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Case No: 2009 Folio 910

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2009

Before :

THE HONOURABLE MR JUSTICE FLAUX

Between :

PHILLIP McGUFFICK **Claimant**
- and -
THE ROYAL BANK OF SCOTLAND PLC **Defendant**

Mr Andrew G. Moran QC and Mr Brendan Burke (instructed by **MJP Justice Limited**) for the **Claimant**

Mr Richard Handyside QC and Miss Julia Smith (instructed by **DLAPiper UK LLP**) for the **Defendant**

Hearing dates: 23rd and 24th September 2009

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.

.....
THE HONOURABLE MR JUSTICE FLAUX

The Hon. Mr Justice Flaux :

Introduction

1. The present claim was commenced in the Chester County Court. It is one of a large number of claims currently before County Courts all over the country where disputes have arisen between lenders (such as the present defendant, The Royal Bank of Scotland Plc to which I will refer as “the bank”) and their borrowers or debtors (such as the present claimant). These disputes concern the effect on loan agreements and other credit arrangements (all of which are regulated consumer credit agreements within the meaning of the Consumer Credit Act 1974) of provisions such as section 77 of that Act, which render the agreement unenforceable in certain circumstances. On 3 June 2009, His Honour Judge Halbert of his own motion referred this case to the Commercial Court in London with a view to its being determined by the Commercial Court as a test case. By order of Andrew Smith J on 25 June 2009, the case was transferred to the Commercial Court and directions for trial were given, including that it should be listed for trial before me on 23 and 24 September 2009.
2. Witness statements were served by the bank from various employees who had dealt with the claimant’s account and (albeit somewhat later than the order of Andrew Smith J required) from the claimant himself, but neither party required any cross-examination. Accordingly, the facts are not really in dispute and can be stated relatively briefly.

The essential facts

3. On 3 October 2005, the claimant entered into a fixed-sum regulated loan agreement with the bank under which the claimant received credit in the sum of £17,034. The total amount to be repaid was £20,781 in 60 monthly instalments of £346.35. It is not suggested by the claimant that the agreement was in any way improperly executed, so that sections 61, 65 and 127 of the Consumer Credit Act 1974 are not directly in issue.
4. No payments were made under the agreement in respect of the 10 monthly payments of £346.35 which fell due between 1 August 2006 and 16 May 2007, save for a payment of £692.71 on 11 January 2007 and a payment of £692.70 on 26 February 2007, which were paid by the Claimant’s Loanguard payment protection insurance, which he had opted to take out at the time that the agreement was entered. In consequence arrears of £2,078.09 were outstanding on 16 May 2007.
5. The bank served a default notice bearing that date on the claimant pursuant to section 87(1) of the 1974. That section provides that the service of such a notice is necessary before the creditor is entitled to take particular steps (including so far as relevant demanding “earlier payment of any sum”, here requiring immediate repayment of the total balance outstanding).
6. That default notice was accompanied by what is evidently a standard form letter of the same date from the bank headed “Formal notice of intention to file a default and to take action to recover debt”. Since considerable reliance was placed on this document by Mr Andrew Moran QC for the claimant, I should quote the relevant passage in full:

“Please note that unless within 28 days of the date of this letter, satisfactory payment or arrangements for payment are made with the Bank, in response to the attached default notice, information about your indebtedness will be given to the following Credit Reference Agencies,

Callcredit plc

Equifax Europe Limited

Experian Limited

The Group and other companies may use the record of default and any other information provided to the agencies when considering applications by you, or other members of your household, for facilities including motor, household, credit, life and general insurance.

The existence of information on accounts in default at the Credit Reference Agencies may impair your ability to obtain credit or other financial facilities such as current accounts for a period of up to six years.”

7. Since June 2007, the balance outstanding on the claimant’s loan account with the bank has been £15,066.21, the last payment having been made from payment protection insurance in that month. No further payments have been made. The bank has not levied any default charge or interest since the account went into arrears in August 2006.
8. In October 2007, the claimant’s account was referred to Apex Credit Management Limited, one of the debt collection agencies used by the bank. Correspondence was sent to the claimant but to no effect and, in October 2008, the bank instructed a second debt recovery agency, Capquest Debt Recovery Limited. They corresponded with the claimant between October 2008 and February 2009, including sending a letter before action dated 12 November 2008, but again this had no effect.
9. By a letter to the bank dated 25 February 2009, MJP Justice Ltd (“MJP”), the solicitors for the claimant, made a section 77 information request in relation to the agreement. The letter stated that the claimant considered the agreement to be in dispute, and that no reference was to be made to any credit reference agencies or other regulatory bodies in respect of the agreement and that no enforcement action should be contemplated whilst the agreement was in dispute. The letter enclosed a letter of authority signed by the claimant giving authority to MJP to seek the information and documents from the bank under section 77. That letter makes it clear that the purpose of obtaining the documents is to ascertain whether or not the claimant can obtain a declaration that the agreement is irredeemably unenforceable under sections 61 and 127 of the Act. This is one of a number of similar requests from the same solicitors on behalf of other clients. The bank has received hundreds of such requests from solicitors and claims management companies, apparently for a similar purpose.

10. It is probably convenient at this stage to set out the relevant provisions of section 77 of the Act as amended:

Duty to give information to debtor under fixed-sum credit agreement

77 (1) The creditor under a regulated agreement for fixed-sum credit, within the prescribed period 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 total sum paid under the agreement by the debtor;

(b) the total sum which has become payable under the agreement by the debtor but remains unpaid, and the various amounts comprised in that total sum, with the date when each became due; and

(c) the total sum which is to become payable under the agreement by the debtor, and the various amounts comprised in that total sum, with the date, or mode of determining the date, when each becomes due.

(4) 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.....

11. The provision formerly in subsection (4) (b) making it an offence to breach subsection (1) was repealed by the Consumer Protection from Unfair Trading Regulations 2008, to which I will return later in this judgment. The “prescribed period” is 12 working days. The evidence of Claire Price, who works in Loan Operations Credit Management Services within the bank, is that although it is the practice of the bank to keep copies of all credit agreements, it is sometimes not possible to comply with requests under section 77 within the prescribed period.

12. In this case, the bank initially could not locate a copy of the agreement and on 8 April 2009, the bank wrote to MJP informing them of this and stated that, in the circumstances, if the claimant decided not to meet his obligations under the agreement, the bank would not be able to enforce repayment of the loan. The letter added that the bank considered that the claimant should continue to meet his obligations under the agreement, bearing in mind that it was not void but remained valid and that any continuing default would be reported to the Credit Reference Agencies (to which I will refer as “CRAs”). In cases where the bank has confirmed

that it is unable to enforce the agreement, its standard practice is not to pursue legal action against the customer and to put a stop to all collection activity, so as not to give the false impression that it is entitled to obtain a judgment. That practice has been followed in this case.

13. Correspondence ensued in which MJP threatened proceedings for a declaration of unenforceability by the court if a copy of the agreement were not produced within 28 days and for an injunction if the claimant's credit rating were affected. By 11 May 2009, the bank had located a copy of the agreement and wrote to MJP enclosing it and stating that recovery action would now continue. Through inadvertence, the bank overlooked that it had not provided a signed statement of account as required by section 77(1).
14. Although collection activity had recommenced, on 13 May 2009 the bank ascertained that the claimant had issued these proceedings and accordingly, collection activity ceased again. That has remained the position since, apart from one letter dated 15 May 2009 sent by Capquest by mistake. Although the bank could easily provide a signed statement of account so as to render the agreement enforceable once again under section 77(4), because the default would have been rectified, it has not done so, quite properly (as the claimant accepts) so as to ensure that there remains a *lis* between the parties enabling the court to determine the issues which have arisen.

The relief sought

15. By the end of the trial the relief which the claimant was seeking was somewhat more circumscribed than appeared from the pleadings or, indeed, from the claimant's skeleton argument. In particular, the claimant no longer seeks declaratory relief. The relief now sought is as follows:
 - (1) An injunction restraining the bank from making reports of the claimant's non-payment under the agreement to any of the CRAs.
 - (2) In the alternative, if the bank is entitled to continue such reporting, a mandatory injunction requiring the bank to report additionally to the CRAs that by reason of the bank's breach of section 77, the claimant has no enforceable liability to make payments under the agreement.
 - (3) A mandatory injunction requiring the bank to notify CRAs to whom it has previously reported the state of the claimant's account either (i) that from 11 March 2009 onwards (the date when the 12 working days prescribed period under section 77 expired) the claimant has not been in default under the agreement or (ii) that from 11 March 2009 onwards, the claimant has defaulted on the agreement in circumstances where through the bank's breach of section 77, he has no enforceable liability to pay.
 - (4) A mandatory injunction ordering the bank to provide the claimant with a signed statement of account required by section 77(1).

The parameters of the case

16. Before setting out the issues with which the case is concerned, I should make clear the parameters of the case and this judgment and, specifically, the matters which this judgment is not dealing with.
17. Mr Moran for the claimant accepted in opening that in some respects the present case was not as appropriate a test case as others might have been, for example because it is a case where, on any view (and as the claimant accepts) the agreement was valid and enforceable until 11 March 2009 (the date when the 12 day period for compliance with a demand under section 77(1) expired). Furthermore, by virtue of section 77(4) the agreement will be valid and enforceable again once the bank has provided the claimant with a signed statement of account. At the outset of the trial Mr Moran wished to leave open whether there were other documents referred to in the agreement the production of which was required by section 77(1). However, the insurance documentation which was originally being sought had been received, in accordance with the sub-section. Specifically, the claimant had received the Loanguard Insurance Leaflet referred to in the agreement. In fact that document appears to me to be the policy document. This point was subsequently abandoned by Mr Moran.
18. He also wished to leave open whether the agreement had properly set out the amount and rate of the total charge for credit as required by section 61(1)(a) and the regulations made under section 60(1)(b) of the Act. However I indicated that I was not prepared for this point to be left open where the claimant and his advisers have had a copy of the agreement since May of this year and that I would proceed on the basis that when the bank provided the signed statement of account, the agreement would become enforceable again.
19. In other words, this is a case of temporary or redeemable unenforceability, concerned only with section 77 of the Act. In that respect it differs from two other factual scenarios where unenforceability can be said to be permanent or irredeemable¹: (i) where the agreement is improperly executed, so that by virtue of section 65(1) of the Act, the agreement is only enforceable on an order of the court and, in the exercise of its discretion under section 127(1) the court declines to make an enforcement order and (ii) the case again under section 65(1) where section 61(1) (a) has not been complied with and by virtue of section 127(3), the court has no power to make an enforcement order (and the similar provision under section 127(4) where section 64 has not been complied with). Sections 127(3) and (4) were repealed by the Consumer Credit Act 2006, but only prospectively in respect of agreements made after 6 April 2007. As Mr Moran points out, there are a large number of regulated consumer credit agreements extant made before that date.
20. In those circumstances, Mr Moran invited the court to make rulings or provide guidance in relation to those different factual scenarios although they were not applicable on the facts of the present case. He also invited the court to give guidance for the situation (which he accepts is not this case) where the lender is deliberately failing to comply with the requirements of section 77(1) and to produce the relevant documents, perhaps because he appreciates that the agreement is improperly executed.

¹ The phrase “irredeemably unenforceable” was coined by Lord Hoffmann in Dimond v Lovell [2002] 1 AC 384.

21. Mr Richard Handyside QC for the bank urged the court not to embark on rulings or guidance with regard to hypothetical factual situations not before the court. I entirely agree: it would be inappropriate to decide anything other than the issues specifically raised by the facts of this case. If the parties have chosen an inadequate test case in terms of all the issues which might be “out there” being raised in the county courts, that may be unfortunate, but it is no part of the court’s function, despite what Mr Moran submits, to remedy that inadequacy by making decisions on hypothetical facts not before the court. It follows that I will only deal with matters such as the effect of sections 65 and 127 to the extent that it is necessary to do so to determine the actual issues in the case.

The issues

22. Before the trial began, I had asked for an agreed list of issues to be prepared. Mr Handyside for the bank produced a list with his skeleton argument which was not formally agreed and which to an extent was overtaken by events, in the sense that certain matters were not pursued by the claimant. Nonetheless it provided a useful summary in relation to the issues which remain for decision.
23. The issues which remain for decision are as follows:
- (1) Whether the claimant’s contractual obligation to pay the amount of £15,066.21, which has been outstanding under the agreement since June 2007, has been extinguished/suspended or continues during the bank’s period of non-compliance with the claimant’s request for information under section 77(1) of the 1974 Act.
 - (2) Whether, during that period of non-compliance, any of the following steps would, if taken by the bank, be enforcement of the agreement contrary to section 77(4)(a) of the 1974 Act:
 - (i) reporting or threatening to report information about the agreement to a credit reference agency;
 - (ii) disseminating or threatening to disseminate the claimant’s personal data in respect of the Agreement to any third party;
 - (iii) demanding payment from the claimant;
 - (iv) issuing a default notice to the claimant;
 - (v) threatening legal action;
 - (vi) instructing a third party to demand payment or otherwise seek to procure payment.
 - (3) Whether the claimant has any right which might properly be protected by an injunction and/or whether it would be just or serve any useful purpose for the Court to grant an injunction restraining the bank from taking any of those steps during the period of non-compliance.
 - (4) Whether the claimant has any right which might properly be protected by an injunction and/or whether it would be just or serve any useful purpose for the Court to grant an injunction requiring the bank to serve the signed statement of account required by section 77(1) of the Act.

- (5) Whether (if the bank is permitted to continue reporting to CRAs) the claimant has any right which might properly be protected by an injunction and/or whether it would be just or serve any useful purpose for the Court to grant an injunction requiring the bank to notify the CRAs that by reason of the operation of section 77, the claimant has no enforceable liability under the agreement.
 - (6) What, if any, impact the Consumer Protection from Unfair Trading Regulations 2008 have on the issues concerned with enforcement of regulated agreements.
 - (7) Whether the letter from MJP solicitors of 10 June 2009 was a valid notice under section 10 of the Data Protection Act 1998.
 - (8) Whether the processing of personal data by the bank which has involved or caused to be made comments, entries or references adverse to the claimant's creditworthiness is contrary to the first data protection principle set out in paragraph 1 of Schedule 1 to the Data Protection Act or is fair and necessary for the purposes of legitimate interests pursued by the bank and by the CRAs.
 - (9) Whether the taking of any of the steps referred to in paragraph (2) above or the failure to notify CRAs that the claimant has no enforceable liability under the agreement would give rise to a relationship between the parties which was unfair to the claimant within the meaning of section 140A of the Consumer Credit Act.
24. Before turning to deal with these issues in turn, I should first set out the provisions of the Consumer Credit Act (other than section 77 which is set out above) which are relevant to the issues before the court and then deal in a little more detail with the nature and purpose of reporting to CRAs, since that is of considerable significance to a number of the issues.

The provisions of the Consumer Credit Act

25. The other provisions which fall for consideration in this case are as follows:

Form and content of agreements.

60. (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.

Signing of agreement.

61. (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.

Consequences of improper execution.

65. (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.

Statements to be provided in relation to fixed-sum credit agreements

77A (1) The creditor under a regulated agreement for fixed-sum credit—

(a) shall, within the period of one year beginning with the day after the day on which the agreement is made, give the debtor a statement under this section; and

(b) after the giving of that statement, shall give the debtor further statements under this section at intervals of not more than one year.

(6) Where this subsection applies in relation to a failure to give a statement under this section to the debtor—

(a) the creditor shall not be entitled to enforce the agreement during the period of non-compliance;

(b) the debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it; and

(c) the debtor shall have no liability to pay any default sum which (apart from this paragraph)—

(i) would have become payable during the period of non-compliance; or

(ii) would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period (whether or not the breach continues after the end of that period).

Ineffective securities.

106 Where, under any provision of this Act, this section is applied to any security provided in relation to a regulated agreement, then, subject to section 177 (saving for registered charges)—

(a) the security, so far as it is so provided, shall be treated as never having effect;

(b) any property lodged with the creditor or owner solely for the purposes of the security as so provided shall be returned by him forthwith;

(c) the creditor or owner shall take any necessary action to remove or cancel an entry in any register, so far as the entry relates to the security as so provided; and

(d) any amount received by the creditor or owner on realisation of the security shall, so far as it is referable to the agreement, be repaid to the surety.

Act not to be evaded by use of security.

113 (1) Where a security is provided in relation to an actual or prospective regulated agreement, the security shall not be enforced so as to benefit the creditor or owner, directly or indirectly, to an extent greater (whether as respects the amount of any payment or the time or manner of its being made) than would be the case if the security were not provided and any obligations of the debtor or hirer, or his relative, under or in relation to the agreement were carried out to the extent (if any) to which they would be enforced under this Act.

(2) In accordance with subsection (1), where a regulated agreement is enforceable on an order of the court or the OFT only, any security provided in relation to the agreement is enforceable (so far as provided in relation to the agreement) where such an order has been made in relation to the agreement, but not otherwise.

(3) Where—

(a) a regulated agreement is cancelled under section 69(1) or becomes subject to section 69(2), or

(b) a regulated agreement is terminated under section 91, or

(c) in relation to any agreement an application for an order under section 40(2), 65(1), 124(1) or 149(2) is dismissed (except on technical grounds only), or

(d) a declaration is made by the court under section 142(1) (refusal of enforcement order) as respects any regulated agreement,

section 106 shall apply to any security provided in relation to the agreement.

Enforcement orders in cases of infringement.

127. (1) In the case of an application for an enforcement order under—

(a) section 65(1) (improperly executed agreements),

(3) The court shall not make an enforcement order under section 65(1) if section 61(1) (a) (signing of agreements) was not complied with...

Unfair relationships between creditors and debtors

140A (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).....

Powers of court in relation to unfair relationships

140B (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.

Power to declare rights of parties.

142. (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.

Notification to CRAs

26. The bank provides information to three CRAs based in the United Kingdom, Callcredit Plc, Equifax Europe Ltd and Experian Ltd. They are each licensed by the Office of Fair Trading (“OFT”) to carry on the activity of operating a CRA, which is defined by section 145(8) of the 1974 Act as follows:

A credit reference agency is a person carrying on a business comprising the furnishing of persons with information relevant to the financial standing of individuals, being information collected by the agency for that purpose.

27. The finance industry in the United Kingdom has established a self-regulating user group, the Steering Committee on Reciprocity or “SCOR”, which, in consultation with industry trade associations and regulatory bodies, including the OFT and the

Information Commissioner's Office ("ICO"), has developed the "Information Sharing: Principles of Reciprocity" document, the latest version of which is dated November 2008. The principles are intended to regulate the sharing of information by lenders through the CRAs. In particular that regulation is to ensure that information is utilised in accordance with the Governing Principle, which is stated to be:

Data are shared only for the prevention of over-commitment, bad debt, fraud and money laundering, and to support debt recovery and debtor tracing, with the aim of promoting responsible lending.

28. In his submissions, Mr Moran accepted that there was a range of proper and legitimate purposes which the scheme of SCOR and the Principles support, including the promotion of responsible lending. However, he submitted that that was not the limit of the scheme. The reference to supporting debt recovery demonstrated that this information sharing was overtly a tool of enforcement. Indeed he submitted that it enabled a creditor to enforce an agreement in the most effective way, by threatening the debtor that if he did not pay the sums due under the agreement, the default would be reported to the CRAs.
29. This could have adverse consequences for the debtor and his "associates", i.e. other members of his household (as the letter from the bank of 15 May 2007 had stated) in the form of an adverse credit rating for up to six years. This might even impair employment prospects in certain government departments or the police, who can access credit data on a person for the purposes of employment vetting, as appears from page 16 of the Principles of Reciprocity.
30. Whilst Mr Moran eschewed any suggestion that the bank had acted in an unscrupulous manner, he postulated the scenario of an unscrupulous lender faced with an information request under section 77(1) who knew or suspected that the agreement was improperly executed and who would not have much inclination to comply with the request. He would not be concerned about the sanction for non-compliance, namely unenforceability under the section, if he had at his disposal the means of enforcement or coercion of an adverse credit reference to the CRAs with the adverse consequences that would follow.
31. This somewhat emotive example, which is a long way from the facts of this case, does demonstrate why it would be unwise to speculate in this judgment as to what, if any, remedies would be available to the debtor in such a case and I decline to engage in such speculation. Mr Handyside said that the bank was unaware of any such case and he emphasised that all the matters identified in the Governing Principle, including the support of debt recovery and debtor tracing, are stated to be with the aim of promoting responsible lending. Responsible lending is not just something to be hoped for. The OFT regards it as an essential element of fitness to hold a licence which entities who wish to carry out consumer credit business are required to hold under section 21 of the 1974 Act.
32. Mr Handyside drew attention to the fact that, in considering whether someone is a fit person to hold a licence, the OFT will under section 25(2) and (2A) have regard to any evidence that the applicant has engaged in business practices which the OFT consider deceitful or oppressive or otherwise unfair or improper, which is in turn

defined by sub-section (2B) as including practices which appear to the OFT to involve “irresponsible lending”. As Mr Handyside pointed out, for the purposes of determining what is irresponsible lending under section 25 of the Act, the OFT has set up the irresponsible lending project. The scope of this project was described in a scoping paper issued by the OFT in August 2008 as follows:

The project will consider behaviour and practices around the decision to lend or to extend an existing line of credit, and the nature and extent of any assessments of a borrower’s ability to repay.

33. In discussing how lending decisions are arrived at, paragraph 4.11 of the scoping paper states:

Considerations about the affordability of a product or amount (the consumer’s ability to repay) and the likelihood of repayment (the consumer’s expected level of risk) are a key and central part of most mainstream lending decisions.

At paragraph 4.23 the scoping paper goes on to discuss the importance of credit scoring in these terms:

Credit scoring and behavioural scoring techniques are a central part of the operation of modern consumer credit markets. Information is available through Credit Reference Agencies which can enable lenders to make better informed decisions on a consumer’s ability to repay and likelihood of default.

34. Mr Handyside submitted that the continued reporting by the bank to the CRAs of the state of the claimant’s account during the period of non-compliance was not a coercive tool in the hands of the bank, but an essential aspect of responsible lending and of the licensing process. I accept that submission. It is borne out by the evidence of Mr Andrew Todd, a member of the Infrastructure and Business Intelligence team at the bank who describes the reporting of consumer credit performance data by the bank to CRAs on a monthly basis as allowing the CRAs to share the bank’s data with other financial institutions for the purposes of assessing credit applications.
35. In relation to the suggestion made by Mr Moran, derived from the reference to members of the claimant’s household in the bank’s letter, that reporting to the CRAs could lead to adverse credit references for other members of his family who were not even borrowers under the agreement, let alone in default under it, Mr Handyside referred to a leaflet available from the ICO called “Credit Explained” from which it is clear that the concept of associates or association for the purposes of credit performance data is limited to those who have a joint account or have made a joint application for credit.
36. Accordingly, I reject any suggestion that the bank is using or has used its continued reporting of the state of the claimant’s account to CRAs, whether during the period of non-compliance or at any other time, as a coercive tool to persuade the claimant to pay the outstanding amount of the loan. Rather the reporting has been for the legitimate purposes, identified in the Governing Principle, of sharing credit

performance data with other financial institutions through the CRAs to promote responsible lending. Of course, it does not follow from the fact that the motive for reporting during the period of non-compliance is an entirely proper one that such reporting is permitted as a matter of law. That is one of the central issues in the case, to which I now turn.

Whether non-compliance with section 77(1) extinguishes the bank's rights

37. Mr Moran on behalf of the claimant advances three propositions in support of the case that it is not open to the bank to continue reporting the state of the claimant's account to the CRAs during the period of unenforceability of the agreement under section 77(4):
- (1) In cases under sections 65 and 127 where the agreement is improperly executed and is either only enforceable by order of the court or is irredeemably unenforceable by virtue of section 127(3), the effect of the statute is that the creditor never acquires contractual rights against the debtor or is deprived of those contractual rights and, correspondingly, the borrower does not come or remain under an enforceable obligation or liability to repay or that liability is removed. The creditor can only acquire or regain the rights and the borrower can only come under an obligation in those cases in which the court makes an enforcement order under section 127(1).
 - (2) In the same regulatory legislative and contractual context and to give a consistent meaning to "enforceable" in different sections of the Act, section 77(4) should be interpreted as depriving the creditor of its contractual right to repayment and, correspondingly, removing the debtor's obligation or liability to repay, subject to a means to restore the right of the creditor and the obligation of the debtor, by compliance with section 77(1).
 - (3) Accordingly the phrase "not entitled while the default continues to enforce the agreement" in section 77(4) should be interpreted as depriving the creditor of its right to take any coercive action to compel or secure performance of the removed obligation or liability of the debtor to make repayment. Reporting to CRAs is said to be such coercive action.

*The effect of **Wilson v First County Trust Limited (No 2)***

38. The first proposition is said by Mr Moran to follow from the judgments of the majority of the House of Lords in Wilson v First County Trust Limited (No 2) [2004] 1 AC 816. The second and third propositions are said to be the necessary consequence of the application of those judgments. Mr Handyside for the bank challenges that the judgments in Wilson support the claimant's case and submits that, on a proper analysis, they support the bank's case. Given that both parties relied on the case and analysed it closely in oral submissions, it is necessary to consider the case in some detail.
39. In that case, Mrs Wilson borrowed £5,000 from the defendant pawnbrokers and pawned her BMW 318 convertible. She did not repay the loan and when the defendants demanded repayment, she commenced proceedings in the county court claiming that the loan agreement was unenforceable under the 1974 Act, because it

did not contain all the prescribed terms. She sought the return of her car. When she had signed the agreement and pawned the car, she had been charged a £250 “document fee”. This was added to the amount of the loan stated in the agreement as £5,250. At first instance the judge held that the document fee was part of the credit and that the agreement was enforceable.

40. Mrs Wilson appealed to the Court of Appeal. The appeal was heard in November 2000, shortly after the Human Rights Act came into force. The Court of Appeal held that the document fee was not part of the credit and, in consequence, one of the prescribed terms in the agreement was incorrectly stated, contrary to section 61(1)(a) of the 1974 Act. In consequence the agreement was unenforceable, as was the security. The car had to be returned to Mrs Wilson, who as a result retained both the amount of the loan and the car and had paid no interest.
41. In the Court of Appeal, Sir Andrew Morritt V-C was concerned at this outcome and considered that it might be arguable that section 127(3) of the Act infringed Article 6(1) of the European Convention on Human Rights. The hearing before the Court of Appeal was adjourned for the Secretary of State for Trade and Industry to be joined as a party and to argue that issue. After the adjourned hearing, the Court of Appeal gave judgment concluding that section 127(3), in so far as it prevents the court from making an enforcement order, is incompatible with article 6(1) of the Convention and with article 1 of the First Protocol to the Convention.
42. The Secretary of State appealed to the House of Lords. Trade associations and insurance companies were also represented and counsel appeared as *amicus curiae*. Before their Lordships, the primary argument for the government was that the court had no jurisdiction to make a declaration of incompatibility in relation to events occurring before the coming into force of the Human Rights Act on 2 October 2000. In that case, not only was the agreement made in January 1999 for a period of six months, but the parties’ rights were determined by the county court decision in September 1999. The alternative arguments for the government were that if the court did have jurisdiction under the Human Rights Act, neither article 6(1) of the Convention nor article 1 of the First Protocol applied.
43. All their Lordships decided in favour of the Secretary of State on the primary issue. They held that the Human Rights Act did not have retrospective effect and that, accordingly, the court had no jurisdiction to make a declaration of incompatibility. It followed that it was not strictly necessary to decide the further issues as to the application of article 6(1) and article 1 of the First Protocol. However, as Lord Nicholls of Birkenhead, who gave the leading judgment, recognised at paragraph 27 of his judgment, since the issues had been fully argued and were of general importance, it would have been unsatisfactory to leave them unresolved. Accordingly, four of their Lordships did give fully reasoned judgments on those alternative issues. Thus, although these are strictly *obiter dicta*, they are clearly entitled to respect.
44. Mr Moran focused particularly on paragraph 44 of Lord Nicholls’ judgment where he said:

44. Thus the question in the present case is one of characterisation of the nature and effect of the relevant provisions of the Consumer Credit Act, considered as a matter

of substance rather than form. In my view, consistently with the underlying objective of article 1 of the First Protocol, the relevant provisions in the Consumer Credit Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction. The rigid ban on enforcement of security and contractual rights prescribed by section 127(3) alone and in conjunction with sections 106 and 113 engages article 1 of the First Protocol. The lender's rights were extinguished in favour of the borrower by legislation for which the state is responsible. This was a deprivation of possessions within the meaning of article 1: see *James v United Kingdom* (1986) 8 EHRR 123, 140, para 38. Whether this statutory interference with First County Trust's peaceful enjoyment of its possessions was justified, and therefore not a breach of article 1, is a separate issue.

45. Mr Moran submitted that this passage demonstrates that where the agreement is improperly executed, section 65 has the effect of removing the creditor's rights or preventing them from coming into existence, hence the reference to the rights being "extinguished". Only in a case where the court makes an enforcement order under section 127(1) are the rights restored or brought into existence. In every other case (whether one where section 127(3) applies or one where the court declines to make an enforcement order under section 127(1)) the rights remain extinguished.
46. Passages to similar effect appear elsewhere in Lord Nicholls' judgment. Thus, in paragraph 49 he refers to the legislation rendering "the entire agreement inoperative" and at paragraph 72 to the lender "losing all his rights under the agreement". On this issue, Lord Rodger of Earlsferry simply agreed with Lord Nicholls.
47. Lord Hobhouse focused in his judgment on the security provided to the defendant by way of pledge of the car. At paragraphs 136 and 137 he said:

136. The relevant Article is Article 1 of the First Protocol. The complaint of those arguing for incompatibility is that the provisions of the Consumer Credit Act 1974 denied the lender its 'Convention rights' under this Article. I agree with your Lordships that they did not but my reasoning is not wholly the same. The evidence of what really happened in the material transaction is exiguous and I recognise that the Article may have been engaged. The transaction purported to be a transaction of pledge, that is to say, a transaction where the possession of a chattel of the borrower is given to and retained by the lender as security for the repayment of the money lent together with agreed interest. So long as the loan has not been repaid the pledgee has a special title in the chattel which is in his possession, by virtue of that possession. At common law the pledgee can thus sue if his possession is wrongfully interfered with, even by the owner. Dishonestly to deprive the pledgee of the possession of the chattel is theft (formerly larceny).

Therefore, s.65 of the 1974 Act has the potential to deprive the pledgee of his special property in the pledged chattel. It follows that s.65 may deprive the pledgee of one of its possessions.

137. Whether or not this is what actually occurred in the instant case is, for me at least, still not clear but I will proceed on the assumption that there was a true pledge involving a transfer of the possession of the motor car from the borrower to the lenders. The documentation purported to evidence a contract of pledge. On this basis, the lenders were seeking to exercise the rights of a person in possession of a chattel and were being prevented from doing so by s.65 so as, in effect, to deprive them of their possession of the motor car and there would be the basis for an Article 1 complaint. If, on the other hand, she actually remained in possession of the motor car throughout, the complaint of the lenders would be that they should have been allowed to seize the motor car from her after she defaulted and sell it to reduce or discharge her indebtedness to them. This would have been merely the purported enforcement of a claimed contractual right which the lenders had never in truth validly acquired, Article 1 would never have been engaged and that would be the short answer to the complaint.

48. Mr Moran quite understandably hones in on the penultimate sentence of paragraph 137 as further demonstration that the correct analysis of sections 65 and 127 is that the creditor never has any rights under an improperly executed agreement and is deprived of those rights from the outset. A similar analysis appears in paragraph 168 of Lord Scott of Foscote's judgment, where, in concluding that article 1 of the First Protocol is not engaged, he said:

First, article 1 of the First Protocol is directed to interference with existing possessions or property rights. FCT never had, at any stage in the history of the loan agreement, the right to enforce against Mrs Wilson the repayment of the £5000. Neither the 1974 Act as a whole nor section 127(3) in particular constituted an interference with a pre-existing right of FCT to enforce repayment by Mrs Wilson of the £5000. The Act, and section 127(3) prevented FCT from ever possessing that right. No authority has been cited to your Lordships for the proposition that a statutory provision which prevents a transaction from having the quality of legal enforceability can be regarded as an interference for article 1 purposes with the possessions of the party who would have benefited if the transaction had had that quality. In my opinion, the proposition should be rejected.

49. Lord Hope of Craighead analysed the issue in a somewhat different way in paragraphs 107 and 108 of his judgment:

107. The rights of property which are in issue in this case are those set in an agreement which is regulated by the 1974 Act. The Act subjects the rights of the creditor to restrictions in some circumstances. Section 65 declares that a regulated agreement which is improperly executed cannot be enforced by the creditor except by means of an order of the court, and section 127(3) declares that it is not to be enforceable at all except upon the condition which it lays down. The agreement which was entered into in this case was from the outset an agreement which was improperly executed. So it was always subject to the restrictions on its execution which sections 65(1) and 127(3) of the 1974 Act set out. I would hold that FCT's Convention rights under article 1 of the First Protocol are not engaged in these circumstances.

108. The Court of Appeal said that the effect of sections 65(1) and 127(3) was to deprive the pawnbroker of its ability to enjoy benefit from the contractual rights arising from the agreement or from the rights arising from the delivery of the pawn: para 32. But the fact is that FCT never had an absolute and unqualified right to enforce this agreement or to enforce the rights arising from the delivery of the motor car. Article 6(1) of the Convention and article 1 of the First Protocol cannot be used to confer absolute and unqualified rights on FCT which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into.

50. That passage seems to me more consistent with the creditor having rights which are restricted by the legislation rather than the creditor not having any rights at all at the outset.
51. Mr Handyside challenged Mr Moran's submission that Wilson is authority for the proposition that the effect of unenforceability under section 65 is that the creditor never acquires contractual rights or is deprived of them from the outset. He referred to various passages in the judgments (including that of Lord Nicholls himself) which appear to be inconsistent with that analysis. Thus, at paragraph 31 of his judgment, Lord Nicholls refers to the fact that the restrictions on enforcement in the Act do not deprive a regulated agreement of all legal effect, in these terms:

These restrictions on enforcement of a regulated agreement are for the protection of borrowers. They do not deprive a regulated agreement of all legal effect. They do not render a regulated agreement void. A regulated agreement is enforceable by the debtor against the creditor. It seems, for instance, that a borrower may insist on making further drawdowns under a regulated agreement even though the agreement is unenforceable against him. Further, section 173(3) expressly permits consensual enforcement against a borrower. A borrower may consent to the sale of a security or to judgment. Moreover, the creditor is entitled to retain any security lodged

until either an application for an enforcement order is dismissed or the court makes a declaration under section 142 that the agreement is not enforceable. That is the effect of sections 113(3) and 106.

52. Lord Nicholls returned to the question of the creditor's rights of security at paragraph 39:

On its face article 1 is engaged in this case, most obviously with regard to the BMW car delivered by Mrs Wilson to First County Trust as security. On delivery First County Trust as pawnee acquired a proprietary interest in the car. That was in January 1999. The company's proprietary interest ceased eight months later, in September 1999, when the court refused to make an enforcement order. In addition, both parties acquired contractual rights under the agreement. 'Possessions' in article 1 is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights. But, by virtue of the statute, the contractual rights acquired by First County Trust were enforceable only with the consent of the borrower pursuant to section 173(3).

53. I agree with Mr Handyside that the recognition in these passages that the creditor's security rights in that case were in place, at least until the court's judgment in September 1999, together with the reference to the creditor's contractual rights being enforceable with the consent of the borrower are more consistent with a restriction on rights rather than the deprivation of rights for which Mr Moran contends. However, one has to accept that paragraph 44 of Lord Nicholls' judgment seems to point the other way, with its reference to extinction of rights and the analysis that there were security rights until September 1999 is not really consistent with Lord Hobhouse's judgment which I have quoted above.
54. Mr Handyside also drew attention to other passages in the judgments which suggest that restrictions on enforcement such as section 127 do not deprive the agreement of all legal effect or render it void. I have already referred to paragraphs 107 and 108 of Lord Hope's judgment. In two passages in his judgment Lord Scott referred to the fact that the agreement was not rendered void or unlawful. In paragraph 164, having set out the terms of section 65(1) he said: "It is to be noted that the agreement is not void or unlawful. It is merely unenforceable except on an order of the court." Then in paragraph 165, he said: "True it is that the loan agreement between FCT and Mrs Wilson was a valid, lawful agreement. But the 1974 Act declared it to be unenforceable."
55. I agree with Mr Handyside that it is important to have in mind the context in which the House of Lords was considering the Consumer Credit Act (and specifically sections 65 and 127(3)) in **Wilson**, namely whether they infringed article 6(1) of the European Convention on Human Rights and article 1 of the First Protocol. Mr Moran insisted that the context in which their Lordships were considering the legislation could not have any impact on their analysis of the effect of the legislation. However, I am not sure about that. The first sentence of paragraph 44 of Lord Nicholls' judgment seems to me to be a reference back to paragraph 35 where he had said:

The distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case. As a matter of drafting, a restriction on the scope of a right may be framed in several different ways. But the drafting technique chosen by the draftsman cannot be determinative of this issue. Human Rights conventions are concerned with substance, not form, with practicalities and realities, not linguistic niceties. The crucial question in the present context is whether, as a matter of substance, the relevant provision of national law has the effect of preventing an issue which ought to be decided by a court from being so decided. The touchstone in this regard is the proper role of courts in a democratic society. A right of access to a court is one of the checks on the danger of arbitrary power.

56. Thus, it seems to me that Lord Nicholls was not concerned in his judgment with determining whether in terms of a traditional English law analysis, section 65 or section 127(3) extinguished the creditor's rights or merely barred his remedies. Had that been directly in issue before their Lordships, one would have expected the authorities on the effect of unenforceability under earlier legislation which made agreements unenforceable in certain circumstances (which Mr Handyside cited to the court in the present case and which I refer to below) to have been cited to the House and dealt with in the judgments.
57. Furthermore, support for Mr Handyside's submission that the House of Lords was looking at sections 65 and 127 of the Act through what he described as "Human Rights Act spectacles" is to be found in the judgment of Lawrence Collins LJ (as he then was) in **Conister Trust v John Hardman & Co** [2008] EWCA Civ 841; [2009] CCLR 4. That case concerned whether a panel solicitors' agreement under a personal injury litigation funding scheme to discharge a client's "remaining liability" under a loan agreement applied on its true construction where the loan agreement was unenforceable under the Consumer Credit Act 1974. The Court of Appeal held that, in the context of the panel solicitor's agreement in question, "remaining liability" imported something which was enforceable and that the creditor had no right of recovery against the solicitors.
58. During the course of the judgment, Lawrence Collins LJ considered the judgments in **Wilson**, pointing out that the House was divided in its reasoning as to why section 127(3) was not incompatible with article 1 of the First Protocol. At paragraphs 50 to 53 of his judgment, he said:

50. I have already said that in *Wilson v First County Trust Limited (No 2)* [2003] UKHL 40, [2004] 1 AC 816 it was held that section 127(3) was compatible with Article 6 of the European Convention on Human Rights, and with the right to peaceful enjoyment of possessions under Article 1 of the First Protocol; and that the House was divided on the reasons for the conclusion on the Article 1 point. The majority considered that Article 1 was not engaged because (per Lords Hobhouse and Scott) the effect of the legislation was that the lender never

acquired rights against the borrower or because (per Lord Hope) the borrower never had a right to enforce the agreement. Lord Nicholls (with whom Lord Rodger agreed) considered that Article 1 was engaged because the lender had rights, which were extinguished by legislation, but that the interference with those rights was justified.

51 Lord Hope said (at para 108) that the lender "never had an absolute and unqualified right to enforce" the agreement. Lord Hobhouse considered that the lenders "never in truth validly acquired" the claimed contractual right: para 137. Lord Scott said that the agreement was not void or unlawful but was "merely unenforceable except on an order of the court" (at para 164); section 127(3) did not constitute an interference with the pre-existing right to enforce payment because the Act and section 127(3) prevented the lender "from ever possessing that right", and the statutory provision prevented the transaction "from having the quality of legal enforceability" (at para 168). Lord Nicholls (with whom Lord Rodger agreed) said that, where there was a failure to comply with the Act, the legislation did not deprive a regulated agreement of legal effect, or render it void, since it was enforceable by the debtor against the creditor (para 31). But the lender's "rights were extinguished in favour of the borrower by the legislation" (para 44); the agreement was "rendered irredeemably unenforceable by section 127(3)" (para 46); the legislation "renders the entire agreement inoperative" (para 49); and the lender "loses all his rights under the agreement" (para 72). But even Lord Nicholls referred to section 127(3) as being "a restriction on the scope of the rights a creditor acquires under a regulated agreement" (para 36).

52 The judge considered that *Wilson* was binding authority to the effect that Conister had no rights under an unenforceable credit agreement, and it followed that the client had no corresponding liability. *Wilson* was dispositive of the legal definition of the word "liability" but that was not conclusive on the question of construction. In concluding that the word "liability" in clause 4.5 did not mean legal liability the judge relied on the colloquial use of the words "debtor" and "creditor" by Lord Nicholls at para 31.

53 I do not consider that any of the cases assists on the question of construction in the present context. The most that can be said is that the different formulations in *Wilson* indicate that for the purposes of Article 1 of Protocol 1 the lender is in the position of never having had any rights or having them extinguished. It is not suggested that the panel solicitor agreement was drafted or negotiated against the background of that decision.

59. It seems to me that this passage is significant in two respects. First, it emphasises that the judgments in **Wilson** do not all speak with one voice and that there are internal inconsistencies, particularly in Lord Nicholls' judgment, which Lawrence Collins LJ highlights in paragraph 51. Second, that in any event, it is for the purposes of the European Convention on Human Rights that the creditor is said to be in a position of never having had any rights or having had them extinguished. It does not necessarily follow that the House of Lords would have engaged in the same analysis if faced with the issues as to the effect of unenforceability which are presently before the court.
60. As I have already indicated, I am fortified in that conclusion by the fact that the House of Lords did not have cited to it or deal with earlier authorities as to the effect of an agreement being unenforceable in a contractual as opposed to a human rights context. Mr Handyside referred to a number of cases decided under earlier statutes. As he said, the distinction between the extinction of rights and the barring of remedies is a familiar concept in English law, for example under statutes of limitation. For present purposes however, one can confine the analysis to cases concerned with what might be described as "consumer protection" statutes. In a number of such cases, the courts have recognised that, although the statute may render the agreement unenforceable, the agreement remains a valid and subsisting contract and rights and obligations under it continue to exist, even if unenforceable by the creditor.
61. **Taylor v Great Eastern Railway Company** [1901] 1 KB 774 was concerned with section 4(1) of the Sale of Goods Act 1893, which provided: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." Bigham J found at 778-9:
- The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer.
62. **Eastern Distributors Limited v Goldring** [1957] 2 Q.B. 600 was concerned with the meaning of "shall not be entitled to enforce" in section 2(2) of the Hire-Purchase Act 1938. The Court of Appeal said this at page 614:
- How is the present case affected by the fact that the hire-purchase agreement is unenforceable? If the Act said that it was void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be unenforceable. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced.
63. **Orakpo v Manson Investments Limited** [1978] AC 95 was concerned with section 6(1) of the Moneylenders Act 1927 which was a direct predecessor of sections 61 and 65 of the Consumer Credit Act 1974. The subsection provided: "No contract for the repayment by a borrower of money lent to him ... by a moneylender ... shall be

enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower ...” Lord Diplock at 106B-C stated the principle in relation to such provisions as follows:

Agreements or securities that are unenforceable are not devoid of all legal effect. Payments made voluntarily pursuant to their terms are not recoverable and I regard it as open to question whether the unenforceability of a higher ranking security which is not void ab initio excludes the doctrine of the merger in it of a lower ranking security in respect of the same charge, at any rate when the higher ranking security remains potentially enforceable in the hands of an assignee.

64. Although **Orakpo** was referred to by their Lordships in **Wilson**, that was in the context of the decision in that case that an alternative restitutionary remedy was not available to a creditor where the agreement was unenforceable: see per Lord Nicholls at paragraph 50, Lord Hope at paragraph 122 and Lord Scott at paragraph 172. Nothing in those passages impinges on the principle stated by Lord Diplock which I have just quoted.
65. Finally, under the Consumer Credit Act itself, there is the decision of the Court of Appeal Criminal Division in **R v Modupe** [1991] CCLR 29. There the appellant obtained loans enabling him to buy cars by giving false information when entering into hire purchase agreements. The relevant agreement did not contain all the prescribed information and was improperly executed so that by virtue of section 65 it was only enforceable on the order of the court. The appellant had been convicted of evading an existing liability by deception with intent to make permanent default contrary to section 2(1) (b) of the Theft Act 1978. He appealed against conviction, contending that since the agreement was enforceable only on the order of the court, there was no existing liability, as there was no liability until such an order was made.
66. The Court of Appeal (Lord Lane CJ and Henry and Hidden JJ) held that the fact that under section 65(1) the agreement was only enforceable on an order of the court did not mean that there was no existing liability on the part of the debtor. They concluded:

There was an existing liability, albeit only enforceable by an order of the court. It is quite plain from s 65 that the object of that provision is that if the agreement is not properly completed, then one of the methods of the disappointed contractor enforcing his liability is removed from him. He cannot help himself. In other words he cannot retake the vehicle if it is a hire-purchase type of agreement. But the argument that no legal liability exists in the light of those matters is one which is not tenable.

67. Taking the authorities as a whole, I consider that (at least outside the human rights context, with which the present case is not concerned) the better view is that the effect of unenforceability under section 65 is that the rights of the creditor and corresponding liability or obligations of the debtor do exist but are unenforceable, rather than that those rights were never acquired or that the creditor was deprived of those rights whilst the agreement was unenforceable. Similarly, under section 113(2)

the creditor's security rights exist but are unenforceable. In the event that the court makes an order under section 127(1) the creditor can enforce its rights under the agreement and in relation to the security. If the court declines to make an order or section 127(3) precludes the court from making an order, then the creditor cannot enforce the agreement. Its rights continue but cannot be enforced.

68. To the extent that there are passages in the judgments of the House of Lords in **Wilson** which are to contrary effect, they are contrary to the earlier authorities to which I have referred, which were not cited to their Lordships. In the ultimate analysis, those passages are obiter and thus not binding on the court. It follows that in my judgment, the first proposition advanced by Mr Moran as set out at paragraph 37 above is not supported by the authorities taken as a whole.

*The impact of **Wilson** on section 77*

69. It must follow from that conclusion that Mr Moran's second proposition (that for the sake of consistency, the court should treat the provisions of section 77(1) and (4) as having the same effect as he contended the House of Lords had attributed to sections 65 and 127) must also fail. However, even if I had accepted his submission that the judgments of the House of Lords in **Wilson** had determined conclusively the effect of irredeemable unenforceability under sections 65 and 127, I would still disagree with his proposition that section 77(4) works in exactly the same way as section 127(1). He submitted that, although in the one case it needs an enforcement order to restore the creditor's rights and in the other case, it needs the creditor to comply with section 77(1) for the rights to be restored, in each case, during the period of non-compliance, the creditor has been deprived of the rights.
70. However, in my judgment, whatever the true ambit of the judgments in **Wilson**, the House of Lords was not concerned with redeemable unenforceability under section 77. It seems to me that there is a distinction as a matter of analysis between a case to which section 65(1) applies, where the creditor's rights are always restricted from the outset (and if Mr Moran's first proposition were correct, the creditor was deprived of the rights from the outset) and a case such as the present, where (as the claimant accepts) the agreement was valid and fully enforceable until 11 March 2009, when the bank failed to comply with section 77(1) and the agreement will become fully enforceable again, once the signed statement of account required by that sub-section is provided.
71. In those circumstances, it seems to me that the argument that, during the period of time when the bank was not compliant with section 77(1) (in relation to which the bank accepts that for that period the agreement was unenforceable), the bank's rights had been completely extinguished or the bank had been deprived of those rights is a somewhat artificial one. The analysis which recognises that the rights continue to exist whilst being unenforceable during the period of non-compliance seems to me much more consistent with the whole concept of redeemable unenforceability.
72. Furthermore, some support for that analysis is to be found in section 77A, which was added by the Consumer Credit Act 2006 and which is another example of redeemable unenforceability, there in relation to annual statements that are to be given under fixed-sum credit agreements. It uses in sub-section (6) (a) essentially the same form of words as section 77(4): "the creditor shall not be entitled to enforce the agreement

during the period of non-compliance”. However, sub-section (6) (c) (ii) recognises that, notwithstanding that by virtue of sub-section (a) the creditor is not entitled to enforce the agreement during the period of non-compliance, the debtor has continuing obligations during that period, in respect of which he may be in breach during that period.

73. Although section 77(4) does not spell out the same consequence, it would be odd if, in the one case of redeemable unenforceability of fixed-sum credit agreements the debtor could remain under obligations and be in breach of them, even though the creditor could not enforce any remedy for such breach by virtue of section 77A(6) (a), whereas in the other case of redeemable unenforceability of fixed-sum credit agreements, the debtor was under no obligation during the period of non-compliance. I consider that in the case of both sections, the scope of unenforceability should be interpreted in the same way. Accordingly I would also reject Mr Moran’s second proposition.

The meaning of enforcement

74. The Consumer Credit Act does not define what constitutes “enforcement” and therefore does not define what actions a creditor may not undertake during a period when the agreement is unenforceable. Both sections 76 (dealing with provisions in agreements which entitle a creditor to take certain steps when an event, such as bankruptcy, occurs, but there is no breach of contract by the debtor) and 87 (dealing with the entitlement of the creditor to take such steps where there has been a breach) contemplate that those steps will amount to enforcement. Those steps include matters which might be said to be obviously enforcement such as (under section 87), enforcing security or (under both sections) recovering possession of goods or land.
75. Both sections also include two steps which might be said less obviously to amount to enforcement: (i) demanding earlier repayment of any sum and (ii) treating any right conferred on the debtor by the agreement as terminated, restricted or deferred. The former of these is referring to a provision in the agreement which provides that on the occurrence of the triggering event (in a non-breach case within section 76) or of default amounting to breach under section 87, the creditor is entitled to demand immediate repayment of the total amount outstanding under the agreement. It was no doubt because the agreement in the present case contained such a provision that the bank served the default notice as it did on 16 May 2007.
76. However, nothing in either sections 76 or 87 can be said to give one any real clue as to the parameters of the concept of enforcement, for the purposes of determining what, if any, action by the creditor is permissible during the period when the agreement is unenforceable by virtue of section 77(1), let alone whether, as the claimant contends, reporting to the CRAs amounts to enforcement and so is not permitted during that period.
77. Mr Moran’s third proposition as set out in paragraph 37 above is to the effect that any coercive action to compel or secure performance of the removed obligation or liability of the debtor to make repayment amounts to “enforcement” and that reporting to CRAs is such coercive action. Accordingly, it is submitted that such reporting is not permitted so long as the agreement is unenforceable.

78. I have no doubt that, contrary to the claimant's submissions, this proposition does not follow from the judgments of the House of Lords in **Wilson**. That case does not deal anywhere with what constitutes enforcement let alone whether reporting to CRAs amounts to such "enforcement". The question then arises whether the meaning of "enforcement" for which the claimant contends finds any support from any other authority. In his submissions, Mr Moran did not rely upon any other decision to support the meaning for which he contends. Rather he relied in somewhat general terms on the Consumer Protection from Unfair Trading Regulations 2008 in support of the proposition that the concept of "enforcement" should be given the wide meaning for which he contends. I will return in the next section of this judgment to deal with my conclusion that reliance on the Regulations by the claimant is misplaced.
79. In contrast, the bank invited the court (as set out in the list of issues) to conclude not only that reporting to the CRAs did not amount to enforcement, but that a number of other activities did not constitute enforcement: (i) reporting to CRAs without also telling them that the agreement is currently unenforceable; (ii) disseminating or threatening to disseminate the claimant's personal data in respect of the agreement to any third party; (iii) demanding payment from the claimant; (iv) issuing a default notice to the claimant; (v) threatening legal action and (vi) instructing a third party to demand payment or otherwise to seek to procure payment.
80. So far as activities (iii) to (vi) are concerned, it was accepted on behalf of the claimant that these did not amount to enforcement or actions to enforce the agreement. That concession seems to me to be correct: at most these activities are steps preparatory to subsequent enforcement. Furthermore, in a recent decision, **Rankine v American Express Services Europe Ltd** [2009] CCLR 3, HHJ Simon Brown QC (sitting as a Deputy High Court Judge) concluded that the bringing of proceedings is only a step taken with a view to enforcement and not actually enforcement. It seems to me that that conclusion must be correct. Were it otherwise, as Mr Handyside pointed out, one would be left with the conundrum that the creditor could not apply to the court for an enforcement order under section 127(1), because to do so would amount to enforcement, not permitted by section 65(1).
81. Once it is recognised that the bringing of proceedings is not enforcement, it necessarily follows that activities (iii) to (vi) do not constitute enforcement, since they are all steps taken prior to the commencement of proceedings and therefore by definition, at most, steps taken with a view to enforcement.
82. I do not consider that either reporting to the CRAs or the related activities referred to in (i) and (ii) come anywhere near amounting to enforcement if activities (iii) to (vi) are not enforcement. These activities are concerned with reporting to CRAs or other third parties and are not even steps taken prior to enforcement such as threatening proceedings would be. Even if one accepted (which for reasons given earlier in this judgment I do not) the claimant's somewhat pejorative categorisation of reporting to CRAs as being motivated by the desire to pressurise the claimant into paying the outstanding balance, at its highest that is an attempt by indirect means to persuade the claimant to pay. If demanding payment directly or through a third party does not amount to enforcement, it is difficult to see how such indirect means could do so, even if the claimant were right as to the relevant motive of the bank.

83. Mr Moran sought to support the claimant's case that reporting to CRAs amounted to enforcement, by reference to a passage in the Crowther Report on Consumer Credit which preceded the passing of the 1974 Act. That passage at paras 6.10.27 and 6.10.28 was headed "Extra-Judicial Enforcement Methods" and provided as follows:

6.10.27 Within certain limits, a creditor is entitled to exercise self-help and to take steps for his own protection which do not involve recourse to the courts. Repossession of secured goods is one such method, though restrictions are imposed by existing legislation and these would continue to apply under the Consumer Sale and Loan Act.

6.10.28 There are, however, various forms of pressure put on debtors which are improper and cause considerable hardship and anxiety to the debtors concerned. These methods include threats of violence, calls on the debtor in person or by telephone late at night or early in the morning, threats to blacklist the debtor or to report him to his employer, the despatch to the debtor's home of vans carrying signs prominently indicating that they are from a debt collecting agency, and so on. Harassment of this kind, which was made the subject of specific recommendations by the Payne Report (paragraphs 1238 *et seq.*) is now an offence under section 40 of the Administration of Justice Act, 1970. We therefore do not propose to go over this ground again.

84. I have some doubt as to whether the authors of the Report really intended that the improper and now criminal activity described in para 6.10.28 should be described as an enforcement method, other than in a loose, colloquial sense. However, whatever the Report intended, it seems to me impossible to categorise reporting to the CRAs or related activities (which could not even begin to be described as improper, let alone criminal, as indeed Mr Moran was at pains to accept) as enforcement.
85. It follows that, in my judgment the reporting to CRAs and related activities do not constitute enforcement for the purposes of the Consumer Credit Act.

The effect of the Consumer Protection from Unfair Trading Regulations 2008

86. The Consumer Protection from Unfair Trading Regulations 2008 (to which I will refer as "the Regulations") were passed to implement Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices. The Directive is a maximum harmonisation Directive, in other words, to the extent that the national law on consumer protection is more stringent than the terms of the Directive, the latter should prevail in order to ensure that there is a free market between member states. In the case of the Regulations, this is achieved by repealing a whole raft of statutory provisions which are more stringent than the Directive, including as already noted, the criminal sanction originally contained in section 77(4) (b) of the 1974 Act.
87. By a proposed re-amendment to the Particulars of Claim, the claimant sought to rely upon the Regulations and to seek injunctive relief on the grounds that reporting

information to the credit reference agencies constituted unfair commercial practices within regulations 3(3), 3(4) (c) and 7. The bank resisted this amendment on the grounds that it was unarguable, since the claimant had no locus to bring a claim under the Regulations, which do not confer any private right of action.

88. At the outset of the trial, Mr Moran indicated that this proposed additional claim would not be pursued, as he did not consider that he could properly argue that the Regulations conferred any right of action on someone in the position of the claimant. Notwithstanding this, it was agreed between the parties that a ruling by the court would be helpful on this issue. To that end, Mr Handyside made detailed submissions in support of the bank's case that the claimant has no locus to enforce the Regulations.
89. In my judgment, there are two reasons why the claimant has no locus to enforce the Regulations. First, upon the correct construction of the Regulations, no right of action is conferred on individuals. The scheme of the Regulations is that regulations 3 to 7 set out various prohibitions of unfair commercial practices and the like and regulations 8 to 13 provide for various offences constituted by such practices. Part 4 of the Regulations, beginning with regulation 19, is headed "Enforcement". Regulation 19 imposes a duty on every enforcement authority to enforce the Regulations. "Enforcement authority" is defined in regulation 2 as the OFT and every local weights and measures authority in Great Britain. The remainder of Part 4 then confers various powers on enforcement authorities (for example powers of entry and investigation or powers to make test purchases). In the Supplementary section at the end of the Regulations, regulation 29 provides that an agreement shall not be void or unenforceable by reason only of a breach of the Regulations.
90. The particular regulations relied upon by the claimant in the proposed amendment impose various duties for the protection of the "average consumer" and the remedies for breach of those duties are the criminal sanctions and the powers of enforcement conferred on the OFT and other enforcement authorities. Nothing in the Regulations confers any right on an individual or makes any remedy available to an individual and, indeed, the fact that an agreement with an individual is not void and unenforceable, even if the trader or creditor is in breach of the Regulations, points strongly against it having been intended to confer any such right.
91. The second reason why, in my judgment, the Regulations do not give the claimant any locus to enforce the Regulations or any cause of action for their breach, is that it is quite clear that the United Kingdom government deliberately excluded any civil law remedies from the Regulations. This emerges from the Explanatory Memorandum to the Regulations prepared by the Department for Business, Enterprise & Regulatory Reform, which was laid before Parliament. It is agreed between the parties that the court can have regard to this Memorandum in interpreting the Regulations and the intent behind them. In any event, this is precisely the sort of background material to which it is well-established the court can have regard in ascertaining the purpose and scope of legislation: see Wilson at para 56 per Lord Nicholls.
92. Paragraphs 49 and 105 to 114 of the Evidence Base forming part of that Memorandum make it clear that the Directive left it to member states to decide whether to provide individuals with a private law right to seek redress for economic loss caused by an unfair commercial practice. The government considered a number

of possible options in terms of providing civil remedies to individuals for breach of the Regulations, but decided not to adopt any of those options.

93. In circumstances where the Regulations confer no private law rights or remedies on the claimant, as Mr Moran accepts, the question remains for what purpose the claimant still relies on the Regulations. What is contended is that the court should construe the provisions of the Consumer Credit Act 1974 (and specifically section 77) consistently with the Directive and with the Regulations made to implement it.
94. In support of that proposition, Mr Moran relied upon the decision of the European Court of Justice in **VTB-VAB NV v Total Belgium NV** and **Galatea BVBA v Sanoma Magazines Belgium NV** (Cases C-261/07 and C-299/07) [2009] 3 CMLR 17. That concerned the Belgian law of 1991 prohibiting combined offers, that is tied selling of goods or services. The law was amended in 2007 to transpose into national law the provisions of the Directive, but unlike in this country with the Regulations, Belgium did not repeal the law. In two cases before the Antwerp Commercial Court, businesses were challenging combined offers by competitors as contrary to the prohibition in the 1991 law. The Belgian court made a reference to the European Court of Justice seeking a ruling as to whether the Directive had to be interpreted as precluding the national law of 1991 prohibiting generally combined offers.
95. The European Court had to consider first the admissibility of a reference for a preliminary ruling. In determining that it was admissible, the Court said, at paragraphs 35 to 39 of the judgment:

35. Firstly, it follows from the case-law that not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within the scope of that directive (see, to that effect, Case C-1/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29).

36. While it is true that, in the main proceedings, the Law of 5 June 2007 amending the 1991 Law and intended formally to transpose the Directive is later in time than the main proceedings and the adoption of the decision to refer, the fact remains that, as is apparent from that decision and as the Belgian Government acknowledged at the hearing, the disputed provisions in Articles 54 to 57 of the 1991 Law, that is to say, those laying down the principle of a general prohibition of combined offers and providing for certain exceptions to that principle, were neither repealed nor even amended by the Law of 5 June 2007.

37. In other words, both at the time of the main proceedings and at the time when the decision to refer was adopted, those pre-existing provisions were regarded by the national authorities as being capable of ensuring transposition of the Directive from the date of its entry into force, that is to

say, from 12 June 2005, and, accordingly, as falling within its scope.

38 Secondly, in any event, it follows from the case-law of the Court that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (Case C-29/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-4/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-44/04 *Mangold* [2005] ECR I-9981, paragraph 67).

39 In that respect, the Court has had occasion to hold that all the authorities of the Member States concerned, including the national courts, have such an obligation to refrain from taking measures. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see, in particular, Case C-12/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 122 and 123).

96. The Court then went on to conclude that the Directive must be interpreted as precluding the relevant national legislation, the law of 1991, in so far as it imposed a general prohibition of combined offers, which was contrary to the Directive (see paras 68 and 69 of the judgment). Mr Moran relied upon the passage I have quoted and in particular paragraph 39, in support of the proposition that the 1974 Act should be interpreted in a way which is consistent with the Directive.
97. In my judgment, reliance on these passages is somewhat misplaced. Those joined cases were ones where the European Court decided that the relevant national law was incompatible with the Directive. In this jurisdiction, all the legislation which was considered incompatible with the Directive was repealed by the Regulations. Mr Moran has not demonstrated that anything in section 77 or in the bank's interpretation of the meaning of "enforce" or "enforcement" in that section or any other section of the 1974 Act is contrary to the Directive or "might seriously compromise..... the attainment of the objective pursued by the Directive". This argument fails.

Injunctive relief

98. Since I have concluded that neither reporting to the CRAs during the period of non-compliance nor any of the other steps identified in paragraph 79 above amounts to enforcement of the agreement contrary to section 77(4), no question arises of the claimant being entitled to an injunction restraining the bank from continued reporting to the CRAs or from taking any of the other steps.
99. Furthermore, even if, contrary to the conclusion I have reached, reporting to the CRAs did amount to enforcement, it is difficult to see that there would be any purpose

served in granting the injunction sought. That is because the reporting by the bank merely reflects that the claimant has not paid the sum of £15,066.21 which has been outstanding since June 2007. The credit record prior to 11 March 2009 showed that by November 2007, the terms of the agreement had not been complied with, the account was in arrears and the balance outstanding was £15,066.21. Even if the bank were restrained from reporting during the period of non-compliance, the credit record would continue to show those matters, so that no practical purpose would be served by an injunction.

100. As for the mandatory order sought that any notification to the CRAs during the period of non-compliance should be qualified (in one or other of the ways identified in paragraphs 15(2) or (3) above) by some statement to the effect that the claimant has not been in default of the agreement or has no enforceable liability to pay during the period of non-compliance, I am not prepared to make such an order for a number of reasons. First, it seems to me that it would be wrong in principle to dictate the terms of the bank's reporting to CRAs pursuant to the Principles of Reciprocity in circumstances where the court has concluded that such reporting during the period of non-compliance is not contrary to section 77 of the Act.
101. That conclusion is reinforced by the second reason, which concerns the practical difficulties which the qualifications which Mr Moran proposes would place upon the bank. In his second witness statement Mr David Black (like Mr Todd, a member of the Infrastructure and Business Intelligence team at the bank) addresses those difficulties. The reporting is by electronic means and the CRAs have no status code for recording the fact that an agreement is unenforceable. No previous suggestion or request has been made to the bank to report an agreement as unenforceable.
102. Third, as Mr Handyside points out, section 159 of the 1974 Act provides the claimant with his own means of requiring the CRAs to note his credit record. That section gives the claimant a statutory right to require CRAs to mark his records with a notice of correction. Thus, he could serve a notice on the CRAs under section 159(3) requiring them to add a statement to his records that the agreement is unenforceable during the period of non-compliance under section 77. It would then be for them to mark the records accordingly or apply to the Information Commissioner for an order relieving them of any obligation to do so on the grounds that such a statement was incorrect, frivolous or unsuitable. Given the availability to the claimant of these remedies of self-help if so inclined, I can see no practical utility in granting the injunction sought.
103. I also consider that there is no basis for granting an injunction compelling the bank's compliance with section 77(1). The only sanction for non-compliance (now that the Regulations have repealed section 77(4)(b)) is that the agreement is not enforceable during the period of non-compliance. Although section 170(3) of the Act preserves the power of the court to grant an injunction, it does not seem to me appropriate to do so against the bank in the present case.
104. Given that the non-compliance now consists only in not having provided a signed statement of account (because quite properly the bank wanted to ensure that there was still a *lis* between the parties for the purposes of this test case), there would be no useful purpose in granting the injunction sought. The absence of the statement may be a technical non-compliance, but the claimant has suffered and is suffering no

prejudice as a consequence, since he has been kept fully informed of the state of his account by annual statements and in correspondence.

105. In his reply submissions, Mr Moran realistically recognised that the court was not going to grant the injunction he sought. He said that he and those who instructed him were concerned that the court should make some reservation that there might well be circumstances in which the court might grant such an injunction. I agree with Mr Handyside that it would be quite wrong to make any such open-ended reservation and I decline to do so. The availability of injunctive relief depends upon the facts of each particular case and on the evidence presented to the court in the particular case. Whether in another case another court might grant an injunction would depend on the facts and the evidence before that court.

The Data Protection Act

106. The first issue under the Data Protection Act 1998 is whether the letter from the claimant's solicitors of 10 June 2009 was a valid notice under section 10(1) of the Act. That provides:

Right to prevent processing likely to cause damage or distress.

10 (1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons—

(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and

(b) that damage or distress is or would be unwarranted. (my emphasis)

107. The letter from MJP to the bank of 10 June 2009 stated as follows:

Please consider this letter a statutory notice under section 10 of the Data Protection Act to cease processing any data in relation to the above account with immediate effect. This means you must remove all information regarding this account from your own internal records and you are advised that you are not entitled to refer this account to any third party and this includes but is not limited to any debt collection agency and credit reference agency.

Should you refuse to comply, you must within 21 days provide us with a detailed breakdown of your reasoning behind continuing to process my data.

It is not sufficient to simply state that you have a ‘legal right’ you must outline your reasoning in this matter and state upon which legislation this reasoning depends. Should you fail to respond within 21 days, we will expect that this means you agree to remove all such data.

108. The bank contends that this letter does not constitute a valid notice under the section, because it fails to specify for what reasons the processing of the data is causing or is likely to cause substantial damage or substantial distress to the claimant or to another person or the reasons why that damage or distress is or would be unwarranted. Mr Moran submits that this is at most a technical defect, in any event remedied by service of the Particulars of Claim.
109. Mr Handyside points out that in fact paragraph 16 of that pleading does not specify any reasons either. He submits that this is not simply some technical defect. The whole point of requiring the person in the position of the claimant to specify reasons for his complaint is so that the data controller knows exactly what the complaint is and can respond to it within the 21 day period under section 10(3). There can then be a constructive discussion as to how the individual’s concerns might be addressed and, if the parties cannot agree, the court may have to make an order under section 10(4).
110. I agree with Mr Handyside that individual claimants should not be encouraged simply to fail to comply with the requirement to specify reasons under section 10(1), which I accept serves the useful purpose which he identified. However, if I considered that, on the material before the court, the claimant had a good case that the data controller had failed to comply with the data protection principles in a manner which was causing substantial damage or distress, I would be reluctant to deny the claimant a remedy merely because the notice was invalid.
111. The second issue is the one of substance. The claimant contends that the bank as data controller is in breach of the First Data Protection Principle in paragraph 1 of Schedule 1 to the Act. That provides:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met....

The conditions in Schedule 2 are as follows:

1. The data subject has given his consent to the processing.
2. The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice,

(aa) for the exercise of any functions of either House of Parliament,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

112. The claimant contends that, in circumstances where the bank has failed to comply with section 77(1) and the agreement is unenforceable under section 77(4), together with what it describes as the enforcement potential of a false report of default, the bank is in breach of the First Data Protection Principle and neither the bank nor the third party CRAs has any legitimate interest in dissemination of credit data concerning the claimant.

113. Given that I have concluded that the continued reporting to the CRAs during the period of non-compliance is legitimate, does not amount to enforcement and does not require to be qualified by some reference to the agreement being currently unenforceable, this argument fails at first base. There is simply no basis for the contention that the data is not being processed fairly and lawfully. The processing of the data by sharing it with other financial institutions through the CRAs, pursuant to the Principles of Reciprocity, is clearly in the legitimate interests of the bank, the CRAs and other financial institutions, for all of whom the governing principle is that the sharing of data has the aim of promoting responsible lending.

114. In that context it is significant that the ICO (whom the bank's solicitors consulted) take the view set out in their email of 14 July 2009, that it is appropriate for CRAs to record information about unenforceable regulated credit agreements because, amongst other reasons, such information may properly inform responsible lending decisions, irrespective of whether the liability of the debtor is enforceable and responsible lending decisions are dependent upon lenders receiving accurate information about the ability and/or inclination of individuals to repay their debts. These are the same considerations as lie behind the Irresponsible Lending Project of the OFT.
115. I reject Mr Moran's submission that the court should ignore the views of the ICO because there is no evidence that the Commissioner has considered the implications arising from the unlawful conduct of the creditor (presumably a reference to the continued reporting amounting to enforcement) and the contractual consequences of that. Given that I have ruled against all those prior arguments advanced on behalf of the claimant, this is a false point. In any event, the views of the ICO as to whether it is in the legitimate interests of lenders and CRAs to share data about unenforceable agreements seem to me to be entitled to considerable weight and respect. It is the ICO which is responsible for the regulation of data protection.
116. Accordingly, there is no ground for the court to make any order under section 10(4) of the Data Protection Act and the claimant's claim for relief under the Act fails.

Unfair relationship under sections 140A and 140B of the Consumer Credit Act

117. The claimant relies upon section 140A(1) (b) and (c) (set out above) and contends that by reason of the bank having sought to exercise or enforce its non-existent rights under the agreement and its continued threat and reporting of the claimant to CRAs when there is no right to enforce the agreement, the agreement is unfair to the claimant. The claimant seeks an order under section 140B(1) (b) that the bank cease making reports to the CRAs essentially in the same terms as the injunctive relief it seeks.
118. Since for all the reasons set out earlier in this judgment I have rejected all the claimant's arguments upon which this alternative way of putting his case depends, it is not necessary to address it further. The suggestion in Mr Moran's submissions that there could be a valid claim under section 140A even if his arguments under section 77(4) were not accepted is misconceived, since the case for the claimant of an unfair relationship relies upon the same allegations as I have rejected in relation to all the other aspects of the case. Just as the claim for injunctive relief must fail, so this alternative claim must fail.