Case Nos. CCA/2009/0010
& CCA/2009/0011

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

On appeal from: Adjudicator's determinations 16 October 2009

Office of Fair Trading's
Decision references: ADJ/1975 – CCA – 512966 (Nine Regions Ltd)
and ADJ/1974 – CCA – 458150 (Log Book Loans)

Dated:

BETWEEN:

Appellants: Log Book Loans Ltd
& Nine Regions Ltd (t/a Log Book Loans)

Respondent: The Office of Fair Trading

Heard at: **The Employment Appeal Tribunal, Audit House**
Victoria Embankment, London EC4Y 0DS

Date of decision:

Before

David Marks QC
(Tribunal Judge)

John Randall

Vernon Fuller

Attendances:

For the Appellants: William Moffett (of Counsel)

	Edward Hicks (of Counsel)
For the Respondent:	Richard Coleman (of Counsel) Craig Ulyatt (of Counsel)
Subject matter:	Striking out: Tribunal Procedure (First-tier Tribunal) (GRC) Rules 2009: Rule 8(3): sections 21, 25, 25A, 32, 34A, 39, 41, 41ZB, 145(7), 184 and 189(1) Consumer Credit Act 1974 Legal Services Act 2007, s.17 Solicitors Act 1974 ss.21, 24 Courts and Legal Services Act 1990, s.70 Companies Act 2006, s.993 Fraud Act 2006, ss. 1, 2, 7 and 12 Consumer Protection from Unfair Trading Regulations 2008, regs 5 & 7
Cases:	Swain v Hillman [2001] 1 All ER 91 Cooper v OFT (2009) CCAT (unreported 12 March 2009) at 19 Credit Default Register and Holmes v Secretary of state for Trade and Industry [1993] CCLR 59 European Environmental Controls Ltd v Office of Fair Trading (2009) UKFTT 274 (GRC) and UT (Upper Tribunal) GC/2295/2010 (CCA 2009/2002)

DECISION

The Tribunal grants the Respondent's application to strike out the appeal of both Appellants.

REASONS FOR DECISION

Introduction

1. This judgment, which provides written reasons for the oral decision set out above, deals with the Office of Fair Trading's (OFT) application to strike out the appeals of the above two Appellants, namely, Log Book Loans Ltd (LBL) and Nine Regions Ltd t/as Log Book Loans (NRL) against the earlier revocation of both Appellants consumer credit licences. The application is made under Rule 8(3) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Tribunal Rules) on the basis that the Appellants' cases, which are for present purposes identical, have no reasonable prospect of success.

2. Both Appellants have carried on, at all material times, a consumer credit business lending relatively modest amounts to individual persons secured by a bill of sale taken over the individuals' motor vehicles. It is a substantial business with recent annual turnover being in the region of £20m. At the heart of the Appellants' appeal against the revocation of their licences is their contention that they have at all times, and in all material respects, been fit and proper persons entitled to benefit from a licence granted under the regime provided by the Consumer Credit Act 1974 (CCA). This application has been made during the hearing of substantive appeals by the Appellants against the revocation of their Consumer Credit licences.

3. Much of the detailed operations of the Appellants are not directly relevant to the present application. Where needs be, reference will be made to the nature and extent of the various aspects of their Appellants'

businesses. What is central, however, to the present application is the admitted use, up to about February 2011, by the Appellants and those individuals who control and own them, of a separate company called Adams Spencer & Phillips (Legal Services) Ltd (ASP) to send letters to NRL's customers, (and for present purposes, it is by and large enough to refer only to NRL) who were in arrears. As will be seen, such letters, which will be called for the purposes of this judgment the ASP letters, constituted what are sometimes called letters before action. More specifically, they were sent by ASP on the apparent basis that ASP was an independent solicitors' firm instructed by NRL to make demands before payment and to threaten legal action against individual borrowers of NRL. Thus, in many cases, the letter stated that:

"Unless payment of the full outstanding balance is received by our clients, we have instructions to commence legal proceedings against you without further notice."

4. It is now formally accepted by the Appellants that, among other matters which will be further set out below, ASP's activities have been carried on by NRL from early 2005 using letters such as the one quoted from above, printed from NRL's systems. It is also admitted that ASP had no employees or staff and that the avowed purpose of such letters was to "[improve] collections from uncooperative or unresponsive customers who had gone into serious or prolonged default" to quote from the statement of the individual whose evidence is central to this application, a Mr Paul Foster, an officer of the Appellants.

5. The main contention advanced by the Appellants in opposition to the OFT's application is in effect that no prejudice or harm resulted or would result from the activities of ASP. So, for example, ASP and by necessary implication, the Appellants, never activated any threat to commence legal proceedings. Although the Tribunal was faced with a series of specific arguments as to why the application should not be acceded to, and the substantive appeals against revocation be allowed to run their course, the Tribunal accepts that in essence the contentions

put forward on the strike out application were in large part, if not overwhelmingly, what could properly be called pleas in mitigation. The principal thrust of such a contention or plea was to the effect that ASP's activities were never intended to cause consumer harm but were in the words of Mr Foster "simply to increase the contact rates with defaulters".

Strike out proceedings

6. Rule 8(3)(c) of the Tribunal Rules provides as follows, namely:

> "(3) The Tribunal may strike out the whole or part of the proceedings if –
>
> ***
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

7. The Tribunal is not aware that the Appellants and the OFT have adopted any material difference in approach to the applicable principles which underlie this particular jurisdiction. They can be summarised as follows. First, there is no practical difference between the manner in which a Tribunal such as the present one should approach such an application and the approach adopted to address applications for summary judgment in the civil courts, see e.g. *Swain v Hillman* [2001] 1 All E.R. 91, especially at 92 per Lord Woolf MR. Second, in those circumstances, the Tribunal or court must consider whether there is a realistic, as distinct from a fanciful, prospect of success. For these purposes, a fanciful prospect will encompass a case that is manifestly unsound and unsustainable. Third, although it is sometimes said that a case should not be struck out if facts relating to the ultimate outcome are, or might be, in dispute, such an observation has to be measured against the context of the case in question. As will be seen, some of the evidence tendered in respect of the present application by the Appellants, in particular in the form of the evidence of Mr Foster, might arguably be so viewed were the present appeals to run their allotted course. However, as will be shown, the OFT is content to rely on the

entirety of Mr Foster's evidence on the assumption that all of it is true for present purposes. This is particularly important because it necessarily means that the OFT and, by parity of reasoning, the Tribunal is again, for present purposes, bound to accept that although there is an admitted deception, there never was any intention to act improperly or unlawfully.

Fitness

8. Section 25(2) and (2A) of CCA found in Part III deals with the Licencing of Credit and Hire Business. Sections 21 to 26 inclusive are grouped under the subheading "Licensing principles". Section 25(2), which is in section 25 being headed "Licensee to be a fit person" and subsection (2A) provide as follows, namely:

> "(2) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things) –
>
> (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit business;
>
> (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;
>
> (c) practices and procedures that the applicant proposes to implement in connection with any such business;
>
> (d) evidence of the kind mentioned in subsection (2A).
>
> (2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person has –

(a) committed any offence involving fraud or other dishonesty or violence;

(b) contravene any provision made by or under –

(i) this Act

(a) paragraph 13 of Schedule 1A to the Financial Services and Markets Act 2000;

(ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;

(iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;

(c) contravene any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);

(d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or

(e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)."

For the sake of completeness, the Tribunal should set out the remaining provisions of section 25, namely:

"(2B) For the purposes of subsection (2A)(e) the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

(3) In subsection (2A), "associate" in addition to the person specified in section 184 includes a business associate."

9. There is no need to set out the provisions of section 184 of the CCA. The definitions contained in that section, as well as in CCA section 189(1) are very wide indeed with the result that a person may be an "associate" of another, for the purposes of the Act, although there is no real or substantial "business associate" between them in any commonly understood sense.

Fit person

10. Although the issue of fitness will be revisited later in this judgment with specific reference to the facts relevant to this application, the Tribunal feels it is important to highlight a few factors of relevance to this application which were referred to by the OFT in its opening written submissions. First, it appears to be common ground that the purpose of the licensing regime is consumer protection. See *Southern Pacific Personal Loans Ltd v Walker* [2010] CCLR 5 (CA) especially at 23. The Tribunal pauses here to say that it was taken to, and will in due course, refer to the guides which elaborate on this essential requirement. Second, although the OFT expressed its agreement with the Appellants that an important aspect of the need to safeguard consumer protection was to eliminate or at least reduce the risk of consumer harm, the parties were at issue as to whether, and if so to what extent, actual harm had to be demonstrated. As will be seen, the Tribunal is firmly of the view that in this case, and as a matter of principle, it is sufficient to find that there is a material risk of consumer harm, representing something of a lesser standard than demonstrable harm, that is relevant. In particular, the Tribunal respectfully agrees that what has to be addressed in this respect is a degree of risk which goes beyond the degree of risk that could be said to be inherent in the conduct of a competent and honest business. Thirdly, and in connection with this last factor, the material risk of consumer harm can quite properly be said to be reflected in the terms of section 25(2), and more particularly, section 25(2A)(e). Not

only are each of the matters listed in section 25(2)(a) to (d) relevant to the risk of consumer harm, but the same risk can properly be viewed as the kind of business practice which could justifiably attract the attention of the OFT as being at the very least unfair or improper, whether lawful or not. Fourth, the Tribunal entirely accepts that past conduct is relevant. Each set of factors is of course different, but if there has been something of a consistent course of behaviour, this should properly been taken into account in assessing integrity, competence and skills and any claims to such effect as well as bearing on the more general assessment of the risk of consumer harm. The Tribunal is loathe to impose any limitation on the definition of fitness for present purposes. Although it is clear that in considering whether a person passes the fitness test, the OFT must ignore what can be called extraneous factors, the process of determining fitness involves a large degree of discretion. The OFT must be "satisfied" that the applicant is a fit person. In the Tribunal's view, this exercise contains at least a two-stage process. First, the factual basis with regard to each of the criteria set out in subsection (2) needs to be considered. This process is a mandatory one given the use of the word "shall" in the opening words of the subsection. Once that process has been undergone, then the next and second step involves the use of discretion, both with regard to taking into account the particular factual and policy circumstances which appear to be in question, and considering the weight to be given to them provided of course that each such exercise in this two-stage process relates to the overall question of fitness.

11. Fifth, the Tribunal pauses here to observe that it must necessarily accept that the exercise which it is presently being asked to conduct on this application is not on all fours with the role it was originally seized of, namely, to review whether a finding of unfitness was properly arrived at with regard to the initial decision to revoke the licences. The issue on the present application is a separate one whether, on what has been called the assumed facts, the Appellants, on any view, would not even

fulfil the basic requirements regarding the first stage of the two-stage process referred to above.

12. Sixth, the Tribunal would again respectfully agree with the OFT to the effect that underlying the entitlement to hold a consumer credit licence and the entitlement to continue to hold one, is a need to display a requisite degree of integrity, both with regard to the way in which the business is run and, also insofar as the same is or may be different in any material respect, with regard to the behaviour of those who run or who are responsible for the business. This fact is again no more than a reflection of the second and third factors already referred to above. The Tribunal was reminded by the OFT of comments made by the Tribunal's predecessor tribunal in *Cooper v OFT* (2009) CCAT at 19, where the following statement occurs, namely:

"The holder of a consumer credit licence must uphold high standards of moral probity given the financial risks which consumers are subject to as a consequence of making consumer credit agreements."

13. The present Tribunal sees no warrant for departing from the above observation.

14. Seventh and finally, the OFT impressed upon the Tribunal the need to maintain public confidence in the licensing regime. Insofar as that exhortation echoes the earlier factors or any of them, the Tribunal is content to accept it. In the Tribunal's view it does no more than reflect the philosophy and spirit which underlies section 25.

15. The Tribunal should perhaps add the following observations. Given the scope and terms of section 25(2), and in particular section 25(2A), it is clearly not necessarily sufficient that a licensee comply with the law in its dealings with its customers. It was thought appropriate to set out the terms of section 25(3) with its reference to the notion of "associate". It is common ground that the Appellants are associates of each other, and if necessary, the Tribunal formally so finds.

<u>Debt collecting: the law and the relevant guidance</u>

16. As has been seen briefly above, the Appellants in the person of Mr Foster have admitted that ASP operated part of the debt collection practice carried on by the Appellants. Any business constituting or relating to debt collecting is "ancillary credit business" under section 145(1)(d) of the CCA. Such a business requires a licence: see section 21(1). Section 39(2) of the CCA makes it a criminal offence to carry on such a business under a name not specified in the licence.

17. The carrying on of debt collecting is defined by section 145(7) as per the taking of steps "to procure payments of debts due under consumer credit agreements or consumer hire agreements …", subject to various exceptions which are not material.

18. Section 25(2A)(a) to section 25(2A)(e) require the OFT to take into account various specific matters tending to show that the person otherwise claiming to be a fit person to hold a licence has committed an offence involving fraud or dishonesty or engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper.

19. The OFT has issued various formal guidance, in particular, a Debt Collection Guidance in July 2003 and in effect reissued in 2006. At para 2.2, the following passage appears with regard to what could be said to constitute an unfair practice:

> "2.2 Examples of unfair practices are as follows:
>
> ***
>
> b. leaving out or presenting information in such a way that it creates a false or misleading impression or exploits debtors' lack of knowledge;
>
> c. those contacting debtors not making clear who they are, who they work for, what their role is or the purpose for the contact is."

20. At para 2.4, the following appears, namely:

"False representation of authority and/or legal position

2.4 Examples of unfair practices are as follows:

***

b. falsely implying or stating that action can or will be taken when it legally cannot."

The Tribunal also notes the OFT's guidance entitled Consumer Credit Licence: General guidance for licensees and applicants on fitness etc (Jan 2008: OFT 966) especially at para 2.5.

21. The OFT also pointed out that at least two trade associations, namely the Credit Services Association (CSA) and the Debt Buyers and Sellers Group (DBSG) in association with the OFT itself, provided a Guidance Document in relation to the "Use, format and content of standard Debt Collection letters" which refer to much the same practice as the OFT's own guidance set out above, as well as to the fact that it is a criminal offence for a company to act in a manner that suggests that it is qualified or recognised by law to act as a solicitor when such is not the case.

The background

22. The application to strike out has been made after the formal opening and part hearing of substantive appeals before the Tribunal by the Appellants against the determination of an adjudicator on 16 October 2009 that their licences be revoked under section 32 of the CCA. The Appellants also appeal against a decision under section 34A of the CCA regarding authorisation to enable the business or businesses to be transferred or wound up. This second ground will be the subject of a separate consideration at the conclusion of this judgment.

23. There were various grounds which underlay the adjudicator's findings, a sizeable number of which concern the alleged substantial consumer harm resulting from the Appellants' business practices. However, the matters concerning ASP which underlie the present application did not feature either before the adjudicator or at the outset of the substantive

appeals. It arose out of material that had been disclosed in preparation for the appeal, but as to which the true meaning and effect did not appear until after the appeals had begun. The substantive appeals occupied several days of hearing including the hearing of substantial witness evidence prior to this present application being made.

24. LBL and NRL have been in business since September 1998 and September 2001 respectively. Their operations principally are run from an address in Putney, namely, 34a Deodar Road, London SW15 2NN. There is another office in Mayfair, London. LBL's licence was issued on 11 November 1998. It covers consumer credit, credit brokerage, debt collecting and other related activities which are not material. NRL's licence dates from 4 January 2002. It too holds a licence for a number of consumer credit related activities.

25. It appears that a Mr Ian Shearer owns 75% of the share capital of NRL and 47% of the share capital of LBL. A Mr James Dawes owns 25% of the share capital of LBL and 48% of the share capital of NRL. The directors of both companies have at all material times been Mr Shearer, Mr Dawes, a Mr Matthew Heap and a Mr Barry Pilgrim. Mr Foster, whose name has been mentioned, joined the boards of both companies in early 2010. Both companies share the same company secretary. The above appears to be common ground.

26. According to the Appellants, the day-to-day management of both companies is conducted by Mr Heap as Managing Director, and Mr David Barnett as Finance Director (Mr Barnett gave evidence as to the authorisation issue which has been mentioned above) and Mr Foster as Credit and Collections Director. In their Re-Amended Reply at para 2(a), it was claimed that Mr Foster is principally responsible, together with the assistance of a Mr Clive Wismayer, for monitoring compliance with the CCA and for other required legal and regulatory requirements affecting the business of both companies. Mr Wismayer is the principal of Messrs Wismayer & Co, a firm of independent solicitors who have been instructed by both Appellants in connection with the substantive appeals

against revocation. As will be seen, it is claimed by the Appellants that Mr Wismayer had no part to play in the institution of the use of the so-called ASP letters and their continued use.

27. The operation of both companies is sizeable. The Appellants employ 140 individuals, including 44 persons described as underwriters, who sign up borrowers. Its turnover for the year ending 31 August 2009 was £18.2m.

28. As part of the evidence on the substantive appeals which the Tribunal heard and which as stated, involved listening to a sizeable number of individual customers, it was confirmed, if confirmation were needed, that the overwhelming proportion of the Appellants' client base consisted of people with a poor credit rating, listing or history who were therefore unlikely to secure loans and advances from other sources such as bank and building societies (this business is sometimes referred to as lending in the sub-prime or non-status markets). The Tribunal also heard enough to be reasonably satisfied that the Appellants in fact targeted people with such histories and that the usual impediments such as county court judgments were not in any real way an obstacle to be granted a modest advance, albeit secured on their vehicles.

29. As at October 2008, the cost of borrowing was 437.4%. This level has varied since that date but has on occasion risen to about 478%. The loan agreements are of course regulated by the CCA.

30. A typical loan is repayable over 58 or 78 weeks, but on occasion for a longer period. This issue will be revisited in connection with the authorisations issue dealt with at the end of this judgment. Although the original advances represent relatively modest sums, on account of the high cost of the borrowing and the actual length of extended terms, the amounts which are finally in issue are often substantial.

31. As referred to briefly above, the loans are secured by a bill of sale over the client's car. The bill transfers legal title in the vehicle to NRL pending discharge of the debt. It appears that the business model was

developed by LBL which in practice meant those who controlled and owned and continued to control and own LBL. LBL licences franchisees to operate the business throughout the United Kingdom. NRL's franchises cover about 85% of the UK. Again, as referred to above and certainly for present purposes, the operations of LBL and NRL can properly be regarded as joint.

32. Neither Appellant has a presence on the high street, other than via an extended network of agents. They do, however, or at least did, advertise widely in the media, including the internet. Typically, a prospective customer contacts an Appellant by phone. Many of those who are referred to as agents are pawnbrokers and operations such as Cash Convertors. The Appellants will then refer a customer who falls within a particular catchment area to the appropriate representative dealing with sales who, as noted above, are described as underwriters. These individuals are, however, employed by NRL. The principal selling point is that the whole process is very quick, taking an average between 24hrs and 48hrs.

33. The underwriter and the customer then agree the amount of the loan over the phone. A meeting is arranged at which the loan documentation is signed. One of the issues which arose in relation to the substantive appeals insofar as the circumstances concerning the commencement of this practice is concerned, was the provision of an opportunity to the customer to consider the documentation prior to the meeting at which signatures would be given. The Appellants maintain that this practice arose after the adjudicator's revocation orders. The loan agreements are concluded with NRL who is also a party to the bill of sale.

34. There was also and is an issue as to where the bulk of the agreement is concluded. Mr Heap had at a previous hearing which dealt with a number of preliminary issues maintained that 95% of the agreements were executed at agents' premises. The Tribunal in its earlier judgment on those issues said it had difficulty in accepting that this figure was so high. In any event, such evidence as the Tribunal heard during the

substantive appeals in this present hearing showed that agreements were sometimes signed in public places or even in cars.

35. The principal franchise agreement is dated 17 October 2005 and is between LBL and NRL. The Tribunal is of the view that its main provisions have a background relevant to this application only insofar as it reflects and indeed confirms not only the joint nature of the operation, but also the high degree of control exercised by LBL and those of its owners and controllers. The Tribunal does not regard it as necessary to recite any of its principal terms in detail, save to say that by its terms, the agreement clearly shows that LBL provided training, documentation with regard to the conduct of the business and support from head office in relation to the conduct of the overall business. Moreover, it was expressly provided that NRL had to operate the franchise in accordance with an operations manual and training provided by LBL.

The Adjudicator's findings

36. As indicated above, the issues canvassed on this application did not arise in connection with the proceedings before the adjudicator. However, given the close relationship between LBL and NRL and of the controlling influence of the former company, the adjudicator held that they were both equally affected by considerations which bore on the question of fitness.

37. In addition, the adjudicator refused LBL's request for authorisation under section 34A(1) of the CCA to carry on the business of credit broking so that it could continue to effect introductions to its franchisees for six months following the revocation of its licence, on the grounds that this was not in the interests of consumers. Section 34A will be recited at length at the end of this judgment.

38. The adjudicator also referred to NRL's request for authorisation to continue to carry on a consumer credit business for six months following revocation and for authorisation to carry on a business of credit brokerage for a period, taking the view the same again would not be

appropriate given the gravity of her findings. She did, however, authorise NRL to continue to collect monies owed under existing loans for six months from the date of revocation.

ASP

39. The role and function of ASP emerged a relatively short time before the hearing of the application to strike out as indicated above. As has also been said, the final picture emerged in a witness statement provided by Mr Foster. That statement will be referred to in detail below.

40. Before doing so, however, the Tribunal feels it is important to highlight those references to ASP which did appear prior to the provision of Mr Foster's statement insofar as they can be said to be relevant to the issues arising on this application.

41. First, there are a substantial number of references in the witness evidence provided by OFT on the substantive appeals to the letters sent by ASP which contain language of the type set out in paragraph 3 above. In the case of three letters disclosed in preparation for the appeal, ASP or perhaps more accurately, NRL using ASP's name and letterhead, sent letters to NRL's customers who were in arrears. Three specific examples were provided within the bundles provided for the appeal, namely a letter dated 21 April 2009 sent to a Joanna Rybak, who was a witness who gave evidence on the substantive appeals, a letter dated 20 August 2010 sent to Gill Betteridge, and a letter dated 18 November 2010 sent to Keely Hutton. These three letters bore some stylistic differences as between each other but all contained the kind of language which has been described as indicative of a letter before action, i.e. a reference to instructions received by ASP to commence legal proceedings or take further legal action.

42. There were in addition several other references in loan notes or documents regarding other customers to such statements as "ASP letter generated/sent". Given what Mr Foster has now admitted and the fact that over 2,000 such letters were sent over a substantial period, it does

not seem to the Tribunal that any viable reliance can be placed by the Appellants as to the fact that a relatively small number were in terms disclosed or referred to in the disclosure process prior to the substantive appeals. The Tribunal is entirely satisfied that for a number of years prior to at least 2009, a large number of letters were sent out as part of an established strategy, for the recovery and payment of outstanding balances, such letters being sent out when the accounts were in what the Appellants have called, "auctioned state", i.e. after the customer's car had been repossessed and sold. Thus, to take another example, a car belonging to a Joanne Frost was auctioned on 22 March 2010, the same being recorded in a loan note on 31 March 2010 with the ASP letter being sent on 26 April 2010, and a car belonging to a Simon Hubbard was auctioned on 15 July 2009, the same being recorded in a loan note on 25 July 2009 with the appropriate ASP letter being sent on 27 August 2009.

43. Second, irrespective of what Mr Foster has admitted, Mr Wismayer, in the course of formal exchanges with the OFT in connection with the substantive appeals and a response to a formal notice sent to him by the OFT pursuant to its powers under section 36B of the CCA stated that:

"ASP sent letters requiring payment of debts due to the companies (strictly NRL) and processed credit card payments. The latter activity is continuing, the former ceased in January 2011."

44. Mr Wismayer also dealt with the duration and scope of ASP's activities and provided the following particulars, namely:

"ASP has operated since 2004 and [that] between August 2009 and January 2011 2,697 letters were sent. It is not known … how many letters were sent between 2004 and 2009."

He also spoke of the genesis of the ASP letter in the following terms, namely:

"It is believed that the form of letter sent to Miss Rybak would have been drafted by a member of NRL staff, whom is not known."

45. Thirdly, neither the OFT nor the Tribunal were provided with any form of written agreement or any other formal documentation or instruction between ASP and the Appellants.

46. Fourth, neither the OFT nor the Tribunal were made aware that ASP as distinct from the Appellants, either of their own motion or by the use of other legal representatives, ever commenced legal proceedings against a NRL customer.

47. Fifth, whilst reference to ASP appears in the material disclosed prior to the substantive appeals, the OFT claimed that it did not appreciate the significance of such references until May 2011. The Tribunal was faced on more than one occasion with a number of heated exchanges between the OFT's Counsel and those representing the Appellants, particularly Mr Wismayer, over issues regarding disclosure and in particular the contention whether, and if so to what extent, the Appellants, or their advisers, had failed to make adequate disclosure.

48. The Tribunal pauses here to say that it is not minded to revisit these exchanges in any great detail. Although the Tribunal is to some extent impressed by the fact, as urged on it by the OFT, that it is somewhat surprising that no fuller reference was made to ASP and its activities prior to May 2011, the content and significance of these exchanges are effectively of historic interest only in the light of what Mr Foster has now stated and in respect of which the Tribunal, in effect, bases its main findings in this application.

49. However, a number of references to ASP which appear in the Appellants more formal publications are in the Tribunal's view of material significance for present purposes. In the Appellants' "Best Practice Guide" the "LBL Collections Department" (version 6), the following statement appears, namely:

> "Log Book Loans unfortunately do not accept credit cards but our Legal Company "Adams Spencer Phillips" does. So we can still offer this service to our customers to enable them to make payments to us."

"Call extn 381 where a member of our Legal Company will answer this phone."

50. There are similar references in the Appellants' "Best Practice Guide for LBL Repossession Department" (version 1.1), including a reference to ASP in the section relating to the sending of letters, warning customers that their accounts are to be passed on to third parties.

51. Equally significant are the following, namely, first a letter dated 24 November 2009 from NRL to the Financial Ombudsman Service referring to ASP, a letter dated 14 January 2010 from a firm of solicitors called Anderson Shaw & Gilbert, representing a Donald Bain, a customer of the Appellants, and addressed to ASP, a letter dated 25 January 2010 from another customer called Cheryl Rahamin addressed to ASP, and a further letter dated 2 June 2010 from the same firm, Anderson Shaw & Gilbert addressed to ASP.

Mr Foster's statement

52. For reasons which are perhaps by now sufficiently apparent, the Tribunal is of the firm view that Mr Foster's statement, which is dated 5 August 2011, should be set out and considered with care.

53. At paragraph 2, he states that ASP was "set up in or about January 2005 with a view to improving collections from uncooperative or unresponsive customers who had gone into serious or prolonged default (usually customers whose vehicles had been recovered)".

He goes on to state the following:

"Its activities were fully integrated into those of NRL such that:

(a) standard letters demanding payment of outstanding sums, although on ASP's letterhead, would be printed from NRL's systems and

(b) callers to ASP's telephone number would be led to believe they were speaking with ASP staff before being passed to NRL. For this

purpose, ASP had its own dedicated telephone line which would be answered by members of the legal team

(c) For a period of time (a search of our records shows September 2009 to April 2010), we attempted ASP telephone calls. A member of the legal team would call, identify themselves as calling from ASP, and attempt to negotiate payment or a payment plan. The process was abandoned because it was ineffective."

54. At paragraph 3, Mr Foster confirms that ASP had no employees or staff "of any kind". In particular, it follows that, despite being called a legal services firm, and being referred to by the Appellants as "our legal company", ASP had no legally qualified employees. At paragraph 5 he claims that "the idea of using ASP in this manner arose from informal enquiries of other debt collectors which revealed that a letter written on a different letterhead would sometimes stimulate a response where letters from the creditor had been ignored."

55. At paragraph 5, Mr Foster states that:

"ASP was intended to appear to be a firm of solicitors but never carried out the threat its earlier letters before action contained to commence legal proceedings against a customer."

He then claims that he was aware of four versions of the ASP standard letter. The first, he admitted, was drafted by himself. He then said he did not know who made the changes but they would have been approved either by himself or by a Ms Gintare Tamosityte, the Repossessions Legal & Professional Standards Teams Manager of the Appellants. He adds that both of them agreed that whichever one of them approved it, "it would have been because ASP never started legal proceedings, so the letter was inaccurate."

56. In the Appellants' written submissions, it was stated that for the period 2005 to 2008, the letter referred to "collections activity" and/or some other form of enforcement and/or "collection" that would follow and for

the period May 2010 to January 2011, the reference was not to commence proceedings, but to take further "legal action".

57. At paragraph 6, Mr Foster confirms that [all] the directors of NRL were at all times aware of this part of its operation and employees within the legal team were similarly aware." This was because they, of necessity, had to take calls on ASP's telephone lines. He said that the legal team, at the date of his statement at least, comprised 13 staff. Their duties included "issuing online court claims, always in the name and on behalf of NRL, preparing the files for hearings in which we represent ourselves in pursuing our most difficult debts."

58. At paragraph 11 he said that the ASP letter "was thus one small part of the entire debt collecting process within the legal team involving a single letter preceding other activity, such as legal proceedings."

59. At paragraph 12 he confirms that the ASP letter was in effect generated electronically as "part of a mail merge process" but that letters "could also be sent manually" e.g., if there was a new address.

60. At paragraphs 13 and 14 he deals with the question of disclosure which has already been alluded to, as the same related to the substantive appeals. He claimed that "no ASP letters were disclosed in these proceedings", partly because "no hard copies were generated and placed on customer files and partly because there was until the beginning of the appeal hearing no pleaded issue raised by the OFT." As has already been seen in this judgment, the first of these explanations at least is not entirely accurate.

61. At paragraph 15, he confirms that ASP letters were used "in the stated manner until 10th February 2011". He then says he conducted a review on account of the revocation process, but he says this was "in anticipation of the coming into force of amendments resulting from the European Union's Consumer Credit Directive". This led him to conclude in the course of the said review that "as the ASP letter lacked

transparency in appearing to threaten legal action which it was never intended ASP should take, the process be discontinued."

62. In consequence, according to paragraph 16, "the only function ASP serves now is processing credit card payments on behalf of NRL, as ASP has the facility to do this while NRL does not." He then confirmed that a total of 2,697 letters were sent between August 2009 and January 2011.

63. At paragraph 17 he referred to a notice issued by the OFT under section 36B of the CCA to Mr Shearer. In addressing the questions raised by that notice, Mr Foster:

    (a) confirmed that to the best of his knowledge "NRL has never sought legal advice with respect to ASP prior to 27 May 2011";

    (b) the instruction to cease using the ASP letters was given orally to him by the fellow employee already referred to, namely, Ms Tamosityte on or about 10 February 2011, the Tribunal pausing here to note that this statement seems somewhat curious given the fact that he was an officer of the company at the relevant time while she apparently was not;

    (c) neither Mr Shearer nor Mr Dawes had any role in the generation of ASP letters (though the same should be compared with what was said above in paragraph 6 of Mr Foster's statement);

    (d) with regard to an automated signature which appeared on most, if not all, of ASP letters, he was unable to identify the individual, or any individual in that respect, adding that it "was put in place by our contractor Keith Malpass" (there appears to be no explanation as to who this individual is, or was), Mr Foster adding that the automated signature was not Mr Malpass' signature but "rather one he either created or found"; and

    (e) he adds, if confirmation be needed, that ASP has never held a consumer credit licence.

With regard to the automated signature the Tribunal noted during the hearing of the substantive appeals that an identical automated signature was also used on letters sent to customers in the name of LBL.

64. At paragraph 19 he alludes to the important issue which has been touched on above, namely the issue relating to consumer harm, in the following terms, namely:

"This was never intended to cause "consumer harm" of any sort, simply to increase contact rates with defaulters. We assumed, perhaps naively, that because a site visit to a debt collector had shown a similar tactic used to increase responsiveness, and because a previous employer of Mr Heap had done the same, that it was an accepted practice and not a "mischief". There was never an intent to act improperly, let alone illegally (in this or any aspect of our business, it is not how we approach the business)."

65. He adds that as part of the review process which has been touched on above and in anticipation of what he saw as substantial changes in the law, what he said was the application of a "man from Mars test" as a result of which he "realised there were flaws with our practice". He therefore "altered it immediately", (despite what is said above with regard to the alleged instruction to cease using the letters given by Miss Tamosityte) and "without reference to any others as to a possible negative effect on income".

66. He goes on to say the following, namely:

"The decision was a compliance one, and made before the OFT had put the matter at issue. We did not have to wait until they told us there was a problem, we assessed and amended it ourselves, unprompted."

67. His statement exhibits a number of specimen ASP letters, two of them at least dating from 2005 and 2009 bearing the Mayfair address, although not exactly the same address throughout, and in one instance, bearing a phone number which clearly is not an Inner London number, but must it seems have been the number of the Putney office.

68. Each of the letters refers in terms to ASP having been "instructed" by LBL and/or to the fact that its "client" was or is LBL. In each of the letters, the threat or distinct possibility of legal proceedings is specifically referred to.

Alleged breaches and/or grounds of unlawfulness and/or unfair practice

69. The OFT has made two principal submissions with regard to what it characterises as breaches. As pointed out above, the issues before the Tribunal is essentially how properly to characterise the admission made by the Appellants and, in particular, whether the said admission would mean that there would be no real prospect of the Appellants being granted a licence within the terms and meaning of section 25(2) and section 25(2A) of the CCA.

70. The first such submission addresses what are called deceitful and oppressive business practices. This reflects the language of section 25(2A)(e).

71. In particular, the OFT alleges that:

    (a) ASP has all the hallmarks of being a sham or device specifically designed to mislead and intimidate consumers into paying. This characterisation is exacerbated by the facts that:

        (i) it has been formally confirmed that ASP has never commenced legal proceedings;

        (ii) ASP appears not to be, and indeed, never to have been able or entitled to or authorised to conduct litigation; and

        (iii) that in response to a specific request made by the OFT for "copies of all instructions given by the Companies [to ASP] in relation to Joanna Rybak" Mr Wismayer formally responded by stating "there are no such instructions"; and

        (iv) the establishment of ASP as an apparently independent law firm was also improperly relied on by NRL in its exchange

with the Financial Ombudsman Service in relation to one specific customer complaint; and

(b) ASP's letters were on the Appellants' own admission designed to give customers the false impression that they had been sent by a firm of solicitors or at the very least by a person or persons duly authorised to carry on the reserved legal activity of the conduct of litigation; and

(c) in the light of (a), the consumer harm was clear in that it necessarily followed from the stated purpose of establishing ASP, admitted to and described by Mr Foster, that the letters it sent were used to pressurise customers through the threat of legal proceedings to pay in circumstances that such customers would or might otherwise not do so, any such pressure being compounded by the express or necessarily implicit reference to the fact that ASP had "instructions" to commence legal proceedings or take appropriate legal action;

(d) in particular, reliance was placed by the OFT on the written terms of Miss Rybak's original complaint dated 19 November 2009 which contained the following statement, namely:

"… I had received a letter from the people calling themselves LBL solicitors … I was terrified. They threatened me with the court, legal costs, etc. I took the letter with me to Lamb Brooks [solicitors instructed by her] and I am glad I did that. The solicitor I saw told me that the letter they had sent me was not from a real solicitor and it was simply rubbish. Somehow I was relieved that it was a scum [sic] but I have to admit I could not believe that someone could pretend to be a solicitor when they were not! Shocking!";

(e) as noted above, the ASP letter contained a London phone number, being the number or numbers of the Appellants, there being clear evidence that the Appellants did receive incoming phone calls intended for ASP, three of the individual customers who did so

being customers called Helen Bain (related to Donald Bain already referred to), Ali Rahamin (also related to the individual called Rahamin already described) and the wife of a Richard Wiggins.

72. The second group of submissions put forward by the OFT regarding alleged breaches "relate to possible criminal activity". The Tribunal pauses here to observe that in its firm view, there is no requirement that there be any form of demonstrable proof that any criminal activity actually took place. It is not for the Tribunal to pre-empt, let alone pre-judge any such matters, either in the form of formal criminal investigations or possible convictions. It is enough in this respect to refer to the parenthetical expression In the terms of section 25(2A)(e), namely, "(whether unlawful or not)".

73. Nevertheless, the following contentions were made by the OFT:

(a) the apparent threat of legal proceedings or legal action constitutes a step taken to procure the payment of the relevant debt and therefore appears to amount to debt collecting within the terms and in respect of section 145(7) of the CCA; this has already been referred to;

(b) if the characterisation reflected in (a) above is correct, either ASP was carrying on a debt collecting business, or NRL and/or the Appellants were doing so under the ASP name in which former case the offence of unlicensed trading under section 39(1) of the CCA was being committed, and if the latter, then NRL was committing the offence of trading under a name not specified in its licence under section 39(2) of the CCA;

(c) there is at least the possibility that NRL and/or the Appellants and/or ASP, jointly or severally, committed other criminal offences including but not limited to the following, namely:

(i) wilfully pretending to be entitled to carry on a reserved legal activity, i.e. the conduct of litigation, contrary to section 17 of the Legal Services Act 2007, as well as having wilfully

pretended to be a solicitor contrary to section 21 of the Solicitors Act 1974 and/or section 70(3) of the Courts and Legal Services Act 1990;

(ii) the carrying on of misleading and/or aggressive commercial practice or practices contrary to Regulations 5 and 7 of the Consumer Protection from Unfair Trading Regulations 2008;

(iii) the carrying on of fraudulent trading contrary to section 993 of the Companies Act 2006;

(iv) fraud by dishonestly making a false representation with the intention of making a gain contrary to section 2 of the Fraud Act 2006; and/or

(v) the making of an article designed for use in the course of fraud contrary to section 7 of the Fraud Act 2006.

74. In support of the said submissions and in particular with regard to the first set of submissions, the OFT place reliance on a decision made by appointed person occupying the role of this Tribunal in *Credit Default Register Ltd and Holmes v Secretary of State for Trade & Industry* [1993] CCLR 59.

75. In that case, the Appellants carried on a debt collecting business in health standard licences. The Director General of Fair Trading issued minded to revoke to notices under section 32 of the CCA. Appeals were then dismissed by the Secretary of State, upheld on further appeal to the High Court. Clearly, the present Tribunal does not regard itself as being bound by that decision, but duly notes the fact that in that case, the use of false threats to pressurise customers was regarded as a proper basis for revocation of the licence. At paragraph 62, the following passage appears, namely:

"What is in our view improper and was indeed accepted as improper by Captain Holmes himself is for the creditor to threaten bankruptcy with no intention of carrying out the threat in the event of non-payment but solely

to intimidate a debtor he knows to be pecunious into offering or making payments he or she cannot afford, so that the debtor sinks deeper into the financial mire."

General

76. Before turning to the Appellants' specific submissions, there are a number of general observations which the Tribunal regards it appropriate to make.

77. In their open written submissions, the Appellants took issue with the OFT which had contended that the holding of a consumer credit licence constituted a privilege and not a right. As the Appellants put it:

"Whilst the requirement of fitness is met, the right to a licence is an entitlement. Statute prescribes as much: "you shall be entitled to be issued with [a licence]" [emphasis added]: section 25(1) of the CCA.

78. Later, the Appellants contended that the position was that upon a licence being granted, the licensee is "deemed fit". They added "the presumption is of continuing fitness". They went on to say that:

"If something arises that leads the OFT to conclude that this is no longer the case, it is for the OFT to establish as much, not least because (as here) it may come after many years of trading during which revocation was not even raised."

79. The Tribunal accepts that the above observations are made in the context of the substantive appeals against revocation and not specifically in the context of this application to strike out. They were made largely with one eye being trained on the question of burden of proof in relation to any such appeal. Nonetheless, the Tribunal respectfully disagrees with any suggestion that once a licence has been granted there is any form of presumed continuing right, let alone entitlement, to be treated as a person fit to hold that licence. See also Consumer Credit License: General guidance for licensees etc (Jan 2008): OFT 966 at para 2.5. Equally, the Tribunal recognises that its view on this score is not a

necessary element in its determination in this case to grant the present application. Given the stance that the Appellants have taken on their position with regard to this application, and given the inference the Tribunal feels it is entitled to draw that in effect what is being contended is a plea in mitigation, rather than a set of substantive defences, it appears to the Tribunal that in that context, no further reliance can be placed on any such proposition.

80. Next, and again as set out in their opening written submissions, the Appellants noted not only that the measure of revocation "should be very slow to be employed in all but the most extremely clear cases", but also that the notion of fitness "necessarily" involves a value judgment. Reference is made in this respect to a comment in Goode on Consumer Credit Law and Practice at 5.62 where allusion is made to "disgraceful" conduct in relation to the granting of a licence, but also to the following proposition, namely:

"The question of "fitness" is a difficult one to prescribe. It necessarily involves a value judgment. Tribunals do not appear to have dwelt upon the meaning of the word, and authorities have shied away from trying to define it preferring (it seems) to proceed on the basis that one knows fitness from unfitness when one see it."

81. The Tribunal would not dissent from the general tenor of that quoted passage. In oral argument, albeit in opening, the Appellants appear to qualify this observation. They claimed that although integrity was important, any requirement that a licensee must be trusted and/or expected to act fairly and legally represented too high a threshold. With respect, the Tribunal finds that qualification difficult to follow in the light of the clear wording of section 25(2A) as a whole, and in particular, subsection (e).

82. Next, and again by way of general observation as to fitness, the Appellants contended in their written opening that "the overall scheme" of the statutory regime, i.e. as regards fitness constitutes "a risk-based approach", i.e. the question of fitness relates to the effects on the

customer. This could easily be seen to be a foretaste of the principal submission made in opposition to the present application, namely, that the absence or marginal amount of actual consumer harm is a necessary ingredient of fitness. To that extent, the Tribunal will reserve its comments on the said submission until later in this judgment.

OFT: aggravating features

83. Again, before turning to the Appellants' principal submissions in opposition to the present application in further details, the Tribunal feels that it is important here to insert a reference to what the OFT has called aggravating features.

84. First, the OFT observes that the conduct complained of continued for some 16 months after the revocation of the licences by the adjudicator. The OFT issued the relevant minded to revoke notices in March 2009. This was followed by the adjudicator's determinations in October 2009. The Notices of Appeal were filed in November 2009. However, as has been pointed out, the use of the ASP letters continued until about February 2011. All this does not seem to be disputed.

85. Second, Mr Foster has implicated amongst the Appellants all those involved in the management of, and governance of the Appellants' business. Again, there is no dispute on this score.

86. Third, the OFT raises the issue of non-disclosure, or as the Appellants might have it, the issue of a lengthier disclosure process in relation to the ASP issue as might otherwise have been the case imputing some, if not most, of the responsibility for any such delay to the OFT. Mr Foster and the Appellants deny that the truth about ASP has been suppressed and go further alleging that there would have been no such suppression even if proper disclosure had occurred. The OFT counters this by stating that a number of proforma letters exhibited to the witness statement of Mr Foster and referred to above should have been disclosed in any event pursuant to the normal rules regarding disclosure and itself goes further in saying that an explanation as to why documents were no longer in the

possession of the Appellants should have been provided in the usual way.

87. Fourth, Mr Foster, as the admitted draftsman of the ASP letter, or at least one of them, has been presented to the Tribunal as an expert in regulatory matters. In addition to their Re-Amended Reply at paragraph 2, the Appellants specifically plead that Messrs Heap and Barnett "have the knowledge, skills and experience to ensure that the Appellants' business is conducted lawfully and fairly" (see in particular paragraph 2(a)). The OFT claims that such representations and statements are untrue in the light of the further evidence provided by Mr Foster.

88. Fifth, the OFT observes that unlike the position with regard to nearly every other aspect of their business, the Appellants apparently took no legal advice with regard to the ASP letter. This appears to be admitted.

89. Sixth, it is said that there is even now a failure to acknowledge the gravity of their conduct by the Appellants. In addition, the attitude of the Appellants on this score sits badly with an avowed stance stressed in Counsel's opening in relation to the substantive appeals to the effect that the Appellants had approached the revocation process and the appeal in a "transparent" manner. In particular, the OFT points to what it says are highly pertinent inconsistencies in at least two respects. First, in response to a section 36B notice, Mr Wismayer had on a previous occasion stated it was "believed that the form of letters sent to Miss Rybak could have been drafted by a number of NRL staff, whom is not known" while Mr Foster now freely admits that he was the person who drafted the said letter. Second, and in response to Miss Rybak's evidence that she originally thought that ASP was a firm of solicitors, Mr Foster stated in his second witness statement that "the ASP letters made no claim to be from a solicitors' firm, they are marketed as our legal representatives" as compared to the most recent witness statement by him that "ASP was intended to appear to be a firm of solicitors".

90. The Tribunal pauses here to note that in this connection the Appellants sought to distinguish the facts and findings in a relatively recent decision

of the First-Tier Tribunal entitled *European Environmental Controls Ltd v Office of Fair Trading* (2009) UKFTT 274 (GRC) (Case No CCA/2009/0002). There, unfitness was made out on a number of distinct grounds, most of which are far removed from the facts which underlie the present application. However, even though the Tribunal entirely accepts the general proposition that each case must be judged according to its own specific facts and context, one of the questions which the Tribunal there found to be a proper ground for unfitness did involve an element of deliberate and knowing inappropriate conduct carried on by the Appellants to the effect that, as it was put, they deliberately and knowingly misled the OFT adjudicator that the Appellant in that case had adopted certain recommendations when it had not .

The Appellants' submissions: strike out

91. As pointed out above, by expressly making their submissions "by way of mitigation" in the words of their written submissions, and more importantly by expressly admitting that the sending of the ASP letters was deceptive, the Appellants can properly, in the Tribunal's view, be taken to have conceded that the application to strike out was, if not properly made then, in principle, one which justifies the relief sought.

92. However, if the Tribunal is wrong in that view, it will treat the matters put forward "in mitigation" as constituting a substantive defence or as a set of defences to the application, if only because at the conclusion of their written submissions by the Appellants, the Tribunal was invited to dismiss the application and give directions for the completion of the appeal hearing.

93. The principal submissions made by the Appellants appear to fall under the following heads.

94. First, it is claimed that although the sending of the ASP letters was deceptive, in the words of the written submissions it is a practice that NRL has since repented of and ceased on both sides.

95. Second, the letters were sent when NRL was seeking to improve collections of money which was "prima facie owed". In short, had ASP been a bona fide independent firm of solicitors, the letters would not have attracted any comment. In consequence, it is denied that the pressure alleged to have been put on customers was as it was put, "wholly illegitimate". It follows according to the Appellants that the proper analysis was to view the use of the letters as legitimate pressure but imposed by "illegitimate means".

96. Third, and, as has been said, this can perhaps be seen as the core contention of the resistance to the application, there was no evidence of any actual customer harm with the possible exception of Miss Rybak. The OFT had referred to 19 customers who had received ASP letters, 18 of whom had, it was said, made no relevant complaint, nor had any of the 18 evinced any reaction to whatever pressure or threat the ASP letters otherwise might have represented or effected. No specific allusion was made with regard to this contention to the fact that over 2,000 letters were admittedly sent out in the relevant period.

97. Fourth, any OFT published guidance simply highlighted practices which might then raise questions of fitness. Engaging in such practices was not of itself determinative. In any event, any practices which were alluded to in the OFT Guidance on Debt Collection were "far more pernicious", to use the expression from the Appellants' written submissions, than the sending out of the ASP letters.

98. Fifth, the practice of using such exchanges as the ASP letters was used by others in the industry. This has already been touched on with regard to the contents of Mr Foster's statement, but no particulars have been provided. The Appellants accepted that this was not a substantive answer for this ground of complaint but added that "it puts the matter in context".

99. Sixth, reliance was placed on the resultant savings in costs in not referring the matter to independent solicitors.

100. Seventh, it was claimed not only that the practice has stopped but also that whilst it lasted, it did so for only two years and only from April 2008 to April 2010 which was a "relatively short term when compared to the overall lifetimes" of the Appellants.

101. Eighth, the Appellants pointed to the absence of any convictions and/or to any evidence which showed or suggested that any criminal charges had been or could be brought.

102. With particular regard to section 39(2), it is claimed that by instructing a solicitor to write a letter before action, NRL as distinct from LBL, would not have been "carrying on its business under a name not specified in the licence" and that ASP never purported to be collecting payment or payments on its own account. With regard to the suggested breaches of the Solicitors Act 1974 and of the Courts and Legal Services Act 1990, infringements by debt collectors were "not infrequent". Moreover, it was claimed that the level of punishment suggested that the infringement did not provoke outrage but only a "mild reprimand". Similar submissions were made with regard to the possible application of section 17 of the Legal Services Act 2007.

103. Ninth, insofar as any allegation of dishonesty was concerned, it was contended that the evidence of NRL's subjective intent could not be challenged and therefore dishonesty could not be established. Here, NRL genuinely and honestly believe it was entitled to the amount or amounts which were sought to be repaid.

<u>The Appellants' submissions on aggravating features</u>

104. The Appellants responded in the following manner to some of the matters which the OFT had characterised as aggravating features.

105. As to the third matter referred to above at paragraph 86, the Appellants responded at length to the suggestion, if not the contention, that there had, or has been, any suppression of the ASP issue. Again, with all due respect to the Appellants and the detailed manner their advisors have revisited the relevant chronology, for the reasons shortly set out above,

the Tribunal has determined it is not necessary, given the basis of its other findings in this judgment which of the parties if any, was singly or in any material way responsible, or more responsible than the other with regard to the way in which the ASP issue came to surface.

The Tribunal's findings

106. Most, if not all, of these findings have been highlighted in the earlier part of this judgment.

107. First, the Tribunal has no hesitation in finding that the ASP letter was sent to give customers a false impression on a number of scores of a body or individual duly authorised to carry on the reserved legal activity of the conduct of litigation. The principal false impression that it created was that ASP was an independent firm of solicitors. Without more, that is enough to demonstrate that the letter, on any basis, represented an improper practice in connection with the business holding of a licence relating to the carrying of the consumer credit business. As has been seen, Mr Foster expressly admitted there was an intention to pretend to be solicitors. The Tribunal firmly concludes and duly finds that the threat to commence litigation was clearly present and represents and constitutes clear evidence of improper conduct in that ASP is not a body or individual duly authorised to carry on the reserved legal activity of the conduct of litigation. No doubt the OFT will consider, if the same has not already been done, to what extent further steps need to be taken in considering to what extent criminal behaviour has actually occurred.

108. Secondly, as is conceded by Mr Foster, everything done in the name of ASP was in fact done by the Appellants. Again, the point can be shortly stated. There were no employees of ASP and all its actions were prompted and conducted by the Appellants and those who ran and controlled the Appellants with the latters' full knowledge.

109. Thirdly, on Mr Foster's own admission, the letters were intentionally deceptive as to the intended actions which they described as being potential or actual consequences of receipt of the letters. In practice,

LBL was never a client of ASP. Quite apart from the other inaccuracies and inadequacies in the said letters, it is enough in the Tribunal's view to point to that fundamental flaw in the letters to make good the submission insofar as the same is not already admitted that the letters were part of a deliberate deceit.

110. In this connection, the OFT in argument said that even now there was a degree of dissembling with regard to the continued use of the letters in the period covered in that respect, namely, until 2011. The Tribunal is not minded to regard that as particularly determinative, although it notes the submission that was made.

111. Fourth, some reliance was placed on the fact that before ASP letters were sent, letters had been produced and sent by the Appellants to their customers (for which the sum of £12 was charged) informing them that the matter with regard to alleged non-payment, etc., had been passed to third party debt collectors. The Tribunal notes this. No clear answer was given for this by the Appellants, but even if it is true, it does no more than underline the degree of deception conducted by the Appellants in the way referred to in relation to the earlier findings. The fact remains that over 2,600 letters were sent over the relevant period. Equally important is the fact that the avowed purpose of the letter was to improve collections.

112. The fifth point is related to what has just been said. 2,697 letters were sent in the period from August 2009 to about January 2011. The Appellants' skeleton argument suggested that "only" 10% of the loan book for the period April 2010 to January 2011 would have received an ASP letter. Enough has been said in this judgment to show that even 10% of the kind of turnover enjoyed by the Appellants nonetheless remained a significant figure on any basis.

113. The sixth point also arises from the previous findings. The deception was carried out with the full knowledge and approval of the boards and senior management of both Appellants. Section 36B notices were sent to the Appellants which confirmed as much. There is no need for the

Tribunal to deal with any more detail on that score. It is clear beyond doubt in the Tribunal's view that NRL instructed relevant members of its staff, particularly the so-called legal team, to cause the letters to be sent and that the same was done with the full knowledge and approval of those boards.

114. Seventh, the deception was in effect bolstered by a system for pretending to the customer that if the customer rang in, they would speak to someone at ASP. Even on the basis of the evidence which the Tribunal has seen, i.e. in effect the witness statement of Mr Foster, the same is clearly untrue. On any basis, there would have been no person able to speak on behalf of ASP given the absence of any employees.

115. Eighth and finally and in conjunction with the last point, from September 2009 to April 2010, an employee of NRL would call customers pretending to be an employee of ASP. What is of particular significance in the Tribunal's judgment is that the practice was stopped not because it was deceptive, but because as Mr Foster explains in his witness statement, the same was regarded as being ineffective and allegedly non-compliant with incoming legislation.

116. There are a number of ancillary matters which the Tribunal takes into account in making those primary findings. First, Mr Foster as has been seen, said that the practice stopped because it "lacked transparency". This is not understood by the Tribunal. If it means anything at all, it has to be placed in context, namely, that it occurred long after the revocation process had taken place, and indeed long after an appeal had been lodged.

117. It seems conceded by all on the part of the Appellants that no legal advice was ever taken. This is completely at odds with what is said to have been close surveillance of regulatory practices conducted by Mr Foster and others on behalf of the Appellants. Next the deception was played out, not simply in front of customers, but also with solicitors instructed by some of those customers as well as the Financial Ombudsman Service. The latter deception the Tribunal regards as

particularly grave amounting as it does to a misrepresentation of the truth in a manner intended to mislead a regulatory authority to whose jurisdiction the Appellants were subject. None of these additional points appear to have been addressed in any cogent way in the written skeleton submitted by the Appellants on the application.

118. Finally, the Tribunal wishes to note, as suggested by the OFT, that ASP still to this day, at least as at the hearing of the application to strike out, is still apparently taking credit card payments in order to facilitate collections. Nothing more will be said about this, save to say that the Tribunal finds it, to say the least, surprising that no effort has been made to change even that practice as a remnant of the original reasons as to why ASP was set up in the first place.

119. Before turning to the so-called aggravating features which have been outlined above, the Tribunal will deal with other aspects of the so-called pleas in mitigation, if not substantive defences, which have been advanced by and on behalf of the Appellants.

120. First, it is said that other unspecified parties were doing the same thing as the Appellants did in issuing and utilising the ASP letters. In the Tribunal's firm view, this cannot possibly justify improper conduct, especially in the light of the relevant guidance issued by the OFT clearly stating that the same would constitute an unfair or improper practice.

121. Secondly, and as has been said, this is at the heart of the Appellants' submission, it is claimed there was no intent to cause consumer harm. The Tribunal finds this a somewhat disingenuous contention. If true, it displays, if anything, an absence of integrity and/or of the requisite moral judgment which the legislation, if not in clear terms, then by necessary implication, regards as being an inappropriate ingredient of fitness, if only because it is addressed by virtue of the relevant OFT guidance on debt collecting and related matters.

122. Thirdly, as has been said, the Appellants would construe what has happened as the use of legitimate pressure by "illegitimate" means. This

submission too, the Tribunal regards as totally disingenuous. As pointed out in oral argument on behalf of the OFT, there is a world of difference between a truthful letter from a bona fide firm of solicitors and an untruthful letter from a bogus firm. Quite apart from that perfectly obvious point, there would be the immense practical difference in the reality of the situation had NRL used a real solicitor as distinct from a bogus firm such as ASP. The Tribunal regards the matter as being properly considered in the following manner, namely to view the matter through the eyes of the consumer. The matter can be posed in effect by a rhetorical question, namely, what would the consumer feel or think if he knew that what he or she was getting was a bogus letter? Finally, with regard to this important contention by the Appellants, their statement that legitimate pressure was involved completely overlooks the fact that it was never the Appellants' intention to commence legal proceedings when the letter was sent out. The Tribunal, in the event, regards it as extremely dubious to say the least to regard the pressure as being anything other than illegitimate.

The Tribunal pauses here to note that harm was also done since the use of an unregulated entity to purport to be able to conduct litigation in effect removed the safeguards which Parliament intended to apply. Reserving the legal activity of litigation to authorised persons ensures that that activity and any action undertaken in contemplation of it is conducted in accordance with binding rules of professional conduct. Reference could be made for example to the Solicitors Code of Conduct 2007 which provides in Rule 10.01 that "You must not use your position to take unfair advantage of anyone either for your own benefit or for another person's benefit". Similar provisions appear in earlier editions of the Guide to Professional Conduct of Solicitors. The Guidance on that Rule states specifically that "particular care" should be taken when a solicitor is dealing "with a person who does not have legal representation". It necessarily follows in the Tribunal's firm view that had the Appellants used solicitors to issue letters before action for their largely unrepresented customers such customers would have had the

benefit of the balance which the rules of professional conduct require to be struck, between a solicitor doing their best for their client, and not taking advantage of the lack of legal knowledge and skill of an unrepresented opponent.

123. Fourthly, the Tribunal turns to the contention that no consumer harm was effected. The Tribunal entirely accepts the OFT's contentions that far from such being the case, consumer harm is necessarily inherent in the deception. Much was made about the particular reaction of Miss Rybak. Indeed, the Appellants contended that she was the only case where any arguable harm took place. The Tribunal respectfully disagrees. Enough has been said to show that there are a number of cases where there is clear evidence that a response was elicited by virtue of the ASP letters and the Tribunal goes further in concluding that there is simply no evidence as to what the reaction, if any, was to the 2,600-odd letters which were admittedly sent. The Appellants have tended to regard the allegedly small number of express reactions as being some form of excuse for deception or improper behaviour. In the Tribunal's view, this is entirely unacceptable. As has been pointed out in argument, even if Miss Rybak's reaction was in effect, at the end of the day, a personal reaction, it is difficult to see why it should be said that other customers might have not been similarly affected.

124. Fifth, reliance was placed as indicated above on the alleged saving in costs. It was suggested in argument with some force by the OFT, in the Tribunal's view, that it is somewhat cheaper to send a fake letter than a real one, circumventing the need to employ a proper solicitor with the attendant fees which that might cost. The Tribunal has quoted extensively from Mr Foster's statement. It is not, as far as the Tribunal can see, a matter which was advanced by him in that witness statement. The Tribunal therefore sets no store on this particular contention.

125. Sixth, again, as indicated above, it is now stressed that the practice has now ceased save with regard to credit card payments. The Tribunal has difficulty following the true import of this concession. The Appellants

themselves have conceded formally in their written submissions that past conduct is relevant. The Tribunal cannot ignore and does not propose to ignore the reality that this practice endured for over six years, including a 16 month period or so post-revocation.

126. There are matters which the Tribunal feels it can legitimately take into account given its primary findings in this case. First, the Tribunal does take into account the need to maintain public confidence in the licensing system. Insofar as this means applying the terms of the statutory conditions in the way in which the Tribunal interprets them, and as has been advanced by the OFT, then that declaration may be of little additional import.

127. The Tribunal ignores in its findings the effect which revocation is said to have upon the business. This is a matter that will be revisited in connection with the authorisation issue. If support is needed for that finding, the same in the Tribunal's view is abundantly evident from the terms of section 25 itself. The fact that the Appellants regard themselves as being the sole or the principal player in the relevant market is not in the Tribunal's view in any way relevant to the discrete issue which is raised in this application.

128. The Tribunal notes that in relation to the substantive appeals, one of the contentions advanced by the Appellants was a so-called improper agenda issue which is not pursued in the present application. This could be said not to be surprising. The Tribunal takes the view that it is perhaps indicative of the fact that in essence what is in issue here is a plea in mitigation and not a substantive defence. There has been no suggestion in the present case with regard to the application to strike out that the deception was caused by this alleged improper agenda, nor indeed could there be.

129. Finally, reliance was placed by the OFT in argument upon the overriding objective. The Tribunal respectfully agrees that provided a proper basis is shown to justify a finding that the applications to strike out should be granted, then assuming the Tribunal is so satisfied, it should take into

account the fact that it will save the public purse a considerable amount of time and expense in truncating what would otherwise be a very lengthy and expensive appeal process. There were 90 or so ring binders prepared in advance of the substantive appeals and as indicated above, the appeal ran its course for some period prior to the application to strike out being conducted. The Tribunal is entirely content to find that, given its findings on the primary issues on the application to strike out, in so doing, it is achieving a proper resolution of the appeals in accordance with the overriding objective set out and reflected in the Tribunal Rules.

Authorisations: section 34A of the CCA

130. Section 34A of the CCA deals with the winding up of standard licensees and their businesses. The section provides in material part as follows, namely:

"(1) If it thinks fit, the OFT may, for the purpose of enabling the licensee's business, or any part of his business, to be transferred or wound up, to include as part of a determination where subsection (2) applies provision authorising the licensee to carry on for a specified period –

(a) specified activities; or

(b) activities of specified description;

which, because of that determination, the licensee will no longer be licenced to carry on.

(2) This subsection applies to the following determination –

***

(c) a determination to … revoke such a licence.

(3) Such provision –

(a) may specify different periods for different activities or activities of different descriptions;

(b) may provide for persons other than the licensee to carry on activities under the authorisation;

(c) may specify requirements which must be complied with by a person carrying on activities under the authorisation in relation to those activities;

and, if a requirement specified under paragraph (c) is not complied with, the OFT may by notice to a person carrying on activities under the authorisation terminate the authorisation (in whole or in part) from a specified date."

131. This section is reasonably clear. It provides that if the OFT determines to revoke a licence, the OFT may as part of that determination, authorise the licensee to carry on specified activities for a specified period which it would otherwise no longer be licenced to carry on for the purpose of winding up or transferring its business. The OFT, it seems, can specify requirements which the licensee must comply with during that period of authorisation, failing which the OFT may terminate the authorisation by notice to the licensee.

132. At the conclusion of the competing arguments regarding the application to strike out the Appellants' appeals, the OFT by its Counsel, contended that in the wake of the adjudicator's findings and the decision made by this Tribunal to accede to the OFT's application to strike out, that there should be no authorisation in the manner otherwise prescribed by section 34A. Alternatively, it was contended that the Tribunal should make any authorisations it thought appropriate subject to certain conditions.

133. Subsection (4) of section 34A which need not, in the Tribunal's view, be set out in full contains further specifications as to what sort of requirements might be imposed in relation to an authorisation.

134. Section 41 of the CCA provides by subsection (1) that:

> "(1) If, in the case of a determination by the OFT such as is mentioned in column 1 of the table set out at the end of this section, a person mentioned in relation to that determination in column 2 of the table is aggrieved by the determination he may, within [a specified period] appeal to the First-Tier Tribunal."

135. In the relevant table, there appear references to a compulsory variation, suspension or revocation of the standard licence. There is no specific reference to the authorisation or to the decision related to authorisation under section 34A, but the Tribunal accepts that as a matter of necessary implication, it would include that eventuality.

136. Section 41ZB deals with the disposal of appeals. Subsection (2) which again need not be set out in full, provides that on disposing of an appeal under section 41, the Tribunal *inter alia* may "vary that determination". Again, the Tribunal would accept that it enjoys the power to vary the authorisation or authorisations in a way which is less favourable to an appellant taking into account any findings it has made and taking into account the position which obtains at the time of its decision. There is now, of course, a suitable decision and relevant findings.

137. The adjudicator determined that under section 34A, NRL should be allowed to continue collections for six months from the date of revocation. She took into account the fact the revocation does not in fact take effect until the exhaustion of the appeal process. She also directed and imposed the requirement that during that six month period, NRL would not effect any repossessions under a bill of sale without an order of the court. No authorisation was made in respect of LBL, though again, with regard to LBL, the revocation would not properly take effect until the exhaustion of the appeal process.

138. Section 32(7) of the CCA provides that:

> "(7) A revocation or suspension under this section shall not take effect before the end of the appeal period."

139. The “appeal period” is defined by section 189 as:

> “… the period beginning on the first day on which an appeal to the First-tier Tribunal may be brought and ending on the last day on which it may be brought or, if it is brought, ending on its final determination, or abandonment;”

In short, the revocation does not take place until the final determination of these appeals.

140. The adjudicator noted in her decision with regard to NRL at paragraphs 163 to 171 the following matters. First NRL had requested authorisation to carry on a consumer credit business for six months after revocation and authorisation to act as a credit broker for 18 months if the prior request were acceded to but, if not, for 24 months. NRL had contended that debt collections under existing loan agreements would not constitute debt collection under section 145(7) of the CCA. However, the adjudicator found that the authorisations requested by NRL amounted to a request to carry on business “as normal” for a period of time after revocation “which would not be appropriate” given the gravity of her findings albeit with regard to matters of unfitness which do not in any way include the ASP issue. In collecting or enforcing debts NRL would be engaged in the business which comprised or related to the provision of credit or otherwise being a creditor under a regulated agreement.

141. She went on to express concern about the “business model” used by NRL “and other franchisees”. For the avoidance of doubt she did not authorise NRL to carry on any other licensed activity or activities or to enforce any debt following revocation of its licenses.

142. With regard to LBL it had sought authorisation to carry on the business of credit broking but that request was rejected.

143. The Appellants appealed against those findings and those determinations. The principal grounds of appeal were first that 6 months was an insufficient period to allow for the transfer or winding up of the business, second that the direction regarding the cessation of

repossessions would be damaging generally and in particular with regard to any transfer or winding up and thirdly that LBL should have been allowed to continue to effect introductions to its franchisees.

144. The OFT now contends that there should be variations of the authorisations so that there is no continuing authorisation under section 34A. The principal arguments advanced by the OFT are the following.

145. First in the light of what Mr Foster had said it was submitted in a manner which in effect finds reflection in the findings endorsed by this Tribunal that the picture that now emerges is more serious than that which was presented to and adjudicated upon by the adjudicator.

146. In other words, as it was put in oral argument, since the Appellants have now been shown to experience difficulty in distinguishing between right and wrong, such as to make them unfit to hold a licence, they are equally unfit to be entitled to benefits from any authorisations. Secondly, in the absence of any evidence from the Appellants that they need suitable authorisations to enable the business to be transferred or wound up, again no authorisations should now be granted.

147. It was pointed out that in the considerable quantity of evidence which had been forthcoming from the Appellants in relation to the substantive appeals, nothing had been said regarding the difficulty that the Appellants would have with regard to any transfer or winding up. Specific attention was drawn to the content of a relatively lengthy set of opening written submissions regarding the appeal in which no such allegation could be found.

148. Thirdly, it was claimed, not without reason perhaps, that the Appellants had already enjoyed an extensive period of trading as a result of which there was said to be a failure to make proper disclosure. The Tribunal has already commented upon the nature of the exchanges between the parties. It repeats its view that although it sees some force in OFT's stance in this respect it does not regard it as necessary to reach any form of final view on the conflicting contentions regarding how the

process of disclosure with regard to the ASP issue developed and/or was addressed. Nevertheless, the overall contention by the OFT has some force insofar as it could still be maintained that, at least considered objectively, the Appellants have enjoyed a period of about 2 years' worth of extended trading during which time they have pursued their activities ending as now with what has proved to be a hopeless appeal.

149. Fourth, the OFT relies on the fact that in general terms the typical term for the credit agreements entered into by the Appellants is 18 months or thereabouts. Reference has been made to this at the outset of this judgment. It therefore followed in the OFT's contention that the vast majority of such agreements which might in all probability in that respect had been entered into after revocation which took place in October 2009 would soon be at an end. In August 2011 when this application was made the period since revocation amounted to some 22 months. The OFT therefore claimed that the Appellants could not by that date at least have had any reasonable expectation that what can be called post revocation agreements would not be affected by the prospect of revocation.

150. Fifthly and finally in connection with the fourth and indeed the earlier points the OFT contended that in all the circumstances the Appellants should have prepared themselves for a transfer or winding up.

151. By way of general observation the OFT reminded the Tribunal that section 34A is not drafted on the basis that some form of authorisation must follow revocation. It merely contains a discretionary power enabling the relevant authority to consider the granting of some form of authorisation. The Tribunal fully accepts that submission.

152. For the sake of completeness, the Tribunal should point out that when it is said the revocation of the licence will not take effect until the appeal process has been exhausted that proposition must take into account the fact that there is a 28 day period in which an appeal can be lodged following upon the issuance of any written determination such as the present determination. Should permission to appeal be refused the

revocation would take effect: should permission to appeal be granted, however, revocation would of course not occur.

153. As a secondary submission to the primary contention set out above that there should now be no authorisation for the business or businesses to continue to trade the OFT submitted that a number of appropriate conditions should be attached to any continued authorisation.

154. First it was said that all ASP letters should cease, although the Tribunal pointed out in argument that the imposition of such a condition would be largely, if not totally, academic. The OFT appeared to agree. Secondly, the OFT urged that neither LBL nor NRL be any longer engaged in any debt collection activities within the meaning of section 145(7) of the CCA, ie only licensed debt collectors should be used. Third, it was submitted that during the 6 month collection period the Appellants only use or instruct licensed debt collectors if the Appellants reasonably believed that the credit agreements were legally enforceable and then only when they sought to recover the amount they reasonably believed to be due.

155. At the conclusion of the oral submissions set out above the Tribunal in effect acceded to an application by the Appellants that they be allowed to address the OFT's contentions within a proper time period on paper following upon the oral hearing. The Tribunal subsequently determined that there should be no further oral hearing in this respect and will now turn to the subsequent written submissions.

156. In the wake of the Tribunal's directions following upon the conclusion of argument on the strike out application the Appellant submitted written submissions in relation to the authorisations issue. The material submitted included a witness statement dated 8 September 2011 by Mr Barnett, a director of the Appellants whose name has been mentioned above. No formal objection was taken to this course and in those circumstances the Tribunal will briefly summarise Mr Barnett's evidence.

157. Mr Barnett stated that to revoke the limited authorisations which the adjudicator had granted or to revoke them entirely would have "a significant effect" on NRL. He confirmed, a matter which has been briefly alluded to above, namely that NRL employees totalled 132 staff, the majority being "in the field" as well as constituting "collection staff" with another 11 by way of "legal staff". The principal asset of NRL was he said is its debt base owed by customers with a paper value of some £24 million of principal and over £59 million by way of interest. The expected recoveries from those figures were put at between £48 million and £50 million secured by property, and the vehicles valued at the time of the loans which, in turn, were worth about £82 million.

158. He then went on to say that "investors" were owed some £32 million. He said immediate revocation of the licenses, without any authorisations at all would prevent all activities from the writing of new business to enforcement actions. The likely effects would be it is claimed be disastrous with a cash flow reduction leading to a "significant reduction in staffing levels". There would be he said in effect a knock on effect resulting in the suffering by customers because possible other lenders would not be able to act "more favourably" towards them. NRL had no cash reserves; hence there would be a detrimental effect on the ability "to satisfy obligations" including interest on NRL's and/or the Appellants' own borrowings.

159. Mr Barnett contended that to leave in place the adjudicator's limited authorisations on NRL would mean that it would have no authority to write new business and would only enjoy limited authority to collect debts for a period of 6 months from revocation with no authority to recover any security or enforced payment of its debts. This has been indicated above. He said that in his opinion the effect on NRL's business would be "so prohibitive that the business would almost certainly become insolvent, very quickly".

160. As indicated above the OFT had by way of alternative submission to a total revocation contended for the following, namely:

(a) authorisations limited to 6 months;

(b) no authority to write new business;

(c) no recovery of security without court order;

(d) no debt collection save by licensed third parties; and

(e) no legal proceedings to recover debt without first forming a reasonable view of the merits and a reasonable view of the amount payable.

161. Mr Barnett contended that only (d) and (e) "ostensibly" differed from the adjudicator's formulations. (e) he claimed would be needlessly time wasting and expensive. (d) he described as "speculative" with similar financial disadvantages. (c) he claimed would not help customers and was also likely to be expensive. He therefore claimed that authorisations "for all aspects of the business would be required for a period of 18-24 months". He confirmed that the average loan length was 1 year but said that in reality 18 months "must therefore be the minimum time frame". If the business were to be sold to facilitate collections, then he "would imagine" "a period of 6 months to 9 months would be appropriate".

162. Much the same approach as advocated by Mr Barnett is set out in the Appellant's written submissions. In paragraph 15 of these submissions it is said that it is "still" envisaged that, subject to any further appeal the Appellants would seek as a first option to transfer its business to a licensed purchaser and that:

> "… in order to facilitate this it would be necessary for the Appellants to be authorised for a reasonable period following the revocation taking effect, to carry out such of their present activities as require a license under the CCA 1974 and would need to be carried out to enable its business to be sold as a going concern."

163. A period of 6-9 months from the date on which revocation would take effect is then proposed as "a reasonable period for these purposes".

164. The Appellants then request that during the said 6-9 months period LBL should be authorised to carry on the business of credit brokerage so as to continue to effect introductions of customers seeking to obtain credit, to NRL and LBL's other franchisees and that NRL be authorised to carry on the customer credit business so that it could continue to provide credit to individuals to include in particular an authorisation to collect and enforce debts due to NRL under regulated consumer credit agreements.

165. It was then said that in the event that a sale cannot be achieved in the relevant time frame, "the businesses will need to be wound up".

166. The Tribunal pauses here to note that no evidence is provided as to what steps, if any, have been taken with regard to any or all of these intended outcomes and related activities.

167. The thrust of the Appellants' contention is that since the striking out application turned effectively on the ASP issue alone and given that the practice of using the ASP letters has now ceased it necessarily followed that the Tribunal could not properly rely to any extent on matters which constituted other grounds on which the adjudicator otherwise relied in making her determinations about authorisations. In other words there is and could be no consumer harm. It was therefore argued that it would be inappropriate for the Tribunal simply to adopt the adjudicator's approach.

168. The upshot of the Appellants' stance is as already indicated that authorisation now sought to be imposed would allow continued trading if there were to be no sale in the period between 24 and 33 months from the time revocation took effect. In practical terms that would mean a prolongation of the relevant period into about 2015, at least 6 years after initial revocations by the OFT in October 2009.

169. The Tribunal is not minded to accede to the most recent submissions put in by the Appellants but is nonetheless minded to adhere to the limited authorisations granted by the adjudicator which on any view would still allow the Appellants to benefit from what the Tribunal views as a

reasonable opportunity to wind up its business or businesses and subject to the conditions which the OFT proposes by way of secondary submission.

170. These conditions (which are to have effect from the date of revocation) are first that ASP cease using the ASP letter which the Tribunal has indicated is largely academic. Second, LBL and NRL are not to take steps to procure payment of debts due under consumer credit agreements or consumer hire agreements. As a practical matter that means that LBL and NRL will only use licensed debt collectors. Third, each of LBL and NRL will use or involve only licensed debt collection agents or parties whenever each or both of LBL and NRL reasonably believe that the applicable credit agreement or agreements is or are legally enforceable and when each or both seek to recover the amount owed and/or believed to be due.

171. The reasons for the Tribunal adopting the above course can be shortly stated. Some of the reasons have been alluded to above with regard to the contentions made by the OFT with regard to the statutory regime. First under section 34A authorisation is a discretionary matter and the Tribunal is entirely at liberty to take into account all relevant considerations. The Tribunal is firmly of the view that the admission of a prolonged period of deception is highly relevant. Secondly, the relevant considerations referred to in respect of the former exercise of discretion must touch and concern consumer protection. Enough has been said earlier in this judgment to demonstrate that the Tribunal finds that the relevant fitness has not been made out. In the Tribunal's judgment that failure should properly be reflected in the application and extent of any authorisation or authorisations. Third, it is for the licensee to make out its case. The evidence of Mr Barnett does no more than reiterate matters which the Tribunal finds have already been visited both in the course of the appeals and in relation to the application to strike out. Given its findings on the strike out application the Tribunal is not impressed by a plea that the work force will suffer. The primary consideration for the Tribunal must be the public interest and consumer

protection. The interest of shareholders and employees are necessarily secondary to this. The conditions which the Tribunal has imposed in response to the OFT's submission will in its view properly reflect an appropriate means of consumer protection given such matters as the average time scale attributable to a typical loan agreement to which the Appellants are parties. Fourth, the OFT also pointed out and the Tribunal entirely accepts that the Appellants have benefitted from what on any view is a substantial period available to consider and if necessary cater for the possibility of revocation since the OFT made the necessary orders and certainly since the adjudicator's findings and directions.

Conclusion

172. The above represents the Tribunal's considered views on the strike out application and its views on the so called authorisations issue which should find reflection in an appropriate direction or set of directions agreed upon by the parties.

DAVID MARKS QC
Tribunal Judge