Note on Consumer Credit Act 1974 s 18

See also the following, which also relate to the Consumer Credit Act 1974 s 18, 1999.004, 1999.001.NFB and 2006.001.NFB.

II

Addendum: ***National Westminster Bank PLC v Anthony John Story and Mary Pallister***

Since the above article was published in Release 49 the Court of Appeal has given judgment in the case of *National Westminster Bank PLC v Anthony John Story and Mary Pallister*, which is reported at [1999] CCLR 70. This is the first case on section 18 of the Consumer Credit Act 1974 to reach the Court of Appeal. The above article should be read subject to the following comments on the case, which is referred to as *Story*.

Story concerned an agreement between the bank and the appellants made in November 1986 by which the bank agreed to advance a total of £35,000 by three separate credit facilities: an overdraft of £15,000 to Mr Story and two separate loans, of £5,000 and £15,000, to the appellants jointly. By subsequent agreements the permitted overdraft rose to £61,572.78 and the loans to a total between them of £456,012.16. The appeal concerned the latter sum only, and the question was whether or not, under section 18 of the 1974 Act, the November 1986 agreement, so far as it related to the two loans, should be treated for the purposes of the Act as two separate agreements, one for each loan. If the answer was in the affirmative they would on the facts be regulated agreements which were improperly executed, and therefore subject to section 65(1) of the Act (consequences of improper execution).

The only ground on which it was alleged by the appellants that the two loans should be so treated was that the loan for £5,000 was a restricted-use credit agreement as defined by section 11(1) while the other loan was an unrestricted-use credit agreement as defined by section 11(2). It was held by His Honour Judge Jack in the Bristol Mercantile Court that in fact both loans were for unrestricted-use credit and that the November 1986 agreement was a single agreement that therefore did not fall within section 18. Both these findings were upheld on appeal. They involved a finding that the only reason the appellants had for treating the loans as two credit facilities rather than one was to provide what Auld LJ at 4E described as 'simple accounting for what was believed to be their entitlement to mortgage [tax] relief of £5,000'. This would not be a relevant factor for the purposes of section 18.

The decision in *Story* has some bearing on the legal meaning of section 11 of the 1974 Act, but that is not our present concern. So far as concerns section 18 the only interest of the decision lies in certain obiter dicta which reveal an uncertain judicial grasp of the intended working of the section. The purpose of the following notes is to resolve any doubts thus created. References are to the transcript of the Court of Appeal judgment.

1. Judge Jack, as quoted by Auld LJ at 3B and 8G, said 'it would be artificial to break [the transaction] down into three separate agreements and contrary to the way it was made'. This is an inadmissible argument. Section 18(2) clearly and peremptorily says that, where a part of an agreement falls within section 18(1), that part *shall* be treated for the purposes of the Act as a separate agreement. Section 18(2) is necessarily artificial because *ex hypothesi* the parties themselves made only one agreement.

2. Auld LJ at 6E repeats, without refuting it, a suggestion by counsel that section 18 could have been got round if the parties had negatived its application by an express stipulation in their agreement. This overlooks the fact that section 173(1) of the Act forbids contracting out.

3. Auld LJ at 14A-D appears to give support to the suggestion in paragraph 4.5 of the Office of Fair Trading's discussion paper of June 1995 'Multiple Agreements and section 18 of the Consumer Credit Act 1974' that an agreement is not in parts if the categories are so interwoven that they cannot be separated without affecting the nature of the agreement as a whole. This suggestion runs contrary to the plain wording of section 18 and is without any foundation.

4. Auld LJ at 14F supports Professor Goode's suggestion mentioned above in this article (page 3) that the phrase 'category of agreement mentioned in this Act' should be construed as if it said 'category of agreement mentioned in Part II of this Act'. For the reason I give there, this view is untenable. Auld LJ goes on to say: 'On that approach . . . restricted-use and unrestricted-use credit agreements . . . are separate 'categories''. They are undoubtedly separate categories on either approach.

5. Judge Jack and Auld LJ overlooked the effect of section 18(1)(a) in rendering the overall agreement a multiple agreement by reason of two distinct facts. The first (Case A) is that one part of it (the £15,000 overdraft) is a running-account agreement while the other part (the £20,000 loan) is a fixed-sum credit agreement. The second (Case B) is that one part of it (covering £12,000 of the credit advanced) is, as argued in the Comment appended to the CCLR report of the case, a restricted-use credit agreement (being a refinancing agreement falling within section 11(1)(c)), whereas the remainder is an unrestricted-use credit agreement. Section 18(2) then requires each part to be treated as a separate agreement.

In Case A this means that the £15,000 overdraft is a separate running-account agreement while the remainder is a separate fixed-sum credit agreement for £20,000. This is of no significance since overdraft facilities are excepted from having to comply with the documentation requirements of the Act.

In Case B section 18(2) means that one deemed agreement is a £12,000 restricted-use credit agreement while the other is an unrestricted-use credit agreement for £23,000. This is significant, because the first agreement is within the Act's £15,000 limit. However it is not clear on the facts whether the refinancing was intended to be effected by way of the first or the second agreement in Case A (or through a mixture of the two). Section 18(4) is then brought into play in relation Case B. It runs as follows-

> 'Where under subsection (2) a part of a multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceedings in any court relating to the multiple agreement be apportioned by the court as may be requisite.'

This means that the overall agreement must be treated *with any necessary modifications* as if it were two agreements, one a £12,000 refinancing agreement and the other an agreement for £23,000 which is not refinancing. Any sum payable under the overall agreement (by the debtors or the creditor) was required to be apportioned by the court *as may be requisite*.

By the time the case came to court it would have been clear (though it is not clear from the judgment of Auld LJ) exactly how the £12,000 had in fact been handled by the bank. It would certainly have been held back from the £35,000 borrowing. It would have been held back from drawings under the overdraft, or from drawings on the loan, or partly as to one and

partly as to the other. It is submitted that the court's apportionment under section 18(4) should have been made accordingly. If the entire holdback was from the overdraft then the documentation requirements of the Act would not bite because the £12,000 refinancing agreement would have been entirely by an overdraft excepted from those requirements. If the entire holdback was from the £20,000 loan then the loan agreement would fall to be treated as two regulated agreements, one a restricted-use credit agreement for £12,000 and one an unrestricted use credit agreement for £8,000. If it was partly the one and partly the other the result would depend on how it was divided.

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