

Neutral Citation Number: [2005] EWCA Civ 956

Case No: B2/2004/2393/CCRTF

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE SOUTHPORT COUNTY COURT**  
**HIS HONOUR JUDGE HOWARTH**  
**Case Number 9002526**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27 July 2005

**Before:**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE WALLER**  
and  
**LORD JUSTICE LLOYD**

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**Between :**

**LONDON NORTH SECURITIES LTD**  
**- and -**  
**(1) TONY JAMES MEADOWS**  
**(2) MICHELLE DEBRA MEADOWS**

**Appellant**

**Respondents**

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**Adrian Palmer Q.C. and Neil Levy** (instructed by Messrs **Blatchfords**) for the Appellant  
**Giles Wingate-Saul Q.C. and Paul Brant** (instructed by Messrs **Chestnutts**)  
for the Respondents

Hearing dates: 13th and 14th June 2005  
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**Judgment**

**Lord Justice Lloyd:**

This is the judgment of the court.

1. This appeal raises issues under the Consumer Credit Act 1974 in relation to a credit agreement, incorporating a legal charge, made between Home Loans (Northern) Limited as lender and the Defendants as borrowers on 5<sup>th</sup> April 1989. Immediately upon making the agreement Home Loans (Northern) transferred the benefit of the loan and the security to another company, then called North Mount Securities Limited. That company has changed its name and is the Claimant, London North Securities Limited.
2. The loan was expressed to be of £5,750 at an APR, assuming no variation, of 34.9% per annum. The security given by the legal charge was over the Defendants' home,

49 Gosforth Road, Southport. This was already subject to two prior mortgages: the first in favour of Birmingham Midshires Building Society and the second to Pioneer Mutual Insurance Company Limited. Both of these dated from 1986 when the Defendants had bought the house. By 1989 the Defendants were in arrear on both prior mortgages, though on the second only to a very modest amount. They wanted to spend money on improving their house but they would not be able to borrow more money from a bank or building society. Accordingly they responded to an advertisement in the press for non-status lending. This led them eventually to enter into the credit agreement and legal charge and to commit themselves to additional monthly instalments of £146.94 per month.

3. They were unable to keep up the payments due on the credit agreement. The Claimant brought possession proceedings against them in 1990 and obtained a suspended possession order. Thereafter there were many applications to enforce the order and attempts to resist enforcement. The Defendants were still in possession of the premises in 2003 when for the first time they received advice that there might have been a defence to the claim for possession under the credit agreement.
4. Eventually on 4<sup>th</sup> February 2004 the original possession order was set aside and permission was given to the Defendants to defend the claim on terms. The case came on for trial in the Southport County Court, but sitting in Liverpool, in October 2004 before His Honour Judge Howarth. By then the Claimant claimed that over £140,000 was due even calculating the sums at a concessionary interest rate of 27%, but with monthly compounding, and including some £43,000 for legal costs, with £37,000 interest on them. After a four day trial the judge held that the credit agreement was unenforceable because of a number of failures to comply with requirements imposed under the 1974 Act. The Claimant appeals.
5. The evidence before the court was not what it might have been for at least two reasons. The Claimant was not the original lender and no one who gave evidence had been involved in the transaction from the point of view of the original lender, or as broker. Over fifteen years had elapsed since the time of the original transaction so that memories had faded and documents had disappeared. Evidence was given at trial by Mr Collis of the Claimant who had no relevant contemporary knowledge of the original transaction, and by Mr and Mrs Meadows who did have relevant knowledge but whose recollection was affected by the passage of time. An expert witness also gave evidence on each side. Largely therefore, the facts appear from the documents and from such inferences as can be drawn from them. There are gaps in the documentation which may be significant. There was one important issue of fact on which the judge made findings on the basis of the documents and the Defendants' evidence. The Appellant challenges those findings.

## **The Facts**

6. When Mr and Mrs Meadows bought their house in 1986 they already had one daughter, who had been born in 1984. They had a second daughter in March 1987. As a result of this increase in their family they wanted to make changes to the house, including moving the bathroom out of what could be, and had at one stage been, a third bedroom, and installing central heating. They believed that they would be able to do each of these tasks for £1,000 and therefore decided to try to borrow £2,000 for this purpose. They responded to an advertisement in the press and Mr Meadows went

to see the advertiser, a company called Phoenix Finance in Islington, Liverpool. He saw a man whose name he could not recall at the trial, to whom he explained their needs. A loan application form was filled in in his presence from the information which he provided. Later he went back to the company's offices with Mrs Meadows so that she too could sign the form. Her signature on it has the date 3<sup>rd</sup> February 1989. This application form is the first document in the case.

7. As it appears now, the figure showing the amount required has been altered from £2,000 to £5,000. The purpose of the loan is given as "home improvements". Boxes in relation to the requirement of an insurance plan are not ticked. The form gives details of the family, of the premises, of the employment and income of both Mr and Mrs Meadows and of outgoings in respect of the first and second mortgages including the monthly payments. It shows arrears of £600 as being outstanding on the first mortgage.
8. Phoenix Finance were brokers rather than lenders. They passed the application on. Several different entities feature in the documents, the inter-relationship between which is not clear. Thus at an early stage an enquiry was made of Birmingham Midshires Building Society as to the state of the mortgage account, and the reply from the society is addressed to Tony Storey Insurance of Armthorpe. This is a name which does not appear elsewhere in the documents. Other entities whose names do appear, apart from the Claimant itself, all share an address at Nelson House, Park Road, Timperley, Cheshire. These were Home Loans (Northern) itself, the lender under the credit agreement, Bridgewater Insurance Services and Murtagh Funding Limited.
9. The response from Birmingham Midshires revealed that on 15<sup>th</sup> February 1989 the arrears amounted to £2,277. A similar enquiry of the second mortgagee showed arrears of £132. A valuation of the property was obtained from a Liverpool firm called Venmore, Thomas & Jones, who gave a value of £45,000 to £47,000.
10. All this was going on without reference to Mr and Mrs Meadows. In March a batch of documents was sent to them for signature. There may have been a covering letter with the documents but if it ever existed it is now lost. A copy of the unexecuted credit agreement should have been sent to Mr and Mrs Meadows containing a notice in the prescribed form indicating their right to withdraw from the prospective agreement: see section 58 of the 1974 Act. This should have been sent so as to arrive at least seven days before the copy for execution arrived. It is not altogether clear that an advance copy was sent but the claim is not defended on the grounds of failure to comply with the Act in that respect.
11. The documents which do survive, signed by Mr and Mrs Meadows, include some which require close attention. All of them have some manuscript insertions, some of which clearly were written in by Mr or Mrs Meadows. Others were written in by other people and the judge held, accepting evidence from Mr and Mrs Meadows, that some of the manuscript insertions were put in after they themselves had signed the documents. Before they signed the documents an important telephone call took place. First, we will describe the documents so as to put the telephone conversation in context.

12. The first of the documents, as set out in the bundle at any rate, deals with the occupation of the property and no particular point arises on that. The second is a declaration as to the Defendants' financial position, saying among other things that once the arrears on the first mortgage have been cleared they will be able to afford monthly repayments of £146, which was the instalment under the intended credit agreement, in addition to the first mortgage payments of £205 per month.
13. Then there are two documents of particular importance, both relating to an insurance premium, which we set out in full. The first is as follows:

“FROM: Mr and Mrs T J Meadows  
49, Gosforth Road  
Southport  
Merseyside

TO: HOME LOANS (NORTHERN) LIMITED

DATE: 13/03/89

Dear Sirs

We acknowledge that you have offered us an advance in the sum of £5,750 and that your insurance premium totalling £750 is now due and payable.

We have requested that you agree to us deferring payment of your insurance premium until after the time that the loan is completed and we confirm that you have agreed to our request provided that we make arrangements so that your insurance premium is then paid.

We acknowledge that we have agreed to your suggestion and that we have today authorised you to split the advance so that you receive a cheque equal to your insurance premium which will be paid on completion of the loan.

Yours faithfully”

14. The next is in these terms:

<u>Name 1</u>	<u>TONY JAMES MEADOWS</u>
<u>Name 2</u>	<u>MICHELLE DEBRA MEADOWS</u>
<u>Address</u>	<u>49 GOSFORTH ROAD</u>
	<u>SOUTHPORT</u>
<u>Postcode</u>	<u>PR9 7UA</u>

Payment Protection Plan  
Premium Deduction Mandate

On completion of the loan arranged for us please deduct from the advance the sum of £750 (in words) SEVEN HUNDRED & FIFTY POUNDS ONLY

and remit this to Bridgewater Insurance Services of Nelson House, Park Road, Timperley, Cheshire, in respect of the single premium payment for the loan repayment insurance policy we have requested.

Signed 1

Signed 2

Date”

15. The next document is addressed to Nelson House but not to any particular entity. It is signed by Mr and Mrs Meadows but it is more or less in blank. It is in effect a mandate authorising discharge of certain liabilities out of the advance, once it has been completed. The form of letter sets out a number of headings or categories. Nothing has been inserted under any of these categories except in manuscript the word “arrears” followed by a question mark. Then there is a certificate by the witness to the execution of the credit agreement as to the identity of Mr and Mrs Meadows, with some supporting documentation. Last there is the credit agreement incorporating the legal charge, signed by Mr and Mrs Meadows and witnessed. It is clear that this was signed on 13<sup>th</sup> March 1989, like all the other documents, but that date does not appear on it. The date which does appear on it, 5<sup>th</sup> April 1989, is said to be that of signature by or on behalf of the lender but in fact it never was signed on behalf of the lender.
16. Thus, between the time when the Defendants signed the application form which is the first document and the date when they received these documents on or shortly before 13<sup>th</sup> March, the amount of the loan had been changed from its original £2,000, first of all to £5,000 by the amendment to the application form, and then to £5,750. The reason for these changes was to allow for repayment of the arrears under the prior mortgages and the payment of the insurance premium of £750. Until Mr and Mrs Meadows received these documents they knew nothing of this and so the figures came to them as a surprise. Mr Meadows gave evidence about what happened next both in his witness statements and in his oral evidence in cross-examination. He put it somewhat differently in oral evidence from what he had said in the witness statements. The gist of his oral evidence was that he telephoned Phoenix Finance and spoke to the man whom he had seen originally when he went to their offices, who said that someone would call him back. Someone did call him and that someone was called Tony. The purpose of Mr Meadows’ call was to ask about the size of the loan and about the insurance policy, both of which were news to him. Tony told him that the arrears on the prior mortgages had to be cleared off before the loan could be made. He was told that the insurance policy was something which he required in view of the circumstances and his situation. He was also told that the loan would be the larger so as to allow for these payments to be made.
17. In his judgment at paragraphs 28 and 29, the judge found that Phoenix Finance had put Mr Meadows in touch with a Tony at Nelson House, to whom he made a phone call. That does not fit exactly with Mr Meadows’ oral evidence of which we have the benefit of a transcript, unlike the judge who, giving judgment at the end of the four days of the trial, was working only from his own notes. We have summarised the gist of Mr Meadows’ oral evidence already. He accepted in evidence that he was not given the surname of the man called Tony who telephoned him. He believed that the caller was at Nelson House, an address that he already knew from the documents, and said that he sounded as if he was in charge there. He later came to suppose that the

Tony who had called him was Tony Murtagh, who was the man behind the brokerage firm Murtagh Funding.

18. The judge inferred that the person at the other end of the phone call was indeed Tony Murtagh. A draft witness statement had been prepared in respect of Mr Murtagh on behalf of the Claimant but this had not been signed. Mr Murtagh did not attend to give evidence, and the witness statement was withdrawn from the trial bundle and no reliance was placed on it in any way at the trial. The Claimant's witness Mr Collis said he had known Mr Murtagh and had contacted him with a view to his giving evidence but had then lost touch with him so that he could not be called.
19. The judge also found that Mr Murtagh was not only conducting a credit broking business through Murtagh Funding but was also controlling the business of Home Loans (Northern) and the business of Bridgewater Insurance Services, all at the same premises, Nelson House. On the Appellant's behalf Mr Palmer Q.C. challenges the judge's inference, first of all that the Tony who telephoned Mr Meadows was Mr Murtagh, and secondly that Mr Murtagh was acting on behalf of Home Loans (Northern).
20. Mr Meadows also said that in the course of the telephone conversation Tony told him that he himself would be paid by way of commission out of the insurance premium. He said that Tony did not explain what the policy was for except to the extent that he corrected an impression that Mr Meadows had gained that the policy was for the lender's protection. The confusing words "your insurance premium" in the letter quoted at paragraph 13 may have contributed to this impression. Mr Meadows said that he was put right on that and that the policy was for the protection of himself and his wife as borrowers but he was given no clue as to what protection the policy would give and he was at no stage sent a copy of the policy or terms of the cover. He did however say that he got the impression that taking out the policy was all part of the deal although he accepted that he did not at any time in this conversation say "Do I have to take out the insurance in order to get the loan?". The judge said that this was not surprising, given that Mr Murtagh who was in control of the transaction said that it was through the insurance premium that he himself would get paid. The judge was satisfied that the transaction would not have proceeded if the insurance premium had not been paid. On that basis he held that Mr Murtagh was acting for Home Loans (Northern) when making the telephone call to Mr Meadows, and that by virtue of the contents of the telephone call and of the documents he, on behalf of the lender, required the Defendants to pay the insurance premium as a term of the transaction. Mr Palmer challenges that finding and the conclusion.
21. The credit agreement specifies the amount of the loan as £5,750, says that the total amount payable is to be paid by 180 consecutive monthly payments of £146.94, which in total would amount to £26,450, gives the APR as 34.9% assuming no variation and the monthly rate of interest assuming no variation as 2.527%. It reserved the right to change the rate of interest on one month's written notice. The first instalment was due one month after the date of the agreement and subsequent instalments on the corresponding day in each successive month. By Clause 7(b) where the credit agreement was secured by a second mortgage any first mortgage arrears, second mortgage and subsequent charges must be discharged on or before completion of the loan. The agreement incorporates general terms and conditions. Under Condition 5, if any instalment or part is not paid on the due date then the

instalment or part outstanding is to bear interest at the monthly rate specified until payment or until paragraph 6 applies. Under paragraph 6, if any instalment or part remains unpaid for 21 days, then on the 22<sup>nd</sup> day the whole balance of the total amount payable, the £26,450, was to become due and payable, less any statutory rebate of interest, and to bear interest at the monthly rate from the 22<sup>nd</sup> day until payment. By paragraph 7, all legal and other charges incurred in protecting or enforcing the agreement were to be repayable by the borrower on a full indemnity basis and were also to bear interest at the monthly rate specified. A legal charge was executed at the same time but that does not call for any particular comment.

22. On 5<sup>th</sup> April 1989, Home Loans (Northern) transferred the transaction to North Mount Securities, the Claimant, on payment of £5,750, which was in fact disbursed directly by North Mount Securities via the solicitors acting, Brand Montague. It is not clear how early in the history this transfer was contemplated. There is an internal document headed “non-status case analysis assessment” in the bundle of documents in which Home Loans (Northern) is identified as introducer but no lender’s name is given. According to a cheque requisition form of Brand Montague, they received a cheque for £5,750 from North Mount Securities, with instructions to pay it out as follows: £2,484 to Birmingham Midshires Building Society, £132.94 to Pioneer Mutual Insurance Company, £750.00 to Bridgewater Insurance Services, there described as a third mortgagee, and £2,383.06 to the borrowers. The documents include a letter from Brand Montague to the building society enclosing a cheque for the sum mentioned to clear the outstanding arrears and giving notice of the charge which was described incorrectly as a second charge. There is also a letter to Pioneer Mutual enclosing a cheque for £132.94 describing it as the amount required to redeem their charge in full. That may be because the normal practice would have been to require the second mortgage to be paid off in full, rather than for only the arrears to be paid off and this may be a standard form of letter. There is also a letter addressed to Bridgewater Insurance Services, enclosing the cheque for £750. Consistently with the description of Bridgewater as a third mortgagee, the letter describes the cheque as the amount required to redeem Bridgewater’s charge in full.
23. On the same date there is a letter from Brand Montague to Venmore Thomas & Jones, the valuers, referring to the valuation that they had provided in respect of the mortgaged property for the borrowers and describing it as “via Murtagh Funding Limited” of Nelson House. The letter refers to the applicants having included the valuation in support of the application, which appears to be somewhat of a misrepresentation, since so far as appears the borrowers never saw the valuation, which was obtained for the lender. The valuers were asked by this letter to confirm their valuation and in effect to accept responsibility for it, in favour of Home Loans (Northern). Also on 5<sup>th</sup> April, Brand Montague wrote to Murtagh Funding in respect of their lender client North Mount Securities on the advance to Mr and Mrs Meadows, reporting that the loan was completed on that day and reporting the distribution of the loan in the manner that we have mentioned. The letter concludes “your fees are nil”.
24. Brand Montague then took steps to have North Mount Securities registered as proprietor of the charge. Pioneer Mutual responded to Brand Montague’s letter by pointing out that the sum paid was not the sum required to redeem the mortgage and they enclosed a redemption statement but that was plainly a mistake and nothing

followed from that. The documents do not include any letter from Bridgewater Insurance commenting on the mistaken reference to them as being third mortgagees.

### **The issues in the proceedings**

25. The points taken in the Defence were as follows. First, it was said that the credit agreement was not properly executed because of its failure to comply with section 61 of the Act and with the Consumer Credit (Agreements) Regulations 1983, and was unenforceable by virtue of section 65 of the Act because it failed correctly to state the amount of credit. There are two aspects to this point: the deduction of some £2,600 in respect of the arrears and the deduction of £750 in respect of the insurance premium. It was said that both of these formed part of the total charge for credit. Next, it was said that the agreement was an extortionate credit bargain within the meaning of sections 138 and 139 of the Act and was subject to being reopened by the court. Next, the point was taken that by reason of the application of the interest rate compounded on interest, charges and expenses it amounted to a penalty and was unenforceable. Two further points arose in the course of the proceedings. Because the credit agreement was not signed by the lender, it was only enforceable with the court's permission. The Claimant applied for such permission. Conversely the Defendants, in case they failed on their other points, applied for a time order under section 129 of the Act.
26. We should mention that, on the Defendants' behalf, Mr Wingate-Saul Q.C. did not accept that the terms of the credit agreement or the legal charge do entitle the Claimant to charge compound interest. The judge did not need to decide that issue and we will say no more about it.
27. In the Reply, the Claimant took issue on all the Defendants' defences to the claim. It asserted that the payment of the arrears and the insurance premium were truly part of the credit, not of the cost of credit, and alleged that the loan had three purposes, namely to pay the mortgage arrears, to pay the single premium for the insurance policy and to pay the balance to the Defendants to be used for the home improvements. It denied that the agreement was an extortionate credit bargain and relied on a number of matters in that respect and other matters for saying that it would not be just to reopen the agreement. It denied that any provisions of the agreement amounted to a penalty.
28. In his judgment, delivered on the afternoon of the fourth day of the trial, evidence having concluded on the third day and submissions on the morning of the fourth day, the judge correctly identified the questions he had to decide, and proceeded to deal with them one by one. He held first that the amount paid to clear the arrears was part of the total charge for credit, not part of the credit itself, and that that had the result that the agreement was unenforceable and the claim must fail. He went on to deal with the other points and first held, for similar reasons, that the £750 spent on the insurance premium was also part of the total charge for credit. That question required him to consider a number of provisions of regulations made under the Act, which we will in turn consider. It is in that context that the principal issue of fact in the case arises. He then proceeded to deal with the question of extortionate credit bargain and held that, if the loan had not been altogether unenforceable, he would have held that it was an extortionate credit bargain and was subject to being reopened by the court. In turn, he held that the provisions of the agreement as regards interest on default

amounted to a penalty. He said that, had there been no other point in the case than the lender's failure to sign the credit agreement, he would have granted permission to the lender to enforce the agreement under section 127 of the Act, on terms as to costs, and also that he would have made a time order in favour of the borrowers under section 129 of the Act on terms which he indicated.

29. The Appellant challenges the judgment on all points which the judge decided, or indicated that he would have decided, in favour of the borrowers.
30. The first question that arises, therefore, is that of the correct statement of the amount of credit. We will deal first with the arrears in this context, and then with the insurance premium.

### **Credit or cost of credit: the arrears?**

31. We take as a convenient starting point the summary of the relevant legal provisions in the judgment of Clarke LJ in *Watchtower Investments Limited v. Payne* [2001] EWCA Civ 1159 at paragraph 60, a case with similarities to the present on the facts, on which the Claimant relies.

“60. The steps which lead to that conclusion are these:

- i) By s 60(1) of the Act the Secretary of State was required to make regulations as to the form and content of documents embodying regulated agreements. By the combined effect of s 60(1) and the Consumer Credit (Agreements) Regulations 1983 a regulated agreement must state the amount of the credit and the rate of the APR.
- ii) By s 61(1)(a) a regulated agreement is not properly executed unless a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under s 60(1) is signed in the prescribed manner both by the debtor and by or on behalf of the creditor.
- iii) By s 65(1) an improperly executed agreement is enforceable only by an order of the court.
- iv) Section 127 regulates the powers of the court to make enforcement orders under s 65(1) and by s 127(3) prohibits the making of such an order if s 61(1)(a) is not complied with unless a document itself complying with all the prescribed terms of the agreement was signed by the debtor.
- v) For this purpose the prescribed terms of the agreement are those prescribed by reg 6(1) of the Consumer Credit (Agreements) Regulations 1983, which for this type of credit provides that the prescribed terms are those set out in Column 2 of Sch 6. They include a term setting out the amount of the credit.

- vi) It follows that unless either the agreement itself or some other document signed by the debtor correctly sets out the amount of the credit the court cannot make an enforcement order under s 65(1) and the agreement is unenforceable.
- vii) By s 9(4) an item entering into the total charge for credit shall not be treated as credit. It follows that, if the amount paid to discharge the arrears on the first mortgage was part of the total charge for credit, it should not have been included in the amount of credit in the document signed by the debtor. The amount of the credit should have been shown net of the total charge for credit.
- viii) The amount of the credit was in fact simply shown as £11,300, which it is common ground included the sum paid to discharge the arrears because the arrears were discharged out of the £11,300. The amount of the credit was thus not shown net of the amount paid by way of arrears. It follows that the agreement is unenforceable if the amount so paid is part of the total charge for credit.
- ix) S 20(1) provides:

‘The Secretary of State shall make regulations containing such provisions as appear to him appropriate for determining the true cost to the debtor of the credit provided or to be provided under an actual or prospective consumer credit agreement (the “total charge for credit”) and regulations so made shall provide

  - (a) what items are to be treated as entering into the total charge for credit, and how that amount is to be ascertained;
  - (b) the method of calculating the rate of the total charge for credit.’
- x) By reg 3 of the TCC Regulations the total charge for credit is defined as the total of the amounts determined as at the date of the making of the agreement of such of the charges specified in reg 4 as apply in relation to the agreement but excluding the amount of the charges specified in reg 5.
- xi) By reg 4 the ‘total charge for credit’ includes:

‘(a) the total of the interest on the credit which may be provided under the agreement; and

(b) other charges at any time payable under the transaction by or on behalf of the debtor or a relative of his whether to the creditor or any other person.’

- xii) It follows that if the part of the credit used to discharge the arrears on the first mortgage was a charge payable under the transaction by or on behalf of the debtor to the creditor or any other person the agreement is not enforceable and the court has no discretion to make an enforcement order.”

32. In *Watchtower* the intending borrower was known to be in arrears under a prior mortgage and it was a requirement of the credit agreement that the arrears be paid off. The Court of Appeal held on the facts of that case that the arrears were part of the credit, not part of the total charge for credit, because on the facts it was an objective purpose of the agreement that the arrears should be paid off out of the loan. By contrast in *McGinn v. Grangewood Securities Limited* [2002] EWCA Civ 522, a different conclusion was reached on different facts. The arrears were modest (£360) and, although it was a term of the agreement that prior arrears be paid off, there was nothing passing between the parties in advance of the agreement which suggested that they should or would be paid out of the loan. So far as the intending borrower was concerned she was unaware that there were any arrears. The arrears amounted to no more than one monthly instalment and it is unclear to what extent it was late in payment. It seems to us that that was a case on very special and unusual facts. The present case is much more like *Watchtower* than *McGinn*.
33. Both of those cases were cited to the judge. He took from *Watchtower* a reference of Peter Gibson LJ at paragraph 45 to the proposition, which is derived from an earlier decision of the Court of Appeal *Huntpast Limited v. Leadbeater* [1993] CCLR 15, that “The court is entitled to look at the reality of the position” in determining whether something which is payable as a condition of the credit agreement is a charge forming part of the true cost of the credit or rather as part of the credit itself. He relied on the fact that, not surprisingly, if Mr and Mrs Meadows had had any choice they would not have borrowed from Home Loans (Northern) at 34.9% the sum required to pay off arrears due to the prior mortgagees under transactions in relation to which a much lower interest rate was payable. He relied upon the proposition that, while in theory the Defendants could have chosen not to borrow anything, and they did think that they might be able to refinance the debt not too far in the future, in practice they did not have a choice in relation to the transaction. He relied on the fact that repayment of the arrears was never discussed at all except in the telephone conversation between Tony, whom he held to be Mr Murtagh, and Mr Meadows. He expressed his conclusion in the following terms at paragraph 49.
- “It is plain in my judgment that the reality of the situation is that the Meadows, who were very obviously desperate, as many people are who seek non-status loans to pay for home improvements of the nature which I have said. There is no doubt on the facts, in my mind, that the agreement is deficient. The situation is that this in reality was part of the cost to the debtor of the credit provided, a credit which in fact was some £2,300.”
34. It seems to us that, with respect to him, the judge did fall into error on this aspect of the case, by underestimating the significance of the conversation between Mr Meadows and Tony about the increased amount of the loan and the need to clear off the arrears. It may not have been prudent for the Defendants to accept the loan on terms that its amount would include sums needed to pay off the arrears, but those

were the only terms on which the loan was available to them and its prudence or otherwise is a different question.

35. The loan application form at the outset stated that there were some arrears although only in relation to the first mortgage and at a significant under- estimate. The credit agreement made it a requirement that all prior arrears be cleared off and it is not in dispute that Mr Meadows was told by Tony on the telephone that the arrears did have to be paid and that the loan amount had been increased so as to provide for that. It was not plausible that the Defendants could have cleared the arrears from any other source, given that they needed to borrow £2,000 from Home Loans (Northern). It seems to us that the correct view is that the Defendants did agree, after the explanation given in the telephone conversation and by signing the documents, that the arrears should be paid off and that the loan would provide the sums that were necessary for this purpose. On that basis it seems to us that the right conclusion is that payment of the arrears became, though it had not previously been, one of the objective purposes of the transaction and that accordingly the sum of around £2,600, which was in fact paid for the arrears, was part of the credit, not part of the cost of the credit, and therefore not part of the total charge for the credit.
36. In coming to the opposite conclusion as he did, it seems to us that the learned judge did not draw all the assistance that he might have done from the judgments in *Watchtower* and in particular from paragraph 52 in the judgment of Peter Gibson LJ, where he said this:

“The court must consider all the circumstances including the documents relating to the agreement and may well have to ascertain objectively the purpose of the borrowing. For the reasons already given I reject Mr Hodgkinson’s submission that it is only permissible to look at the contractual documents. The purpose of the court’s consideration is to arrive at what in reality is the true cost to the debtor of the credit provided.”
37. Applying that test, Peter Gibson LJ at paragraph 54, having reviewed the evidence, said that in those circumstances “It is inevitable to conclude that the objective purpose of the loan at least included the repayment of the arrears”. At paragraph 67 Clarke LJ agreed with Peter Gibson LJ that the discharge of the arrears on the first mortgage was plainly part of the purpose of the loan and was not part of the true cost of the loan. Likewise, in our judgment, the discharge of the prior mortgage arrears was part of the purpose of the loan in the present case by the time the Defendants signed the agreement.
38. Mr Wingate-Saul submitted that, at least as regards the small arrears under the second mortgage, the case was similar to *McGinn*, and the arrears ought to be regarded as part of the cost of the credit. That would be an artificial distinction, given that, by the time of the telephone conversation, it was known that there were arrears under both mortgages and the lender’s position was that both sets of arrears had to be paid off. There is no indication that any distinction was made in the telephone conversation between one amount of arrears and the other. He also submitted that the lender ought to have documented the position, to show the change in the purpose of the loan, by having an amended application form prepared and signed, giving the payment of arrears as part of the purpose of the loan. There are no doubt many respects in which

the documentation of this transaction might have been improved, even apart from matters governed by the statutory provisions. But it does not seem to us that it was necessary to go through that formality once the position had been explained to Mr Meadows on the telephone and he had accepted it.

39. For those reasons we respectfully disagree with the judge's conclusion that the amount of credit was wrongly stated by failing to deduct the amount used to pay off the arrears.

#### **Credit or cost of credit: the insurance premium?**

40. It does not follow that the same is true in respect of the £750 used to pay the insurance premium. Both the facts and the relevant law differ. It is a puzzling item. It is described as being for a payment protection plan, or "loan repayment insurance policy". It was paid to Bridgewater Insurance Services, but there is no indication that they are insurers and no one has ever identified the insurer in respect of the policy. Indeed no one has ever disclosed or referred to a policy at all. The premium deduction mandate refers to the Defendants as having requested the policy but that belies the true facts. They never requested any policy, nor did they want one, especially not at a premium of £750. The proposition that they had requested the policy was set out in the letter they were invited to sign and which they did sign following the telephone conversation with Tony (see paragraph 13 above). In the course of that conversation Mr Meadows was told that he needed the policy but he was told nothing at all about what the terms of the policy were. There is no indication of what protection, if any, it gave in what events and to whom. In practice it seems to have afforded no protection to the borrowers when they got into difficulty in making payments under the loan. If the person who spoke to Mr Meadows about the policy had been a truly independent insurance broker he would have had, first, to have found out a great deal more than he knew about Mr and Mrs Meadows' circumstances and needs and, secondly, to have explained a great deal more than he did about the product which he recommended.
41. The judge held in this respect that the conversation that Mr Meadows had with Tony Murtagh, that he was not in the position of an independent mortgage or insurance broker and that accordingly the conversation, so far as it related to insurance, did not amount to a recommendation by an independent broker to his client that he ought to take out such a policy. He held that Mr Murtagh was in a position of conflict of interest "putting it in fairly neutral terms". Mr Murtagh was setting up the deal and would only get paid for it if he could get a commission on the policy and he made no bones to Mr Meadows about that fact. The judge found that the transaction would never have gone through if Mr and Mrs Meadows had refused to take up the policy or to borrow the £750 for that purpose. A material difference between this sum and the amount required to pay off the arrears is that the Defendants already owed the arrears and by paying them off, albeit at disadvantageous terms as regards interest and default provisions, at least they obtained some value. So far as the insurance premium is concerned it is all together unclear what value they obtained and they were under no prior obligation to pay this sum of money.
42. In order to decide whether this sum forms part of the total charge for credit or part of the credit it is necessary to consider various provisions of the Consumer Credit (Total

Charge for Credit) Regulations 1980, as they stood in April 1989. We will first set out the relevant regulations.

**“3 Total charge for credit**

For the purposes of the Act, the total charge for the credit which may be provided under an actual or prospective agreement shall be the total amounts determined as at the date of the making of the agreement of such of the charges specified in regulation 4 below as apply in relation to the agreement but excluding the amount of the charges specified in regulation 5 below.

**4 Items included in total charge for credit**

Except as provided in regulation 5 below, the amounts of the following charges are included in the total charge for credit in relation to an agreement

- (a) the total of the interest on the credit which may be provided under the agreement; and
- (b) other charges at any time payable under the transaction by or on behalf of the debtor or a relative of his whether to the creditor or any other person; notwithstanding that the whole or part of the charge may be repayable at any time or that the consideration therefor may include matters not within the transaction or subsisting at a time not within the duration of the agreement.

**5 Items excluded from total charge for credit**

(1) The amounts of the following items are not included in the total charge for credit in relation to an agreement

.....

(c) any charge relating to an agreement which is an agreement to finance a transaction of a description referred to in paragraph (a) or (b) of section 11(1) of the Act, being a charge which would be payable if the transaction were for cash;

.....

(j) a premium under a contract of insurance the making or maintenance of which is not required by the creditor as a condition of the making of the agreement.”

43. Thus the first question is whether the amount in question is a charge specified in regulation 4. If it is, it is then necessary to consider whether it is taken out of the total charge for credit by being included in regulation 5(1).

44. In order to understand the application of regulation 4(b) it is necessary to set out the meaning of “the transaction”, which is given by regulation 1(2):

““transaction”, except in regulation 5(1)(c) below, means an agreement, any transaction which is a linked transaction by virtue of section 19(1)(a) of the Act, any contract for the provision of security relating to the agreement and any other contract to which the debtor or a relative of his is a party and which the creditor requires to be made or maintained as a condition of the making of the agreement.”

The same regulation defines “agreement” as a consumer credit agreement.

45. Thus the transaction, in regulation 4(b), means the consumer credit agreement and also any other contract to which the debtor is a party which the creditor requires to be made as a condition of the making of the consumer credit agreement. The judge’s findings amount to holding that the creditor, Home Loans (Northern), did require the debtors to make the insurance contract as a condition of making the consumer credit agreement. On that basis, the insurance policy is part of the transaction within this definition. It would follow that the sum payable under the insurance policy, namely the premium, is within the terms of regulation 4(b) as a charge at any time payable under the insurance policy, which is part of the transaction, by the debtor, not to the creditor but to any other person, namely the insurer. The case was not argued before the judge with reference to regulation 4(b) in that way but the judge came, in effect, to the same conclusion by reference to regulation 5(1)(j) to which we will come. The judge’s conclusion was that the lender did require the borrowers to enter into the insurance policy.
46. It would follow that the insurance premium is included in the total charge for credit, unless it is excluded by regulation 5. Two paragraphs, both quoted above, were relied upon in this context. One of them is paragraph (j) under which, if the making of the insurance contract was optional, then the premium is not part of the total charge for credit. In any case where the insurer is not the same as the creditor, that proposition is the exact converse of 4(b) and there are therefore almost no cases in which a charge could fall within 4(b) and be excluded from it by 5(1)(j). It may be consistent with that, that since then when the regulations were amended, paragraph (j) has disappeared. We need not pay further attention to it other than to note that it is one of a series of six paragraphs, each of which refers specifically to premiums under contracts of insurance of one kind or another or in one set of circumstances or another. At least it is clear to what type of payment those paragraphs relate.
47. It is not at all so clear to what type of payment paragraph (c) relates and whether it can relate to an insurance premium. In order to examine the ambit of paragraph (c) it is necessary to note that the word “transaction” does not here have the same meaning as is given by regulation 1(2). Rather its meaning is given by the cross reference to section 11(1)(a) and (b) of the Act. Section 11(1) and (2) are as follows:

**“11 Restricted-use credit and unrestricted-use credit**

- (1) A restricted-use credit agreement is a regulated consumer credit agreement

- (a) to finance a transaction between the debtor and the creditor, whether forming part of that agreement or not, or
- (b) to finance a transaction between the debtor and a person (the “supplier”) other than the creditor, or
- (c) to refinance any existing indebtedness of the debtor’s, whether to the creditor or another person,

and “restricted-use credit” shall be construed accordingly.

(2) An unrestricted-use credit agreement is a regulated consumer credit agreement not falling within subsection (1), and “unrestricted-use credit” shall be construed accordingly.”

48. Counsel agreed that, in terms of the classification in section 11, the present credit agreement has features which bring it within three categories. In respect of the payment of the arrears the case is within section 11(1)(c). In respect of the home improvements, there being no requirement as to how the borrowers would use the £2,300 odd which was paid to them, it falls within section 11(2) as unrestricted-use credit. So far as the insurance premium is concerned it falls within section 11(1)(b) because it was to finance the transaction between the debtor and the insurer in respect of the payment of the premium.
49. In this context it is also necessary to note the provisions of section 18 of the Act dealing with multiple agreements, under which a consumer credit agreement which has features which bring it within more than one category of agreement mentioned in the Act may fall to be treated as including several separate agreements. Section 18(1) to (3) are as follows:

**“18 Multiple agreements**

- (1) This section applies to an agreement (a “multiple agreement”) if its terms are such as-
- (a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or
  - (b) to place it, or a part of it, within two or more categories of agreement so mentioned.
- (2) Where a part of an agreement falls within subsection (1), that part shall be treated for the purposes of this Act as a separate agreement.
- (3) Where an agreement falls within subsection (1)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly.”

50. On that basis, and given that the several categories in section 11(1) and (2) are different categories for this purpose, it appears that the agreement between Home Loans (Northern) and Mr and Mrs Meadows falls to be regarded as three separate agreements, one within section 11(1)(b) as regards the £750, another within section 11(1)(c), as regards the arrears, and the rest within section 11(2).
51. Mr Palmer submits that whether regulation 5(1)(c) applies depends on whether or not the amount in question is paid for in cash or is financed by the credit agreement. We disagree. The regulation is itself neutral as to the source of payment of the amount which is said to be the charge.
52. In the commentary on this regulation in Goode on Consumer Credit at paragraph 29.168, the learned authors say this:

**“Charges payable even if the transaction were for cash**

If the charge is one which would be payable even on a cash transaction, it is excluded from the total charge for credit. For example, delivery or installation charges imposed on a debtor under a credit agreement that would also have been charged to a cash purchaser will be excluded. Where a cash buyer would have had to pay a charge but of a lower cost than that chargeable to a debtor under a consumer credit agreement, then presumably the excess payable by the debtor enters into the total charge for credit. Needless to say, this head of exclusion does not apply to charges on refinancing within the CCA 1974, s 11(1)(c) since these are obviously not applicable to those paying cash.”

53. It seems to us that this is correct. It shows that the regulation is directed at charges ancillary to the principal subject-matter of the credit agreement or of the transaction which is financed by the credit provided under that agreement. Such charges (for example for delivery, as mentioned by Goode) might be paid from the debtor’s own resources or they might themselves be financed by the credit agreement. The comparison required by the regulation, with a situation in which “the transaction” is for cash, is with a hypothetical transaction, either between the debtor and a third party supplier or between the debtor and the creditor itself, for example for the purchase of a motor car, where that purchase is not financed by a credit agreement.
54. On that basis, the distinction to be drawn in order to see whether the regulation applies is whether the payment which is said to be the charge in question is or is not ancillary to the principal subject-matter of the credit agreement or the transaction financed by it. If the sum in question is, or is payment for, the principal subject-matter of either, it is not an ancillary charge and the regulation does not apply to it. If, on the other hand, it is an ancillary charge, then the regulation can be applied to it, and requires a comparison with what charge would be imposed if the transaction which is in fact financed by the credit agreement were, instead, for cash. That seems to be a logical and workable basis on which to determine whether the regulation applies.
55. If that is right, and if, because of the effect of section 18, the credit agreement is to be regarded as divided into three and considered separately, one of the three being within section 11(1)(b) as regards the £750, then regulation 5(1)(c) does not apply because

the £750 is the principal subject-matter of the credit agreement, not an ancillary charge. Even if the agreement is not to be dissected under section 18, it would still be necessary to focus on that element of it which does come within section 11(1)(b), because it is that which attracts the application (if at all) of regulation 5(1)(c). Looked at in that way, the £750 is clearly part of the principal subject-matter of the credit agreement, rather than an ancillary charge.

56. An alternative analysis which leads to the same result is this. Mr Palmer has to show that the £750 is a charge relating to a consumer credit agreement to finance a section 11(1)(b) transaction, namely the payment of the premium under the insurance contract. Regulation 4(b) shows that the £750 is a charge in the context of the transaction as a whole. Correspondingly the £750 can fairly be described as a charge relating to the transaction for the loan of £2,300 for unrestricted use (the home improvements) and of £2,600 to pay off the arrears, or to the transaction as a whole. It cannot properly be characterised as “a charge relating to” that part of the overall transaction by which the payment of the insurance premium was financed.
57. Either way, the £750, which is a charge within regulation 4(b), is not taken out of the calculation of the total charge for credit by regulation 5(1)(c). For that reason we agree with the conclusion reached by the judge that the insurance premium is not a charge to which regulation 5(1)(c) applies. With the benefit of the perhaps more analytical submissions addressed to us, and of time taken to consider this judgment, we have dealt with the point at greater length than he did, but in essence he was right in his vivid phrase, at paragraph 56 of his judgment, that “this is not within shouting distance of what is provided for in regulation 5(1)(c)”.
58. We must however return to regulation 4(b) because the application of that regulation depends on the proposition that the lender required the debtor to enter into the insurance policy as a condition of the making of the agreement. It is on that point that Mr Palmer challenges the judge’s finding of fact.
59. For this purpose the critical stage in the sequence of events is the telephone conversation between Mr Meadows and Tony on or about 13<sup>th</sup> March 1989, following receipt by Mr and Mrs Meadows of the documents for signature and preceding their signature of those documents. The judge held that the person at the other end of the conversation was Tony Murtagh and that he was acting with authority on behalf of Home Loans (Northern) as well as of Bridgewater Insurance Services and other entities. He also held that the effect of the conversation, in its context, was that Home Loans (Northern) did require Mr and Mrs Meadows to take out the insurance policy. Mr Palmer submits that there was no adequate evidential basis for the judge’s finding that the Tony at the other end of the telephone was Mr Murtagh, or that whoever it was was acting with authority on behalf of the lender, or that what he said amounted to imposing a requirement by the lender that the policy be effected. He relied on the general proposition that an insurance broker acts for the would-be insured, not for the insurer, and said that in any conversation with Mr Meadows about the insurance policy, the person who made the call to Mr Meadows was doing so as insurance broker, and therefore not as agent for the lender or any third party. We now consider those submissions in relation to the evidence.
60. The question of who was at the end of the telephone and what was said, together with the general question of the involvement of Mr Murtagh, is dealt with in several

passages in the judge's judgment. At paragraph 29 there is the first reference to the telephone call. As we have already mentioned the judge mistakenly thought that Mr Meadows made, rather than received, the telephone call. It follows that he was mistaken in thinking that Mr Meadows knew for that reason that the telephone conversation was to someone at Nelson House. At paragraph 33 the judge mentions Mr Murtagh, his draft witness statement and his unavailability at trial. He goes on to say this:

“What his part in the transaction and his company's part and what their connection one with the other was is very difficult to know. But it seems that he was conducting some sort of insurance or loan brokerage business, was also conducting the business of Home Loans (Northern) Limited I infer from all the facts of this case, and certainly conducting Bridgewater Insurance Services. All of them having offices in the same relatively large office building, I have no reason at all to think that they were other than connected through similar, if not the same, shareholder control. Indeed, the very form of the documents lead one to that in that a letter to Home Loans (Northern) Limited [the letter quoted at paragraph 13 above] refers to “your insurance premium of £750”, it could not in truth refer to that if Bridgewater Insurance Services were an independent and wholly unconnected entity.”

61. At paragraph 48, in the context of discussing the arrears, he mentions the “brief telephone call between Mr Murtagh and Mr Meadows”. At paragraph 50, in the context of insurance, the judge says in terms that he infers that the Tony at the other end of the telephone was Tony Murtagh. He says that Tony Murtagh told Mr Meadows that “because of his circumstances he needed this insurance”. He goes on to say that if Mr Murtagh had been an independent broker there would have been a strong case for saying that this was advice by an independent broker to his client as to what he required. At paragraph 51, he says this:

“However, I have no doubt at all on the evidence that Mr. Murtagh was in a position of conflict of interest, putting it in fairly neutral terms. He was setting up the deal and would not get a penny for doing so unless he could get some commission on this policy, and he told Mr. Meadows in that phone conversation that that was how he was going to be paid.”

62. The nub of the judge's finding on the point is set out in paragraphs 53 and 54 as follows:

“On the facts, I have no doubt at all that Home Loans (Northern) Limited were a creature of Mr. Murtagh and Mr. Murtagh in the telephone conversation to Mr. Meadows, in my view, applying the reality of the situation, required the taking out of this insurance, thus it was required by the creditor.”

“One repeats a number of points. Neither Mr. nor Mrs. Meadows ever requested such a policy. The initial loan application was not ticked in regard to the “insurance selected box”. That was, of course, filled in at Phoenix Finance's offices by Phoenix Finance themselves, not by Mr.

and Mrs. Meadows, they only signed it. The documents were clearly completed in advance when sent to Mr. and Mrs. Meadows. Of course, Mr. Murtagh, or any one of his companies, would not have received any remuneration unless the insurance was taken out. I have no doubt at all, looking at it in the reality of the situation, that this was required by the creditor. It is as simple as that.”

63. Mr Palmer’s challenge to those findings starts from the position that, as is now clear, the judge was mistaken in thinking that Mr Meadows was the maker rather than the recipient of the crucial telephone call. The first phone call which led to this second and crucial phone call was made by Mr Meadows to Phoenix Finance. In those circumstances, Mr Palmer suggests, the most natural inference is that the person who called him back was someone from Phoenix Finance. That is not a suggestion or possibility that was put to Mr Meadows in cross-examination. It is clear from Mr Meadows’ evidence that he believed that the second telephone conversation was with someone who was not at Phoenix Finance but at Nelson House. He was not cross-examined as to his reason for that belief. It was not put to him that the person who called him back was someone from Phoenix Finance and accordingly it seems to us that the judge’s findings cannot be criticised on the basis that the more likely sequence of events is that the second phone call came from someone else at Phoenix, other than the person to whom Mr Meadows had first spoken. Bearing in mind that Phoenix Finance had in fact passed the application on to be dealt with elsewhere and that the further communications to Mr and Mrs Meadows came from Nelson House, with Murtagh Funding Limited being referred to, albeit not overtly to them, as the broker active in the matter (see the letter of 5<sup>th</sup> April 1989 from Brand Montague to Venmore Thomas and Jones mentioned at paragraph 23 above), it seems to us that, so far from Mr Palmer’s suggestion being correct, the natural inference is that the enquiry was itself passed on to Nelson House to be answered.
64. Mr Harvey Collis, Chairman and Managing Director of the Claimant, gave evidence and was cross examined about what he knew about Mr Murtagh. He said that he had met him, but he did not know what his connection was with Home Loans (Northern), Murtagh Funding or Bridgewater Insurance Services. He said that he had attempted to make contact with Mr Murtagh again with a view to evidence being given in the proceedings and had had one conversation with him but was unable to make contact before the trial with a view to Mr Murtagh signing his witness statement and attending trial. In the course of the conversation that he did have with Mr Murtagh, Mr Collis said, Mr Murtagh told him that Home Loans (Northern) Limited was defunct and so was Murtagh Funding Limited. He could not remember whether Mr Murtagh told him that he was a Director of those two companies. He said it might have been an assumption “but I cannot remember whether he told me or not”.
65. It seems to us that the connection between the companies is plain from the documentation and from the pattern of the transaction. Phoenix Finance as a broker passed on the enquiry to Mr Murtagh. Murtagh Funding was then treated as the credit broker, Home Loans (Northern) was the lender, albeit only nominally since it turned out that the money was provided by the Claimant, and Bridgewater Insurance Services was involved as an insurance broker. As the person who spoke to Mr Meadows frankly said, the only way that any money was going to come to any broker out of this transaction was through the insurance premium. Since the transaction was

in the end immediately passed on to the Claimant, that meant that there was nothing in it for Home Loans (Northern), Murtagh Funding, or Bridgewater Insurance Services, or whoever lay behind any one or more of those companies, except by way of commission on the insurance. In those circumstances it seems to us that the judge was well entitled to draw the conclusion that Mr Murtagh was the individual behind the lender, the credit broker and the insurance broker, that he saw commission on an insurance premium as the way to make a return for his own organisations on the transaction, and that when Mr Meadows' query was passed on to him via Phoenix about the amount of the loan and the provision for arrears and the insurance policy, he was the natural person to speak to Mr Meadows and to explain the requirement as to the payment of the arrears and, to put it neutrally, the position as regards the insurance premium.

66. So far as what Mr Murtagh said to Mr Meadows is concerned, Mr Palmer accepts that the judge was entitled to conclude that Mr Meadows' understanding, at the end of the conversation, was that he had no option but to take out the insurance policy. Mr Palmer submits that a fair and objective reading of what was said may not have amounted to that and that it could be read as fair, impartial and considered advice from a broker acting for Mr Meadows as to what his interests required. That seems to us a somewhat bizarre suggestion in the context, once it is accepted that Mr Murtagh was the person making the telephone call, that he was the person behind the lender and the credit broker as well as the insurance broker, that he was speaking to Mr Meadows in respect of requirements of the lender at any rate as regards the arrears, and that in relation to the insurance he gave Mr Meadows no explanation at all of what the terms and nature of the policy was, other than that it was for the protection of the borrowers rather than that of the lender. In those circumstances, and having regard to the terms of the documents, in particular the obscurely worded letter addressed to Home Loans (Northern) (set out at paragraph 13 above) referring to "your insurance premium", it seems to us that the judge's conclusion on this point cannot be faulted. This cannot properly be regarded as a conversation in which Mr Murtagh was, for part of the time (when he was talking about the arrears and the amount of the loan) speaking on behalf of the lender but for another part (when he was talking about the insurance policy) speaking as Mr Meadows' broker, not on behalf of the lender.
67. Accordingly, we reject Mr Palmer's submission that the crucial finding of fact, that the lender did require the borrower to enter into the insurance contract, was not warranted by the evidence. In our judgment the judge was entitled to come to the conclusion that he did at paragraph 54, that the creditor required the debtor to take out the insurance policy. Accordingly it seems to us that the insurance premium was a charge falling within regulation 4(b) and, for the reasons already given, not one excluded from the total charge for credit by regulation 5(1)(c).
68. We should record that the Defendants applied to the court to adduce fresh evidence to reinforce the judge's conclusion that Mr Murtagh was the person making the telephone call and was properly to be regarded as acting on behalf of the lender. Having reviewed the evidence that was before the judge it seemed to us that it was unnecessary to go into this additional evidence. As a result the application was not pursued.

## Conclusion

69. In those circumstances, while we respectfully disagree with the judge's conclusion in respect of the mortgage arrears, we agree with his conclusion about the insurance premium. It follows that we dismiss the appeal because, if the insurance premium was part of the total charge for credit, as we hold, then the amount of credit under the agreement was incorrectly stated. It should have been stated as £5,000, not £5,750. It is agreed that this is a breach of the Act which cannot be overcome. It follows that the judge was right to dismiss the claim, though not for the first of the reasons that he gave.
70. In relation to section 18 of the Act, Counsel made submissions either way as to whether, if the agreement is to be dissected into three separate agreements as we have mentioned, the document failed to comply with the Act in another respect namely by not stating the amount of credit under each part of the agreement separately. We were shown passages from Goode on Consumer Credit and an article by Mr Francis Bennion on the application of section 18 from which it is apparent that the matter is far from clear and open to some controversy. It is unnecessary for the purposes of dealing with this appeal to enter into that debate, which would only arise if Mr Palmer were right on the question of the insurance premium being part of the credit rather than the total charge for credit. In those circumstances we say nothing more about section 18. Nor do we say anything about the issues of penalty, extortionate credit bargain and other matters which were debated before the judge and the subject of his indications but which would not affect the outcome of this appeal. Mr Palmer told us that all aspects of the judge's judgment were regarded with concern by lenders in the sector of the market in which the Claimant operates and invited us to rule on all the points raised. It seems to us, notwithstanding this plea, that it would be inappropriate to give what would inevitably be non-binding indications of the position as regards the other points in the case.
71. Accordingly, we dismiss this appeal on the sole ground that, although the amount paid to discharge the arrears was part of the credit, the amount paid by way of the insurance premium was part of the total charge for credit, not of the credit itself, and therefore the amount of credit was incorrectly stated in the credit agreement and the credit agreement is unenforceable.