

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
HIS HONOUR JUDGE PURLE Q.C.
[2009] EWHC 103 (Ch)

Royal Courts of Justice Strand, London, WC2A 2LL

5 November 2009

B e f o r e :

LORD JUSTICE WALLER, VICE-PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LORD JUSTICE DYSON and
LORD JUSTICE LLOYD

Between:

SOUTHERN PACIFIC MORTGAGE LTD
Claimant Respondent
- and -

JAYNE ELIZABETH HEATH
Defendant Appellant

Bradley Say (instructed by Burton & Co LLP) for the Appellant
Malcolm Waters Q.C. and Jonathan Hough (instructed by Glenisters) for the Respondent
Hearing date: 13 October 2009

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Lord Justice Lloyd:

Introduction

1. This appeal raises for decision a question as to the correct interpretation of section 18 of the Consumer Credit Act 1974 which has serious consequences for transactions of a commonplace nature, and which has been the subject of strongly divergent academic comment.

2. The Act seeks to protect consumers by imposing a number of distinct requirements as regards the documentation of transactions to which it applies. Some of these prescribe the content of the document to be provided to the consumer, for example that the amount of the credit (a term defined by the Act) must be specified. Others require the consumer to have the opportunity to think about the terms of the agreement, or proposed agreement, and to change his mind. What requirements apply to any given transaction or proposed transaction depends on the nature of the transaction. For that purpose the Act has a number of definitions of different types of transaction, some of which are or may be cumulative while others are mutually exclusive.

3. The particular problem with which this case is concerned is a transaction which falls within more than one "category of agreement", at least one of those categories being one mentioned in the Act. Such a transaction would give rise to several concerns, as regards consumer protection. One is to ensure that all appropriate formalities are observed, having regard to the nature of the transaction. Another is to avoid the possibility of evasion of the statutory regime, by the aggregation or combination into one transaction of what are really two or more separate transactions, if, taken separately, they would be subject to the Act's controls whereas as one larger transaction they would escape it, for example because the amount of the credit exceeds the monetary limits relevant under the Act. One would also expect the legislation to be framed in a way

which makes it clear, both for consumers and for providers of credit, what is the regulatory regime and when and how it applies to any given transaction. Otherwise it would be unfair and inappropriate as regards one or both parties.

The facts

4. The appellant owns a house in Worksop, Nottinghamshire. She had the benefit of a mortgage advance from Halifax, on which some £19,000 was outstanding. She wished to obtain further credit on the security of the house. In January 2002 she obtained an offer from a different lender of a loan of almost £29,000 gross (just over £28,000 net after payment of various fees and costs) to be secured on a first legal mortgage of the house. In order to ensure that the new lender obtained a first legal mortgage, the previous mortgage to Halifax would have to be redeemed, and it was a term of the offer that this should happen. On 7 March 2002 the transaction was completed, the Halifax mortgage was redeemed, and about £9,000 was released to the appellant. Shortly thereafter the benefit of the mortgage was assigned by the lender to the present respondent. Nothing turns on that.

5. At the time of the transaction, an agreement providing for credit of more than £25,000 was not regulated by the Act. On that footing, the formal requirements of the Act as regards the content of the documents and as regards procedures for execution were not followed. On behalf of the appellant it is now argued that the agreement has to be treated for the purposes of the Act as if it comprised two separate agreements, one relating to the amount which was used to repay the previous mortgage, and the other for the rest. If that were correct, the Act would have applied to each agreement, and, because it had not been complied with, no part of the agreement would be enforceable.

6. The appellant fell into arrears under the new mortgage, and the respondent took proceedings for possession. It obtained a first possession order suspended on terms, in 2004, and another, suspended on different terms, in 2006. In 2007, when the appellant faced a warrant for possession, she obtained advice which for the first time suggested the defence which is now raised to the possession claim. The warrant was suspended pending her appeal.

7. The appeal eventually came on before His Honour Judge Purle Q.C. in Birmingham, sitting as a High Court Judge. He gave judgment on 29 January 2009, extending time for the appeal but dismissing it. I granted permission for this second appeal. The point is important and has not previously arisen for decision in the Court of Appeal.

8. I say at once that I would dismiss the appeal, largely for the same reasons as were expressed by Judge Purle in his clear and admirable judgment.

The legislation

9. A consumer credit agreement was defined (at the relevant time) by section 8(2) as a personal credit agreement by which the creditor provides the debtor with credit not exceeding £25,000. It is a personal credit agreement if the debtor is an individual: section 8(1). A consumer credit agreement is a regulated agreement unless it is an exempt agreement as provided for in or under section 16.

10. Sections 10 to 13 set out categories of agreement under the Act. First, in section 10, we meet running-account credit and fixed-sum credit. A facility under a personal credit agreement must be for one or for the other. Section 11 is concerned with restricted-use and unrestricted-use credit. Any particular credit provided under a credit agreement must be one or the other and cannot be both. Section 12 defines debtor-creditor-supplier agreements and section 13 defines debtor-creditor agreements, in a mutually exclusive way.

11. Section 18 is the provision with which this appeal is principally concerned. The first four subsections are as follows:

"(1) This section applies to an agreement (a 'multiple agreement') if its terms are such as—

(a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or

(b) to place it, or a part of it, within two or more categories of agreement so mentioned.

(2) Where a part of an agreement falls within subsection (1), that part shall be treated for the purposes of this Act as a separate agreement.

(3) Where an agreement falls within subsection (1)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly.

(4) Where under subsection (2) a part of a multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceedings in any court relating to the multiple agreement be apportioned by the court as may be requisite."

12. Because the agreement between the parties in this case was secured by a mortgage of land, the procedural requirements of the Act do not allow the borrower a specified period after execution of the agreement for second thoughts, but rather require that an advance copy of the unexecuted agreement be sent to the prospective borrower, containing a notice indicating the borrower's right to withdraw from the prospective agreement: section 58. By virtue of section 61(2), this must be sent at least 7 days before the execution copy is sent to the borrower, and the lender must not contact the borrower either during that period or for 7 days after the execution copy has been sent (unless within those 7 days the agreement is returned executed by the borrower) except in response to a specific request. The substantive provisions of the advance copy must match the execution copy precisely, so that, by the time when the advance copy is prepared, it has to be known exactly what the terms of the eventual agreement will be.

13. Under section 61 the agreement is not properly executed unless a document in the prescribed form and containing all the prescribed terms and conforming with the regulations is signed by or for both parties, and section 58 has been complied with as described above. An improperly executed agreement is enforceable against the debtor only on an order of the court. Unless there is a document which contains all the prescribed terms of the agreement signed by the debtor, the court could not make an order for the enforcement of the agreement: section 127(3). This provision has been repealed but not so as to affect its application to previous transactions.

14. Under the regulations, if the agreement between the present parties was a regulated agreement, the document should have set out the amount of the credit to be provided under it, and the rate of interest on the credit.

15. The Act adopted a novel technique of setting out examples with notes, "for illustrating the use of terminology" used in the Act: section 188, but in the event of inconsistency between an example and some other provision in the Act, the latter prevails: section 188(3). The examples are in Schedule 2. Examples 16 and 18 are said to be of particular relevance; I have set those out in an Appendix to this judgment.

The parties' submissions

16. The appellant's argument is, in summary, as follows. As regards the sum which was applied in redemption of the Halifax mortgage, the present agreement was for restricted-use credit, because it was to refinance existing indebtedness of the appellant: see section 11(1)(c), while as for the balance of the credit it was for unrestricted-use credit under section 11(2). Therefore the one transaction contained within it two different types, or categories, of agreement, in terms of the definitions in the Act. Because one part of the agreement fell within one category and the rest within another, section 18(1)(a) applied to the respective parts. Each part, therefore, has to be

treated as a separate agreement under section 18(2). If the two parts of this agreement are treated in that way, then one is for restricted-use credit of some £19,000 and the other is for unrestricted-use credit of some £9,000, and both are regulated agreements, but the requirements of the Act have not been complied with as regards either agreement, and neither of them, nor the whole, is accordingly enforceable.

17. For the appellant, Mr Say submitted that, if an agreement falls into disparate categories (such as restricted-use and unrestricted-use, or running-account and fixed-sum), then section 18(1)(a) applies. Section 18(1)(b) applies if, and only if, all the categories which are relevant are congruent and compatible, such as unrestricted-use, running-account, and debtor-creditor. The point of section 18(1)(b) is twofold, as can be seen from section 18(2) and (3). If part of the agreement falls within (1)(b) (as opposed to (1)(a), presumably), then that part is to be treated as a separate agreement. Whether it is part or the whole that falls within (1)(b), then section 18(3) provides that the Act is to apply to the agreement on the basis that it falls within each of the relevant categories.

18. Since every regulated agreement will undoubtedly fall within several compatible categories, on Mr Say's reading section 18(1)(b) would apply to every regulated agreement. Even if the agreement does not comprise separate parts for the purposes of section 18(1), there would be several categories, and the effect of section 18(3) is the somewhat obvious one that all relevant requirements of the Act have to be complied with, whatever the categories may be.

19. Mr Waters Q.C. for the respondent submitted that this would leave section 18(1)(b) and (3) with no meaningful purpose or function. On his reading, the purpose of section 18(1) is to deal with disparate categories, not with compatible categories, there being no need to make any special provision for categories of agreement which are compatible. He drew attention to the opening words: "This section applies to an agreement ... if its terms are such as to place it ...". He argued that this does at least two things: it shows that attention has to be given to the effect of the terms of the agreement, and it also indicates that only in some cases will the section apply, because of the word "if". He submitted that, on Mr Say's reading, all regulated agreements, without exception, would be multiple agreements, whereas the opening of section 18(1) leads the reader to suppose that multiple agreements will be special cases, whether or not frequent. The language of the Act would have been quite different, he suggested, if every regulated agreement was to fall within section 18(1). Moreover, any agreement which falls within section 18(1)(a), and therefore falls to be treated as two or more separate agreements for the purpose of the Act, would also fall within section 18(1)(b) because each separate part would itself fall into two or more compatible categories.

20. In contrast to Mr Say's reading of section 18(1), Mr Waters submitted that both (a) and (b) are concerned with disparate categories, and the difference between them depends on whether the agreement, by its terms, does fall to be treated as being in separate parts or not. If it does, then it is right to treat the different parts separately, and to apply the Act separately to each. If not, then the important point is that, if the Act does apply, all its relevant provisions should apply cumulatively. There should not be scope for an argument that the agreement is, for example, predominantly in one category and therefore only the requirements relevant to that category need to be observed.

21. One of the functions of section 18(1)(a), on that basis, is one of anti-avoidance, preventing the Act being rendered inapplicable by combining into one agreement distinct elements which, taken separately, would be or include one or more regulated agreements, but taken together exceed the relevant monetary limit, and so escape the Act altogether. That is consistent with the point that the section applies to "an agreement", rather than to "a regulated agreement"; it does not presuppose that the agreement would, but for the section, fall within the Act.

22. The other function of the section is to ensure that, if more than one set of requirements is relevant under the Act, both or all are complied with. In this context the purpose of the respective provisions in paragraphs (a) and (b) of sub-section 18(1) is to identify the agreement in relation to which, for the purposes of the Act, the requirements are to be observed. Financial amounts may be

relevant to that, so that it is necessary to know the details of the agreement as regards which a particular set of requirements must be complied with. The credit provided under each notionally separate agreement would be different, and would presumably have to be stated separately.

23. On his reading of the section, Mr Waters submitted that there is nothing in the terms of the present agreement which is such as to place one part of the agreement in one category and another part in another category. On the basis that the agreement provides both restricted-use and unrestricted-use credit, he argued that neither this fact, nor any other feature of the agreement, requires or permits it to be dissected into parts. It was an agreement for the provision of a single advance by way of fixed sum credit, and the fact that part of that credit was to be used in a specific way, and the rest was not, does not enable or call for the agreement to be treated as being in two separate parts.

24. A separate point was raised in a Respondent's Notice, namely that no part of the credit was to be treated as restricted-use credit. In view of my conclusion on the appeal it is not necessary to decide that point, and I will assume in the appellant's favour that part of the credit was restricted-use credit.

25. As presented by Mr Say in his submissions, the crux of the debate is between two different approaches to the question whether section 18(1)(a) applies: should one look first at the terms of the agreement to decide whether it falls into parts, or rather (as Mr Say argued) is it first necessary to consider whether the agreement falls into disparate categories, in which case he said that the paragraph must apply? While that is an important question, another on which the parties diverge critically is whether section 18(1)(b) is concerned with disparate categories or only with compatible categories: is it an antithesis to 18(1)(a) in that it is not concerned with disparate categories, or is it a complement in that it too deals with disparate categories, but in relation to agreements which are not to be separated out into parts?

The decided cases

26. The application of section 18 has been touched on, but not decided on the point now at issue, in a number of cases decided at appellate levels. *Dimond v Lovell* [2002] 1 AC 384 concerned an agreement under which an individual whose motor car had been damaged in an accident hired a car from a company on terms that the hire charges were not immediately payable by the hirer and were to be recovered out of any damages payable by the other driver's insurance company. It was said that this involved the hire company providing credit to the hirer, so that the agreement was regulated under the Act. The Court of Appeal and the House of Lords accepted this argument. Lord Hoffmann rejected a submission that the agreement was a multiple agreement, and that the hire element of it was separate and unaffected by the Act. At page 396 he said this:

"The difficulty I have with this argument is that it seems to sever the provisions that create the debt (hiring the car) from the provisions that allow credit for payment of the debt. Whatever a multiple agreement may be, one cannot divide up a contract in that way. The creation of the debt and the terms on which it is payable must form parts of the same agreement."

27. Similar arguments were rejected on the same basis in *Burdis v Livsey* [2002] EWCA Civ 510.

28. Previously, in *National Westminster Bank v Story*, [1999] CCLR 70, the Court of Appeal had occasion to consider whether section 18 applied to a case where the bank had agreed with two individual customers to lend them £35,000 on three separate facilities, one being an overdraft of £15,000 for one borrower and the others by way of two loan facilities, of £5,000 and £15,000, to the two borrowers jointly. At the relevant time £15,000 was the financial limit for the credit under a regulated agreement. The borrowers resisted enforcement on the basis first that there were three separate agreements and secondly that if it was a single agreement it was nevertheless a multiple agreement under which each facility was to be treated as provided under a separate agreement, the £5,000 loan facility being provided as restricted-use credit because it was to refinance existing indebtedness of the borrowers to the bank under a previous loan.

29. The court held that it was a single agreement, and rejected the contention that any part of it provided restricted-use credit. Auld LJ, with whose judgment Lord Woolf MR and Robert Walker LJ agreed, observed at page 77 that:

"The main purpose of section 18 is to prevent frustration of the Act's protection to borrowers by the artificial combination of two or more agreements in one so as to take the total credit negotiated above the limit qualifying for protection."

30. Because he held that, even if the agreement had been one which fell into parts, all of them were within the same category under the Act, the controversial issues under section 18 did not arise. However, he made these comments about the section at page 78:

"Whatever the uncertainties as to the meanings of 'part' and 'category' of agreement under section 18, they do not require resolution in this case. My inclination, without formally deciding the matter, is that the word 'part' in this context includes, but is not restricted to, a facility that is different as to some of its terms from another facility granted under the same agreement or one that can stand on its own as a separate contract or bargain. However, I believe that it would accord with the ordinary and natural use of the word for it to have a broader application so as to include, as here, a separate facility provided with others under an agreement where, even if the facility as a contractual entitlement does not stand on its own, the debtor's use, or non-use, of it does not affect the contractual nature of the agreement as a whole, in particular, his entitlement to use those other facilities."

31. He also expressed an inclination towards the view that "categories" of agreement under the Act means categories mentioned in Part II of the Act, but since this meant that restricted-use and unrestricted-use credit were separate categories, and this was the view most favourable to the borrowers, it was unnecessary for him to decide that point. Nor does that point arise in the present case.

32. In *London North Securities Ltd v Meadows* [2005] EWCA Civ 956, decided by Lord Phillips of Worth Matravers MR, Waller LJ and myself, it was, again, unnecessary to decide any point arising under section 18.

The academic debate

33. There is disagreement among commentators on the Act as to the correct approach to the provisions of section 18. One of the commentators is Mr Francis Bennion, the draftsman of the Act. We were shown his article "Multiple Agreements under the Consumer Credit Act 1974" [1999] CICC 1. We have also seen the passages from Goode, *Consumer Credit Law and Practice*, and Guest and Lloyd, *Encyclopaedia of Consumer Credit Law*, in which the points are discussed.

34. Professor Goode uses labels which are not found in the Act: multipart agreement for an agreement in parts, each of which is in a different and disparate category; unitary agreement for one which falls into two or more categories but does not fall into separate parts; mixed agreement for one, part of which is multipart and another part of which is unitary. Although these are not statutory they are convenient for reference purposes. In his work it is argued that section 18(1)(b) shows that the mere fact that an agreement falls within two or more statutory categories does not of itself make it a multipart agreement within section 18(1)(a). The theory advanced is that a multipart agreement is one in which two or more essentially distinct bargains are rolled up into one agreement. By contrast, an agreement providing for a single facility covering different and disparate categories of credit would be a unitary agreement, and therefore within section 18(1)(b). It is suggested that, on this basis, examples 16 and 18 in Schedule 2 to the Act are wrong.

35. Guest and Lloyd, in their notes to section 18, support the view that "two or more categories" in section 18(1)(b) must mean disparate categories, since otherwise every agreement would be multiple. They also support the view that the first question to be asked concerns the terms of the agreement, and whether they treat different elements in the transaction differently, with different terms of repayment, different security, different interest rates or the like. If they do, the agreement

is likely to be a multipart agreement. Even if they do not, but if there is a substantial degree of disparity between the two elements, having regard to their subject-matter, their legal classification and the operation of the Act, then they are likely to constitute a multipart agreement. They also argue that, in a case of the present kind, where a loan is advanced part of which has to be used to repay existing indebtedness secured on the property and the rest is available for use freely, "the agreement is to be treated as an agreement in each of the categories in question and the Act applies to it accordingly, but the two elements do not require to be treated for the purpose of the Act as separate agreements under section 18(2)", unless special factors exist such as different repayment terms or some other difference of treatment between the two elements in the credit.

36. A different view is expressed by Mr Bennion in his article. He argues that "category of agreement" includes every type of agreement mentioned in the Act. He takes issue with the reading that "categories" in section 18(1)(b) must mean disparate categories, since otherwise every agreement would be a multiple agreement. He sees no problem with his reading, that categories means any kind of category, and no disadvantage in terms of consequences. He suggests that the section has a practical effect only where it needs to and can otherwise be ignored. He expresses the view that "what matters with a multi-agreement document is that it is possible to collect from the document as a whole what amount to the respective terms of two or more separate agreements" to which the Act then has to be applied to see whether each constitutes an agreement falling within a category under the Act.

37. He disagrees with Professor Goode's view that an agreement cannot fall within both of section 18(1)(a) and (b) and discounts the criticism that, on his view, section 18(1)(b) applies to every agreement within the scope of the Act, and achieves nothing in relation to most of them. He sets out a worked example which has some similarities to the present case. He argues that, because it provides both restricted-use and unrestricted-use credit, it is within section 18(1)(a) and the several parts must be treated as separate agreements for the purposes of the Act. It is not clear from his discussion how he is able to collect from the hypothetical document governing the postulated agreement as a whole "what amount to the respective terms of two or more separate agreements".

Discussion

38. Mr Say and Mr Waters sought assistance from the respective commentators, but the debate which we have to resolve is that which arises from the facts of the present case, rather than any wider controversy as to the scope and effect of the section. For example, it is unnecessary to form a view as to the width of the word "category". Having noted the general lines of the academic disagreements, I propose to focus on the points advanced by Counsel and on their application to the present case.

39. Part of the debate before us centred on the practical difficulties that would arise in a case such as this if the two parts of the credit were treated as provided under separate agreements for the purposes of the Act. In order to comply with sections 58 and 61, the advance copy would have to state the amount of the credit which was restricted-use (i.e. to be applied in discharge of the existing mortgage) and separately the amount which was unrestricted-use, freely available to the borrower. In the ordinary way, the former would be the amount required by the prior mortgagee in redemption of its mortgage. This would depend on the interest accrued to the date of redemption, and might also be affected by other matters such as the incurring of expenses by the lender in the meantime which it would add to the security. Neither the prospective new lender nor the borrower would be able to specify or anticipate what that amount would be. It would therefore be necessary to get a figure from the existing lender. Of course, lenders are accustomed to being asked for redemption figures in respect of a future date: that is commonplace on the completion of a sale of mortgaged property. However, the existing lender would have to commit itself to accepting a stated amount, on a future date far enough ahead to allow for the completion of the procedures under the Act, and the new transaction would have to be completed on that future date. It is by no means clear that such agreement would readily be obtained, and whether the transaction would in fact be completed on the specified date might be subject to chances and uncertainties against which it would be difficult to provide.

40. For those reasons, Mr Say's interpretation of the Act might be counter-productive for would-be borrowers, since it might make it unnecessarily difficult for a new lender to be sure that its loan documentation would comply with the Act, and so it might be reluctant to make the loan. However, Mr Say's submission was that the Act is clear and that arguments from practical difficulty cannot prevail unless there is an ambiguity which, he argues, cannot be found in the Act. He also contended that any difficulties would not be insuperable, and he showed us *McGinn v Grangewood Securities* [2002] EWCA Civ 522, where an agreement was held unenforceable because of a failure which arose from a similar practical problem.

41. It seems to me that the argument for the respondent is correct. The starting point is that it is from the terms of the agreement that one must find out whether the agreement is one under which there are two or more parts, in different categories, or whether it, or part of it, falls into two or more categories. It is not correct to start from the proposition that more than one disparate category is concerned, and to conclude from this that the agreement must fall into two or more parts. That the starting point is the terms of the agreement is consistent with Mr Bennion's view, as noted in the passage which I have quoted at paragraph [36] above. In addition I agree with Mr Waters that it is significant that it is the agreement which is to be placed in one or more categories, not the credit provided under the agreement.

42. I also agree with Mr Waters, and with Judge Purle in his judgment under appeal, that categories in section 18(1)(b) means disparate categories, just as it does in section 18(1)(a). I come to that conclusion both because I would expect the same word, used in two different parts of one subsection, to mean the same thing in each, and also because the alternative reading, that it means any categories in section 18(1)(b), would mean that there is no point to this paragraph. It seems to me to be logical to read the sub-section as covering two possibilities, both being cases in which there are elements of an agreement which fall within two or more disparate categories, at least one of which is a category under the Act. Paragraph (a) deals with the case where the respective elements within the agreement can be seen as constituting separate parts of the agreement; paragraph (b) deals with the opposite case where they cannot be seen in that way. Moreover, this reading of section 18(1)(b) is supported also by the opening words "if the terms of the agreement", because on the other reading the paragraph would apply to every agreement, not, as the opening words suggest, only to some.

43. I accept the submission that the reading for which Mr Say contends would present would-be lenders with serious practical difficulties. They may not be insuperable, but it seems to me that this practical consequence is one which it is legitimate to bear in mind when interpreting the Act. It follows from what I have already said that I do not accept Mr Say's argument that the Act is so clear that this point is not available. A case such as *McGinn* does create real difficulties for lenders, but the court in that case made it clear that the problem identified there arose in somewhat exceptional circumstances, and that it would not be too difficult for the lender to avoid it.

44. I agree that the section is in part aimed against attempts to avoid the application of the Act. Auld LJ said the same in *Story*. The reading of the section which I prefer does not defeat that object.

The statutory examples

45. Mr Say submitted that Judge Purle had been wrong to hold that examples 16 and 18 in Schedule 2 to the Act were wrong. Mr Waters said that it was not essential to his argument that the examples were wrong, but that, if they were inconsistent with his submissions about the primary provisions of the Act, then the inconsistent aspects of the examples should be rejected as wrong.

46. Example 16 in Schedule 2 to the Act is of an agreement relating to a credit card which can be used to obtain cash from the card issuer (unrestricted-use credit) or to pay for goods or services or cash from suppliers or banks who agree to honour the card (restricted-use credit as regards the goods or services, and unrestricted-use credit as regards cash). On any view of section 18 it is a multiple agreement because it provides these two forms of credit and therefore falls into two

disparate categories under the Act. The analysis set out in the Schedule states that the whole agreement falls within several categories, and is therefore to be treated as an agreement in each category under section 18(3), which presupposes that section 18(1)(b) applies. That seems to me to be correct. What is puzzling is that it goes on to state, in the last sentence, that the restricted-use credit and unrestricted-use credit elements of the agreement are, by section 18(2), to be treated as separate agreements, which assumes that section 18(1)(a) applies. I would respectfully disagree with that proposition, as Professor Goode does. It seems to me that it falls within section 18(1)(b) and section 18(3), not within section 18(1)(a) and section 18(2). In any event, even if section 18(2) were to apply, the credit under the agreement could not be divided between the separate parts, as the whole amount of the credit is available in relation to each aspect of the agreement. On that footing, it makes no difference whether the agreement is taken as falling within section 18(1)(a) or (b). I note also that, insofar as the analysis states that the whole agreement falls into several categories and that section 18(3) therefore applies, it does not support Mr Say's submission as to section 18(1)(b) which is that this applies only if all relevant categories are consistent and compatible.

47. Example 18 is of an agreement for a current account with (implicitly from past conduct) an overdraft facility of an unspecified amount. The statutory analysis states that it is a regulated consumer credit agreement for unrestricted-use running account credit. It also states that, because another part of it, concerned with the operation of the account when in credit, is outside the Act, it is a multiple agreement and that section 18(1)(a) applies to the two separate parts of the agreement. Again, Professor Goode states that it is not a multipart agreement but a unitary agreement falling into two categories, of which only one is within the Act. Accordingly, he says, section 18(1)(a) does not apply and it is not a multiple agreement at all. This is another case in which, even if section 18(1)(a) does apply, it does not cause the credit provided to be dissected and attributed in separate parts to different agreements. Nor does the correctness of the analysis make any difference to the way the example would be treated under the Act in practice.

48. Mr Bennion does not accept as valid the criticisms of the analysis in relation to the statutory examples. He suggests that, instead of treating them as erroneous, Professor Goode should have seen that they show his reading of the Act to be wrong, insofar as it treats section 18(1)(a) and (b) as mutually exclusive. Mr Waters submitted that the examples are not necessarily wrong, for example because in the case of the credit card different terms (e.g. as to interest) may apply to the two different aspects of the facility, and each can be used freely without the other being used at all. He also pointed out that, in the overdraft example, different terms would undoubtedly apply to the account when in credit and to the overdraft facility, and the two aspects of the agreement are in their nature distinct and mutually exclusive in the sense that only one can be used at any one time. Mr Say submitted that it was not legitimate to add facts to the statutory examples, and I see some force in that as regards example 16. In the case of example 18 it seems to me that it must go without saying that different terms apply to a credit balance and to an overdraft.

49. The significance of the examples in relation to the present debate is not for what they show directly as regards a case such as the present. They are relevant because the analysis assumes that an agreement can fall within both paragraphs (a) and (b) of section 18(1). However, even if that assumption were wrong, the application of the Act to the examples would be no different from that stated.

50. Having reflected on the point, with the benefit of the academic writings as well as Counsel's submissions, I have come to the conclusion that the analysis of Example 16 in the Act is wrong in one respect, because the better reading of the substantive provisions of the Act is that paragraphs (a) and (b) of section 18(1) are mutually exclusive. I therefore hold to the view which I have stated above, notwithstanding its being inconsistent with the basis of this aspect of the statutory analysis, and with Mr Bennion's expressed opinion. I disagree with the last sentence of the analysis in relation to example 16. I do not disagree with the treatment of the example for the purposes of the Act which appears from the statutory text, but only with the analysis of how that conclusion is reached. As regards that aspect of the analysis, it seems to me that it is wrong in the light of the correct interpretation of the primary provisions in section 18. It must give way, as section 188(3)

provides, in the case of inconsistency with other provisions in the Act: see paragraph [15] above.

51. As regards example 18, it seems to me that the statutory analysis may be correct. Professor Goode argues that it is not a multipart agreement but a unitary agreement. However, it seems to me that the agreement may very well fall into parts, the current account aspect being distinct from the overdraft facility. Each of them is available to be used separately, and they will be governed by different terms. On that basis I agree that section 18(1)(a) would apply. If Professor Goode were right to treat the agreement as unitary, rather than multipart, I would agree with him that section 18(1)(a) does not apply. Section 18(1)(b) alone would be relevant and it would follow that the agreement was not a multiple agreement at all, because section 18(1)(b) only applies if both categories are within the Act.

Conclusion

52. Turning back to the facts of the present case, the appellant had from the respondent the offer of a single facility, which could only be drawn down as a whole. It was to be secured by a first mortgage on the property, which was at the time subject to the existing mortgage in favour of Halifax. It was a term of the loan agreement that any existing mortgage was to be paid off out of the loan. Assuming, in the appellant's favour, that this means that the part of the credit which would be used to redeem the existing mortgage was restricted-use credit, nevertheless I find nothing in the terms of the agreement which permit a conclusion that part of the agreement is to be placed in one category (restricted-use) and part in another (unrestricted-use). It is a single agreement which cannot be dissected into separate parts. To go back to Mr Bennion's words quoted at paragraph [36] above, it is not possible to collect from the document as a whole what amount to the respective terms of two or more separate agreements. Nor can it be brought within the words of Auld LJ quoted at paragraph [30] above. The whole credit facility had to be drawn together or not at all, as Judge Purle noted at paragraph 38 of his judgment.

53. I consider that the agreement was one whose terms placed the whole of the agreement in two relevant and disparate categories under the Act, so that section 18(1)(b) applied. It was not one whose terms placed part of the agreement in one category and another part in another. The agreement could not be taken apart in that way. It was a unitary agreement, in Professor Goode's language. Accordingly it is not to be treated as two separate agreements, and because the amount of the credit provided exceeded £25,000 it was not a regulated agreement.

54. Those are my reasons for concluding that Judge Purle was correct in his decision and that his order should not be set aside or varied. I would dismiss this appeal.

Lord Justice Dyson

55. I agree.

Lord Justice Waller

56. I also agree.

Appendix

Examples 16 and 18 from Schedule 2 to the 1974 Act

Example 16

Facts. Under an unsecured agreement, A (Credit), an associate of the A Bank, issues to B (an individual) a credit-card for use in obtaining cash on credit from A (Credit), to be paid by branches of the A Bank (acting as agent of A (Credit)), or goods or cash from suppliers or banks who have agreed to honour credit-cards issued by A (Credit). The credit limit is £30.

Analysis. This is a credit-token agreement falling within section 14(1)(a) and (b). It is a regulated consumer credit agreement for running-account credit. Since the credit limit does not exceed £30, the agreement is a small agreement. So far as the agreement relates to goods it is a debtor-creditor-supplier agreement within section 12(b), since it provides restricted-use credit

under section 11(1)(b). So far as it relates to cash it is a debtor-creditor agreement within section 13(c) and the credit it provides is unrestricted-use credit. This is therefore a multiple agreement. In that the whole agreement falls within several of the categories of agreement mentioned in this Act, it is, by section 18(3), to be treated as an agreement in each of those categories. So far as it is a debtor-creditor-supplier agreement providing restricted-use credit it is, by section 18(2), to be treated as a separate agreement; and similarly so far as it is a debtor-creditor agreement providing unrestricted-used credit. (See also Example 22.)

Example 18

Facts. F (an individual) has had a current account with the G Bank for many years. Although usually in credit, the account has been allowed by the Bank to become overdrawn from time to time. The maximum such overdraft has been is about £1,000. No explicit agreement has ever been made about overdraft facilities. Now, with a credit balance of £500, F draws a cheque for £1,300.

Analysis. It might well be held that the agreement with F (express or implied) under which the Bank operate his account includes an implied term giving him the right to overdraft facilities up to say £1,000. If so, the agreement is a regulated consumer credit agreement for unrestricted-use, running-account credit. It is a debtor-creditor agreement, and falls within section 74(1)(b) if covered by a direction under section 74(3). It is also a multiple agreement, part of which (i.e. the part not dealing with the overdraft), as referred to in section 18(1)(a), falls within a category of agreement not mentioned in this Act. (Compare Example 17.)