

IN THE CHESTER COUNTY COURT

Between

SOUTHERN PACIFIC PERSONAL LOANS LTD

Claimant and Respondent

And

MICHAEL WALKER AND JANE WALKER

Defendants and Appellant

JUDGMENT ON APPEAL

This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on a date to be fixed. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. The official version of the judgment will be available from the County Court Office once it has been approved by the judge.

The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

1. This is an appeal from a decision taken by District Judge Gilham on the 21st of June 2007. It is an unusual appeal in that the point on which it depends was not taken before the District Judge. Since an appeal of this kind is conducted by way of review, it is not normally possible to appeal a District Judge on the basis of argument not put before her but the point in this case is important and it has been argued on its merits without reference to any procedural difficulties. I heard oral submissions on 5th January but the matter was not completed that day so it was agreed that there should be further submissions in writing and that I would deliver a written judgment. Written submissions were duly received. This document, when perfected, may be treated as a fully written judgment. Both counsel, Mr Adrian Salter for the Appellants and Mr David Gilchrist for the Respondents argued the case extremely well and I am indebted to both for the quality of their submissions.

2. The order subject to appeal was a suspended possession order in respect of the defendants home at 4, Sandringham Close, Winsford, Cheshire CW7 2RT. The debt which gave rise to the possession order arose under an agreement dated the 26th of March 2005.

3. It is necessary to examine the terms of the agreement in some detail. It is headed "Credit Agreement regulated by the Consumer Credit Act 1974". It purports to record a secured loan and the figures are in a series of 10 boxes. The first, box A, states that the loan is £17,500. Box B is for payment protection insurance and there was none so it contains 0. Box C is labelled "Amount of Credit" and contains the figure £17,500. Box D is labelled "Broker Administration Fee" and is £875. Box E is

labelled "Total Amount Financed " and contains the total £18,375. (The remaining boxes do not have letters so I shall revert to numbers for them)

4. The interest rate on the loan was variable, and box six contains a figure of 9% above LIBOR. Box seven contains the rate of interest payable at the time which is stated to be 13.98%. Box eight contains the repayment term of 180 months; box nine contains the monthly payments figure which was £244.46, subject to variation and box 10 states the APR as 16%

5. A number of features need to be noted. First, the description of the fee is artificial. The charge was made by the finance company. Second (ignoring any potential variation in the interest rate) 180 months, (179 payments) at £244.46 means the total repayments on an initial loan of £17,500 would be £43, 758.54. The total charge for credit would therefore be £26,258.34. The figures in the agreement relating to the rates of interest can be reconciled with the amount to be repaid only if interest is charged on the £875 Broker Administration Fee.

6. The statutory regime relevant to the case is singularly complicated. It should be noted that The Consumer Credit (Agreements) Regulations 1983 have been amended since this agreement took effect and have to be considered in their pre-amendment form.

7. This was a regulated agreement. Section 65 of the Consumer Credit Act 1974 states:

" (1) An improperly executed regulated agreement is enforceable against the debtor on an order of the Court only."

8. Section 61 of the Act defines "not properly executed" as follows:

"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..... and by or on behalf of the creditor and

(b) the document embodies all the terms of the agreement other than implied terms....

9. The prescribed terms are set out in the Consumer Credit (Agreements) Regulations 1983, regulation 6 as being the terms in column 2 of schedule 6 of the regulations. The relevant paragraphs of schedule 6 are paragraphs 2 and 5. Paragraph 2 requires

" A term stating the amount of the credit"

and paragraph 5 requires

"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:

- (a) number of payments*
 - (b) amount of payments*
 - (c) frequency and timing of payments*
 - (d) dates of payments*
 - (e) the manner in which any of the above may be determined*
- Or in any other way, and any power of the owner to vary what is payable."*

10. In addition to the prescribed terms, regulation 2 (1) of the CC(A)R requires that
"documents embodying regulated consumer credit agreements shall contain the information set out in column 2 of schedule 1 to these regulations"

11. The relevant paragraph of schedule 1 is paragraph 10 which requires

(1) the rate of interest

(2) the total amount of other charges included in the charge for credit in relation to see credit to be provided.

12. The enforcement order contemplated by section 65 (1) is governed by section 127 (3) which states

"the court shall not make an enforcement order under section 65 (1) if section 61(1) (a) was not complied with unless a document containing all the prescribed terms of the agreement was signed"

13.. It follows that if any of the prescribed terms is missing from the agreement or mis-stated the agreement is unenforceable and the court has no discretion to grant an enforcement order. If any of the required terms is missing or mis-stated, the agreement is enforceable only to the extent that the court grants an enforcement order. The court has a wide discretion whether to grant such an order in toto or on terms or on a restricted basis.

14. The other relevant statutory provision is section 9 (4) of the Consumer Credit Act itself which reads:

"for the purposes of this act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment"

15. The case for the Defendants is that the possession order should not have been made because the loan is unenforceable as a result of breach of the regulations. The principal point taken is that the total amount of credit is not properly stated because the figure used to calculate the interest is £18,375 when the total amount of credit was £17,500. The case cited in support of the argument is **Wilson v First Counties Trust [2001] EWCA Civ 633** which went to the House of Lords on the issue of compatibility with the Human Rights Act as **Wilson v Secretary of State for Trade an Industry [2003] UKHL 40** . In that case Mrs Wilson borrowed £5,000. She was charged a fee of £250 as an arrangement fee and this was added to the amount she borrowed so the amount of credit was stated to be £5,250. Both the Court of Appeal

and the House of Lords held that this rendered the agreement irrevocably unenforceable because the amount of credit was misstated by the £250.

16. The case for the Claimant company is that Wilson is not a parallel because of the inclusion of boxes 3, 4 and 5 in the present agreement. It is argued that the amount of credit is correctly stated in box C as £17,500 and the broker administration of £875 is then added to it. This leads to a total of £18,375 which is described as "total amount financed" an expression which does not appear in the act. Thus it is said, this agreement does not make the error that the agreement did in the case of Wilson.

17. The difficulty with the Claimants' argument, it seems to me, is that, although the figure of £18,375 is not specifically described as the amount of credit, it is in fact treated as such. Interest is calculated on that total rather than on the lower figure.

18. In my view, counsel for the Defendants is correct in his argument that section 9(4) effectively prohibits charging interest on a charge for credit even if time for payment is deferred. The reason is that if it is included in the amount of credit, that contravenes the decision in Wilson, if it does not then the document does not accurately record the reality of the transaction. I really cannot improve on the way he puts it in his further submissions which were submitted on 30th January.

"to charge interest upon any element of a regulated advance is by definition to treat that element as credit. This is equally true where that element must by law form part of the charge for credit since it cannot lead a double life (as the trial judge had wrongly held it could in Wilson) Yet section 9 (4) is absolutely prohibitive. It does not say that a particular element can be treated as credit for some purposes (e.g attracting interest) of but not for others (eg identifying the aggregate advance) nor does it say that a particular element may be treated as credit by the lender, but not by the court"

19. It is well established law that the court should look at the substance not the form. Counsel for the Defendants cites **Watchtower Investments v Payne CA** 20.07.01

"the purpose of the court's consideration is to arrive at what in reality is the true cost to the debtor of credit provided"

20. This is plainly right. In reality in this case there were not three elements to the repayment, the capital, the fee and the interest on the capital, but four elements, the capital, the interest on the capital, the fee and the interest on the fee. The fact that the last was included meant that the fee was treated as credit and this contravenes section 9 (4).

21. Another way of considering the matter is to ask what was "the charge for credit (other than interest)". If "other than interest" is read as meaning "other than interest on the credit" and if "interest on the credit" is confined to the interest on the £17,500, then "the charge for credit other than interest on the credit" is not just £875 it is £875 plus the interest on it. £875 is 5% of the loan of £17,500 and hence is 5/105 of £18375. It follows that, of the total repayable under the agreement, (£43, 758.54) approximately 5/105 represents the £875 and the interest on it. 5/105 is £2083.74. Looked at in this way, the total cost of the credit other than interest (on the

credit) is not accurately stated. There is no figure in the written document which bears this description. The only figure is the £875 and to this needs to be added the interest on it of £1208. 74. The truth is that the charge for credit other than interest on the credit is more than £2000. To that extent also it can be said that the agreement does not contain all its terms.

22. I therefore accept the arguments put forward by Mr Adrian Salter for the Defendants (Appellants) and find that the agreement is irredeemably unenforceable and the possession order will be quashed.

23. That makes it unnecessary to decide the "second row" argument about the alleged breach of the terms required by schedule 1 but for the sake of completeness I will deal with it briefly. The point made by the Defendants is the one identified in paragraph 21. Schedule 1 para 10.2 requires the lender to state the cost of the credit. (Other than interest). I have already held that this agreement mis- states the cost of credit by failing to include the interest on the £875. Therefore the breach is established. The question remains should the court make an enforcement order? In my view it should not. This agreement is an attempt to circumvent the provisions of s 9 (4) and it should not be encouraged. Appeal allowed.

Derek R Halbert
Designated Civil Judge, Cheshire.
12th March 2009.