them as separate things. The borrowers' argument meant that a prescribed term would be "driven" by prescribed information which was plainly contrary to the importance prescribed terms had been given in the CCAR 1983 and Section 127 of the CCA 1974 (before its appeal);
- the APR need only be stated at the start of the agreement when it is produced and signed: it is therefore a guide for borrowers at that date. Lenders are, however, allowed to change the rate of interest. In such a case, the APR cannot act as the driver any more when the rate is varied;
- the view expressed by HHJ Tetlow in *Brooks* that the borrower's argument was "looking through the wrong end of the telescope" was approved and applied by analogy to these cases: the rate of interest had been contractually agreed and there was no reason to say it should be any other figure.

OTHER ISSUES

The Court also robustly, and shortly, dealt with the other issues raised by the borrowers. It decided that:

1 The borrowers' argument that the agreement must state the annual rate of interest rather than the monthly rate was flawed. Paragraph 4 of Schedule 6 to the CCAR 1983 simply requires a term stating "the rate of interest": it does not say the "annual" rate of interest.

2 There was no requirement by Paragraph 10 of Schedule 1 to the CCAR 1983 to state the total charge for credit but, even if there were, it would not render the agreement irredeemably unenforceable as suggested by the borrowers.

3 Even if there was a breach of Schedule 1 to the CCAR 1983, there was no evidence of prejudice or culpability put forward by the borrowers meaning the Court could not, and should not, decide whether to make a declaration under Section 142 of the CCA 1974.

4 Even if the agreement was improperly executed, it did not create an unfair relationship following the High Court's decision in *Carey & Others v HSBC Bank plc & Others* [2009] EWHC 1681.

5 Even if the agreement was irredeemably unenforceable, the lenders were not prevented from registering adverse credit entries, requesting payment, issuing proceedings to recover monies due or taking steps before issuing proceedings following *McGuffick v The Royal Bank of Scotland plc* [2010] 1 All ER 634.

COMMENT

The Court's stern approach to the borrowers' claims, particularly on an application for summary judgment, is most welcome. Lenders will take considerable comfort from the fact that speculative enforceability claims like the ones raised in this decision, and the recent decision in *Brooks*, will be scrutinised and robustly dealt with by the Court. It is also pleasing that the Court approved HHJ Tetlow's decision in *Brooks* on similar issues meaning the rate of interest and APR issue should now be beyond doubt. It therefore seems likely that future consumer credit challenges should quickly decline. It must also be the case that after the event insurers, who have been actively funding the adverse costs orders on these cases, will seriously review their position in the market. This can only be further icing on the cake for lenders.

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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