Guildhall

Newsletter

COMMERCIAL NEWS SUMMER 2012

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EDITORIAL

A major development at Guildhall this year is the launch of its new Employment Team comprising Nick Smith, Debbie Grennan, Julian Allsop, Douglas Leach and Allan Roberts. The team collectively possesses an immense amount of expertise in all areas of employment law and litigation, including discrimination and harassment, constructive and unfair dismissal, TUPE, equal pay, breach of contract, bullying and stress claims, whistleblowing, collective labour law and restrictive covenants, as well as all aspects of non-contentious advisory and drafting work. Obviously this development complements the long-standing expertise of the Commercial Team which frequently embraces disputes involving companies and directors and other senior staff, and the all-too-common scenario of the employees absconding with client lists on data sticks. Two members of the Employment Team are guest contributors to this newsletter... and now to its contents:

From the Commercial Team, Ross Fentem considers the recent Court of Appeal case of *Golden Ocean Group v Salgaocar Mining Industries* and adopts a "frequently asked questions" approach to the problem of e-guarantees. In that case the Court of Appeal had to apply a statute from the reign of Charles II to the question of whether an email chain could amount to a legally binding guarantee. John Virgo considers whether the routine selling of financial derivatives to small and medium sized enterprises constitutes the next scandal to engulf the financial services industry, or whether banks will be able to hide behind their boilerplate disclaimers. Nicholas Briggs considers the issues arising out of solicitors' retainers and the consequent scope of the duty of care, based on two recent authorities. Lucy Walker provides a Consumer Credit Act update focussing on recent cases concerning default notices and the unfair relationship test.

From the new Employment Team, Julian Allsop considers the pitfalls of relying on non-solicitation clauses to combat the suborning of clients in the wake of the *Towry Law Group* case. Allan Roberts considers the principles in play when the statutory policies of TUPE rub up against the piercing of the corporate veil argument where complex corporate structures are used.

If you would like more information on our Employment team please visit www.guildhallchambers.co.uk or contact team clerk Justin Emmett on tel: 0117 930 9000 or by email justin.emmett@guildhallchambers.co.uk

If you have any comments and suggestions about current and future articles please email the editor on gerard.mcmeel@guildhallchambers.co.uk. We aim to make these newsletters as topical and relevant as we can.

Gerard McMeel, Editor

COMMERCIAL SEMINAR 2012

REGISTER NOW!

Following on from the success of last year's Commercial seminar, the team are delighted to announce they will be hosting their fifth annual seminar on Thursday 15th November 2012 in Bristol. This year the seminar will be focussing on commercial fraud.

We are offering an 'Early Bird' discount of 20% for the first 20 people who register their interest (via the QR code or website – quoting "Newsletter"). For further information and to register your interest in our upcoming seminar please scan or visit www.guildhallchambers.co.uk/seminars

Guarantees in the electronic age

S.4 of the Statute of Frauds is no "dusty relic". This much was conceded by the unsuccessful appellants in *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, a case dealing with the enforceability of a guarantee given and proved by a chain of e-mail correspondence. The language of the Statute may be arcane, but as Lord Hoffmann pointed out in *Actionstength Ltd v International Glass Engineering SPA* [2003] 2 AC 541, the policy of protecting people from being held liable as guarantors on the basis of ill-considered, ambiguous or completely fictitious oral utterances remains good. Translated into modern terminology, s.4 requires that, for a guarantee obligation to be enforceable: (1) the agreement to guarantee must be in writing or, if the agreement is made orally, there must be a memorandum or note evidencing the oral agreement, and (2) the agreement, memorandum or note must be signed by the guarantor or someone authorised by him to sign it on his behalf. In an electronic age, the courts must grapple with the thorny issues that are raised by allegations that guarantee obligations have been created by instantaneous electronic communication. The FAQs that follow are intended both as a guide and as a warning.

1 Can a guarantee be concluded, or evidenced, by e-mail correspondence?

The practical problem with e-mail is also its greatest benefit. It is instantaneous. It can feel like a conversation, in which touch-typing replaces speech. But an e-mail is clearly a piece of writing. Although the draftsman of the Statute of Frauds could not have foreseen modern developments in information technology, guarantees had in the Twentieth Century been enforceable if made by fax. Article 9(1) of EC Directive 2000/31 requires EU Member States to ensure that their legal systems permit contracts to be concluded electronically, and the Law Commission expressed the view in 2001 that in general the common law was sufficiently flexible to ensure compliance with this obligation. It took Judge Pelling QC (sitting as Judge of the Chancery Division) in *J Pereira Fernandes SA v Mehta* [2006] 2 All ER 891 to confirm the obvious proposition that an enforceable guarantee obligation may be created or evidenced electronically.

In *Mehta*, the allegation was not that there was an e-guarantee in writing, but that the e-mail correspondence showed a sufficient memorandum or note. Nilesh Mehta had authorised a member of his staff to send an e-mail to the creditor at a time when a winding-up petition had been presented against a company of which Mr Mehta was director. By the e-mail, Mr Mehta sought an agreement for an adjournment of the hearing of the petition, and offered that he would give *"A Personal Guarantee ... in the amount of £25,000"* to the creditor. The e-mail concluded *"I am also prepared to give a company undertaking ... pending the signing of the Personal Guarantee"*. The e-mail was an offer to give a guarantee, which was then orally accepted by the creditor. By analogy with *Parker v Clark* [1960] 1 WLR 28, the written (e-mailed) offer was held to be a sufficient memorandum for the purpose of s.4. If an e-mailed memorandum suffices for s.4, it follows that an e-mail is capable also of comprising a written guarantee: this is confirmed by *Golden Ocean*.

Parliament could legitimately have chosen not to allow certain kinds of guarantees to be created, or evidenced, by e-mail. Article 9(2) of EC Directive 2000/31 allows Member States to provide special rules for "contracts of suretyship granted ... by persons outside their trade business or profession". Parliament did not respond by exempting "consumer" guarantees. Instead, the Consumer Credit (Electronic Communications) Order 2004 expressly allows guarantees regulated by the Consumer Credit Act 1974 to be concluded electronically, and makes provision for the form and content of such regulated security documents.

2 Can an e-guarantee be concluded or proved by consideration of a long thread of emails?

In *Golden Ocean*, Christopher Clarke J at first instance had held that an enforceable contract of guarantee of obligations under a charterparty may be created by an electronic chain

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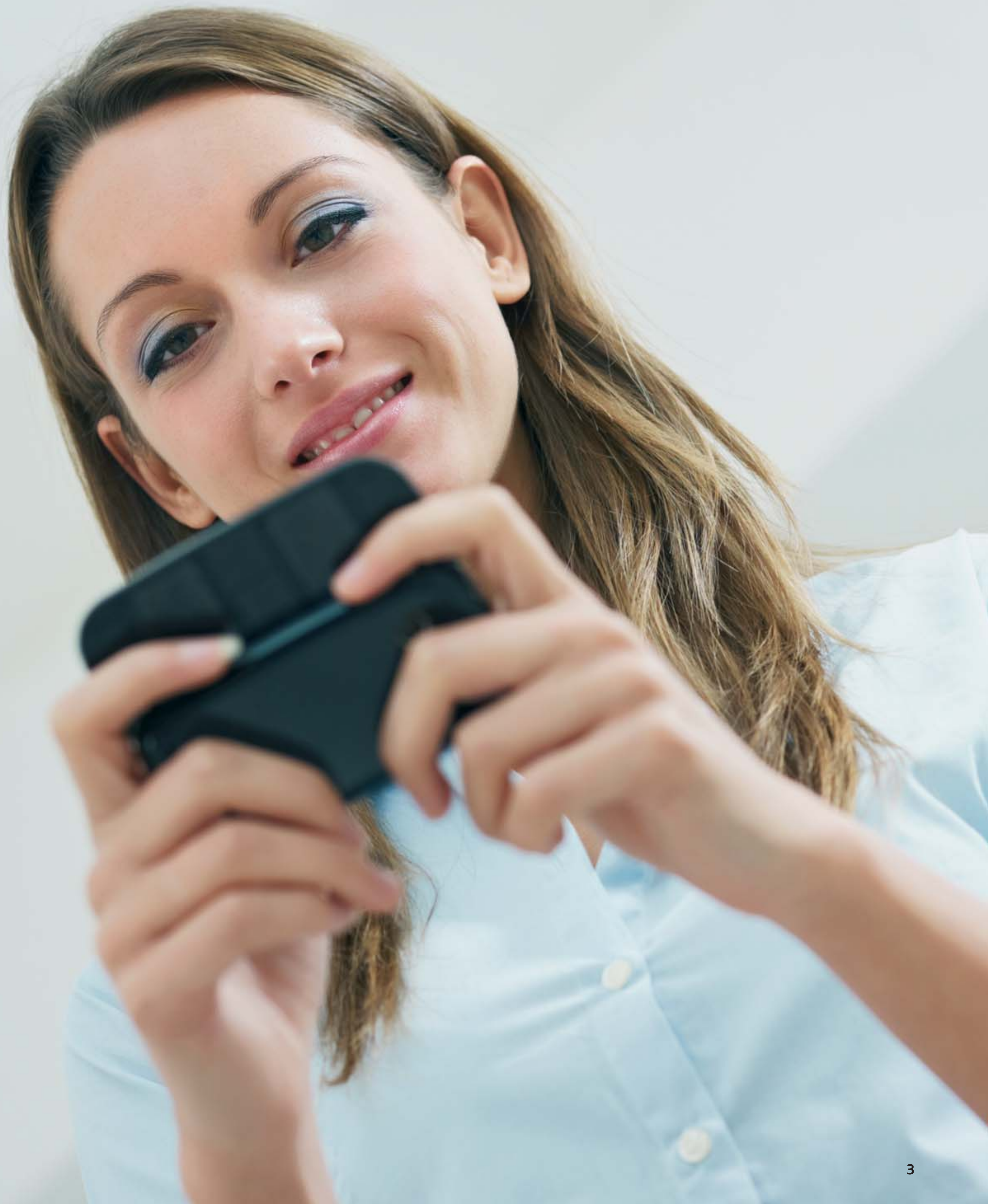
"For the purposes of the Statute of Frauds, it must be determined whether or not a given communication is in writing. There is no hybrid category."



of documents. The Defendant guarantors had applied to set aside the Claimant creditor's permission to issue a Claim Form and serve it on them in Goa, on the basis among other things that the e-mail correspondence on which the creditor relied as creating the guarantee obligation was not contained in a single electronic document. To find a guarantee, one had to work backwards from an e-mail of acceptance reading *"Yes. Confirm the 5 days that's fine. Cd U send me recap – with todays date?"*, through a series of other e-mails, eventually to reach an e-mail sent some weeks earlier which described the recap as *"A/c Trustworth Limited Singapore fully guaranteed by Salgaocar Mining Industries Goa"*.

On appeal, it was argued that it would be inimical to the purpose of the Statute of Frauds that it be satisfied only after a lengthy, educated trawl through a lever-arch file full of email exchanges. One might comment that the volume of documentation might in most modern commercial cases be reduced if parties to litigation found a way round the habit of printing out every single chain behind every single e-mail each time that each e-mail produced a reply. But leaving that aside, and notwithstanding that the submission was just forensic exaggeration (the e-mail chain was relatively short), the Court of Appeal held that the length of the chain was not important. Tomlinson LJ said at [22] that *"I can see no objection in principle to reference to a sequence of negotiating emails or other documents of the sort which is commonplace in ship chartering and ship sale and purchase"*. Tomlinson LJ approved the first-instance decision that there is no principled limit to the volume of documentation through which one might have to trawl in order to determine whether a contract of guarantee had been concluded. There would not appear to be any rationale for confining the decision to the immediate context of chartering and maritime contracts; it may be the case that the chartering context gave precise meaning to terms employed by the negotiators and made it unambiguous that the parties intended to be bound by their relatively informal e-mail correspondence, but the principle is one of general application.

3 Is an electronic signature a "signature"?

Unsurprisingly, yes. In *Golden Ocean*, it was common ground that an electronic signature was good enough. In *Re Stealth Construction Ltd* [2012] 1 BCLC 297, it was conceded by the applicant liquidators that the insertion of the correspondents' first names at the bottom of the e-mails in question was sufficient for the purpose of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, which also imposes a signature obligation in order that an enforceable agreement be created. The concessions are clearly correct.

4 What is a sufficient "electronic signature"?

S.7(1) of the Electronic Communications Act 2000 provides for the admissibility into evidence of any "electronic signature" which has been incorporated into or is logically associated with a particular communication and which has been "certified" by the signatory. S.7(2) goes on to define "electronic signature" in somewhat circular fashion as something in electronic form which (i) is incorporated into or logically associated with an electronic communication or data, and (ii) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data and/or its integrity. On the face of it, this is much too circular to be of any practical use, and concerns anyway the law of evidence and not the Statute of Frauds.

Flaux J held in *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95] that s.6 of the Statute of Frauds (Amendment) Act 1828 (under which a fraudulent misrepresentation as to credit is not actionable unless the representation is made in signed writing) would *"clearly be satisfied"* provided that the representation was contained in an e-mail which *"includes a written indication of who is sending the e-mail"*. That last phrase is perhaps a little wide. The cases suggest that a mere "written indication" is not enough to constitute a signature for statutory purposes. To satisfy s.4 of the Statute of Frauds, a purported signature must be one which *"is intended for a signature"*: see *Evans v Hoare* [1892] 1 QB 593. In *Decouvreur v Jordan* (Times, May 25, 1987), the Court of Appeal held that *"any writing by the party to be charged by which he identifies himself or by which he can be identified ... and which shows, objectively, an intention to adopt the note or memorandum will suffice"*.

So, the question is whether a given "written indication of who is sending the e-mail" is, objectively, one which demonstrates an intention to have the sender identified as adopting the document. This concurs with the view of the Law Commission that compliance with any statutory signature requirement for an electronic document can be tested in a functional way by analysing whether the conduct of the would-be signatory manifests an intention to authenticate the relevant instrument.

The recent cases demonstrate that a sufficient electronic signature may be given very informally. In *Re Stealth*, "Jo and Suzy" were enough. In *Golden Ocean*, the e-mail at issue, which had purportedly been sent on behalf of the Defendant company, also contained the sender's first name ("Guy") at its foot. The e-mail's language was described as "matey", but the communications were not merely inconsequential. Tomlinson LJ insisted that the decision to sign off the acceptance e-mail with the word "Guy" was properly regarded as an authentication of the contract which was contained in the chain of e-mails of which it was the culmination. Indeed, even a nickname may be enough, so long as it is a sufficient identification with a sufficient objective intention to authenticate.

By contrast, in *Mehta*, Judge Pelling did not accept that an e-mail memorandum which did not contain Mr Mehta's name anywhere than in the "sent by" box appearing in the recipient's inbox had a sufficient signature. The Judge relied on Lord Westbury's speech in *Caton v Caton* (1867) LR 2 HL 127, which differentiated between a "signature" appearing in an instrument only incidentally, and a "true" signature which is intended to relate and refer to every part of the instrument in question. Judge Pelling considered at [29] that, *"absent evidence to the contrary"* the automatic insertion of an e-mail address could not be held to have been *"intended for a signature"*. The decision is obviously right, but the proviso gives rise to some problems: what sort of evidence could Judge Pelling have had in mind, other than that of the subjective intention or purpose of the sender? The solution may be that Judge Pelling was cautiously allowing for circumstances that may develop in which a party is able consciously to choose whether to allow his e-mail address to be read by the recipient; where such an election is available

“The recent cases demonstrate that a sufficient electronic signature may be given very informally. In Re Stealth, “Jo and Suzy” were enough. ”

and known to be available, then it may be said that an objective intention to sign may be manifest.

This chimes with Christopher Clarke J’s explanation of *Caton* in *Golden Ocean* at first instance ([2011] 2 All ER (Comm) 95) at [95]: *“there must be something ... which is voluntarily affixed to the document by way of authentication thereof”* (emphasis added). A formulation which includes a proviso of voluntariness does throw up some problems of its own where automatically-generated e-mail footers are involved. The lowly employee in a large corporation may in practical terms have no choice about the form of the automatic footer, and no realistic method of having it removed. Can he be said to have voluntarily affixed the footer to the document? To the extent that the problem will arise in a personal guarantee case, the answer is probably yes. It appears that in *Lindsay v O’Loughnane*, just such an automatically-generated signature was held to be sufficient, although the judgment is not wholly clear on the point. From the point of view of the recipient, there will be no difference between (i) the sender who consciously chose to include the signature or not to have it removed, (ii) the sender who did not know that the signature would appear, and (iii) the sender who did not want the signature to appear but was not in a position to remove it (assuming he took no steps to draw this to the attention of the recipient). The sender in all the above examples will objectively have shown an intention to adopt the writing by an automated signature; it is not for the recipient to inquire further.

The unwilling purported e-guarantor who is unable to remove the signature would be well-advised to add rubric at the end of his e-mail to the effect that the automatic signature is not intended to authenticate anything in the body of the text, and hope that has the desired effect. Those with the financial or technological capacity might usefully stipulate from the outset that no message is to be treated as authenticated without an encrypted signature.

5 Can a guarantee be sent by text? Or Facebook? Or Twitter?

Nowadays, people like to spend most of their time avoiding the exigencies of speaking to one another by communicating in an electronic text-speak which contains only the vestiges of written language. Others brief “friends”, real or otherwise, over remote social networks. On one view, these forms of communication are far closer to oral exchanges than to written exchanges. But the same might once have been said of e-mail. For the purposes of the Statute of Frauds, it must be determined whether or not a given communication is in writing. There is no hybrid category.

Electronic writing is writing for the purpose of the Statute of Frauds, and it would be bizarre if the fact that the writing appears on a particular platform is a sufficient distinguishing feature. I suspect that the issue will not be one of whether there is “writing”, but of whether there is an intention to create legal relations. At least as they are presently used, Facebook and Twitter (for instance) are not platforms from which one carries out commercial transactions. But the courts’ attitude will change as technologies develop and usage diversifies. The prevalence of text-message evidence in civil cases in my current practice shows that the courts are treating texts with more and more (commercial) seriousness. *“GTEE INVCE PD”* texted by a buyer referring to his financially-distressed principal’s purchase might be enough (although *“GTEE INVOICE PD LOL”* would probably not get home). The Twitter-user who tells his umpteen followers that he has *”just guaranteed £million supply of widgets by A to B”* may find himself having created a written memorandum: there is no requirement that the creditor even see the memorandum. In the light of *Mehta* and *Golden Ocean*, the only sure-fire answer – for a purported e-guarantor – is the oldest one in the (physical, metaphorical, but definitely not e-book): never sign anything.

Ross Fentem

Another scandal?

Thematic mis-selling is a feature of the UK financial services landscape. Past scandals include the mis-selling of personal pension plans, which is estimated to have cost the industry c£12b in compensation; the systematic mis-selling of payment protection insurance, which is now reported as likely to give rise to c£5b of payouts in redress. The sale of interest rate swaps and hedging products in 2007 and 2008 by a number of major high street banks look set to be the next such scandal. Estimates as to the number of swaps sold vary but may well run into hundreds of thousands. The Bristol Mercantile Court is to hear this year one of the first cases that will analyse the issues surrounding the sale of these products. In this article, I highlight some of the main areas of concern arising from rate swap sales.

The principal targets for the sale of swaps and hedging instruments have proved to be small and medium sized enterprises with reasonably substantial commercial borrowing. At a funding review banks took the opportunity to suggest that if the cost of borrowing were to rise then the borrower may have difficulty in servicing their repayment obligation. To 'protect' the borrower against that risk a swap contract was recommended under which interest rates could be fixed at an affordable level. So far, so good. Unfortunately, that is pretty much all that was explained. Offered an apparently fixed rate described as 'protection' many SMEs signed up.

A swap is a form of financial *derivative* – specifically a *'contract for differences'* within Article 85 of the **Financial Services and Markets Act 2000 (Regulated Activities) Order 2001**: accordingly, any advice and arranging of the product is regulated and must comply with the Conduct of Business Rules. As interest rates began to fall from 5.75% in July 2007 to 0.5% from March 2009 borrowers began to realize the hidden costs and features of the product they had acquired – and that the swap contract had rarely been sold in a manner compliant with the Conduct of Business Rules. The latter *Rules* require that in recommending such a product the bank takes reasonable steps to ensure that the decision to trade is suitable for its client (COBS 9.2.1 R (1)) and that it has obtained such information as is necessary to have a reasonable basis for believing that the recommended transaction meets the client's objectives (COBS 9.2.2 R); further, the bank must explain the risks of the specific type of investment being recommended including the risks particular to that type of investment and in sufficient detail to allow the client to make an informed decision (COBS 14.3.2 R).

Risks routinely not explained in selling these often long dated instruments (many were written for 10, 15 or 20 years) include the following:

- If base rates fall the product would cease to be 'in the money' and leave the hedger with a financial obligation to the bank for the term of the hedge;
- Any repayment of the commercial borrowing leaves the financial obligation in place under the hedge for its term;
- Exiting the hedges prematurely may involve a substantial cost which could be unaffordable;
- The bank may be able to terminate the hedges and claim the breakage costs because of an event of default in any event under a 'cross default' clause;
- The fixed rate applies only to fix base rate and leaves the bank free to increase its margin charges;
- There may be 'over-hedging' on the basis that (i) the value of the hedge exceeds the commercial borrowing and (ii) if the hedge does not amortise so the degree of 'over-hedging' would simply increase with time;
- The contingent liability for the breakage costs may impact on Loan to Value ratios in respect of borrowings and/or make the loan 'non-transportable'; and
- Often no proper comparison was undertaken with a fixed rate mortgage.

So far the banks have tried to hide behind 'disclaimers of liability' and an insistence that the swap was acquired as part of an 'execution only' piece of business. These issues will be considered by the Bristol Mercantile Court this year. The judgment should throw welcome light on this area of claim.

John Virgo

"To 'protect' the borrower against that risk a swap contract was recommended under which interest rates could be fixed at an affordable level."

Trouble with solicitor retainers

This article considers two recent cases concerning solicitor retainers. The first is a Bristol case that was reviewed by the Court of Appeal known as *Padden v Bevan Ashford* [2011] EWCA 1616 and the second was fought in the Technology and Construction Court known as *Shepherd Construction Limited v Pinsent Masons LLP* [2012] EWHC 43 (TCC).

The terms of a solicitor's retainer are important. They are important because the terms set out the rights and obligations of the parties and identify the tasks to be undertaken. In general firms have in place finely tuned systems ensuring that all its solicitors produce, at the first opportunity, an engagement letter that will incorporate its terms and conditions, scope out the retainer and inform the client how to complain. Nevertheless, however hard a solicitor tries to cater for each and every eventuality, some issues may remain unexpressed. This can add a degree of uncertainty and therefore the better the written retainer the less certainty.

As is well known a retainer does not even have to be reduced to writing. The mere act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Terms that have been expressly agreed will be incorporated as well as terms which the law will imply in the particular circumstances.

The above two recent cases both raise interesting issues regarding the retainer. In the first there was no written retainer and thus the scope of duty was ascertained from the circumstances, and duties were implied by law. In the second case it was argued that there was a 'single' retainer that survived a firm's merger and later conversion to an LLP. The single contract argument was necessary to fix the LLP with a duty of care to revise and update previous advice provided to the Claimant and revise and update documents drafted by the firm and on which it relied in its business dealings.

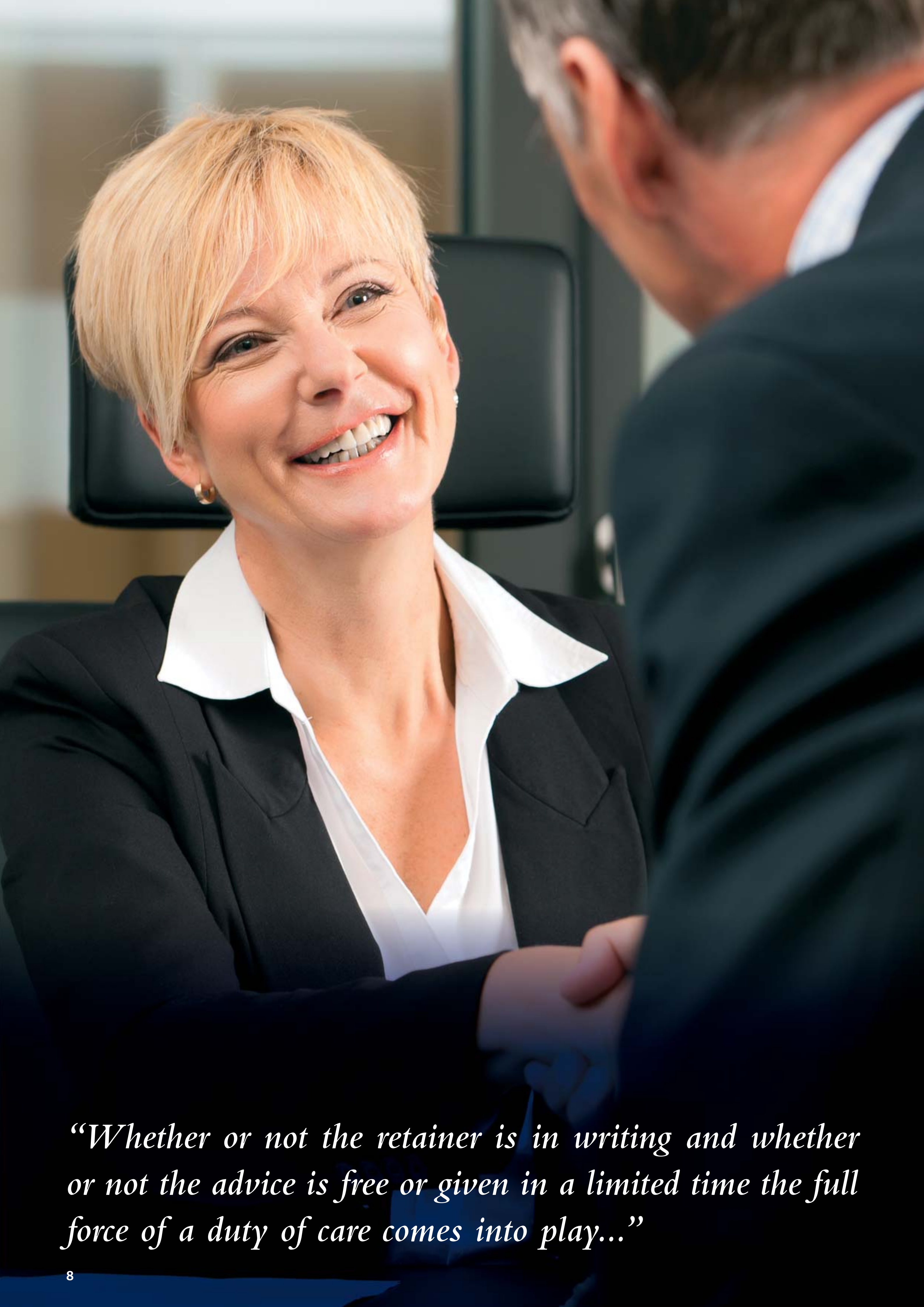
Padden v Bevan Ashford

The facts of the first case are unfortunate. They concerned a husband and wife and the duty of a solicitor to give advice to the wife when securing her husband's debt with a charge on jointly owned property. The husband and wife had been married for a number of years and had three children, the oldest of whom was 17. They lived in a substantial house near Exeter and they held a long lease that had been granted by the National Trust. They had a joint bank account, and some shares and endowment policies. The husband appeared to be a successful financial consultant employed by a company called Arbuthnot Pensions and Investments Ltd ('A').

One day, apparently out of the blue, the wife was told by her husband that she could not use their joint bank account as it had been frozen by A. He said he would sort it out. A few days later he arrived home with his solicitor who told the wife that the dispute had "turned criminal" as her husband had taken money owned by one of A's clients. The solicitor, according to the wife, informed her that the only way to avoid criminal prosecution was to sell the house and give the money back. That if she did not her husband may go to prison. He told her to take independent legal advice but that she should 'ignore any advice that she might be given not to sign'.

A few days later armed with some documents and a consent form drafted by her husband's solicitor to 'forego her interest in the house, the endowments, and her interest in Mr Padden's pension policies' she attended the Defendant solicitors' office in Tiverton and explained that she needed to see someone urgently. She saw a recently qualified solicitor who gave the first half hour of her advice free of charge. The solicitor advised the wife not to sign the documents but was told that she was going to sign them anyway. The husband was later prosecuted for taking £2m of client money, a divorce ensued and one year after the divorce the husband died. The wife then sought to set aside the charge on grounds of undue influence and after the house was sold subject to a compromise, issued proceedings against the Defendant solicitors claiming damages for negligently having failed to advise her properly in connection with the transaction. Procedurally the case descended into chaos as a result of the Judge treating the matter in a summary way. The result of this was that the Court of Appeal sent the matter back for trial to be heard by a different Judge. However the Master of the Rolls considered the scope of a law firm's retainers and how advice should be provided and having reviewed the relevant cases commented:

- The court must be aware of imposing upon solicitors duties beyond the scope of what they are requested and undertake to do.
- When undertaking the work a solicitor is not bound to say … "if I were you I would do it"; or "if I were you I would not do it",… [he] should put clearly before the [client] the nature and consequences of the act … [so] that from the clear language of an independent mind they should know what they are doing.
- The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession. This test is not altered as a result of the advice being free.
- In relation to wife guarantees the core minimum a solicitor should do is set out in *Royal Bank of Scotland v Etridge* (no 2) [2002] 2 AC 773.
- The core minimum includes a duty to understand the nature, effect, and potential consequences of the transaction, and that the wife is not under a misapprehension or undue influence.
- Merely advising a person in the position of the wife that she should not enter into the contemplated transaction, falls well short of the duty imposed on a solicitor when called on to perform the Etridge duty.
- The standard of care owed was not affected by reason of the relationship being 'for a very short period of time', or the advice was provided in 'a short, free session' and was a meeting with 'a client who had just come off the street'.



"Whether or not the retainer is in writing and whether or not the advice is free or given in a limited time the full force of a duty of care comes into play..."

- If faced with a situation where there was insufficient time the solicitor should inform the client that there is insufficient time to properly advise.
- In such circumstances the proper course for a solicitor is to explain that full advice is needed and that requires an investigation as to the facts.

Shepherd Construction Limited v Pinsent Masons LLP

In the second case, the Claimant pleaded that there was a single retainer starting when they engaged Masons, covering the period when Masons merged with Pinsent and remaining in place when the firm became Pinsent Masons LLP. Although it was accepted that the retainer itself would have had to have been renewed on the occasion that the firm changed status the single contract argument was based on the notion that the retainer in the last firm was the exact same as the first firm and therefore there was a duty on the last firm to review and check work done by the predecessors on a continuing basis to ensure that advice and contracts were not out of date or obsolete. The Court found that it was unsustainable to argue that there was a single contract ("the Single Contract) even if renewed by each successor firm. Each retainer with each firm had to be considered separately. Focusing on the retainer issues the court found:

- A solicitor's functions and responsibilities must primarily be determined by his or her retainer.
- There was no suggestion or assertion that there was any express agreement, oral or otherwise, by which the Single Contract between the Claimant and each of the three firms had been concluded.
- A key indicator was that the Claimant was billed for the provision of individual pieces of work by the respective firms and such billing was not pursuant to a Single Contract.
- The fact that the respective firms of solicitors sent out unsolicited briefings or invited the client to breakfast meetings or seminars or even sought to solicit more work from the client does not give rise to a general retainer.
- The same goes for the argument that the same people within the respective solicitor firms had contact with and generally gave advice to the Claimant.
- The court suggested that there could be no implied retainer to the effect that a professional person had to review all previous advice or indeed services provided on a continuing basis.
- However there is nothing that prevents an agreement or specific retainer or commission which imposes a continuing duty on a professional to keep earlier advice or services under review and some sort of obligation which requires the professional to review and revise previous advice given or services provided on commissions or retainers.
- The position could also be different in a family solicitor context. As an example, a solicitor may draft a will for a long-standing private client and later handle his divorce; knowing that an impending re-marriage would invalidate the earlier will, it may be incumbent upon the solicitor at least to advise his client of this consequence.

Summary

These cases emphasis how important it is to ensure that a written retainer is in place from the outset. The dangers and perils of providing incentives to new clients whereby they obtain free advice in a short period of time can be a risky strategy. Whether or not the retainer is in writing and whether or not the advice is free or given in a limited time the full force of a duty of care comes into play, and the standard of care does not vary as a result of the advice being free.

These cases also demonstrate how the courts are not keen to uphold general retainers. In the second case the Judge said that "the Single Contract relied upon by ***Shepherd*** is in effect a general and continuing retainer by which the relevant firm was required to review all advice and drafting which it had previously done. One has only to summarise this position to realise that it is hopelessly wide."

However there is a word of warning. The court specifically did not deal with the position where the solicitor who remained under a valid retainer had knowledge that advice previously given or documents previously drafted had become obsolete (for instance by reason of a new act of parliament coming into force) or commercially imprudent. In these circumstances (commercial context circumstances) it is arguable that a duty arises to advise the client that there is a known problem or potential problem.

Nicholas Briggs

Consumer Credit Act default notices

Ian Karl Robert Brandon v American Express Services Europe Limited [2011] EWCA Civ 1187

What?

On 25th October 2011, the Court of Appeal handed down judgment in *Ian Karl Robert Brandon v American Express Services Europe Limited*. The Court's decision perpetuates the current uncertainty about what action a lender can or should take if it discovers that a default notice served by a lender on a borrower pursuant to s. 87(1) Consumer Credit Act 1974 is defective.

Regulatory background

Under the provisions of the Consumer Credit Act 1974, (as amended, the "CCA") if a creditor wants to take certain steps to enforce a CCA regulated credit or hire agreement, the creditor can only do so provided that he has first served on the debtor a default notice in the prescribed form. The steps which a creditor cannot take without first having served a compliant default notice on the debtor are listed at s.87 CCA and include termination of the regulated agreement; demanding accelerated payment of sums payable under the agreement; and the recovery of goods.

In order to be compliant, the default notice must be in the prescribed form pursuant to s.88 (2) CCA and must clearly set out the debtor's breach of the agreement and the steps which the debtor should take to cure his breach. Crucially, the debtor must be allowed at least 14 clear days in which to remedy his default before the creditor becomes entitled to take enforcement action.

Facts of the matter

Mr Brandon was in arrears under his credit card agreement with American Express Services Europe Limited ("Amex"). Amex served on Mr Brandon a default notice and then, when Mr Brandon failed to remedy his default, Amex pursued him for the full outstanding balance owed under his credit card agreement.

Amex applied for and obtained summary judgment against Mr Brandon following a hearing before Deputy District Judge Gisby at Bristol County Court on 5th June 2009. Mr Brandon appealed the summary judgment on the basis that, amongst other things, the s.87 default notice served on him by Amex was defective. The notice did not allow him the statutorily prescribed 14 clear days in which to cure his default. Mr Brandon argued that accordingly, Amex was not entitled to enforce the credit card agreement against him.

At a hearing on 25th May 2010 before HHJ Denyer sitting as a judge of the High Court at Bristol County Court, Mr Brandon's appeal against summary judgment was dismissed. HHJ Denyer noted that Mr Brandon did not deny that he owed Amex money. HHJ Denyer also noted that no enforcement action was taken against Mr Brandon within 14 days of the date of the default notice. HHJ Denyer concluded that to the extent the s.87 default notice served on Mr Brandon was defective due to the nature of the defects and the prejudice caused to Mr Brandon as a result of such defects was de minimis. Judgment in favour of Amex was upheld.

In a hearing on 12th and 13th July 2011, the Court of Appeal reversed this decision. Noting the threshold test for summary judgment at Part 24 CPR, the Court held unanimously that Mr Brandon did indeed have a real prospect of success with his defence based on the invalidity of the notice. The Amex case based on default was, in the view of the Court, untenable. The default notice on its true construction did not give Mr Brandon the requisite 14 clear days in which to remedy his breach. A failure to comply with the time period provided by statute could not be overlooked as de minimis. If the default notice had not or might not have allowed the minimum statutory period for Mr Brandon to remedy his default then it was at least realistically arguable that such a defect in the notice could not be dismissed as de minimis, both as to the nature of the defect and the prejudice caused thereby.

> *"The decision in Brandon is a rare item of bad news for creditors. The rules as to the form and content of CCA default notices are not straightforward, yet service of a compliant default notice is a pre–requisite of a successful action against a debtor where the creditor is seeking a remedy listed at s.87(1) CCA."*

Amex had also sought to advance arguments that it was in any event entitled to terminate the credit card agreement with Mr Brandon pursuant to a contractual provision in the credit card agreement itself and thus, did not need to serve a s.87 default notice on Mr Brandon in order to terminate the agreement. However, the Court held that Amex could not avail itself of this route to termination.

Impact for creditors

The decision in *Brandon* is a rare item of bad news for creditors. The rules as to the form and content of CCA default notices are not straightforward, yet service of a compliant default notice is a pre–requisite of a successful action against a debtor where the creditor is seeking a remedy listed at s.87(1) CCA. Defective notices are widespread and until the judgment in Brandon, many creditors took comfort from the judgment by HHJ Denyer that a defective notice was not fatal to any claim against a debtor provided that the creditor could demonstrate that the defect was de minimis and/or otherwise that no prejudice was caused to the debtor as a result of the defect.

The judgment in *Brandon* has essentially put the situation back to square one. The Court of Appeal did not make any decisions on the

"Of significance is the fact that in reaching his conclusions set out above, HHJ Behrens took into account the nature of the relationship between the parties and their relative bargaining strengths."

substantive law; it simply held that Mr Brandon had a real prospect of success. As to the merits of his argument regarding the defective notice, that will be for the Court to decide in due course.

Unfair relationships

Shafik Rahman & 7 ors v (1) HSBC Bank PLC (2) Andrew Donald Roger (3) Roger Nicholas Phillips (2012) [2012] EWHC 11 (Ch)

What?

The decision of HHJ Behrens sitting as a judge of the High Court in Leeds confirms that within the parameters of a large scale commercial lending relationship between lender and borrower, where the parties had equal bargaining power, neither the requirement for overdraft facilities to be repaid on demand or the enforcement of cross default clauses contained in the relevant facility agreements was unfair for the purposes of s.140A CCA.

Regulatory background

Under s.140A CCA, a borrower can apply to the Court for a determination that the relationship between lender and borrower arising out of the credit agreement between them is unfair, (s.140A(1) CCA). The unfairness can arise as a result of the terms of the agreement between lender and borrower; the way in which the lender has exercised or enforced his rights under the agreement between lender and borrower; and/or as a result of any other thing done or not done by or on behalf of the lender. The Court may take into account all matters which it thinks are relevant, (s.140A(2) CCA). Crucially however, it is the relationship between lender and borrower which the Court must assess for unfairness and not the contractual provisions framing that relationship, (*Harrison v Black Horse Limited*, [2011] EWCA Civ 1128). Once a borrower has made an allegation of unfairness, the burden of proof falls on the lender to show that the relationship is in fact fair, (s. 140B (9) CCA).

If the Court determines that the relationship between lender and borrower is unfair, then the Court has wide powers to intervene in the relationship and make appropriate orders, including requiring the lender to do or cease doing anything specified in such order, (s.140B CCA).

As a point to note, a borrower, provided that he is an 'individual' for the purposes of the CCA, (namely; a natural person; an unincorporated association; or a small partnership comprising 3 partners or fewer, (s.189(1) CCA)) may apply to the Court assess his credit agreement for unfairness under s.140A CCA even if the credit agreement itself does not fall to be regulated by the CCA.

Facts of the matter

In *Rahman*, the Claimants who, as a family group, had built up a large portfolio of investment properties alleged that the relationship between them and the lender, HSBC Bank PLC ("HSBC") was unfair. HSBC had advanced a range of facilities to the Claimants including on demand and term facilities and had taken security by way of legal mortgage over the properties comprised in the Claimants' portfolio.

The Claimants encountered difficulties in meeting their repayment obligations. HSBC invited the Claimants to submit their proposals for repayment against the background of a deteriorating relationship between the Claimants and HSBC. Eventually, HSBC demanded repayment of the on-demand facilities and, pursuant to a cross default clause contained in the relevant facility agreements, also demanded repayment of the term facilities previously advanced to the Claimants, even though in respect of some of the term facilities, the claimants continued to service the interest payments on those term facilities. HSBC also appointed an LPA Receiver over the properties.

The Claimants alleged unfairness based on (i) the terms of the agreements and the mortgages, in particular the existence of the cross default clause which enabled HSBC to demand repayment of the term facilities ahead of time; (ii) the manner in which HSBC called for repayment and appointed the LPA Receiver; and (iii) alleged breaches by HSBC of promises of additional funding.

On the facts of the case, HHJ Behrens concluded that there was nothing remotely unfair about the repayment of overdraft facilities on demand. Such terms were commonplace. HHJ Behrens also concluded that there was nothing unfair about the inclusion of a term allowing HSBC to appoint an LPA Receiver following default on the basis that such a provision was also commonplace within the banking industry.

Further, HHJ Behrens concluded that, on the facts of the matter, the existence of the cross default clause was justified by sound commercial reasons in order to protect HSBC's security position.

Impact for creditors

Rahman provides further positive news for lenders in respect of the factors that a Court will take into account when assessing unfairness for the purposes of s.140A CCA. Of significance is the fact that in reaching his conclusions set out above, HHJ Behrens took into account the nature of the relationship between the parties and their relative bargaining strengths. HHJ Behrens noted that the facilities advanced by HSBC constituted commercial lending and involved the advancement of substantial sums. On the facts, the Court found that the Claimants were in a strong bargaining position and had indeed threatened to take their business elsewhere on a number of occasions.

The decision in *Rahman* shows that it will be more difficult for borrowers who are commercially experienced to succeed with allegations of unfairness. On the facts of *Rahman*, the Court concluded that Mr Rahman had read the terms and conditions of the various facility agreements carefully and was aware of the nature of the facilities. In common with earlier authority therefore, (see for example, *Maple Leaf Macro Volatility Master Fund and Another v Rouvroy & Another* [2009] EWHC 257 (Comm)) in the circumstances, there was nothing unfair about the relationship.

Newsflash

In another case concerning unfair relationships pursuant to s.140A CCA, on 21st February 2012 the Supreme Court gave the Harrisons permission to appeal in *Harrison & Harrison v Black Horse Limited* [2011] EWCA Civ 1128. The appeal pertains to the limited question of whether the taking of an undisclosed commission by a lender in respect of the sale of a payment protection insurance policy (when there was no regulatory obligation to disclose the existence or amount of the commission) created an 'unfair relationship' for the purposes of s.140A CCA. The Harrisons' appeal will be the first time that the Supreme Court has considered the question of unfair relationships.

Lucy Walker

Deal or no deal

Post termination non-solicitation restrictions frequently appear in contracts of employment. However, employers should be aware that the protection that they afford can be inadequate, particularly where the client may view their close relationship as being with the employee, rather than the employer, as it is necessary in each case to prove that solicitation of the client has taken place. The gap can be filled by the imposition of a non-dealing clause, which eliminates the requirement to prove whether the former employee has initiated contact with the client and whether in the circumstances, such contact amounted to solicitation. This distinction was highlighted in the recent judgment in *Towry EJ Ltd v Bennett and others* [2012] EWHC 224 (QB).

In October 2009, Edward Jones Limited was acquired by the Towry Law Group and its name was changed to Towry EJ Limited. Its business was the provision of financial advice to investors and as part of its strategy the financial advisers were encouraged to develop personal relationships with their clients by networking in the local community. At the time, the contracts of employment germane to the financial advisers who would become Defendants in this litigation contained a fairly standard post termination restrictive covenant that prohibited the direct or indirect solicitation of any business, orders or custom from Towry's existing clients for a period of 12 months.

Following the acquisition, the employees of the acquired business realised that Towry intended to operate a different strategy that was based upon fewer local offices and less emphasis on personal relationships with individual clients. The seven individual Defendants left their employment with Towry and joined the corporate Defendant, Raymond James Investment Services Limited.

From February 2010 to July 2011, Towry was concerned to receive a large number of requests from their clients to transfer their business to Raymond James Investment Services Ltd, amounting to a loss that was estimated by it to be worth approximately £6m. It brought a claim in the High Court claiming amongst other things, that the Defendants had breached their post termination restriction whereby they would not solicit clients of Towry for a period of 12 months. There was no issue as to the validity of the clause, which was not exorbitant in its purported ambit. And on the face of it Towry had reasonable cause for complaint having regard to the rapid and substantial shift in business.

The matter was heard by Mrs Justice Cox DBE in June and July 2011 and judgment was handed down on 14th February 2012. Whilst Towry succeeded in resisting an allegation that they had not acted in repudiatory breach of the employment contracts, Towry did not succeed in persuading the Judge that any of the individual Defendants had solicited the large number of clients who had transferred their business to Raymond James Investment Services Ltd.

As a matter of principle, the Court held that a contractual non-solicitation clause of this kind meant that ex-employees must not directly or indirectly request, persuade or encourage clients of their former employer to transfer their business to their new employer. It was legitimate for employers to prevent their former employees from exerting influence of this kind over their clients. The question in the case before the Court (and by extension, in any case of this kind) was whether Towry demonstrated on all of the evidence that an individual Defendant's communication with its clients contained a material element of persuasion with a view to gaining the benefit of the business of those clients. It was noted that the fact that the client was the first to initiate contact was not determinative of whether or not there had been solicitation in respect of that contact.

Distilled, Towry's case in relation to solicitation was heavily dependent upon the inference that it invited the Court to draw from the fact that nearly 400 clients had put in transfer requests following the Defendants' move to Raymond James Investment Services Limited. Nevertheless, despite the sheer volume of requests, the inference that could legitimately be drawn from the number of requests was insufficient in itself to persuade the Judge that it had discharged the burden of proof. What was required in this case was some cogent proof of how it was that the transfer requests came into being, rather than evidence of the fact that the completion and processing of the transfer requests took place at later meetings between the clients and the Defendants. This evidence as to the earlier causation was not adduced.

The case demonstrates the key distinction between a non-solicitation and a non-dealing clause. If the individual Defendants had agreed to be bound by a non-dealing clause, they would almost certainly have lost the case as each transfer within the period of the restriction would have been a breach of contract. The Court was understandably reluctant to accept a case based on inference which would have effectively imposed a non-dealing provision on the parties, where none had previously existed.

It's also a cautionary tale to those seeking to enforce a non-solicitation clause; they must have proof of the key element of persuasion with a view to gaining the benefit of the business of its former clients. Cox J did not rule out the possibility of a case based wholly on inference satisfying the burden placed on the employer, but this case demonstrates the dangers of relying on broad inferences, even where the bigger picture might suggest they are well founded.

Julian Allsop

Brushing past the veil

It is a relatively common story, Company A (NewCo) acquires the undertaking of Company B (OldCo) and along with it all of OldCo's employees. By virtue of Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) the transfer does not operate to terminate the contracts of employment but instead they are deemed to be have been originally made with NewCo. Well perhaps it is wishful to think of such a clean story as being common. More typically NewCo acquires part of the business or undertaking of OldCo, which may be held by a subsidiary. Then the question becomes, who was employed by OldCo immediately before the transfer and assigned to the part transferring?

"So can the veil ever be pierced and if so when? There appears to be a reluctance of Tribunals to take this course and the EAT has persistently expressed caution about doing so. This is no doubt because it involves fundamental principles of company law."

With Regulation 4(3) making it clear anyone dismissed contrary to Regulation 7 (i.e. by reason of or a reason connected to the transfer) is deemed to have been employed immediately before the transfer, the issue of assignment becomes a relatively straightforward question of fact. But what of the position with a group holding or labour-only company? Here some or all of the employees may be employed by the group, but work primarily with the subsidiaries. What happens when NewCo only acquires the subsidiaries? The converse may also apply when the employees are employed by the subsidiaries but it is the group that is acquired and the subsidiaries liquidated. When this situation arises, will the Courts and Tribunals pierce the corporate veil and look at the group as a single economic entity? The answer is most probably not, or at least not openly. If the veil is not lifted, would an employee have any other recourse? The answer is possibly, though it will depend on the facts of each case and may require fine distinctions to be made. With the Court of Appeal recently deciding in *Key2Law (Surrey) LLP v De Antiquis*[1] that a transfer by administration does not provide a get out of jail card from the effects of TUPE, this issue is likely to gain more prominence, as it is perhaps the only means to circumnavigate the regulations. So this article revisits the issue, and looks at when an employee may be assigned even if their contract of employment is not with OldCo.

When looking at this question, one might be forgiven for thinking it ought to be straightforward. After all Regulation 4 requires not only that an employee be assigned to the part of the transferring business but also that they are employed by OldCo (the transferor). Of course such a simple analysis would permit corporate structures to be used to obviate the protections of TUPE entirely. This was the observation of Morrison J in *Duncan Web Offset v Cooper*[2]. Whilst accepting prima facie an employee of X employed to work for Y (e.g. a subsidiary) would not transfer, he recognised the need for Tribunals to *"be astute to ensure that the provisions of the Regulations are not evaded by devices such as service companies, or by complicated group structures which conceal the true position"*. However, as this was not necessary to determine the case, Morrison J's observations are non-binding. Moreover, in *Brookes v Borough Care Services Ltd and anor*[3] the EAT expressly rejected a suggestion that piercing the veil was a necessary part of considering claims under TUPE and the Acquired Rights Directive.

So can the veil ever be pierced and if so when? There appears to be a reluctance of Tribunals to take this course and the EAT has persistently expressed caution about doing so. This is no doubt because it involves fundamental principles of company law. In *Millam v Print Factory*[4] the Claimant was employed by Fencourt (F), whose shareholding was subsequently acquired by McCorquodale (M). This would not ordinarily give rise to a transfer as F remained a separate company and the Claimant's employer. In 2005 both companies were placed into administration, with the business of M being acquired by Print Factory Ltd. The Claimant contended his employment transferred to Print Factory. The Tribunal accepted this contention as M's management of F was far more than that of a simple shareholder or parent company, such that the Claimant was employed by M. The EAT upheld the appeal on the basis the Tribunal had wrongly pierced the corporate veil. Whilst the EAT acknowledged the option to lift the veil, it stated this generally required the subsidiary company to be shown as a sham or façade. This was in line with other areas of law. The Court of Appeal however, reinstated the Tribunal's decision, but not on the basis the veil could not be lifted or that the test was different in some way. One must therefore observe that in the TUPE context it appears the veil can be lifted, but only if that somewhat high test is met. That tide mark may explain the Tribunal's reluctance. Accordingly a Claimant can, though is unlikely, to succeed here.

However, the basis upon which the Court of Appeal reinstated the decision in *Millam* may provide solace. Buxton LJ concluded this was not a case of piercing the veil, highlighting this arose only where *"activity x is carried on by Company A, but for policy reasons it is sought to show that in reality the activity is the responsibility of the owner of company A, company B."* Instead he considered the Tribunal had not found activity x to have been conducted by F, decided to pierce the veil and thereafter attributed the activity to M. Rather he formed the view the Tribunal had found the activity was carried on by M. He stated *"No judicial effort was required to render [M] liable for what was done by [F] because the ET found that it was [M], not [F], that was performing the activity in the first place."* One may find this a fine distinction; a brush past the veil rather than piercing it. In the case of *Millam* the rationale rested on F being *"fully integrated"* within M. This starts to look like treating the group as a single economic entity by another avenue. If this does not require the veil to be lifted, Claimants may still contend that they are employed by the group, where it exercises sufficient control over the subsidiary. This will enable employees to argue for a transfer of their employment, should the group but not the subsidiary be acquired by NewCo. The necessary degree of control required is unclear, though in light of the Tribunal's reluctance to entertain such arguments thus far, it is likely to be considerable. So can the employee succeed without piercing the veil? Possibly, though each determination in that respect will be fact specific and may require fine distinctions to be made, a fine art.

Allan Roberts

[1] [2011] EWCA Civ 1567

[2] [1995] IRLR 633

[3] [1998] ICR 1198

[4] [2007] IRLR 526

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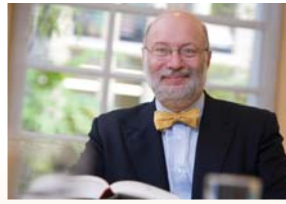

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