

## CONSUMER CREDIT & TOXIC DEBT LITIGATION NEWSLETTER

The last 18 months have seen a surge in Consumer Credit Agreement and related toxic debt litigation. Members of Chambers have acted in challenges to Consumer Credits relying upon irredeemable unenforceability together with related aspects of financial mis-selling and unfair credit relationships.

The purposes of this newsletter, which will be published on an occasional basis, is to provide updates on many of the key issues currently being litigated through the county courts and the appellate courts together with summaries of key cases which are binding upon the County Court.

Members of Ropewalk Chambers act both on behalf of finance houses and for consumers providing advice, drafting and advocacy services. In addition, training is offered to professional clients in this important but complicated area of commercial practice. Queries should in the first instance be addressed to Andrew Hogan at Ropewalk Chambers, [andrewhogan@ropewalk.co.uk](mailto:andrewhogan@ropewalk.co.uk) or (0115) 947 2581.

### **Manchester Mercantile Court test cases due to be heard by His Honour Judge Waksman QC at the end of November 2009**

On the 30<sup>th</sup> November 2009 His Honour Judge Waksman QC was due to commence trying a number of test cases which have been selected and transferred to the High Court of Justice, Manchester District Registry Mercantile List in order to deal with a number of issues which are common to many challenges to the enforceability of Consumer Credit Agreements currently being litigated in County Courts across the country. The actual issues that the Judge has determined are appropriate to try are:

- (1) When providing a copy of an executed agreement in response to a request under Section 78(1) of the Consumer Credit Act 1974:
  - (a) Must a creditor provide a photocopy (or other form of complete copy) of the original agreement that was signed by the debtor or can a creditor provide a document which is a reconstitution of what would have been signed?
  - (b) Must a creditor provide a document which would comply (if signed) with the requirements of the Consumer Credit (Agreements) Regulations 1983 as to form at the date the agreement was made?
  - (c) Must the copy provided include the debtor's name and address, and if so in what form?

- (2) If an agreement has been varied by the creditor under a unilateral power of variation, is a copy of the executed agreement, as varied, a sufficient copy for the purposes of Section 78(1)?
- (3) Does a creditor's breach of Section 78(1) of itself give rise to an unfair relationship within the meaning of Section 148?
- (4) If there is a breach of Section 78(1), is that sufficient without more to make a declaration to that effect (whether pursuant Section 142 or CPR 40.20) appropriate, in particular:
  - (a) Where the creditor admits the breach but did not admit it before the issue of proceedings?
  - (b) Where the creditor denies or does not admit the breach?
- (5) Does the document signed by the debtor contain the prescribed terms of the purposes of Section 61 and/or Section 127(3) if:
  - (a) They are on a sheet which is referred to on the piece of paper that was signed by the debtor; or
  - (b) Where that sheet is attached to a piece of paper signed by the debtor; or
  - (c) Where that sheet is separate from but was supplied with the piece of paper signed by the debtor?
- (6) If it were not established, at trial, that there was a document signed by the debtor containing the prescribed terms, would that of itself entail an unfair relationship?

The result of the test cases will no doubt be scrutinised keenly by those involved in this area of litigation. Already finance Houses and those that represent them are utilising the mere existence of these test cases to seek stays in other cases which are currently proceeding through the county courts.

### **The Amount of Credit .v. A Charge for Credit revisited**

On the 12<sup>th</sup> November 2009 the Court of Appeal (Mummery, Sullivan LLJ and Owen J) handed down Judgment in the case of Southern Pacific Personal Loans Limited .v. Walker & Anr [2009] EWCA Civ 1176. The case considers whether a Consumer Credit Agreement contended to be unenforceable was correct and the case concerned the statutory meaning of "credit", how "the amount of credit" should be calculated and whether once properly calculated the amount was correctly stated in the agreement.

At first instance on 27<sup>th</sup> April 2009 His Honour Judge Halbert in the Chester County Court had held that the agreement was totally unenforceable and ordered a discharge of the Charge registered on the property. The issue as to whether he was right to do so went to the Court of Appeal.

The basic meaning of credit is set out in Section 9 of the Consumer Credit Act 1974 which defines it as a cash loan and any other form of financial accommodation but pursuant

to Section 9(4) an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment. The distinction between credit and a charge for credit is essential to an understanding of how the legislation works.

Those items financed by the creditor which form part of the total charge for credit must be identified and stripped out before the amount of credit is itself determined. After charges for credit have been stripped out the other items financed by the creditor go to make up the amount of the credit. It should be noted that a charge for credit is not defined within the 1974 Act.

In the case of Southern Pacific, £17,500 was made by way of loan to the borrower and a broker administration fee of £875 was added to the loan producing the total amount of £18,375 together with interest to be paid on the total sum over a period of 180 months. The issue that taxed the courts was whether the amount of credit for the purpose of compliance with the legislation was £17,500 or £18,375. As the Court of Appeal observed, the question was whether the £875 fee itself was credit or what could properly be described as a charge for credit.

The Court of Appeal overturned the judge below holding that they were unable to agree with the Judge that £18,375 was the amount of credit. The Court of Appeal held that the amount of credit was the sum of £17,500 and the fee of £875 was not added and included in the relevant box on the form as it was part of the total charge for credit not part of the credit.

The Court of Appeal also went on to hold that the judge had been wrong to find below that Section 9(4) of the Consumer Credit Act 1974 effectively prohibited interest on any charge for credit including the £875 broker administration fee. The Court of Appeal held that it was not the function or effect of Section 9 to prohibit anything but rather to supply a special statutory meaning to the Court's concept of credit in the 1974 Act and to distinguish it from a charge for credit. The Court of Appeal also went on to hold that the judge had misinterpreted the provisions of the Consumer Credit (Agreements) Regulations 1983.

Accordingly, this case represents a pragmatic attempt by the Court of Appeal attempting to uphold an agreement which had been made between the borrower and lender where on a fair reading of the agreement it could not be said that the borrower had in any shape or form been misled by the financial information provided in the agreement but notwithstanding which technical arguments had been advanced as to whether the items and charges specified in the agreement had been correctly characterised. The Judgment could be read as representing a triumph of substance over form.

### **Stop press**

The recent decision of the Court of Appeal in Southern Pacific Mortgage Limited.v.Heath [2009] EWCA Civ 1135 may yet be subject to further challenge. An application for permission to appeal to the Supreme Court, was lodged on 2<sup>nd</sup> December 2009.

**Andrew Hogan**

**December 2009.**