*APPEAL AGAINST REFUSAL TO GRANT A CONSUMER CREDIT LICENCE – proposed internet-based debt counselling business – Appellant's website went live and was capable of being accessed by consumers despite application for licence still under consideration – other regulatory breaches also committed - material on website contained numerous errors and omissions, only some of which had been remedied by Appellant at date appeal was heard – assessment of skills, knowledge and experience of the controller of Appellant for purposes of section 25(2) of the 1974 Act – appeal dismissed*

**IN THE CONSUMER CREDIT APPEALS TRIBUNAL**

**BETWEEN:**

**QSOLVENCY LIMITED**

**Appellant**

**- and -**

**THE OFFICE OF FAIR TRADING**

**Respondent**

**Date of hearing:** **16 and 17 June 2009 (sitting in public)**

**Venue of hearing:** **The Tribunals Service, 45, Bedford Square, London WC1B 3DN**

**Tribunal:** **Mr. Keith Rowley Q.C. (chairman)**
**Mrs. Miriam Scott**
**Mr. Vernon Fuller**

**Appearances**

**For the Appellant:** **Mr. A.P. Odunaiya, the director of the Appellant**

**For the Respondent:** **Mr. Andrew Paton of the Office of Fair Trading**

## DECISION

### A. Introduction

1. This is the unanimous decision of the above-mentioned Tribunal ("the Tribunal").

2. The Tribunal has before it an appeal brought by Qsolvency Limited ("the Appellant") against the determination ("the Determination") dated 28 January 2009 of Ms. Elaine Rassaby ("the Adjudicator") acting on behalf of the Office of Fair Trading ("the OFT") that the Appellant's application dated 22 June 2008 ("the Application") for a licence under the Consumer Credit Act 1974 ("the 1974 Act"), as amended by the Consumer Credit Act 2006, be refused.

3. Where the context so requires, all references hereafter to the 1974 Act are to that Act in its amended form.

4. The Appellant's Notice of Appeal, which was dated 24 February 2009 and received by the Tribunal on 27 February 2009, was signed on its behalf by its sole director and the holder of its one issued share, Mr. Adedoyin Paul Odunaiya. The grounds of appeal were set out in an accompanying document entitled "The Grounds of Appeal for Qsolvency Ltd." ("the Grounds"), which was themselves supported by what was described as a "Schedule of Appeal Evidence".

5. In various places both the Notice of Appeal and the Grounds erroneously referred to Mr. Odunaiya personally as the appellant. No point has been taken in that respect by Mr. Paton, who appeared before us on behalf of the OFT, and we are satisfied that, notwithstanding these mistaken references, the Notice of Appeal can properly be regarded as having been served on behalf of the Appellant. It did, nevertheless, show an apparent lack of comprehension on the part of Mr. Odunaiya as to the legal distinction between a company and the person who owns it or has the conduct of its affairs that is consistent with other failures on his part to understand relevant legal principles.

6. The appeal proceeded in accordance with the provisions of the Consumer Credit Appeals Tribunal Rules 2008, S.I. No. 668 of 2008, and, as provided for by section 41(1C) of the 1974 Act, was by way of rehearing against the Determination. It was conducted on the Appellant's behalf by Mr. Odunaiya, and we would wish at the outset to record that he did so carefully, effectively and with great courtesy throughout.

## B. The Appellant

7. The Appellant was incorporated on 28 April 2008 and Mr. Odunaiya is its sole director and shareholder. Although assisted to some extent by his wife, Mrs. Shirley Odunaiya, the Appellant is, in effect, his *alter ego* and its fitness to be granted a licence under the 1974 Act therefore depends upon (*inter alia)* Mr. Odunaiya's skills, knowledge and experience as the person having the conduct of its business: see section 25(2)(b) of the 1974 Act.

8. The Appellant proposed to use the trading name "Online Debt Advice", that also being the domain name adopted by it for its website.

## C. Mr. Odunaiya

9. Mr. Odunaiya is aged 35. He graduated with a BSc in Computer Science with Accounting from the University of Buckingham in March 1998, he thereafter trained as an accountant and in March 2003 he was awarded a Professional Accountancy Certificate by the Institute of Chartered Accountants of England and Wales.

10. In August 2005 Mr. Odunaiya underwent a career change, joining Thomas Charles & Co. Ltd. ("Thomas Charles"), a company carrying on business in the field of debt counselling. As he put it in his evidence before us, despite his background in accountancy he "fell into insolvency [work]". He remained with Thomas Charles until December 2007 (in the Grounds this period was somewhat optimistically referred to by Mr. Odunaiya as "many years"), having attained the position of Senior Debt Consultant. He told us that, when

he left Thomas Charles, there were 10 or 11 other employees holding the same position.

11. Mr. Odunaiya told the Adjudicator that he dealt with some 2,500 insolvency cases whilst he was at Thomas Charles, though elsewhere he has estimated the number as being about 1,000. Although that discrepancy is surprising, it is not one to which we attach any weight as we are satisfied that, by virtue of the work done by Mr. Odunaiya at Thomas Charles, he is an experienced debt counsellor. Conversely although Mr. Odunaiya has the academic and professional qualifications to which we referred in paragraph 9 above, he told us that he did not have any qualifications in the field of either debt counselling or insolvency. He said that he did have a (as he described it) "big book" on the subject of corporate and personal insolvency, but, when asked at the hearing, he was unable to recall its name.

12. The evidence before us included approximately 40 testimonials from a number of clients of Thomas Charles who dealt with Mr. Odunaiya whilst he was employed by that company. These testimonials took the form of Client Feedback that was entered onto Thomas Charles's website between July 2006 and January 2008. The feedback uniformly praised the services received by those clients from Mr. Odunaiya, though they did of course represent but a small number of those for whom Mr. Odunaiya acted whilst at Thomas Charles and hence we need to treat them with some reserve. We also saw a letter from a former client, a Ms. Monica Troughton, and a letter of reference from Mr. Mark Bassford of Grosvenor Partners LLP, a firm of chartered accountants.

## D. The Appellant's business in outline

13. Although the Appellant was not incorporated until April 2008, Mr. Odunaiya began the task of constructing its business immediately after he left Thomas Charles in December 2007. He said that he had put all his resources into the Appellant with the result that his wife was now the breadwinner and that he is living on state benefits.

14. In seeking to describe the Appellant's business, we can do no better than to quote from its website in the form in which it appeared on 4 November 2008:

> "Welcome to Online Debt Advice
>
> **Are you a company or an individual struggling with debt ? Are you robbing from Peter to pay Paul ? Do you worry about your home being repossessed ? If so you have come to the right place.**
>
> Online Debt Advice provides 24hrs debt assistance through its multimedia advice system. This simply means that you can get all the assistance you want online. Once you have registered, watch the videos and selected the right solution (*sic*). Depending on the solution you choose further assistance will also be provided through meetings with our qualified consultants if required."

15. In the section headed "About Us" the website stated:

> "Online Debt Advice is owned by Qsolvency Ltd which operates throughout the UK and is licensed under the Consumer Credit Act 1974. Online debt advice serves as an internet portal that enables you to get all your debt advice and help in one place online. Our advice is delivered via video, audio and text and is available 24 hours a day. Once registered, you will have instantaneous access to debt advice and assistance."

16. As conceived, the website contained two key features, namely:

16.1 online calculators which were designed (i) to determine whether the client was solvent or insolvent and (ii) if insolvent, which of the three insolvent solutions to be offered by the Appellant, namely a debt management plan ("DMP"), an individual voluntary arrangement ("IVA") or bankruptcy would be appropriate;

16.2 online videos which explained the various options in more detail.

17. We will come back to both the calculators and the videos later; for present purposes it suffices if we make two observations.

18. First, although the intention was that users of the Appellant's website would be encouraged to register with the Appellant, this being a process that was to be free of charge, it was possible to use some areas of the website without being a registered user. In particular, Mr. Odunaiya accepted at the hearing before the Adjudicator, as he did in his evidence before us, that it was possible to use the calculators without registering.

19. Secondly, Mr. Odunaiya's original intention had been that the videos would be available for purchase only. However that policy changed in September 2008, at which time he decided that all the videos on the website should be available free of charge to all registered users.

20. Finally we should mention at this point that Mr. Odunaiya recognised that the Appellant could not provide all the services required in connection with the solutions to which we referred at paragraph 16.1 above. He therefore proposed, when necessary to refer the client to other organisations able to provide services that the Appellant could not, for example acting as the supervisor of an IVA. Those organisations were Philip Gill (Insolvency Services) Limited, a company which trades under the name Philip Gill & Co. ("Gill") in Wales and Northern Ireland; Grosvenor Partners LLP; and Funding Network Loans Limited, a company which trades under the name Easycall Finance.

## E. The Application

21. The Application was completed and submitted by Mr. Odunaiya on the Appellant's behalf. It described the Appellant's business as that of a financial adviser, and it identified Mr. Odunaiya and his wife (there referred to as Ms. Shirley Harding) as the persons who ran the Appellant, he as its director and she as its administrator. The licence applied for was limited to category E1, being the activity of debt-counselling to be offered on a commercial basis.

22. Because commercial debt-counselling is regarded by the OFT as high risk credit activity, the Appellant was required to submit a Credit Competence Plan using the OFT's form "CCP 1" ("the CCP"). The CCP, the accompanying letter from Mr. Odunaiya dated 30 June 2008 and the Appellant's Business Model all emphasised the importance of the Appellant's website in providing advice to its clients. Thus:

22.1 At section 59 of the CCP it was stated that "Our website provides the debtors with self help tools and videos to help them determine their ability to pay themselves".

22.2 At section 67 of the CCP, dealing with IVAs, it said "Our website calculators and video will guide debtors on their decision in choosing an IVA as their preferred solution".

22.3 Mr. Odunaiya's letter dated 30 June 2008 stated "Qsolvency provides debt advice for companies and individuals through downloadable videos. Our innovation approach was devised in order to cut down on admin costs and ensure that access to advice and help is available 24 hrs a day" and "The standard videos will do a large bulk of explanation while further work if necessary will be done by me".

22.4 The Business Model said "90% of advice and application form filling is delivered via downloadable video and video content on our website".

23. Further documentation was supplied to the OFT by Mr. Odunaiya on the Appellant's behalf in July and September 2008

24. Between those two dates, at the OFT's request Ms. Evelyn Westwood of Hounslow Trading Standards Service and her colleague, Ms. Nishi Patel, visited the Appellant on 28 August 2008 and thereafter prepared a report for the OFT which she and Ms. Patel signed on 3 September 2008. By a letter dated 12 September 2008 Mr. Odunaiya, who had been provided with a copy,

agreed that, "[a]ll in all" the report was accurate, but did explain in his letter that the Appellant's business model would evolve and change in response to demands from the market from time to time, and he also said that he might offer a free telephone number if clients needed to speak to a debt adviser before making a final decision on a debt solution.

25. We will refer to just a few passages from the narrative section of the report prepared by Ms. Westwood and Ms. Patel.

25.1 It recorded Mr. Odunaiya's explanation of the nature of the relationship between the Appellant and what he had described as "sister" companies (being those to which we referred to in paragraph 20 above).

25.2 It recorded that Mr. Odunaiya said that he intended to use a company called "Rent My Property Ltd" for clients who might need to sell and then rent back their property, but that he was still in discussions with that company.

25.3 There were discussions about the manner in which Mr. Odunaiya would ensure that the Appellant complied with the Data Protection Act 1998 ("the 1998 Act").

25.4 Mr. Odunaiya said that only a very small percentage of the Appellant's work would be responding to emails and letters as he expected customers mainly to use the website; he said he did not expect to be on the telephone very often and had no plans to record calls.

25.5 Mr. Odunaiya is also recorded as having said as follows:

> "Essentially the business consists of a website which includes general advice about debt, calculators which work out if a consumer is solvent or insolvent, calculators which work out which options a consumer has in relation to their debt, and online videos to purchase which give step by step instructions on how to use the various options. The videos

> include the relevant forms that can be down loaded and printed out to complete. Mr. Odunaiya also offers a premium telephone helpline and e-mail advice if a consumer needs more help. He intends that consumers will be able to decide which option they use having used the calculators and also follow his videos without any further intervention from himself."

## E. Progress of and refusal of the Application

26. Mr. Odunaiya was unhappy about the time taken by the OFT to deal with the Application, and made his dissatisfaction known not only by chasing the OFT to speed up the process but also by contacting his Member of Parliament. Eventually, a very detailed Minded to Refuse notice ("the MTR Notice") under section 27(1) of the 1974 Act dated 1 December 2008 prepared by the Adjudicator was served on the Appellant. An oral hearing was then held before the Adjudicator on 15 and 18 December 2008, following which and as we said at the outset of this decision, the Application was refused by the Determination dated 28 January 2009.

## F. Observations on the licensing process made by Mr. Odunaiya

27. In both his written and oral submissions to us, Mr. Odunaiya has expressed his very strong sense of grievance at the manner in which the Application has been handled by the OFT.

28. First, he has repeatedly complained about the length of time taken by the OFT to determine the Application, being from 22 June 2008 until 28 January 2009. He told us that he had gained a lot of experience working as a debt adviser at Thomas Charles and, whilst he was aware that the Appellant's business model was innovative in nature because of the substantial use it proposed to make of the internet, he said that he was confident that the Application would be successful.

29. We do have some sympathy with Mr. Odunaiya on this point, in that we can

understand that a period of seven months in which Mr. Odunaiya was effectively in limbo must have been very difficult for him and his wife. It is not, though, a matter that goes to fitness. We would also observe that, given the complexity of the Appellant's business and the vulnerability of the clientele which the Appellant hoped to attract, the process was bound to be a somewhat lengthy one. In our view Mr. Odunaiya was unwise to conduct his affairs on the assumption that the Appellant would be bound speedily to be granted a licence. Despite his experience at Thomas Charles, the process was not in any sense a formality.

30. By way of explanation, in his evidence to us Mr. Odunaiya said that his experience was in providing debt advice, not licensing (by which we understood him to mean the process of obtaining a licence under the 1974 Act).

31. We do of course accept that this is correct, but as an argument it appears to us to miss the point. Any person wishing to carry on the business of providing debt advice within the jurisdiction is required to obtain a licence under the 1974 Act and, to the extent that this required Mr. Odunaiya to familiarise himself with what was required in order to obtain one, then the onus was on him, not the OFT.

32. More generally, Mr. Odunaiya made a number of comments about the manner in which the Application had been handled by the OFT. In his oral evidence to us he described the process through which he had been as "torrid"; in his written submissions he alleged that the Adjudicator had not been impartial; and in his oral argument he said that the OFT had bullied him, that it "didn't like" him and that the process had been "very unfair".

33. Again, these are not matters that go to the Appellant's fitness, save possibly to the extent that if these allegations are unfounded then they could be regarded as counting adversely against the Appellant. Overall, though, given the favourable view we have formed of Mr. Odunaiya's character and *bona fides*, we propose to disregard them. We should make clear, though, that in our view

these allegations of impropriety on the part of either the Adjudicator or the OFT are without foundation as we are sure that Mr. Odunaiya, on mature reflection, will agree.

## G. Our approach to this appeal

34. In our experience the course which this Application has taken has been unusual, in that the manner in which the Appellant's business was proposed to be carried on has been in a state of continuous evolution from the date the Application was submitted. Thus, changes were made to the Appellant's website after the Application was submitted but before service on it of the MTR Notice; after service of the MTR Notice but before the Adjudicator's Determination; and then after the Determination but prior to the hearing before us.

35. It would be a laborious and not altogether straightforward task if we were to attempt to track each and every change made during this process, even if we were able precisely to date them (which, in the event, we are not). However we do not consider that to be necessary, given that our function is to decide whether, on the material presently before us, the Appellant is a fit person to hold a licence. Conversely and as we shall now explain, that does not mean that, as some of Mr. Odunaiya's submissions to us appeared to envisage, that where a matter raised by the OFT as going to the Appellant's fitness has been addressed in a manner which deals with the OFT's concern, we can treat such a matter as being a matter of history only and not relevant to the task in which we are engaged.

36. Whilst the Appellant is entitled to credit for having responded positively to the OFT's concerns, where it has done so, as part of the process of judging its (the Appellant's) fitness we have to bear in mind all the matters that have been raised by the OFT during the course of the entire application process. The fact that, in it original form as constructed by Mr. Odunaiya, the Appellant's business model, was (as the OFT would have it) seriously flawed in numerous respects plainly bears very heavily on the question of fitness. Under the 1974

Act the burden is on the applicant to satisfy the OFT or, on appeal, that it is a fit person to hold a licence. Depending upon their character, past deficiencies which have only been remedied as a result of action on the part of the OFT are capable of going to the very heart of the issue of fitness. Moreover given that the Appellant' target audience is people who are likely to be in serious financial difficulties, we need to be particularly astute when considering the question of fitness.

## H. The statutory framework

37. As we have already mentioned, the burden is on the Appellant to satisfy us that it is fit to be granted a licence under the 1974 Act. Mr. Paton also rightly reminded us that the grant of a licence is a privilege, not a right: we refer to the judgment of Sheen J. in *North Wales Motor Auctions Ltd v Secretary of State for Trade* [1981] CCLR 1. Mr. Paton additionally pointed out that the stated primary purpose of the 1974 Act, as appears from its preamble, was "to establish for the protection of consumers a new system…. of licensing". That is to say, the legislation is intended to protect consumers, not the rights of an applicant seeking a licence to run its business.

38. The relevant criteria are to be found in section 24 of the 1974 Act, the material provisions of which are in the following terms:

> "(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.
>
> (1AA) If such an applicant—
>
> (a) makes an application within subsection (1)(b) of section 24A 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 so far as it falls within the description or descriptions of business set out in his application in accordance with subsection (2) of that section,

he shall be entitled to be issued with a standard licence covering the carrying on of that type of business so far as it falls within the description or descriptions in question.

(1AB) If such an applicant makes an application within section 24A(1)(a) or (b) in relation to a type of business but fails to satisfy the OFT as mentioned in subsection (1) or (1AA) (as the case may be), he shall nevertheless be entitled to be issued with a standard licence covering the carrying on of that type of business so far as it falls within one or more descriptions of business if—

(a) he satisfies the OFT that he is a fit person to carry on that type of business so far as it falls within the description or descriptions in question;

(b) he could have applied for the licence to be limited in that way; and

(c) the licence would not cover any activity which was not covered by his application.

(1AC) In this section 'description of business' means, in relation to a type of business, a description of business specified in a general notice under section 24A(5)(a).

…

(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;

(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) contravened 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). "

## I. Matters not in dispute

39. We start by identifying a number of matters relied on by the Adjudicator in the Determination, and also by Mr. Paton before us, which are now not in dispute.

### (a) The Appellant's website going live

40. Mr. Odunaiya explained, in additional written material submitted by him to the Tribunal dated 24 April 2009, the considerable effort that had gone into the

production of the Appellant's website, which was built by a team of web developers from a company called I-COM International Limited. He said that it took a team of 11 people no less than 6 months to construct it. No doubt the cost was commensurate with the work involved.

41. Initially, that website remained inactive whilst the Application was being considered by the OFT. However when the Application was not dealt with by the OFT as swiftly as Mr. Odunaiya would have wished, he decided in September 2008 that the Appellant's website should go live. He was quite frank in his written representations to the Adjudicator as to why this was:

> "As Qsolvency could not trade, preparing the site for trading was the next practical thing to do. This meant online visibility. Online visibility is critical to the survival of any online business. If you do not work on your search engine optimisation or appear online so that Google can recognize your business your business would not survive. It can take 6 to 12 months for an online business to see these benefits. A lot of businesses advertise during this period but Qsolvency never did."

42. The fact the website had gone live came to the attention of the OFT in late September 2008. On 15 October 2008 it was accessed by Mr. David Philpott, Deputy Director of the OFT's Consumer Credit Group.

43. Included in our bundles is a note of a telephone conversation between Mr. Odunaiya and Mr. Philpott in which the latter warned Mr. Odunaiya that, as a result of its website being live, the Appellant was potentially in breach of the 1974 Act by carrying on the business of debt counselling without a licence. It is apparent from Mr. Philpott's note that Mr. Odunaiya disputed this proposition, as he did also before the Adjudicator. The grounds on which he did so were that the Appellant had had no contact with any users of the site and that no income had been received from any such users. Bank statements produced by Mr. Odunaiya bear out the latter point, and we accept the former. Indeed, Mr. Odunaiya told the Adjudicator that he did not know how many people had used the website since it went live nor, in particular, whether any of them had used the calculators.

44. The website was live for approximately four months, although Mr. Odunaiya's evidence is that for two of those four months this was for the purpose of enabling the OFT to continue to view the site and assess its changes.

45. Very sensibly, at the hearing before us Mr. Odunaiya did not persist in disputing this part of the OFT's case. In his oral submissions to us he accepted it had been a mistake to activate the website, and in his written submissions to us he described his decision as having shown his "inexperience as a new entrant into the business and frustration". In those written submissions he also accepted that he should have acted on the information given to him by Mr. Philpott when they spoke on 15 October 2008. We accept the sincerity of those observations.

46. In the OFT's Statement of Case Mr. Paton characterised Mr. Odunaiya's conduct in this regard as reckless. We are inclined to think that this overstates the position, though we accept entirely that Mr. Odunaiya's conduct in this respect is a serious matter to which we should and do attach considerable weight. We are particularly concerned that (i) Mr. Odunaiya did not heed the warning given to him by Mr. Philpott on 15 October 2008 (and, it would appear, did not appreciate that the gravamen of Mr. Philpott's complaint was that the Appellant or Mr. Odunaiya, or both, were committing a criminal offence by virtue of section 39(1) of the 1974 Act); (ii) as he freely admitted in his oral evidence to us, Mr. Odunaiya did not seek professional advice to confirm (or contradict) his view that Mr. Philpott was wrong; and (iii) as he said in his written submissions to us, the website was only taken down after the Determination. This is a matter that is relevant to our decision by virtue of section 25(2)(a) and (b) and 25(A)(b)(i) of the 1974 Act.

47. We would add, by way of minor digression, that this is not the only example before us, and which we take into account, of Mr. Odunaiya failing to take professional advice when it would have been appropriate for him to do so. We refer to two further instances.

47.1 Mr. Odunaiya produced in support of the appeal an email plus

attachment from Ms. Melanie Giles, who is a licensed insolvency practitioner and a director of Gill, sent in April 2008. The attachment consisted of one of the Appellant's video scripts to which Ms. Giles had made some amendments. In her covering email she recommended that Mr. Odunaiya commission an IVA expert and DMP expert to write the relevant sections for him. He did not do so.

47.2 The Appellant's terms and conditions have been subject to sustained criticism by the OFT. In his evidence to us Mr. Odunaiya explained that he had bought a standard form set of terms and conditions online and, as he put it, "amended them to fit" having looked at the terms and conditions of licensed debt management companies, which he had used "as a guide". This was despite his (Mr. Odunaiya) having no legal qualifications or training. It was only after the OFT raised various issues as to the contents of those terms and conditions that he consulted Lawdit, which he described to us as "online solicitors".

**(b) Wrongly claiming to be licensed under the 1974 Act**

48. This arises out of the material on the Appellant's website to which we referred at paragraph 15 above. The statement that the Appellant was licensed under the 1974 Act was plainly wrong and Mr. Odunaiya did not attempt to suggest otherwise. The explanation, as he told the Adjudicator, was that the text had been prepared in anticipation of a licence being granted to the Appellant and that the website had therefore gone live in September 2008 in this incorrect form. The offending passage was removed once it had been drawn to Mr. Odunaiya's attention.

49. Again, Mr. Paton urged us to take a serious view of this point, characterising the Appellant's conduct as deceitful. Again we think that overstates the position, as we think what occurred was due to ineptitude rather than iniquity, although we take Mr. Paton's point that arguably the Appellant or Mr. Odunaiya, or both, thereby committed a criminal offence under the Consumer Protection from Unfair Trading Regulations 2008, S.I. No. 1277 of 2008: we

refer to regulations 3 and 12 of, and paragraph 4 of Schedule 1 to, those Regulations.

50. The point, in short, is that through Mr. Odunaiya the Appellant should have been aware of the contents of its own website when that site went live in September 2008. Again, this is a matter that is relevant to our decision by virtue of section 25(2)(a) and (b) and 25(A)(b)(i) of the 1974 Act.

**(c) Non-compliant complaints policy**

51. One of the documents provided by Mr. Odunaiya to Ms. Westwood and her colleague on the occasion of their visit on 3 September 2008 was entitled "Customer Complaint Handling Procedures". At paragraph 6 of that document it stated:

> "Where a client has previously complained to Qsolvency Ltd about our services is not satisfied with the outcome (*sic*), the client may refer that matter to the OFT".

52. That paragraph was plainly in error. Since 6 April 2007, by virtue of section 229A of the Financial Services and Markets Act 2000 all businesses that hold a licence under the 1974 Act are required to have a complaints handling system which complies with rules prescribed by the Financial Ombudsman Service ("FOS"). Those rules requires (*inter alia*) a business's complaints system to inform a consumer of his ultimate right to refer any unresolved complaint to the FOS; the OFT has no part to play in the complaints process. Once again, the error was corrected once it had been drawn to Mr. Odunaiya's attention.

53. In the OFT's Statement of Case Mr. Paton submitted that although this error had been rectified, it was evidence that showed both a trader which was unaware of the relevant regulatory landscape and one which possessed insufficient skills and knowledge to engage in high risk credit activities.

54. We agree with the thrust of that submission; it is supported by Mr. Odunaiya's own oral evidence to us in which he stated that he was sure of the accuracy of the website when it went live in September 2008. In fairness to Mr. Odunaiya, we should also say that he also acknowledged that it was his responsibility on behalf of the Appellant to ensure the accuracy of the content of the website and also that he did later acknowledge a number of deficiencies in it, including himself describing parts of the bankruptcy video script as "poorly verified". We note also that the "Complaints Handling" section of the CCP completed by Mr. Odunaiya in June 2008, more than two months before the website went live, specifically drew his attention to (*inter alia*) the need to comply with the FOS's rules and its role as the ultimate arbiter of unresolved disputes. However that appears to have passed unnoticed (or at least was not acted on) by Mr. Odunaiya.

55. Again, this is a matter that is relevant to our decision, this time by virtue of section 25(2)(a) and (b) and 25(A)(b)(ii) of the 1974 Act.

**(d) Failure to register under the 1998 Act**

56. This contention, which was not raised by or relied on by the Adjudicator, also arises out of the Appellant's website having gone live in September 2008, at which point members of the public were able to access and enter personal data onto the site. However at that time the Appellant was not registered under the 1998 Act. Processing such data by an unregistered person would constitute a criminal offence under sections 17(1) and 21(1) of the 1998 Act.

57. This was a matter of which Mr. Odunaiya ought to have been aware, because the application of 1998 Act to the Appellant's business is a matter that was recorded as having been discussed between Mr. Odunaiya and Ms. Westwood and her colleague on the occasion of the latters' visit on 3 September 2008.

58. Again, the error was remedied. Mr. Odunaiya informed us that a temporary registration was effected in the Appellant's name in March 2009 and a full registration effected as from 1 June 2009. Once more, though, this is a matter

that is relevant to our decision by virtue of sections 25(2)(a) and (b) and 25(A)(2) (b)(ii) of the 1974 Act. It seems to us that Mr. Paton's submissions to which we referred in another context at paragraph 53 above apply here with equal force.

**(e) Unlicensed credit broking**

59. We referred at paragraph 22 above to the limited nature of the licence applied for by the Appellant. However when Ms. Westwood and her colleague visited the Appellant on 3 September 2008 they specifically drew Mr. Odunaiya's attention to the fact that, as some of the debt solutions offered by him involved the re-mortgaging of the debtor's house, as to which he (Mr. Odunaiya) was intending to refer the debtor to a mortgage provider, the Appellant would probably require a licence that included credit broking.

60. It does not appear that Mr. Odunaiya either heeded, or sought professional advice in relation to, those observations. Instead, when the website went live later that month it specifically referred to re-mortgaging as being one of the debt solutions provided by the Appellant.

61. Once again, we bear in mind Mr. Paton's observations recorded by us at paragraph 53 above and must take this into account by virtue of sections 25(2)(a) (b) and 25(A)(2) (b)(i) of the 1974 Act.

**J. The services provided by the Appellant's website**

**(a) Preliminary**

62. This part of the case has a certain kaleidoscopic quality to it, because of the manner in which the Appellant's business model has changed, partly as a result of Mr. Odunaiya's own unprompted actions (for example his decision in September 2008 that the videos on the Appellant's website should be available to users free of charge), but largely as a result of the OFT's response to the

Application, primarily in the form of the MTR notice and, subsequently, the Determination. We also think it is the case that, as the application has proceeded, Mr. Odunaiya has appreciated the weaknesses in the original focus of the Appellant's business model being on online advice and has moved towards a greater element of personal contact.

63. In both his oral and written submissions to us, Mr. Paton stressed that there was a flaw in Mr. Odunaiya's approach to the case, in that he (Mr. Odunaiya) appeared to think that the licensing system took the form of a monitoring or educative process by which an applicant was able to bring its business model up to the required standard with the assistance of the OFT.

64. Mr. Paton put the matter thus in the OFT's Statement of Case:

> "39. … The purpose of the regime is not to provide a means to continually revise and update a business model, nor to act as a method of providing feedback to traders.
>
> 40. Rather, the purpose of the licensing regime is to adjudge whether an applicant is fit to conduct licensed business. In accordance with s. 25(2)(a) of the Act, the skills, knowledge and experience of the applicant are matters to which the OFT (and it is submitted, the Tribunal) are specifically directed to consider in assessing fitness.
>
> 41. It is submitted that this assessment cannot be an iterative process; constantly noting issues and reverting to the applicant for amendments and/or improvements. The applicant should, when presenting an application for a licence, be in a position to be judged possessed of sufficient skills, knowledge and/or experience to run the proposed business. Effectively, it is submitted that they should evidence self-sufficient competence, without a need for regular monitoring or regulatory guidance."

65. We agree with that submission. Whilst we would accept that Mr. Odunaiya deserves some credit for his attempts to meet the numerous objections made by the OFT in both the MTR Notice and its Statement of Case for the hearing before us, the fact remains that, by so doing, Mr. Odunaiya is remedying deficiencies in the Appellant's business model which ought not to have been

present in the first place. Although, given the unusual nature of the business model, some imperfections are perhaps to have been expected, we have to take into account both their nature and number, and the particular vulnerability of the Appellant's target audience. Further, the Appellant's failure correctly to structure its business at the outset, despite Mr. Odunaiya's misplaced belief in the complete accuracy of its website, plainly casts very serious doubt on his skills, knowledge and experience in the context of section 25(2)(b) of the 1974 Act. We are prepared to accept that Mr. Odunaiya is a skilled and experienced debt counsellor; however that does not mean that he possesses the skills, knowledge and experience required properly to conduct a licensed consumer credit business.

**(b) The website as at 4 November 2008**

66. The attachments to the MTR Notice included 64 pages printed from the Appellant's website at the above-mentioned date. Although by that date the website had been live for some weeks, we are satisfied that these pages accurately portray the state of the website when launched.

67. We shall refer to some passages in those pages as indicating what appear to us to have been manifest deficiencies in its content at that time. We emphasise that what follows is not intended to be comprehensive, and should be read in conjunction with paragraphs 10 to 15, 27 and 37 to 47 of the MTR Notice, and paragraphs 40 to 42 and 54 to 62 of the Determination.

68. The passages to which we refer are as follows.

68.1 Mr. Odunaiya is described as an "Insolvency Specialist" although, as we have mentioned above, he has no insolvency qualifications.

68.2 It referred to assistance being provided "by our [i.e., the Appellant's] qualified consultants", yet Mr. Odunaiya was the Appellant's sole director and employee, nor does he hold either an insolvency or debt-counselling qualification.

68.3 Both calculators were described as offering users "an instant answer", which was misleadingly simplistic.

68.4 The function of the videos was described as being to direct the user to "the right solution for you".

68.5 The "Solvent or Insolvent" calculator provided for four items only to be inputted, viz., the user's "Total unsecured debt", "Value of house", "Outstanding mortgage and secured loans" and "Value of your car". It made no provision for the inclusion of any other assets, such as savings or shares, which were plainly relevant to determining the user's solvency.

68.6 However someone who was not a property owner was told that they did not need to use the "Solvent or Insolvent" calculator, but that "… if you rent … you are simply Insolvent if you are struggling to pay your debt". In our view the term "struggling" was wholly inappropriate in this context. It hardly needs stating that a user's "struggle" to pay his debts might be successful or unsuccessful, yet someone who "struggled" successfully could hardly be described as insolvent. Also, this approach again ignored the possibility of the (tenant) user owning significant non-property assets.

68.7 The calculator entitled "Do I qualify for an IVA, Bankruptcy or DMP ?" also provided for four items only to be inputted, viz., "Total unsecured debt", "Total monthly income", "Total monthly expenses" and "Number of Creditors", but without any attempt being made to breakdown or analyse these different component parts. Despite this, the calculator was described as a "very powerful tool that will ensure you select the right solution".

68.8 On using the above-mentioned calculator, it was possible for the user to receive the recommendation that he should "declare bankruptcy". The user would then be able to purchase the bankruptcy video which

gave detailed instructions, including weblinks, about the bankruptcy process, which was capable of leading the user to proceed direct to bankruptcy without speaking to anyone at the Appellant (or, indeed, anyone else). Mr. Odunaiya suggested in his written submissions that "the official receiver would discover if a solvent person tries to declare bankruptcy", but that suggestion misunderstands the nature of the bankruptcy process. As Mr. Paton submitted, the Official Receiver only becomes involved after a person has been adjudicated bankrupt, and there would be significant costs involved in later getting the bankruptcy annulled.

68.9 The solutions offered to a solvent user were three-fold, namely "Remortgage/secured loan on property", "Sale of property option" and "DMP Video and Application". The advice and applications were stated to be free though, in relation to all three options it was later, but not very clearly, stated in the Appellant's Terms and Conditions that it (the Appellant) would receive a commission or a fee from a third party on the adoption of one or other of these solutions.

68.10 It was also only by reading the terms and conditions that the user would discover that "when you chosen (*sic*) the sale of property solution, your property will be bought from you by an investor at a quick sale price which will be below the market rate." Whether a fire sale at less than market value would be a sensible course of action is not addressed. Indeed, it was only during the course of the hearing that it became fully apparent to us that what was really intended here was that the user would continue to reside in the property after the sale as a tenant of the purchaser (Mr. Odunaiya said, as he had done to Ms. Westwood and her colleague, that he was considering using a company called "Rent My Property Ltd."). In our view, the potential complexity of such arrangements raised numerous issues not touched on in the website's content.

68.11 In describing the bankruptcy process, it was stated that, in bankruptcy,

"you will no longer own your house; the court becomes the owner". That was plainly wrong: a bankrupt's assets vest in his trustee in bankruptcy, not in the bankruptcy court.

68.12 The user was led to believe that the effect of bankruptcy would be to free him from debt entirely, and the website failed to explain that certain debts (e.g., fines and student loans) survive bankruptcy.

68.13 The website described an IVA as a "private agreement"` and as "private and discreet", without mentioning that IVAs are recorded on a register that is available for public inspection.

68.14 It said, without offering any explanation, that an IVA would not be available to a debtor who owed less than £16,000.

68.15 It stated that "[b]ecause of our experience and our no-nonsense approach we have a 98% success rate in getting IVAs and CVAs accepted", though without explaining that (i) this was a reference to Mr. Odunaiya's success rate whilst employed by Thomas Charles, not to the Appellant's own success rate (by definition it had not at that time undertaken any IVAs or CVAs), and (ii) the 98% success rate was based on careful selection of proposed IVAs and CVAs where it was possible to be confident that the proposal would be accepted by creditors.

68.16 It described IVAs as being a "Government backed scheme (part of Insolvency Act 1986)" ("the 1986 Act"). Whilst the statement in parentheses was undoubtedly true, IVAs cannot properly be described as "Government backed".

68.17 The Appellant sought favourably to compare its services with what it described as "certain charities [that] are actually funded by the banks and credit card companies" which, it was said, meant that "it will be very difficult for these charities to provide you with an impartial view

or give an unbiased advice (*sic*) about your situation."

68.18 The Appellant's terms and conditions contained a very widely drawn exclusion clause, including the exclusion of liability for any negligence on the part of the Appellant.

69. In the light of the foregoing we have no doubt that, on the material before her, the Adjudicator was right to refuse the Application.

**(c) The position at the date of the hearing before us**

70. We now turn to the Appellant's website as it was constituted at the date of the hearing before us. Material in this respect was put before us by both Mr. Paton on behalf of the OFT and Mr. Odunaiya on behalf of the Appellant.

71. We start with Mr. Paton's material, in the form of website print outs dated 16 June 2008, as to which we comment as follows.

71.1 The calculator entitled "Do I qualify for an IVA, Bankruptcy or DMP ?" remained in unchanged form.

71.2 That calculator was both described as a "very powerful tool that gives you a good idea of the right debt solution", but the website also stated that "[t]he calculator results alone do not constitute advice because it has limitations. You still need to speak to our debt consultant for a comprehensive look at your circumstance." The limitations are not explained and we accept Mr. Paton's submissions that the message conveyed to the user as to the value of the calculator is unclear.

71.3 The total debt required in order for a user to be eligible for an IVA has increased to £18,000. That, though, is not a statutory minimum and, as Mr. Odunaiya told us in his evidence, was a figure chosen by him. He also told us that whilst some companies used a much higher limit (he mentioned £40,000 as an example), there were also companies that

went below £18,000. Although he said that he was "open to take below £18,000", there remains a real risk that a debtor would be unnecessarily steered by the Appellant away from an IVA and, perhaps, towards bankruptcy because of the adoption of this arbitrary limit.

71.4 In the case of a user who, on the basis of the calculator results, is recommended to declare himself bankrupt, he is told (*inter alia*) that "[w]ith no property or major assets you may have very little to lose", but in our view that is a deceptively simple statement that might mislead the user to misunderstand the nature and potentially far-reaching consequences of bankruptcy.

71.5 The DMP video still contained observations tending to steer the user away from using organisations such as the Consumer Credit Counselling Services and the Citizens Advice Bureau which offer a free debt counselling service; it did so by referring to delays that might be experienced in dealing with them, as opposed to using the services offered by the Appellant.

72. We now turn to the video scripts for the website Home Page, Solvent Page and Help Page provided to us on behalf of the Appellant.

72.1 The Home Page begins by stressing the comprehensive nature of the debt advice and help available through the Appellant's online videos, suggesting to the user that the videos in themselves may be sufficient.

72.2 When dealing with property that is jointly owned by the debtor and another or others (erroneously referred to as a "joint mortgage": the property might be free from mortgage), it is said that "only half the equity in the property will be legally yours". That statement assumes that (i) there are only two co-owners and (ii) they own the property beneficially in equal shares. Neither will necessarily be the case.

72.3 It is also said that if, after the user has paid his general living expenses, "you are struggling to make your monthly debt repayment, this also means you are insolvent". We have already commented, at paragraph 68.6 above, on the inappropriateness of the use of the adverb "struggling" in this context.

72.4 The "Solvent Solutions" text suggests that, in the case of a property owner who is unable to release the equity in it, the sale of the property is the "best and only option", and that the proceeds should "clear the debt and also help you rent a property or buy a smaller house". That seems to us a considerable generalisation that may or may not be correct; it will inevitably depend on the user's particular circumstances.

72.5 The solvency calculator still proceeds on the basis that a tenant (as opposed to a property owner) does not need to use the calculator as "you are simply insolvent if you are struggling to pay your debt".

73. We turn finally to the "Bankruptcy Basic Information" script provided to us on behalf of the Appellant.

73.1 The script begins with the rather surprising statement that "[b]bankruptcy is a very good solution for anyone with serious debt problems and for those who feel that the IVA requirements are too difficult to meet." Although an improvement on the previous suggestion that bankruptcy is the "quickest and easiest way to deal with your debt problem", it still appears to us, as Mr. Paton submitted, to strike an unduly positive note as regards the adoption of the bankruptcy route.

73.2 It states that "[i]f you inherit a large sum of money during the 12 months restriction period, you will be required it use the money to pay off your debt". That, however, seems to us an unduly simplistic attempt to explain a highly technical area of the law dealing with a

bankrupt's after-acquired property, which goes beyond inheriting a large sum of money.

73.3 In the section headed "How to go bankrupt", it is said that "[g]oing bankrupt is quite straightforward and can be done within a day", and points the user in the direction of downloadable forms on the website's "Resources" page. There is a risk that a user, seduced by the description of bankruptcy as a "very good solution", may be induced to take a "Do it yourself" route to bankruptcy without taking proper advice, either from the Appellant or anyone else.

74. The result, as it seems to us, is that despite significant improvements to the Appellant's website and business model as a result of the intervention of the OFT, the material before us still falls well short of demonstrating that the Appellant, and Mr. Odunaiya, have the requisite skills, knowledge and experience to conduct a consumer credit business. Taken with the various regulatory failings to which we referred at paragraphs 40 to 61 above, we are left in no doubt as to the manner in which we should dispose of this appeal.

## K. Other matters

75. The conclusion we expressed at paragraph 74 above means that it is not necessary for us additionally to analyse numerous other points relied on by Mr. Paton in opposition to the appeal. We therefore note them for completeness only.

75.1 Mr. Paton submitted that the Appellant's website provided a misleading impression of the services, if any, that are available to Scottish consumers, the point being that, in certain respects, Scottish law offers different debt solutions because of the different system of law that applies in the jurisdiction. Mr. Paton argued that the Appellant's website was unclear as to the extent to which it (the Appellant) was able to assist Scottish consumers. We would merely comment that we see the force in the argument that the information

provided by the Appellant on this topic was less than clear.

75.2 Mr. Paton also submitted that the Appellant's website did not clearly explain the nature of the relationship between the Appellant and what were variously described as its "sister companies" or "partnering organisations": we refer again to paragraph 20 above. Those entities were, in fact, independent businesses in their own right with whom it was intended the Appellant would have an arm's length commercial relationship, albeit that Mr. Odunaiya may have had a close personal relationship with the proprietors of those businesses. We would add that the terms in which those businesses were referred to were also capable of creating a misleading impression as to the size of the Appellant's business, or of wrongly conveying the impression that it was part of a larger group.

75.3 It was further submitted that the Appellant's business model, involving as it did the use of Gill in connection with IVAs, meant that the Appellant intended to refer consumers for advice to a person (Gill) who was not registered under the Act. However in his Statement of Case on behalf of the OFT Mr. Paton accepted this was (as he described it) "a difficult area". Having reflected further on the point, we are minded to think that the answer to the apparent conundrum is that, at the point at which Gill would become involved, the matter would have moved from being governed by the 1974 Act to falling within the 1986 Act, in relation to which both Mr. Gill and Ms. Giles are licensed insolvency practitioners. Since we have neither had the benefit of full argument in opposition to Mr. Paton nor is this point in any sense critical to the outcome of the appeal, we attach no weight to it. For the avoidance of doubt, we emphasise that we certainly do not make any finding that any actual or proposed activities on the part of Gill were or would be unlawful under the 1974 Act.

75.4 Our attention was drawn to the Unfair Terms in Consumer Contracts Regulations 1999, S.I. No. 2083 of 1999, and to the decision of the

House of Lords in *Director General of Fair Trading v. First National Bank plc* [2002] 1 A.C. 481, as regards various provisions in the Appellant's standard terms and conditions, in particular the revised exclusion clause therein contained. Again, we see the force of Mr. Paton's argument but, were we to have decided all other matters in the Appellant's favour, we would not have dismissed the appeal on this narrow ground but would, instead, have been minded to adjourn to permit the point to be addressed by the Appellant.

75.5 The same observations applies as regards Mr. Paton's submission, by reference to the decision the European Court of Justice in *Oceano Grupo Editorial SA v. Rocio Murciano Quintero* [2000] E.C.R. 1, that it would an unfair contract term for the Appellant to trade in other jurisdictions (such as Northern Ireland), but to require consumers to travel to England to defend a claim brought by or make a claim against the Appellant.

## L. Conclusion

76. We have, therefore, reached the clear conclusion that this appeal should be dismissed, our being entirely satisfied that, having regard to the criteria specified in section 25(2) and (2A) of the 1974 Act, the Appellant is not a fit person to be granted a licence.

77. In conclusion, we should make one final reference to Mr. Odunaiya. We appreciate that our decision will come as a severe disappointment to him, after all the time, trouble and resources he has invested in the Appellant's business. At the hearing before us Mrs. Odunaiya also spoke briefly but impressively on her husband's behalf, explaining his considerable skills and commitment as a debt-counsellor. We have taken all that into account, but it does not affect our conclusion as to the Appellant's lack of fitness to be granted a licence under the 1974 Act.

78. We note that the Adjudicator referred to Mr. Odunaiya having an "intransigent

approach". That, however, was not our perception of his personality. Rather, for our part we perceived a persistent inability on his part to comprehend why the business model he created was inadequate for the purposes of the 1974 Act; that lack of comprehension goes to the heart of our decision.

## M. Costs

79. By a post-hearing email to the Tribunal, Mr. Paton stated that, in the event that the appeal was dismissed, he would not be seeking an order for costs on behalf of the OFT against the Appellant.

## N. Decision

80. This appeal is therefore dismissed with no order as to costs.

**KEITH ROWLEY Q.C.**
**CHAIRMAN**

CCA/2009/0004