IN THE XXXXXXXX COUNTY COURT

CLAIM NO.XXXXXXXX

Between

XXXXXXXXXXXX

Claimant

and

XXXXXXXXXX

Defendant

DEFENCE

Background

1. In my original defence I pleaded that the Claimant had provided insufficient information for me to file an adequate defence. *Inter alia*, the Claimant had failed to provide a copy of the agreement relate to the alleged debt and had not provided evidence that a valid Default Notice had been served.

2. On date, the Court ordered the Claimant to produce all the relevant documents as outlined in my defence. The Claimant filed and served various documents in response to this order on date and the Court ordered to file a new defence in response.

3. The documents produced by the Claimant in response to the order of the Court are:

i) A list of Schedule of Documents
ii) A copy of an Application Form for the Amex Blue Credit Card dated September 2000 and stamped "Approved UK New Accounts, Date 25 September 2000"
iii) Terms and Conditions dated May 2002
iv) A further copy of an unrelated terms and conditions
v) A copy of a Default Notice dated 3 August 2007

4. Of these, only items ii, iii and v are relevant to the claim. The Claimant contends that the Default Notice provided by the Claimant is not compliant with sections 87 and 88 of the Consumer Credit Act 1974 and the copy agreement provided by the Claimant is not enforceable under sections 61, 65 and 127(3) of the Consumer Credit Act 1974.

The validity of the Default Notice

5. Notwithstanding the matters pleaded elsewhere in this defence or the earler defence, the Claimant must under Section 87(1) of the Consumer Credit Act 1974 serve a valid Default Notice before they can demand early payment of sums not yet due under a Regulated Credit Agreement or terminate the agreement.

3. Under the Interpretation Act 1978 Section 7, it states:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expressions "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have effected at the time at which the letter would be delivered in the ordinary course of post."

4. Practice Direction, Service of Documents - First and Second Class Mail.

"With effect from 16 April 1985 the Practice Direction issued on 30 July 1968 is hereby revoked and the following is substituted therefore.

1). Under S7 of the Interpretation Act 1978 service by post is deemed to have been effected, unless the contrary has been proved, at the time when the letter would be delivered in the ordinary course of post.
2). To avoid uncertainty as to the date of service it will be taken (subject to proof to the contrary) that delivery in the ordinary course of post was effected:-
(a) in the case of first class mail, on the second working day after posting;
(b) in the case of second class mail, on the fourth working day after posting.
"Working days" are Monday to Friday, excluding any bank holiday.
3). Affidavits of service shall state whether the document was dispatched by first or second class mail. If this information is omitted it will be assumed that second class mail was used.
4). This direction is subject to the special provisions of RSC Order 10, rule 1(3) relating to the service of originating process.

8th March 1985
J R BICKFORD SMITH Senior Master
Queen's Bench Division"

5. Further to the above, CPR rules on service also state the required timescales to be given for serving of documents :-

Under CPR 6.26 First class post (or other service which provides for delivery on the next business day) is deemed to be "served" The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day.

6. The Default notice supplied by the Claimant is dated Friday 3rd August, to allow service in line with the statutory requirements mentioned in points 3 to 5 above, 2 working days were required to allow for 1st Class postage. Thus the Rectify date should be 14 calendar days from Wednesday 8th August, namely Wednesday 22nd August 2007, not the 14 calendar days from the date of the letter as stated in the Default notice which would have been 17th August.

7. I therefore put the Claimant to strict proof that any Default Notice sent to me was valid and allowed the statutory 14 clear days to rectify the breach.

8. I also note that to be valid, a Default Notice needs to be accurate in terms of both the scope and nature of breach and include an accurate figure required to remedy any such breach. The prescribed format for such document is laid down in Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561) and Amendment regulations the Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004 (SI 2004/3237).

9. The failure of a Default Notice to be accurate not only invalidates the Default Notice (Woodchester Lease Management Services Ltd v Swain and Co - [2001] GCCR 2255) but is an unlawful rescission of contract which would not only prevent the Court enforcing any alleged debt, but give me a counter claim for damages (Kpohraror v Woolwich Building Society [1996] 4 All ER 119).

10. It is submitted that the above Default Notice served s87(1) Consumer Credit Act 1974 failed to comply with the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561).

11. For a Creditor to be entitled to terminate a regulated Credit Agreement where there is a breach, demand repayment in full or take any legal action to recover any monies due under the Agreement, a creditor must serve a Default Notice under section 87(1) of the Consumer Credit Act 1974 which states:

Section 87. Need for Default Notice

(1) Service of a notice on the Debtor or hirer in accordance with section 88 (a "Default Notice ") is necessary before the creditor or owner can become entitled, by reason of any breach by the Debtor or hirer of a regulated Agreement -

(a) to terminate the Agreement, or

(b) to demand earlier payment of any sum, or

(c) to recover possession of any goods or land, or

(d) to treat any right conferred on the Debtor or hirer by the Agreement as terminated, restricted or deferred, or

(e) to enforce any security.

12. The Act also sets out via Section 88(1), that the Default Notice must be in the prescribed form, as below:

Section 88. Contents and effect of Default Notice

(1) The Default Notice must be in the prescribed form…

13. The wording must make it clear that no variation is acceptable. Therefore it cannot be dispensed with as a De Minimus issue.

14. I note that the regulations do not allow any variation in the form of these statements and therefore it is suggested that where the statements are not as laid down in the regulations the Default Notice is rendered invalid as a consequence.

15. In the case of Woodchester Lease Management Services Ltd v Swain & Co - [1998] All ER (D) 339 in the Court of Appeal, the Court addressed in some detail the issue of the contents of a Default Notice and should the notice fail to comply with the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561)

it would render the Default Notice invalid I quote the comment of KENNEDY LJ: "This statute was plainly enacted to protect consumers, most of whom are likely to be individuals" the judgment appears to confirm the consumer credit legislation made under the Consumer Credit Act 1974 as plainly enacted and set out to offer protection to the consumer. Therefore it is suggested that the failure of the Claimant to set out the Default Notice in accordance with the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561) could unduly prejudice me as it failed to allow the required time to remedy the alleged default.

16. The Claimant's failure to issue a valid Default Notice must surely prevent a right of action and would make any termination of the Agreement unlawful, as statute provides the procedure that must be followed. Since the Claimant has failed to adhere to statutory procedure it is averred that the Claimant does not have a right of action, and can never now have a right of action having terminated the Agreement unlawfully.

17. Furthermore, the Arrears Total outlined cannot be accurate, as the Balance on the Account was at least partly comprised of Unlawful Charges plus additional Charges and Interest added unlawfully whilst the Account was in Dispute. Therefore, the Arrears claimed cannot be accurate, as they are themselves calculated using a Total that was itself inaccurate.

18. This is at all times an Agreement Regulated by the Consumer Credit Act 1974. There is no provision in the Act that allows a large financial institution to terminate an Agreement that is in alleged default or breach simply by giving notice to the Consumer. Section 98(6) makes that quite clear. The Creditor must follow the steps outlined in Section 87 and Section 88 if they are to lawfully Default and Terminate, and enjoy the benefits of Section 87.

19. Finally, an invalid Default Notice cannot be remedied by simply issuing a new Default Notice. The Claimant may not serve a second effective default notice in prescribed form post-termination of the agreement. Any such second default notice will necessarily state a date by when I would be required to comply after which in default the agreement would terminate. The second default notice would therefore contain the fiction that the agreement endured when that cannot be the case, as it was terminated on XX/XX/XX. Terminating an Agreement on the back of a defective Default Notice, simply confirms the undeniable truth that Termination of the agreement by the Claimant was carried out in circumstances which then prohibited them from enjoying the benefits of Section 87, namely the opportunity to seek early Payment of a sum that was, prior to Termination, only payable in the future.

The enforceability of the Agreement

20. Under the Consumer Credit Act 1974 there are certain conditions laid down by parliament which must be complied with if such agreement is to be enforced by the courts. These conditions are prescribed under regulations made by the Secretary of State under section 60(1) CCA 1974, the regulations referred to being the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553). *Inter alia*, the agreement must:

1. properly identify the debtor by name and full postal address (Schedule 1);

2. inform the debtor of the Protection and Remedies Available under the Consumer Credit Act 1974 to Debtors under Regulated Consumer Credit Agreements. In the present case, this means there should be a section headed "Your right to cancel" containing the required information (Schedule 2);

3. be signed by the debtor in a signature box of the prescribed form (schedule 5); and

4. contain certain prescribed terms relating to important financial information (Schedule 6).

21**.** Commenting on the provisions of Schedule 6 in his judgment in the case of Wilson and another v Hurstanger Ltd [2007] EWCA Civ 299, TUCKEY LJ said:

"33 In my judgment the objective of Schedule 6 is to ensure that, as an inflexible condition of enforceability, certain basic minimum terms are included which the parties (with the benefit of legal advice if necessary) and/or the court can identify ***within the four corners of the agreement****. Those minimum provisions combined with the requirement under s 61 that all the terms should be in a single document, and backed up by the provisions of section 127(3), ensure that these core terms are expressly set out in the agreement itself: they cannot be orally agreed; they cannot be found in another document; they cannot be implied; and above all they cannot be in the slightest mis-stated. As a matter of policy, the lender is denied any room for manoeuvre in respect of them. On the other hand, they are basic provisions, and the only question for the court is whether they are, on a true construction, included in the agreement. More detailed requirements, which are designed to ensure that the debtor is made aware, so far as possible, of specified information (including information contained in the minimum terms) are to be found in Schedule 1."* (my emphasis)

22. The Defendant admits that the agreement supplied complies with the requirements of the regulations in respect of identifying him as the debtor but does not contain any of the prescribed financial terms. This is sufficient to render the agreement unenforceable.

23. In this last respect, the defendant refers to LORD NICHOLLS OF BIRKENHEAD in the House of Lords Wilson v First County Trust Ltd - [2003] All ER (D) 187 (Jul):

"28.........I should outline the salient provisions of the Consumer Credit Act 1974. Subject to exemptions, a regulated agreement is an agreement between an individual debtor and another person by which the latter provides the former with a cash loan or other financial accommodation not exceeding a specified amount. Currently the amount is £25,000. Section 61(1) sets out conditions which must be satisfied if a regulated agreement is to be treated as properly executed. One of these conditions, in paragraph (a), is that the agreement must be in a prescribed form containing all the prescribed terms. The prescribed terms are the amount of the credit or the credit limit, rate of interest (in some cases), how the borrower is to discharge his obligations, and any power the creditor may have to vary what is payable: Consumer Credit (Agreements) Regulations 1983, Schedule 6. The consequence of improper execution is that the agreement is not enforceable against the debtor save by an order of the court: section 65(1). Section 127(1) provides what is to happen on an application for an enforcement order under section 65. The court 'shall dismiss' the application if, but only if, the court considers it just to do so having regard to the prejudice caused to any person by the contravention in question and the degree of culpability for it. The court may reduce the amount payable by the debtor so as to compensate him for prejudice suffered as a result of the contravention, or impose conditions, or suspend the operation of any term of the order or make consequential changes in the agreement or security.

"29. The court's powers under section 127(1) are subject to significant qualification in two types of cases. The first type is where section 61(1)(a), regarding signing of agreements, is not complied with. In such cases the court 'shall not make' an enforcement order unless a document, whether or not in the prescribed form, containing all the prescribed terms, was signed by the debtor: section 127(3). ***Thus, signature of a document containing all the prescribed terms is an essential prerequisite to the court's power to make an enforcement order****….".* (my emphases)

"30. These restrictions on enforcement of a regulated agreement cannot be sidestepped....."

And furthermore:

"36. In the present case the essence of the complaint is that section 127(3) of the Consumer Credit Act has the effect that ***a Regulated agreement is not enforceable unless a document containing all the prescribed terms is signed by the debtor".***

24. Finally, it should be noted that, in the same judgement, LORD NICHOLLS OF BIRKENHEAD, said:

"49. ....The message to be gleaned from sections 65, 106, 113 and 127 of the Consumer Credit Act is that where a court dismisses an application for an enforcement order under section 65 ***the lender is intended by Parliament to be left without recourse against the borrower in respect of the loan****. That being the consequence intended by Parliament, the lender cannot assert at common law that the borrower has been unjustly enriched*.(my emphasis)

"50. This interpretation of the Consumer Credit Act accords with the approach adopted by the House in Orakpo v Manson Investments Ltd [1978] AC 95, regarding section 6 of the Moneylenders Act 1927 and, more recently, in Dimond v Lovell [2002] 1 AC 384, another case where section 127(3) precluded the making of an enforcement order. In Dimond's case the restitutionary remedy sought was payment of the hire charge for a replacement car used by Mrs Dimond. The House rejected a claim advanced on the basis of unjust enrichment. Lord Hoffmann observed that Parliament contemplated that a debtor might be enriched consequential upon non-enforcement of an agreement pursuant to the to the statutory provisions. ***It was not open to the court to say this consequence is unjust*** *and should be reversed by a remedy at common law: [2002] 1 AC 384, 397-398."* (my emphases)

25. The copy of the agreement provided by the Claimant consists of two parts: a copy of an application form signed by the Defendant and dated September 2000 plus a copy of Terms and Conditions dated 2002 but claimed to be those "applicable at inception of the account".

26. Schedule 6 of the Consumer Credit (Agreements) Regulations 1983, gives the prescribed (financial) terms relevant to a Credit Card agreement (agreement for running-account credit) as:

Credit Limit	
3 Agreements for running-account credit	A term stating the credit limit or the manner in which it will be determined or that there is no credit limit
Rate of Interest	
4. Agreements for (a) running-account credit	A term stating the rate of any interest on the credit to be provided under the agreement
Repayments	
5. Consumer Credit Agreements	A term stating how the debtor is to discharge his obligations under the agreement to make the repayments, which may be expressed by reference to a combination of any of the following-- (a) number of repayments; (b) amount of repayments; (c) frequency and timing of repayments;

(d) dates of repayments;
(e) the manner in which any of the above may be determined;
or in any other way, and any power of the creditor to vary what is payable.

27. It should be noted that none of these terms are present in the Application form provided by the Claimant. They are, however, present in the document described as "True copy Credit Card Agreement/Terms and Conditions applicable at inception of account" ("the T&Cs").

28. As has already been noted, the application form was signed and approved in September 2000. The T&Cs are quite clearly marked "Blue101TC May02" indicating that they are not (as the Claimant claims) the terms and conditions applicable at the inception of the account but those published 2 years later. Thus, the documents provided have both my signature and the prescribed terms but not in the same document. The requirement that "*all the terms should be in a single document*", and "*within the four corners of the agreement*" as demanded by TUCKEY LJ in Wilson and another v Hurstanger Ltd is not met.

29. From this and from the above judgement of LORD NICHOLLS OF BIRKENHEAD, it is clear that without a credit agreement, signed by the defendant and containing the information prescribed in the regulations, the Claimant's claim cannot succeed.

Statement of Truth

I xxxxxxxxxxx, believe the above statement to be true and factual

Signed ....

Dated this xx day of xxxxxx, 2009