

Claim No: 9CC00709/MC736

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**MOLD DISTRICT REGISTRY**  
**MERCANTILE COURT**

Date: Monday, 28<sup>th</sup> February 2011

Before:

**HIS HONOUR JUDGE CHAMBERS QC**  
**(sitting as a Judge of the High Court)**

Between:

**MR KEITH HARRISON**

**Claimant**

- and -

**LINK FINANCIAL LIMITED**

**Defendant**

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**Martin Budworth** (instructed by **Watsons Solicitors**) for the Claimant

**Iain MacDonald** (instructed by **DLA Piper LLP**) for the Defendant

**Hearing date: 30<sup>th</sup> September 2010**

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**Judgment**

## HHJ Chambers QC :

### Introduction

1. The interval between the date of the hearing and the handing down of this judgment has in large part been devoted to the production of a series of written submissions by the parties as well as the preparation of this document.
2. This is a case about a credit card agreement (“the agreement”) entered into between the Claimant and MBNA International Bank Ltd now MBNA Europe Bank Limited (“MBNA”) in 1998. As matters stand, it is the common position of the parties that any indebtedness under the agreement was assigned to the Defendant in October 2008. Precisely when in October is a matter of contention.
3. The Claimant says that he is not liable for any sum standing to his debit under the agreement. In the counterclaim that sum is put at £20,269.69.
4. The reasons why the Claimant says that he is not liable under the agreement are set out in the Amended Particulars of Claim. They are said to arise from breaches of the Consumer Credit Act 1974 (“the Act”). And related legislation. Unless otherwise stated, all references to “sections” hereafter, are to sections of the Act. I summarise the alleged breaches as follows:

#### Irredeemable breaches under section 127(3)

##### Section 61(1)

##### Schedule 6 para 4 of the Consumer Credit (Agreements) Regulations 1983 (“the Regulations”)

Failure to set out a rate of interest applicable to credit card cheques and other non-card transactions and a rate for balance transfers.

The case is based upon the assertion that the Claimant received the Application Form (TB1/128) on the reverse of which were provisions headed “FINANCIAL & RELATED CONDITIONS” (TB1/129) (“the FRC”) but that neither then nor when his card was sent did he receive anything akin to the document headed “TERMS & CONDITIONS” (“the terms & conditions”) referred to in the evidence indifferently as “C1” and “NW6” (TB4/1510) (“C1”).

Although the failures of themselves constituted redeemable breaches, the need to refer over to the terms & conditions, whether provided or not, in order to ascertain the relevant interest rates, put MBNA and thus the Defendant in irredeemable breach.

##### Schedule 6 para 5 of the Regulations

Failed to state “any power of the creditor to vary what is payable”.

Redeemable breaches under section 127(1) and (2)

Schedule 1 para 22 of the Regulations

Failed to set out the default charges payable by the Claimant on breach of the agreement.

Further failed to set out a term allowing MBNA to vary the terms of the agreement except at condition 8 which provides a power to vary the rates of interest.

Sections 62 and 63 - redeemable breaches under section 127(1) and (2)

Section 62 Failed to send a copy of the terms & conditions with the application pack.

Section 63 Failed to provide a copy of the executed agreement.

Section 78(1)

MBNA and the Defendant remain in default of a properly constituted request under section 78(1).

Sections 87(1) and 88 and schedule 2 para 3 of the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561)

By a notice dated 3 October 2008 and received on 9 October 2008 the Claimant was given until 21 October to pay £3,3361.78 a period of 12 (not 14) days. Furthermore the relevant indebtedness was assigned to the Defendant before 21 October 2008 thus rendering the notice ineffective to discharge its function.

Further the sum of £3,3361.78 was overstated by £26.65.

The wrong agreement number was given.

MBNA and the Defendant have harassed the Claimant in such a way as to disentitle the Defendant from any recovery under the agreement.

5. The Defendant resists the claim on largely factual grounds. It asserts that a copy of the terms & conditions would have been provided to the Claimant prior to his entering into the agreement. The agreement was entered into by a combination of the Claimant sending in the application form dated 28 April 1998 and MBNA issuing a credit card which was received in a card holder on or about 21 May 1998 (TB1/150). All the relevant rates of interest were to be found in the FRC but reference to the terms & conditions completed the definitions of those elements of the arrangement to which

the rates applied. The consequence was that the transaction was compliant with regulation 6 and schedule 6 of the Agreements Regulations.

6. The power to vary the agreement was to be found in condition 15 of the terms & conditions.
7. Condition 14 of the terms & conditions set out the default charges.
8. The Defendant asserts that with the credit card the Claimant would have received a copy of the agreement as executed which would have contained what is to be found in C1 (TB4/1510) with or without the application details on the obverse and thus was section 63 compliant, the original provision of the terms & conditions having been section 62 compliant.
9. The Defendant asserts that the balance said to be due is correctly calculated and that any miscalculation is, in any event, irrelevant to the overall outcome of the case.
10. The Defendant denies entitlement to relief including a declaration that the agreement cannot be enforced by reason of non-compliance with section 78(1) or under section 142(1). Relief under section 140B of the Act is also denied.
11. The Defendant counterclaims for £20,269.69.
12. Thus much of the analysis will depend upon my findings on the following issues:
  - a. Did MBNA enclose a copy of its terms & conditions with the application form that it sent to the Claimant?
  - b. Did MBNA enclose a copy of its terms & conditions with the card that it sent to the Claimant in May 1998?
  - c. Did the MBNA serve a compliant default notice?
  - d. Has the Defendant complied with section 78(1)?

### **What happened?**

13. In order to answer most of the questions that I have set out one must consider the history of events during the time that MBNA (as opposed to the Defendant) had the carriage of the card.
14. It is common ground that the Claimant was a targeted subject of an extensive mail shot. In other words his name appeared upon an invitation to apply for a credit card but that name could have been among 5 million to whom such an invitation was sent.
15. Given the numbers, it is surprising that there can be no real confidence as to what the relevant terms & conditions were when the Claimant signed the application form (TB1/128) on 28 April 1998. The Claimant kept no such terms & conditions because

he says that he never received any. MBNA had no policy of retention beyond six years.

16. We do know what the FRC were both because the Claimant photocopied the form that he returned and its reverse (TB1/129) and MBNA has located its own copies.
17. An oddity of the table that appears in paragraph 7 of the FRC is that it includes Retail Transactions under the generic heading "Cash Advances".
18. The mistake does not appear in the terms & conditions first proffered as being those extant at the time of the agreement, namely C (TB1/156) or in those finally proffered and spoken to by Mrs Nicola Worden of MBNA, namely C1 (TB1/158).
19. Absorbing as was the description given by Mrs Worden of her impressive attempts to put together an archive of relevant terms & conditions, the fact is that the exercise only began in the middle of 2009 and that, until C1 made its appearance, MBNA appeared to have every confidence in C as the embodiment of the relevant terms & conditions.
20. Entirely understandably, the Defendant's evidence given through MBNA is of the "would have" variety. "*We would have sent the terms & conditions because that is what we were required to do and our systems would have been designed to do*". But there was evidence neither of the system nor its implementation.
21. The Claimant said that he did not expect his application to mature, without more, into an agreement. He expected further formality. Thus he was not particularly surprised by the lack of extensive terms & conditions, not least because he gave no thought to the matter. Indeed he admitted that at no time were terms & conditions things to which he did give real thought.
22. Despite the misleading title of the brochure "*TERMS & CONDITIONS for MBNA Cardholders*" ("the brochure"), the Claimant does not seem to have thought that these were, in fact, the governing terms and conditions. I say this because he gave sufficient consideration to the document to decide that he did not want to buy the PPI covered by the brochure.
23. Nevertheless, the Claimant kept the brochure together with a photocopy of the application form annotated with the date of its return (28/4/98) and the identity of the person who had returned it (the Claimant) (TB1/128). Also retained was the photocopy of the FRC (TB1/129).
24. In addition the Claimant kept the letter sent to him by MBNA (TB3/941) and the marketing flyer (TB3/943).
25. The Defendant pointed to the fact that, not many months previously, the Claimant had successfully applied for a card from American Express which was granted under a procedure akin to that observed by MBNA. He could not therefore have thought that

any further step or documentary involvement on his part would be required. The Claimant's response was essentially to the effect that he did not have that in mind when he became involved with MBNA.

26. The Defendant also suggested that a presently adverse outcome to proceedings in respect of the American Express card had some bearing on this case. Nothing shown to me in respect of that case shed any light one way or the other on how I should approach this case.
27. The Claimant's position was that at the relevant time he and his wife were running a reasonably successful business that was short of credit. He put in for the card in response to an unsolicited approach and was absolutely delighted when it resulted in a credit facility of £12,500 (TB1/150).
28. It was the Claimant's evidence that after an adverse business experience resulting from lack of records he kept every document that came into the house. Those documents were not always filed immediately nor were they necessarily filed by the Claimant. However the documents were immediately put into some sort of folder rather than being kept loose.
29. It is a striking feature of this case that there are in the trial bundle not just the photocopies of the application form and the FRC as well as the brochure but also the letter and the flyer. Had the terms & conditions been sent to the Claimant it is difficult to see how he might have chosen to discard them in favour of the letter and the flyer. I see no reason to suppose that either someone in the Claimant's household chose not to keep them or that they became fatally separated from the other documents.
30. If the terms & conditions were not sent, it would not be the only mistake that MBNA has made in respect of this matter.
31. As stated earlier, the table on the FRC was incorrectly drawn and escaped detection despite the scale of the run. It must now be common ground that the default notice was sent by second class post despite MBNA's original assertions to the contrary. Furthermore, I accept the contemporaneous annotation of the Claimant on the default notice (TB1/164) that the Office of Fair Trading information sheet was not included despite the assertion in the letter that it had been and Mrs Worden's evidence that she "*would find it surprising if there was no sheet*".
32. Thus one is left with a situation in which I find the following:
  - i. At the time when he was involved in acquiring a credit card from the MBNA the Claimant employed a system of retaining communications that was intended to be comprehensive.
  - ii. The system was normally implemented as described by the Claimant.

- iii. Apart from the terms & conditions, the Claimant undoubtedly retained all documents whether by way of original or photocopy that were in the application package sent by MBNA however ephemeral.
  - iv. Albeit over a lengthy period, there are instances of failure on the part of MBNA to send or to prepare documentation as required.
33. Bearing in mind that my task is to decide the case on a balance of probabilities, I find that the above circumstances indicate that the terms & conditions were not sent with the offer package. However, this view must be examined in the light of a further element.
34. It is the Claimant's case that, at no relevant time did he receive a copy of MBNA's terms & conditions. Thus he says that when on 21 May 1998 he received his MBNA card in its card holder (TB1/150) he received no documentary equivalent of that which accompanied the new card which he received on 2 November 2001 (TB1/152).
35. The Claimant described in graphic terms his excitement at receiving the MBNA card in May 1998 with its accompanying indication that he was to have a credit limit of £12,500. Might he, in all the euphoria, have mislaid another document that appeared to be of no great significance? He explained in his evidence that, whatever his assiduity in retaining documents, he was no great reader of terms & conditions.
36. Whatever the odds against a failure to send one set of terms, one would have thought that they would lengthen considerably against there being two such failures. One failure is suggestive of inadvertence. Two failures are more indicative of something systematic. There is also another aspect.
37. Were I to decide that a copy of the terms & conditions was sent with the card, this would mean that I rejected the Claimant's evidence that they were not so sent with the necessary implication that on that occasion at least he did not retain all incoming post in the way that he described. And if he did not retain all incoming post on that occasion, where does that leave his case to the effect that he retained everything that he received in April?
38. It seems to me that the logic of the situation is as follows.
39. MBNA is and was a large and sophisticated organisation which would have been expected to have systems in place to ensure compliance with all statutory requirements. So far as the sending of necessary documents was concerned, there was no reason not to have such systems and I cannot see why, regardless of the lack of evidence on the point, there should not have been some general system for the assembling of compliant packs.
40. If the terms & conditions were not sent, I think that this must have been because of inadvertence in the instant case.

41. Not knowing what the system was, I do not know how robust it was in execution.
42. Whether or not the terms & conditions were sent with the card, I think that the evidence is sufficiently strong to establish that they were not sent with the application pack. I say this because of the lengths that the Claimant undoubtedly went to by way of retaining material and see no reason why, even if the brochure gave the impression of containing the terms & conditions, the Claimant should have discarded the real terms & conditions despite retaining what was obviously marketing material.
43. I therefore proceed upon the basis that the Claimant was not sent the terms & conditions with the application pack. This constitutes a further error on the part of MBNA in addition to those that I have listed.
44. So was the error repeated when the credit card was sent?
45. In her evidence Mrs Worden gave a helpful description of how the terms & conditions would have formed a leaflet. This can be done by using the two pages at TB4/1499 and 1500. As intended, the cover of the booklet is eye catching. The title "***Terms & Conditions***" cannot be missed by anyone glancing at the document. Further down appear the words "**IMPORTANT – YOU SHOULD READ THIS CAREFULLY YOUR RIGHTS**".
46. In fact the document with which I am concerned is C1 which does not have quite the same eye catching quality as that referred to by Mrs Worden. Nevertheless the document is headed "**TERMS & CONDITIONS**" and no one seeing it could have failed to appreciate that it was of significance. I have no doubt that, if the Claimant received the document, he would have wished to retain it. It follows that, if the document was sent and not retained, this must have been due to a mistake.
47. Obviously mistakes do happen. It is possible that the Claimant, in his excitement at receiving the card, put aside a set of terms & conditions and failed to see that they were filed. However, I do not think that this was likely. The document was clearly important. It would have registered. The Claimant did retain the card holder. It is not very likely that when going to the trouble of retaining the holder he would have forgotten that there was also the leaflet containing the terms & conditions.
48. Whatever the odds, the fact is that, if something had once gone wrong with MBNA's system, it could have gone wrong again. Despite the help from Mrs Worden, I had no evidence from anyone involved with MBNA in 1998. I did have a lot of credible evidence from the Claimant whom I found to be a straightforward and reliable witness.
49. I reject the purely speculative suggestion that a set of terms & conditions might have remained in its envelope.
50. On balance, I am of the view that the terms & conditions were not sent with the card.

51. Thus I find that neither with the application pack nor with the card was the Claimant sent the MBNA terms & conditions.

### **The history thereafter**

52. From 2007 onwards series of domestic problems and rising interest rates put the Claimant in increasing difficulties over payments on the card. Then the payments stopped. Although one senses in the Claimant's evidence an attempt to secure some sort of moral high ground, were it not for the protection afforded by consumer legislation there can be little doubt that the Claimant would be liable to either MBNA or the Defendant in respect of the counterclaim. But the legislation is there for a purpose.

53. In my view, the Claimant rightly complains that, mainly by MBNA but also by the Defendant, he was hounded by telephone calls seeking payment of what was said to be due. The calls were a form of torture oppressively frequent in amount and often without attribution to an identifiable number. I am unimpressed by suggestions that all that the Claimant had to do was to seek a meeting when the position was that those who called him would not listen to what he had to say of his difficulties. Nevertheless I am not entirely impressed by the Claimant's failure to write a detailed letter in which he set out his position. I sense that the Claimant wished to engage upon his own terms albeit in no negative fashion.

54. On 3 October 2008 MBNA sent a default notice (TB4/1502). Paragraph 12 of Mrs Worden's statement dated 26 July 2010 reads as follows:

Exhibited to this Witness Statement at "NW3" is a copy of the default notice which was served by MBNA on the Claimant ("**the Default Notice**"). The Default Notice was dated 3 October 2008 and, in accordance with MBNA's standard procedure was despatched to the Claimant on 3 October 2008 by way of UK Mail's Business Class service which guarantees delivery within two days of despatch, including Saturdays. It is not, and was not in October 2008, the standard practice of MBNA to send default notices to customers by second class post. There is no reason why the Default Notice sent to the Claimant in this case would have been sent by second class post contrary to MBNA's standard procedures.

55. Investigation by the Claimant who knows about such things revealed that the notice was sent by second class post. Mrs Worden's own investigations revealed that it was "possible" that this was so. Her manner indicated that this was an elegant way of conceding the point as in my view she had to. Thus subsequent investigation contradicted a hitherto firmly held position of the Defendant that the notice had gone by a suitable post and was served in time. It was not. It was issued and sent by second class post on 3 October 2008 arriving (as was to be expected) on 9 October 2008 and

was stated to expire on 21 October 2008. Given the date of delivery, the expiry date should have been 23 October 2008. The notice was bad.

56. At about the same time as that covering the notice of default, MBNA assigned the debt said to be owed by the Claimant to the Defendant. It was one of a parcel of debts of the type regularly sold to entities such as the Defendant. There is a dispute as to precisely when the debt was assigned. I am not sure how much turns on the point. On any view the default notice was served before the assignment. Notice of the assignment was not given before the date given for the expiry of the notice and payment to MBNA within the period would have operated as a good discharge.
57. The position deteriorated and in light of a threat to proceed against the Claimant's home he took pre-emptive action and started these proceedings.
58. Insofar as the relevant history is concerned, that was not the end of the matter.
59. As indicated earlier in this judgment, MBNA had no copy of the terms & conditions applicable when the Claimant made his contract in May 1998. But during the course of this case it became accepted law that a finance house could comply with its obligation under section 78(1) of the Act to produce those terms & conditions by reconstituting them. Such an enterprise did not require a facsimile reproduction but did require a legible setting out of the provisions in question. In those circumstances the question is whether C1 is compliant with section 78(1).
60. However before addressing the question I must turn to a related matter.
61. During the hearing the Defendant's pleaded case continued to refer to C as the relevant document. But the actual position had changed with the appearance of Mrs Worden's statement dated 23 July 2010. The Defendant now seeks permission to amend its statement of case to bring it into line with the case that it ran at the trial. The Claimant opposes the application. He says that he was forced to address the document at the trial but lacked the opportunity to submit it to the analysis that resulted in his showing that C was a 'cut and paste' production derived from a number of sources.
62. I cannot say that I really understand the Claimant's position.
63. The Defendant was fully entitled to produce a reconstituted version of the terms & conditions provided that it contained all the relevant terms. The only difference between C and C1 is to be found in the increased charges for breach that are set out in condition 14.1. The unsurprising inference is that the increases were imposed after the lower charges were first imposed. Thus, given no change in the remainder of the document, if C was an accurate rendition of the terms & conditions save for the charges for breach then so will be C1. The consequence is that if the attack on C was good then it will also be good in respect of C1 and, if it was bad, then the likelihood is that it will be bad in respect of C1. I therefore cannot see how the Claimant is

disadvantaged by the amendment and permission is granted accordingly. I now return to the question of whether C1 contains the relevant terms & conditions.

64. Paragraph 18 of Mrs Worden's statement contains the following passage:

"... In April 2010 the Defendant requested a copy of the original terms and conditions which would have applied to the Credit Agreement at the time it was entered into. Initially MBNA retrieved from its template library a copy of the terms and conditions which applied to the Platinum Plus Visa credit card at a slightly earlier date to April 1998 and which therefore included different charges at condition 14.1 of the terms and conditions. A copy of these terms and conditions are attached at Exhibit "NW5" [*i.e.* C]. A copy of the terms and conditions template in use at the time that the Claimant entered into the Credit Agreement is now attached at "NW6" [*i.e.* C1]. The prescribed terms in conditions 8 and 9 of the document attached at "NW6" mirror those in the credit agreement (as they would have done at the time they were sent to the Claimant), and the remaining clauses were the standard clauses in force for all of MBNA's credit card customers at that time. I confirm that the template of the terms and conditions shown at "NW6" [*i.e.* C1] are the actual terms and conditions which applied to the Credit Agreement at the time that it was entered into."

65. The passage requires careful reading and its terms became a little clearer in the course of Mrs Worden's evidence. It seems to me that what Mrs Worden was saying was that, for the most part, during any period with which the court might be concerned in order to focus on the section 78 issue the terms & conditions were in standard form and were therefore properly described as a template. She was further saying that there was no real difficulty in identifying the template relevant to the period with which I am concerned because it was clearly in use over all of any period that one might consider to be relevant in deciding whether or not section 78 had been complied with. The variables were the interest, APR and charges figures.

66. It seems to me that the Claimant has not particularly engaged with this way of putting the case. I take the point that one would have expected there to have been reference codes that would have identified terms & conditions that were current at any particular time. I think that, as with other aspects of the Claimant's case, the Defendant has been unduly dismissive of the point. But the difficulty which it seems to me that the Claimant faces is that there appears to be no suggestion that, in some way, Mrs Worden in assembling her archive of material was random in her attribution of dates referable to various sets of terms & conditions. In fact there was no particular examination of Mrs Worden's methodology in the course of her cross-examination.

67. Despite the misplaced confidence with which she stated the facts set out in paragraph 12 of her statement in respect of the sending of the default notice, Mrs Worden was an intelligent, conscientious and patently honest witness. No good reason has been advanced to me as to why what may be called the general terms & conditions during at least part of 1998 might be expected to have been different from those in C1. The

provisions for interest and APR were derived from the FRC. There is nothing to undermine confidence in the accuracy of the amount of the charges.

68. That said, I cannot say that I regard the Defendant's approach as ideal. I think that, given the lack coding, it would have been helpful to have been shown the latest terms & conditions current before the making of the agreement as to which there could be no argument and those current at the earliest date after the agreement as to which there could be no argument. If, subject to figures, the terms & conditions were the same, it would be clear that the template was current at the relevant time and the only question would be what the relevant figures were. By contrast, I note that the "sample" terms & conditions "NW2" which accompanied Mrs Worden's statement are in a materially different form from C and C1. They also appear to bear a code "12X015". However, I have no date for them and the rates are different from those undoubtedly current when the agreement with the Claimant was made.
69. The evidential burden to show compliance with section 78 is on the Defendant. The standard is the normal civil standard, namely that on a balance of probabilities C1 contains the terms & conditions that governed the agreement with the Claimant when it was made. I find that the burden has been discharged.

### **The consequences of the findings**

70. Having gone into some detail on my findings of fact, I propose to take this aspect of the case relatively shortly.

### **Regulatory conformity of the contractual documents**

71. It seems to me that the only legitimate concern that may arise either from the FRC or the terms & conditions arises from the comprehensive attributions given to "Cash Advances" in the template that appears in the FRC. However, as a retail transaction is self-evidently not a cash advance and such transactions are distinctly addressed in the document, I cannot see that there is either ambiguity or legislative breach.
72. I am also unimpressed by the argument that there was a breach arising out of the difference of a basis point in interest charged in the first statement as against that chargeable under the agreement. As the difference operated in the Claimant's favour and the true rate was to be found in the agreement it seems to me that there is nothing in the point.
73. It further appears to me that all relevant matters were set out as and where the legislation required.
74. Although I rather doubt that that it is open to the Defendant to demonstrate that an interest rate is shown in the FRC by employing reverse engineering from the APR, it seems to me that a proper reading of the FRC does show all relevant interest rates.

### **The notice of enforcement**

75. The notice of enforcement was a statutory pre-condition of enforcement. It was a bad notice and enforcement cannot be attempted in dependence upon it. However, bad notices can often be remedied by the service of good notices and I see no reason why that should not be so in respect of credit agreements.

### **Sections 127 and 140**

76. It seems to me that in the present case the discretions to be exercised under the respective sections come to much the same and I see no reason to draw a distinction between them.

77. I start with the fact that I have found breaches of both sections 62 and 63 of the Act. Common sense suggests that one might be overly concerned with a situation in which a person who is not too interested in the contents of terms & conditions fails to receive them on one occasion but does receive them during the formation of the relevant agreement or before it comes into operation. However it also seems to me that common sense must take a different view if no set of terms & conditions is sent at any relevant time. I do not think that it can be an answer to say that the debtor was not particularly interested in reading such a document and was only too happy to receive the benefit afforded by the agreement. Not least is this so because the contents of the terms & conditions are the subject of a regulatory regime which is concerned with giving a consumer at least the opportunity of acquiring relevant information.

78. Thus, although I think it must be common knowledge that the vast majority of consumers do not read the small print of their agreements and many do not read the large print, it is perfectly clear that the legislature regards it as desirable that such documents should be provided. It seems to me that a total failure to supply the required documents will *prima facie* call for some reaction from the court. Without any further special circumstance and depending on the time that the agreement has run, I think that one would expect a reduction in the sum recoverable but not its elimination.

79. In the present case the agreement ran for some time before the Claimant encountered difficulties and he did receive copies of current terms & conditions. But I do not think that can be a full answer because once the agreement had begun to run, the Claimant was effectively locked into it.

80. The Claimant attributes many of his problems to the way in which the interest charged him rose and rose until not only could he not cope with it but the balance due to MBNA was largely, if not entirely, composed of interest and charges. He attributes the interest element to the requirements of "securitisation". Quite what that means I do not know. Whether or not the Claimant knew it, the fact is that organisations that provide credit to consumers have themselves to use credit for which they must pay. The cost of credit moves up and down. Creditors such as MBNA make their money on the margin obtainable between the cost of their borrowing and the income from their lending. I have no idea whether MBNA were or were not greedy in the amount

that they charged debtors as against what they had to pay their creditors. What I do know is that when interest rates rise it will become increasingly hard for debtors to service their borrowings.

81. That said, if a debtor gets into difficulties, I cannot see why that is a good reason to make no payment at all to a creditor. I have heard no good reason why the Claimant simply stopped paying MBNA. However, I am implementing a statutory regime and that is only one factor, albeit an important one, in my considerations.

82. Another factor in the opposite direction is the apparently cavalier manner of the sending both of the enforcement notice and the failure to include the requisite document. But that is not something to which I attribute great weight.

83. Cumulatively and damningly is what I find to be the way that MBNA and the Defendant went about recovering their debt. I am satisfied that the Claimant's description of the way that he was hounded by his creditors is essentially correct not least in the use of "non-traceable" telephone calls. It seems to me that such conduct has no proper function in the recovery of consumer debt. Whatever the strength of the suggestion that the courts should only be a last resort, I can see no legitimate comparison between a series of measured warnings which, after full opportunity for response, lead to legal proceedings and what took place. Even more is the situation to be deprecated when it was only well into this action that the Defendant was able to comply with section 78 and thus able to pursue a claim. An inability to comply with section 78 can be no excuse for conduct of which it must be supposed the sole purpose must have been to make the Claimant's life so difficult that he would come to heel. I cannot think that in a society that is otherwise so sensitive of a consumer's position this is conduct that should countenanced.

84. In the circumstances I propose to dismiss the counterclaim but to make no order for any repayment of money already paid to MBNA.

### **Conclusion**

85. No one need attend the handing down of this judgment.

86. All consequential matters including the form of the final order, unless agreed, will be dealt with at a hearing that will be an adjourned hearing of that at which this judgment is handed down. Any relevant time limit will be extended until then.