Neutral Citation Number: [2009] EWHC 3417 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Date: 23 December 2009

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

BETWEEN:

Case No. 9MA06008

EMMA CAREY

Claimant

and

HSBC BANK PLC

Defendant

AND BETWEEN:

Case Number 9TS02266

SHAFEEL YUNIS

Claimant

and

BARCLAYS BANK PLC

Defendant

AND BETWEEN:

Case Number 0SF01266

SAMANTHA CONNIFF

Claimant

and

BARCLAYS BANK PLC

Defendant

AND BETWEEN:

Case Number 9SF02648

MOHAMMED ADRIS

Claimant

and

THE ROYAL BANK OF SCOTLAND PLC

Defendant

AND BETWEEN:

Case Number 9MA02780

BRIAN BACKWELL

Claimant

and

THE ROYAL BANK OF SCOTLAND PLC

Defendant

AND BETWEEN:

Case Number 9MA10331

RAJAN MANDAL

Claimant

and

THE ROYAL BANK OF SCOTLAND PLC

Defendant

AND BETWEEN:

Case Number 9PR00618

ANDREW LIGHT

Claimant

and

MBNA EUROPE BANK LIMITED

Defendant

AND BETWEEN:

Case Number 9MA11185

ROBERT ATKINSON

Claimant

and

BANK OF SCOTLAND PLC

Defendant

AND IN ALL CASES:

OFFICE OF FAIR TRADING

Intervening Party

David Uff and James Malam (instructed by MSB Solicitors) for Emma Carey
David Uff and James Malam (instructed by BPS Solicitors) for Samantha Conniff, Brian Backwell and Andrew Light
Zoe Thompson and Laura D'Cruz (instructed by Ascot Lawyers Solicitors) for Shafeel Yunis
Julian Gun Cuninghame and Bradley Say (instructed by Consumer Credit Litigation Solicitors) for Mohammed Adris, Rajan Mandal and Robert Atkinson

Sonia Tolaney and James Macdonald (instructed by Addleshaw Goddard LLP Solicitors) for HSBC Bank Plc
Andrew Mitchell (instructed by Lovells LLP) for Barclays Bank Plc
Bankim Thanki QC and Julia Smith (instructed by DLA Piper (UK) LLP Solicitors) for The Royal Bank of Scotland Plc
Geraint Howells (instructed by Bank of America Legal Dept.) for MBNA Europe Bank Limited
Fred Philpott (instructed by SCM Solicitors) for Bank of Scotland Plc

Stephen Neville (instructed by the OFT Legal Dept.) for the Office of Fair Trading

Hearing dates: 30 November – 4 December 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This judgment deals with two matters concerning requests for copies of credit card agreements pursuant to section 78 of the Consumer Credit Act 1974 ("the Act") and the consequences of non-compliance with that provision. The first matter is the determination of six preliminary issues of law, arising in a number of selected cases. The second is the application by two of the Defendant banks to strike out or to obtain under CPR 24 the summary dismissal of certain claims brought against them on the basis of no reasonable grounds and/or abuse of process and/or no real prospect of success ("the Applications").

2. The purpose of this judgment is to give general guidance, in the context of the cases before me, in the hope that this will narrow or eliminate the issues arising in the hundreds of other similar claims issued in County Courts around the country, many of which have been stayed pending the outcome here.

3. On 8 October 2009, over 100 such cases, issued in the North-West of England, were listed before me at a CMC. From them, a number were transferred into the Manchester Mercantile Court from which the issues were taken or in respect of which the Applications were later made. 3 cases were also listed for trial before me, without the need for oral evidence, but they were later settled.

4. The claims made on behalf of individual credit card holders are usually handled initially by claims management companies. In the main, they tend to use a relatively small number of solicitors. One result of this is that in the hearings, I had the benefit of submissions from Counsel instructed by such firms who have appeared in or dealt with a good many of the issued claims. I also heard from Counsel instructed by a fair cross-section of the banks involved as Defendants. This has meant that I have had full and careful argument from both sides on all of the issues. I have had the additional advantage of the involvement of the Office of Fair Trading, which intervened by consent and which was also represented by Counsel. I am grateful to all Counsel for their considerable assistance and also to the solicitors who co-operated to produce unified bundles of case papers, skeleton arguments, and authorities.

5. The preliminary issues have been framed as the following questions:

   (1) When providing a copy of an executed agreement in response to a request under s78(1) of the Consumer Credit Act 1974:

      (a) Must a creditor

         (i) provide a photocopy (or other form of complete copy) of the original agreement that was signed by the debtor or at least provide a copy which is derived directly from the original agreement or complete copy thereof, or

         (ii) can a creditor provide a document which is a reconstitution of the original agreement which may be from sources other than the actual signed agreement itself?

(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, as at the date the agreement was made in order to comply with s78?

(c) Must the copy provided under s78 include the debtor's name and address as at the date when the agreement was made, 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 s78(1), or must the creditor provide a copy of the original agreement as well?

(3) Does a creditor's breach of s78(1) of itself give rise to an unfair relationship within the meaning of section 140A?

(4) If there is a breach of s78(1), is that sufficient without more to make a declaration to that effect (pursuant to 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 for 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 the 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 STATUTORY PROVISIONS

The nature of the agreements

6. It is common ground that the (typical) credit card agreements which are the subject of the preliminary issues constitute "regulated agreements" for "running account credit" falling within ss8 and 10 (1) (a) of the Act. They also constitute "credit token agreements" under s14 by reason of the provision of the credit cards themselves.

Executed and unexecuted agreements

7. "Executed agreement" is defined under s189 (1) as being "a document, signed by or on behalf of the parties, embodying the terms of a regulated agreement, or such of them as have been reduced to writing." An "unexecuted agreement" is defined as "a document embodying the terms of a prospective regulated agreement, or such of them as it is intended to reduce to writing." By s189(4) "A document embodies a provision if the provision is set out either in the document itself or in another document referred to in it."

Part V of the Act

8. This Part is entitled "Entry into Credit or Hire Agreements" and then a section within that, immediately before s60, is entitled *"Making the agreement"*. This is concerned, among other things, with the duties of the creditor when the agreement is first made.

Proper execution of the agreement

9. In particular while the parties may succeed in making an executed agreement (see above), if it fails to conform to requirements made by regulations as to form and content it will be an improperly executed agreement ("IEA").

10. Specifically, **s61** (1) provides as follows:

> **s61 (1)** "A regulated agreement is not properly executed unless:
> (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner, and
> (b) the document embodies all the terms of the agreement, other than implied terms, and
> (c) the document is, when presented or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible."

11. Section 189 (1) defines "prescribed" as "prescribed by regulations made by the Secretary of State". The relevant power here is contained in **s60**:

> **s60** (1) "The Secretary of State shall make regulations as to the form and content of documents embodying regulated agreements, and the regulations shall contain such provisions as appear to him appropriate with a view to ensuring that the debtor or hirer is made aware of—
> (a) the rights and duties conferred or imposed on him by the agreement,
> (b) the amount and rate of the total charge for credit (in the case of a consumer credit agreement),
> (c) the protection and remedies available to him under this Act, and
> (d) any other matters which, in the opinion of the Secretary of State, it is desirable for him to know about in connection with the agreement.
> (2) Regulations under subsection (1) may in particular—
> (a) require specified information to be included in the prescribed manner in documents, and other specified material to be excluded;
> (b) contain requirements to ensure that specified information is clearly brought to the attention of the debtor or hirer, and that one part of a document is not given insufficient or excessive prominence compared with another…."

The Consumer Credit (Agreements) Regulations 1983 ("the Agreements Regulations")

12. These were made by the Secretary of State pursuant to s60.

13. By Regulation 2 (1) and Schedule 1, the credit card agreements with which I am concerned had to contain certain information. This included the following:

    (1) By paragraph 2 of Schedule 1, *"The name, postal address and, where appropriate, any other address of the debtor"*. Prior to 31 December 2004 Schedule 1 paragraph 2 of the Agreements Regulations required that 'All Types' of regulated agreement provide *"The name and a postal address of the debtor"*.

The present reference to "other address" is intended to cover electronic addresses such as e-mail addresses;

(2) By paragraph 8 of Schedule 1, the credit limit which could be expressed in different ways, including "a statement indicating the manner in which the credit limit will be determined by the creditor and that notice of it will be given by the creditor to the debtor..";

(3) By paragraph 10 of Schedule 1, the rate of interest and the total amount of other charges included in the total charge for credit;

(4) By paragraph 15 of Schedule 1, the APR.

14. By Regulation 2 (3) and Schedule 2, a description of the protection and remedies available to the debtor. By paragraph 3, where the agreement was cancellable, this would include the following: "Your right to cancel. Once you have signed this agreement, you will for a short time have a right to cancel it."

15. Then, by Regulation 6 and Schedule 6 the following terms had to be contained in a regulated agreement for running account credit if it was not to be an IEA, and were prescribed for the purposes of s61 (1) (a):

> "A term stating the credit limit or the manner in which it will be determined or that there is no credit limit" (paragraph 3 of Schedule 6);
> "A term stating the rate of any interest on the credit to be provided under the agreement" (paragraph 4 of Schedule 6);
> "A term stating how the debtor is to discharge his obligations under the agreement to make the repayments, which may be expressed by reference to a combination of any of the following:
> number of repayments;
> amount of repayments;
> frequency and timing of repayments;
> dates of repayments;
> the manner in which any of the above may be determined;
>
> or in any other way, and any power of the creditor to vary what is payable." (paragraph 5 of Schedule 6).

I shall refer to these as "the Prescribed Terms".

16. Accordingly, the document which is signed by the parties (and which forms all or part of the executed agreement) must itself contain the Prescribed Terms and the name and address of the debtor. Other terms may be incorporated by reference but not the Prescribed Terms.

Copies of the agreement at the time when it is made

17. The initial duty is to provide a copy of the unexecuted agreement, as set out in **s62** as follows:

> **"s62** (1) If the unexecuted agreement is presented personally to the debtor or hirer for his signature, but on the occasion when he signs it the document does not become an

executed agreement, a copy of it, and of any other document referred to in it, must be there and then delivered to him.
(2) If the unexecuted agreement is sent to the debtor or hirer for his signature, a copy of it, and of any other document referred to in it, must be sent to him at the same time.
(3) A regulated agreement is not properly executed if the requirements of this section are not observed."

18. A further duty imposed upon the creditor by **s63** is to supply copies of the executed agreement as follows:

> **"s63** (1) If the unexecuted agreement is presented personally to the debtor or hirer for his signature, and on the occasion when he signs it the document becomes an executed agreement, a copy of the executed agreement, and of any other document referred to in it, must be there and then delivered to him.
> (2) A copy of the executed agreement, and of any other document referred to in it, must be given to the debtor or hirer within the seven days following the making of the agreement unless—
> (a) subsection (1) applies, or
> (b) the unexecuted agreement was sent to the debtor or hirer for his signature and, on the occasion of his signing it, the document became an executed agreement.
> (3) In the case of a cancellable agreement, a copy under subsection (2) must be sent by an appropriate method.
> (4) In the case of a credit-token agreement, a copy under subsection (2) need not be given within the seven days following the making of the agreement if it is given before or at the time when the credit-token is given to the debtor.
> (5) A regulated agreement is not properly executed if the requirements of this section are not observed."

Enforcement of IEAs

19. The basic rule is stated by **s65**:

> "**s65** (1) An improperly-executed regulated agreement is enforceable against the debtor or hirer on an order of the court only.
> (2) A retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement."

20. Then **s127(1**) provides as follows where an application to enforce is made by the creditor:

> "..the court shall dismiss the application if, but only if, it considers it just to do so having regard to:
>
> (i) prejudice caused to any person by the contravention in question, and the degree of culpability for it; and
>
> (ii) the powers conferred upon it by sub-section 2 and sections 135 and 136 [power to reduce or discharge the sums owed to compensate for prejudice caused, to suspend or place conditions on enforcement or amend an agreement or security].."

21. Then, **s127(3)** provides, in relation to agreements made before 6 April 2007, as follows:

> "The Court shall not make an enforcement order under s 65(1) if section 61(1) (a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under s60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor ..(whether or not in the prescribed manner)."

22. Accordingly, non-compliance with the relevant regulations is capable of being cured upon application by the court unless the document signed by the debtor did not contain the Prescribed Terms. In such a case the non-compliance cannot be cured and, in the words of Lord Hoffman in *Dimond v Lovell* [2002] 1 AC 384 at p397F, the agreement is "irredeemably unenforceable".

A worked example

23. The way in which credit card agreements are made and become executed agreements naturally varies but one common way is illustrated by the "Barclaycard Platinum" booklet provided to me. This consists of 11 pages and attached to the final page by perforations is a form which can be detached and folded into 4 pages, one of which is a stamped addressed envelope to Barclaycard. Pages 6 to 9 contain all the terms of the intended agreement. The Prescribed Terms are set out at page 6 which, together with page 7 contains what is described as key financial and other financial information and key information as well as a box explaining the prospective debtor's right to cancel. Pages 8 and 9 contain what are described as "Barclaycard conditions".

24. The applicant, having received the booklet, then makes the application for the credit card by filling in the detachable form and sending it off. In this particular example, the applicant must give his name and address as well as other personal details. On the same pages as those details will be found a box telling the applicant about his right to cancel, but the Prescribed Terms are also set out again in highlighted boxes. There is a signature box in the centre of the first two pages of the form which make up one landscape page. Underneath the signature box it reads "For the other conditions which form part of this agreement please refer to the accompanying Barclaycard Conditions" ie those at pages 8 and 9 of the booklet.

25. On the other side the Prescribed Terms and other information is repeated.

26. The signed application form, detached from the booklet, is then sent to Barclaycard. If it approves the application, it signs the form as well. At that point there comes into existence an executed agreement.

27. In this example, the unexecuted agreement does not become executed when signed by the debtor because it has to be signed by the creditor after receipt of the application form. So s62 (1) applies. Here the s62 duty will be satisfied by the provision to the applicant of the booklet from which the form was detached. All of the terms of the prospective agreement are at pages 6 to 9.

28. But a copy of the executed agreement must also be provided under s63. In this example it will be provided not by sending back to the debtor a photocopy of the signed application form but a document very similar to the booklet except that there is different cancellation notice.

Part VI of the Act

29. This Part is entitled "Matters arising during currency of credit or hire agreements". And under the rubric "Duty to give information to debtor under running-account credit agreement" is **s78**, the provision at the centre of this litigation. This provides as follows:

> "**s78** (1) The creditor under a regulated agreement for running-account credit, within the prescribed period *[12 working days]* after receiving a request in writing to that effect from the debtor and payment of a fee of [£1], shall give the debtor a copy of the executed agreement (if any) and of any other document referred to in it, together with a statement signed by or on behalf of the creditor showing, according to the information to which it is practicable for him to refer,—
> (a) the state of the account, and
> (b) the amount, if any, currently payable under the agreement by the debtor to the creditor, and
> (c) the amounts and due dates of any payments which, if the debtor does not draw further on the account, will later become payable under the agreement by the debtor to the creditor.
> (2) If the creditor possesses insufficient information to enable him to ascertain the amounts and dates mentioned in subsection (1)(c), he shall be taken to comply with that paragraph if his statement under subsection (1) gives the basis on which, under the regulated agreement, they would fall to be ascertained.
> (3) Subsection (1) does not apply to—
> (a) an agreement under which no sum is, or will or may become, payable by the debtor, or
> (b) a request made less than one month after a previous request under that subsection relating to the same agreement was complied with.
> …
> (6) If the creditor under an agreement fails to comply with subsection (1)
> (a) he is not entitled, while the default continues, to enforce the agreement;..."

30. Variation of or modification to the original agreement is dealt with by **s82** which provides as follows:

> "**s82** (1) Where, under a power contained in a regulated agreement, the creditor or owner varies the agreement, the variation shall not take effect before notice of it is given to the debtor or hirer in the prescribed manner.
> (2) Where an agreement (a "modifying agreement") varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as—
> (a) revoking the earlier agreement, and
> (b) containing provisions reproducing the combined effect of the two agreements,
> and obligations outstanding in relation to the earlier agreement shall accordingly be treated as outstanding instead in relation to the modifying agreement…"

The Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 ("the Copies Regulations")

31. Section 180 of the Act conferred power on the Secretary of State to make regulations "as to the form and content of documents to be issued as copies of any executed agreement."

32. It is helpful to set it out in full:

> "**s180** (l) Regulations may be made as to the form and content of documents to be issued as copies of any executed agreement, security instrument or other document referred to in this Act, and may in particular—

(a) require specified information to be included in the prescribed manner in any copy, and contain requirements to ensure that such information is clearly brought to the attention of a reader of the copy;
(b) authorise the omission from a copy of certain material contained in the original, or the inclusion of such material in condensed form.
(2) A duty imposed by any provision of this Act (except section 35) to supply a copy of any document—
(a) is not satisfied unless the copy supplied is in the prescribed form and conforms to the prescribed requirements;
(b) is not infringed by the omission of any material, or its inclusion in condensed form, if that is authorised by regulations;
and references in this Act to copies shall be construed accordingly.
(3) Regulations may provide that a duty imposed by this Act to supply a copy of a document referred to in an unexecuted agreement or an executed agreement shall not apply to documents of a kind specified in the regulations."

33. The Copies Regulations were made under this provision.

34. Under the rubric "General requirements as to form and content of copy documents" Regulation 3 provides as follows:

> "(1) Subject to the following provisions of these Regulations, every copy of an executed agreement, security instrument or other document referred to in the Act and delivered or sent to a debtor, hirer or surety under any provision of the Act shall be a true copy thereof.
> (2) There may be omitted from any such copy–
> (a) any information included in an executed agreement, security instrument or other document relating to the debtor, hirer or surety or included for the use of the creditor or owner only which is not required to be included therein by the Act or any Regulations thereunder as to the form and content of the document of which it is a copy;
> (b) any signature box, signature or date of signature (other than, in the case of a copy of a cancellable executed agreement delivered to the debtor under section 63(1) of the Act, the date of signature by the debtor of an agreement to which section 68(b) of the Act applies);
> (c) in the case of any copy of an unexecuted agreement delivered or sent to the debtor or hirer under section 62 of the Act, the name and address of the debtor or hirer; and
> (d) in the case of any copy of an executed agreement given to the debtor under section 77(1) of the Act for fixed-sum credit, or under section 78(1) for running-account credit, under which a person takes any article in pawn, any description of the article taken in pawn"

35. Regs. 7, 8, 9 and 11 are also relevant but it is more convenient to deal with them in context below, in relation to Issue 2.

CONSIDERATION OF THE ISSUES: INTRODUCTION

36. The White Paper on the Reform of the Law on Consumer Credit was published in September 1973. It followed on from the publication of the Crowther report in 1971. The Crowther Committee had criticised the existing legal framework whereby the protection for the consumer from abuses by the supplier of credit varied depending on the legal form of the transaction rather than its structure. Equally there were unjustified differences in the legal restrictions on different types of lender with detailed control of some but none on others. In Chapter 6 the Crowther Committee referred to justified complaints about the

severity of sanctions under the Moneylenders Acts for infringement of statutory requirements which could render the entire loan agreement unenforceable. There needed to be a single set of rights and obligations to cover all types of consumer credit transaction and a system of uniform regulation. With certain exceptions the White Paper sought to follow the recommendations in the Crowther Report.

37. Paragraph 5 of the White Paper referred to the "twin purposes" of the proposals as being the release of the credit industry from existing outdated restrictions and allowing it to develop within a framework which will encourage competition and secondly to provide consistent and adequate protection for the consumer across the whole spectrum of credit transactions. The proposed bill would give many lenders much greater freedom than in the past while imposing that degree of control which is necessary in any modern economy. The bill was due originally to have been passed in about February 1974 but the general election in that month meant that it was lost. But almost immediately after the election it was reintroduced in substantially the same form and passed on 31 July 1974.

38. Those acting for the banks here contended that I should approach the Act on the basis of the "twin purposes". However, the Preamble to the Act states that it was to establish, for the protection of consumers, a new system of licensing and other control of traders concerned with the provision of credit. In the recent Court of Appeal decision in *Southern Pacific v Walker* [2009] EWCA 1176, Mummery LJ observed at paragraph 23 that "The 1974 Act was passed to protect consumers of credit, an aim which accounts for its substantive content and conditions its judicial interpretation." So primacy was accorded to the protection element of the Act.

39. And while it is undoubtedly the case that the Act was designed, in part to relieve creditors of some of the more drastic sanctions for non-compliance and introduce consistency which would benefit them as well as debtors, that was not to say that Parliament could not still impose severe penalties, by way of deterrent as it were, in certain cases.

40. Thus, in *Wilson v First County Trust* [2004] 1 AC 816, Lord Scott stated as follows at paragraph 169:

> "The 1974 Act represented a relaxation of the rigidity of the controls. The discretion allowed to the courts by section 127(1) of the Act was not to be found in its predecessors (see section 6 of the 1927 Act). These controls recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need of funds to make ends meet…They need protection and part of the protection is the insistence by the Act that the "prescribed terms", representing the important terms of the loan transaction, must be set out in a document to be signed by the debtor if the repayment of the loan is to be enforceable. I do not accept that this protection, harshly though it may in some cases bear upon lenders, is disproportionate."

41. And Lord Nicholls made clear at paragraphs 71-76 that, while the effect of s127 (3) was drastic "even harsh, in its adverse consequences for a lender" and was an exception to the general rule laid down in s127 (1) whereby the Court could decide whether it was just and equitable to enforce where there was a non-compliance, and might sometimes involve punishing the blameless *pour encourage les autres*, it was open to Parliament to adopt such an approach.

42. All of that said, the extent to which it is necessary to have resort to such over-arching considerations depends on the language of the particular provision being construed and its immediate context and purpose. In relation to the matters before me, I was not greatly assisted by these general considerations.

ISSUE 1

Introduction

43. The issue here is this:

> 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
>
> (i) provide a photocopy (or other form of complete copy) of the original agreement that was signed by the debtor or at least provide a copy which is derived directly from the original agreement or complete copy there of, or
>
> (ii) can a creditor provide a document which is a reconstitution of the original agreement which may be from sources other than the actual signed agreement itself?
>
> (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, as at the date the agreement was made in order to comply with s78?
>
> (c) Must the copy provided under s78 include the debtor's name and address as at the date when the agreement was made, and if so in what form?

44. It is common ground that the purpose of s78 is (at least) to provide the debtor with information as to the terms of the agreement with the creditor, as well as a present statement of his account and future obligations insofar as they are known. Beyond that common ground, however, the parties have adopted very different positions. The Claimants say that the information is both as to the present and the original position under the agreement, and the reason for having the information about the original agreement is so that the debtor may be satisfied that he did indeed enter the agreement by signing a document which was a properly executed agreement ("the Proof Purpose"). On the other hand, the Defendants say that it is a question only of providing current information, that is, information about the current terms of the agreement along with current financial details ("the Current Information Purpose"). This difference falls into sharp focus on Issue 2 and to some extent on Issue 1 (c) but is also relevant to Issue 1 (a) in the sense that the Claimants' approach is driven to a large extent by the Proof Purpose.

45. For the purpose of Issue 1 (a) it is necessary to assume that the agreement has not been varied under s82 (1) – as it may not have been if the s78 request was made not long after the agreement was made.

Issue 1 (a)

The Parties' Positions

46. It is common ground that the s78 copy need not be a photocopy or other form of literal copy of the executed agreement. Beyond this, the Claimants' position divides internally:

    (1) Mr Uff and Mrs Thompson essentially contend for the same thing: the creditor can recreate a copy of what it says was the executed agreement but only if this is done by looking at the executed agreement itself ie the document containing the signature of the debtor; as both accepted, in practice this entails the retention by the creditor of the original (or a literal copy of it, for example a photocopy or scanned copy if the original has gone);

    (2) Mr Gun Cuninghame however says that the creditor may "reconstitute" the copy from sources other than the original (for example its separate records as to the details of the debtor, the type of card provided and what terms and conditions would have applied at the time the debtor signed the agreement); all that is needed is that the copy be "honest and accurate".

47. The Defendants' position is that all that is required is a copy of all the terms and conditions of the executed agreement and any other material information and that any kind of reconstitution will suffice however derived. They would no doubt accept that the reconstitution should be accurate and made *bona fide* and thus on Issue 1 (a) there is no real difference between their position and that of the Claimants represented by Mr Gun Cuninghame.

Preliminary Points

Executed agreement...and of any other document

48. It should be noted that while s78 refers to a copy of the executed agreement and other documents referred to in it, this latter requirement is likely to be superfluous in relation to the terms of the agreement, since by s189 (1) the definition of "executed agreement" itself connotes the terms contained in it (the Prescribed Terms) and the others which may be incorporated by reference.

"True copy" and the case-law

49. The expression "true copy" is a familiar one. It indicates that the copy need not be an exact one and immaterial differences between the original and the copy which do not mislead the reader as to the contents can be ignored. So, in *Burchell v Thompson* [1920] 2 KB 80, in the context of bills of sale it was said that a true copy need not be an exact copy and "mere mis-spellings, mere failures to fill up blanks which can be filled up from other parts of the deed – matters which do not in any way affect the purpose for which the true copy is required – will not prevent the document registered from being a "true copy" within the meaning of the Act" per Scrutton LJ at p102. In that case, the words "per annum" were omitted in the copy in relation to the rate of interest and it was held that this did prevent there having been a true copy. In *Re Hewer* (1882) 21 ChD 871 it was said that a true copy did not necessarily need to be an exact copy "but that it shall be so true that nobody reading it can by any possibility misunderstand it" per Bacon CJ at p875. There the alleged error as to the description of monthly payments was held to be "as

purely a clerical error as can be imagined" (p876) and on a proper reading the necessary information was there. So there was a true copy in that case.

50. I accept that Parliament may be assumed to have been familiar with this case-law interpretation of the expression "true copy". See *Barras v Aberdeen Steam Trawling* [1933] AC 402 in which Viscount Buckmaster said at p411 that

> "It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

51. However, the expression "true copy" must be treated with some care in the present context. Unlike the Bills of Sale Act 1878, s78 and the Copies Regulations spell out expressly a number of different requirements as to the content of copies as well as some matters which specifically may be omitted. Moreover the kind of discrepancies which were said not to matter in *Burchell* and *Hewer* (supra) were in truth of a fairly low-level kind. The key point was that an exact copy was not necessary. I do not accept that the use of the expression "true copy" in the context of s78 imports a substantive criterion of materiality which must be satisfied before something that was in the executed agreement needs to be reflected in the copy. Leaving aside spelling mistakes and discrepancies of that kind, materiality is to be determined by what s78 and the Copies Regulations, upon a proper construction require, as opposed to a judgment made by the creditor or by the Court. So in my view, the work to be done by the words "true copy" is very limited insofar as materiality is concerned. They would, however, encompass the "honest and accurate" notion espoused by Mr Gun Cuninghame, if that needed to be spelled out at all. Indeed it is to be noted that Reg. 3 (1) does not state that the copy "may" be a true copy – it says that it "shall" be a true copy. And in *Burchell* (supra) Atkin LJ stated at p105 that a true copy document is not merely a document which states in summary form the effect of the stipulations in the original or the true legal effect of the original – it is to be a copy of the original.

<u>Executed agreement as the subject of the copy</u>

52. Mrs Thompson laid great stress on the fact that the thing to be copied ie the executed agreement, is, by definition, the document signed by the debtor. I agree but that does not take one very far when it is clear from the provisions of the Act and the Copies Regulations – and is accepted by the Claimants – that a photocopy is not required, and that the signature need not be reproduced. The effect of this is that in one vital respect the copy need not match the original. This emphasises that the key question is not what is to be copied – which is uncontroversial – but how that copy may be made and of what it is to consist.

Analysis: The nature of the copy required

53. The one thing that could give the debtor real proof (absent forgery on the part of the creditor) that he did indeed enter into an executed agreement with the creditor, does not have to be provided by the creditor – ie a copy of his signature. Nonetheless Mr Uff and Mrs Thompson contended that the creditor must in effect prove execution of the

agreement by reference to the document itself as opposed to using its secondary records, however reliable they may be. I disagree for the following reasons:

(1) The copy is meant to be provided for a modest sum (now £1, originally 15p) within a relatively short timescale (12 working days); this suggests that the copy should be relatively straightforward and cheap to create; having to work (and only work) from the original signed document requires its production which in the context of most credit-card providers may be time-consuming and costly;

(2) By Reg. 3 (2) (a) of the Copies Regulations information relating to the debtor or for use by the creditor (other than that required to be in the executed agreement by the Agreements Regulations) may be omitted from the copy thereby emphasising that a literal copy is not required;

(3) Once it is accepted that provision of a photocopy to the debtor is not required and that the signature may be omitted, it is not clear why the purpose is not simply information as to what the agreement contained as opposed to proof of its making;

(4) After all, the debtor will have been provided with s62 and s63 copies at the time when the agreement is made. If there was any question as to whether he had in fact entered an agreement, it would surely have arisen then and been dealt with by those copies. The fact that the debtor may later have lost such copies does not alter the position. The purpose is thus simply informational;

(5) None of the Claimants gave a persuasive reason for the omission of the signature under Regulation 3 which might lessen its significance as a factor counting against the Proof Purpose. Mr Uff thought that the omission was because the signature may have been on a set of carbon copies and the one retained by the creditor was too faint to reproduce; on the facts there is no evidence that this sort of problem could occur but if it did, it would suggest that the duty on the creditor to keep the original executed agreement as proof of the agreement made by the debtor may not be able to be fulfilled. For her part, Mrs Thompson suggested that the omission was because the fact of signature was assumed in the definition of executed agreement of which the copy was to be provided. Quite so, but that hardly assists her since, as she made clear, s78 copies were being sought in the numerous cases that have now been brought in order to see if there was a properly executed agreement signed by the debtor. On that analysis, the last thing that the creditor should be absolved from providing is the proof of execution ie by the signature. It was not suggested by the Claimants that by 1983 it was not generally feasible for lenders to make and send photocopies. Indeed, in *Lloyds Bank v Mitchell* 13 September 2009 (Leeds County Court) Counsel for the Defendant debtor (who did not appear in any of the cases before me) argued positively that because the lenders could provide copies, s78 actually required nothing less. This was rejected by HHJ Langan QC (see below) but not on the grounds that photocopying was not easily done if the original was still there;

(6) Moreover, a requirement that the original be used to make the copy could work real injustice where the creditor had lost it, in a fire for example. This was one of the reasons why HHJ Langan QC held in *Mitchell* (supra) at para. 17 that a photocopy was not necessary and a reconstruction would do. As he put it:

> "Suppose a situation in which a lender could not find an original agreement which had been misplaced in its archives, or in which a batch of such agreements was destroyed in a fire. Suppose also that the lender could reconstitute the agreement or agreements from other sources – a card index or computerised records of transactions, and a copy of the standard terms printed on application forms at the relevant date. In such a case, even though no doubt could be cast on the accuracy of the work of reconstruction, the lender would be subject to the section 78(6) bar on enforcement and, in the case of destruction by fire, the bar would necessarily be perpetual. This would, in my judgment, be a grave injustice to the lender, while to permit reconstruction would not work any countervailing injustice to the borrower. I do not accept that a fair apportionment of risk between the parties requires the court to adopt the interpretation for which Mr Berkley contends."

(7) In answer to this, it was suggested that any lender should make a copy or further copy of the original and store it at some other location. This seemed unrealistic to me. It also took no account of the fact that the lender might be other than a large bank, with much smaller resources;

(8) Moreover, the Proof Purpose contention requires that the creditor retain not only the front of the application form – where the signature would be – but also the reverse, assuming that not all the terms were on the front and the reverse was not simply blank. It would not be enough for the creditor to produce a copy of what it said were the prevailing terms at the time for that card. Mr Uff said that this additional burden might be avoided if the front of the form had some sort of code on it, perhaps at the bottom, to indicate the precise set of terms which would apply and which could in turn be ascertained by reference to that code. But absent that both sides would be needed;

(9) In fact, Mr Uff accepted that in relation to the case of *Light* what the creditor had done there did amount to a true copy save for the question of name and address (see below) and a complaint that the copy itself was not easily legible, a factual matter with which I am not concerned. In *Light* the original executed agreement had been lost. So the bank could not provide the source for the copy as the Proof Purpose required. What the bank there had, however, was a record of the source code that would have appeared on the application form and agreement and this source code would tell the creditor what particular form of agreement and set of terms and conditions were used. This enabled the creditor to produce a redacted copy of a different debtor's executed agreement which it said would have been in the same form because it had the same source code. But in reality that is very close to the situation in other cases where the creditor has the debtor's details and can tell from the card and date of agreement what the form and conditions used would have been. Yet this would not be acceptable to Mr Uff. It is noteworthy that Mrs Thompson would probably not have accepted the copy in *Light* as compliant because on her case the creditor could never fulfil a s78 request unless it had in its possession the original executed agreement or a photocopy or a scanned image of it on the computer. Nothing less would do. The only rider to that was that at one stage she accepted that provided that the creditor had a record that an agreement had been signed by the debtor in form X and that the original agreement was archived in a place where it could be reached if necessary and they had a "blank" copy of form X which would form the basis of the reconstituted copy, then that may be enough for s78. But if that were right it undermines the Proof Purpose

advanced which depends on the creditor at least seeing for itself the executed agreement at the time of the request for the copy;

(10) The stresses and strains within – and the substantive differences between – the Claimants' various arguments here are some evidence of the difficulties with the Proof Purpose approach;

(11) It is said that if the debtor cannot have a copy in the sense required (for the most part) by Mr Uff and Mrs Thompson then he is at a disadvantage should he wish to challenge whether he made a properly executed agreement at all. I do not agree. First, this point only has real force if the Proof Purpose underlay s78 and I do not think that it does. Second, it assumes that there is no obligation on the debtor to make out at least some sort of positive case as to improper (or non-) execution of the original agreement. If he does and for example asserts positively that although he has been using a credit card agreement for years he never actually signed an agreement, or one that complied with s61, the creditor may well have to try and find the original in order to deal with that allegation. (I deal further with the absence of such positive allegations in relation to s61 when I consider below the Applications.) But that tells one nothing about the scope of s78;

(12) Obviously, in theory, there is more possibility of error if a creditor reconstructs from sources other than the executed agreement itself but for it to be able to reconstruct at all it will need the details of the debtor, the type of card and the date when made. If it has such details, it appears that there is no real difficulty in ascertaining the applicable terms including the relevant Prescribed Terms. And if so, there is unlikely to be a real risk of inaccuracy; I do not accept that a reconstituted copy is simply based on "mere assertion" by the creditor. It must – of necessity – be based upon records held as to the debtor and the agreement he made. That a creditor needs to take care when providing the copy is highlighted by the fact that it is implicit in its duty (as stated by Mr Gun Cuninghame) that it is an "honest and accurate" copy;

(13) I have already adverted to the overarching purpose of the Act being consumer protection within the ambit of a new and consistent framework which has benefits for lenders, too. But that does not impel a conclusion that the purpose of s78 must be the Proof Purpose. I accept that Part V of the Act provides important protection to the debtor in particular at the time when the agreement is made. Hence the statement of Clarke LJ in *McGinn v Grangewood* [2003] CCLR 11 at para. 70 to the effect that the purpose of s127 (3), which may work harshly against a creditor, is to ensure that the amount of credit is correctly stated. And the statement of Sir Christopher Slade in *Huntpast v Leadbetter* [1993] CCLR 15 at p27 that it is crucial to the working of the Act that the parties know at the date when they make the agreement whether or not it is regulated. But none of this assists very much on the question of the nature and extent of the copy to be provided after, and in some cases many years after, the agreement was made;

(14) Mrs Thompson submitted that the approach she advocated with Mr Uff was not merely dependent on the Proof Purpose but also followed from the language of s78. But I do not accept that the language here impels that result and all the factors already mentioned point away from it.

54. Accordingly, the copy need not be as contended for by Mr Uff and Mrs Thompson and instead, a creditor can satisfy its duty under s78 by providing a reconstituted version of the executed agreement which may be from sources other than the actual signed agreement itself.

Two Riders

55. First, the Defendants contend that a key driver for the answer just given is the Current Information Purpose. For my part I do not consider it necessary to find that this is the purpose of s78 in order to find as I have on Issue 1 (a).

56. Second, I should record that at one stage, Mrs Thompson submitted that "disclosure of the [actual] agreement is often the start of a PPI claim. Consumers in those cases are looking not only to get out of their agreements but also, in most cases, to recover damages, damages in the form of the PPI premiums and interest that they've paid over the course of the years. Sometimes the first time that a borrower knows that he or she has taken out PPI on a loan or credit card is when they actually see the agreement." It was not clear to me how far this particular point about PPI was being taken as it did not feature in anyone's skeleton argument. Ms Tolaney directed me to another part of Mrs Thompson's submissions where she said that "the only information that you need to see is whether the Prescribed Terms are there. We don't care about his annual income or all the other questions they asked him. That's irrelevant information about the debtor." Ms Tolaney therefore submitted that in truth a question on the form about whether or not PPI was to be taken out is no more than irrelevant information about the debtor. Mrs Thompson then commented on that and said that it was not irrelevant personal information because if PPI was taken out a further set of terms and conditions became part of effectively the credit agreement - but that was not accepted by the Defendants. I invited both sides to address me further on the point if they wished but neither did so. In truth this was a matter raised somewhat obliquely in oral argument and the Claimants did not provide any detailed submissions on the point at all. For present purposes, therefore, I have disregarded it.

Information to the debtor as to the type of copy provided

57. Mr Gun Cuninghame says that in providing the copy the creditor should state that it is a reconstituted as opposed to a direct copy. Mr Mitchell for Barclays says that it is not necessary to do more than say in the covering letter that it contains a copy compliant with s78. I accept that as a matter of law, s78 does not itself require any particular explanation as to how the copy was made. However, as matter of good practice and so as not to mislead the debtor it is clearly desirable that the creditor should explain that it is providing a reconstituted as opposed to a physical copy of the executed agreement. It will also explain why the copy might otherwise look a little odd – see, for example, the first page of the copy in *Carey* at page 197. The creditor can also explain in the letter that this procedure is satisfactory under the Act. This accords with the thrust of the latter part of paragraph 2.9.5 of the OFT Draft Guidance. And in practice, the Defendants thus far have usually said something about what it is they are providing under s78 in the letters accompanying the copies where actual photocopies of the executed agreement are not supplied. See for example the letters at pages 117 (*Yunis*), 177 (*Carey*), 600 (*Backwell*), 677 (*Mandal)* and 802 (*Light)*. Mr Thanki pointed out that as far as RBS was concerned it makes it clear in the covering letter when it is reconstituting the agreement.

Issue 1 (c)

58. It is more convenient and logical to deal with this before Issue 1 (b) which is not concerned with content at all, but form.

59. The Claimants all contend that the copy must contain the name and address of the debtor as at the date of the executed agreement. The Defendants deny that this is required at all.

60. As a matter of common sense it is difficult to see how a copy of an agreement can omit the names of the parties. It might be thought that the address of the debtor, however, was immaterial, at least to the debtor, who can be assumed to know what it was at the time, if different from his present address. However, as noted above, any application of the concept of materiality must not override the requirements of s78 and the Copies Regulations properly understood. In my view it is clear that the name and address must be provided:

    (1) The name and address of the debtor would have appeared on the executed agreement and it is not suggested otherwise; a copy of the executed agreement would thus, without more, need to contain those details;

    (2) Moreover those details are required by the Agreements Regulations. While Reg. 3 (2) (a) permits the omission of certain information about the debtor, this does not apply if the information was required by the Agreements Regulations. As the name and address is (see paragraph 13(1) above), the obvious implication from Reg. 3 (2) (a) is that it cannot be omitted;

    (3) Even more tellingly, Reg. 3 (2) (c) permits the omission of the name and address from the s62 copy (of the unexecuted agreement). That surely entails the conclusion that outside the case of a s62 copy, the name and address is required; this is supported by the editors of Guest and Lloyd's *Encyclopedia of Consumer Credit Law* (*"Guest")* at p3200/1;

    (4) As against this, the Defendants contend first that Reg. 3 (2) merely sets out a list of expressly permitted omissions. It does not mean that other omissions, entailed by an application of materiality, are not permitted. I disagree. Leaving aside what might be described "low level" omissions which could be cured by such an application (spelling errors, non-misleading presentational matters) the form of Reg. 3 suggests that it is providing a code for what is to be expected in a copy, as s180 itself provided for in some detail. Any omission of any significance (which must include name and address) needs to be expressly permitted under sub-paragraph (2);

    (5) On Reg. 3 (2) (c) specifically, it was said that this was entailed because it would usually be impossible to put a name and address in the s62 copy which would be presented to the debtor (for example as in the worked example) in a booklet available to all prospective applicants, before he had engaged in the application process. I follow that, but I do not see why that deprives the point made in sub-paragraph (3) above of its force. Indeed, it may suggest that there had to be a compelling reason (impossibility as Mr Mitchell put it in paragraph 16 (c) of his written submissions) before the omission of the name and address could be contemplated.

(6) It is also said that this view of Issue 1 (c) will place an unnecessary (and perhaps impossible) burden on lenders because it may be hard to find the original address or it may have been lost altogether because for example it was electronically overwritten by a later address. This is of course possible in theory but it is noteworthy that in the cases before me, it was not suggested that the creditors concerned could not have produced a name and address if necessary and that included the case of *Yunis* where none was provided, in part to keep the *lis* generated by that case, alive; (I canvassed this point with Ms Tolaney for HSBC on Day 2 p59 but in the event no further submissions from HSBC as to the practicality of providing in some way the original name and address were made, on the basis that there was no evidence available on the point);

(7) I am mindful of the theoretical scenario postulated which compares a failure to provide a name and address in the executed agreement itself and a similar omission in the s78 copy. In the former case, to omit the address would lead to an IEA but one which the Court could enforce under s127 (1). On the other hand, assuming that the address was indeed on the original executed agreement but the s78 copy omitted it, the result would be continuous unenforceability under s78 (6) until and unless the address were found and inserted into or onto the reconstituted copy. The more serious state of affairs is the former yet the latter yields the harsher consequence. In abstract terms that is correct – but I have serious doubts as to whether the latter is likely to arise. See sub-paragraph (6) above;

(8) It is further said that the provision of the name and address to the very person who can be expected to know it is unnecessary and pointless. But part of that submission relies on the broader argument that the purpose of s78 and the Copies Regulations is the Current Information Purpose. However, as explained in relation to Issue 2 below, I think that is too narrow a meaning. And if – as I find in relation to Issue 2 – a copy of the original executed agreement (albeit reconstituted if the creditor wishes) is still necessary where there have been later variations, there is no reason why the copy should not, equally, include the name and address of the debtor at that time.

61. Having decided that question, there is the consequential question of <u>how</u> the creditor is to provide the original name and address. Consistent with my finding on Issue 1 (a) I take the view that it is open to the creditor to provide the name and address within the reconstituted copy from whatever source it has of those details. It does not have to take them from the executed agreement itself, which is what Mr Uff and Mrs Thompson contend. The difference between the parties here is graphically illustrated by what has happened in *Carey*. Initially the creditor reconstructed the executed agreement – as shown at pages 197-201 – but without the name and address filled in. Then this was added to the reconstruction from HSBC's records.

62. Mr Uff in particular contended that this was not s78 compliant because the name and the address did not come from the executed agreement. He said that the copy had to be of that document which on its face tied itself to the debtor. Only in that way could the debtor be assured that agreement was indeed to be attributed to him because the name and address on it was reproduced directly on to the copy. But this argument depends on the correctness of the Proof Purpose being the driver behind s78 and the Copies Regulations, which I have rejected. On the other hand, it is not as if the provision by the creditor of the

name and address from its records is not of some value to the debtor. It at least indicates that the creditor has a record of the fact of this person at an identified address making an agreement at some point in the past.

Issue 1 (b)

63. As between the Claimants and the Defendants, there appears to be no real dispute here. The question is "Must a creditor provide a document which would comply (if signed) with the requirements of the Consumer Credit (Agreements) Regulations 1983 as to form, as at the date the agreement was made?" and the answer to be given is "No".

64. It is accepted that the Agreements Regulations govern the form and content of the executed agreement signed by the debtor made pursuant to s60, and that the Copies Regulations, made pursuant to s180, govern the form and content of copies to be provided under the Act. For the avoidance of doubt I consider that the reference in s180 (2) (a) to the "prescribed form" and "prescribed requirements" is a reference to the requirements imposed by the Copies Regulations, not the Agreements Regulations. The only prescription as to form made in connection with s78 is the general requirement in Reg. 2 that the copy should be "easily legible".

65. The OFT contends that a significant divergence on the question of form as between the executed agreement and a s78 copy would stop it from complying, not because the Agreements Regulations directly apply but because it would no longer be a true copy (this definition amounting in context, to a requirement about the copy as opposed to a relaxation of the term – see paragraph 51 above). This view is supported by Goode's *Consumer Credit Law and Practice* (*"Goode")* at para. 30.329. One can imagine a case where the content reproduced in the copy has been set out in such a confusing manner that it might mislead the debtor as to what was in the executed agreement to the extent that it cannot be described properly as a true copy. But that scenario is more theoretical than real. And the contention made by the OFT and *Goode's* commentary was not explored by the actual parties in any detail. Nor is it strictly necessary for me to deal with it in relation to Issue 1 (b). If a "form" point is taken hereafter in relation to a particular copy supplied under s78 that will have to be considered, in context, at that stage.

66. The OFT has expressed concern that what may be said about its contentions as to form in relation to a s78 copy could affect also the position as to form under s63. However, since I am not making any ruling on its point as to form, there need be no such concern.

67. By way of postscript I should record that in relation to content, Mrs Thompson stated that s78 does not itself require a copy of an agreement which is itself fully compliant with s61 (1). Mr Uff put it slightly differently. He said that if there was prescribed information in the executed agreement (as there should be) and the true copy did not reproduce it and there was no permitted deviation in that regard (see Reg. 3 (2)) then the copy is not a true copy. If, on the other hand, some prescribed information is (wrongly) omitted from the executed agreement the copy should reflect that omission and not seek to insert it after the event as it were, for then it would no longer be a copy. Mr Gun Cuninghame said much the same thing. Ms Tolaney for her part accepted that the prescribed information and terms would appear in the s78 copy but that was because they were material as opposed to being required by the notion of "true copy" *per se*. The only point of practical

difference between the parties here (where Ms Tolaney relies on the concept of materiality to exclude information) is name and address, which I have dealt with above.

68. In practice there does not seem to have been a problem in providing a copy of the prescribed information or terms, which is hardly surprising since the application forms which became the executed agreements and the full set of terms and conditions (for example as supplied under s63) are all in standard form and incorporate what is prescribed. It is not suggested that any of the reconstituted copies considered by me (assuming they were in general terms found to be true copies) have actually omitted any of the prescribed information or terms save (in some cases) for the name and address.

ISSUE 2

Introduction

69. This is:

> "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), or must the creditor provide a copy of the original agreement as well?"

70. The question here arises where the executed agreement has been varied to some extent under s82 (1). If it has, does Reg. 7 of the Copies Regulations require the creditor to supply by way of a copy a copy of the original executed agreement plus a copy of such of its terms as have been varied? Or will it suffice to provide, in effect, a single compendious set of current terms and conditions which will consist of the original terms insofar as they have never been varied together with the latest versions of all the terms that have been varied?

71. To put this in its factual context, it is well-known that creditors frequently update their credit card agreements under powers which allow them, unilaterally, to do so. It appears that in most cases, when the creditor varies the agreement it will notify the debtor of the particular changes made but will also show them in the context of the entire terms of the agreement as they now are – see for example *Carey* at pp204-219.

The Interpretation of Reg. 7

72. First the relevant Regulations must be set out.

73. Reg. 7 makes further provision in respect of copies where the agreement has been varied under the rubric *"Copies of agreements or security instruments where the agreement or security instrument has been varied"*

> "(1) Where an agreement has been varied in accordance with section 82(1) of the Act, every copy of the executed agreement given to a debtor, hirer or surety under any provision of the Act other than section 85(1) shall include either—
> (a) an easily legible copy of the latest notice of variation given in accordance with section 82(1) of the Act relating to each discrete term of the agreement which has been varied; or
> (b) an easily legible statement of the terms of the agreement as varied in accordance with section 82(1) of the Act".

74. Regulation 8, with the rubric *"Copies of credit-token agreements where the agreement contains a power of variation"* provides that:

> "Every copy of an executed credit-token agreement given to the debtor under section 85 (1) of the Act where the agreement may be varied under a power contained in it shall comprise an easily legible statement of the current terms of the agreement (whether or not varied in accordance with section 82 (1) of the Act)."

75. Regulation 9, with the rubric *"Copies of old agreements and security instruments where the agreement or security instrument has been lost etc"* provides as follows:

> "Any copy of an executed agreement made before 19th May 1985 ... which is given to the debtor... under any provision of the Act on or after that date may comprise an easily legible statement of the current terms of the agreement ... insofar as they are known to the creditor ... where, due to an accident or some other cause beyond his control, the creditor ... does not have in his possession the executed agreement ... or any copy thereof".

76. Regulation 11, insofar as is relevant provides under the rubric *"Duty to supply copies of documents not to apply to certain kinds of documents"*

> "A duty imposed by the Act to supply a copy of a document referred to in an unexecuted agreement or an executed agreement shall not apply to a document of any of the following kinds:—
> (g) in the case of a modifying agreement, a document embodying the terms of the earlier agreement other than a document a copy of which is required to be given under section 77(1), 78(1), 79(1), 85(1), 105(5), 107(1), 108(1) or 109(1) of the Act".

77. The principal question is as to the meaning of "shall include" at the end of the body of Reg. 7 (1) and immediately before Reg. 7 (1) (a). The Claimants say that it means in this context, "shall be accompanied by" so that the items referred to in sub-paragraphs (a) or (b) are to be supplied <u>in addition to</u> the copy of the (original) executed agreement. The Defendants say that "include" must be read, effectively as "consist of" so that all that is required is a statement of all the current terms.

78. I first examine the phrase as used in Reg. 7 itself. To my mind it connotes the "additional" sense. Indeed, as regards the material to be provided under sub-paragraph (a) (which Mr Mitchell refers to as "Option A") it is hard to see that it can mean anything else. It requires simply the variation notices so that if there are original terms which are not varied they will not, or need not, be found in the latest notices of variation. But if this is all that the s78 copy now needs to consist of, it would or may be incomplete. Mr Mitchell's answer to this is to imply a duty to supply the original terms as well, insofar as not varied. But that is really tantamount to reading "include" in the additional sense. If that is what it means in the first place, as the Claimants contend, there is no need for such implication.

79. Even with sub-paragraph (b) ("Option B"), it does not follow that "include" is used in the sense of "consist of". That is because it still refers only to the terms of the agreement "as varied" so that any original terms not varied would be outwith (b). I think that this is what it does mean. It is to be distinguished from (a) only in the sense that it allows the creditor to produce instead of copies of its actual variation notices, as sent to the debtor under s82

(1), a statement setting out the details of all the terms that have been varied. This appears to be the view of *Guest* in the notes at p3204, where reference is made to Reg. 7 and the need, by way of addition, for "the notice or the varied terms". It then refers to the debtor deducing the new terms from the notice (a clear reference to Option A) and the copy of the original, and if the "new terms" are sent (a clear reference to Option B) comparing the new terms with the old. If this is the correct reading of (b), again "include" must be read in the "additional" sense and Mr Mitchell would have need of his implied duty to provide a copy of the original.

80. But it may be that Option B connotes by the expression "the terms of the agreement as varied" all the currently applicable terms, being those which have been changed and those which have not. That seems to be the view of *Goode* at para. 35.47-35.60. But even if so, the fact still remains that on the Defendants' reading of Reg. 7, the governing word for both Options A and B – ie "include" – is to be used in two different ways. This makes no sense.

81. The words of Reg. 7 then need to be compared with those of Regs. 8 and 9. Reg. 8 deals with credit token agreements and the duty under s85 (1) to supply a copy of the executed agreement every time a new credit token is supplied (this includes a credit card). Reg. 8 provides that the copy here shall "comprise" ie consist of an easily legible statement of the current terms whether varied or not. In effect that is what the Defendants contend is meant by Reg. 7. But if so, it is very unclear why it did not use such language.

82. The first answer proferred by the Defendants is that Reg. 7 gives the creditor two options, A and B. But this is hardly a benefit because, as has been pointed out Option A (as construed by Mr Mitchell) is cumbersome and inconvenient for the creditor who is much more likely to use Option B. The need for options, on Mr Mitchell's analysis, is simply not clear. And even then it still raises the question why Option B was not couched in the same terms as Reg. 8 because on Mr Mitchell's analysis Option B is to precisely the same effect as Reg. 8 namely that "the terms of the agreement as varied" sets out all the current operative terms whether they have ever been the subject of variation or not, and leaving out terms which have now been deleted. And it is to be noticed that, as with Reg. 7, Reg. 8 deals with the situation where there is a power to vary, and it clearly encompasses the situation where some of the terms may have been varied. This highlights the contrast with Reg. 7 which has simply not adopted the language of "current terms".

83. In this regard, it is necessary to refer to paragraph 39.4 of *Goode* which is relied upon by the Defendants. This paragraph is in the section dealing with credit token agreements and the supply of a copy of such an agreement under s85 (1) whenever a new credit token is issued. The latter part of that paragraph starts by reciting the terms of Reg. 8 ending with footnote reference 6. It then goes on to say this:

> "Thus, whenever a replacement card is given to the debtor, he must be given a further copy of the executed agreement under which the card was issued, and the copy must incorporate the current terms of the agreement even if these have not been changed. Where the terms have been varied under s82 (1), the creditor need supply only a copy of the agreement as so varied; it is not necessary to supply a copy of the executed agreement in its original form."

84. All of this seems to me to be a reference to the effect of Reg. 8. The first sentence deals with where there have been no variations. Here, the current terms (which are in fact the same as the original terms) must still be given, again, as it were. That is because of the use of the requirement for a statement of "the current terms". The second sentence then deals with the case where at the time of the issue of the new credit card, there have been some variations. Here, there is no need to provide the original because the requirement for "current terms" means the agreement in its current form, including terms which were varied (from something else) previously. However the footnote at the end of the last sentence refers to Reg. 7. And so it is said to be a description of the true effect of Reg. 7 (as contended for by the Defendants) and not Reg. 8. I confess that I find this reference to Reg. 7 to be out of context and obscure. Indeed it may be an error and Reg. 8 should have been referred to. Certainly the footnote would make equal if not more sense if it did. Because an express provision (as in Reg. 8) that only the current terms need be provided clearly allows for the removal of material from the original. On any view I do not accept that this final sentence is indeed a general commentary on the effect of Reg. 7 whatever else it may have been.

85. However, *Goode* does deal with Reg. 7 in its proper context at para. 35.47-35.60. Having quoted it, he goes on to say that Option A "requires the creditor..to examine each distinct varied term and to include in the copy of the executed agreement the latest notice of variation relating to that term. This may involve the inclusion of a copy of two or more notices..where the last notice does not encompass all the terms varied." He then says that Option B "requires a statement not merely of the variations but of the terms as varied ie the terms of the whole agreement in its latest form, including terms which have not been varied." To my mind that rather suggests that *Goode* sees Reg. 7 as providing for material additional to the copy of the original executed agreement, as opposed to the meaning advanced by the Defendants. But on any view it is certainly not advancing as the effect of Reg. 7, the notion that it requires no more than all the current terms.

86. I have also been referred to *Guest* at p3204-3204/1. It supports the Claimants' not the Defendants' position on Reg. 7. In particular it states that in contrast to Regs. 8 and 9 what is required is a "true copy of the original agreement *together with* either the notice or the varied terms." Issue is taken with the next sentence saying that if the debtor is sent the notice with the true copy he may deduce what the new terms are while if he is sent the new terms with the copy he may compare the new terms with the old. It is asked rhetorically why the debtor might wish to make that comparison which is said to be pointless. But I think that all that *Guest* is saying here is that in order to see the full terms of the agreement one needs to look at the new terms (on his assumption that only the varied terms are shown under Option B) and then "old" terms which have not and which remain current. In any event, this observation does not undermine *Guest's* careful analysis here which I find to be persuasive.

87. Reg. 9 deals with pre-19 May 1985 executed agreements which the creditor does not now have in his possession due to some cause beyond his control. Here, as with Reg. 8, it need only provide "an easily legible statement of the current terms" insofar as they are known to the creditor. Yet again it raises the question of why Reg. 7 did not use similar words if this was its intended effect. The fact that the obligation here is qualified by the words "insofar as they are known to the creditor" (because the agreement has been lost) does not deprive this point of its force in relation to Reg. 7. The clear import of Reg. 9 is that

something less is required of the creditor in the situation it deals with. The obvious reason is because in the case of old agreements, information as to what the executed agreement said may simply not be to hand at all. But the creditor can be expected to know at least some of the current terms – as one assumes that the agreement is still running – and so it must provide what it knows.

88. Moreover, it is hard to see why Reg. 7 did not use the word "comprise" (ie consist of) if that is what was meant – or some other words to the same effect. It is said by Mr Mitchell that this would not work because Option A requires something other than "comprise" since impliedly the original terms which were not varied do need to be supplied alongside the notices of variations. A word like "contain" would do, on his analysis, although that would still require the original terms and the notices to be within one document, which may not be straightforward. But in any event that is something of a self-imposed obstacle because the Defendants do not see Reg. 7 as requiring the original terms in any event. And as Mrs Thompson has pointed out all of these problems would be overcome if different governing words had been used for each of Options A and B. But they were not.

89. It is also said that one cannot derive much assistance from Regs. 8 and 9 because they provide a simple formula and not the elaborate language of Reg. 7. Quite so, but then the natural inference is that this is because Reg. 7 was seeking to do something different, and more than, Regs. 8 and 9 as opposed to doing effectively the same thing but in a more cumbersome way. The two different Options do of course make sense if the Claimants are right. Not all executed agreements capable of variation are varied as often as credit card agreements are. Where there have been only one or two variations, it may very well suit the creditor simply to add to the copy of the executed agreement the latest notices. In more complex cases Option B will suit. All of that makes sense if there remains the underlying requirement to supply the original executed agreement and the variations alongside, or as a supplement to it.

90. And if the overarching point is that <u>any</u> copy of the executed agreement need only consist of the current terms meaning (a) the original terms which were never varied and remain and (b) other terms which have been varied along the way and (c) entirely new terms, it is very hard to see why Reg. 8 is needed at all. The same goes for Reg. 9 save that the qualifier "insofar as known to the creditor" still needs to be made.

91. The more natural interpretation is that Reg. 7 is different because what it requires, fundamentally, is different.

92. A further point arises in connection with modifying agreements made under s82 (2) and the effect of Reg. 11 (g). In the end, I did not see this as assisting either side's case materially. A modifying agreement supplements or varies an earlier executed agreement. The modifying agreement itself does not have to repeat within the document which embodies it, such of the original terms as have not altered. But it does have to say that such terms remain. Reg. 11 of the Copies Regulations deals with "documents referred to" in an executed agreement and the general requirement of s78 that these be provided together with the copy of the executed agreement itself. Reg. 11 (g) then says that if a copy is required of the modifying agreement the creditor need not also supply a copy of the earlier agreement which will have been referred to in it. That earlier agreement is however still subject to the s78 copying regime. A debtor can still ask for a copy of the

executed agreement as it was before the modifying agreement came along. That is clear from the proviso at the end of Reg. 11 (g). And that proviso also makes clear that nothing in the rest of (g) entails that if a copy is required of the earlier agreement under s78, there is now no obligation to provide it at all. On any view this does not support the notion that s78 and the Copies Regulations are concerned with the current position only.

93. Mr Mitchell also produced what was described as a practical example of the treatment of varied agreements under the Defendants' interpretation of Reg. 7, and that of the Claimants. At the end of the day I am afraid to say that I did not find it to be of much assistance. It showed that under Option A the debtor might well be confused because the latest notices of variation might refer to earlier notices which did not have to be provided. That scenario could arise under Option A under Defendants' or the Claimants' interpretation because the Defendants say that there is an implied duty to provide the original terms as well, insofar as not varied at all, while the Claimants say that original needs to be provided anyway. But the problem of references to intermediate variations remains.

94. As for Option B, Mr Mitchell says by reference to his practical example that it is a much better way of providing the current information because there would be no missing references. I can see that if the creditor provides under this Option a full set of all the current terms. But where the practical example goes wrong is in supposing that on the Claimants' case, Option B need produce a different result – in the confusing form set out at pages 2 and 3 of the example sheet. That result is there only because Mr Mitchell contends that the provision of a copy under Option B under the Claimants' interpretation would be in one document setting out all the terms (old and new) side by side in a confusing way. But there has to be some common sense applied here. If the creditor has to provide (using shorthand) a copy of the original agreement and a copy of the agreement in its current form, and does so in the same letter, it will obviously say which is which and is likely to have the copy of the original in one document and the copy of the current in another. The proof of this lies in what has happened in these cases so far. Where creditors have chosen to give a copy of the executed agreement as well as the present terms (ie not standing on an argument that there is no need to provide the former in cases of variation) they have done just that. They have provided two different sets of terms without, it appears, any difficulty at all. Any debtor reading those letters will understand what is being done. See, for example, the letter from HSBC in *Carey* at p157 or from RBS in *Backwell* at p600. Indeed, as Mr Neville has suggested, if the creditor sent the Reg. 7 material without any explanation, it might be regarded as a deliberate attempt to confuse which could be taken into account by the OFT if it were looking at an allegation of unfair business practice. In other words there is a clear incentive for the banks to give the explanation as to which terms are which.

The alleged Current Information Purpose of S78

95. It is a key part of the Defendants' submissions on Issues 1 (a) and (c) and especially 2 that the purpose of s78 is to provide the debtor with current information. Where the terms of the executed agreement have not changed that will require a copy of those terms. But where they have changed, the purpose is only to provide the debtor with the terms are they presently are. That is because the section is directed to telling the debtor about his current position and nothing else.

96. Reliance is placed on paragraph 1.6 of the OFT draft guidance. That says that the purpose of the sections is to give the debtor relevant information about her contract and the current state of the account. Parliament has recognised that documents may be lost and debtors may be unable to ascertain what their rights are. If there is a dispute over what is owed, preventing enforcement (ie because of s78 (6) presumably) until clarification is provided is important protection for the customer. I see that, but this part of the guidance was not looking specifically at the case where the agreement has been varied and in that context, paragraph 2.11 suggests that Reg. 7 requires the original terms as well. Just as importantly, the written submissions of the OFT support more broadly the notion that a copy of the executed agreement in its original form must also be provided.

97. It is then said that Part VI of the Act is clearly only dealing with current events, as it were, as opposed to Part V which deals with circumstances surrounding the actual making of the executed agreement. I do not agree. Part VI is headed: "Matters arising during currency of credit or hire agreements" and it is true that it is concerned with actions which may arise after the agreement has been made ie within its "currency" in the sense of duration. One of those things is a request for a s78 copy. But it hardly follows that the subject-matter of the request must be limited to those matters which are still current.

98. As to s78 itself, it is true that along with a copy of the executed agreement the creditor must give an up-to-date statement of account. That is certainly a "current" matter but it does not mean that all aspects of the section are to be read as dealing only with current matters. Equally the fact that the copy is to be provided within 12 working days and for £1 does not necessarily entail that whatever the creditor has to provide is limited to a set of current terms and conditions on the basis that this would take the least time to obtain. Given my answers to Issue 1 generally, I do not consider that an undue burden, one not contemplated by the Act, will be placed upon the creditor.

99. Turning to the Copies Regulations themselves, it is then said that the fact that certain omissions from the copy are expressly provided for means that it is also confined to current matters. But that does not follow. It may entail the conclusion (and does in my view) that s78 is not directed to providing proof of execution but that does not mean that the only purpose is to provide current information. And the fact that many Claimants have, on the Defendants' case been abusing their s78 rights by reason of the manner in which such claims have been advanced and the very quantity of such claims, equally, does not mean that s78 must be confined to current information.

100. It is also said that the requirement that the Option A notices and Option B statements must be "easily legible" implies current information only, because it emphasises the importance of the legibility of this information. That does not follow either. In fact Reg. 2 says that all copies must be easily legible. If they are under Reg. 7 now to consist of or contain only the terms as varied, one wonders why easy legibility is repeated. There might be more need for it if (as the Claimants contend) these are <u>additional</u> materials to be supplied. But on any view this feature does not advance the Defendants' case.

101. It is true that what Reg. 7 does not require, when a s78 copy of a varied agreement is sought, are copies of all the intermediate notices. It is true that if it were the purpose of these provisions to provide the debtor with proof that every act done by the creditor since

inception of the executed agreement was lawful, they should be required as well. So, for that matter should all copies of the current terms required by Reg. 8, (to be supplied whenever a new credit-token is issued) be provided. But the fact that they are not does not mean that the only purpose of these provisions is to provide current information to the debtor and nothing else.

102. It is further said that the spectre of repeated requests by the same debtor under s78 (though he cannot make the request more than once a month) shows that s78 only requires the (more modest) statement of all the current terms. But that is an unrealistic scenario. First, there is no evidence that this has happened. Second, if it did, the first answer to the request would require the creditor to produce a reconstituted version of the (original) executed agreement. After that it would presumably have little difficulty in providing it again for the creditor along with the current terms.

103. The only other language that is relevant is that of Regs. 7 – 9. But for all the reasons given above, that suggests that the information to be provided is not limited to that which is current in relation to the executed agreement.

104. In my judgment, the debtor has a legitimate interest in seeing a copy of the agreement he signed, not in the sense of proof of execution but as information. He has that right irrespective of whether it was later varied. He may wish to review it and see what he agreed, or he may have a concern as to enforceability and he can at least see what terms were there. But in fact it is not necessary in my view to spell out every conceivable interest he may have. It is enough to say he has an interest in seeing what he signed up to and to have a record of it (*Guest* at p3200 states the purpose as being the provision of a record). That he should be entitled to a copy (with the limitations I have already described) in return for payment of a modest fee does not seem to me to be absurd, impossible or futile. The notion that a person can obtain a copy of an agreement from another party by paying a fee is hardly novel.

105. I see no difficulty in saying that the framers of the Act saw it as important in the interests of debtors that they should able to obtain as copy of the agreement they made for whatever purpose they want, it being assumed that they ask for a copy because they have mislaid their own, and then, if in fact the agreement has been varied, they are given the up to date terms as well. This is what Options A and B are designed to do, more or less elegantly. The fact that the purpose of s78 falls short of the supply of proof or the best evidence possible of the executed agreement does not undermine this.

106. What has happened in this case is that each side has taken a somewhat polarised position which assumes no possible middle ground between the purpose it contends for and that contended for by the other side. I regard that as setting the bar too high in terms of construing s78 and the Copies Regulations. The fact that many claims now made under s78 may properly be regarded as unattractive and merely fishing for a case of unenforceability (as to which see below) must not obscure a proper analysis of the provisions.

107. Mr Mitchell urged me not to look at Issues 1 and 2 through the wrong end of the telescope ie starting with the "primary" duty to provide a copy of the executed agreement

and then adding to it where it has been varied. Rather, he said, I should look at all these questions through the purposive prism of the supply only of current information. I could see the force of that if he were right about the exclusive purpose of s78. But I do not think he is. The result of the Defendants' analysis is, in truth, an attempt to force the language of Reg. 7 far beyond that which it can reasonably or sensibly go.

108. Accordingly, I conclude that Reg. 7 requires a copy of the executed agreement in its original form as well as a statement of the terms as they are at the time of the request.

APPLICATION OF PRINCIPLES UNDER ISSUES 1 AND 2 TO INDIVIDUAL CASES

109. The Preliminary Issues dealt with above are pure questions of law arising in the cases to which they relate. But it is obviously helpful to seek to apply the principles enunciated above to the facts of the relevant cases, being *Carey, Light and Yunis.*

A Preliminary Point – the Application Form

110. As noted above, in the majority of cases, the application form which is the document actually signed by the debtor will constitute all or part of the executed agreement. It must "contain" all the prescribed information and terms and "embody" the rest which can be incorporated by reference. There was some debate before me whether the application form needs to form part of the s78 copy. In part, the Claimants submitted this because they said that the actual signed application form had to be retained anyway before a true copy could be produced. I have rejected that argument.

111. But that still leaves open the question of whether any particular part of the application form should be included in the reconstituted agreement in order for it to constitute a copy under s78.

112. On any view, large parts of the typical application form may be omitted, namely information in relation to the debtor or included for the use of the creditor and the signatures of and signature boxes relating to, both parties. And if the application form contained the Prescribed Terms on the front, for example, they would not need to be reproduced as such if they were present in the full terms and conditions already provided as part of the reconstituted agreement. So what is left is likely to be a highly attenuated document. This can be seen from those parts of the reconstituted agreements in *Carey* at p197 and in *Atkinson* (now settled but still useful as an example) at p39.

113. It seems to me that the following information needs to be included in the reconstituted copy agreement (assuming of course that it was present in the original):

(1) Heading: Credit Agreement regulated by the Consumer Credit Act 1974. Mr Mitchell accepted that it should be there as a matter of description and it is always in the copy terms and conditions provided anyway;

(2) Name and address of the debtor: I have already held that this must be provided in the copy;

(3) Name and address of the creditor: there may be little interest on the part of the debtor in seeing this but the creditor is a party to agreement and it would look odd

if it was left out altogether. It appears in the *Carey* and *Atkinson* pages referred to above;

(4) Cancellation clause applicable to the executed agreement. Taking *Carey* as an example, the reconstituted application form contains a copy of the cancellation notice as it would have appeared at the time. On the executed agreement itself, this is in very brief form. At p198 there is the more extensive cancellation provision box which is required for s63 copies by reason of Reg. 5 of the Copies Regulations and the schedule thereto. As both Mr Say and Mr Mitchell have pointed out, there is a difference between the two. It seems to me that there is the possibility of confusion here. As the cancellation notice in the executed agreement is the one to be copied, there is strictly no need for the further and different one in the attached terms. That one could simply be struck out. Mr Mitchell has said that the provision of the s63 version is better because it gives a fuller description of the cancellation rights. I see that but, even though it may seem artificial, to fulfil the requirement of true copy of the executed agreement, it is the shorter cancellation provision that should be included.

114. All of the above may be provided on a sheet which is separate from the full statement of terms and conditions which also forms part of the reconstituted agreement, as in *Carey*. But the creditor may decide to reconstitute the agreement in a different way so that, for example, the information above is populated electronically onto the same sheet as that which sets out the terms and conditions, or some of them. I do not intend here to prescribe the precise form of the reconstituted agreement, nor should I seek to do so. The key point is what information it should contain, subject of course to the uncontroversial point that its format should not be such as to mislead the debtor as to what he agreed to.

115. For the avoidance of doubt, I have also considered whether a statement like that appearing in the reconstructed application form in *Carey* referring to the agreement to the terms and conditions "attached" needs to be included in the reconstituted copy. Or if the application form had said "I agree to the terms overleaf", whether that should be included. In my judgment, this aspect of the form is not necessary for the purpose of the s78 copy although there is nothing to stop a bank from putting it in, as HSBC did in *Carey*, or indeed from furnishing a copy of the type of application form or signature page that the debtor would have signed, as some banks have done. The statement referring to terms and conditions is not itself prescribed information and the supply of the terms and conditions which were applicable at the time will tell the debtor what he needs to know in terms of the content of what he signed up to, including the presence (or otherwise) of the Prescribed Terms. I am fortified in this approach by the fact that from what I have seen and heard, the s63 copies typically provided do not replicate the application form but are in the form shown at pp198-201 or (in the case of *Yunis)* at pp372-373. This does not appear to have generated any problems or indeed litigation. And it would be surprising if the s78 copy required a more onerous exercise than a s63 copy, the latter being sent at the time when the debtor may be most interested in seeing what it was that he signed up to.

116. In practical terms what this is likely to mean is that if the creditor chooses to use as the s78 copy, the s63 copy which would have been provided to that particular debtor at the time following execution of the agreement, this will be sufficient provided that the information referred to at paragraph 113 above is supplied. This exercise is not a mere

formality. The creditor will need to check carefully that the details of the debtor at the time are indeed correct and that those are the particular terms (including Prescribed Terms) that he agreed to. This is to ensure that it is an honest and accurate copy.

Carey

The Original Agreement

117. The relevant documents are at pages 197-201. Page 197 is a partial reconstruction of what would have appeared on the application form which became the executed agreement together with all the terms. All the terms (including Prescribed Terms) are to be found at pages 198-201. There are in substance only two objections to these documents as constituting a true copy. Both concern the derivation of the information therein. First it is said that while the name and address is there, it has just been added from HSBC's own records and not from an examination of the executed agreement on which it would have appeared. The second is the very fact that this is a reconstitution which was not made directly from, or is not shown to have been made directly from, the executed agreement or a literal copy thereof. I have rejected both of those points as a matter of principle, above.

118. As indicated above, it seems to me that the cancellation provision at p198 should be omitted as it conflicts with that given at p 197.

119. The only other possible question is whether the terms and conditions set out at pages 198-201 were <u>in fact</u> those applicable at the time of the executed agreement and contained or referred to therein. The pleaded claim is that the agreement was made in the early 1990s whereas the creditor says 1999 and the terms and conditions appear to derive from 1998. The appropriate course here is to allow that purely factual issue to go forward if the debtor wishes it. In any particular case there may arise a factual dispute of this kind which may need to be resolved. The important point, however, is that a copy provided under s78 is not to be regarded as non-compliant simply because it is reconstituted or is derived from a source of information other than that which appears on the original executed agreement itself. The fact that the creditor no longer has the original executed agreement is not therefore, itself a bar to compliance with s78.

Variations

120. As I understand the latest terms and conditions (including those just varied and those varied earlier or not varied at all) were also provided by HSBC and are at p369-370. Assuming that this is correct, then Reg. 7 is also complied with.

Yunis

121. The document at page 132-133 amounts to a compliant copy save that it needs to contain the information referred to in paragraph 113 above, including Mr Yunis's name and address at the time. It is not suggested that the terms and conditions provided were not the ones governing at the time. There appears to be no difficulty about the latest variation as this is provided at p135.

122. A point was taken in *Yunis* by Mr Mitchell that the Court should deal only with the pleaded non-compliance with s78 which was the absence of a signed document, a

contention which is clearly wrong. I deal with this in more detail in the context of the Applications. But given the principles I have sought to elucidate, it makes no sense to impose an artificial fetter caused by an incomplete pleading, on the application of those principles to the relevant cases. And in truth the matters were canvassed in argument. None of that of course affects the entirely separate point as to whether the adequacy or otherwise of a s78 copy can of itself generate a claim that the agreement was improperly executed. That is the core of the strike-out application.

Light

123. The position here is that MBNA has produced an application form of the kind which it says would have been signed by Mr Light. It contained the prescribed terms on the reverse and also referred to a separate set of full terms and condition by which the debtor said in the form he would be bound. A blank application form has now been populated with Mr Light's name and then address. Mr Uff has raised only two points. The first is that it appears that the name and address is derived not from the actual agreement signed by Mr Light but from other electronic records kept by MBNA. Here, see exhibit "NW3" to Ms Worden's statement of 27 November 2009. But as a matter of principle I have ruled against Mr Uff on that point. That leaves his second objection which is that the copy provided is not easily legible. That is a factual issue which will have to be determined hereafter if the debtor wishes to pursue it. Otherwise the s78 copy here is compliant.

Conniff

124. The copy documentation here is not compliant because it only consists of the current terms and not the original terms.

ISSUE 3: UNFAIR RELATIONSHIP

Introduction

125. The issue here is this: "Does a creditor's breach of section 78(1) of itself give rise to an unfair relationship within the meaning of section 140A?" It arises in the case of *Adris*.

126. The relevant provisions are as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following–
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)....."
>
> **"140B Powers of court in relation to unfair relationships**

> (1) An order under this section in connection with a credit agreement may do one or more of the following–
> (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
> (d) direct the return to a surety of any property provided by him for the purposes of a security;
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
> (f) alter the terms of the agreement or of any related agreement;
> (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.
> (2) An order under this section may be made in connection with a credit agreement only–
> (a) on an application made by the debtor or by a surety; ...
> (9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

127. In *Adris* it is alleged that no s78 copy was provided. That must be assumed to be so for the purpose of my decision on this issue. Then paragraph 10 of the Particulars of Claim pleads as follows:

> "The Claimant contends that the Defendant's failure to respond to the request made under section 78 of the Act creates an unfair relationship between the parties within the meaning of section 140A of the Act."

128. The claim of an unfair relationship depends solely on the absence of a s78 copy. No other facts are alleged. The legal foundation for the allegation can only be s140A(1)(c) – something not done by the creditor ie no s78 copy.

129. The relief originally sought pursuant to s140B was (a) a writing down to zero of Mr Adris's credit-card account with RBS and (b) the return of all monies he had ever paid to RBS in discharge of his credit card debts on the grounds of payment under a mistake. That latter claim has now been abandoned.

Analysis

130. Mr Gun Cuninghame's point is a short and simple one. It will be recalled that s78 (6), the sanction for non-provision of a s78 copy, is that while this default continues, the creditor is not entitled to enforce the agreement. The recent decision of Flaux J in *McGuffick v RBS* [2009] EWHC 2386 (Comm) considered the effect of a parallel provision in s77 (4) (a) of the Act. For these purposes, it was not suggested that there was any material difference between that and s78 (6). If *McGuffick* is rightly decided, the effect of the unenforceability provision is as follows: the contractual liability of the debtor to pay any sums due or falling due by reason of his use of his credit card remains. It is not the case that the creditor's rights to payment were never acquired or that they were extinguished. The result is that if the debtor stops paying during the s78 breach period, interest will

accrue. And if and when the s78 breach is cured, the creditor may sue him and recover all outstanding amounts. Moreover, during the breach period the creditor can still report the debtor to credit reference agencies ("CRAs") without the need to tell them that the agreement is currently unenforceable. It can demand payment from the debtor or instruct a third party to do so and can issue a default notice. None of that constitutes "enforcement". The only restriction on the creditor is that he cannot, after starting proceedings, obtain a judgment which enforces the agreement. So he cannot obtain a judgment sum, a charging order to enforce that judgment or make the debtor bankrupt.

131. Against that background Mr Gun Cuninghame contends that by reason of this very situation in and of itself, the debtor is placed in a dilemma. He can continue to pay as in fact he is obliged to do and avoid interest and other charges which the creditor can enforce if he later cures the breach. But then the present s78 breach gives him nothing. Or he can stop paying (or perhaps even continue to spend but not pay) in the hope that the creditor will never cure the breach so that whatever else the creditor may do he cannot sue the debtor to judgment. Mr Gun Cuninghame says that this creates a dilemma for the debtor because he cannot be sure whether the creditor will cure the breach. I agree that this is a dilemma in the sense that the debtor is faced with gambling or playing safe. But it hardly follows that an unfair relationship has thereby arisen. His "dilemma" arises partly as a result of the fact that Parliament has decreed that a s78 breach is curable and partly because *McGuffick* has confirmed that the restrictions on practical enforcement by the creditor are limited. It cannot be said that because this is the law it leads to an unfair relationship.

132. A further element of the dilemma prayed in aid by Mr Gun Cuninghame is that without a s78 copy the debtor will also not know whether the agreement is irredeemably unenforceable under s127 (3) which it might be. But that is entirely speculative and the point is undermined by (a) the fact that it is not the purpose of s78 to provide proof of a properly executed agreement, (b) the fact that regardless of any s78 breach, if the debtor wants to allege an IEA it behoves him to make some kind of positive allegation about it (see below) and (c) it is conceded by the Claimants represented by Mr Gun Cuninghame that a finding that there is an IEA does not, of itself, lead to an unfair relationship (see Issue 6 below).

133. In truth what the debtor is seeking to do here is to achieve a more dramatic remedy against the creditor for a s78 breach (for example a writing off of debts that is presumably irreversible) than the statute has provided in s78 (6). In my view this is a hopeless proposition.

134. Of course, I deal only with the case, as here, where nothing further is alleged than the simple fact of the s78 breach. Sections140A (1) and (2) make clear that the Court will need to decide on the basis of particular facts said to create unfairness to the debtor and matters going to their particular relationship. An example of this is the decision of Blair J in *Khodari v Al Tamimi* [2008] EWHC 3065 at paras. 45-46 and that of the Court of Appeal ([2009] EWCA 1042) at paras. 39-44. But no specific facts are alleged here at all. Mr Gun Cuninghame is right to say that a debtor does not have to plead specific facts if he does not want to. That is true. But the result in the present context is that the claim to unfair relationship is bound to fail. I should add that the fact that s140A (9) places the

burden of proof on the creditor does not, in this context, make any difference and the "dilemma" argument advanced by Mr Gun Cuninghame did not rely upon it.

135. It is necessary to add a postscript however. It appeared to be the case during Mr Gun Cuninghame's submissions that he wished to contend that *McGuffick* was wrongly decided on the key point that the liability to pay remains during a s78 (6) unenforceability period. This being a prior High Court decision I should of course follow it unless satisfied that it was wrong. I was taken through the decision in considerable detail by Mr Thanki. I was also referred in depth to the decision of the House of Lords in *Wilson v First County Trust Limited (No. 2)* [2004] 1 AC 816. In *McGuffick*, Flaux J conducted an exhaustive and rigorous examination of that decision, which was in the context of A6 (1) of the ECHR and A1 of the First Protocol thereto. See paragraphs 38 – 68 of his judgment. His conclusion was that there were statements of their Lordships in *Wilson* which supported the position of RBS, namely that unenforceability under s127(3) did not mean that the parties no longer had any rights or liabilities thereunder. But in any event the context of *Wilson* was different from the context before him (and me) and he concluded by reference to a number of authorities which were directly in point (see paragraphs 60-67), that the better view was that the rights of the creditor and the obligations of the debtor did exist but were unenforceable. The creditor's "rights continue but cannot be enforced". To the extent that there were passages in *Wilson* inconsistent with that, they were contrary to earlier authorities not cited and were in the ultimate event *obiter*. See paragraph 67 and 68. All of this dealt with the effect of a decision of the Court under s127 (1) not to make an enforcement order or the effect of s127 (3) where it cannot make such an order so that the lack of enforceability will be permanent.

136. However, Flaux J went on to hold that even if he was wrong about the effect of the position under s127 (1) and (3) the position under s77 (4) was in any event different and would still entail the conclusion that the creditor's contractual rights remained (with the consequences as to what was the prohibited "enforcement" under s77 (4) described above). The key difference with s77 (4) (and s78 (6) here) is of course that the creditor can unilaterally cure the breach at any time by supplying a conforming copy at which point the agreement becomes "enforceable" again. See his paragraphs 69 – 73. I respectfully agree entirely with the conclusions reached by Flaux J and for the reasons he gave.

137. In fact, for his part, Mr Gun Cuninghame only raised two particular points about *McGuffick* in his written submissions. The first was that *McGuffick* only dealt with the issue of the ability of the creditor to report the debtor to credit reference agencies as opposed to any "bigger question" as to the debtor's position under a redeemably unenforceable agreement. I disagree. In order to reach the conclusion which he did, Flaux J had to examine in some detail the position of the debtor. If the creditor's rights continued, so did the debtor's liabilities – the only restriction is enforcement through the Courts.

138. The second point, which Mr Gun Cuninghame did not develop in oral argument save to make a brief reply submission on it, was to argue that *McGuffick* was decided *per incuriam*. He relies on the following passages from the judgments of the House of Lords in *Dimond* (supra). First, at p397, Lord Hoffman said that "the effect of section 65(1) of the Act is that she no longer has to pay." Then, at p398A he said that "Parliament

intended that if a consumer credit agreement was improperly executed, then subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law: compare *Orakpo v Manson Investments Ltd* [1978] AC 95." Finally he referred to the words of Lord Hobhouse in saying that "The consequence of the failure to comply with the statutory requirements is clearly spelt out in the statute. The contract cannot be legally enforced by the creditor against the debtor: sections 65 and 127. It may be thought that this may sometimes produce a harsh result and an unmerited windfall for the debtor. But this is what Parliament has provided no doubt in accordance with a broader policy. Again I agree with your Lordships that there is no basis for implying an obligation of the hirer to pay contrary to the statute." (at p405). And even if these words were merely *obiter dicta* they were not in any event drawn to the attention of Flaux J or if they were he did not give them proper attention.

139. As to this point, first, it overlooks the fact that *Dimond* was specifically referred to in the Skeleton Argument of Counsel for the Claimant in *McGuffick* of which I have been provided with a copy. Second, Flaux J must have been very familiar with *Dimond* since he appeared when still in practice in *Lagden v O'Connor* [2004] AC 1067 which Lord Nicholls described as the "sequel" to *Dimond*. Thirdly, and crucially in my view, *Dimond* was referred to extensively by their Lordships in *Wilson* which Flaux J expressly considered. Fourthly, as with *Wilson* the context of *Dimond* was again different. Here the Claimant sued the Defendant for negligence in relation to a road accident and claimed the cost of hiring a replacement car. The accident claims management company acting for her provided the car under an agreement whereby she did not have to pay the hire immediately and in practice it would come out of the damages recovered from the Defendant's insurers. It was held that the hire agreement with the Claimant was a regulated credit agreement but was unenforceable under s127 (3) as it was in breach of s61(1)(a). So the Defendant argued that it should not have to pay damages in respect of the hire charges which were unenforceable as against the Claimant. One counter-argument to this was that it was still open to the hire company to sue the Claimant for recovery of the hire charges on the basis of unjust enrichment. The House of Lords rejected that on the basis that to treat the Claimant as having been unjustly enriched would be inconsistent with the purpose of s65 to the effect that she did not have to pay. If it were otherwise, the effect of the section could be reversed by a simple claim for unjust enrichment and there would have been in reality double recovery on the part of the Claimant. See Lord Hoffman at p397G and 398A and 400A-D, and Lord Hobhouse at 405F-406A. Thus the context was whether the creditor could have some other parallel claim which was enforceable against the debtor and which would in effect subvert s65. It is hardly surprising that their Lordships answered the point as they did. But that does not mean that they were opining as to whether the creditor's rights under the agreement were themselves extinguished and along with them, the debtor's obligations. They did not have to do so. The quotations cited by Mr Gun Cuninghame are taken out of context. Read in context, they do not assist him in his challenge to the decision in *McGuffick* and form no additional reason why I should not follow it.

140. In any event, consideration of whether *McGuffick* was rightly or wrongly decided is strictly irrelevant to Issue 3. If it was rightly decided the debtor's "dilemma" arises but for the reasons already given, that does not of itself lead to an unfair relationship. On the

other hand, if it was wrongly decided, so that there was some effect on the substantive obligation upon the debtor to pay (the scope of which in any event was not explored in argument), it would mean that in some way or other, the debtor would be entitled to withhold payment for the duration of the unenforceability period. But if that were right, the debtor would unquestionably (and irreversibly) be better off. In such circumstances the dilemma would not even arise. How that situation can be described as *per se* unfair to the debtor I cannot begin to see. In truth, the actual unfair relationship argument mounted by Mr Gun Cuninghame depends on *McGuffick* being right, not wrong.

141. In any event, the argument must fail. The answer to Issue 3 is "No".

ISSUE 4

Introduction

142. As stated, this read as follows:

> "If there is a breach of section 78(1), is that sufficient without more to make a declaration to that effect (whether pursuant to 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?"

143. The issue arises in the context of where (as in virtually all cases before me) the debtor alleges in the Particulars of Claim that the creditor has failed to comply with s78 because it has not produced a s78 copy at all, or it is defective, and then seeks a declaration that

(1) The creditor has failed to comply with s78 and

(2) As a result the creditor is not entitled to enforce the agreement.

144. The declaration the subject of this issue is (1) not (2). It is obvious, because s78 (6) expressly says so, that if there is a breach of s78, the creditor cannot enforce the agreement. It follows that if this is admitted by the creditor there can be no point in commencing proceedings simply to obtain a declaration to the effect of s78 (6). None of the Claimants have suggested otherwise.

145. In practice, though not always, the issue as to a declaration in form (1) arises because there is a dispute between the parties as to whether s78 has been complied with or not. But there is usually a larger context as well. This can be illustrated by reference to the cases said to generate this issue.

Carey

146. As is clear from my earlier rulings there was a real dispute between the parties here as to whether there has been s78 compliance or not. But in addition, in this case, the debtor also alleged that an unfair relationship arose as a result of the (claimed) s78 breach. She also claimed an injunction to stop the creditor from enforcing the agreement.

Backwell

147. Here a s78 breach was alleged but it was also said that if what the creditor provided was a true copy, it necessarily followed that there was an IEA. That is a separate matter but it turned at least in part on what a s78 copy could and could not be expected to show, a matter discussed above in the context of Issue 1. The debtor also sought a declaration that the agreement could not be enforced.

Conniff

148. This, equally, alleged a s78 breach and a consequential declaration was sought that the creditor could not enforce.

Yunis

149. Here a s78 breach was alleged and a declaration to that effect was sought but also a specific injunction, preventing enforcement by means of reporting to credit reference agencies. An order requiring that the creditor provide the s78 information was also sought and an order for non-enforcement (presumably permanent) if this was not complied with.

150. On any view it seems to me to be likely that the number of challenges about s78 copies will diminish significantly hereafter for the following reasons:

(1) First because it should now be clear what will count and not count as a s78 copy. On any view there have been real issues between the parties before me over this which I have endeavoured to decide;

(2) Second, because of the decision in *McGuffick* to the effect that a s78 breach does not remove any underlying liability from the debtor. And it does not stop the creditor from referring the debtor's debt to a CRA. Many of the cases that came before me at the time of the CMC on 8 October had been started very much earlier, before *McGuffick* had been decided. Hence the claims for declarations as to non-enforcement and injunctions to prevent reporting to CRA's. So the utility of having a determination of a s78 breach has much reduced;

(3) Third, I have already ruled that a s78 breach *per se* does not generate an unfair relationship;

(4) Fourth, because, absent any positive allegation of improper execution, a claim to that effect based solely on the absence of or defect in a s78 copy will not succeed; see my determination of the Applications below;

(5) Fifth, and taking the facts of the cases before me as an example, what they tend to show is that, given time, the creditors are usually able to supply a conforming s78 copy even if not within the prescribed 12 working days. Provided that the creditor makes it clear that it accepts that the agreement is unenforceable (in the *McGuffick* sense) pending compliance with s78, there is nothing further which the debtor needs to do at that time. How long the debtor might be expected to wait in such circumstances I return to below.

151. The real question concerns Issue 4 (b) and not Issue 4 (a). If there are proceedings on foot and within them, the creditor formally admits non-compliance with s78 there is no point in maintaining the proceedings just to obtain a declaration to that effect. Indeed what has tended to happen in a number of those cases is that the debtor then seeks to discontinue the claim, subject to a determination as to costs. That will be the real issue there. Accordingly I can say at this stage that the answer to Issue 4 (a) in the terms stated, is "No." I therefore turn to Issue 4 (b).

The Parties' positions

152. MBNA has contended that neither the County Court nor the High Court has any jurisdiction to grant a declaration as to a breach or otherwise of s78. This argument has only been developed in detail by Mr Howells on behalf of MBNA. The other Defendants have been content to rely upon it. If the Defendants are wrong on jurisdiction, so that the question concerns discretion, they contend that the answer to Issue 4 (b) is either "No, because it all depends on the facts" or more simply "It depends" and in any event the answer cannot be "Yes". The Claimants' position is that the Court does have jurisdiction and the answer to Issue 4 (b) is either "Yes" but certainly not "No" without qualification.

Jurisdiction

Introduction

153. It is not in dispute that both the High Court and the County Court have a general power to grant declaratory relief. The County Court did not have that power in 1974 but acquired it in 1984. This power is recognised by CPR 40.20 which provides that:

> "The Court may make binding declarations whether or not any other remedy is claimed."

154. It is not contended by Mr Howells, nor could it be, that the Act contains any express limitation on the power of Court to grant declaratory relief in relation to any question arising in relation to a s78 breach. Instead, he contends that this power has been removed by implication as a result of s142 and/or s170 of the Act. It is of course possible to have such a limitation by implication but any such implication must be clear.

s142

155. This provides as follows:

> **142. – Power to declare rights of parties**
> (1) Where under any provision of this Act a thing can be done by a creditor or owner on an enforcement order only, and either—
> (a) the court dismisses (except on technical grounds only) an application for an enforcement order, or
> (b) where no such application has been made or such an application has been dismissed on technical grounds only, an interested party applies to the court for a declaration under this subsection,
> the court may if it thinks just make a declaration that the creditor or owner is not entitled to do that thing, and thereafter no application for an enforcement order in respect of it shall be entertained.
> (2) Where—
> (a) a regulated agreement or linked transaction is cancelled under section 69(1), or becomes subject to section 69(2), or

(b) a regulated agreement is terminated under section 91,
and an interested party applies to the court for a declaration under this subsection, the court may make a declaration to that effect.

156. It is common ground that any application for declaratory relief in relation to s78 cannot be made pursuant to s142. This is because the section only applies where something can be done upon an enforcement order (from the Court). That is not so in a s78 (6) situation. See *Rankine v American Express Europe* [2009] CCLR 3 at para. 15. In fact, the power granted by s142 is highly specific. Where an application to enforce has been dismissed or on the application of an interested party the Court can go further and declare not merely that the owner cannot do that which he has applied unsuccessfully to do or that which an interested party says he cannot do – it can make an order barring any further application in the future. That last order is not one which one would ordinarily expect as part of the Court's power to grant declaratory relief. It is in effect a debarring order to the effect that the creditor may never do that thing. The creation of this specific head of relief does not, in my judgment mean that the High Court (and later the County Court) had no general jurisdiction to grant declaratory relief in relation to s78. And while the heading of s142 appears general in its terms, it still has to be looked at in the context of the words of s142 itself. It does not in my view impliedly oust any general power to make declarations.

157. The fact that in 1974 the County Court did not have a general jurisdiction to grant declaratory relief does not alter the position. The High Court did, and if necessary the parties could have gone there. The exclusive jurisdiction of the County Court applies only where the creditor seeks to enforce - see s141.

158. Nor do I consider that s142 needed to contain words such as "without prejudice to its general power to grant declarations" in order to avoid an implied ouster.

S170

159. This provides as follows:

> **170**.—(1) A breach of any requirement made (otherwise than by any court) by or under this Act shall incur no civil or criminal sanction as being such a breach, except to the extent (if any) expressly provided by or under this Act.
> (2) In exercising its functions under this Act the OFT may take account of any matter appearing to it to constitute a breach of a requirement made by or under this Act, whether or not any sanction for that breach is provided by or under this Act and, if it is so provided, whether or not proceedings have been brought in respect of the breach.
> (3) Subsection (1) does not prevent the grant of an injunction, or the making of an order of certiorari, mandamus or prohibition or as respects Scotland the grant of an interdict or of an order under section 9l of the Court of Session Act 1868 (order for specific performance of statutory duty).

160. Mr Howells first invokes s170 (1) and says that a declaration is a "sanction". I disagree. A declaration as to the parties' respective rights does not without more constitute a sanction. And here the declaration is limited to saying whether there has been a breach or not. The sanction which follows arises because of what s78 (6) provides not by reason of any declaration. Mr Howells then said that the power to grant declaratory relief was impliedly ousted by s170 (3). I disagree. That sub-section creates a specific qualifier to, or carve-out from, the general rule laid down in s170 (1). It is not free-standing. One can

see that an injunction might in some circumstances be regarded as a sanction as might an order for *mandamus* etc. All s170 (3) does is to say that notwithstanding s170 (1) such orders can be made. It was not setting out in general terms the only kind of relief which the Court could grant in relation to an issue arising under the Act.

Other Agencies

161. Mr Howells also submitted that the absence of a power to grant declaratory relief did not prevent any alleged s78 breach being notified to the OFT or the appropriate licensing authority for possible action by them against the creditor. That may be but if there is a real question as to whether there has been a s78 breach or not, the body which can authoritatively determine that is the Court. In any event such alternative action is not sufficient to support an implied ouster of the Court's jurisdiction.

Generally

162. Mr Howells made a number of other points but as he recognised, they were the sort of matters that would equally arise in relation to consideration of the Court's discretion, if it had jurisdiction. I deal with that below.

163. There is one reality-check to Mr Howells's submissions. I have been invited by all parties to determine, among other things, the scope of the creditor's duties under s78. I have also sought to explain how that impacts upon the documents provided in particular cases. In substance that seems to me to approximate to or come close to granting declaratory relief. But if Mr Howells is right, I have no jurisdiction to decide such matters at all. At one stage in argument, he said as much. He later said that in fact I could decide the preliminary issues – it was just that I could not make a declaration. But it remains very surprising to me that in circumstances where there was a serious issue as to whether or not the creditor was in breach, I could not declare that it was or it was not.

164. For all the reasons given above I am quite satisfied that the County Court and the High Court have the jurisdiction to grant declaratory relief as to whether a creditor was or was not in breach of s78.

Discretion

165. As noted in paragraphs 145 - 149 above, debtors have in practice tended to ally their s78 relief with something else. At the very least they would seek a declaration as to non-enforcement at a time when that might have prevented the creditor from reporting the debtor to a CRA. That is no longer relevant. And I suspect that in the future, it will be rare for the debtor to seek <u>only</u> a declaration as to non-compliance with s78. So the question posed by Issue 4 (b) may well be artificial.

166. Nonetheless, it cannot be said that in all cases where the issue is compliance with s78, a declaration as to that question would be inappropriate.

167. First, although it may be of limited utility after *McGuffick*, if there is a genuine issue between the creditor and the debtor as to whether a s78 copy has been provided, the debtor may well have a legitimate interest in having that question decided (just as the parties in the cases before me clearly did) even if the underlying rights and liabilities are

not themselves affected. The debtor may wish to take a risk if the Court held that there was no s78 copy, and not pay his bills. It might be foolish but that is a matter for him.

168. Second, I do not think that the remedy should be ruled out, as it were, just because the issue would have to be decided anyway if the creditor subsequently sought to enforce the agreement. As Mr Thanki accepted there may be cases where enforcement is threatened and the debtor wishes to pre-empt them. And in an appropriate case a declaration may have the effect of leaving the creditor in no doubt that it cannot enforce by Court action. One has to bear in mind that a debtor might not always be dealing with a large institutional lender. It may be a much more modest creditor whose administration is wanting or which has clearly acted irresponsibly.

169. Next, it is said by the Defendants that this is a particularly pointless exercise because even if a declaration was granted, the creditor might a short time later produce a conforming copy. I see that but it is a submission conditioned, in my view, by what has been happening in some of the cases before me where after an initial failure to provide a proper s78 copy, the correct copy is later provided. Or if it has not, it is to enable a *lis* to remain in existence. Also, now that all of these points have been ventilated, the scope for dispute will hopefully much reduce. What I think can be said is that if a conforming copy cannot be provided within 12 working days, but there is some prospect that it may be provided within a reasonable period thereafter, any debtor would be most unwise to launch proceedings immediately simply to establish the s78 breach. Such a step, even if technically well-founded as a matter of law, might well be regarded as disproportionate and could adversely impact upon the debtor in costs. That, of course, applies to any litigation which is started precipitately. It may also be the case that a claim to establish s78 breach is itself regarded as trivial by the Court, depending on the particular facts. That, also, may sound in costs. All will, of course, depend on the exercise of the discretion of the judge dealing with costs in any particular case.

170. In my judgment, what all of this shows is that it is unwise to be prescriptive on what are, after all, matters of discretion. The answer to Issue 4 is neither "Yes" nor "No" but "It depends". The matters on which it depends will include what other relief, if any, is sought, and its connection with the s78 issue, and the facts prayed in aid by the debtor as to why, in that particular case, there will be real utility in having a declaration. That is no more than stating the obvious in relation to any claim for declaratory relief but it perhaps bears repetition in the current context. It is also no more than restating, with regard to the particular context of the cases before me, the observations of Neuberger J as the then was in *Financial Services Authority v Rourke* [2002] C.P.Rep. 14:

> "Accordingly, so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order....
> It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the

declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

ISSUE 5

Introduction

171. This arises solely in connection with s61(1)(a) and the requirement thereunder that the document signed by the debtor "contains" all the Prescribed Terms . The question is as follows:

"Does the document signed by the debtor contain the Prescribed Terms for 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 the 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?"

172. It arises now only in the *Carey* case.

Agreed Principles

173. The parties in *Carey* have helpfully agreed the following principles. The fourth one was added by Mr Uff, with their agreement. No other party takes issue with them. The OFT has formulated the matter in a slightly different way but accepts these principles are close to its position.

(1) It is not sufficient for the piece of paper signed by the debtor merely to cross-refer to the Prescribed Terms without a copy of those terms being supplied to the debtor at the point of signature;

(2) A document need not be a single piece of paper;

(3) Whether several pieces of paper constitute one document is a question of substance not form. In particular a physical connection between several pieces of paper is not necessary in order for them to constitute one document;

(4) Additionally, a physical connection (or one or more physical connections) between several pieces of paper does not necessarily constitute them as one document;

(5) Accordingly, where the debtor's signature and the Prescribed Terms appear on separate pieces of paper, the questions of whether those pieces of paper together constitute one document is a question of substance and not form.

174. As a matter of law, those principles appear to me to be correct, in the context of s61.

Mr Uff's preliminary point

175. Mr Uff said that I should not deal with Issue 5 at all because it was too fact-sensitive and there were questions about the nature of the documents supplied in *Carey* anyway. But Ms Tolaney suggested that I would have to proceed on the basis of assumed facts and so I would not be making a final ruling at this stage on whether the documents as supplied in *Carey* conformed to s61(1)(a). Moreover, although care needs to be taken with assumed facts it seems to me that a determination on the assumed facts here will be helpful and should provide some general guidance, especially in the light of the principles helpfully agreed between the parties. Mr Uff sensibly went on to make his substantive submissions on Issue 5 if I was against him on his preliminary point, which I am.

The Assumed Facts

176. The documents are those at pp197-201. They were reproduced in argument by Mr Uff in what he called his "mini-bundle", an expression which appears at various points in the transcripts but which is the same as pp197-201.

177. According to HSBC, p197 is a reconstituted application form. I referred to it above in the context of Issues 1 and 2. The assumed facts here are as follows:

(1) Ms Carey signed a form which contained, among other things, the entries at p197 including the specific reference to being bound by "the terms and conditions attached"; that form did not itself have the Prescribed Terms stated on the front or the reverse;

(2) The form (referred to as "a signature page" in the WS from Alan Burden dated 3 December 2009) would have been produced with Ms Carey's details already on, for her to sign once her application, already made, had been approved;

(3) At the same time as the form was produced electronically, the relevant terms and conditions (including the Prescribed Terms and information) would have been printed off and physically attached to the form by a staple;

(4) Ms Carey would then have been invited to read the agreement, consisting of the signature page and attached terms and would then have signed and dated the signature page. It would then have been countersigned by the bank;

(5) The relevant terms and conditions would not have been precisely in the form of pages 198-201 simply because that is a s63 copy with the different cancellation clause. But they would have been the full terms with the Prescribed Terms included either in landscape form (as shown at pp198-201) or portrait form.

178. Ms Tolaney contends that on those assumed facts, the document signed by the debtor did indeed "contain" the Prescribed Terms. I agree for the following reasons:

(1) As described, it is hard to see the form and attached terms as anything other than one document. It is not suggested that there were separate page numbers on the terms attached but if there were, on these assumed facts, it would make no difference;

(2) The signature page itself makes clear that it is incomplete as a document and needs something else because it has no terms on it at all and makes specific reference to the terms "attached"; it only makes sense if something else goes with it; equally pp198-201 need something to go with them, not least a place for the applicant's details and signature;

(3) The signature page refers to a credit agreement regulated by the Act and so makes clear that it is the first page of an agreement for which there must be other pages;

(4) The signature page and terms are presented to the debtor as a package;

(5) This would satisfy the notion that the Prescribed Terms can be identified within the "four corners of the agreement" – see *Hurstanger v Wilson* [2007] 1 WLR 2351 per Tuckey LJ at para. 11.

179. Indeed, on those assumed facts, Mr Uff accepted that there was a strong argument that the signature page was one document with, and thus contained, the terms.

180. I would add only these further observations:

(1) If the terms page later became detached, this would not alter the analysis which is of the position at the time the executed agreement is made;

(2) The word "attach" connotes to me some physical attachment which is obviously how HSBC used it in the assumed facts given. The word might conceivably be used in some other way, for example to denote terms supplied as part of the package, lying separate but with page numbering sequential to a page 1 on the form; that may well be sufficient but this is hypothetical territory and I see no need to do more than rule on the question by reference to the assumed facts, with reasons, and against the background of agreed principles. This I have done;

(3) There is no utility in my seeking to answer the questions in Issue 5 in their current state because the scenarios postulated all require some further elaboration before a simple "yes" or "No" answer can be given.

181. I should add that I was referred by Mrs Thompson to s189 (4) which defines the term "embody" and is set out in paragraph 7 above. I did not think that this assisted the analysis. "Embody" means contain or incorporate by reference. Terms other than Prescribed Terms may be (merely) incorporated by reference as opposed to contained in the executed agreement. In the assumed facts the relevant provisions were referred to on the signature page. But this did not prevent them from being "contained" within the document signed by the debtor. That is because they were not set out in "another document" referred to in the signed document. On the analysis above, the terms were not in "another document" at all but in the same document as the signature page. On the assumed facts they were as much contained in the signed document as if the signature page said had that the debtor agreed to be bound by the terms "overleaf" and the relevant terms were set out on the reverse.

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182. This arises in the case of *Mandal*. It is as follows:

> "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?"

183. The context is where it is not merely alleged that there was an IEA but that there was no signed agreement containing the Prescribed Terms .

184. It is conceded by Mr Gun Cuninghame who appeared from Mr Mandal, that despite his written submissions at paragraphs 59 and 60, the answer to the question is "no".

185. In my judgment that concession is rightly made for the following reasons:

(1) On this analysis the agreement is irredeemably unenforceable under s127 (3). So, and unlike the s78 scenario, there is no uncertainty here as to whether the creditor might at some future point remedy the breach, for it cannot. And even in the s78 case, I have already determined under Issue 3 that such uncertainty as is generated by the debtor's "dilemma" does not itself create an unfair relationship anyway;

(2) The fact that the creditor may nonetheless report the debtor to a CRA (which according to *McGuffick* he can) does not entail an unfair relationship. Nor does the fact that the creditor might yet write to the debtor seeking repayment of the debt; if what the creditor does amounts to harassment, the debtor will of course have remedies elsewhere, and the mere theoretical possibility of such conduct cannot without more constitute an unfair relationship;

(3) As with Issue 3, where there is a particular remedy provided (here under s127 (3)) it is hard to see why Parliament should intend that another set of remedies (under s140B) should automatically come into play at the same time without expressly saying so.

THE APPLICATIONS

Introduction

186. In *Adris* the Defendant, RBS, made an application on 5 November to strike out the claim as disclosing no reasonable grounds for bringing it and/or as an abuse of process or to obtain summary judgment so as to obtain its dismissal. A similar application was made by Barclays in the *Yunis* case, on 17 November. Although inter-related, I deal with each in turn.

Adris

187. It is necessary to describe the Particulars of Claim in a little more detail than hitherto. Paragraph 7 alleges that a conforming s78 copy was not provided. Paragraph 8 alleges non-enforceability under s78 (6) as a result. Paragraph 9 is key and says as follows:

> "If the Defendant is unable to prove that an agreement was signed in respect of the credit card which complied with section 61 (1) (a) of the Act and contains all the terms prescribed by regulation 6 and schedule 6 of the Consumer Credit

(Agreements) Regulations 1983, the Claimant will contend that the credit card agreement in question is irredeemably unenforceable by reason of s127 (3) of the Act."

188. Paragraph 10 claims an unfair relationship between the parties by reason of the s78 breach, already dealt with above. Various relief is then claimed in the body of the Particulars of Claim relating to the s78 matters and in the prayer the first head of relief is a declaration that the agreement is indeed irredeemably enforceable.

189. There is no positive allegation that it was an IEA and indeed there is nothing at all from the Claimant, Mr Adris as to the circumstances in which the agreement was entered into. There is no plea that he did not sign it or did not recall signing it or anything of that kind. The plea of IEA depends entirely on paragraph 9.

The Evidence

190. In support of the application RBS adduced a witness statement ("WS") from its solicitor Ms Higgins. On the basis of her own knowledge and information received from RBS and the Royal Bank of Scotland Group she said as follows:

(1) Upon being requested to provide a s78 copy RBS was unable to locate a copy of the document actually signed by Mr Adris but it did provide a copy of the terms prevailing at the time along with current terms and a current statement of account;

(2) She also produced a copy of the kind of application form used at the time when Mr Adris obtained his card being a standard form document designed to set out on the reverse all the prescribed information and terms as indeed it did. See pp559-560. There was no scope for any kind of bespoke documents and such forms were drafted by lawyers to ensure that they complied with the Agreements Regulations; further, unless a signature was provided, credit could not in any event be given; she was not however submitting that his application form contained those particular terms which came from a Visa not a Mastercard agreement. But the point was that the bank had a standard process for application forms designed to ensure that the signature was always there and so were the relevant Prescribed Terms and information;

(3) Whenever the agreement was varied, Mr Adris received a new current set of terms as he did whenever he was supplied with a new credit card. He was also supplied with monthly statements of account;

(4) She also referred to the fact that this claim was one of 19 virtually identical claims made by Mr Adris's solicitors, Consumer Credit Litigation Solicitors ("CCLS"), being faced by RBS or National Westminster Bank Plc (both of which are members of the Royal Bank of Scotland Group) where the bank could not produce the signed document containing the Claimant's signature or could only produce part. In no case was there any specific allegation that a particular Claimant had not signed a document when entering into the agreement or that particular Prescribed Terms were missing from that which were signed. She says that it thus appears to be the case that the IEA claim was made speculatively in the hope that the bank will never be able to prove a properly executed agreement or that if and when a

copy of the signed agreement is produced it will be found to be an IEA. She also referred to the website of Cartel Client Review ("CCR") one of the claims management companies which have been responsible for launching many of the claims on behalf of individual card-holders, including the claim made here by Mr Adris. One message says *"Could you possibly claim to write off your credit card balance? You may have a claim to have your outstanding credit card balance completely written off!"* In another section the website says: *"We analyse whether your credit card balance is unenforceable. If this is found to be the case your balance could be cleared written off or cancelled."* If the agreement was unenforceable *"then the lender may have no legal basis on which to enforce the contract and pursue for the outstanding balance.…*[the] *goal is to write off your entire credit card where possible."*

191. No evidence in reply was served. At the end of his submissions Mr Gun Cuninghame said that there was a WS from Mr Adris saying that he could not remember whether he signed the agreement or not but that was not before me and no application was made to put it in (Day 4/162-163). Thus RBS's evidence is unchallenged.

Submissions

192. RBS contend that (a) Mr Adris's claim in relation to paragraph 10 (unfair relationship) and (b) his claim based on paragraph 9 (IEA) should each be struck out as disclosing no reasonable grounds for the claim and/or as an abuse of process and/or should be dismissed as having no real prospect of success.

Unfair relationship

193. The allegation here is simply that an unfair relationship has arisen but without any particular facts in support other than the alleged failure to supply the s78 copy. I have already held that this is not sufficient, without more, to found such a relationship. Mr Gun Cuninghame's only point here (in addition to what he said on Issue 3 itself) is that I should not strike out this part of the claim before deciding Issue 3. But obviously I am deciding all the matters argued at the recent hearing, together. Mr Adris does not need to await the outcome of Issue 3 before responding to the application to strike out and indeed there has been no application to adjourn it. It would have been open to Mr Adris to put in evidence on the unfair relationship issue, without prejudice to his contentions on Issue 3. But this was not done.

194. Given my findings on Issue 3 and the claim as formulated for an unfair relationship here, it must follow that the claim here should be dismissed as having no real prospect of success. It is equally appropriate to strike it out on the basis of no reasonable grounds.

195. I have considered whether the unfair relationship claims amounts to an abuse of process. This was not in fact alleged in the application but it was in argument. I think that the better characterisation of this claim is that it is misconceived, for all the reasons already given. It is not so much that it is speculative as that it is hopeless, because mere reliance on a failure to provide a s78 copy cannot found the claim. So I would not have struck it out as an abuse of process.

IEA

196. The first point made by RBS is that what paragraph 9 effectively does is to shift the burden of proof on to it to prove that there was not an IEA. There is no basis for any such reversal of the usual burden which would be on Mr Adris, since it is his claim and his allegation that there was an IEA. It is not suggested that there is any special rule in the Act reversing the burden of proof in the case of an alleged IEA as there is in other instances – see for example s171 and s140B (9) in relation to unfair relationships.

197. It was then said that while the evidential burden may shift in the course of the trial, the legal or persuasive burden remains on the party making the allegation (here Mr Adris) and that in any event there has been no evidence adduced to raise even a case to be answered because no facts have been alleged or put in evidence at all, other than reliance on s78.

198. Finally, Mr Thanki pointed to the complete lack of particularity in the allegation as to IEA.

199. Mr Gun Cuninghame accepted that the burden of proof was on his client but said that there was enough evidence to say that the matter should go to trial. Apart from what was pleaded in paragraph 9 (which on its face can only be interpreted as invoking a reversal of the burden of proof) he pointed to the fact that, according to him the terms said by the bank to have been the relevant ones at the time, 1996, (see page 545-549) could not have been, because there were standard charges in there which only came about after 2005. So although the document said 1996 it could not have come from that time. This was a matter pleaded in the Particulars of Claim but it was not the subject of any separate evidence. And the Defence did not admit this matter. That seems to me to be far too slim a basis for mounting an IEA claim. First even if there was an issue about that, the fact remains that even the complete absence of a s78 copy does not by itself mean that there was an IEA. I have already held that the purpose of the s78 copy is not to provide proof. Here it needs to be remembered that under s127 (3), the Court must not make an enforcement order "unless a document… containing all the Prescribed Terms… was signed by the debtor" [my emphasis]. The failure to provide a s78 copy (which need not contain the signature in any event) does not mean that an agreement was not signed at the time. Secondly, there is the positive evidence adduced in the WS of Ms Higgins and referred to in paragraph 190(1) to 190(3) to the effect that the bank's system meant that it would not have been possible for Mr Adris to have made an executed agreement which did not contain (a) his signature and (b) the Prescribed Terms. Thirdly, and critically, it behoves the Claimant to put forward some kind of case as to what he alleges was the position. That is so regardless of the nature of the s78 copy provided (or not provided). It is in my judgment remarkable that this remains the position on the material before me. The absence of any positive case or evidence is in my judgment fatal to Mr Adris's case.

200. For those reasons, I hold that there is no real prospect of Mr Adris succeeding in his allegation that there was an IEA and this head of his claim should be dismissed. It would also be appropriate to strike it out as disclosing no reasonable grounds for bringing the claim.

201. It is also said that the IEA claim is an abuse of process because it is speculative, in that on the face of it, Mr Adris would appear (at best) not to know whether he can show an IEA or not. The approach seems to have been to leave it to RBS to see if it can produce a copy of the actual executed agreement. If it can, and it is properly executed, the claim will presumably not be pursued. If it cannot, then the Court is to be invited to say that there was no properly executed agreement. In other words the success of the claim does not depend on any input from the Claimant on the issue but only on what (a) the Defendant may or may not be able to show and (b) what the Court should infer from that. The object of the exercise is to achieve, if possible, the "goal" of preventing enforcement of the agreement. In my judgment this case falls within the situation referred to by Cooke J albeit in a different kind of case when dealing with abuse of process, namely *Nomura v Granada* [2007] EWHC 642 (Comm) at para. 37:

> "In my judgment, when regard is had to these authorities the key question must always be whether or not, at the time of issuing a Writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshall what it knew, to formulate Particulars of Claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a Claim Form at all 'in the hope that something may turn up'."

202. Mr Gun Cuninghame says that *Nomura* is different from the case before me because there is an intention to proceed in any event. In fact, for the reasons given in paragraph 150 above, that intention might be open to doubt now. But in any event, if in truth the claim is speculative, an intention to prosecute it nonetheless hardly saves it from being characterised as an abuse of process.

203. I entirely accept Mr Gun Cuninghame's point that I should not strike out the IEA claim simply because CCR has advertised for business in the way described above and has, together with other claims management companies, made claims in their hundreds if not (according to evidence filed in the *Yunis* strike-out application) thousands against many banks. As it happens, the OFT has already warned against the dangers of misleading credit-card holders as to their rights and their expectations if claims are made (see paragraph 1.2 of the Draft Guidance which also refers to some creditors having apparently not understood their obligations under s78). It has also stated in paragraph 1.7 thereof that the purpose of s78 is "to provide information to the consumer, not to provide a method for the consumers to avoid paying their debts." But what is relevant about the volume litigation and largely standardised claims which have resulted from advertisements of the kind referred to is that there is here a real risk that claims will be insufficiently tailored to the circumstances of the individual debtor relating to the making of his particular agreement. Hence, in this case, the bald assertion of an unfair relationship or an IEA accompanied by what looks like an attempt to reverse the burden of proof. It is that absence of individualised pleading (and evidence) that has led to my answering Issue 3 as "No" and my characterisation of the claim of an IEA in the case of *Adris* as speculative. So I accept that the IEA claim here is an abuse of process and may be struck out on that basis.

Relief

204. It follows that the claims of an IEA and unfair relationship must be struck out. That leaves, strictly, an issue about s78 compliance on the facts. But the only relief claimed in the actual Prayer is under 142 (1), which can only relate to a finding of an IEA, and an order under s140B which requires an unfair relationship. And the only relief claimed in the body of the claim is in paragraph 11 which again, is all founded upon s140B. That being so, it is unclear whether there is in fact anything left in the *Adris* case. If not, it should be struck out in its entirety. But before taking that course I would wish to hear Counsel upon it, in the light of my judgment generally, after it has been handed down.

Yunis

Pre-action correspondence

205. On 2 April 2009 the claims management company Brunel Franklin sent what appears to be a standard letter to Barclays. In it they stated that under s78 Barclays had to produce "Copy of executed agreement (signed by all parties to the agreement)" and "a document..itself containing all the Prescribed Terms of the agreement signed by the debtor or hirer.." among other things. This suggests that there had to be a signed document provided or at least a copy of a signature. Neither of these are required under s78. The letter also asked for disclosure of the following: "As provided for under s62 and s63 evidence that you complied with your obligations to present copies of the unexecuted and executed copy of the credit agreement..As provided for under s64 evidence that your complied with your obligations to forward a copy of the relevant cancellation notice to our client." That led to a letter from Barclays dated 14 April supplying what it said were the original terms and conditions when the account was opened and stating also that a copy of the current terms would be sent under separate cover. The former are at internal numbers 119-120 and again at 132-133. A print-out showing that these were the terms in the operative period is at p131.

206. This led to a letter dated 19 June from Ascot Lawyers ("Ascots"), the solicitors for Mr Yunis saying that the agreement provided was "unexecuted" and that they were to consider legal proceedings following the failure "to provide the executed agreement nor confirming whether you compiled with your obligations under sections 61-63". It went on to acknowledge that under the Copies Regulations there was no obligation to provide a signed copy. Nonetheless what had been sought was a copy of the "properly executed document eg one signed by both parties and containing all the Prescribed Terms .." This suggested that while Barclays did not have to provide it under s78 they nonetheless wanted proof of a properly executed agreement. This was so that they could determine whether a properly executed agreement existed at all. The letter also said that the bank was obliged to keep a copy of the signed agreement not only to comply with its statutory obligations but also to ensure that it could take enforcement action in the event of default. The latter does not follow. It is open to a credit card provider to commence enforcement action without a copy of the signed executed agreement. All it needs to do is persuade the Court that this the agreement would have been signed for example by reference to its records of this particular customer and his credit card and its standard procedures and terms at the time. In the absence of some positive evidence from the customer to challenge the execution of the agreement, such evidence is likely to be sufficient. The letter from Ascots contained no allegation of any kind from their client as to what he understood he had signed or when.

207. A letter from the bank dated 2 July effectively stated that it had provided all that was required under s78 and supplied documents again.

208. A letter before action from Ascots dated 18 August 2009 said that Barclays was in default of its obligations because it did not supply a copy of the executed agreement. Here what was meant was clearly a copy of the actual agreement as signed and showing the signature. The letter stated that Ascots acted for Mr Yunis on a CFA which allowed for a success fee and an ATE insurance premium of £1,785 for cases that settle after issue of proceedings and a further £5,565 for cases going to a final hearing. Proceedings were issued two days later, on 20 August.

The Statements of Case

209. Paragraph 9 of the Particulars of Claim refers to the making of a s78 request. Paragraph 11 says that in response Barclays "supplied a copy of some of the terms and conditions. The Claimant denies that this is a true copy of the agreement, as it is not a document signed by both parties embodying the terms of the agreement." Paragraph 12 alleges that the bank continued to be in breach of its statutory obligations under the CCA and could not, while the default continued, enforce the agreement. This could only be a reference to the duty under s78 and to s78 (6). That pleading was wrong insofar as it suggested that unless a signed copy, or a copy showing the signature on the executed agreement was provided, the creditor would be in breach. Indeed the letter from Ascots dated 19 June 2009 had conceded as much.

210. Paragraph 13 alleges as follows:

> "The Claimant's case is that there is not in existence a signed copy of the agreement. Further, in the premises, as a consequence of the Defendant's failure to produce a copy of the executed agreement it should be inferred adversely to the Defendant that there is not a document in the prescribed form itself containing all the prescribed terms....Further or alternatively, the Claimant will rely upon the doctrine of *res ipsa loquitur*, in particular that the Defendant's failure to produce a signed copy of the executed agreement speaks for itself and such a document does not exist."

211. Paragraph 14 alleges that it was an IEA and was not in the prescribed form nor did it contain all the Prescribed Terms nor was it signed by the Claimant in the prescribed manner.

212. Paragraph 15 refers to s127 (3) and said that the Defendant had failed to disclose any document signed by the Claimant containing all the Prescribed Terms and therefore could not enforce the agreement.

213. The prayer claims the following relief: a declaration under s142 that there should be no enforcement of the agreement now or in the future, a declaration of s78 failure and no enforcement in the meantime, an injunction against a reference to any CRA, in the alternative to the first declaration an injunction against the Defendant requiring a 78 copy and a signed statement of account and finally a declaration that if the s78 copy is not now supplied or fails to comply with s 61 (1) (a) there should be no enforcement now or in the future of agreement.

214. The Defence pleads that the agreement was entered into on or around 21 November 2000. It "not admits" that the copy supplied was not a true copy under s78 and makes no admissions as to the breach of s78 alleged in paragraph 12. Paragraph 8 denies that the Claimant had a right to a copy of the agreement which complied with s 61 (1) but went on to make no admissions as to any non-compliance by the agreement with s 61 (1). All the relief claimed was denied. I am told that the reason for the non-admissions (as opposed to positive denials) was because the Defence was drafted at a time when it was not clear that the bank had retrieved all the relevant documents. It was not brought up to date to make a positive Defence because of what was said in paragraph 3 of the Reply which itself was not clarified until just before the hearings started (see below). I can see force in that point. A further reason why the bank has not produced all the documents it now has was in order, I was told, to preserve a *lis* in Yunis certainly in relation to Issue 1. I interpose to say that as far as the applications here are concerned I have to deal with them on the basis of the evidence which has been filed.

215. Paragraph 3 of the Reply says that for the avoidance of doubt "the Claimant will aver that these proceedings are not based on any alleged failure by the Defendant to comply with the statutory duty imposed under section 78 ..."

216. However, in paragraph 5 (b) of his WS served on Friday 27 November 2009, Mr Williams, the solicitor acting for Mr Yunis said that paragraph 3 of the Reply should have read "not based solely on any alleged failure..."

217. Paragraph 4 says that the Defendant had been asked to "provide evidence of compliance and has failed to do so...in the premises the Claimant asks the Court to draw an inference adversely against the Defendant that they were not complied with."

218. Paragraph 6 says that the Defendant had not yet provided a "signed copy of the executed agreement" and a declaration was sought that the agreement was unenforceable on the basis of the earlier pleaded adverse inference, and other relief pleaded in the Particulars of Clam was repeated.

219. It is clear that the only pleaded complaint about the s78 copy provided was that it was not signed or was not a copy of document containing a signature. That said, it would be unrealistic for me to ignore the fact that in the context of Issue 1 both sides addressed the *Yunis* documents also from the perspective of the omission of a name and address and the extent to which the application form itself required to be produced. I have dealt with those matters above. Mr Mitchell reminds me that in that context the bank does have the name and address and also the form of application which Mr Yunis would have signed. They are not presently before me, however, and Mr Mitchell contends that in fact it does not matter what is or is not before me as far as s78 copies are concerned. His case is that even if nothing was supplied this cannot of itself yield the inference of an IEA as claimed in paragraph 13 of the Particulars of Claim.

The Evidence

220. The bank adduced a WS dated 17 November 2009 from Lucy Clark, one of its in-house litigation counsel, in support of its applications. Paragraphs 24-29 describe the standard application process for obtaining a credit card with Barclays. This really follows the

explanation given to me by Mr Mitchell in the worked example referred to above. The application form would contain on the reverse either the prescribed information and terms, or that material plus all the other terms and conditions. The applicant would fill in and sign the form and send it off leaving behind the booklet to which it had originally been attached which contained all the terms and constituted the s62 copy. In the application form the applicant agreed to be bound by all the terms in the booklet. If, when received by the bank, the form was unsigned, the application would be rejected. If the application was accepted the bank would sign the form, too and send to the applicant a s63 copy. The process was a standardised one and deigned to ensure compliance with the Act.

221. Evidence was also adduced on behalf of Mr Yunis. First there was a WS from Mr Moses a solicitor with Donns LLP, not the firm acting for Mr Yunis. Most of it is irrelevant to these applications. Paragraph 7.12 asserts that Donns LLP has a number of clients who confirmed to them that they were never provided with any agreements by lenders to sign or they signed application forms but cannot remember their contents. That is of no value in connection with this application in relation to which there is no evidence from Mr Yunis himself about his credit card and application (save to the very limited extent referred to in paragraph 17 of Mr Williams' WS), nor any plea in relation thereto.

222. Paragraphs 14-16 asserts that the bank's applications here were "designed to frustrate the Court's objectives in determining the preliminary issues" and was premature and inappropriate. In fact, at the CMC on 8 October, I heard submissions from Mr Mitchell and Miss Smith on the whole question of burden of proof and inferential pleas in relation to alleged IEA's. I declined to have these matters treated as preliminary points of law in their own right but made the observation that if the relevant banks considered that the deficiencies in approaching the cases this way meant that they were unsustainable, there was nothing to prevent them from applying to strike out or seek summary dismissal, as with any Defendant who wished to say that there was no case against it. That such an application might be made following the CMC is expressly referred to in paragraph 4 of the Order made by me in the Mercantile Court at the CMC. And the Applications have been dealt with by me in this judgment, after consideration of all of the preliminary issues. Moreover, at no stage did Mrs Thompson seek an adjournment of the Applications.

223. As for Mr Williams' WS, paragraphs 6 – 9 similarly complain about the Applications as an "ambush" but for the reasons already given there is nothing in this.

224. Paragraph 17 says that the Claimant asserts that he does not believe that there is in existence a properly executed copy of the agreement because he does not have such an agreement himself. It is said that he wants a copy "so that he can see if a properly executed agreement was in fact entered into and/or whether there are any other possible causes of action." The terms of this illustrate the speculative nature of the exercise. The question under s61 is whether a properly executed agreement <u>was</u> made and signed at the time. The absence of a copy of a signed executed agreement (which the bank is not obliged to provide anyway) is no evidence that such an agreement was not made. What paragraph 17 does not reveal is what Mr Yunis himself says was the position as to what, if anything, he signed when applying for his card.

225. In paragraph 18, Mr Williams says that of the hundreds of cases in which he is involved, the Claimants are able to recall that they signed something although they have no idea what the document was and in a significant number of cases they do not recall signing anything and their evidence will be that they applied for the credit card [it is not here said how] and then just received the credit card in the post or the loan amount was simply deposited into their account. On any view I do not follow the latter in the credit card context, since it is not a loan for a fixed sum to be advanced at the outset. But none of this entirely unspecific material can assist on the applications before me because, again, there is nothing from Mr Yunis about his position. Paragraph 91 says that in due course evidence as to the bank's usual practice (which is present in the WS from Ms Clark) will be negated by evidence from the many Claimants who will say that they never signed an agreement. But this misses the point. What is needed at the outset is some positive plea from the Claimant in this case and, where there is an application to strike out or for a summary dismissal of the claim, evidence to support that plea.

226. Paragraph 23 refers to allegedly defective Barclays agreements in two other (unidentified) cases not even being dealt with by Mr Williams. That is of no assistance either.

227. There is then a WS from Ms Britton, a trainee solicitor with a different firm again, CCLS who is the Head of its Credit Card Department. She refers (though not by name) to the two cases (which seem to be the ones referred to by Mr Williams) where it is alleged that the agreements did not contain any of the Prescribed Terms. Here copies of the signed application form were provided by Barclays. What has been exhibited to Ms Britton's statement is the front, but not the rear of the form. For the record I am told that Barclays have worked out which these cases are and say that the Prescribed Terms are on the reverse (consistent with what Ms Clark says was standard practice) so there is nothing in this point. That evidence is not before me which is hardly surprising since I am not dealing with those cases but Mr Yunis's. Allegations made in other cases, to which there may well be a complete answer, are simply irrelevant.

Submissions

228. Mr Mitchell submits that the fact that no signed copy is produced under s78 cannot without more yield the inference that the signed application form does not still exist, or more importantly that a properly executed agreement was not signed at the time.

229. Mrs Thompson says that such an inference can and should be made. She referred me to paragraph 2.9.4 of the OFT Draft Guidance. What this says is that often consumers and their advisers assume that if a signed copy is not provided it necessarily means that the agreement cannot be enforced either under s78 or under s127 (3). But this overlooks the fact that there is no obligation to produce a copy of the signature and that "s127 (3) does not apply merely because a signed document is not available at the court hearing; the section requires that a document containing the Prescribed Terms "was" signed by the debtor...The creditor may be able to provide evidence that its practice was always to require a signature and that its agreements always complied with section 61 (1) (a) and the debtor ...may be unable to satisfy the court that he or she did not sign an agreement." I do not see how that passage helps Mrs Thompson on this application.

230. Mrs Thompson says that to contend, as Barclays undoubtedly have, that "you have no evidence" is inappropriate in the context of a strike-out or summary judgment application which should only be granted if, as a matter of law, there is no case. But that seems to me to misunderstand the nature of these applications. They have at their heart the point that there is no evidence or plea from Mr Yunis at all as to what he said he did or did not do, or sign or did not sign, in respect of the agreement in question and that it is insufficient, without more, to point to the absence of a signed, or any proper s78 copy as a foundation for a plea of an IEA. That is an entirely appropriate point to be considered on applications such as this. And as with *Adris* and essentially for the same reasons, I consider that it is well-founded.

231. Mrs Thompson went on to say that she had an alternative case which was to the effect that assuming Barclays had failed to produce a s78 copy, the Court had power to order them to do so by way of an injunction. And if they subsequently produce a copy of the signed application form, the issue of an IEA can be looked at then. And if they do not, then the Court should at least make a declaration at common-law, not under s142, that the agreement is permanently unenforceable and not merely unenforceable for the duration of a s78 breach as s78 (6) provides. I do not think that such an alternative argument assists Mrs Thompson. First I have to deal with the principal claim being made now, as to an IEA which is the focus of the applications. Second, the question as to the appropriateness of such an injunction is an open one: paragraph 16 of the judgment of HHJ Brown QC in *Rankine* (supra) suggests that it may be but that question did not arise directly for that decision there. Third, it ignores the fact that if a proper case of IEA is mounted, disclosure will take place and of course at that point, if not earlier when the bank makes its defence, it is going to have to disclose the documents relevant to that agreement, whether it had to disclose them at the earlier s78 stage or not. Finally, I do not see that a permanent declaration of the kind mentioned by Mrs Thompson would be appropriate when s78 (6) expressly says that the agreement will be enforceable for so long as the breach persists. If it does, the agreement remains unenforceable. If at some later stage it is cured it is difficult to see why the creditor should not then be entitled to enforce.

Relief

232. There is no claim that there is an unfair relationship here. As to the claims for relief based upon an IEA, as set out in paragraphs (1) and (5) of the Particulars of Claim, they should be struck out on the grounds that no reasonable grounds for the claim are made out and the claim has no real prospect of success. As with *Adris* I would also strike them out on the grounds that they are speculative and hence an abuse of process.

233. As to the s78 claim, insofar as the allegation of breach is based on the absence of a signed copy, that particular allegation should be struck out because there is no obligation to provide such a copy. Insofar as there remains an issue (albeit unpleaded) about the absence of a name and address, it would be wrong to strike out the claim in relation to s78 altogether. Whether there will in reality be anything left may depend on the production by Barclays of the name and address and the other information referred to in paragraph 113 above. The question of the appropriateness of any declaratory relief in the form of paragraph (2) (a) of the prayer also arises. These are matters on which I will hear submissions following the handing-down of this judgment. I will equally hear Counsel on paragraph 4 of the Prayer. I was not addressed on this by Counsel but as presently advised, I do not see how this can survive the decision of Flaux J in *McGuffick.*

SUMMARY OF FINDINGS

234. The following is a brief summary of the principal findings and conclusions set out above:

(1) A creditor can satisfy its duty under s78 by providing a reconstituted version of the executed agreement which may be from sources other than the actual signed agreement itself;

(2) The s78 copy must contain the name and address of the debtor as it was at the time of the execution of the agreement. But the creditor can provide the name and address from whatever source it has of those details. It does not have to take them from the executed agreement itself;

(3) The creditor need not, in complying with s78, provide a document which would comply (if signed) with the requirements of the Consumer Credit (Agreements) Regulations 1983 as to form, as at the date the agreement was made;

(4) If an agreement has been varied by the creditor under a unilateral power of variation, the creditor must still provide a copy of the original agreement, as well as the varied terms;

(5) If a creditor is in breach of section 78 this does not of itself give rise to an unfair relationship within the meaning of section 140A;

(6) The Court has jurisdiction to declare whether in a particular case, there has been a breach of s78. Whether it will be appropriate to grant such a declaration depends on the circumstances of that case;

(7) In assessing whether Prescribed Terms are "contained" in an executed agreement the principles set out at paragraph 173 above are relevant. On the assumed facts set out at paragraph 177 the Prescribed Terms were so contained;

(8) The claims that there was an unfair relationship and an IEA in *Adris* should be struck out or dismissed. The claim that there was an IEA in *Yunis* should be struck out or dismissed. The absence of any positive pleaded case or evidence as to the circumstances of the making of the agreement by the debtor concerned was fatal to the IEA claims. The absence of any positive plea or evidence as to particular facts relied upon in support of the unfair relationship claim other than failure to provide a s78 copy, was fatal to that claim.

235. Following the handing down of this judgment, I will hear Counsel on the form of the various orders that will need to be made, any further directions in relation to the cases with which I have dealt and all other consequential matters.