

Are broker's fees "credit" or a "charge" under the Consumer Credit Act 1974?

Southern Pacific Personal Loans Ltd v. Walker
[2009] UKSC/0217

Consumer Credit – broker's fee – credit and charge distinction – documentation – total charge for credit

Wilson v. First County Trust [2001] 3 All ER 229¹
Watchtower Investments Ltd v. Payne [2001] GCCR 3055²
Humberclyde Finance Ltd v. Thompson [1999] GCCR 2141³
Wilson v. Robertsons (London) Limited [2005] 3 All ER 873⁴

The Supreme Court heard argument this month on whether a broker's fee is "credit" or part of the charge for credit. It has reserved its judgment on whether the credit agreement is totally unenforceable or not. The case was heard on **Thursday 13th May 2010** before **Lords Hope, Mance, Walker, Brown & Clark**.

The Walkers applied for a loan of £17,500 secured by 2nd charge against their home. A broker's administration fee of £875 was added to the loan amount in the financial & related particulars of the agreement. This showed the amount of credit as £18,375. The loan was regulated by the Consumer Credit Act 1974⁵ and this required compliance with the Consumer Credit (Agreements) Regulations 1983⁶. Schedule 6 requires a regulated consumer credit agreement to correctly state the "amount of credit".

Section 9 of the 1974 Act defines "credit" as "a cash loan or any other form of financial accommodation". Section 9(4) says that "for the purposes of this Act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment".

Richard Mawrey QC for the borrowers asserted that truth in lending is the fundamental principle behind the 1974 Act which distinguishes between "credit" and "charge for credit". The broker's fee is a charge for credit and not itself credit. The borrowers questioned if the APR is correct and whether the broker's fee was included in the total charge for credit calculation.

Adrian Salter, for the borrowers submitted that Regulation 4(a) of the Consumer Credit (Total Charge for Credit) Regulations 1980⁷ would be redundant if the fee was treated in the manner laid down by the Court of Appeal.

Lord Mance wanted to know whether the broker was the agent of the borrowers or the agent of the bank. **Lord Mance** puzzled over a £40 Land Registry Fee questioning who paid it, whether it was included in the charge items or affected the APR. **Lord Clarke** wanted to know if interest was payable on an £8 documentation fee paid by the borrowers.

Mr Nicholas Elliott QC for the bank said the only issue to determine was: "Is this agreement irredeemably unenforceable?" He said the Court of Appeal was correct and the answer to this question was "No". The court has to ask what is the "amount of credit" and then ask whether the agreement correctly states this. Additionally:

¹ Court of Appeal decision not the House of Lords decision www.bailii.org/ew/cases/EWCA/Civ/2001/633.html

² www.bailii.org/ew/cases/EWCA/Civ/2001/1159.html

³ www.bailii.org/ew/cases/EWCA/Civ/1996/787.html

⁴ www.bailii.org/ew/cases/EWCA/Civ/2006/1088.html

⁵ www.opsi.gov.uk/acts/acts1974/pdf/ukpga_19740039_en.pdf

⁶ SI 1983/1553 as amended by SI 2004/1482

⁷ SI 1980/51 which says that the "total interest on the credit which may be provided under the agreement"

- Section 9(4) of the 1974 Act does not preclude the charging of interest,
- Regulation 4(b) of the 1980 Regulations⁸ has no definition there of “other charges” and there is no reason to construe these words other than normally,
- Particular sums may be part of the charge for credit whether optional or compulsory payments,
- No reason why a creditor should stipulate that debtor should pay interest on items that fall within the 1980 Regulations,
- Regulation 4 does not stipulate that interest cannot be charged on items that otherwise would be a charge,
- Credit v. Total Charge for Credit – fact that interest is payable is irrelevant,
- Regulation 4(b) is so broad that it can cover interest,
- The APR here only refers to the £17,500 loan and does not include the £875 fee. (A schedule confirming this was in the court bundle).

The Court was referred to the findings in 4 other cases:

- *Wilson v. First County Trust*⁹ - the Court of Appeal decision has remained unchallenged since May 2001 that a bank states the actual total of credit and takes out charges.
- *Watchtower*¹⁰ - where a mortgage company pays off arrears on a previous mortgage and adds this to a new loan – this payment is not a charge.
- *Humberclyde*¹¹ - a non-compulsory payment may be a “charge”.
- *Wilson v. Robertsons*¹² - items financed by the creditor forming part of the “total charge for credit” must be identified and “stripped out” before the amount of credit is determined.

We expect the Supreme Court’s judgment to be handed down on this before the end of the summer term – so it is likely to appear in about July 2010.

If the appeal is allowed, then claims management companies will start to swoop down on any agreement entered into before April 2007 with broker’s fees included. They will bring claims that these agreements are irredeemably unenforceable.

Practical guidance:

- This case serves as reminder to as to the importance of complying exactly with the demanding requirements of consumer credit rules – particularly the 1983 Regulations¹³.
- From April 2008 the regulated financial limit for agreements with individuals was removed entirely – so all these agreements are now covered by these consumer credit rules.
- Although changes made by the Consumer Credit Act 2006 now always give a court the discretion whether to enforce an agreement with mistakes in it – this does not apply to any agreement taken out before 6th April 2007.
- Although section 127 (3) to (5) of the 1974 Act was repealed with effect from 6th April 2007, this is not the end of the matter. Where a regulated consumer credit agreement comes before a court with mistakes on it, a bank will still need to show it is just to make an enforcement order, address the prejudice caused to both sides, deal with culpability for the error, and be prepared to address any submissions advanced as to how the debt or interest should be reduced or time given to pay the debt.

⁸ SI 1980/51

⁹ *Wilson v. First County Trust* [2001] 3 All ER 229 Court of Appeal decision not the House of Lords decision. www.bailii.org/ew/cases/EWCA/Civ/2001/633.html

¹⁰ *Watchtower Investments Ltd v. Payne* [2001] GCCR 3055. www.bailii.org/ew/cases/EWCA/Civ/2001/1159.html

¹¹ *Humberclyde Finance Ltd v. Thompson* [1999] GCCR 2141 www.bailii.org/ew/cases/EWCA/Civ/1996/787.html

¹² *Wilson v. Robertsons (London) Limited* [2005] 3 All ER 873 www.bailii.org/ew/cases/EWCA/Civ/2006/1088.html

¹³ SI 1983/1553 as amended by SI 2004/1482