In the First-tier Tribunal
General Regulatory Chamber
(Consumer Credit)

Case No. CCA/2012/0007

On appeal from:

The Office of Fair Trading's Decision reference:	ADJ/2371-CCA-646773
Dated:	6 February 2012

BETWEEN:

Appellant:	RG Car Sales Limited
Respondent:	The Office of Fair Trading
Heard at:	The Finance and Tax Tribunal, 45 Bedford Square, London WC1B 3DN
Date of Hearing:	27 June 2012 (sitting in public)
Date of this Decision:	5 October 2012
Before:	Keith Rowley Q.C., Tribunal Judge Neil Pardoe Miriam Scott

Appearances:

The Appellant:	Mr. Reece Green, a director of the Appellant
The Respondent:	Ms. Ruby Adesuyi, solicitor, of and on behalf of the Office of Fair Trading

Subject matter:	Appeal against a determination by the Office of Fair Trading under section 27 of the Consumer Credit Act 1974 refusing to grant a licence under that Act to the Appellant
Authorities referred to:	*Derry v. Peek* (1889) 14 App. Cas. 337 *North Wales Motor Auctions Ltd v. Secretary of State for Trade* [1981] C.C.L.R. 1 *Armitage v. Nurse* [1998] Ch. 241 *Leeds City Council v. Hussain* [2002] EWHC 1145 (Admin) *Cooper v. The Office of Fair Trading* (CCA/2008/0006)
Legislation referred to:	Consumer Credit Act 1974 sections 7, 25(2A), 27, 36B and 41ZB(2) Rehabilitation of Offenders Act 1974 sections 4 and 5 Criminal Justice Act 1988 section 39

DECISION OF THE FIRST-TIER TRIBUNAL

The unanimous decision of the Tribunal is that the appeal be dismissed.

REASONS FOR THE DECISION

A. Introduction

1. By an undated Notice of Appeal received by H.M. Courts and Tribunal Service on 20 February 2012 an appeal was brought against the determination dated 6 January 2012 ("the Determination") of Ms. Alison Spicer ("the Adjudicator"), acting on behalf of the Respondent ("the OFT") and made under section 27 of the Consumer Credit Act 1974 ("the 1974 Act"), refusing the application dated 4 October 2011 made by RG Car Sales Limited for the grant of a licence under the 1974 Act.

2. At box B of the Notice of Appeal headed "About the Appellant" the name of the appellant was given as "Mr Reece Green".

3. Although and as we explain later in this decision, in autumn 2011 Mr. Green himself did indeed apply to the OFT for a licence under the 1974 Act, that application did not proceed. Rather, the determination against which this appeal was brought was, as we have said, that of an application dated 4 October 2011 ("the Application") made by RG Car Sales Limited, a company owned and controlled by Mr. Green.

4. No point has been taken about this apparent irregularity in the Notice of Appeal. Very sensibly, the appeal before us has been treated as being that of RG Car Sales Limited, not Mr. Green personally. Thus in this decision the term "the Appellant" falls to be read accordingly.

5. Mr. Green appeared before us on behalf of the Appellant and argued the Appellant's case skilfully and courteously; he also gave evidence before us on oath and was cross-examined on his testimony.

6. As the Appellant's name implies, it carries on business as a retailer of second-hand motor vehicles.

7. The grounds on which the Application was refused by the Adjudicator were two-fold, namely that:

    7.1 Mr. Green, the Appellant's sole director, had recently been convicted of a criminal offence involving violence committed whilst he (Mr. Green) was working in his uncle's vehicle sales business, and

    7.2 the Appellant had knowingly provided false or misleading information in the Application by omitting to disclose Mr. Green's conviction.

8. For these reasons the Adjudicator concluded that the Appellant had not satisfied her that it was fit to hold a licence under the 1974 Act.

9. In its grounds of appeal annexed to the Notice of Appeal the Appellant (or, more correctly, Mr. Green, since the first person was used throughout) contended, in summary, that:

9.1 the failure to disclose Mr. Green's conviction was a genuine mistake;

9.2 the conviction was a one-off act of violence for which Mr. Green had served his sentence and he vowed never to act in a violent manner again;

9.3 Mr. Green had worked in the car industry for over five years, during which time he regularly arranged finance for customers and he had excellent customer reviews;

9.4 overheads made having business premises and staff extremely costly and he had been working from home (in the event his parents' home) on his own since starting trading in September 2011 without any problems;

9.5 he was an honest and hard working young man and a consumer credit licence was vital to his business;

9.6 he felt he had been treated unfairly by the OFT during the licence application process.

10. In the event, before us Ms. Adesuyi who appeared for the OFT to resist the appeal sought in opposition to rely on a further new ground, not advanced before the Adjudicator, namely the Appellant's conduct in advertising the availability of finance in relation to vehicles which it (the Appellant) was offering for sale at a time when it did not hold a licence under the 1974 Act.

11. That new ground was foreshadowed in the OFT's skeleton argument settled by Ms. Adesuyi and dated 22 June 2012 and in various documents included in the bundle before

us.

12. Since under section 41ZB(2) of the 1974 Act an appeal to the Tribunal is by way of rehearing, in principle it is open to us to admit evidence as to and take into account matters occurring or coming to the attention of the OFT after the date of the Determination. Despite the relatively late stage at which the matters giving rise to the new ground were raised by the OFT, we are satisfied that (i) they are matters which are relevant to this Decision and (ii) Mr. Green was well able to and did deal thoroughly with this new ground at the hearing before us.

B. Material facts

13. We now turn to the relevant factual background.

(a) Mr. Green's business background

14. Mr. Green was born on 17 July 1988 and was therefore aged 23 at the date of the hearing before us.

15. He lives with his parents at 49 Packmores Road, London SE9 2NA, at which premises he has an office through which he carries on business through the Appellant.

16. Mr. Green told us that he had been in sales since leaving school, initially as an estate agent and subsequently in cars. He said that he had always wanted to work in the car sales industry and that, prior to the formation of the Appellant, he had worked for his uncle for four years. We understand Mr. Green's uncle to be Mr. John Bradley, that Mr. Bradley's business is or was known as Eltham Car Sales and that he is himself the holder of a licence under the 1974 Act.

17. The Adjudicator had before her, as do we, an undated written reference from Mr. Bradley (but marked in manuscript "Rec'd 30/1/12) stating (*inter alia*) that Mr. Green had worked

for him "for the past four years".

18. We attach no significance to the discrepancy between the four year period referred to in both Mr. Green's oral evidence and Mr. Bradley's reference, as against the longer period of five years referred to in the Appellant's grounds of appeal (*c.f.* paragraph 9.3 above).

19. Mr. Green said that he was employed by Mr. Bradley as the business's sales manager, that Mr. Bradley would visit the business three times a week to check up but that, save for those visits, the business was effectively run by Mr. Green and three others on Mr. Bradley's behalf. Whilst so employed Mr. Green said he dealt with all aspects of the provision of finance for customers who wished to purchase cars, a fact which is broadly confirmed by Mr. Bradley's reference. Mr. Green said that as a result of those dealings he knew "all the rules and regulations".

20. The finance house with which Mr. Green dealt on Mr. Bradley's behalf was London & Surrey Motor Finance Limited ("L & S"), which has provided a post-Determination written reference for Mr. Green dated 17 May 2012 in the following terms:

> "We write to confirm that Mr Reece Green has been known to us as a Sales Manager of Eltham Car Sales over the last three years.
>
> During that time our dealings with him have been very satisfactory and there have been no unresolved issues."

(b) The Appellant

21. The Appellant was incorporated on 28 September 2011 and Mr. Green is its sole director, having been appointed to that office on 30 September 2011; we were told by him that he is its sole owner, that it has no (or no other) employees and that it began trading in October 2011.

22. Mr. Green also said that the Appellant had sold some 40 to 50 cars since then, that all its customers were "very, very happy" with the way in which they were treated and that L &

S (with whom he had dealt when working for Mr. Bradley) were keen for him to have a licence under the 1974 Act.

23. Ms. Adesuyi did not cross-examine Mr. Green on this part of his evidence and, having carefully considered it, we accept it as true. We therefore proceed on the basis that, at the date of the hearing before us, the Appellant had traded for approximately eight months without any complaints from its customers.

(c) Mr. Green's conviction

24. On 23 March 2011 Mr. Green was convicted at Greenwich Magistrates' Court of the offence of assault by beating contrary to section 39 of the Criminal Justice Act 1988, for which he was sentenced to carry out 200 hours of unpaid community work, ordered to pay compensation of £100 and costs of £200. He informed us that he had pleaded not guilty to the charge and represented himself at the trial.

25. The combined effect of sections 4 and 5 of the Rehabilitation of Offenders Act 1974 is that Mr. Green will not be treated as rehabilitated, and the conviction not treated as spent, until the expiry of the period of five years from the date of the conviction, namely 23 March 2016.

26. At the hearing before us Mr. Green thought that he had retained the paperwork relating to his conviction, which would have shed more light on the circumstances in which he committed this offence. Unfortunately, though, in a post-hearing email dated 2 July 2012 to the Tribunal he said that he was mistaken and now believed that he had discarded the paperwork "as I didn't think I would need it anymore as it happened nearly two years ago".

27. We are therefore compelled to proceed on the basis of Mr. Green's oral testimony alone, which was to the following effect:

27.1 the victim of the assault was a traffic warden;

27.2 contrary to the assertions made twice in the OFT's Response, he had not "beaten up" the warden (and, in fairness to Ms. Adesuyi, we add in parentheses that at the hearing before us she accepted that this was a misdescription of the offence);

27.3 the incident involved what Mr. Green described as a "confrontation" with the warden;

27.4 during the incident he pushed the warden out of the way in order to reach his car;

27.5 the warden did not suffer any injury as a result and the £100 compensation was in respect of the warden's loss of earnings in having to attend court (Mr. Green described it as "time out of work");

27.6 he acted "out of manner" and felt hard done by when he was convicted; and

27.7 it was "a bit strong" to say, on the basis of the conviction, that he was a violent person.

28. Ms. Adesuyi did not cross-examine Mr. Green on this part of his evidence and, having carefully considered it, we accept it as true. In particular we accept that, in terms of the various criminal offences involving violence to the person, Mr. Green's conduct ranked towards the bottom of the scale.

29. It nevertheless remains the case that the offence involved Mr. Green assaulting a traffic warden who was engaged in the performance of his duties and, we infer (and even allowing for the fact that the sentence may in part have reflected Mr. Green's not guilty plea), the imposition of a sentence of 200 hours' community work suggests to us that the court regarded the offence as one of some seriousness.

(d) The Application

30. Towards the end of the hearing before us matters took an unexpected turn.

31. During the course of his closing submissions on behalf of the Appellant Mr. Green mentioned, for the first time, that the Appellant's application for a licence had been preceded by a previous application made by him in his own name as a sole trader.

32. This earlier application by Mr. Green ("the first Application") was something of which Ms. Adesuyi and the representative of the OFT who was present with her were previously unaware. We were, though, informed that a copy of the first Application would have been retained on the OFT's computer system.

33. That did indeed prove to be the case, a copy being provided to Tribunal as one of the attachments to a post-hearing letter from Ms. Adesuyi dated 29 June 2012.

34. It is not necessary for us to deal in detail with the first Application, and it suffices for us to note that:

34.1 it was, as Mr. Green explained in his evidence to us, an application by him as a sole trader;

34.2 Mr. Green intended to use the trading name "RG Car Sales";

34.3 he wished the licence to cover credit brokerage only;

34.4 in answer to the question in the Application Form whether he had ever been convicted of any offence he answered "No";

34.5 he signed a declaration by which he (i) expressed his understanding that it was an offence knowingly or recklessly to give false information to the OFT, and that if

he gave false or misleading information a licence might not be issued, and (ii) confirmed that he had answered every question as fully as possible, had included all relevant details and that the information given was true and complete; and

34.6 the application was dated 23 September 2011.

35. We now turn to the Application itself.

36. In this respect the bundle of documents before us was not as complete as we would have wished. In particular, whilst addressing us Mr. Green referred to Guidance which appeared on the OFT's website and which he said he had read when completing the Application.

37. In the event, under cover of Ms. Adesuyi's letter dated 29 June 2012 we were supplied with print outs of a number of documents which we were informed would have been available on or through the OFT's website on 23 September 2011 when Mr. Green completed the first Application.

38. Since those documents were not available at the hearing, Mr. Green was not asked orally about them. We understand, however, that Mr. Green was sent a copy of Ms. Adesuyi's post-hearing letter and enclosures; we have not received any comments from him on any of those documents.

39. There are two documents taken from the OFT's website which are capable of constituting the Guidance to which Mr. Green referred at the hearing, being either the General Guidance document, reference OFT969, or that entitled "How to complete the credit licensing forms" which appeared in the credit licensing section of the website.

40. So far as material:

40.1 the former document informed the reader (at paragraph 2.22) that it was a

criminal offence knowingly or recklessly to provide false or misleading information to the OFT when applying for a consumer credit licence;

40.2 the latter document suggested that, before completing an application form, the applicant should have to hand (*inter alia*) information on any convictions.

41. Without convening a further hearing to determine this factual issue, it is impossible for us to know to which of those documents Mr. Green was referring, even if he could now remember. However we do not consider reconvening would be a proportionate use of the Tribunal's resources: whichever document Mr. Green may have read (and it could have been both) would clearly have warned him of the need to take care, and to provide full and accurate information, when completing a licence application form (being a task which he undertook twice within the space of 11 days).

42. Turning now to the Application itself, we would note the following:

42.1 it was made in the name of the Appellant;

42.2 Mr. Green was identified as the person who (in the language of the application form) "runs your organisation";

42.3 the question whether "any individual ... we have asked you to tell us about on this form has ever held or applied for any other consumer credit licences" was answered "No"; and

42.4 the Application was dated 4 October 2011.

43. Save as aforesaid, the Application accorded with the first Application in the respects we described at paragraphs 34.3 to 34.5 above.

44. Mr. Green's evidence was that although he told Mr. Bradley that he (Mr. Green) was

applying for a licence under the 1974 Act, he (Mr. Green) did not discuss the completion of the Application with either Mr. Bradley or anyone else.

45. Ms. Adesuyi cross-examined Mr. Green, albeit fairly briefly, about the Application, eliciting from him that he had read the Application generally and the declaration in particular before signing the Application.

46. In the OFT's Response it was contended (in effect) that Mr. Green had knowingly or recklessly failed to disclose his conviction in the Application, i.e., that he had acted dishonestly.

47. This contention was repeated in the OFT's skeleton argument, it being said (*inter alia*) that:

> "The provision of false information to the OFT on the application form, is in the OFT's view, indicative of a willingness to act in a mendacious manner in circumstances where it is felt that such action could yield benefit to the appellant."

48. However and as we pointed out to Ms. Adesuyi during the course of the hearing, the contention that Mr. Green had acted dishonestly in completing the Application in the terms in which he did was not put to him in cross-examination. It ought to have been. If the Tribunal is to be invited to make a finding of dishonesty against a witness, which finding would involve a conclusion on our part that the witness has committed both a criminal offence under section 7 of the 1974 Act and perjury whilst giving evidence before us, that allegation should have been clearly put to him in cross-examination so as to give him the opportunity specifically to respond to it.

(e) The Determination

49. After consideration by the OFT of the Application, the Adjudicator gave the Appellant notice under section 27(1)(a) of the 1974 Act dated 8 December 2011 that she was

minded to refuse it.

50. Acting by Mr. Green, the Appellant exercised its right under section 34(1)(b) of the 1974 Act to make oral representations at a hearing before the Adjudicator. This took place on 9 January 2012 and we have been provided with a transcript of that hearing. Since, first, the matter before us is by way of statutory rehearing and, secondly, Ms. Adesuyi did not place particular reliance on anything said (or not said) by Mr. Green to the Adjudicator, we need not refer to the contents of the transcript.

51. The Determination was dated 6 February 2012 and for present purposes we sufficiently summarised its conclusions at paragraph 7 above. We will, however, revert to one aspect of it later, at paragraphs 83 to 88 below.

(f) The new ground

52. The new ground relied on before us by Ms. Adesuyi on behalf of the OFT concerns certain material that appeared on the Appellant's website, in particular that at various places on that website and at various times representations were made that the Appellant was able to arrange finance for its customers. Plainly it could not lawfully do so without a licence under the 1974 Act.

53. This first came to the OFT's attention after the Determination, in circumstances and for reasons that were not explained to us.

54. The point was, in short, that in about mid-March 2012 the OFT discovered that the Appellant's website advertised the availability of finance:

54.1 in the text appearing on its home page, and

54.2 as Ms. Adesuyi told us, in the description given of three vehicles offered for sale by the Appellant (we add in parentheses that Mr. Green informed us that as this

time there would have been about 25 cars appearing on the Appellant's website: Ms. Adesuyi accepted that the representation was only made in relation to a small number of those vehicles).

55. This discovery led the OFT to serve a notice under section 36B of the 1974 Act dated 15 March 2012 requiring the Appellant to explain why the website advertised the availability of finance when it (the Appellant) did not hold a consumer credit licence.

56. Mr. Green's prompt reply on behalf of the Appellant, by an email also dated 15 March 2012, was as follows:

> "… I have now addressed this problem and changed the text in my adverts. When my website was first setup I had just applied for the CCL Licence and during this time I was dealing with Auto Trade setting up my website and they asked if i (*sic*) offered finance in which i (*sic*) stated to them that I have just applied for my CCL License (*sic*) and I should hopefully be able to sell finance very soon, so they included that on my web page. At no stage have I arranged finance under the name RG car sales ltd (*sic)* and this is why I have now taken it off my web page."

57. Although we found Mr. Green's evidence on this topic not altogether easy to follow in places, this explanation by email largely corresponded with what he told us during the course of the hearing. He explained to us that:

57.1 the website had been created for him by Autotrader and was a "template" website;

57.2 he (Mr. Green) had not noticed the reference to finance on the home page, and

57.3 the few vehicles (which Mr. Green referred to as "prestige" vehicles) where finance was also referred to in the descriptive text constituted old stock and that the text had merely been copied and pasted from what Mr. Green described as an "old website".

58. Mr. Green said, quite logically, that there would be no point in misleading customers by saying that the Appellant offered finance if it did not, and we note that the OFT has not suggested that the Appellant has ever, in fact, arranged or offered to arrange finance for customers. However Mr. Green equally accepted that he needed to take more care regarding the content of the Appellant's website. He said that on receipt of the OFT's notice the necessary changes were made to remove the offending references within about 4 to 5 hours.

59. That, however, does not appear to have been the case. Screenshots taken by the OFT on 19 June 2012 showed that although the home page had been amended, three prestige vehicles were still advertised in terms which represented that finance was available through the Appellant.

60. As we have said, Mr. Green's evidence here was not as clear as we would have wished. As appears below, in reaching our Decision we can and do take into account that, despite the matter being drawn to his attention in mid-March 2012, vehicles were still described as being available with finance more than three months later. We are, though, minded to give Mr. Green the benefit of the doubt that this was not intentional: it would require him not only to be dishonest but, additionally, extremely stupid to think that he could continue to offer these misleading descriptions despite (i) the OFT being alert to the matter and (ii) the Appellant having outstanding a pending appeal against the Determination.

C. The relevant legislation

61. Since this is not in dispute we deal very briefly with it, taking the few relevant provisions of the 1974 Act in numerical order.

62. Section 7 provides as follows:

> **"Penalty for false information**

A person commits an offence if, for the purposes of, or in connection with, any requirement imposed or other provision made by or under this Act, he knowingly or recklessly gives information to the OFT, or to an officer of the OFT, which, in a material particular, is false or misleading."

63. The material provisions of section 25 provide as follows:

"Licensee to be a fit person.

(1) If an applicant for a standard licence–

(a) makes an application within section 24A(1)(a) in relation to a type of business, and

(b) satisfies the OFT that he is a fit person to carry on that type of business with no limitation,

he shall be entitled to be issued with a standard licence covering the carrying on of that type of business with no limitation.

...

(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 businesses;

(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) contravened any provision made by or under–

(i) this Act;

...

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

(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 persons specified in section 184, includes a business associate."

64. We would only mention at this point that, as was not disputed before us, Mr. Green plainly falls within section 25(2A) as being an employee, agent or associate of the Appellant. More generally, principles of corporate attribution mean that anything done by Mr. Green in the course of the Appellant's business is to be attributed to the Appellant itself.

D. Authorities

65. We should refer briefly to the authorities cited to us by Ms. Adesuyi.

66. First, Ms. Adesuyi has reminded us that, as explicitly appears from section 25(1) of the 1974 Act, the onus is on the Appellant to satisfy the OFT, and consequently on appeal the Tribunal, that it is fit to hold a consumer credit licence, and also that the grant of a licence is a privilege, not a right, which should be accorded only to those who, on proper evidence, are shown to be fit persons: see *per* Sheen J. in *North Wales Motor Auctions*

Ltd v. Secretary of State for Trade [1981] C.C.L.R. 1.

67. Secondly, Ms. Adesuyi also reminded us that the potential financial and other consequences for an applicant, its officers, employees and shareholders, in the event of the refusal of a licence, should carry little or no weight. Either an applicant is a fit person to hold a licence or it is not; an applicant's fitness cannot depend on the results which will flow from a grant or refusal: *Leeds City Council v. Hussain* [2002] EWHC 1145 (Admin).

68. Finally, Ms. Adesuyi also referred us to the decision of the Consumer Credit Appeals Tribunal in *Cooper v. The Office of Fair Trading* (CCA/2008/0006). We did not, though, find that decision of any real assistance, as in our view it does not establish any principle of general application.

E. Discussion

69. Against the above background we shall consider in turn each of the three grounds relied on by the OFT in opposing this appeal.

70. We should, though, preface this part of the Decision by saying that we formed a favourable view of Mr. Green as a witness. He gave his evidence in an open and frank manner and we treat him as an honest witness who gave truthful evidence before us. There was nothing elicited in either Ms. Adesuyi's limited cross-examination of Mr. Green or her submissions to us that persuaded us to the contrary.

(a) The conviction

71. If this were the only matter weighing against the Appellant, we freely confess that we would find this appeal finely balanced. Whilst we do not under-estimate the seriousness of the offence or its chronological proximity to the Application, the evidence before us does suggest that Mr. Green's conduct in this regard was out of character. Given the

favourable view we formed of him as a witness and his unchallenged evidence that he had dealt wholly satisfactorily with applications for finance whilst working for Mr. Bradley for four years, there would be some attraction in the argument that it was conduct which was unlikely to be repeated.

72. We also do not accept that it is possible from this one incident to conclude that Mr. Green has a propensity for violence, as Ms. Adesuyi submitted to us.

73. We also do not think that the fact that the Appellant carries on business from an office at Mr. Green's parents' home increases any risk there might otherwise be to consumers.

74. More generally, had Parliament intended that a conviction for an offence of violence, without more, would disqualify a person from holding a licence under the 1974 Act, then it would have said so in that Act. It did not; instead, under section 25(2), an offence of this character is something to which the OFT (and, on appeal, the Tribunal) "shall have regard". It is a relevant factor but not determinative, and we cannot and do not treat it as being so. Plainly, as a relevant factor, it is not a point counting in the Appellant's favour; putting the matter at its lowest, it is suggestive of an inability on the part of Mr. Green to remain calm and controlled when in a stressful situation.

75. The conviction, though, is but one of the three grounds on which the OFT relies; we must, therefore, now turn to consider the other two.

(b) The Application

76. In his evidence before us Mr. Green frankly accepted that, as he put it, he had "made mistakes all the way" and he described the process of seeking to obtain a licence as a "huge learning curve".

77. Specifically as regards his failure to disclose the conviction, he said it was a "careless mistake", that he should have taken more care in answering the relevant question and that

he answered the relevant question as he did because he thought that it was limited to offences involving "fraud, finance, that type of thing". He freely accepted in cross-examination that he had read and understood the declaration section at the end of the Application Form before signing it. As we have already recorded, he also said that he had read what he called "the Guidance" on the OFT's website and recalled that it did refer (without limitation) to the need to disclose any convictions.

78. The essence of Ms. Adesuyi's submissions was that the Application Form was unequivocal and that Mr. Green's assertion that he understood the obligation to disclose past convictions was limited in the manner he described was simply not credible; the only explanation for the non-disclosure was, she suggested, deliberate concealment on his part.

79. Whilst we agree that the form, and such guidance as Mr. Green may have read before submitting either the first Application or the Application, were unequivocal, in our judgment that does not compel the conclusion that Mr. Green's conduct was knowing or reckless within the terms of section 7.

80. Having heard and carefully considered his evidence, including his being cross-examined (an advantage not enjoyed by the Adjudicator), we are satisfied that Mr. Green's failure to disclose his conviction was occasioned by, as he accepted, carelessness on his part and was not dishonest.

81. His limited ability in the field of form-filling is demonstrated by the fact that, in the Application, he additionally wrongly stated that no individual mentioned in that Application had previously applied for a licence under the 1974 Act: see paragraph 42.3 above. However he had personally done so, just 11 days earlier, by means of the first Application, and we are unable to conceive of a reason why he should wish to conceal that earlier personal application. Moreover had Mr. Green given any thought to the point, he might well have concluded that the OFT would have had systems in place which would have enabled it immediately to pick up such a recent related application for a licence (though, in the event, it did not).

82. Mr. Green's error, in our view, is therefore indicative of a general lack of care on his part when completing the Application in this respect, not to any sinister or malevolent intent. We therefore respectfully differ from the Adjudicator who concluded that Mr. Green was a person who was willing to deceive the OFT in order to obtain a licence under the 1974 Act.

83. Having reached that conclusion, it is necessary at this point for us to revert to one aspect of the Determination. At paragraph 3.19, as part of the section of the Determination headed "Failure to notify the OFT of the conviction for assault", the Adjudicator said as follows:

> "Mr. Green is the sole director of the applicant and completed the application form on the applicant's behalf. I do not find Mr. Green's account of his failure to declare his conviction on the application form to be credible. He accepted that the question on the application form asked for information on 'any conviction' and on that basis I find that it was not reasonable for him to infer that a conviction for assault would not be relevant to his application, especially as the conviction was so recent. Had he any doubts about the matter, it would have taken a simple telephone call to the OFT to check whether or not the conviction should be included. On the balance of probabilities I find it more likely than not that Mr. Green omitted the conviction from the application form knowingly, so as not to endanger a favourable outcome to the licence application."

84. In our view that paragraph discloses a misconception by the Adjudicator as to the meaning of the phrase "knowingly or recklessly" in section 7 of the 1974 Act.

85. The fact that, as may be the case here, it was not reasonable (using the Adjudicator's own adjective) for an applicant to fail to disclose a conviction, or any other matter that ought to be disclosed, does not mean that he has acted "knowingly or recklessly" within the meaning of section 7.

86. The classic statement of the law in this area to be found in the speech of Lord Herschell in *Derry v. Peek* (1889) 14 App. Cas. 337 at 374:

> "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."

87. More recently, in *Armitage v. Nurse* [1998] Ch 241 at 254B-C Millett L.J., when considering the meaning of the phrase "actual fraud" in a trustee exoneration clause, said:

> "... English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other. The doctrine of the common law is that "gross negligence may be evidence of mala fides, but is not the same thing *per* Lord Denman C.J. in *Goodman v Harvey* (1836) 4 A. & E. 870."

88. We are entirely satisfied that, by enacting section 7 in the terms in which it did, Parliament intended that nothing short of dishonesty was required in order for an offence under that section to be committed, and that unreasonableness will not suffice. It was, in our view, unfortunate that the Adjudicator chose to express herself as she did in paragraph 3.19 of the Determination. Had our jurisdiction been one of review only rather than rehearing, we would have been constrained to conclude that in this respect the Adjudicator misdirected herself in law.

89. However having concluded that Mr. Green did not commit an offence under section 7 of the 1974 Act, the fact that he failed to disclose the conviction in the Application remains a matter of considerable importance to us in undertaking the task imposed on us by section 25(1), viz., to determine whether the Appellant is a fit person to be granted a licence.

90. Specifically, the evidence discloses that both in the Application itself and, shortly before, in the first Application, Mr. Green failed either to read with care or to understand the clear and readily comprehensible message that all convictions, without exception, were required to be disclosed. It goes without saying that the OFT needs applicants to make full and complete disclosure if it is to do its job properly. This serious omission by Mr. Green is plainly a relevant matter for the purposes of section 25(2) and counts heavily against the Appellant's application.

91. Notwithstanding his previous experience whilst employed by Mr. Bradley, the manifestly deficient way in which Mr. Green completed two applications forms mean that, were the Appellant to be granted a licence, we cannot be confident that he would exercise the requisite degree of care and skill when dealing with applications for finance by his customers.

(c) References to the availability of finance on the Appellant's website

92. As with Mr. Green's failure to disclose his conviction, we have concluded that the references to the availability of finance on the Appellant's website were as a result of errors rather than an intention to deceive.

93. Equally, though, these references, and especially the fact that some still remained on the website more than three months after the OFT's notice under section 36B of the 1974 Act dated 15 March 2012, reflect very poorly indeed on Mr. Green's administrative and business skills generally, and in particular on his understanding of the requirements of the consumer credit legislation and the need for traders to comply with it.

94. We repeat in this context our observations at paragraph 91 above.

95. Ms. Adesuyi also submitted that advertising the availability of finance which, in fact, was not available through the Appellant was capable of constituting both an unfair or improper business practice falling within section 25(2A)(e) of the 1974 Act and an offence under

regulation 3 of The Consumer Protection from Unfair Trading Regulations 2008, S.I. No. 1277.

96. We see the force in and are inclined to accept the former submission, albeit that we have attributed Mr. Green's conduct to carelessness rather than dishonesty.

97. The latter point was raised for this first time in Ms. Adesuyi's oral submissions. It was not mentioned in either the OFT's Response or its skeleton argument, the Appellant had no notice that the point was to be raised and it was not adequately explored before us. We propose, therefore, to disregard it.

F. Conclusion

98. The cumulative effect of the matters we have discussed at paragraphs 65 to 97 above is that, given its total dependence on Mr. Green, the Appellant has not discharged the burden of satisfying us that it is a fit person to be granted a licence under the 1974 Act.

99. We reach that conclusion because of;

99.1 the concerns we have about Mr. Green's character as a result of conviction, albeit we think the OFT has considerably over-stated its case on this issue, taken together with

99.2 his carelessness and lack of attention to detail in (i) failing to disclose that conviction and (ii) allowing incorrect references to finance being available from the Appellant to be included and then remain on the Appellant's website.

100. In deference to Mr. Green, we should only add that we have seen nothing in the material before us which suggests that the OFT has acted in any way unfairly in dealing with the Application. The OFT has an important public duty to perform under the relevant part of the 1974 Act and in our opinion it has acted entirely properly throughout in discharging

that duty.

101. For all the above reasons, therefore, we unanimously dismiss this appeal.

G. Costs

102. No submissions were addressed to us on the question of costs.

103. Under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, any application for costs must be made to the Tribunal not later than 14 days after the date on which the Tribunal sends this decision to the parties.

[Signed on the original]

Keith Rowley Q.C.
Judge, First-tier Tribunal (Consumer Credit)

5 October 2012