Case No: 0XY3859

IN THE CLERKENWELL AND SHOREDITCH COUNTY COURT

Date: 08/03/2012

Before :

DISTRICT JUDGE MANNERS

- -

Between :

	SANTANDER CARDS (UK) LTD	**Claimant**
	- and -	
	DIANA MAYHEW	**Defendant**

- -

- -

Karin Tampion (instructed by **Howard Cohen**) for the **Claimant**
Paul Brant (instructed by **Watsons**) for the **Defendant**

Hearing date: 8th March 2012

- -

JUDGMENT

1. This is a claim for the recovery of a debt accrued on a credit card.
2. The starting point here must be a reminder that this is a case where a major commercial enterprise is seeking judgment against a consumer. It is true that the underlying "merits" undoubtedly favour the Claimant but it is also true that it is and was incumbent on Santander to get its tackle in order.
3. In April 2000 the Defendant went into Harrods and picked up an application form for a Harrods store card. She filled in the form at home and sent it to GE Capital Bank on 5th April 2000. Her application was successful and a card was sent to her. The Defendant began to use the card.
4. The card was "upgraded" to a credit card in September 2003. The Defendant was "selected" for the upgrade and an unsolicited card was sent to her in the post. The Defendant voluntarily activated the card and thereafter used it to make some small purchases and to transfer the outstanding balances from several other cards.
5. In May 2009 GE Capital Bank became Santander Cards (UK) Limited, the Claimant.
6. The Defendant ran into financial difficulties and in July 2009 she failed to make the minimum payment due on the card. She informed the Claimant of her problems in February 2010 and it was agreed that she would make payments of £5.44 a month from March 2010.
7. On 12th October 2010 the Claimant served a default notice with a final demand

being sent on 11th November 2010. These proceedings were issued on 20th December 2010.

8. The Claimant brought this claim and it is for it to prove, on a balance of probabilities that it is entitled to judgment for the sum claimed.

9. Evidence for the Claimant was given in the form of the statement of John-Paul Murphy the solicitor with conduct of the case. A hearsay notice was served and although Mr. Murphy was present in court no oral evidence was adduced on behalf of the Claimant. The Defendant herself gave evidence.

10. Four issues fall for determination (i) whether the agreement entered into in April 2000 was valid (ii) whether the upgrade in 2003 was valid (iii) whether the default notice complied with the requirements of the Consumer Credit Act and (iv) whether the Defendant's request under section 78 of the Consumer Credit Act was complied with and, if it did not, whether that rendered the whole agreement unenforceable.

11. Was the April 2000 agreement valid? Section 61 of the Consumer Credit Act requires that a valid agreement must contain all the prescribed terms (credit limit, interest rate and repayment terms) and be signed by the debtor and the creditor. The Defendant's case was that she went into Harrods banking hall and picked up a pre-paid foldable application form which she took home, filled in and sent off. She said there were no terms and conditions other than those printed on one side of the form. She had kept a copy of the form for her records. She also said that when she received the store card there were no terms and conditions with it. It was the Claimant's case that terms and conditions were supplied, that procedures for providing terms and conditions were automated and that it would be unrealistic to expect that the Claimant could call anyone to give evidence as to the application of those procedures in this case. The Claimant was not able to provide a copy of the documents which it said would have accompanied the application form. The Defendant struck me as a methodical person who had kept a copy of the application form for her records and I have no doubt she would have kept, though possibly not read, any terms and conditions sent to her. I believed her evidence that she had not received any terms and conditions, either when she took the application form or when she received the card. I therefore find that the April 2000 agreement is unenforceable.

12. Was the 2003 upgrade valid? In September 2003 the Defendant's card was "upgraded" to a dual card meaning that it was now a storecard and a Mastercard. The new card was sent unsolicited to the Defendant who needed to sign and activate it before she used it. It was open to the Defendant to decline the new card but she chose to activate it and use it. The new card had an introductory rate of interest for transferred balances and using it would gather loyalty points. The Defendant took advantage of both these features. The Defendant says that the agreement changed from a restricted use debtor-creditor-supplier agreement to being an unrestricted use debtor-creditor agreement and a debtor-creditor-supplier agreement which amounts to a modification of the agreement such that compliance with the requirements set out in regulation 7 of the Consumer Credit (Agreements) Regulations 1983. Compliance with the regulation requires a copy of the fresh agreement containing the relevant prescribed information to be served on the debtor. The Claimant did not allege that any such document was sent to the debtor. It was the Claimant's case that the new card was supplied under a credit token agreement which remained in

force and that there was no modification attracting regulation 7. In my judgment the Claimant's analysis is wrong and there was a modification of the agreement requiring compliance with regulation7. The Claimant did not argue that it had complied with the regulation.

13. Was the default notice valid? Under section 87 of the Consumer Credit Act a default notice must be served before any termination or demand for earlier payment. Section 88 of the Act provides that a default notice must be in the prescribed form. The Claimant served a default notice by post of 12th October 2012. The Defendant says that the notice was defective because it gave the wrong figure for the amount due and no OFT fact sheet was included. The Claimant explains that the difference is the amount by which the Defendant's credit limit had been exceeded and that error was detrimental to the Claimant rather than to the Defendant. It was the Claimant's case that the OFT fact sheet would have been included with the default notice and in the event that it was not there was a clear statement at the end of the notice that the Defendant should contact the Claimant so that the sheet could be sent. The Defendant denied that the OFT fact sheet was sent with the default notice, stated that she did not request the sheet and candidly admitted that she might not have read the whole letter. No evidence was adduced before me actively saying the fact sheet had been enclosed. The Claimant invited me to conclude that that the defects in the default notice were de minimis but I do not agree. The whole point of a default notice is that the debtor should know exactly what is owed and it is irrelevant that any defect would be to the detriment of the creditor. I accept the evidence of the Defendant that no OFT fact sheet was enclosed and words inviting her to send for the missing sheet are not sufficient to remedy the defect of its absence. It is unfortunately the case that many debtors in the position of the Defendant in this case do not read to the end of letters thus the importance of documents being enclosed.

14. The Defendant's section 78 request In order to comply with section 78 the creditor must provide a copy, reconstituted if necessary, of the terms and conditions originally agreed between the parties and, if different, those in force at the time of the request within 12 working days, the agreement is unenforceable until the request has been complied with. On 17th November 2010 the Defendant made a section 78 request to Lewis Debt Recovery, a chasing letter was sent on 6th January 2011 and a section 78 request was made to the Claimant on 15th January. The request was replied to on 2nd February. The Defendant sent an entirely disingenuous reply on 4th February alleging that she had received information for the wrong account. She claimed that she needed information for account 5413613010473940 not the information she had been sent which related to account 6356505552255858. Her evidence was that she had kept the original agreement and a moment's checking would have revealed to her that the 6356 number related to her original account. In my judgment the Claimant complied with the section 78 request within the stipulated time and is not prevented from enforcing this debt for non-compliance with a section 78 request.

15. It follows from what I have said above that the claim is dismissed. The claimant must pay the Defendant's costs to be subject to detailed assessment if not agreed

Henrietta Manners

20th March 2012