

**IN THE LEEDS COUNTY COURT**

**HIS HONOUR JUDGE LANGAN QC**

*BETWEEN:-*

BANK OF SCOTLAND PLC

*Claimant*

-and-

ROBERT MITCHELL

*Defendant*

**SKELETON ARGUMENT  
ON BEHALF OF THE DEFENDANT**

1. This is the trial of the issue directed to be heard by the Order of District Judge Jordan dated 29<sup>th</sup> January 2009 [4]. That order set aside the default judgment in the action and directed that there be a trial of the issue identified in the recitals to the Order.

**The Issues to be Determined at the Hearing**

2. Since the Defendant was then acting in person and it appears that there was no attendance on that occasion on behalf of the Claimant the precise definition of the issue is derived from the following words namely the recording by the District Judge that the Defendant was “proceeding[s] (*sic*) on the basis of a breach of s. 61(1)(a) of the Consumer Credit Act 1974, namely that the Claimant failed to comply with the requirements to give copies of all the documents relevant to the agreement at the time of signing” and the Defendant “contending that

notwithstanding s. 65 of [the] Consumer Credit Act 1974 s. 127(3) of the Act preventing the enforcement.”

3. Having regard to those recitals and the evidence filed by the parties prior to and after the making of the Order directing this hearing a sharper yet faithful definition of the issues would be as follows: -

- (1) Was the Credit Agreement improperly executed by reason of a failure to comply with the requirements of section 61(1)(a) of the Consumer Credit Act 1974 (“the 1974 Act”)?

- (2) If so, does section 127(3) of the 1974 Act preclude the granting by the Court of an enforcement order, so as to render the Credit Agreement irredeemably unenforceable?

4. Pursuant to District Judge Jordan’s Order the following witness statements were exchanged, namely:-

- (1) the Statement of Robert Mitchell, the Defendant dated the 4<sup>th</sup> March 2009; and

- (2) the Statement of Neil William Russell, a legal assistant employed by the Claimant dated the 3<sup>rd</sup> April 2009.

5. It is common ground that on the 2<sup>nd</sup> December 2003 the Defendant signed the document, which is headed “CREDIT CARD APPLICATION” [11]. The document was also signed on behalf of the Claimant on the 2<sup>nd</sup> December 2003

whereby it became an executed credit agreement. For convenience the document is henceforth referred to as “the Credit Agreement”.

### The Statutory Framework

6. The Credit Agreement is for running-account credit within the meaning of section 10 (1) (a) of the 1974 Act and is a regulated agreement.
  
7. By section 60 of the 1974 Act, the Secretary of State is required to make regulations as to the form and content of regulated agreements.
  
8. There are very detailed requirements, which prescribe the form and contents and manner of signing of regulated agreements. What is important for the present is the requirement in section 61(1)(a) for there to be in existence a signed document containing all the prescribed terms.
  
9. Section 61(1) of the 1974 Act provides that

A regulated agreement is not properly executed unless – (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor ...and by or on behalf of the creditor...

10. Amongst the regulations made under section 60(1) the most important for the present purposes is the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553) (“the Agreement Regulations”).
11. The reference to “*the prescribed terms*” is to those terms which are set out in Schedule 6 to the Agreement Regulations. In the case of running-account credit agreements are prescribed terms are those which specify:
- (a) the credit limit or the manner in which it will be determined or a statement that there is no credit limit;
  - (b) the rate of interest;
  - (c) the repayments, which may be described by reference to a combination of any of the number, amount, frequency and timing of payments, date of repayments and the manner in which any of the foregoing may be determined; and any power of the creditor to vary what is payable.
12. If the document, which is the regulated agreement, does not contain *all* the prescribed term then it an improperly executed agreement. In the present case it is contended that the Credit Agreement did not contain *any* of the prescribed terms and was therefore improperly executed for that reason.
13. Section 65 (1) of the 1974 Act provides that

An improperly-executed regulated agreement is enforceable against the debtor...on an order of the Court only.”

14. However such specific form of improper execution presents an insurmountable difficulty for a creditor such as the Claimant in circumstances where the relevant agreement was executed prior to the 6<sup>th</sup> April 2007.

15. Prior to the amendments introduced by the Consumer Credit Act 2006 section

127(1) of the 1974 Act provided as follows: -

In the case of an application for an enforcement order under section 65(1) (improperly executed agreements)... the court shall dismiss the application if, but (subject to subsections (3) and (4)) only if, it considers it just to do so having regard to the prejudice caused to any person by the contravention in question, and the degree of culpability for it; and the powers conferred on the court by subsection (2) and sections 135 and 136.

16. The underlined words together with the subsections (3) and (4) were removed by the amending statute in 2006 with effect from the 6th April 2007 but those repeals were not made retrospective in effect. Accordingly in relation to relevant Credit Agreement the subsection 127(3) still applies and provides that:

The Court shall not make an enforcement order under section 65(1) if section 61(1) (a) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60 (1) itself containing all the prescribed terms of the agreement was signed by the debtor whether or not in the prescribed manner.

17. There is no doubt that the practical effect of a failure to comply section 61(1)(a) is to render the relevant credit agreement irredeemably unenforceable since the Court is bound to dismiss the application for an enforcement order unless the credit is able to produce a document containing all the prescribed terms signed by the debtor. This proposition is unlikely to be challenged and is entirely supported

by two House of Lords decisions: *Dimond v Lovell* [2002] 1 AC 384 and *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

Has there been a failure to comply with section 61(1)(a) of the 1974 Act?

18. According to the Defendant he was provided with a copy of the executed credit agreement, which comprised nothing more than the signed document itself and which appears at [11]. He is adamant that he was not supplied with any other documents or terms and conditions.
  
19. There is no direct challenge to the Defendant's evidence. Mr. Russell in his statement refers to standard procedures and expresses his belief that a copy of a further document comprising terms and conditions would have been provided to the Defendant (a) at the time of signing as well as (b) together with further copy of the executed credit agreement by post.
  
20. Mr. Russell also makes the point in paragraphs 12 and 13 of this statement (which it is assumed will be developed in legal submissions) that there was a reference to the Conditions in the credit agreement and that they were also the subject-matter of a declaration by the Defendant so that presumably it is said that those Conditions were incorporated into the credit agreement.

21. Whilst there would appear to be a factual issue to be determined in the present case and one in which we invite the Court to believe the Defendant, it is submitted, irrespective of the finding made by the Court, that as a matter of objective reality the Credit Agreement failed to comply with section 61(1)(a) of the 1974 Act since it does not contain the prescribed terms. **The writer is quite willing to advance this submission by way of a preliminary point of law and construction because if he is correct then strictly no live evidence will be necessary to be heard.**
22. The key words in section 61(1)(a) are the reference to a “*document*” “*itself containing all the prescribed terms and conforming to the regulations under section 60(1)*”. This language is clear and specific and ensures that mere reference to terms contained in another document will not suffice. The document must contain the prescribed terms just as the signed document referred to in section 127(3), which might save the day, must however contain the prescribed terms.
23. The construction contended for by the Defendant is entirely consistent with the language of section 61(1) and is also supported by Professor Goode in his encyclopaedic work (cf. Goode: Consumer Credit Law and Practice Vol. 2 IIB[5.121] and see also the comments at IIB[5.247]). There the learned author draws a distinction between the language of paragraph (a) (“contain”) and paragraph (b) (“embody”). It is respectfully submitted that the Court should adopt the same reasoning in determining this issue in favour of the Defendant

irrespective of whether or not it finds that the Defendant was supplied with documents other than the Credit Agreement itself.

24. It is submitted that the first of the two issues to be determined must be answered as follows: **The Credit Agreement was improperly executed by reason of a failure to comply with the requirements of section 61(1)(a) of the Consumer Credit Act 1974.**

Is the Credit Agreement Irredeemably Unenforceable?

25. It follows as a matter of law from the determination of the first of the issues that the particular non-conformity is in relation to prescribed terms and that the Court can be satisfied that the Claimant will be unable ever to produce a document containing those prescribed terms signed by the Defendant.

26. Accordingly the determination of the second issue is also in favour of the Defendant and the Court must find that as section 127(3) of the 1974 Act precludes the granting by the Court of an enforcement order **the Credit Agreement irredeemably unenforceable.**

**David Berkley QC**

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31<sup>st</sup> May 2009