

Southern Pacific Securities 05-2 Plc –v- Walker

Common Sense Prevails in the Supreme Court: Yet More Great News for Lenders in Southern Pacific Securities 05-2 Plc –v- Walker and another

■ By Ian Norman, 7 July 2010

Southern Pacific Securities 05-2 Plc (in substitution for Southern Pacific Personal Loans Limited) (Respondent) –v- Walker and another (Appellants)

■ **Background**

The parties entered into a fixed sum credit agreement on 20 April 2005, which was secured on their home and whereby the Respondent loaned the Appellants the sum of £17,500. In addition to the loan a 'Broker Administration Fee' of £875 was advanced to the Appellants to enable them to pay for the arrangement of the loan. Interest was payable on the Broker Administration Fee at the same rate as on the loan of £17,500.

The credit agreement set out the 'Amount of Credit' as £17,500 (being the loan) and the 'Total Amount Financed' as £18,375 (being the loan together with the Broker Administration Fee).

It was agreed that the loan agreement was only enforceable if it contained certain prescribed terms (section 127(3) Consumer Credit Act 1974 ('the Act')). The prescribed terms for agreements such as the one entered into by the parties in this case included a term stating the amount of credit. Section 9 of the Act defines 'credit' as including "*a cash loan, and any other form of financial accommodation*" (section 9(1)) and provides that for the purposes of the Act "*an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment*" (section 9(4)).

The Appellants were in arrears on the loan payments, owing at least £40,000. On 21 June 2007, a District Judge granted a suspended order for possession of the property. They appealed to the Circuit Judge, arguing that the credit agreement incorrectly states the amount of credit and therefore, by section 127(3) of the Act, the credit agreement was unenforceable.

The Appellants' case is that the true amount of credit was not £17,500 but £18,375, which is the amount

shown in the agreement as the 'Total Amount Financed'. The Appellants succeeded in the Chester County Court on 27 April 2009, and the judge ordered the discharge of the charge registered on their property.

The Respondent appealed this decision to the Court of Appeal, which allowed the appeal on 12 November 2009. The issue in the Appellants' appeal to the Supreme Court is the correct definition of an 'amount of credit' under the Act, and whether the Act permits interest to be charged on a sum (such as the Broker Administration Fee) which is not part of the total amount of credit but rather is a charge for credit.

■ **The Judgment**

Lord Clarke delivered the judgment of the Supreme Court, which unanimously dismissed the appeal, essentially for the same reasons given by the Court of Appeal. Although the said Broker Fee was advanced to the Appellants and repayable over the term of the loan with interest, it was part of the total cost of, or charge for, the credit and therefore cannot be treated as credit.

■ **Reasons**

The Supreme Court held that as section 9(4) provides that an item entering into the total charge for credit cannot be treated as credit, the first step is to determine the Total Charge for Credit so that those items financed by the creditor can be stripped out before the amount of credit is identified.

In determining the charge for credit, the court must assess what is the true cost to the debtor of the credit provided under the credit agreement. There was no doubt that the Broker Fee was a charge for credit within the meaning of the Act. Once it was accepted that the Broker Fee was a charge for credit, it follows that it must be stripped out of the credit by virtue of section 9(4). If the Broker Fee had been included in the amount of credit, it would have fallen foul of the decision in **Wilson –v- First County Trust Limited [2001] QB 407**. The court decided that **Wilson** was correctly decided.

The court then considered whether the above conclusion was affected by the charging of interest. The Court determined that it was not so affected, as section 9(4) does not prohibit the charging of interest on items entering into the charge for credit. If the Appellants case was correct, section 9(4) should have read:

“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 (*unless interest is charged, in which case it shall be treated as credit*)”.

If the Broker Fee was part of the charge for credit, it followed that interest on such fee was also part of the charge for credit. The Court agreed with the earlier decision of Mummery LJ in the Court of Appeal; that interest is not a necessary indicator or feature of credit.

■ Summary

The above long-awaited decision will see a very large number of claims against lenders struck out or summarily dismissed by courts up and down the country. It undoubtedly reinforces the common sense approach adopted by the Court of Appeal and is yet further welcome evidence for lenders that the Judiciary is prepared to take a common sense view of some of the novel arguments being put forward by debtors in a bid to avoid liability for their debts.

A copy of the full judgment of the Supreme Court is available from the [Supreme Court website](http://www.supremecourt.gov.uk/index.html) [link to <http://www.supremecourt.gov.uk/index.html>].

For further information or advice in relation to Consumer Credit Litigation, please contact:

Ian Norman

[e-mail profile](#)

Telephone: 01844 268348

Fax: 01844 214984