



# Carey v HSBC & Associated Claims: Have We Seen the End of Consumer Credit Campaigns?

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The May 2008 judgment in **Rankine v American Express Services Europe Ltd [2009] CCLR 3**, in which this firm acted for American Express, went a long way towards suppressing the tide of debtors attempting to write off the entire balance on their loans and credit cards on the basis of trivial technicalities. The case of **Carey v HSBC [2009] EWHC 3417 (QB)** has gone even further in delivering a serious blow to those encouraging spurious consumer credit claims.

Carey considered requests by debtors for copies of credit card agreements pursuant to section 78 of the Consumer Credit Act 1974 (“the Act”) and the consequences of non-compliance with that provision. Some, including claims management companies and certain websites, had given consumers an exaggerated expectation of what a creditor must do to comply with such a request. Carey confirms that a creditor’s duty under s78 is not as onerous as consumers have been led to believe.

## **The s78 copy**

A creditor satisfies its duty under s78 by providing a reconstituted version of the executed agreement, which may be from sources other than the actual signed agreement itself. In other words, the s78 copy does not need to be a direct physical copy such as a photocopy. Crucially, a creditor is not under an obligation to provide a signed copy of the agreement. Many debtors had been arguing that a failure to provide a signed copy entitled them to escape their obligations under their agreement, but in light of Carey, cases brought on this basis will undoubtedly fail.

The s78 copy must also contain the name and address of the debtor as it was at the time of execution of the agreement and if the agreement has been varied by the creditor under a unilateral power of variation, the creditor must still provide a ‘copy’ of the executed agreement, as well as a copy of the varied terms.

## **Consequences if a creditor is in breach of s78**

Whilst the default continues, the creditor is not entitled to enforce the agreement. In short, the creditor cannot:

- Obtain a judgment which enforces the agreements
- Obtain a charging order; or
- Obtain a bankruptcy order.

However, the contractual liability of the debtor to pay any sums due remains. Furthermore, during the s78 default period interest will still accrue and the creditor is entitled to demand payment, issue a default notice and/or report the debtor to a Credit Reference Agency.

## **“Irredeemably unenforceable agreements”**

There will, however, remain the class of agreements which the court will regard as “irredeemably unenforceable”. These are agreements, which do not contain the so called “Prescribed Terms”. The prescribed terms are set out in Regulation 6 and Schedule 6 of the Consumer Credit (Agreements) Regulations 1983 and include, for example, the number and frequency of repayments, the rate of interest and the credit limit.

It is vital that these Prescribed Terms are “contained” in the executed agreement; it is not sufficient for the piece of paper signed by the debtor merely to cross-refer to the Prescribed Terms without a copy of those terms being supplied to the debtor at the point of signature. If possible, all the terms of the agreement and the signature box should be physically attached to each other in order to avoid any potential argument on this point.

## **Section 140A: Unfair Relationship**

Claimants have also been arguing that a breach of s78 gives rise to an unfair relationship within the meaning of section 140A of the Act and entitles the court to essentially rewrite the agreement between the parties. Carey decided that this was not the case; if a creditor is in breach of s78, this does not, in and of itself, give rise to an unfair relationship within the meaning of section 140A.

## **Conclusion**

Carey is welcome clarification in the area of consumer credit law, which greatly limits the scope of claims that might be brought on the basis of s78. Indeed, this firm has found that many claimants who had commenced legal action based on arguments such as those raised in Carey have already notified the creditor of their intention to discontinue their claims. The decision should also be

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viewed as fair and sensible. As is clear from the judgments in Rankine and Carey, it would be unjust if a creditor was not entitled to recover an outstanding balance on the basis of a mere technicality. The Carey judgment will hopefully curb the enthusiasm of those encouraging consumers to bring spurious claims. In fact, the Ministry of Justice has warned that this case should be taken fully into account when advising consumers on the prospects for bringing any such claim. It also said that any evidence that businesses are misrepresenting the outcome of this case (and others) or misleading consumers will be treated very seriously.

Taking the decisions in Rankine and Carey in conjunction with the Supreme Court decision in the so called "unfair bank charges" litigation, one would hope that the era of mass consumer mobilisation against financial institutions has come to an end. Others will say that is wishful thinking and that instead claims management companies and certain websites will continue to stir consumers into pursuing such claims focusing on other parts of the Act. Only time will tell.



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