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Finance and Consumer Credit Alerter

February 2011

Cases reviewed in this Alerter:

Phoenix Recoveries (UK) SARL v Kotecha (26 January 2011)

HSBC Bank plc v Brophy (2 February 2011).

PHOENIX RECOVERIES V KOTECHA

The debtor successfully appealed the judge's decision allowing a claim by the assignee of a credit card debt. The judge had found that, on the balance of probabilities, the appropriate records had been supplied in response to the debtor's request under section 78 (1) of the Consumer Credit Act 1974 for a copy of the credit card agreement, and that the debt was therefore enforceable.

On appeal, the debtor contended that there was no credible evidence that the documents sent to him were the same as those which had formed part of the relevant agreement. He pointed to the bank's leaflet inviting him to apply for the credit card, which had clearly set out different (and lower) APRs than those in the terms and conditions which were supplied to him in response to his section 78 request. This point had not been made to the Judge, although it was discernible from the papers.

The Court of Appeal accepted that interest rates were a term of central importance in credit card agreements. There was a strong case that the applicable rates of interest that would have been specified in the terms and conditions when the agreement was made in 1998 were those in the leaflet, not those supplied in response to the section 78 request. Under section 78 (1), the creditor was obliged to set out the actual, original terms and conditions of the agreement at the time it was made. The assignee of the debt had not proved that it had satisfied that statutory obligation: accordingly, it was not entitled to enforce the agreement.

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HSBC BANK PLC V BROPHY

The debtor unsuccessfully appealed against the decision of Flaux J, dismissing his appeal from Willesden County Court. Two points were made on his behalf in response to HSBC's attempt to recover the debt outstanding on his credit card. The first was that his credit card application form was no more than an agreement to enter into a prospective regulated agreement, which was void as a result of section 59 of the Consumer Credit Act 1974.

Giving the leading judgment (with which Sullivan and Sedley LJJ agreed), Moore-Bick LJ said that he found the "invitation to treat"/section 59 argument difficult to understand, but that whichever way it was put, it could not succeed. It was clear from the application form, read as a whole, that it contained nothing more or less than an application for running account credit in the form of a credit card. By signing the application form and returning it to the bank, the debtor applied for credit and offered to be bound by the terms and conditions set out in the form. The bank accepted the offer by counter-signing the form, at which point there came into being an executed agreement within the meaning of s. 61. Section 59 has no application to an offer that may, or may not, mature into a binding agreement.

The second argument was that Clause 3 of the application form (which said that "Your credit limit will be determined by us from time to time and notified to you") failed to comply with Schedule 6 of the Agreements Regulations 1983 (setting out the prescribed terms for the purposes of sections 61(1)(a) and 127(3) of the Act, including a term which states the credit limit or the manner in which it will be determined, or that there is no credit limit).

Moore-Bick LJ decided that the expression "the manner in which it will be determined" in Schedule 6, para 3, is "deliberately broad and is apt to cover any arrangements for the determination of the credit limit that may be agreed between the parties in cases where there is neither a fixed credit limit nor the absence of any credit limit." The meaning of Clause 3 of the form was clear: it provided for the bank to determine the credit limit from time to time at its discretion by notifying the debtor of its amount. Thus, the manner in which the credit limit would be determined, within the meaning of Schedule 6, was by notification to the debtor. How the bank decided what that limit should be was a matter entirely for itself.

Furthermore, Schedule 6 imposes no obligation on the creditor to inform the debtor at the time he signs the application form of the amount of credit that will be made available to him, either by stating a figure or by providing a formula that would enable him to calculate for himself what the initial credit limit will be.

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