7 July 2010

PRESS SUMMARY

Southern Pacific Securities 05-2 Plc (in substitution for Southern Pacific Personal Loans Limited) (Respondent) v Walker and another (Appellant) [2010] UKSC 32
On appeal from: 2009 EWCA Civ 1176

JUSTICES: Lord Hope, Lord Walker, Lord Brown, Lord Mance, Lord Clarke

BACKGROUND TO THE APPLICATION

The parties entered into a fixed sum credit agreement on 20 April 2005 whereby Southern Pacific Securities (the respondent) loaned Mr and Mrs Walker (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).

Under the Consumer Credit Act 1974 ('the Act') agreements predating 6 April 2007 are only enforceable if they contain certain prescribed terms (section 127(3)). 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 are in arrears on the loan payments, owing at least £40,000, and risk losing their home. 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 is 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 Court of Appeal allowed the respondent's 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.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, essentially for the reasons given by the Court of Appeal. Although the Broker Administration Fee of £875 was advanced to the appellants

and repayable with interest, it was part of the total cost of, or charge for, credit and therefore cannot be treated as part of the credit. Lord Clarke delivered the judgment of the Court.

REASONS FOR THE JUDGMENT

Section 9(4) of the Act provides that an item entering into 'the total charge for credit' shall not be treated as credit. It follows that if an item is part of the total charge for credit, it cannot form part of the amount of credit. The relevant authorities stress that the first step is to assess the total charge for credit so that those items financed by the creditor which form part of the 'charge for credit' can be identified and stripped out before the 'amount of credit' is determined (paras [**14**]-[**16**]).

The Act does not define 'charge for credit'. Following *Watchtower Investments Ltd v Payne* [2001] EWCA Civ 1159, in determining the charge for credit, the court must decide the true cost to the appellants of the credit provided under the agreement. In this case, two items were the subject of debate: the Broker Administration Fee and the interest charged on that fee. In the court's judgment there was no doubt that the Broker Administration Fee was part of the total cost of the credit. It was a fee paid to intermediary brokers and, as such, was a cost to the appellants of borrowing the £17,500. Once it is accepted that the fee was part of the total charge for credit, it follows that it must be stripped out of the amount of credit and, by section 9(4) of the Act, cannot be treated as credit. If the fee had been expressed in the agreement as part of the amount of credit so that the amount of credit was shown as £18,375, the agreement would have been unenforceable, as was held in *Wilson v First County Trust Ltd* [2001] QB 407 (paras [**18**]-[**19**]).

The court then considered whether that conclusion is affected by the fact that the respondent was lending the fee at a rate of interest. The court concluded it is not. Section 9(4) does not prohibit the charging of interest. If the fee itself was part of the total charge for credit, it follows that interest on the fee was also part of the total charge for credit and cannot be treated as credit. Contrary to the Appellants' submissions, interest is not a necessary feature or indicator of credit (paras [**20**]-[**24**]).