[2010] UKFTT 643 (GRC)

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CONSUMER CREDIT)

Case No. CCA/2009/0010 &
CCA/2009/0011

On appeal from:

Office of Fair Trading's Decision reference:
Dated:

Appellant: Log Book Loans Ltd

Respondent: The Office of Fair Trading

BETWEEN:

Appellant: Nine Regions Ltd (trading as Log Book Loans)

Respondent: The Office of Fair Trading

Heard at: The Tribunals Service, 45 Bedford Square, London WC1B 3DN

Date of hearing: 8-9 November 2010 (sitting in public)

Date of decision:

Before

David Marks QC

John Randall

Vernon Fuller

Attendances:

For the Appellant: Malcolm Waters QC

For the Respondent: Richard Coleman, Craig Ulyatt, Counsel

Subject matter: Preliminary issues - various

Cases: Peace v Brooks (1895) 2 QB 451
Nine Regions Ltd v Belcher (Worcester County Court Ref No 9QZ397719)13 may 2010 unreported

Meridian Global Funds v Securities Commission (1995) 2 AC 500
Odyssey Re (London) Ltd v OIC Run-off Ltd (2001) Lloyd's Rep IR 1
Clauss v Pir (1988) 1 Ch 267

Manchester Sheffield and Lincolnshire Railway Co v North Central Wagon Co (1883) 13 App Cas 554

General Accident Fire v Robertson (1909) AC 404

R v Delmayne (1970) QB 170

Chanel Ltd v Triton Packaging Ltd (1993) RPC 32

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CONSUMER CREDIT)

Case No. CCA/2009/0010 & CCA/2009/0011

DECISION OF THE FIRST-TIER TRIBUNAL

JUDGMENT

Introduction

1. This hearing concerns five separate questions which in general terms have been called preliminary issues. The questions have arisen in relation to an appeal by the Appellants against decisions made by an Adjudicator with the Office of Fair Trading (OFT) taking the form of two determinations dated 16 October 2009 to revoke consumer credit licences which are held by both Appellants. The Notice of Appeals are dated 18 November 2009. Both Notices of Appeal were accompanied by lengthy and detailed Grounds of Appeal. The OFT filed a Response on 29 January 2010 followed by an Amended Response on or about 9 April 2010. The Appellants served a Reply on 6 May 2010. Directions for the determination of the preliminary issues in the sense described above are dated 19 May 2010. It is perhaps fair to observe that the preliminary issues in the sense in which the expression has been used in this case do not necessarily constitute preliminary issues in the classic sense such that the determination of one or more issues will necessarily resolve the appeal as a whole between the parties. The parties have however agreed that these issues be addressed at this stage by the Tribunal.

2. The hearing of the issues took place over two days. A number of witnesses gave evidence and were cross-examined as well as being

questioned by the Tribunal. Some of what was related did not necessarily touch or concern the five issues. However, the credibility of at least one of the Appellants' witnesses was put in issue by the OFT in a way which will be set out in further detail below. In the time available, it was not possible for the Tribunal to hear and consider oral argument as to each and all of the five issues. The course that was taken with consent of all the parties' representatives was that the remaining two issues which were already addressed in detail in the parties' Skeleton Arguments and which were provided prior to the hearing were to be further developed in writing after conclusion of the hearing. This has been done, and again, allusion will be made to this where appropriate. The Tribunal is not conscious of the fact that any prejudice has been expressed or felt by the parties by embarking upon this course.

3. The Tribunal wishes to express its gratitude to the parties and, in particular, the legal representatives, especially Counsel for the efficiency displayed prior to and during the hearing, and with regard to Counsels' submissions, as to the clarity and quality of their arguments. Two of the issues concern arguments concerning bills of sale which are employed as part of the business activities of the Appellants. Prior to a consideration of each of the issues in turn but after relating those issues, the Tribunal feels it appropriate to set out some of the background in detail before turning to its findings.

<u>The issues</u>

4. The first question is framed as follows: is a bill of sale rendered void under sections 8 and 10 of the Bills of Sale Act (1878) Amendment Act 1882 (the 1882 Act) in circumstances where its execution by the Appellants' customer, i.e. the grantor, is attested by the employee of the Appellants who negotiates, agrees and signs on behalf of the Appellants, the credit agreement between the customer and the Appellants? This has been called "the attestation issue".

5. The second issue is framed as follows, namely: do the cheque-cashing stores and other shop premises occupied by a person or persons whom the Appellants have appointed as its agents constitute premises at which the Appellants carry on business (on a temporary basis) for the purposes of section 48(2)(a) and/or section 67(1)(b)(i) of the Consumer Credit Act 1974 (the CCA)? This has been called "the business premises issue".

6. The third issue is framed as follows, namely: is the date on which a bill of sale is registered to be taken to be the date shown on a stamp applied to the bill by the Central Office of the High Court, or some other and, if so, what date? This has been called "the registration issue".

7. The fourth issue is framed as follows, namely: did the sending by the Appellants of text messages to selected existing customers whose payment history with the Appellants indicated that they might qualify for a top-up loan, constitute the publication by the Appellants of a credit advertisement within the meaning of Regulation 2 of the Consumer Credit (Advertisements) Regulations 2004 ("the Advertisements Regulations 2004")? This has been called "the text messages issue".

8. Fifth and finally, the issue is put as follows: in cases where a credit advertisement published on behalf of the Appellants, or either of them, contained words indicating that loans can be made quickly, did those words constitute an incentive to apply for credit or to enter into an agreement under which credit is provided for the purposes of Regulation 8(i)(d) of the Advertisements Regulations 2004? This has been called "the incentive issue".

9. In the first four of the above preliminary issues, reference is made to one of the Appellants whose initialled title is NRL, but for reasons explained below, it is not inappropriate at this stage to substitute reference to NRL by the term "the Appellants" since for all practical purposes as to these preliminary issues, no critical distinction need be made between the two Appellants, namely Nine Regions Ltd on the

one hand and Log Book Loans Ltd on the other, the latter of whom will be referred to herein as “LBL”.

The background

10. The background can be taken largely from the OFT’s Amended Response. By way of general observation, the Tribunal was not troubled with any difficulty that insofar as the basic factual matrix relating to the preliminary issues was concerned, very much if at all, was in substantial dispute between the parties. The Appellants can be referred to, where appropriate, as LBL and NRL as mentioned above. In the context of these preliminary issues, reference will be made in the main to the former of these two entities. As will be seen, the principal, if not exclusive, contracting party with those who owned or occupied the premises at which business was carried on for practical purposes was LBL. LBL is the sole party who entered into arrangements with LBL’s employees, arrangements again which will be referred to in further detail below ; for present purposes, NRL is the entity which entered and enters into arrangements with the public.

11. However, in October 2005, LBL which developed the money lending business and in which LBL and NRL were and remain engaged, granted NRL a franchise for an initial five year term to operate the said business in a defined territory with the United Kingdom. The market at which this business was aimed comprised predominantly low income individuals, namely as it was put, individuals with impaired credit ratings or individuals who might otherwise find it difficult to get finance on normal terms and conditions.

12. The essence of the credit agreement entered into with NRL is the granting of a bill of sale by the customer over a motor vehicle which the borrower owns. The bill of sale represents a security interest entitling NRL to seize the same should the occasion arise, and sell the vehicle in order to recover its debt in the event of default.

13. In round terms, LBL's activities were carried out in and through a number of nationwide chains such as Cash Converters and Cash Generators who are described as agents. The Appellants' advertisements provide potential customers with a telephone number relating to a national call centre. That telephone number leads to contact with a sales representative whom the Appellants describe as an underwriter. Each underwriter is an employee of NRL. Invariably, though not uniformly, a meeting would be held at one of the stores listed above. This is because LBL has at all times only had two main offices of its own for administrative purposes, the main one being in Putney, London with a related office based in Mayfair, London.

14. In consequence, a meeting between a borrower and the underwriter would occur at the agents' premises above referred to otherwise belonging to and/or operated by chains such as Cash Converters or indeed a smaller operation such as a local newsagent. On occasion, such meetings would occur in a car park or elsewhere wherever the vehicle might be located. Such a meeting would represent the only occasion on which the borrower would meet the underwriter and on which the credit agreement and the bill of sale would be signed and the customer given a cheque. In the words of the Amended Response, that would be the only occasion on which the customer would have to consider the pre-contract information, as well as the agreements referred to, namely the credit agreement and the bill of sale.

15. In the Appellants' formal Reply, the Appellants assert that since November 2009, they have expressly offered potential customers the opportunity to have unexecuted documentation sent to them before the meeting which otherwise might take place. In addition, a Customer Statement which all customers are invited to sign during any meeting with an underwriter was amended In January 2010 to state that if they wished, the customers could take the documentation away to think about it, and if necessary, take independent advice before signing. It was also alleged that a courtesy call which the Appellants make to

customers after completion of a loan transaction also includes a question in which customers are asked to confirm whether they were offered sight of the written copy of the contract prior to meeting the underwriter.

16. It is perhaps only fair to state at the outset that the Appellants' Reply at paragraph 28(a) itself details the contents of the critical meeting between the underwriter and the potential customer in the following terms, namely:

"… in the great majority of cases, the meeting between the underwriter and a potential customer takes place at the premises of one of NRL's agents being premises at which NRL carries on business on a temporary basis."

At paragraph 28(c)(i), the following passage appears, namely:

"The meeting between the underwriter and the customer takes place after an earlier telephone conversation in which (as stated in paragraph 6(d) above) the essential terms of the proposed transaction will have been agreed. The purpose of the meeting is to enable the underwriter to ensure that the customer qualifies for the loan and understands the terms of the transaction and to enable the relevant documentation to be executed."

The Tribunal pauses here to note that in its formal Response, the OFT duly noted that on occasion the meeting referred to above occasionally took place in a car park as indicated above, but in any event, the meeting represented the only opportunity which the customer had to consider pre-contractual information as well as the credit agreement and the bill of sale.

17. As stated above, LBL and NRL are parties to a franchise agreement under which NRL was granted a fixed term to operate a business, providing loans to the public. It was to do so, however, using what was called "LBL's specified knowledge, knowhow, logo and business

format". Under the franchise agreement, LBL provided NRL with a Manual containing a written description of the appropriate methods and systems to be used in conducting the business. LBL also provided training to NRL's staff, together with master copies of all relevant documentation. It also provided assistance on advertising, head office support, staff and related matters. The business, though coming in via NRL used the name "Log Book Loans": in consequence, NRL was required to use and display LBL promotional material inside the relevant premises. In particular, NRL was advised to operate its activities in accordance with an operations manual, as well as the training provided by LBL.

18. In its Reply, LBL (a term which as indicated above can be used compendiously for present purposes to describe both itself and NRL) accepted that in "the great majority of cases" which it put as some 94.5% in the case of loans made from July 2009 and January 2010, a meeting between a potential customer and the underwriter took place "at the premises of one of NRL's agents (typically a cash-chequing store)": see paragraph 6(b). The Reply went on to allege in general terms that NRL carries on business "on a temporary basis" at each of its agents' premises and that "the activities which it carries on at such premises include, but are not limited to, attendance by underwriters for the purpose of concluding loan transactions with the customers". The Reply also admits that "in other cases" such a meeting might take place not only in cars or in car parks, admittedly on only a "very occasional" basis, but also at the customer's property. LBL alleges however that its preference was that such meetings take place at its "agents' premises", but that any other arrangement would apply if the customer so requested it.

19. However, LBL also claimed that the "essential terms" of the transaction, i.e. the amount of the loan, and the frequency of repayments as well as the issue of security were agreed between the customer and the underwriter in an initial telephone conversation. The

customer would therefore be aware of such terms before going through the paperwork with the underwriter and any subsequent and invariable final meeting.

20. The Tribunal was shown a document entitled “An Agency Agreement” entered into between LBL and Cash Converters (UK) Ltd. The latter could be said to be a typical agent. The Agency Agreement shown to the Tribunal is unsigned. It was prepared by or on behalf of Cash Converters by its former or present solicitors, namely Messrs Wragge & Co. Evidence was given during the hearing about the said Agreement and this will be referred to in due course. The Tribunal however feels it important at this stage to set out in full some of the terms of this Agreement.

21. Clause 2 is headed “Appointment”. The appointment is that of Cash Converters as LBL’s agent. Under clause 2.1 and in consideration of the nominal sum of £1, LBL appoints Cash Converters and Cash Converters duly agrees to act as LBL’s “agent to solicit and obtain in LBL’s name Loans to Customers, on the terms and conditions of this Agreement”. Clause 3 stipulates that all requests for “Loans” obtained by Cash Converters and transmitted to LBL shall take place “on the basis of LBL’s standard terms and conditions current at the time such orders are obtained”. Clause 4.1(k), under a heading entitled “CC Obligations” says that during the term of the Agreement, Cash Converters shall “allow LBL access upon written notice to enter the Branches at reasonable times to ensure compliance with this Agreement”.

22. Clause 11.4 addresses what is called the “Nature of this Agreement” in the following terms, namely:

“This Agreement does not create a partnership or joint venture between CC and LBL and no CC employee of LBL shall claim to be an employee of **“.**

23. By email dated 26 January 2004, the then Chief Executive Officer of Cash Converters, a Mr Julian Urry, contacted Mr Gordon Craig, a representative of LBL and referred to the fact that "[S]ometime ago the terms and conditions of the [Agency] Agreement … was [sic] changed and verbally agreed between myself and Richard Cook". The Tribunal was informed that Mr Cook was, at that time, a duly authorised representative of LBL. The email goes on as follows, namely:

"However, the changes were never documented although implemented immediately. Richard and or Guy was supposed to confirm the changes in writing but never got round to doing it, no surprise there!! and to be fair I never chased them. For the sake of good order we need to produce a letter confirming those changes. I have produced a draft letter that needs to be written from LBL Ltd to CC and would be grateful if you could send it to me."

24. By letter dated 26 January 2004, Mr Craig wrote to Mr Urry purporting to confirm "the changes to the Agency agreement that exists between our companies". The changes apparently referred to are then set out as relating to the appropriate rate of commission and an increase thereto as well as to an agreement on the part of the Cash Converters that LBL could appoint other retail agents in other locations at its sole discretion. Mr Urry then appended a handwritten note on the letter stating that the contents of Mr Craig's letter were "an accurate account of the agreement reached with Richard Cook".

25. Leaving aside the underlying question as to whether the anterior agreement was ever executed (as to which more will be said below in relation to the oral evidence), if nothing else, it is apparent from the terms of these exchanges that if the agency agreement in its unexecuted form as shown to the Tribunal was being referred to, there was no reference anywhere to the fact of LBL being entitled to use Cash Converters' premises and/or to the extent of such usage.

26. By a written agreement dated 24 April 2006 also shown to the Tribunal, LBL entered into a separate agreement with Cash Generators Ltd as its Agent. This is a signed agreement and bears the date 28 April 2006. There is however no clause which is either the equivalent to clause 4.1(k) of the unexecuted 2004 Cash Converters agreement or which in any way addresses the basis on which LBL occupied or utilised any premises used, owned or occupied by Cash Generators. Clause 1.4 merely states that LBL agreed "that in the event a store/s ceases to operate under the Cash Generator franchise they will not be permitted to act as an agent for a period of twelve months following such an event".

27. Nonetheless, the parties produced a bundle of documents which included a series of apparently monthly invoices in 2010 issued to LBL by Cash Generators regarding the charging of "rent" more particularly called "rent of office", chargeable to LBL by Cash Generators. As will be noted again below, the term "rent" is of itself not determinative given the terms of the agreement referred to above. In the circumstances, the Tribunal finds it difficult to afford a meaning to the term which in any real sense ascribes to it the usual meaning which the word "rent" normally implies, at least in the absence of some form of independent tenancy agreement.

28. The Tribunal was also shown a written agreement dated 5 January 2009 between LBL and Instant Cash Loans Ltd (ICL) under which the latter company, namely ICL was appointed as LBL's agent in respect of the product which is described as "Log Book loans". No provision in this Agreement (which was provided by way of a dated but unsigned copy to the Tribunal), addresses the question of where ICL was to carry out its functions and more importantly, nothing is said in the Agreement about the entitlement of LBL to utilise any premises owned or occupied by ICL. At clause 12 there is what is called an Entire Agreement clause.

29. The Tribunal was also shown a copy of LBL's Operations Manual. On any basis, it represents a critical component of the relationship between the Appellants and their underwriters. The version shown to the Tribunal is expressly marked as being "Issue: March 2010".

30. Paragraph 1 confirms that the Manual is for "all LBL Underwriters and is designed to explain the Underwriter role. The Manual also gives instructions and guidelines for the Underwriter to follow." At paragraph 2.1, the heading is "Communication". The following bullet points appear, namely:

"
- All your Agents, Cash Converters, Cash Generators, etc must receive at least 1-2 visit (sic) per week otherwise they will soon forget about you! Get into the minds of your Agents. Once a month you should have a structured meeting with the Franchisee or Manager to discuss performance or ways to increase business. For example you can present statistics/results and, compare the Agent to other stores in a performance "league table".

- All Affiliate Agents (Money shops, Cheque Centres, etc) must be visited a minimum of once per calendar month.

- Ensure the visits consist of much more than just showing your face as part of a routine check. Make the Agents feel special and appreciated; again this will have a positive effect on them and their productivity. Go into the agent with an agenda and come out having achieved positives for both you as an LBL Underwriter and for your agent as a corporate partner.

- All Underwriters should organise, at least once a month, to attend their various agent's team brief meetings/training sessions and promote our product, and yourself, to the staff.

- All Cash Converters and Cash Generator stores must have at least one OPEN DAY per quarter organised between yourself

and the manager. Your Regional Manager (RM) will be able to assist you with this if required."

31. At the end of paragraph 2, the following unnumbered instruction appears and is underlined in bold, namely:

"**You must not sign up a customer in any Agent's store other than the Agent who provided the lead. If you have any issues with this you must contact your Regional Manager**".

32. Perhaps self-evidently, and understandably, LBL relies on this last statement in support of its overall contention that the underwriter, of necessity, had to carry out LBL's business at the premises of LBL's agent. As will be seen below, the Tribunal is to say the least sceptical about taking this statement at face value or in isolation when viewed against the remainder of the evidence presented to it, and in particular, the remainder of the Manual.

33. In any event this broad generalisation advanced on the part of the Appellants could be said to be tempered by matters already referred to in connection with pre-contractual dealings between LBL and its customers as referred to above. Thus at paragraph 5.4 of the Manual in the section headed "MESSAGES", the following instruction appears, namely:

"• If you cannot get through to a customer you should leave a voicemail and send a text message. Below are some examples – texting the customers is a very efficient method of communication …"

Many of the examples given not unnaturally involve an invitation to customers whose requests have been favourably considered to contact the underwriter by text or by phone. Indeed, later sections of the Manual refer expressly to the exchange of information by telephone, e.g. paragraph 6 which is addressed to the "capture" of "all details needed to underwrite the loan correctly and be able to process it

through to completion". In paragraph 6, the underwriter is directed before meeting a customer always to "offer them [i.e. the customer] the opportunity to have their Pre-Contract Information, a sample Credit Agreement and a sample Bill of Sale posted for them to review before they decide whether or not to proceed." The passage goes on, as follows, namely: "This is the customer's choice, and they may prefer to review the documents when you meet them, but they must be given the opportunity to have them provided beforehand."

34. In this connection, the Tribunal was also shown LBL's publication entitled "Best Practice and Rules: Underwriting (version 3)" apparently issued in February 2008. On an unnumbered page headed "Handling of Leads", much the same guidelines to underwriters appear as are set out in the Manual which former guidelines reiterate the need for the underwriter to communicate with the customer in the pre-contract stages by phone. In connection with such matters as explained in the LBL procedures, such as questions of valuation with regard to "quotations of the appropriate figures", the same advice was also provided. The use of texting was also expressly referred to.

35. Yet another related document produced by LBL is entitled "Three Day Training Module", a document apparently written or compiled by a Christopher Morgan. He is described as a, or the Training Manager. The document is also unnumbered. However, after a passage marked "Introduction", a section appears with regards to a heading entitled "Process of Loan Application". It can perhaps be seen why from what has been said in this judgment that the procedures described under this heading make no reference or allusion to there being any need for an underwriter to be other than by his computer or by a printer when preparing the loan documentation. Indeed, the ensuing pages exhibit a number of specimen screens which are used to illustrate the appropriate procedures. Further on, and apparently in the same Module, a similar layout appears headed "Database Management". The page addresses the way in which an underwriter can review his

performance on a periodic basis with a view either to engaging the customer with regard to further advances, or with a view to reviewing the underwriter's own past performance. None of the instructions set out in the bullet points in any way entails on its face any need for the underwriter to be present in a particular location. Reverting to the Manual, paragraph 7 is headed with the phrase "Processing a Loan". The Tribunal finds it unnecessary to set out the terms of this passage in full. It confirms that after all the loan documentation has been processed and the loan amount agreed, a "time and date" for the appointment must be arranged. Prior to that, the underwriter is to prepare the application form, a procedure which on any view would not require him to be in any particular place when he carries out that task.

36. Paragraph 13 is headed "Paperwork". Paragraph 13.7 reads as follows after the headed "Amendments to Agreements/BOS":

> "• Any hand written amendments to agreements may make them unenforceable. You should have your laptops with you at all times which means there should be no problems with printing paperwork. No amendments by hand!"

37. The issues addressed by that quoted passage were revisted in oral evidence. The quoted passage however makes it clear at the very least that the underwriter does not need physical premises such as an office in order to conduct all material aspects of his underwriting business prior to completion. The point is reinforced in later passages where references are again made not only to the use of a mobile phone, but also to all items and equipment regarded as "essential" when the underwriter is out on the road: see in particular paragraph 14.7, e.g. a digital camera, various stationery equipment and computer equipment and spares.

38. The Tribunal feels it appropriate to allude to certain other documentation which was referred to during the hearing and which bears upon the relevant practical aspects of the manner in which LBL

and its underwriters carry out their business activities. As part of its investigation into the affairs of LBL, the OFT met with representatives of Cash Converters at what was described as an "Intelligence Gathering Meeting" at one of Cash Converters' stores on 18 March 2010. Admittedly, no representative of LBL was present. In a section headed "Log Book Loans (LBL)", a passage appears in which it is related that people sometimes came into a store and asked for help raising cash. It was further explained the staff would then go through all of the services they provided and took the most suitable form of assistance for the customer. It was further stated that LBL was "rarely suggested by staff" and when it was, "it was the very last option raised". It was then indicated that customers were then invited in turn to direct their questions to Log Book Loans "as requested by LBL themselves". The notes then record that "when pressed", a representative of Cash Converters admitted that if a customer asked what a Log Book Loan was, "the staff would briefly explain that it is a loan secured on the car …" Customers would then fill in a brief form giving "little more than their contact details, which is then passed to LBL …"

39. A prior meeting had been held between the OFT and representatives of Cash Converters on 8 January 2010. Again, no-one from LBL was present. The notes reflect the fact that Cash Converters is the largest pawnbroker of its kind in the United Kingdom, followed by Cash Generators out of a total of 900 pawnbrokers. Paragraph 10 of the notes refers to the fact that over the past 15 years, Cash Converters has been dealing with third party cheque cashing which they state "is fading away due to alternative options such as BACS payments" and other means of payment. The notes then refer to the fact that Cash Converters was "well aware of the negative perception of Logbook Loans" thereby trying to distance themselves from them "though this cannot happen overnight". It was pointed out that in the shops, representatives would only point customers in the direction of LBL "if

asked". It admitted however that it had received a commission in respect of services provided to LBL.

Evidence

40. The Tribunal heard oral evidence from a number of witnesses. Some of the evidence which it heard orally was based on earlier witness statements provided by all the witnesses. The Tribunal was also shown other witness statements where witnesses were not called. They are of limited assistance but will be referred to where appropriate below. The Tribunal is grateful for the care with which the witnesses applied themselves in dealing with the questions put to them.

41. The first witness was Timothy Thorne. He is a Principal Trading Standards Officer employed by Herefordshire Trading Standards Service. In his witness statement he describes a recent visit to a local Cash Generator store in Hereford. His evidence went on to describe what had been related to him by the supervisor in that store. This person, according to Mr Thorne, confirmed that "the LBL rep does bring consumers in to the shop purely in order to sign the credit agreements". This evidence was confirmed to him by an assistant manager working in the same store. If a private individual entered the store in order to discuss a loan, they were "immediately" told that such discussions were to be conducted with LBL and that LBL would contact them "shortly". It was stressed that Cash Generators had "absolutely nothing to do with any pre loan negotiators". They did however allow a customer to take a LBL leaflet away. The most the store did was to put the customer's details on a form, together with contact details, and "pass it on". Together with the leaflets, there was a LBL sign posted on the outside of the store.

42. In his oral evidence, Mr Thorne confirmed that the store in question advertised at least one other financial service relating to Western Union. The Tribunal finds that nothing said by Mr Thorne in cross-examination in any way qualified the principal thrust of his witness statement. In any event, the facts related by him seemed to the Tribunal to be entirely in keeping with the documentation which has been summarised above, albeit that Mr Thorne restricted his comments to the operations in one store alone. The Tribunal naturally takes this latter point into consideration in assessing his evidence.

43. The next witness from whom the Tribunal heard was Ms Gill Betteridge. She related in her witness statement what was called "my experiences in signing my loan agreement in Cash Converters". The Tribunal again accepts immediately that as in the case of Mr Thorne, it would be wrong to extrapolate a generalised practice to be attributed to the activities of LBL from the experience of only one customer. Insofar as her evidence does not tally with the documentation and other evidence received, the Tribunal clearly makes due allowance for that fact. First, she says in her witness statement that on first contacting LBL, the agent who represented them "gave me the impression they had offices there", i.e. at Cash Converters. The Tribunal is not minded to place too much reliance on such an assertion. That said, what she recounts in her witness statement does not differ substantially from the picture which can be said to emerge even on the documentation described above. In her words, "it did not look as if LBL were based in the store". However, it is true that Ms Betteridge does not carry matters very far. Although she says in her witness statement that it did not "look as if LBL were based in the store", she went on to concede, even in her witness statement, that LBL nonetheless "gave the impression that the Cash Converter store was their premises". In cross-examination, she went into further details about the layout of the store she had used. The Tribunal does not feel that anything material emerged during the course of those exchanges.

44. The third witness from whom the Tribunal heard was a Mr James Peter Spratley. On any basis, his evidence was of some importance. He has been the chief financial officer and company secretary of Cash Converters for over 10 years. His witness statement confirmed that his company owned or operated some 161 retail stores "nationwide", of which 33 are corporate (i.e. operated by the small company itself) while the remainder are franchised.

45. At paragraph 5 of his witness statement he stated as follows, namely that:

"Log Book Loans are permitted to locate, maintain and replace points of sale within Cash Converters' outlets and to conduct business with their customers there. In many cases, stores have an area specifically set aside for this type of business, with a different coloured carpet, tables and chairs and a counter behind which our staff or Log Book Loans staff may sit or stand, separated from the customer by glass."

46. Later in his statement he admitted to the relationship between his company and LBL as being "of considerable mutual benefit". In the case of LBL, it took advantage of a marketing benefit resulting from the advertisements of its products and in the case of Cash Converters it gained commission. This last mentioned benefit in turn caused Cash Converters to offer a substantial discount on cheques which were cashed by LBL customers. At paragraph 12, he stated:

"Such use is not confined to the conclusion of loan transactions. Log Book Loans' underwriters will also visit stores from time to time to review points of sale, discuss issues arising with the staff, make telephone calls and conduct other tasks. It is helpful to have an underwriter in a store from time to time as gives the product a presence and enables any detailed enquiries about it to be answered, albeit the store staff will have a significant knowledge to answer and pass on initial enquiries and leads."

47. It is clear to the Tribunal that Mr Spratley is very well placed to address the practical realities surrounding the relationship between his company and LBL. In cross-examination he confirmed that of the 161 stores referred to, he had visited 30 or 40 over the past five years.

48. With regard to the meetings held with OFT and referred to above including the specific reference to the apparent "fading away of cheque cashing", he commented in cross-examination that Cash Converters had indicated at the relevant meetings that its "franchisees" should not "actively promote" LBL. He went on to observe that from about 2002 to 2003 until the present, the majority of Cash Converter stores were not branches that in fact promoted LBL products. By this he meant and stated that such stores made it clear that LBL was a "separate business". He described Cash Converters as a "broker" with an introductory role to obtain its commissions from the referrals it made.

49. He referred to the meeting held on 18 March 2010 and was asked to comment upon the passage in the notes which reflected a statement that LBL was "rarely suggested by staff and when it is it is the very last option raised". He however was not present at that meeting. He observed that certain stores might have taken it upon themselves not to like or promote a particular product. The Tribunal finds nothing in his answers which lessens the weight of the observations referred to in the preceding paragraph of this judgment.

50. Reference had been made by Ms Betteridge to the use or presence in some stores of a dedicated counter or area at which LBL business was undertaken with its customers. Mr Spratley observed that insofar as such counters or areas existed, they were also used for non-LBL business, in particular for Cash Converters own "third personal finance" services. With regard to the passage quoted above from paragraph 12 of his witness statement, Mr Spratley conceded that he did not have an understanding of what LBL "does on the ground". In particular, he did not know whether the underwriter made his or her phone calls from within a store, but he confirmed that he was not aware that any LBL

representative was “based in any store that I am aware of”. He referred to the fact that “rent” for occupation of a Cash Converter store was paid by LBL but pointed out that the amounts were small, amounting to about £100 per month and more importantly that any such payments occurred “rarely”.

51. Finally, he was asked about the undated Agency Agreement discussed above. He claimed that although he had seen it before, it dated from at least 2005. The commission rates were now different. Insofar as clause 4.1(k) was concerned with the specific reference to the express obligation borne by LBL to give notice to enter a store, he accepted that to his knowledge, no written notice was, or is, ever given.

52. The Tribunal then heard from a Mr Matthew Heap. He is the present Managing Director of both LBL and NRL. On his own admission, much of his written statement addressed the second of the preliminary issues before the Tribunal. He confirmed that there are currently 44 LBL “underwriters” “throughout the United Kingdom”. He, himself, has previously worked as an underwriter. He confirmed that in fact since LBL did not engage in lending itself “NRL itself has no physical retail presence on the high street or elsewhere”.

53. He added that 35 underwriters were “field-based” and organised into geographical areas. Overall, these individuals dealt with 895 agents’ outlets. He then itemised in paragraph 6 specific actions with which each underwriter was charged, ranging from reviewing points of sale through training agents’ employees, ensuring that a software interface was present between the agent and NRL, attending team meetings of agents’ staff and attending agents’ stores’ open days. These elements, as will be seen, were fastened on by the Appellants in arguing that in general terms, LBL could be said to be carrying on business, albeit temporarily, at agents’ stores.

54. At paragraph 7 of his witness statement, he stated that “Crucially the underwriters write the great majority of their business from agents’ premises”. He added:

“They are encouraged to do so and probably write as much as 95% of their loans in this way.”

His justification for this statement was threefold. First, he pointed to the underwriters’ access to facilities such as photocopiers and to a counter or desk on the premises. Secondly he pointed to the fact that the loan documentation “will usually be signed on the premises of the agent which generated the lead” and thirdly he stated that where the agent’s store was engaged in retailing consumer goods it could derive “a further benefit” should the customer choose to spend his money in that store.

55. Paragraph 12 of his witness statement on which some emphasis was placed both in his examination and cross-examination, reads as follows:

> “12. The simplicity of the arrangements and the clear mutuality of advantage they embody are not such as to give rise to complications in practice. Indeed, I have no recollection of any issue or dispute arising, whether in the course of pre-contract negotiations or subsequently in the performance of any contract between NRL and any of its agents, as to NRL’s right to use the stores in the ways described in paragraphs 6 to 8 above. If it were to be suggested that existing contracted arrangements should be interpreted as excluding such a right, or expressly altered so as to exclude it, this would strike at the root of the relationship and render the parties’ relations wholly unworkable. Access to the stores is essential, and not merely desirable, to give business efficacy to the relationship.”

56. In cross-examination Mr Heap accepted that invariably the preliminary exchanges between an underwriter and a prospective borrower would

be by telephone. NRL/ LBL have, as it pointed out above an office in Mayfair as well as in Putney. Either or both would be contacted by phone by the prospective customer in that respect. The details would then be passed to the underwriter who would then contact the customer. He asserted that 75% of the working week of a typical underwriter would relate to work carried out "within" one of the agents' stores. He did however agree that the procedure and steps detailed in the Training Module represented activities that could be carried out on laptops or on the telephone. He also appeared to suggest that many of these activities would also take place within a store.

57. He was also asked to reconsider paragraph 6 of his written statement which itemised, as indicated above, the number of detailed aspects evidencing an underwriter's involvement with the agent. He maintained that the various factors there listed did not merely speak to the relationship between an underwriter and an agent, but really described the range of an underwriter's activities. However, in the Tribunal's view, he was constrained to admit that the formal Reply of LBL differed in its description of these matters, given the specific plea in paragraph 6(d) that the:

"… essential terms of the transaction (including the amount of the loan, the number, amount and frequency of the repayments and the security) are agreed between the customer and the underwriter in the initial telephone conversation between them. The customer will thus be aware of these terms before going through the paperwork with the underwriter in the subsequent meeting between them"

58. Pausing here, the Tribunal is inclined to view Mr Heap's reliance on the 75% attendance figure, if not with some circumspection then more importantly as a statistic which even if true has to be placed in the context of the considered terms and effect of the pleaded Reply. Moreover, the Module and the other in-house materials produced before the Tribunal confirm to the Tribunal's mind that the real, albeit

preparatory, business activities of LBL are conducted well before the time and occurrence of the formal agreement.

59. Indeed, if anything, the detailed aspects of the underwriter's activities set out in Mr Heap's statement are entirely consistent with the purpose and sense of the Module and the other written materials. They are not, as he would seem to put it, necessarily indicative, let alone conclusive indications of a practical engagement within the stores of the agent, on the part of the underwriter regarding the carrying on of all key business activities on the part of the Appellants in the forms of reviewing points of sale, training agents' employees and attending team meetings of agents' staff. Insofar as the same is suggested, these last activities do not in the Tribunal's view necessarily lead to the conclusion that LBL was carrying on business in any meaningful way on these stores' premises.

60. The thrust of Mr Heap's evidence, perhaps entirely understandably, was that the underwriter would spend nearly all his time in the store. As will be considered below in further detail, even as a matter of common sense, the time spent by a person in a location cannot of itself necessarily lead to the conclusion that that person thereby carries on business in that given location. This would be to ignore the more formal attributes of that question, not least the issue of to whom the premises belonged in law and the relevant legal relationship, if any, not to mention any other formal aspects of the relationship between the parties.

61. In addition the Tribunal has some difficulty in unreservedly accepting Mr Heap's assertion in his witness statement that "probably as much as 95%" of the underwriters' loans are written from agents' premises. The three stated rationales for this statistic need to be examined with care. The first points to the use of photocopiers and the use of a counter or dedicated area. The Tribunal is not convinced on the evidence it has heard that all the preliminary pre-signature stages would necessitate attendance of the premises and the use of those items. The other

evidence strongly points to the fact that attendance was, strictly speaking, only required on signature. The second point relied on, in effect, reiterates as much. The third rationale refers to the knock-on effect of retail sales, but this too is a point which adds nothing.

62. The Tribunal is therefore disinclined to accept unreservedly the assertion that quite as much time was spent "on site" as suggested by Mr Heap. This disinclination in the Tribunal's view is justified by Mr Heap's assertion that if an underwriter was committed to 20 agents he would visit each agent every week. However, if an underwriter was engaged with more than 20 agents, the figure would diminish to once a fortnight. These bare statistical assertions do not, to the Tribunal's mind, square very easily or at all with the principal suggestion or assertion that 75% of an underwriter's week is spent in agents' premises. To the Tribunal's mind, given the ease with which virtually all pre-signature stages can be conducted in any location, Mr Heap's opinion seems somewhat excessive. This was, in the Tribunal's view further fortified by a comparison between the letter and tenor of Mr Heap's evidence on the one hand, and on the other paragraph 13.7 of the Operations Manual referred to above. Mr Heap claimed in response that the printers provided to underwriters were not "suitable for heavy printing". Be that as it may, in the Tribunal's view the Manual speaks unequivocally of there being "no problem" as to printers. It may be, as Mr Heap claimed that a photocopier in situ might have to be employed for certain purposes on occasion such as the copying of a passport, but that of itself does not detract from the fact that it is only the final formalities of the transaction that are generally attended to at an agent's premises.

63. Understandably, Mr Heap was cross-examined on the wording of paragraph 12 of his statement which is set out above. In particular he was asked about the way in which the final sentence with its clear legalistic slant was justified and prepared. Mr Heap had some difficulty in demonstrating that he alone was the one and only author. However,

the Tribunal is far from convinced when viewed against the entirety of the evidence, not to mention the terms of paragraph 12 themselves, what is said in that paragraph carries matters very much further.

64. Mr Heap, by his own earlier stated admission, was aiming to deal with the question as to whether LBL was carrying on business on the agents' premises in some meaningful sense. The most that can be said from his evidence, again, viewed against the other materials provided by his company is that some, but by no means all, let alone the major part, of LBL business was carried out on an agent's premises. This question will be reconsidered below. The Tribunal, for the moment, did not find that overall Mr Heap's evidence did very much other than paint a very rough and ready description of matters only remotely germane to the issues raised by the second preliminary issue.

65. The Tribunal also has some difficulty in equating the thrust of Mr Heap's witness statement with its implication that there was a right to occupy premises and carry on business in an agent's premises with the absence of any formalised right of this sort, at least in express terms, in the only signed agreement produced to the Tribunal, namely that Cash Generators' agreement of 24 April 2006, which is referred to above. If as the Tribunal infers Mr Heap was not solely responsible for the formulation of his paragraph 12, it remains in the Tribunal's view somewhat curious, if not startling that no attempt was made by him or by LBL to address via one of its witnesses at least the insertion of the Entire Agreement clause in an executed agreement which appeared on its face to exclude any and all of the terms and conditions other than those contained in it in circumstances where no reference was made to a right to use agent's premises.

66. The implications of the Wragge & Co unexecuted document will be addressed in relation to the evidence of a subsequent witness put forward by LBL.

67. The upshot of Mr Heap's evidence to the Tribunal's mind is with the greatest of respect to that witness, one in which the Tribunal remains no wiser having read the documentary materials and listened to his oral evidence than the impression the Tribunal had prior to consideration of his witness statement and the contents of his cross examination.

68. The next witness from whom the Tribunal heard was a Mr Paul Foster, a director of both NRL and LBL. Although his witness statement in effect addressed only the last three listed preliminary issues he did deal in passing with some more general aspects of his companies' activities. In his witness statement he stated that after an initial contact between underwriter and customer, and assuming the latter wished to proceed, "a face to face meeting between customer and underwriter will follow". He added that in "the vast majority of cases this meeting will take place at an agent's store …". If by that passage it was intended to imply that at a pre-completion stage there would be invariably a meeting of the type described, the Tribunal is far from convinced that this proposition has been made good by the evidence as a whole. The Tribunal's reluctance to accept that statement at its face value is justified by Mr Foster's own admission that he is concerned with matters which take place after the loan agreement has been made and was therefore not qualified to consider on how it was set up.

69. The rest of his witness statement and indeed of his evidence dealt with the last three preliminary issues and will be revisited in connection with those matters.

70. The next witness who gave evidence was a Mr Iain Shearer. Although he described himself in his witness statement as "a non-executive director and shareholder" in both LBL and NRL, it was apparent to the Tribunal that he was very familiar with the affairs of both companies. He claimed, and the Tribunal duly accepts, that in many respects although he is not involved in the day to day running of LBL's business activities, he nonetheless is very well acquainted with the way in which

its major operations function. However, his two witness statements although short, addressed specifically the second preliminary issue and it was clear by the time he completed his evidence that his influence on the companies' business practices was very strong if not, in many ways, largely decisive.

71. In the first of his two witness statements provided to the Tribunal, Mr Shearer formally confirmed the contents of Mr Heap's witness statement and by implication his evidence "describing in detail the terms [sic] the workings of the relationships between the appellants and their agents". It follows that insofar as the Tribunal has already expressed misgivings about Mr Heap's evidence on various points the same reservations apply mutatis mutandis to any reliance sought to be placed on Mr Shearer's evidence save insofar as otherwise indicated in this judgment.

72. Mr Shearer deals with the inception of the relationship between the principal agents employed by the Appellants and the Appellants themselves since the time he acquired a major shareholder in LBL in June 2003 having by them already acquired a substantial interest in NRL in September 2001. He states that over that period, ie presumably prior to 2003 at least, his meetings with the Chief Executive of Cash Converters did not involve any negotiation, merely an affirmation of pre-existing arrangements, which Mr Heap has described, the essence of which being that Cash Converters would continue to act as agents for LBL to promote LBL's products and solicit loans to LBL's customers and in return, receive a commission for each completed loan.

73. He goes on to confirm that the Wragge & Co document is "probably only a draft" adding at paragraph 7 of his statement:

"In fact, none of the arrangements made subsequently, whether with individual agents or agent chains, has been reduced into writing, the basic terms being so straightforward and mutually beneficial. There

was at one time an agent's pack which set out the parties' respective obligations but it was found not to be required and is no longer used."

74. Mr Shearer provided a second and subsequent statement regarding the second preliminary issue.

75. The second statement was prepared on the express basis, as Mr Shearer put it, of "dealing with" three key documents, two of which having already been described in some detail in this judgment. The three documents in question are first, an agreement dated 4 June 2003 between a company known as Plangem Limited and NRL (under the rubric Nine Regions), secondly, the email from Mr Urry and Mr Craig dated 26 January 2004 and thirdly the agreement dated 24 April 2006 between LBL and Cash Generators.

76. He also deals with the Wragge & Co document. In paragraph 3 of his second statement he apologises for the fact that his prior suggestion in his earlier statement that no arrangements made subsequently to the Wragge & Co agreement had been reduced to writing, was not correct for which error he apologised. In the Tribunal's view nothing turns on this insofar as this relates to the changes already commented upon in above.

77. In paragraph 4 he confirms that following a further search of the Appellant's offices in Putney he was "reasonably sure that there are no further such documents within the appellants' possession, power or control". In particular he confirmed no dated or signed copy of the Wragge & Co document had come to light.

78. He reverted to the first document involving the company known as Plangem. No description of this document has yet been set out in this judgment. The document is in fact a signed agreement between the entity described as Nine Regions and the company known as Plangem Limited. The agreement expressly records the institution of an unspecified period from 4 June 2003 during which period there is an express reference to Plangem making an office available for the

representatives of the entity known as Nine Regions which as stated above is in effect NRL. The office available was located at a Cash Converters store in Leeds. The same was made available expressly on the basis of there being a payment "of an all inclusive occupancy cost of £100.00 per calendar month" with Nine Regions being responsible for the purchase of its own equipment, telephone and other costs. The fact remains that the Plangem agreement referred to one specific store alone. In his second statement Mr Shearer said that in June 2003 when he acquired his interest in LBL there were more franchises than there are at present. After that time in his words and after the sale of the logbook lending franchise to NRL "the store would conduct only the Cash Converters operations as part of its core business while continuing to make its premises available for the marketing and sale of logbook lending activity in return for a commission".

79. Later in the same second statement Mr Shearer again dealing with the Plangem/NRL agreement states that the agreement in question:

"… is in fact the expression of a hybrid arrangement which prevailed before the relevant franchise was brought in and reflects the fact that, for a time, Plangem retained the franchise but, in effect, sub-let its operation to Nine Regions Ltd, with the express consent of Log Book Loans Ltd as franchisor."

80. With great respect to Mr Shearer, there seems to be no warrant in the Tribunal's view for characterising the "occupancy cost" set out in the agreement as rent or sub rent as he appears to suggest. However, the abiding consideration is that even on the evidence of Mr Shearer it is far from clear that the arrangements which were in place in 2003 with regard to one specific store are of any real relevance to a consideration of the position as things now stand. Indeed in paragraph 7 Mr Shearer accepts that the arrangements he describes in some detail were only extant "for a time".

81. With regard to the exchanges between Mr Urry and Mr Craig set out above, Mr Shearer, while accepting that he was not aware that a signed copy of the Wragge & Co document had been found and that he was further not aware that it had been concluded, nonetheless was of the view that Messrs Urry and Craig were possibly "proceeding on the basis that the Wragge & Co document set out the terms of the relationship between the two companies, but that is purely speculation on my part".

82. The Tribunal is not minded to speculate either in the way referred to or at all. The fact remains that there is no written evidence of the precise terms on which LBL and/or NRL presently carry on their business activities within agents' stores with regard to the basis of their occupational rights, if any, and/or their rights to use the said stores for the purposes of their business. The Tribunal cannot and therefore does not assume that there was any final arrangement in place either regulating or addressing in any way the basis on which LBL utilises the stores, at least in the cases of Cash Converters and Cash Generators, save with the possible exception of very small and isolated outlets.

83. Admittedly Mr Shearer's role on his own evidence, was somewhat removed from day to day control. However, the Tribunal is satisfied that given his majority beneficial ownership of LBL at least and the degree of involvement he himself admits to, he remains reasonably conversant with the principal working practices of LBL despite his own description of his position as being that of a "non executive" officer. He added that for "training" and "regulatory" purposes he visited agents' stores. He added that were the question of a contract to "come up" Mr Heap would speak to him and that he would certainly be "in the loop" about such matters.

84. The Tribunal therefore has little hesitation in accepting these last assertions. There was some question regarding whether any agreement in the form of the Wragge & Co document had been executed which touched upon the occupancy or similar rights that LBL

might have with regard to the stores. This was entirely understandable since LBL generates about 500 loans in total per month which in turn commits it to at least £45,000 in the same period in terms of commission.

85. Mr Shearer was asked about the recent draft agreement between LBL and the company known as ICL referred to above. He called this draft "a travelling draft". There is an Entire Agreement clause in the draft which draft makes no reference to any rights which LBL might otherwise enjoy by way of occupancy or similar rights with regard to the agent's premises.

86. Apart from the three documents alluded to in his second witness statement, Mr Shearer was shown other LBL generated documents which LBL had since disclosed. The first is set out on LBL headed paper and is entitled "Agent Service Level Agreement and Code of Conduct". One copy is a draft and does not bear the name of any agent. It expressly characterises the latter as an "independent contractor" whose obligations are stated to be the "promotion" of LBL's services and the provision of "client information and introductions". A monthly fee is paid by way of commission and consideration. The other copy is an executed copy of an agent agreement with a particular agent, in this case it seems a small or modest sized newsagent. Mr Shearer confirmed to only having seen these documents "a few days ago". He felt constrained to admit that paragraph 7 of his first statement set out above was in the light of that agreement erroneous, particularly with regard to the second sentence set out in paragraph 7, again cited above to the effect that although there was at one time an agent's pack the same was no longer used. He admitted that in the light of the signed copy of the agent agreement referred to above, the same was currently in use. The Tribunal notes that this executed copy makes no reference whatsoever to any right on the part of LBL to occupy the agent's premises or even use the same as to which Mr Shearer claimed in his words that it was used "on an informal basis".

87. Again with great respect to Mr Shearer the Tribunal has difficulty in understanding how any qualification can be made to the clear terms of the executed agent agreement referred to in the preceding paragraph. Moreover, the Tribunal cannot ignore the clear terms of paragraph 7 of his first statement which clearly must have been addressed with care either with the assistance of his lawyers or otherwise.

88. Although the Tribunal accepts that Mr Shearer strove to give an honest explanation of LBL's primary activities, it feels bound to conclude that his evidence taken as a whole is deficient in at least one material effect. The result is that the Tribunal is yet again constrained to rely upon whatever documentary evidence exists with regard to the practical arrangements which otherwise obtain between LBL and its principal agents.

89. Mr Heap was recalled to provide the Tribunal with some form of statistical information as to how a typical underwriter might stand particularly with regard to visiting or attending upon an agent's store. The Tribunal is grateful for the exercise he duly carried out within the two days earmarked for the hearing. However, he reiterated a statistic that has already been referred to, namely reference to the fact that some 95% of all loans advanced by LBL were signed up on an agent's premises. The Tribunal entirely accepts that visits by underwriters occurred to agents' premises for the other reasons which have been touched on such as general liaison with site staff etc. But the fact remains that as a practical matter not to mention in terms of legal analysis there is simply no warrant on the basis of the documentary evidence produced for inferring that any activity other than the signature process would take place on a regular basis "on site".

<u>The first issue</u>

90. The first issue has been set out above at the beginning of this judgment. The key aspects of the relationship between customer and LBL (or more accurately NRL) have been sufficiently set out in the

earlier part of this judgment. First, the underwriter will contact the customer usually by phone. The second stage involves a meeting, often on the agent's premises. This is usually preceded by preparation of the documentation on the part of the underwriter. In any event, the meeting referred to will invariably culminate with the signing of the relevant agreements on site.

91. The key documents comprise an executed credit agreement and a bill of sale. There is no need to refer to these documents in full. At the foot of the bill of sale there is express provision for an attestation with two relevant lines, the first bearing the description "Address of Witness" and the second with the description "Description of Witness". Section 8 of the 1882 Act provides that a bill of sale is void in respect of the personal chattels comprised in it if among other requirements the bill is not "duly" attested. Section 10 reads:

"The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto …"

92. As already alluded to in this judgment, for the purposes of the determination of this issue, the parties have agreed, and the Tribunal duly accepts, that in all cases the customer's signature is witnessed by an underwriter.

93. The OFT contends that LBL (or more accurately NRL) attests the bill in a way which contravenes section 10. The basic contention of LBL is that the underwriter effects the attestation "in his personal capacity" and not as agent for NRL.

94. The Appellants place great reliance upon the decision *Peace v Brookes* [1895] 2 QB 451, a decision of Hawkins J. A bill of sale was given to secure the repayment of monies advanced by several firms. To paraphrase the headnote, the only attesting witness was the agent and manager of one of the firms who were grantees of the bill. He had in the terms of the headnote, conducted the negotiations with regard to

the giving of the bill of sale and the payment which the bill secured. The witness's name was Mr Leck. At page 453, the learned Judge stated:

"There is no pretence for saying that Leck was a party to the bill of sale according to the ordinary understanding of that expression; and I see no reason for interpreting it in any other sense. The object of the legislature in dispensing with the formalities required by the Act of 1878 was to simplify the process to be observed in the execution of a bill of sale and to make the attestation by any credible witness, not being a party, sufficient. The agent of a party to an instrument is not of necessity a party to it himself. If the legislature had it in contemplation that an agent should be treated as that which he is not, I think it would have used words to express such intention."

95. The Appellants also relies on it decision in the Worcester County Court entitled *Nine Regions Ltd v Belcher* by District Judge Savage (Case Ref No. 9QZ39719) dated 13 May 2010. With the greatest of respect to the learned District Judge, the Tribunal is not only not bound by this decision, but in addition the degree of analysis he applies to his consideration of the decision of Hawkins J is, to say the least, less than expansive. It consists simply of an assertion that the case before him where attestation was also in issue was "almost on all fours" with the earlier High Court decision. In those circumstances, the Tribunal is not minded to spend any further time in reviewing the learned District Judge's decision.

96. The Tribunal respectfully agrees with the OFT's primary submission that at the heart of this issue is the clear statutory intention articulated in and reflected by section 10 to the effect that the attestation should be effected by a "credible" person. Bills of sale are documents created and prescribed by statute. By common consent, bills of sale need to be completed with the utmost precision and clarity, mindful of their statutory origins and purpose.

97. Unlike the decision in *Peace v Brookes supra*, the agent, i.e. the underwriter in this case is an agent of a company, not of a partnership. Once a company enters into the equation, of necessity rules of attribution apply. In the leading case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, this approach was confirmed in no uncertain terms by Lord Hoffmann giving the principal speech in the Privy Council at 506B-C. His Lordship then went on to state that what he called primary rules of attribution (e.g. those in a company's Articles) are not enough *per se* "to enable a company to go out into the world and do business" ibid 506 E-F. At page 507A-E, the following passage appears:

"The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when the rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself" as opposed to his servants or agent. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the Board or an unanimous agreement of its shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers

that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) *was for this purpose* intended to count as the act, etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." (*in original*)

98. In the *Meridian* case, the Privy Council had to consider a situation in which a chief investment officer of an investment management company, as well as a junior colleague with the company's authority, but without the knowledge of the board, had used funds managed by the company to acquire shares in a public issuer. The company thereby became a security holder in that issuer. However, it failed to give the relevant statutory notice. The court at first instance and the appellate court both held that for the purposes of failure to give notice, the knowledge of the two individuals could be attributed to the company. The Privy Council agreed. Having regard to the policy of the legislative provisions, the appropriate rule as to attribution was that a corporate security holder would have the relevant knowledge when it was known to a person or persons who, as here, had been responsible for acquiring the level of interest with the company's authority. In other words, the critical questions were first, were the company's acts properly to be attributable to an individual agent or representative? And second, if yes to the above, which individual or representative was implicated?

99. There can be little if any doubt in the Tribunal's judgment that nothing inhibits section 10 from applying to a company. There are a number of reasonably self-evident propositions that can be advanced in support of

that finding. First, nothing in the wording of section 10 or indeed in the bills of sale legislation as a whole omits companies from its ambit. Second, and coupled with the latter proposition, companies legislation, at least in a form still recognisable in the modern companies statutory legislation was already in being in the form of the Joint Stock Companies Acts 1844 and 1856. Companies were on any basis active commercial organisations, even at the end of the 19th century. Third, it is inconceivable that the strict policy underlying the bills of sale legislation would have been enacted in a way such as to exempt companies from the legislation's scope.

100. Further, more than enough has been said already in this judgment to describe the seminal role of the underwriter. Indeed, in nearly every case, he will be the only human point of contact that the customer has with LBL. Far from there being any question about the identity about the individual agent whose acts could be said to be ascribed in this way to LBL, there can be no doubt in the Tribunal's judgment that the only candidate in that respect is the underwriter himself. If any evidential support is required for this proposition, the Tribunal refers to the evidence of Mr Heap quite apart from the ample documentary evidence to which reference has also been made.

101. In addition, the Tribunal has been shown a statement prepared by one Clive Wismayer, the principal of the solicitors' firm representing the Appellants and dated 23 July 2010. The same will be referred to in connection with the third issue below. However at paragraph 3 of the statement, Mr Wismayer says in express terms that it was the "duty" of at least one underwriter to verify the bill of sale on oath. If nothing else, this statement further confirms the appropriateness of properly attributing that act to LBL for the purpose of the circumstances considered in relation to the first issue.

102. Some debate turned on the true import and meaning to be given to the term "credible" in the statute. In the Tribunal's judgment, there can be no exhaustive or finite definition of this adjective. At the very least, it

covers a person whose words, and in particular, whose attestation can be properly and objectively viewed as capable of belief. Thus, to provide a perhaps obvious example, a convicted fraudster would not be a credible witness. However, as already stated, this element is not at the heart of the present issue save to the extent that a credible person is described as someone who is not a party to the bill. The reason for this last requirement is not difficult to discern. A party to a bill on any view cannot be seen as someone other than one with a direct interest in the bill being executed in his favour. It is equally easy to see why such a risk would lie at the heart of the policy underlying the bills of sale legislation concerned as it is with the protection of individual debtors who remain readily susceptible to improper commercial pressure.

103. The Tribunal is firmly of the view that the above considerations in the preceding paragraph militate conclusively in favour of determining the first issue in favour of the OFT. However, a number of specific and detailed contentions were put forward by the Appellants. Out of respect to the careful way they were deployed, the Tribunal will address them in turn.

104. First, reliance was placed on the argument that the underwriter signed in his personal capacity and not in his capacity as agent. To a limited extent that proposition is of course true since a company cannot act save by virtue of its individual representatives or agents. However, the proposition not only misstates the factual reality; it also fails totally to take into account the vice addressed by this section, namely to circumscribe, if not prohibit, the possibility of a party to the bill from taking part in the act of attestation. The reality is represented by the factual position illustrated and confirmed by Mr Wismayer.

105. Second and linked to the first issue is that it is said that it is inconceivable that Hawkins J could have held that the bill in *Peace v Bookes* supra was validly attested if he did not also accept the necessary corollary that a grantor's agent could validly attest the bill.

This argument too has been alluded to already. In a corporate context as distinct from that of a partnership, the analysis is entirely dependant on the proper application of the rules of attribution. In the passage quoted from Hawkins J's judgment he made no finding that Mr Leck was a party: indeed he dismissed any such suggestion in finding specifically that there was "no pretence for saying that Leck was a party to the bill" (see supra at page 453). The learned Judge also added that:

"The agent of a party to an instrument is not of necessity a party to it himself".

In the OFT's initial Determination of Minded to Revoke Notice in the instant case it was specifically noted in paragraph 14 in the section headed "Business Model" that LBL "accepted" that its model "relies largely on the use of Bills of Sale … to secure loans against customers' cars …". Even the evidence related in the earlier part of this judgment makes good the truth and applicability of that statement.

106. Next LBL contended that an act of attestation is "by its very nature one which [the underwriter albeit as an agent] carries out in his personal capacity". In *Odyssey Re (London) Limited v OIC Run-off Limited* [2001] Lloyd's Rep IR 1 the relevant issue concerned the giving of perjured evidence in previous proceedings to which the perjurer's employer was a party. In the Court of Appeal, the principal question was whether the judgment in relation to which the perjured evidence had been given should be set aside. At page 11, Nourse LJ in referring to Lord Hoffmann's speech in the *Meridian* decision stated in column 2 that the question whether such evidence should for the purposes of what is called the fraud of a party rule be attributed to the corporate principal "depends on the facts of the particular case". On the one hand he said that perjured evidence had neither been procured nor knowingly adopted by the principal nor was it given at a time when the perjurer was still part of its "directing mind and will". On the other hand the individual in question as director and general manager was both

"part of the company's directing mind and will at the time and personally responsible for the transaction about which he gave the evidence in support of its case" (page 11, second column). The learned Lord Justice then went on at page 11 and following to say as follows, namely:

"I prefer a test I have found helpful in the past, by reason of its requirement that the acts of the natural person should be identified as the acts of the company.

***

On that view of the matter the question, ultimately, is this. For the purposes of the fraud of a party rule, did Mr Sage have the status necessary to make his evidence the evidence of Orion? I refer only to his status, because the concept of authority adds nothing in the present context and, moreover, is potentially misleading where the natural person is neither the agent of the company nor someone who has been suborned to commit the perjury."

107. Later on page 12 (first column), the learned Lord Justice went on as follows:

"Applying the test suggested, I am satisfied that, at the time that he went into the witness box in November 1989 Mr Sage did have the status necessary to make his evidence of Orion. In my judgment the two most important considerations are, first, that he was the witness, above all others on whose evidence the success of Orion's case has come to depend. He was its "vital" witness ... Of equal importance is the consideration that he had acquired that status not simply because his evidence related to a transaction for which he had been personally responsible as part of Orion's directing mind and will at the time, but also because in the six months or so before the trial he had been a committed member of the team which took decisions as to how Orion's case was to be presented. The evidence established that Orion deliberately sought … to make Mr Sage feel part of the team which

was helping to row it to victory. Whatever the rights and wrongs of that may have been, Orion succeeded in identifying him with its own interests and thus with itself".

108. The Tribunal respectfully feels that the comments made by Nourse LJ apply relatively easily, if not in some curious way fittingly to the effects and incidents of the present case.

109. Finally, it was contended that to attribute the act of attestation to LBL through its underwriter as its agent is contrary to the principle that a witness must be present in person at the time of execution. See e.g. **Halsbury's Laws of England, Deeds** etc 4th edition, Vol. 13 (2007 Reissue) at para 36. In other words the act of giving evidence is one which must be performed personally and which is incapable of being delegated. See e.g. *Clauss & Another v Pir* [1988] 1 Ch 267.

110. In that case the issue concerned the construction and effect of what was formerly Order 24 r.3 of the Rules of the Supreme Court (commonly abbreviated as RSC) which prescribed the verification by affidavit of the discovery of documents. It was held by Francis Ferris QC (as he then was) sitting at that time as a Deputy High Court Judge that that duty could not be delegated. However, the short answer to the overall contention put forward by the Appellants is provided by the learned Deputy Judge at 271B where he stated that the obligation imposed by Order 24 Rule 5 was a personal one in particular by use of the phrase within the Rule of the term "by him". The learned Deputy Judge stated:

"Of course, by implication or otherwise these provisions have to be modified in relation to companies which have no persona which would enable the company to swear an affidavit, but I do not think the need for a modification in relation to official persons affects the principle."

111. For all the above reasons the short answer to Issue 1 is yes.

<u>The second issue</u>

112. The second issue is set out above. This has been called the business premises issue. The statutory provisions which are referred to in the preliminary issue need to be set out in full and in the context of the sections referred to as a whole.

113. Section 48 of the CCA is headed "Definition of canvassing off-trade premises (regulated agreements)". Section 48 forms the first of a series of sections under a global title within the CCA headed "Canvassing, etc". Section 48 provides as follows, namely:

> "(1) An individual (the "canvasser") canvasses a regulated agreement off trade premises if he solicits the entry (as debtor or hirer) of another individual (the "consumer") into the agreement by making oral representations to the consumer, or any other individual, during a visit by the canvasser to any place (not excluded by subsection (2)) where the consumer, or that other individual, as the case may be, is, being a visit –
>
> (a) carried out for the purpose of making such oral representations to individuals who are at that place, but
>
> (b) not carried out in response to a request made on a previous occasion.
>
> (2) A place is excluded from subsection (1) if it is a place where a business is carried on (whether on a permanent or temporary basis) by –
>
> (a) the creditor or owner, or
>
> (b) a supplier, or
>
> (c) the canvasser, or the person whose employee or agent of the canvasser is, or
>
> (d) the consumer."

114. Section 48 should be read subject to section 49 which is headed "Prohibition of canvassing debtor-creditor agreements off trade premises". Section 49 provides in relevant part as follows:

> "(1) It is an offence to canvass debtor-creditor agreements off trade premises.
>
> (2) It is also an offence to solicit the entry of an individual (as debtor) into a debtor-creditor agreement during a visit carried out in response to a request made on a previous occasion, where -
>
> (a) the request was not in writing signed by or on behalf of the person making it, and
>
> (b) if no request for the visit had been made, the soliciting would have constituted the canvassing of a debtor-creditor agreement off trade premises."

115. Pausing here, it can be seen that what is addressed by these two sections is the canvassing of a regulated agreement "off trade premises" which is prohibited. Further, what is excluded from the expression "off trade premises" are those locations listed in subsection (2) of section 48. In particular, the exemption from the prohibition which is imposed by a combined reading of sections 48 and 49 is with regard to a place "where a business is carried on (whether on a permanent or temporary basis) by" *inter alia* a creditor. Section 49 makes it clear that the prohibition carries with it a criminal penalty.

116. Section 67 is the first in a series of sections within the CCA under the general title "Cancellation of certain agreements within cooling-off period". Section 67 is headed with the phrase "Cancellable agreements". It provides as follows, namely:

> "(1) Subject to subsection (2) a regulated agreement may be cancelled by the debtor or hirer in accordance with this Part if

the antecedent negotiations included all representations made when in the presence of the debtor or hirer by an individual acting as, or on behalf of the negotiator, unless -

(a) ***

(b) the unexecuted agreement is signed by the debtor or hirer at premises at which any of the following is carrying on any business (whether on a permanent or temporary basis) –

(i) the creditor or owner;

(ii) any party to a linked transaction (other than the debtor or hirer or relative of his);

(iii) the negotiator in any antecedent negotiations."

117. In the present case, in the light of its formal determinations, the OFT has found that LBL or more accurately NRL has breached the prohibition against canvassing debtor-creditor agreements off trade premises contrary to section 49, and secondly that LBL (again more accurately NRL) has failed to give consumers a, or any, statutory notice of their cancellation rights as required by section 64 of the CCA which need not be recited here. It is common ground that NRL's loan agreement constitutes a "debtor-creditor" agreement.

118. The distinction between NRL and LBL which until now for practical purposes has been largely ignored needs to be revisited to some extent. In the light of all the evidence it has seen and heard, the Tribunal accepts and duly finds the following facts for the purposes of the second issue. First, LBL as franchisor does not itself engage in any lending actively. Mr Heap confirmed as much in his evidence in chief. He commented that the loans by NRL were and are made under what can be called the Log Book Loans brand and that all the underwriters were employees of NRL. Second, and as a consequence

of this first fact, NRL acts through the agency of its underwriters who, as stated more than once in this judgment, negotiate the loans and finally enter into agreements with the consumers. Third, the latter activity, i.e. the entering into of loan agreements with the consumers happens on the premises of the agent. Fourth, the agents on whose premises the agreements are signed are not, in a true legal sense, agents: in particular save as otherwise provided in any written agreements that may be validly in place, they have no authority to act on NRL's or LBL's account or behalf. Fifth and finally, there are about 900 associations comprising principally major chains of independent lenders such as Cash Converters and Cash Generators.

119. The Tribunal therefore concludes that whatever else can be said about NRL's activities, the said activities, whatever form they may take, can constitute no more than a temporary activity on the premises of the agent insofar as the notion of temporariness is concerned within the meaning of section 48.

120. The OFT has alleged that there is a breach of section 49(2) since the underwriter's visit to an agent's store is not made in response to a previous signed and written request and in consequence the breach arises by virtue of a solicitation of the entry into by the customer of a credit agreement at the store. Secondly, the OFT has alleged that the credit agreement in every case preceded as it is by oral representations made in the presence of a customer are cancellable under section 67 and that the Appellants have failed to give the necessary notice of cancellation rights as prescribed.

121. The short point which arises from the considerations set out in the preceding paragraphs is now reflected in the formulation of this second preliminary issue.

122. Certain matters can be said not to be in dispute. First the Appellants accept that the underwriter does not obtain a signed, written request from a customer prior to the meeting taking place in a store. Next it is

accepted that the critical issue , in relation to section 49, is whether section 49(2)(b) has been infringed, i.e. whether there has been "canvassing … off trade premises". This is in turn reflected in a consideration of whether the agent's store is excluded from section 48(1) because it is a place where business is carried on a temporary basis by a creditor, here, the Appellants. Finally, insofar as the second issue relates to section 67, the question is whether cancellation rights are excluded in the case of a credit agreement signed by customers at an agent's store. The Appellants again maintain such a store falls within section 67(1)(b) as being premises at which the creditor is carrying on any business on a temporary basis.

123. Both parties also agree that there is no direct authority on what is precisely required to show that a place or premises falls within both sections for the purposes of this issue. The difference in terminology will be noted. The provisions in section 48 refer to a place where business is carried on. Section 67 refers to premises where any business is carried on. On the facts of the present case, the Tribunal is not minded to consider this difference (if it be such) any further. It is or should be common ground that on the facts of this case all agents' stores constitute both a place and premises and the Tribunal so finds.

124. Section 48(2) talks of "a business" being carried on. The Tribunal accepts, since it does not appear to be disputed by either party, that the business referred to in the section must of necessity be an independent or self-standing business. To read the words in any other way would prevent the subsection from applying to an independent branch out of a number of separate branches operated as part of a network by a single creditor. Conceptually, it is clear on the face of the wording of both provisions that it is enough if "a" business (in the sense of the same constituting part of the creditor's business) is carried on on the site in question.

125. From what is said in the previous paragraph, it might be thought that it necessarily follows that both sections do not contemplate the presence

of a permanent establishment on the site in the sense that a temporary identifiable presence at a particular location is not required. An example was given of a stand at a trade fair or trade show which it was argued by the Appellants would fall within both provisions. These are examples given by **Goode, Consumer Credit Law and Practice** ("Goode"), Vol 1, p.28.87(c) and 31.100-31.110.

126. Pausing here, the Tribunal would in general respectfully agree with the above proposition but would qualify its acceptance of the proposition by noting that, first, each case must be considered against the context of the relevant statutory background and purposes and secondly, the presence of a stand or stall at the trade fair *per se* would be but one, but not necessarily the or a determinative factor, in determining whether the same would properly fall within or without the relevant provisions.

127. This is a convenient point at which to address a further observation made in their written submissions by the Appellants. The Appellants claim that section 48(2) envisages that the place where the canvasser visits may be a place where a business is carried on by the creditor or by the canvasser himself. Consequently it is argued that where the canvasser's own business is concerned, section 48(2) "must contemplate that the canvasser's business is carried on at the place where the canvasser visits", i.e. as it is claimed a place or places where the canvasser is not based permanently but one which he visits intermittently. From this it is said to follow that the canvasser's business may be properly carried on at a place where the canvasser is only intermittently present. It is therefore claimed that section 48(2) should apply to a place where the creditor's business is carried on in the place where his employees are only intermittently present such as in the present case, e.g. at Cash Converters or Cash Generators.

128. The Tribunal with respect finds this argument ingenious but not entirely convincing. The fallacy lies in equating the act of canvassing with the wider implications of the notion of carrying on business. Section 48 is

by common consent part of a series of provisions which were introduced to protect vulnerable customers against the risk of exploitation by lenders. Thus at the extreme end of such a spectrum door step salesmen would be clearly aimed at by the legislation. Other examples suggest themselves such as representatives at other non established places of business such as showrooms and shops where on any sensible basis no established place of business exists with regard to the lender. It may be that a situation would be permissible where one of the factors is reflected in the fact that employees "are only intermittently present" such as an established place of business which was open on a periodic basis. However, in the Tribunal's view it goes too far to suggest, if the same be alleged in this case, that intermittent presence per se will always represent a permissible state of affairs, see e.g. with regard to the underlying policy of the CCA the Crowther Report (1971) Cmnd 4596 especially at para 2.5.18 and 6.7.1.

129. The Appellants in their written submissions themselves quite properly note the policy reasons which were articulated in the Crowther Report. Both parties in fact cite a section in the Report at para 6.7.1 which states and notes that sales pressure can be exerted just as much in a shop or showroom as on the doorstep adding that "a seller who has an established place of business is at least in a position where he can be reached by a consumer seeking redress".

130. The Tribunal was also referred to a commentary in the **Encyclopaedia of Consumer Credit Law** at (para 2-068) which reads as follows, namely:

"Although para. (b) refers to "premises at which any of the following is carrying on any business (whether on a permanent or <u>temporary</u> basis)", they must be premises at which a business is carried on: merely to conduct business there (e.g. during a visit) would not suffice" (emphasis in original).

131. The Appellants argue that reference in paragraph 6.7.1 of the Crowther Report to “an established place of business” simply reflects the fact that the right of cancellation under the predecessor statutory provisions, i.e. the Hire Purchase Act 1965 was excluded where the agreement was signed at “appropriate trade premises”. Moreover, it is entirely fair to say section 67(1)(b) does not use the hallowed phrase “established place of business” since it speaks of carrying on of business “whether on a permanent or temporary basis”.

132. In general terms the Tribunal agrees with the observations reflected in the preceding paragraph. However, the CCA must be read without recourse to earlier statutory provisions at least in the absence of a clear legislative sign to the contrary. Moreover, the Tribunal takes the view that in paragraph 6.7.1 of the Crowther Report the phrase “established place of business” is a compendious expression which serves only in general terms to indicate what is required. It may be somewhat unfortunate that that phrase was used given the way it appears in other statutory areas but the Tribunal is not minded to regard it as being anything other than the most generalised description of the necessary requirements.

133. Instead each party has attempted to list a number of indicia which, if present, would individually and collectively point to the clear conclusion that the Appellants and each of them are and is carrying on business at the agents’ “place” or “premises”.

134. In the light of what has been said above in relation to this issue, the Tribunal is of the view that a number of general considerations need to be borne in mind.

135. First, as the parties themselves accept, the question of whether a person carries on business at a particular place or premises or in a particular manner certainly for the purposes of sections 48 and 67 of the CCA is one of mixed law and fact. Second the legislative policies underlying both provisions are clearly designed to ensure that the

canvassing and cancellation right issues are to a great extent determined by considerations which should be of a kind which protect the customer, in particular by ensuring that there are premises which, if not exclusively devoted to the carrying on of business by the creditor or canvasser, then certainly are premises where the canvasser or creditor can be located without due difficulty. Third, there is a spectrum of factual situations along which spectrum a particular setting and a particular case may fall to be determined. Fourth, by dint of the third factor there can be no more than a flexible and non-exhaustive set of useful indicators which may be applicable to any particular case. Nonetheless the Tribunal is firmly of the view that there has to be what is sometimes called an irreducible core of specific indicators which need to be addressed in undertaking the analysis required. Fifth, one element of this irreducible core is a consideration of what, if any, legal or other formal arrangements are in place in a case where the place or premises is or are legally and/or beneficially or in some other way owned or controlled by a third party, in particular an agent or alleged agent, coupled with a consideration of whether and if so to what extent the canvassing and/or cancellation process can be said to be or constitute the carrying on of business on such premises either on a permanent or more particularly as here on a temporary basis.

136. To that extent and with respect to the Appellants, a consideration of what the Appellants have called the customer's "perception" of an agent's status if relevant at all can at most only be a confirmatory point should the legal and formal arrangements referred to in the preceding paragraph otherwise be absent or unclear.

137. This fifth and final factor has been transposed by the OFT into a series of queries most of which can be said to be answerable by the kind of legal and factual analysis suggested above. The OFT lists a series of issues addressing control of the premises, the degree to which others are excluded apart from the canvasser or creditor etc coupled with the

related question of the extent to which business is in fact carried on in any real sense at the place or premises in question.

138. The Tribunal is therefore minded to begin by considering the elements advanced by the Appellants which they claim can properly be said to constitute formal arrangements in place to justify their contention that no infringement has incurred of the two sections set out in this second issue.

139. First, reliance is placed on what are called “points of sale” present in agents’ premises or stores. Messrs Heap and Spratley gave evidence to such effect by emphasising elements such as advertisements and the display of materials which alluded to or referred directly to the Appellants. Of itself the Tribunal regards this element as at best neutral. It certainly fails to confirm the existence of a formal right to carry on business on the agents’ premises.

140. Second, reliance was placed on store staff training by local underwriters. Both Mr Heap and the Training Manual made reference to this. However, the Tribunal is again of the view that this feature of itself proves nothing.

141. Third, it is said that the agents’ staff will have access to NRL’s “agents’ interface” showing materials which would help demonstrate whether a prospective customer was likely to be eligible for a loan. This feature is again referred to in the LBL’s Manual. In the Tribunal’s view this element in no way addresses the formal issue reflected in the fifth general proposition set out above. The fact that the store has access to knowledge of NRL’s business if anything tends to suggest that the agent rather than LBL or NRL is to be entrusted with the responsibility of conducting NRL’s business.

142. Next, reliance is placed on the holding of the occasional open days where in-store staff are acquainted with LBL materials. The Tribunal takes the same view as it does with regard to the previous two factors relied upon.

143. The Appellants then claimed that the underwriter would not normally seek permission from the agent to use its store to meet customers but would normally give advance notice of his or her attendance so that the store would have cash available should the customer wish to cash the loan cheque. Enough has been said in this judgment already to show that some confusion reigns over the extent to which formal notice, if any, should be given prior to an underwriter visiting a store. The position is unclear and therefore the Tribunal is loathe to accept an unqualified assertion of this sort. Nonetheless if it is accepted that advance notice is normally given, the same is hardly of itself conducive to a finding that LBL thereby can be said to be carrying on business even on a temporary basis of the agents' stores. It has never been suggested that NRL has ever had "run of the place" quite apart from the absence of any clear set of documentation setting out the terms and conditions on which access can or cannot be afforded.

144. Further, with regard to the point discussed in the preceding paragraph should the customer wish to cash a cheque that of itself again cannot answer or contribute towards as to where the business is being carried on by NRL. Again if anything this points to the opposite conclusion.

145. Next it is claimed that the agent and the underwriter "proceed" on the basis that the underwriter is entitled to use the store for the "above purpose". The Tribunal repeats what it has already said above. It is not enough in the Tribunal's judgment for reliance to be placed on some form of undefined mutual understanding as was done by one or more of the witnesses put forward by the Appellants. Certainly the same should not be done, as has already been made clear in the absence of any clear documentary confirmation of the terms on which such an understanding can be said to be based. There is simply no irrefutable evidence that NRL had any form of specific right to enter into and use the agents' premises either by virtue of a licence or a tenancy or some similar arrangement reflecting rights of occupation and use. In particular none of the evidence already referred to in this judgment

clarified the extent to which the agent was entitled to carry out LBL's business on the agents' premises save in the few excepted cases where there was some form of written agreement. Certainly in the case of the major outlet used by LBL, i.e. Cash Converters and Cash Generators no such documentation has been produced.

146. The evidence of Mr Shearer has been dealt with above. In the Tribunal's judgment he was not only responsible for an error in misstating the precise status of affairs with particular regard to the continued use of agency agreements, at least in the case of the smaller agents, but he also failed to demonstrate that any formal arrangement of the type referred to above has ever been in place in any form of considered fashion either previously or at present.

147. The Tribunal has carefully considered whether any implied contractual right can be said to exist to justify the presence of some basic terms and conditions setting out the manner in which LBL and/or NRL can use agents' premises. Regrettably the Tribunal is of the view that there is simply no justification for the importation of any such formal entitlement either by way of implied term or otherwise. A court will generally be prepared to imply a term if there arises for an existing contract an inference that the parties must have intended the stipulation in question. One such circumstance is recourse to the need to import a need for business efficacy. The second is where the missing terms sought to be implied represent the obvious but unexpressed intention of the parties. See generally **Chitty on Contracts**, Vol 1, General Principles, 13-004 (30th Edition).

148. The importation of an implied term is not being advanced by the Appellants in any considered fashion as a ground for answering issue 2 in their favour. In addition the Tribunal is firmly of the view that the evidence clearly demonstrates not only that the parties have been happy to continue their formal arrangements (said by more than one witness to be of mutual benefit) but have also deliberately refrained from expressing any form of mutual interest of the type referred to in

any formal fashion. There is simply no warrant for the importation of the doctrine of implied term or for recourse to any implied contract.

149. In this all important respect the Tribunal makes no apology for revisiting the terms of the relationship between LBL and its agents albeit at the risk of some repetition.

150. The first important feature is that the agents are introducers of the business to LBL. They charge commission for that privilege. It is consequently impossible to construe the commission as some form of consideration for a right to occupy the agents' premises. Second agents agree to display advertising and other materials on behalf of LBL. However, they do so as agents engaged on an independent basis. Third, as has been mentioned at least once above, the principal agreements shown to the Tribunal, namely those with Cash Converters and Cash Generators contain "Entire Agreement" clauses. As a matter of law and quite apart from any issue concerning formal execution of these agreements, such clauses would bar the importation of any of the rights suggested or required, e.g. rights as to occupation save in the clearest possible terms. Fourth and of particular significance none of the agreements shown to the Tribunal stipulate that the Appellants can make use of premises in the way suggested. Fifth, if anything, the tenor and detail of all the evidence points to the overall requirement that in most cases it is LBL which must "on written notice" provide prior warning of their intention to deal out of premises even if in reality such a requirement is more honoured in the breach than in the observance.

151. It follows that the Tribunal entirely accepts the submissions made by the OFT that no evidence exists to justify any finding that any mechanisms are in place addressing the element of control over the agents' premises, such as to justify a finding that the Appellants are carrying on a business on those premises whether on a temporary basis or otherwise within the spirit and intendment of sections 48 and 67 of the CCA.

152. Next, the Tribunal is not satisfied that it can be said with any degree of certainty that the Appellants conduct business to any substantial degree on those premises. The witnesses' evidence was admittedly somewhat confused and in many ways inherently inconsistent. However, when recourse is had to the written materials provided by the Appellants the Tribunal is wholly convinced that the model displayed by such materials in particular the training materials point to a business which is largely conducted off the agents' premises or as it was put "on the road".

153. As indicated above the Tribunal is therefore on balance inclined to the view that the extent to which any NRL and LBL activity is in fact carried out on an agents' premises is extremely limited. Other evidence put forward before the Tribunal in the form of witness statements by witnesses who did not attend to give evidence in person but whose evidence has therefore been accepted by the Appellants as being admissible pointed to the fact that their only connection with the premises was the formal execution of the documentation. See e.g. the evidence of Leanne Evans, a supervisor at the Cash Generators store in Hereford, the evidence of one Suzanne Ford relating her experience in relation to signing agreement with NRL in November 2007 at Cash Converters' Wirral store and that of Joy Blake giving a similar experience in relation to signing an agreement with NRL in December 2008 at Cash Converters, Wolverhampton. There was in addition evidence from one Ingrid Temmerman who recounted her experience in signing an agreement with NRL in a Cash Converters' store. The Tribunal feels there is no need to go into this evidence in detail. However the Tribunal wishes to emphasise that with regard to the evidence of Suzanne Ford, Joy Blake and Ingrid Temmerman the Appellants gave no formal notice that they did not wish to cross examine those three witnesses. The net result is that though those witnesses' evidence remains admissible the Tribunal affords such evidence less weight than it otherwise would have done had the various issues which here are relevant had been further scrutinised.

However the Tribunal finds that even with that qualification nothing said by those three witnesses detracts from the Tribunal's main findings .

154. Earlier in this judgment, reference was made to the payment of what purports to be rent for the use of offices in certain locations. At most 8 locations belonging to both Cash Converters and Cash Generators were involved. Yet again the evidence as to these occurrences was confusing and to a large extent inadequate. As the OFT pointed out and has been pointed out above the use of the term "rent" without more is not determinative. In any event as also pointed out 8 out of a total number of some 900 agents whose services are employed by LBL is a wholly insufficient basis on which to rest an established universal pattern of activity.

155. For the above reasons the Tribunal therefore answers to Second Issue with a no.

The third issue

156. The third issue is set out above. The background can be shortly stated. In its Amended Response the OFT has referred to the formal requirement of the Bills of Sale legislation that a bill of sale is void unless registered within 7 clear days of its execution. In paragraph 62 the OFT alleges that the Appellants (there referring to NRL alone) does not have in place a system for ensuring that all bills of sale are registered within that period. It alleges that the Appellants have purported to enforce bills even though the bills have not been registered in a case of a number of listed individuals who number 9 in total.

157. The Appellants' Reply has countered these allegations with the following assertions. First it contends that NRL is supposed to send bills of sale to the High Court for registration. They claim that their "understanding" is that the date of the court's stamp on the bill is not conclusive of the date on which the bill was registered. They further claim that in a case where the bill is received by the court within the 7

days but where the bill is stamped with a date which falls more than 7 clear days after execution "the court may on application re-stamp the bill to show the date of receipt as the date of registration". In cases where the bill arrives too late it is alleged the court's "normal practice" is to return the bill unstamped. The relevant passage in the Reply is paragraph 45(b) where it is stated as follows:

"The fact that a bill has been stamped, albeit with a date which is more than seven clear days after its execution is accordingly consistent with its having been registered within the time permitted by the 1882 Act".

158. Section 8 of the 1882 Act provides that a bill of sale is void "if it is not registered under the Principal Act [i.e. the Bills of Sale Act 1878 (as amended)] within seven clear days after the execution thereof."

159. Section 13 of the Bills of Sale Act 1878, i.e. the 1878 Act, provides that the Masters of the Queen's Bench Division in the High Court are to be treated as the registrar for the purposes of the 1878 Act. By section 12 the registrar is to keep a register in which details of bills of sale including a registration number, are to be entered.

160. It has already been observed in this judgment that the legislative requirements regarding bills of sale are to be strictly observed. One principal reason is to ensure the protection of third party creditors from the possible adverse consequences of secret transfers of title to goods remaining in the possession of the former owner. A register was considered to be a key part of this protection. See generally *Manchester Sheffield and Lincolnshire Railway Co v North Central Wagon Co* (1883) 13 App Cas 554 especially at 556 per Lord Herschell.

161. The upshot of the formal exchanges between the Appellants and the Courts Service was for a substantial period the apparent implementation of a practice whereby bills were not registered by the Masters on the same date as they were received.

162. As already indicated Mr Foster gave evidence on this issue. In his view as confirmed in his witness statement he said that initially the Courts Service indicated that the date of "sealing" was the date of registration. However, after various exchanges between the Appellants and the Service in 2009 in particular in the latter party's case on the part of a Mr Alvin Aubeeluck described as the Enforcement Team Leader in the Enforcement Section at Room E17 at the Royal Courts of Justice, it was accepted in an email exchange in November 2009 that late registration would be accepted at least in the case of one day after the seventh following execution. However, Mr Foster then went on to claim that, since that exchange, he had been advised that such a practice was incorrect and the bill must be registered <u>within</u> 7 clear days after execution (his emphasis). In further exchanges during December 2009 he was also informed that a typical interval between receipt of the bill and "sealing" was three days. However, one of the exchanges in the form of a letter from Mr Aubeeluck of 10 December 2009 asserted that bills which clearly had been received within the permitted 7 clear day period were according to Mr Foster sealed and returned "without demur" but were "nevertheless regarded, not necessarily correctly and perhaps upon closer consideration as void".

163. The Tribunal is content to assume that correspondence up to February 2010 seemed to suggest that at the very least there was some uncertainty within the Enforcement Section.

164. Such uncertainty appears to have ended on or by 16 February 2010. By an email of that date Mr Aubeeluck wrote to the Appellants stating:

> "We will now register all Bills of Sale the date they were received. Until now they may have been received here, say 15/02/2010 but were sealed 16/02/2010. From today the received date stamped on post opened, will determine the date of registration [sic]".

165. The Tribunal shares the uncertainty regarding the true meaning of this quoted passage, an uncertainty expressed in the OFT's written

submissions. Either it meant that the Master or Masters would thenceforth ensure that the practice would obtain whereby bills would be registered on the day of receipt or perhaps more arguably it meant that the Master would not treat the date of receipt as the date of registration if in fact a bill was registered on a subsequent day.

166. Fortunately, the Tribunal does not have to resolve the issues articulated in the preceding paragraph. It would have difficulty in doing so: if nothing else it has not received any evidence on the issue other than the witness statement and evidence from Mr Foster and the correspondence. In addition it has received a witness statement from Mr Wismayer, a statement already referred to above. In his statement dated 23 July 2010 Mr Wismayer made an application under section 14 of the 1878 Act to extend the time for registration of a bill in the case of an identified individual but not one of the 9 listed by the OFT in its Amended Response. Other points made by Mr Wismayer are covered by the submissions made during the hearing. The Tribunal regards it as sufficient merely to allude more fully to the terms of section 14 of the 1878 Act without citing the same in full and which is headed "Rectification of the register" and which provides inter alia that on being satisfied that the omission to register a bill of sale within the prescribed time limit was "accidental or due to inadvertence" the High Court may in its discretion extend the time for registration on such terms and conditions as it thinks fit. The technique and indeed the type of language employed by section 14 is familiar in at least one other analogous setting namely that of late registration with regard to the registration of charges under the Companies Acts.

167. The relevant narrative effectively ends with a letter dated 26 July 2010 from a Mr Adams of the Courts Service to the OFT in which it is stated as follows, namely:

"On the rare occasion that a Bill of Sale is not processed in the office on the day of receipt, the "received" date is taken to be the date of registration as this was the date that the Bill of Sale was received in the

building, and should therefore be within 7 working days of the Bill of Sale being signed".

168. Not surprisingly the Appellants have embraced and endorsed the propriety and use of the practice apparently adopted by the Enforcement Section that short of formal rectification for late registration, sealing can be, as it is put in the Appellants' written submissions "corrected without formality". Emphasis is placed on the opening words of section 10 which stipulate that a bill "shall be … registered under the Act in the following manner …" and in particular section 10(2) which provides that within seven clear days of the making of the bill the original bill plus a copy and the required affidavit are to be "presented to" the registrar. This last element say the Appellants, necessarily means that once and provided the necessary documents have been so provided, registration can be treated as duly effected. The element of "presentation" it is said means that once the documents have been received by the Courts Service they are within the control of the registry.

169. In the Tribunal's judgment the determination of this point turns on what is meant in the legislation by the term registration. It is agreed that the notion and term are not defined or explained in either the 1878 or the 1882 Acts or indeed elsewhere. The OFT submits that registration must mean the entering of the bill on the register. The Tribunal respectfully agrees.

170. First enough has been said about the system whereby registration is implemented under the 1878 Act. As a matter of ordinary language if nothing else the word "registration" does not signify receipt, at least in the absence of the clearest indication to the contrary. No such contrary indication exists in either Act.

171. Second some support for the first proposition can be found in the case cited by the OFT, namely *General Accident Fire and Land Assurance v Robertson* [1909] AC 404. In that case the House of Lords construed

an insurance policy which expressly dealt with its "registration". At page 412 Lord Loreburn observed that "registration" "… must mean something in the nature of a record which may be available for use if disputes arise". He went on to add that it was not enough that a date stamp was "impressed" on the coupon slip, nor that the slip was "… temporarily placed in a bundle with others on which the same fee had been paid, nor that the daily sum total of remittances, including Hunter's 6d., was entered in the book. No name whatever was entered in any of these processes, and no record of a name preserved except for a few days." Reference should also be made to Lord Shaw's speech at pages pp 414-5 where he expressly remarked that "in ordinary transactions registration would assume a register of some separate kind, and in a ledgerized form familiar in accounting …".

172. Third and finally,(and the Tribunal places particular significance on this factor), another aspect of the legislative policy referred to above at paragraph 160 is clearly that a third party should be able to see whether a bill has been executed. Receipt by the registry would tell him nothing.

173. In these circumstances the Tribunal has little hesitation in answering the third issue in the following manner: the date shown on the stamp.

The fourth issue

174. As indicated above, the fourth and fifth issues were not the subject of oral arguments at the hearing although some evidence was given with regard to the former issue. However, the parties are content to rely on written submissions and at the close of the hearing the Tribunal granted permission for them to file further written submissions if so advised in the light of what was said at the hearing.

175. The fourth issue has been set out above at the beginning of this judgment. It has been referred to as the text messages issue. The background can be taken from the substance of the OFT's initial written submissions.

176. The OFT has alleged that text messages sent by NRL offering what are called top-up loans are in contravention of regulation 8(1)(d) and regulation 9(1)(d) of the Advertisements Regulations. The Regulations in question will be set out below. The basis of the allegation is that the text messages provided an incentive, namely the interests and alleged benefit of speed, and further that the APR was not included. This aspect is non material to the present issue.

177. The Appellants deny that the text messages in any way constitute "credit advertisements" for the purposes of the Regulations. A sample message is sufficient. One example drawn from the Appellants' operation Manual reads:

"Congratulations Greg: you've been pre-approved for a Top-Up on your Logbook loan. Please call your Local Rep today on 0700 0000000".

178. The evidence put in by the Appellants is to the effect that NRL generates text messages in two ways. First NRL sends what are called "ad hoc" messages sending them by individual underwriters to individual clients. Reference to LBL's "Three Day Training Module" provides evidence of this means of promoting the Appellants' products. In the heading entitled "Database Management" trainee underwriters are advised to consider the use of text messages and to send "around 50 texts every two days so the flow can be managed and responses can be immediate". The Tribunal is satisfied there can be little doubt that a large number of such texts were and are sent.

179. Mr Foster, who gave some evidence on this score, confirmed the alternative practice of sending texts messages "en masse", an expression that he appeared to have coined, from the Appellants' head office.

180. The Advertisements Regulations 2004 by paragraph 1(2) defines "credit advertisement" as:

"… an advertisement to which Part 4 of the Act [i.e. the CCA] applies by virtue of its falling within section 43(1)(a), or which falls within section 151(1) of the Act insofar as section 44 is applied to such an advertisement".

181. Section 44 of the CCA entitles the Secretary of State to make regulations as to the form and content of the relevant advertisements.

182. The Tribunal's attention has also been drawn to section 189(1) of the CCA and its definition of the term "advertisement" which provides as follows:

"advertisement" includes every form of advertising, whether in a publication, by television or radio, by display of notices, signs, labels, show cards or goods, by distribution of samples, circulars, catalogues, price lists or other material, by exhibition of pictures, models or films, or in any other way, and references to the publishing of advertisements shall be construed accordingly; … (emphasis highlighted by OFT in its written submissions).

183. **Goode** supra at 28.9 comments that the definition "covers all forms of media used to advertise either consumer credit or hire facilities. It is not limited to visual advertisements but extends to any form of advertising, visual or aural, written or oral, including advertising on the radio or television, in-store or on the internet. It even includes sales talk in a shop or show room".

184. The Appellants draw attention to a specific provision in the Advertisements Regulations, namely Regulation 2 which provides that:

"A person who causes a credit advertisement to be published shall ensure that the advertisement complies with all the applicable requirements of these Regulations".

185. The two provisions which are referred to in the preliminary issue itself provide in the case of Regulation 8(1) that a credit advertisement is

required to specify the typical APR if the advertisement "includes any incentive to apply for credit or to enter into an agreement under which credit is provided". Further Regulation 9(1)(d) provides that a credit agreement shall not include the expression "loan guaranteed" or "pre-approved" or any similar expression, "except where the agreement is free of any conditions regarding the credit status of the debtor".

186. At the heart of the Appellants' case is that these two provisions have no application to text messages sent to existing customers whose payment history with NRL indicates that they might qualify for a top-up loan.

187. In his witness statement, Mr Foster confirmed, that underwriters can only send a text message about the possibility of a top-up loan after the customer's account had been vetted to verify that the customer had a good payment record and further that the vehicle still constituted adequate security for any further lending. He also confirmed that such text messages could be generated either by individual underwriters sending the messages to individual customers on an "ad hoc" basis or by means of the "en masse" method referred to above.

188. The Appellants focus on the word and term "publish" in Regulation 2. The term means or connotes, according to the Appellants, the need for the advertisement to be issued or displayed to the public at large or to a section of the public. Another passage in **Goode** is relied on being that at paragraph 28-23 where a discussion is engaged in regarding what is meant by an advertisement being published for the purposes of section 43(1), namely:

> "… the advertisement must be issued or displayed either to the public at large or to an individual or individuals as members of the public, not in some other capacity."

189. Much the same approach is taken by the OFT as is claimed by the Appellants in the OFT's own Frequently Asked Questions particularly at Q.2.1 regarding the Advertisements Regulations, i.e. to the effect that

publication means communication to the public or making the advertisement available to the public or to a section of the public such as by way of leaflets at bank branches or by a mailshot.

190. Put shortly, the Appellants maintain that existing customers are not in the same category as members of the public, i.e. they do not receive communication as such when it is sent to them purely on the basis of their payment and credit history and rating. The same analysis, it is said, applies to en masse messages to existing customers.

191. This approach it is claimed is entirely in keeping with and indeed it is said to be fortified by Mr Foster's evidence. Mr Foster was cross examined on his witness statement. He admitted that the formulae set out in the section of the Training Module headed "Database Management" do not contain a precise formulation of the criteria to be used as to the selection of those customers who were to receive messages. Moreover acknowledgements of the selection criteria were not recorded in writing anyway and were not applied with any real rigour in the past. The Tribunal accepts that it was necessarily implicit in what he said that the "en masse" emails used to be sent out in even larger numbers than they are at present. As for the "ad hoc" messages and the point above referred to that the instruction in the Training Module was to the effect that around 50 texts be sent every two days Mr Foster commented that underwriters probably sent somewhat fewer than this in practice but accepted that there was "no prescriptive maximum".

192. The Tribunal makes due allowance for the partial lack of clarity in Mr Foster's evidence but is not prepared to accept that it detracts from the Appellants' primary position that it is not the public that was or is in receipt of the text messages.

193. The Appellants further point to another passage in **Goode** supra at page 28.23 where the editors express the view that an advertisement can be published "even if it is merely a letter or circular sent to a single

individual, or to members of a ... society, if it is sent to him or them as a member or members of the public for the purpose of attracting business".

194. The decision of the Court of Appeal in *R v Delmayne* [1970] QB 170 is cited in support of that proposition. In that case a document was sent to an individual after his admission to membership of a deposit and loan society but in a way that expressly made it clear that it was "addressed to the public at large". The Appellants not unnaturally distinguish the instant case on the basis of the written and oral evidence to the effect that recipients are here chosen on the basis of confidential information in the Appellants' own records.

195. Regulation 2 rather than Regulations 8 and 9 employs the term "published". As part of their overall contention that no publication has here taken place the Appellants addressed the question of whether and to what extent the texting which has occurred can be said to be the subject of any form of publication or not.

196. Three possibilities are canvassed drawn from suggestions set out in the **Encyclopaedia of Consumer Credit Law** supra at 2-044, pages 2054/30. First the publication may simply mean "communicated or made known", e.g. a one off letter addressed to a specified person and no one else. The editors suggest that this meaning is unlikely because of the additional effect of the word to which the notion of publication is attached, namely "advertisement". Second and this is the editors' preferred meaning, the publication means "communication to the public". The Appellants agree. However, they point to a further commentary on this variant in the **Encyclopaedia** which reads as follows, namely:

"Thus a circular letter by a bank to its employees offering them credit facilities for the purchase of season tickets for travelling to work would not be "published" although a "mail shot" to members of a motoring association or to existing account holders would be, as in the latter

case, they would be circulated as members of the public as well as members of the group (see *R v Delmayne* above; *Chanel Limited v Triton Packaging Limited* [1993] RPC 32)".

197. The Appellants seek to qualify the terms and effect of that passage by claiming that if the recipients were as here in effect selected from a special list of individuals based on confidential information available to the sender, thereby qualifying for a special offering not otherwise available to the public then such recipients would constitute recipients who were not members of the public but would be members of a specially designated group.

198. The *Chanel* decision was one which involved a network of perfume distributors who sold the products to family friends and acquaintances. The defendants supplied the distributors with perfume samples and a Manual. A chart was also included stamped "confidential" in which each of the defendants' perfumes was compared with the perfume it imitated. The issue was whether the supply of the chart contravened a provision in the Trade Marks Act 1938 by the use of the plaintiffs' trade marks "in an advertising circular or other advertisement issued to the public". At first instance and as affirmed in the Court of Appeal it was held that it was important to note that by signing the application form and paying the fee and on having the application accepted by the Defendants the distributor did not cease to be a member of the public.

199. The Appellants respond to the apparent applicability of this decision and finding to the present case by reverting to a consideration of the selection process here employed by the Appellants. In the words of the Appellants' second Skeleton Argument:

> "The nature of the selection process accordingly ensured that the recipients of the messages received by them in their capacity as a sub-group of NRL's customer-base, and not as members of the public."

200. The third meaning adumbrated in the **Encyclopaedia** is to the effect that "published" can also mean "circulated" or even "distributed". The

Appellants contend that if such were the case one or more of these latter two terms would have been used.

201. The Tribunal finds the resolution of this issue not without some difficulty particularly in the light of the otherwise somewhat surprising absence of any discrete definition of the terms “published” or “publication” in the legislation. It begins its analysis with a consideration of the issue of how the term or expression “published” is to be construed not in isolation but against the other provisions set out in the relevant legislation in particular the pivotal provisions of section 43(1) of the CCA which refer to the subject matter of the publication, namely advertisement.

202. In the Tribunal’s judgment this necessarily leads to the definition of advertisement set out above and drawn from section 189(1) of the CCA. Apart from the phrases and terms already emphasised in the quotation of that section, a key indication of what is likely to amount to publication is to be found in the concluding words, namely:

> “… and references to the publishing of advertisements shall be construed accordingly”

203. Thus by way of example some form of distribution other than those relating, to say, catalogues would fall to be included.

204. The OFT refers in particular to a passage from Bennion, **Consumer Credit Control** to confirm the propriety of this approach though the Tribunal is satisfied that the wording on its face and suggested effect of section 189(1) are clear.

205. Next it is clear that reference to a class or type of recipient is nowhere alluded to let alone qualified in or by section 189(1). The exercise which needs to be considered for present purposes is first to assess whether the text messages here in issue fall within the scope of section 43(1)(a) of the CCA and secondly, whether the texting falls within the letter or necessary intendment of section 189(1).

206. One difficulty may well be what the position might be with regard to one single recipient who is in receipt of one of the itemised forms of publication but this is not a difficulty which arises on the facts of the present case. Here Mr Foster made it abundantly clear that NRL maintained a database of some 70,000 past and present customers. The last "en masse" texting was sent in early to mid 2010 to 4,000 or so customers in four waves of 1,000 each. He admitted, however, that such selection criteria as there was was hardly scientific. As mentioned above the Tribunal is quite happy to adopt a broad acceptance of his evidence. Clearly the overall consideration was that there was a general intention to address a limited constituency, namely those with a history that might otherwise qualify them for a top-up loan of some sort.

207. The fact remains, however, that contrary to the first suggested variant of the term and expression "published" referred to by the **Encyclopaedia** and addressed above and indeed by the Appellants the Tribunal is (subject to what has already been said) sceptical that publication simply means "communicated or made known". However, this is not the variant which the Appellants themselves adopt.

208. The legislative policy must not be lost sight of just as in the case of the business premises issue. The Tribunal finds it impossible to ignore the clear purposive requirement underlying the Advertisements Regulations to ensure that advertisements contain a fair and reasonably comprehensive indication of the nature of the credit and of the true cost attributable to that credit: see generally section 54 CCA. The need for protection of customers remains the same irrespective of the nature of the recipients targeted or in fact contacted.

209. The above conclusions may be said to leave unaddressed the critical central plank to the Appellants' case that there is in this case no publication at all.

210. The Tribunal finds nothing in the legislation whether in the Regulations or in the principal Act which justifies a line being drawn between new and existing customers and/or between those with no track record and those with a previous track record whether good, bad or indifferent. The consequences of adopting such an approach can be seen to be somewhat extreme given a moment's reflection. It cannot have been the policy of the CCA to have allowed advertisements to be disseminated, albeit restricted to further lending without some form of control as to the content and manner of exchanges between lender and customer.

211. The unintended consequences referred to in the preceding paragraph finally persuade the Tribunal that the two judicial authorities cited by the Appellants and referred to above really have no place in relation to the resolution of this issue. Both the contexts and the statutory language differs considerably with regard to those presently being considered.

212. For all the above reasons the Tribunal answers the fourth issue in the following manner, namely Yes.

The fifth issue

213. The fifth and final issue is set out above. It has been called the incentive issue.

214. The background is relatively straightforward. At various times the Appellants have placed a number of print and radio advertisements extolling the speed with which loans can be obtained. Simple short phrases are usually employed such as "simple, fast loans", "call for an immediate decision" and the like.

215. The OFT has alleged that the tone and content of these advertisements constituted an incentive to apply for credit or to enter

into an agreement under which credit is provided within the meaning of Regulation 8(1)(d) of the Advertisements Regulations 2004 which Regulation is set out in full above.

216. The Regulations stipulate that the typical APR should be specified which clearly is not done. In addition in accordance with section 167(2) of the CCA it constitutes a criminal offence to cause an advertisement to be published which infringes the Advertisements Regulations.

217. The Appellants' case is that such advertisements or announcements do not amount in each case to an incentive.

218. No definition of the term "incentive" appears in the CCA or indeed in the Regulations. The Tribunal is satisfied that the purpose of Regulation 8(1)(d) in this connection is to ensure that customers are properly alerted to at least one, if not the major component of a loan transaction, namely the APR. Enough has already been said already in this judgment to confirm that the CCA is enacted with a view as one of its principal aims to protect potentially vulnerable borrowers.

219. Nothing need be said further about the meaning and effect of the APR, namely the Annual Percentage Rate or what is sometimes called the "charge for credit".

220. The OFT claims that the issue is one of impression. In general terms the Tribunal would agree. An incentive is a species of encouragement or even enticement. The OFT alleges that a claim or assertion that the loans are available quickly represents in effect a classic example of such a phenomenon. The point is ultimately a relatively short and simple one.

221. The Appellants' approach is equally reasonably short and simple. Regulation 8(1)(d) addresses something over and above the basic product itself or the basic service normally offered by the lender. An incentive connotes some form of special treatment or what is sometimes called an "add-on" (such as a free gift).

222. The Tribunal is minded to accept the Appellants' approach. The Tribunal has looked at a binder prepared in relation to this fifth issue containing all the relevant advertisements which are in issue. The Advertisements are almost entirely when considered in the round a description of the basic product offered by the Appellants and little if anything else. The fact that the APR is not referred to in the Tribunal's view is immaterial. Admittedly on occasion reference is made to the availability of "fast loans" but the question is not so much whether the word "fast" represents an incentive but whether the degree and nature of the speed suggested is set out in some form of detail. The Tribunal regards the advertisements as occupying a completely different realm from those in which there might well be regarded to be an incentive such as the offering of a special gift or a holiday or a stated discount etc.

223. The Tribunal therefore answers this fifth issue in the following way, namely No.

David Marks QC
Judge – First –tier Tribunal (Consumer Credit)