

## Consumer Credit Act 1974: Helpful Guidance on Sections 77 and 78

### Background

In yet further litigation arising from the Consumer Credit Act 1974 ('the Act'), the High Court has handed down some very helpful guidance for Lenders grappling with a mountain of section 77 and 78 requests for copy agreements. Whilst *Carey & Others –v- HSBC Bank Plc & Others [2009] EWHC 3417 (QB)* focused on section 78 requests in respect of credit card style agreements, given the similarities with section 77 it will no doubt apply to requests made regarding fixed-sum loan agreements.

### The Questions

The Court was asked to consider 6 questions relating to s.78 (and s.77) requests ('a Request'). On the basis that a Request had been made:

1. Whether a lender must provide:
  - A photocopy of the original agreement (or a copy derived directly from the original) or a reconstituted copy produced from sources other than the original signed agreement;
  - A document which (if signed) would comply with the Consumer Credit (Agreements) Regulations 1983 ('the Agreements Regulations');
  - A copy of the agreement including the debtor's name and address at the date when the agreement was made.
2. If an agreement has been varied, what the lender must provide.

3. Whether a breach of s.78 itself gives rise to an unfair relationship under s.140A of the Act;

4. If s.78 is breached, whether the Court can make a declaration of non-compliance:

- If the lender admits the breach but did not admit it before proceedings were issued; and
- If the lender denies or does not admit the breach.

5. Whether a document signed by the debtor contains the prescribed terms if:

- They are on a sheet which is referred to on the piece of paper signed by the debtor;
- Where that sheet is attached to the piece of paper signed by the debtor; or
- Where that sheet is separate from but was supplied with the piece of paper signed by the debtor.

6. If at trial the Court decides that there is no document signed by the debtor and containing the prescribed terms, whether that alone amounts to an unfair relationship under s.140A of the Act.

### The Answers

1. In order to satisfy a Request, a lender can supply a reconstituted copy of the agreement, produced from sources other than the original agreement. It need not supply a document which would (if signed) comply with the Agreements Regulations at the date the agreement was made. The document must however contain the name and address of the debtor at the date the agreement was made,

although this information can be obtained from records and need not be obtained from the original agreement.

2. If the agreement has been varied by the lender under a unilateral power in the agreement (see s.82(1) of the Act), the lender must provide the original agreement as well as the varied terms.
3. A breach of s.78 (and therefore s.77) does not itself give rise to an unfair relationship under section 140A of the Act.
4. The Court has power to make a declaration of non-compliance with s.78 (and s.77), although whether or not such a declaration is made will depend on the individual circumstances of any case. The Court will not make a declaration if the lender admits in the proceedings that it has not complied with a Request.
5. The prescribed terms are “contained” in the agreement if they are on a piece of paper stapled to the document signed by the debtor, where the document states that the “terms and conditions are attached”.
6. The fact that the Court has found, at trial, that there is no signed agreement containing the prescribed terms does not itself give rise to an unfair relationship under s.140A of the Act.

## Review

This judgment is yet more welcome news for lenders, particularly as throughout his judgment His Honour Judge Waksman QC confirmed:

- The purpose of a Request is informational, in order to advise the debtor of the state of his account and not to prove that an agreement

complies with the Act and Agreements Regulations.

- There is no need for the lender to keep the original agreement; though they will have to keep sufficient information on record. Any reconstituted agreement should be “honest and accurate”.
- If the lender provides a reconstituted copy, it should as a matter of good practice tell the debtor that it is reconstituted.
- It is good practice to produce reconstituted agreements in a similar form to the original.
- Lenders enforcing agreements based on reconstituted information will have to prove that it is “honest and accurate”.
- The fact that the lender fails to comply with s.78 (or s.77) does not affect the underlying rights and liabilities of the parties. It is a matter for the debtor whether he wishes to take a risk and not make his payments.
- Borrowers will have to substantiate claims that their credit agreements are unenforceable and it will not be sufficient for them to claim that a document supplied in response to a Request does not comply with the Act and Agreements Regulations.

## Conclusion

This decision is likely to deter claims management companies from making Requests in a bid to bring claims challenging the fundamental enforceability of loan agreements. It is yet another welcome decision for lenders and will see a large swathe of claims already at Court struck out. It remains to be seen whether claims management companies have the stomach for more.

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