House of Lords

Office of Fair Trading *v* Lloyds TSB Bank plc and others

[2007] UKHL 48

2007 Oct 2, 3; 31 Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance

Fair trading — Consumer credit — Credit card — Connected lender liability — Credit card transactions entered into abroad — Claim by debtor for misrepresentation or breach of contract by supplier — Whether statutory remedy available against creditor where transaction entered into abroad — Consumer Credit Act 1974 (c 39), ss 11, 12, 75

The defendant banks issued credit cards pursuant to consumer credit agreements regulated by the Consumer Credit Act 1974[1]. At the time of the Act's enactment, based on the recommendations of the Crowther Committee Report on Consumer Credit (1971) (Cmnd 4596), such cards were generally issued within the framework of a three-party structure which involved agreements between the card issuer, the cardholder and the supplier of the goods or services purchased with the card. The three-party structure of agreements subsequently developed into a four-party structure involving a "merchant acquirer", whose function was to recruit new suppliers willing to accept the issuer's card. The claimant as industry regulator sought declarations as to the effect on credit card transactions, entered into either within the United Kingdom or abroad, of section 75(1) of the 1974 Act, under which a cardholder having a claim against a supplier for misrepresentation or breach of contract could pursue the same claim against the lender, who would be jointly and severally liable with the supplier. The judge held that such "connected lender liability" under section 75(1) applied to credit card transactions entered into under the four-party structure within the United Kingdom but did not attach to transactions entered into abroad, whether under the three-party or the four-party structure. On appeal, the Court of Appeal, having affirmed that four-party transactions fell within section 75(1), held that section 75(1) extended to transactions entered into abroad by customers of UK card issuers.

On appeal by the banks—

Held, dismissing the appeal, that the imposition on UK credit card issuers of a statutory liability to cardholders in respect of foreign supply transactions did not amount to extraterritorial legislation; that section 75(1), consistent with the policy behind the 1974 Act of protecting consumers, which was applicable as much to overseas as to domestic supply transactions, contained no words of territorial limitation; that section 75(2) of the Act, in conferring on lenders a statutory right to indemnity from suppliers where their relationship was subject to a UK law, was not directed to consumer protection and afforded no grounds for limiting the scope of section 75(1); and that, accordingly, section 75(1) governed agreements between UK credit card issuers and their customers without territorial limitation (post, paras 1, 4, 6–8, 9, 12–14, 15–16, 27, 29, 36–38, 44).

[1] Consumer Credit Act 1974, s 11(1): "A restricted-use credit agreement is a regulated consumer credit agreement . . . (b) to finance a transaction between the debtor and a person (the 'supplier') other than the creditor . . ."

S 12: "A debtor-creditor-supplier agreement is a regulated consumer credit agreement being . . . (b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier . . ."

S 75(1): see post, para 18.

S 75(2): see post, para 34.

A Decision of the Court of Appeal [2006] EWCA Civ 268; [2007] QB 1; [2006] 3 WLR 452; [2006] 2 All ER 821 affirmed.

The following cases are referred to in their Lordships' opinions:

Blain, Ex p, In re Sawers (1879) 12 Ch D 522, CA

Clark v Oceanic Contractors Inc [1983] 2 AC 130; [1983] 2 WLR 94; [1983] 1 All ER 133, HL(E)

B *English v Donnelly* 1958 SC 494

R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening) [2005] UKHL 28; [2005] 2 AC 561; [2005] 2 WLR 1061; [2005] 2 All ER 555, HL(E)

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800; [1981] 2 WLR 279; [1981] 1 All ER 545, CA and HL(E)

C The following additional cases were cited in argument:

Gingi v Secretary of State for Work and Pensions [2001] EWCA Civ 1685; [2002] 1 CMLR 587, CA

Graf v Filzmoser Maschinenbau GmbH (Case 190/98) [2000] All ER (EC) 170; [2000] ECR I-493, ECJ

Jarrett v Barclays Bank plc [1999] QB 1; [1997] 3 WLR 654; [1997] 2 All ER 484, CA

D *Kay's Leasing Corpn Pty Ltd v Fletcher* (1964) 116 CLR 124

Keck and Mithouard, Criminal proceedings against (Joined Cases C-267/91 and C-268/91) [1993] ECR I-6097, ECJ

Procureur du Roi v Dassonville (Case 8/74) [1974] ECR 837, ECJ

Säger v Dennemeyer & Co Ltd (Case C-76/90) [1991] ECR I-4221, ECJ

APPEAL from the Court of Appeal

E This was an appeal, by leave of the Appeal Committee of the House of Lords (Lord Hoffmann, Lord Walker of Gestingthorpe and Lord Mance), by the first defendant, Lloyds TSB Bank plc, and the second defendant, Tesco Personal Finance Ltd, against the order of the Court of Appeal (Waller, Smith and Moore-Bick LJJ) allowing an appeal by the claimant, the Office of Fair Trading ("OFT"), against that part of the decision of Gloster J [2004] EWHC 2600 (Comm); [2005] 1 All ER 843 whereby she had dismissed its F application for a declaration as against the first and second defendants and American Express Services Europe Ltd ("Amex") as third defendant that section 75(1) of the Consumer Credit Act 1974 extended to cases where the credit provided under a regulated credit agreement falling within section 12(b) of the Act financed the purchase of goods or services under a transaction with a supplier which had been made outside the United G Kingdom.

The facts are stated in the opinion of Lord Mance.

Mark Hapgood QC and *Sonia Tolaney* for Lloyds TSB and Tesco. The application of section 75 of the Consumer Credit Act 1974 to overseas transactions would give the 1974 Act extraterritorial effect. There is nothing in the Act which suggests that overseas transactions were intended H to be within its legislative grasp so as to displace the assumption that a United Kingdom statute is not intended to have extraterritorial effect: see *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 144–145, 152.

Section 75 was introduced on the recommendation of the Crowther Committee Report on Consumer Credit (1971)(Cmnd 4596). At that time

the use of a credit card abroad was theoretically possible but exceptional, and there is no suggestion that the committee—or Parliament—had overseas transactions in mind when introducing connected lender liability. The committee's rationale for the imposition of connected lender liability was that, since the lender and the supplier were engaged in a joint venture to their mutual advantage, it would not be right, in cases where the supplier had made false representations or supplied defective goods, for the lender to be able to disclaim all responsibility. That rationale is far less applicable to overseas transactions because it is generally more difficult for the card issuer to intervene in a dispute between the cardholder and an overseas supplier. Further, a supplier in a non-European country is likely to be advised that a judgment of a United Kingdom court in proceedings in which he does not appear will not be enforceable in his own jurisdiction.

Section 75 has to be read as a whole. The creditor's right under section 75(2) to be indemnified by the supplier is the quid pro quo for the imposition of connected lender liability on the creditor under section 75(1). The whole premise of section 75 is that the courts of the United Kingdom have an enforceable and effective jurisdiction over the supply transaction and over the supplier.

The cancellation provisions in section 67 to 72 of the Act provide an additional indication that the Act was not intended to apply to foreign transactions. In particular, section 69(1)(ii) cannot operate outside the jurisdiction to cancel the contract giving rise to the linked transaction between the overseas supplier and the debtor. This undermines the entire regime governing cancellable agreements.

The non-applicability of section 75 to overseas transactions need not conflict with the United Kingdom's obligations under the EC Treaty in respect of the free movement of goods and services within the common market: see *Graf v Filzmoser Maschinenbau GmbH* (Case 190/98) [2000] ECR I-493 and *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 587, paras 43 and 46.

Jonathan Sumption QC and *William Hibbert* for the OFT. Section 75(1) is concerned with the legal relationship between the debtor and creditor. It is impliedly limited to agreements with a creditor carrying on business in the United Kingdom. The question of extraterritorial effect therefore does not arise.

It is not possible to derive a restriction on section 75(1) from the implied territorial limits on the right of indemnity against the supplier which is conferred on the creditor by section 75(2). By section 173(1) of the Act any agreement inconsistent with section 75(1) is to that extent void. Section 75(1) is a mandatory provision for the protection of consumers applying to any United Kingdom credit agreement in the specified categories as part of the law of the forum, irrespective of their proper law.

By contrast, section 75(2) is in no sense mandatory. It is not a provision for the protection of consumers. It is not affected by section 173(1) but is subject to any contrary agreement. The creditor and supplier are at liberty to make such arrangements between themselves as they choose. They can agree to subject their relationship to a foreign law: see *English v Donnelly* 1958 SC 494 and *Kay's Leasing Corpn Pty Ltd v Fletcher* (1964) 116 CLR 124.

A right under section 75(1) has been held to exist notwithstanding that the English court had no jurisdiction over the associated supply transaction because it was subject to the exclusive jurisdiction of the courts of a foreign country: see *Jarrett v Barclays Bank plc* [1999] QB 1, 15.

The effect of sections 67–72 of the Act is to entitle the debtor within a limited period to cancel the credit agreement and any "linked transactions" when they were face to face oral negotiations away from the trade premises. These provisions are most unlikely to apply to supply agreements financed with a credit card. The potential of sections 67–72 to affect overseas transactions is too remote to cast much light on the construction of the Act.

To differentiate between overseas and domestic transactions for the purpose of section 75 would be inconsistent with articles 28EC, 29EC and 49EC of the EC Treaty and so cannot be reconciled with EU law: see *Procureur du Roi v Dassonville* (Case 8/74) [1974] ECR 837, para 5 and *Säger v Dennemeyer & Co Ltd* (Case C-76/90) [1991] ECR I-4221.

Hapgood QC, in reply, referred to *Criminal proceedings against Keck and Mithouard* (Joined Cases C-267/91 and C-268/91) [1993] ECR I-6097, para 16.

Iain MacDonald, for AMEX, did not address the House.

Their Lordships took time for consideration.

31 October. **LORD HOFFMANN**

1 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Mance, with which I agree. I gratefully adopt his statement of the background and the issues in this appeal.

2 Section 75(1) of the Consumer Credit Act 1974 makes a creditor under a debtor-creditor-supplier agreement jointly and severally liable with the supplier in respect of any misrepresentation or breach of contract by the latter in relation to a "transaction financed by the agreement". The question is whether a "transaction" within the meaning of the Act includes a transaction which takes place and is performed abroad and is governed by a foreign law.

3 There is nothing in the language of section 75(1) to exclude foreign transactions. But the appellant credit card issuers, who are "creditors" for the purposes of section 75(1), submit that, for two main reasons, such a limitation should be implied.

4 The first is the presumption that legislation was not intended to have extraterritorial effect: see *Ex p Blain, In re Sawers* (1879) 12 Ch D 522. But extraterritorial effect means seeking to regulate the conduct or affect the liabilities of people over whom the United Kingdom has no jurisdiction. In this case, the Office of Fair Trading accepts that section 75(1) applies only to agreements with a creditor carrying on business in the United Kingdom. The effect of the section is equivalent to the statutory implication of a term in the contract between a UK creditor and the debtor by which the former accepts joint and several liability with the supplier. If the supplier is a foreigner, the Act does not purport to regulate his conduct or impose liabilities upon him. It is only the UK creditor who is affected. To construe it as applying to such cases does not therefore conflict with the presumption against extraterritoriality.

5 The second reason is based upon section 75(2), which provides that, subject to contrary agreement, the creditor is entitled to be indemnified by the supplier against loss suffered by reason of claims against him under section 75(1), and also upon section 75(5), which says that a creditor sued under section 75(1) is entitled, in accordance with rules of court, to have the supplier made a party to the proceedings.

6 For the reasons already stated, section 75(2)(5) would not be construed as applying to foreign suppliers. Parliament would be presumed not to have intended to impose a statutory liability upon foreigners. Of course the creditor, in his agreement with the supplier (if there is one) may have expressly contracted for a right of indemnity or he may have one under the foreign law. But he cannot invoke the statutory remedy under section 75(2).

7 The appellants submit that section 75(1) should be construed as limited to cases in which the supplier would have a right of indemnity under section 75(2). The two subsections should be treated as indissolubly linked. It seems to me, however, that if Parliament had wanted to limit the application of section 75(1) by reference to the enforceability of section 75(2), it would have said so. It is not obvious why there should be such a link. Section 75(1) is consumer protection legislation for the benefit of the customers of UK creditors. It cannot be excluded by agreement between debtor and creditor. Section 75(2) is a default provision to regulate relations between creditor and supplier. It applies only in the absence of contrary agreement and can be supplemented by the terms of the contract or (if foreign) the governing law. If card issuers choose to authorise the use of their cards by foreign suppliers or join four-party schemes under which their cards may be so used, they can be expected either to make their own arrangements about indemnity against liability under section 75(1) or accept that the commercial advantages of allowing foreign use outweigh the absence of a right of indemnity.

8 Section 75(2) is therefore an inadequate basis for implying a limitation in the scope of section 75(1). The appellants also relied upon provisions in the Act about cancellation which they said were incapable of application to transactions with foreign suppliers. Perhaps in some cases they are, but if section 75(2) cannot bear the weight of the appellants' argument for an implied limitation in section 75(1), the other provisions are still less able to do so. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

9 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Mance. I agree with them, and for the reasons they give I would dismiss the appeal.

10 Not all consumers may be aware of the right of recourse against the card issuer that section 75(1) of the Consumer Credit Act 1974 affords should the supplier breach his obligations under the supply contract. But there is no doubt that some are, and that claims are now being made in relation to foreign transactions as well as those entered into domestically. One such claim is pending in the Sheriff Court at Kirkcaldy: *David Boyack v The Royal Bank of Scotland*. Your Lordships were told that the claim in that case relates to a clock purchased in Dubai arising out of, it is said, misrepresentations that were made orally by the supplier. The case was

A sisted on 15 August 2007 to await the outcome of this appeal. The question whether the right of recourse extends to foreign transactions is therefore of considerable importance to consumers, as it plainly is too for the banks and other card issuers.

11 Section 75(1) of the Act is concerned with the relationship between the debtor and the creditor. As there is no indication to the contrary, the ordinary territorial limitation applies. It states what the law is in regard to
B transactions which have a sufficient nexus with the United Kingdom for them to be subject to its laws. For practical purposes this can be taken to be so where the card issuer carries on business in any part of the United Kingdom, bearing in mind that the Act extends to Northern Ireland: section 193(2). The same territorial limitation applies to section 75(2). As Mr Hapgood for the appellant card issuers pointed out, the right of
C indemnity under that subsection would not found an action in Dubai against the seller of the clock to Mr Boyack, in the absence of any indication that the law of any part of the United Kingdom was to apply their transaction. The seller is not subject to the jurisdiction of the Scottish courts, so he is under no incentive to enter an appearance in the action to answer the allegations that are made against him in Scotland. If Mr Boyack succeeds in his claim against the bank, the bank will have to go to Dubai to obtain redress against
D a supplier with whom—as this was a four-party transaction of the kind described by Lord Mance in para 24—it has no contract. That, in essence, is the complaint that the appellants make about extending the right of recourse to foreign transactions. The absence of an effective means of redress in the case of four-party transactions, over which they have no direct control, lies at the heart of the argument.

E **12** The answer to the question whether the right of recourse under section 75(1) does extend to foreign transactions is to be found in the words of the statute, not in any presumption either way as to its application extraterritorially. As one looks for the answer, the most striking feature is the absence of any indication in the subsection that it was the intention that it should not to apply to them: see Lord Wilberforce's response to the
F question whether the statute that he was considering in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152 could not have been intended by the legislature to apply to companies if they were non-resident: "Why not?" The words "in relation to a transaction financed by the agreement", read with the definitions in sections 11(1)(b) and 12(b) of the Act, are unqualified. They are to be understood as extending to whatever was in contemplation when the agreement between the debtor and the creditor was
G entered into. In 1974 the use of credit cards issued by UK providers for foreign transactions was limited to Barclaycard: Report of the Monopolies and Mergers Commission on the Supply of Credit Card Franchise Services in the United Kingdom (1980) (Cmnd 8034), para 3.9. But I do not think that it can be said that Parliament did not envisage the possibility of transactions being entered into abroad, linked to the relationship between
H the issuer of the card and the cardholder, of the kind that is now commonplace. Almost invariably—leaving aside American Express and Diners Club, who make their own arrangements—they are entered into today as part of a four-party transaction. But there is nothing in the language of section 75(1) to indicate that transactions of that kind are excluded from the right of recourse. Nor are transactions of that

kind included among the transactions listed in section 75(3) to which section 75(1), expressly, does not apply.

13 The simple and unqualified statement of the right that is expressed in section 75(1) is consistent with the policy that lies behind the Act, informed by recommendations by the Crowther Committee. Its long title states that the new system which it lays down is "for the protection of consumers". That policy applies to debtors and creditors within the territorial reach of the Act generally. Transactions of that kind are to the commercial advantage of the supplier and the creditor. The creditor is in a better position than the debtor, in a question with a foreign supplier, to obtain redress. It is not to be assumed that the creditor will always get his money back. But, if he does not, the loss must lie with him as he has the broader back. He is in a better position, if redress is not readily obtainable, to spread the cost. He is in a better position to argue for sanctions against a supplier who is not reliable. For his part, the debtor is entitled to assume that he can trust suppliers who are authorised to accept his credit card. These considerations, which support the right of recourse in relation to tripartite arrangements, are just as powerful in the case of four-party transactions.

14 It was submitted that section 75(2) casts light on the meaning of section 75(1). But, unlike section 75(1), section 75(2) is not concerned with consumer protection. It is not to be seen as a quid pro quo for the right of recourse that is afforded to debtors by section 75(1). So I do not think that one can find here any implied limitation on the scope of section 75(1). Nor, for the reasons that Lord Mance has explained, is any implied limitation to be found in the provisions about cancellation and its consequences in sections 67 to 74 of the Act. Cancellation is just one of the risks that the creditor has to bear in its assessment of where the balance lies between the commercial advantages and disadvantages of the system that it enters into when it commences business as a card issuer. So, for these and all the other reasons that Lord Mance gives, I would reject the argument that section 75(1) applies only to domestic transactions.

LORD WALKER OF GESTINGTHORPE

15 My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Mance. For the reasons which they give, with which I fully agree, I too would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

16 My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Mance, and for the reasons which they give, with which I fully agree, I too would dismiss this appeal.

LORD MANCE

17 My Lords, credit cards have become a worldwide convenience. For many they have superseded cheques. Consumers often use them to pay for goods or services where formerly cash would have been tendered. Consumers may know that their use carries the advantage of a potential right of recourse against the card issuer should the supplier breach his obligations relating to the supply contract. This advantage arises under section 75(1) of the Consumer Credit Act 1974. The question now is

A whether it extends to the use of credit cards in relation to foreign transactions. The respondent, the Office of Fair Trading ("OFT"), acting in the interests of consumers, maintains that it does. The appellants, Lloyds TSB Bank plc and Tesco Personal Finance Ltd, credit card issuers and representatives of the UK credit card industry, maintain the contrary.

18 Section 75(1) reads:

B "*Liability of creditor for breaches by supplier*

"(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

C

A credit card involves a debtor-creditor-supplier agreement falling within section 12(b), the consumer being the debtor and the card issuer the creditor: the agreement is

"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in
D contemplation of future arrangements, between himself and the supplier";

a restricted-use credit agreement within section 11(1)(b) is "a regulated consumer credit agreement . . . to finance a transaction between the debtor and a person (the 'supplier') other than the creditor". Section 75(3) (as amended by articles 3 and 4 of and the Schedule to the Consumer Credit
E (Increase of Monetary Limits) Order 1993 (SI 1983/1878)) disapplies section 75(1) to a claim under a non-commercial agreement or relating to any single item with a cash price of or under £100 or over £30,000.

19 The 1974 Act was enacted following the Report of the Committee on Consumer Credit chaired by Lord Crowther (Cmnd 4596). The committee, in para 6.1.15, identified as the first of three primary tasks of consumer
F credit legislation "the redress of bargaining inequality", including "giving the credit consumer certain built-in contractual rights and limitations of liability which cannot be excluded": para 6.1.15.i. It observed, at para 6.1.16, that it was the law's task to maintain a fair balance between the creditor and the debtor, and that in considering which of two innocent parties should bear the greater loss, it was "much easier for the business debtor to do so than the individual debtor". The former could "in the light
G of his business experience, take account of certain loss risks in his charges and thus spread the burden over the public at large. The impact of one item of loss upon an individual debtor may be extremely severe": para 6.1.16.i.

20 The committee, at paras 6.2.22–6.2.25, distinguished "connected" from "unconnected" loans—foreshadowing the later statutory distinction between debtor-creditor-supplier agreements (section 12) and debtor-
H creditor agreements: section 13. The committee described connected loans as involving situations where "the sale and loan aspects of the transaction are closely entwined" and the connected lender and the seller, where not the same person, are "in effect engaged in a joint venture to their mutual advantage": para 6.2.24. In paras 6.6.24–29 it concluded that in such situations the legal right which a buyer might have against his seller was not

sufficient protection, observing that the majority of cases in which the buyer was likely to suffer were those where the seller was of doubtful repute and able to continue in business only because of the financial support received from the lender. In that light, the committee recommended that the connected lender (creditor) should incur a primary liability for a supplier's misrepresentation or breach (para 6.6.26), along lines later reflected in section 75(1). It explained, at para 6.6.29:

> "In reaching this conclusion we have been influenced by the additional fact that if the delinquent seller is worth powder and shot it ought to be easier for the lender to put pressure on him to deal with the complaint than it is for the borrower. The lender is not likely to be so inhibited by expense from suing the seller; and in most cases proceedings by the lender would be unnecessary because the lender is in a position to say to the seller that future financing facilities will be withdrawn unless the seller attends to the complaint and takes greater care in the conduct of his business."

21 The committee added, at para 6.6.31:

> "It is of course implicit in our recommendations that a lender who incurs a liability to the borrower in the circumstances we have described should have a right of indemnity from the dealer or supplier who caused the trouble. To avoid any doubt, this right of indemnity should be expressly stated in the enactment."

A right of indemnity was duly incorporated in section 75(2) which I set out in para 34 below. Its existence and scope are central to the appellants' case on this appeal.

22 The committee in chapter 6.12 applied its reasoning regarding connected lending to the liability of credit card issuers for defective goods and services, explaining, at para 6.12.9, that:

> "there is in fact a close business relationship between an issuer and the suppliers who have agreed to accept that issuer's credit cards. The issuer, through provision of the card, swells the turnover of the supplier, and for conferring this benefit usually receives by way of discount an agreed percentage of the invoice price of the goods or services supplied. Moreover, a cardholder dealing with a reputable issuer has every reason to assume that the issuer will list only reputable suppliers."

Further, the card issuer was "much better placed than the cardholder to secure redress from the offending supplier" and agreements between issuers and suppliers would usually impose an express obligation on the supplier to deal promptly with legitimate complaints by cardholders: para 6.12.10. The consideration that a card issuer might be unwilling to make a claim on a particular supplier for fear of losing that supplier's goodwill was "a commercial matter which the issuer or other lender has to decide for itself"; it did not justify depriving the consumer of the protection which the committee believed he should otherwise have: para 6.12.11.

23 As appears from these passages, the Crowther Report was issued and the 1974 Act enacted in an era when credit cards involved tri-partite arrangements—between a card issuer and cardholder, between the card issuer and suppliers authorised by the card issuer to accept its cards, and

A between the cardholder and a particular supplier in relation to a particular supply. American Express and Diners Club continue to operate on this basis. But the position with most other cards is now more complex. Large-scale consolidation has led to card issuers becoming members of one of the two main international credit card networks, Visa and MasterCard. Under the rules of these networks, certain card issuers are authorised to act as "merchant acquirers", in practice only within their home jurisdictions. They B contract with suppliers ("merchants") to process all such suppliers' supply transactions made with cards of the relevant network, by paying to such suppliers the price involved, less a "merchant service charge". Suppliers do not become members of the network, but contract with merchant acquirers to honour the cards of the network (i e to accept them in payment of supplies). Where the merchant acquirer is itself the issuer of the card used C in a particular transaction, the transaction is tripartite and the merchant acquirer looks direct to its cardholder (debtor) for reimbursement of the price. But in the more common (and in the case of a foreign transaction inevitable) case of use of a card issued by a card issuer other than the merchant acquirer who acquired the particular supplier, the network operates as a clearing system, through which the merchant acquirer is reimbursed by the card issuer, less an "interchange fee". This is a fee less D than the merchant service charge, so that both the merchant acquirer and the card issuer receive a commission on the transaction. The House was told that there are some 700,000 credit card outlets within the UK, and some 29 million worldwide. The value of foreign transactions in which UK credit card issuers are involved is, however, presently less than 10% of that of domestic transactions.

E **24** In the courts below, the appellant card issuers contended that the consequence of the development of four-party schemes—whereby a credit card can be used to pay a supplier not recruited into the network by, and not in a contractual relationship with, the relevant card issuer—was that there were no "arrangements", pre-existing or in contemplation, between that card issuer and supplier within the meaning of section 12(b) of the 1974 Act. So, they submitted, section 75(1) could have no application. Both F Gloster J [2005] 1 All ER 843 and the Court of Appeal (Waller, Smith and Moore-Bick LJJ) [2007] QB 1 rejected that submission, and the House refused permission to appeal on the point. The Crowther Committee and Parliament when enacting the 1974 Act did not know how the credit card market would develop. But the language of "arrangements" used in the Act is well capable of embracing the modern relationships between card issuers G and suppliers under networks like Visa and MasterCard: cf per Lord Hoffmann in *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2005] 2 AC 561, para 33, considering Lord Wilberforce's statement of principle regarding the application of statutory provisions in new circumstances in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* H [1981] AC 800, 822.

25 The card issuers' submission that section 75(1) applies only to domestic transactions arises on that basis. Legislation is primarily territorial. It is now common ground that section 75(1) is subject to some territorial limitation. In *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 144–145, Lord Scarman described the principle as being, that, unless the

contrary is expressly stated or plainly implied, UK legislation is "applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction". However section 75(1) only addresses the relationship between the card issuer (creditor) and the cardholder (debtor), and the OFT accepts that the principle of territoriality means that sections 11, 12 and 75(1) of the 1974 Act are confined to UK credit agreements.

26 The precise delimitation of a UK credit agreement is open to debate, on lines explored in *Goode*, *Consumer Credit Law and Practice* (1999), vol 1, paras 49.82–49.90 (suggesting that the relevant nexus depends upon the co-location in the United Kingdom both of the debtor or hirer's residence or place of business and of the negotiation or making of the credit agreement, or, in other cases, upon an evaluation of all the factors connecting that agreement with the United Kingdom) and *Guest & Lloyd*, *Encyclopedia of Consumer Credit Law* (July 2006 rev), para 2-194–2-9 (tentatively advancing as the test whether the relevant debtor or hirer dealt as part of the United Kingdom market—e g resided and negotiated the agreement here).

27 No party to this appeal invites the House to engage in that debate. What matters is that there is nothing in sections 11, 12 or 75(1) purporting to legislate extraterritorially in relation to the supplier or the supply transaction financed by the credit agreement. To impose on UK card issuers a liability to UK cardholders by reference to liabilities arising under a foreign supply transaction is not axiomatically to legislate extraterritorially. It is not uncommon for domestic contractual relationships to involve obligations defined by reference to foreign contracts or events. In these circumstances, I agree with the OFT's submission that, if there is any limitation on the transactions to which section 75(1) applies, it must be found in ordinary principles of construction and implication.

28 The card issuing appellants contend for, and Gloster J [2005] 1 All ER 843, para 59 accepted, a limitation excluding from section 75(1) supply transactions with at least the following characteristics: (1) the contract [between the debtor and the supplier] was made wholly outside the United Kingdom, or (if not) the acts of offer and acceptance were done partly within and partly outside the United Kingdom; and (2) the contract was governed by a foreign law; and (3) the goods were delivered, or services supplied outside the United Kingdom, or the goods were despatched outside the United Kingdom for delivery within the United Kingdom. Section 75(3) introduces only two (presently irrelevant) qualifications to the generality of section 75(1). But the appellants seek to derive such a limitation from a variety of considerations. First, they submit that the implications, if section 75(1) applies to overseas transactions, are "startling and readily apparent", in that it would make UK card issuers the potential guarantors of some 29 million foreign suppliers, with whom they would not have any direct contractual relations. Gloster J in a clearly reasoned judgment accepted this among other of the appellants' submissions. But it is one which depends on today's market. The 1974 Act falls to be construed against the background of the market as it existed and was understood and foreseen at the time of the Crowther Report and the passing of the Act.

29 Further, the general factors outlined in paras 20–22, which led the Crowther Committee to recommend the imposition on card issuers of a

A liability reflecting suppliers' liability to debtors, all apply as much to overseas as to domestic supply transactions—if not more so. In relation to overseas transactions, there would be likely to be an even greater discrepancy between the cardholder's ability to pursue suppliers on the one hand and the ease with which card issuers could obtain redress through the contractual and commercial ties which Crowther contemplated would link them and suppliers. Card issuers' ability to bear irrecoverable losses and so B "spread the burden" exists in relation to both overseas and domestic transactions.

30 That, in today's market, arrangements between card issuers and overseas suppliers under schemes such as Visa and MasterCard are indirect (rather than pursuant to a direct contract as is still the case with American Express and Diners Club) is a consequence of the way in which the Visa and C MasterCard networks have developed and operate. Likewise, the fact that the rules of these networks give card issuers no direct choice as to the suppliers in relation to whom their cards will be used. The choice of suppliers is, in effect, delegated to the merchant acquirers in each country in which these networks operate, and provision is made, as one would expect, to ensure and monitor the reliability of such suppliers in the interests of all network members. That network rules may not provide all the protections D that they might, e g by way of indemnity and/or jurisdiction agreements, is neither here nor there. They could in theory do so, and it is apparent that there are some differences in this respect between different networks. The Crowther Report and 1974 Act proceed on the basis of a relatively simple model which contemplated that card issuers would have direct control of such matters. A more sophisticated worldwide network, like E Visa or MasterCard, offers both card issuers and cardholders considerable countervailing benefits. Card issuers make a choice, commercially inevitable though it may have become, to join one of these networks, for better or worse.

31 Mr Hapgood for the appellants drew attention to features of the present legal and commercial situation which they as card issuers regard as anomalous. Liability under section 75 only arises where the cash price of the F supply is over £100 but not more than £30,000: section 75(3). It arises even if the credit only relates to part of the price (as where the consumer pays part in cash or by cheque). It is potentially unlimited, a source of repeated complaint by card issuers. It arises even where the cardholder in practice uses his credit card like a charge card, paying off the entire balance in one instalment at once. Charge cards which, by contract, operate on this basis G have been excluded from the operation of the 1974 Act by regulations made under section 16(5)(a). None of these anomalies is special to, or can be determinative of, the application of section 75(1) to overseas transactions. Their effects could be exacerbated if overseas transactions are covered, but, if so, only as a matter of degree and not in any way which provides a reason in principle for a different construction of section 75 to that which would otherwise apply.

H 32 As a matter of fact, it is accepted that, even in 1974, there was some limited use of credit cards (in particular Barclaycard) for overseas transactions. Further, the 1974 Act itself contemplated that credit agreements might have overseas aspects which could require special attention. Thus, section 16(5)(c) enables the Secretary of State by order to

provide that the Act should not regulate consumer credit agreements with "a connection with a country outside the United Kingdom". Section 9(2) provides: "Where credit is provided otherwise than in sterling, it shall be treated for the purposes of this Act as provided in sterling of an equivalent amount." These provisions are directed at the nature of the credit agreement and of the credit provided under it, rather than directly at the supply transaction in a debtor-creditor-supplier context. But they militate none the less against the appellants' submission that the 1974 Act is incapable of affecting any form of credit to support an overseas transaction.

33 Another consideration is that if the concept of "transaction" is limited as the appellants suggest, the limitation must presumably apply throughout sections 11, 12 and 75. But in that event a restricted-use credit agreement for the purposes of a foreign transaction would cease to fall within section 12, and would instead be a "debtor-creditor agreement" within section 13. That this would be an unnatural categorisation appears from the language of these sections alone. But it is confirmed by the differing particulars which the Crowther Committee contemplated would be given in the respective cases of connected and unconnected loan agreements (Crowther, paras 6.5.10 and 11), and which are now in fact required under the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553). The particulars called for in the case of restricted-use debtor-creditor-supplier agreements within section 12 include, not surprisingly, a description of the goods, services or other things involved, whereas no such particulars are required in the case of a debtor-creditor agreement within section 13: cf paragraph 3 of Schedule 1 to the Regulations.

34 At the forefront of the appellants' case is the submission that the 1974 Act contains provisions showing that it cannot have been intended to apply to overseas transactions. First among those relied upon is section 75(2):

> "Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor."

This is supplemented in section 75(5) by a provision entitling the creditor "in accordance with rules of court" to have the supplier made a party to any proceedings brought against the creditor under section 75(1). The appellants submit, and Gloster J accepted, that the "whole premise" of these provisions is that a UK court will have jurisdiction over the supply transaction and the supplier.

35 Mr Sumption for the OFT accepts that the statutory indemnity provided by section 75(2) cannot operate worldwide. He submits that it is limited to contractual or restitutionary relationships subject to the law of one of the parts of the United Kingdom. It does not have either the mandatory quality or the background in social policy of section 75(1) to give it any wider application. Rather, it was designed to reflect that which it was assumed would anyway exist (see the Crowther Report, para 6.6.31) and it is subject to any contrary agreement. An agreement to subject to a foreign law a relationship which is in all other respects domestic equates with or is analogous to a contrary agreement: cf, e g, *English v Donnelly* 1958 SC 494. Under the 1974 Act, section 173(1) voids any term to the extent that it is

A inconsistent with a provision of the Act for the debtor or hirer or his relative or any surety. Section 75(1) is such a term, section 75(2) is not.

36 The appellant card issuers submit that, if section 75(2) is limited to relationships between a card issuer and supplier subject to a domestic law of the United Kingdom, this confirms that section 75(1) cannot extend to overseas supply transactions. But that does not follow. First, the relationship of a UK card issuer and an overseas supplier may be subject to B (say) English law. At the time of the Crowther Report and the 1974 Act, it would have been envisaged that such a relationship would in all likelihood involve a direct contract, and a UK card issuer would on that basis have been quite likely to stipulate for English law. Even now, network rules and the contractual agreements made by merchant acquirers with overseas suppliers could select a UK law to govern the relationship between UK card issuers C and overseas suppliers, and they could no doubt also be structured to make the relationship directly contractual for at least indemnity purposes. The characteristics of an overseas supply transaction between a debtor and a supplier for which the appellants contend (cf para 28 above) determine neither the nature nor the governing law of the relationship between a UK card issuer and an overseas supplier. Yet, on the appellants' case, section 75(1) and (2) cease to apply if an overseas supply transaction has at D least those characteristics, even if the relevant card issuer could and would otherwise have the statutory indemnity provided by section 75(2) because his relationship with the supplier was governed by UK law. Mr Hapgood submits that subsections (1) and (2) of section 75 cannot be "disconnected". But the appellants' own case involves a disconnection, since it seeks to derive, from an indemnity provision capable on its face of applying to all E creditor-supplier relationships subject to UK law, a limitation in the scope of liability under section 75(1) based on characteristics relating to the supply-debtor transaction which have no necessary connection with the creditor-supplier relationship.

37 Secondly, whatever the law applicable to the relationship between the UK card issuer and the relevant supplier, the card issuer may very well have a right to indemnity in respect of sums paid compulsorily under F section 75(1). Section 75(2) does no more than reflect a well-recognised restitutionary right at English common law. Other developed legal systems are likely to recognise a similar right. Further, under the simple model contemplated at the time of the Crowther Report and 1974 Act, it would have been envisaged that a card issuer would be able to introduce into his relations with suppliers an express contractual indemnity mirroring the lines G of section 75(2). Even today, the network rules for Visa and MasterCard could provide for suppliers to indemnify card issuers in full in respect of liabilities incurred under provisions such as section 75(1), and could no doubt also be structured, if necessary, to create direct contractual rights for that purpose. It cannot in these circumstances be assumed that Parliament envisaged that section 75(2) would be the only route to indemnity. Take the example of a tripartite situation which could have been foreseen at the time H of the Act—a relationship between a UK card issuer and a French supplier subject to French law and to an express indemnity mirroring section 75(2). It is hard to think that Parliament would have intended the cardholder to lose the benefits of section 75(1) merely because the indemnity arose contractually rather than statutorily.

38 Thirdly, the Crowther Report does not suggest that liability under section 75(1) depends on the existence of an effective indemnity. Section 75(2) is itself subject to any contrary agreement. More relevantly, Crowther recognised that the effect of section 75(1) would be to impose on card issuers irrecoverable losses, but took the view that card issuers were better able to bear them than cardholders: see para 19 above. Again, this militates against treating the existence of a statutory indemnity under section 75(2) as critical to liability under section 75(1).

39 As to section 75(5), it is true that, whatever rules of court may provide, an overseas supplier will be less easily brought before a UK court than a domestic supplier, and may simply ignore any attempt to join him, in which case any UK judgment may not be enforceable against him here or anywhere. But again it was a principal theme of the Crowther Report that creditors would have a strong contractual and commercial influence over their suppliers and that, where resort could not be had to such suppliers, losses were better borne by creditors, who could spread them over the public at large, than by debtors.

40 The appellants submit that there are other provisions in the 1974 Act which indicate that section 75(1) cannot have been intended to address foreign supply transactions. Under section 67 et seq certain credit agreements are cancellable within a cooling-off period (of either five or 14 days), and, where notice of cancellation is given, section 69(1) provides that it "shall operate—(i) to cancel the agreement, and any linked transaction, and (ii) to withdraw any offer by the debtor or hirer, or his relative, to enter into a linked transaction". On cancellation, the supplier must repay any sums he has received from the debtor (section 70(1)); the supplier and creditor are jointly liable to repay to the debtor any sums paid by him (section 70(3)); where the creditor repays the debtor, the supplier must indemnify the creditor for loss thereby suffered including costs (section 70(4)); and the debtor is treated as having the statutory duty to take reasonable care of the goods supplied (both pre- and post-cancellation) (section 72(3)(4)(7)), but is under no duty to deliver them up save at his own premises and upon request (section 72(4)(5)), and where no such request is made within 21 days of cancellation his duty to take care of the goods ceases. The preceding provisions of section 72 do not however apply to certain goods, including perishables, consumables after consumption, goods supplied to meet an emergency and goods incorporated in land: section 72(9).

41 The circumstances in which a right of cancellation arises are limited: the negotiations for the credit agreement must have "included oral representations made when in the presence of the debtor or hirer by an individual acting as, or on behalf of, the negotiator", but, even then, an agreement is not cancellable if it falls within one of two categories: the first, if it is secured on or to finance the purchase of land, the second if it is signed by the debtor or hirer at premises at which the creditor or owner or any party to a linked transaction (other than the debtor or hirer or a relative) or the negotiator is carrying on business: section 67. A typical situation in which the right to cancel exists is thus where a credit agreement is, after oral negotiations and representations in the debtor's presence, signed at the debtor's home.

42 Where a right to cancel exists, it is correct that notice of cancellation can in law only impact on a linked transaction which is sufficiently

A connected with the United Kingdom. The nature of the link does not require final determination here. Section 69(1) may simply address all linked transactions subject to any UK law. But its protective intent may give it a wider impact, e g upon any linked transaction involving a supplier and/or debtor dealing as part of the UK market. Whatever its scope, there are situations in which cancellation of a linked transaction could not on the face of it be effective, e g if the supply transaction took place overseas with a B foreign supplier subject to a foreign law. Further, if in such a case the UK creditor were to repay the debtor sums paid by the debtor prior to the notice of cancellation, the statutory indemnity provided by section 70(4) would not be effective, if the creditor-supplier relationship was subject to a foreign law. The scope of the indemnity provision in section 70(4) thus raises similar considerations to those already discussed in relation to section 75(2). The C absence or inapplicability of the statutory indemnity does not necessarily exclude the existence of a statutory liability on the part of the creditor towards the debtor under section 70(1).

43 The ineffectiveness of the provisions for cancellation in relation to overseas supply transactions (e g made with a foreign supplier for supply overseas subject to a foreign law) is more problematic. But the Court of Appeal was in my view right to hold that it is insufficient to affect the D apparently unqualified application of sections 11, 12 and 75(1) to any supply transaction. The cancellation provisions of section 67 et seq are ancillary to the main purpose of the Act. Section 69(5) of the Act permits regulations excluding linked transactions, of a description to be prescribed in the regulations, from the operation of the right to cancel. So the present problem could be entirely avoided by regulations. The right to cancel can E anyway only arise in limited circumstances, and can then only impact on linked transactions in the case of a debtor-creditor-supplier agreement where credit is advanced within the very short cancellation period provided by section 68. That means, in the case of a credit card, that the card was issued and used and cancellation then took place within that period—probably a very rare occurrence. Be that as it may, it remains true that the cancellation provisions could in law be ineffective or inapplicable in certain F situations which may be envisaged at least theoretically. But that possibility, arising in the ancillary context of cancellation within the cooling-off period, is in my view quite inadequate to shape or change the construction otherwise attaching to the separate and much more central provisions of section 75(1).

44 For the reasons I have given, which substantially coincide with those given by Waller LJ in the Court of Appeal, I consider that there is nothing in G the 1974 Act to introduce or require any further limitation in the territorial scope of section 75(1), other than that the credit agreement must be a UK credit agreement. I therefore reject the appellant card issuers' submission that section 75(1) is limited in application to domestic supply transactions and so inapplicable to overseas supply transactions, however defined. I would accordingly dismiss this appeal.

H *Appeal dismissed.*

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C T B