Neutral Citation Number: 2013 EWHC 2685 (QB)

Case No: 0 MA 30298

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Civil Justice Centre
1 Bridge Street West
Manchester M60 9 DJ

Date: 3 September 2013
Draft Circulation Date: 21 August 2013

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- - - - - - - - - - - - - - - - - - - -

Between :

SUTHERLAND PROFESSIONAL FUNDING LIMITED

Claimant

- and -

(1) BAKEWELLS (A FIRM)
(2) MARK CADELL COLLINS
(3) MARTIN GERARD JINKS
(4) ANDREW ROBERT MURFIN **Defendants**

Mr Timothy Dutton QC (instructed by **Ozone solicitors**) for the **Claimant**
Mr Geoffrey Zelin and Mr William Hibbert (instructed by **Nelsons Solicitors Ltd**) for the **1st to 3rd Defendants;**
The 2nd Defendant did not appear and was not represented.

Hearing dates: 5-7 August 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by the Claimant ("SPFL") for the repayment of the total of principal, contractual and default interest said to be due to it from the First Defendants ("Bakewells"), a firm of solicitors in which all the defendants were partners. References to "*the Defendants*" hereafter are to all defendants other than Mr Collins against whom judgment was entered on 12 January 2011 with quantum to be determined and judgment not to be enforced until after this trial.

2. This claim is in relation to sums that are ostensibly due under a series of loan agreements (collectively hereafter "CCA loan agreements") entered into by the Claimant with clients of Bakewells that were regulated under the Consumer Credit Act 1974 ("CCA"). The loans the subject of the CCA loan agreements were made from a facility that was provided by SPFL pursuant to an agreement in writing between Bakewells and SPFL made on 7th September 2004 when it was signed by the Fourth Defendant, who was the last of the partners in Bakewells to sign. The Agreement is entitled "*Minute of Agreement*" and is known in these proceedings and is referred to below as the "MoA". The claim made in these proceedings is brought by SPFL pursuant to clause 5.1 of the MoA. The issues between the parties are ones of construction and law and the evidence that I heard was limited to what was contended to be factual matrix evidence relevant to the construction of the agreement between SPFL and the Defendants. To the extent that is necessary I refer to this evidence below when considering the construction questions that arise in relation to that agreement.

3. The CCA loan agreements were in writing and were contained in forms that were provided to Bakewells and their agents by SPFL. A copy of the "pad" of forms that was provided by SPFL is set out in the Appendix to this judgment. The "pad" consisted of a top copy in red print which was the agreement signed by Bakewells' client, a pink coloured copy, which was supposedly sent to the client by SPFL pursuant to CCA, s. 63(2), a blue copy that was to be sent to Bakewells and a yellow copy that was required to be given to Bakewells' client pursuant to CCA s. 62(1).

4. The CCA loan agreements were entered into in order that clients of Bakewells who wished to make personal injury claims could meet the cost of disbursements incurred by Bakewells in the course of conducting the litigation together with the premiums due to After the Event Insurers ("ATE Insurers") in respect of After the Event policies by which those clients insured against the risk of the underlying claim being lost and thus of having to meet the legal costs of the defendant to those proceedings and repay the loan to SPFL. Bakewells undertook the conduct of the litigation pursuant to Conditional Fee Agreements ("CFAs") with their clients under which fees became payable to Bakewells only in the event that the claim succeeded as success was defined by the CFAs.

5. This litigation arises from the fact that 69 cases that Bakewells undertook using the model described above either were settled by accepting offers that were too low to allow repayment of the sums lent under the CCA loan agreements concerned to be

recovered from the settlement sums, or were dismissed or discontinued with no order as to costs (which inevitably meant that the loans the subject of the CCA loan agreement could not be repaid other than by the client or Bakewells). The ATE insurers avoided liability under the ATE policies in respect of each of the 69 failed claims. SPFL has decided not to pursue the clients who are the nominal borrowers under the CCA loan agreements concerned but to pursue the partners of Bakewells under clause 5.1 of the MoA. Bakewells maintain that SPFL is unable to pursue the nominal borrowers under the CCA loan agreements because they are "*irredeemably unenforceable*" by reason of the failure of the CCA loan agreements to comply with the CCA and various regulations made pursuant to the CCA.

6. SPFL's case is that (a) the CCA loan agreements are on proper analysis enforceable; but (b) even if that is not so, the obligation created by clause 5.1 is clear and it obliges Bakewells to pay "…*the amount of the Total Amount Payable under the Loan Agreement* …" that remains outstanding in any circumstances where "… *the Loan Agreement is unenforceable against the Borrower at the instance of* …" SPFL. The Defendants maintain that on proper construction clause 5.1 is a guarantee that in the circumstances is unenforceable. If contrary to the Defendants' case, the clause creates a primary obligation to pay SPFL, the Defendants maintain that the effect of clause 5.1 is not as broad as is alleged by SPFL but is confined in its scope to cases where the unenforceability is the result of a failure on the part of Bakewells to comply with its obligations under the MoA and in any does not apply where unenforceability arose prior to funds being paid out by SPFL pursuant to the relevant CCA loan agreement to or to the order of the nominal borrower. In any event, the Defendants deny that SPFL is entitled claim what is described as "default" interest from either the nominal borrowers under the CCA loan agreements or from Bakewells under clause 5.1.

The CCA Points

7. A wide variety of points are taken as to why the CCA loan agreements are irredeemably unenforceable by operation of various provisions of the CCA or the Regulations made pursuant to the CCA. I have focussed below on the main allegations made by the Defendants that are said to have this effect. If and to the extent that one is established it will not be necessary strictly to consider each of the other allegations made.

8. The CCA has undergone amendment but it is common ground that the provisions to which I refer below were those that applied to the CCA loan agreements. It is also common ground that the CCA loan agreements were "*regulated agreements*" and "*restricted use credit agreements*" within the meaning of the CCA.

9. *The absence of an express term specifying the applicable interest rate*

The CCA loan agreements were either in the form appended to this judgment or a form that did not differ materially from it. In each case the loan was for a fixed sum (usually £2000), which was identified as the "Amount of Credit" and interest was a fixed sum (usually £489). The repayment obligation was to repay the "Total Amount Payable" (that is the amount loaned together with the fixed interest sum) 18 months after the date of the agreement or earlier if the underlying claim was settled or concluded earlier. No interest rate was specified. The APR was stated to be 16.3%.

The terms and conditions that applied to each loan were those set out on the reverse of the relevant form. They are reproduced in the Appendix.

10. CCA S.61(1) provides:

> "(1) A regulated agreement is not properly executed unless:
>
> (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under s. 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner; and
>
> (b) the document embodies all the terms of the agreement, other than implied terms, and
>
> (c) the document is, when presented to or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible"

11. The "*prescribed terms*" referred to in s.61 are set out in the Consumer Credit (Agreements) Regulations 1983 ("the Agreements Regulations"). Reg.6 provides that "*the terms specified in Column 2 of Schedule 6 … in relation to the type of regulated agreement referred to in Column 1 … are hereby prescribed for the purpose of section 61(1)(a) …*". Paragraph 4 of Schedule 6 of the Agreements Regulations requires there to be a term stating the rate of interest on the credit to be provided under the agreement provided that the agreement was for "*… fixed-sum credit falling within the exceptions in paragraph 9(a) to (c) of Schedule 1 …*" of the Agreements Regulations. The exceptions that the Defendants contend are relevant are those set out at paragraphs 9(b) and (c) which respectively apply to fixed sum credit agreements:

> " (b) under which the total amount payable by the debtor to discharge his indebtedness in respect of the amount of credit provided may vary according to any formula specified in the agreement having effect by reference to … any…factor;
>
> (c) which provide for a variation of, or permit the creditor to vary … the amount or rate of any item included in the total charge for credit after the relevant date …"

12. SPFL maintain that the amount of interest payable is fixed at the amount stated whether the loan is repaid at the end of the term or an earlier date if the underlying case is completed before then. No rate is specified and in consequence neither of the exceptions relied on is engaged.

13. It is submitted by the Defendants that a rate is necessarily implicit in a fixed sum credit agreement and in consequence, if SPFL is correct in saying that the whole of the fixed sum is payable whether the loan is repaid at the end of the term or earlier in accordance with its terms, the rate of interest must necessarily vary if the loan is repaid earlier than the end of the 18 month term since the rate implicit in a repayment

say 6 months after the relevant agreement was entered into will be greater than the rate implicit if repayment is made at the end of the term. If this is right then the CCA loan agreements are agreements to which paragraph (c) of schedule 1 applies because it is an agreement that provides for a variation of the rate of interest that is payable depending on when repayment is effected. Alternatively, the Defendants assert that any reasonable construction of the agreement would result in the implication of a term whereby the interest payment would be pro rated dependent on when the loan was repaid. In that event the CCA loan agreement is one to which either paragraph (b) or (c) would apply.

14. SPFL's submissions on this point are those set out in Paragraph 64-66 of Mr. Dutton's skeleton submissions. Mr. Dutton does not argue for either the point pleaded in Paragraph 5(d) of the Reply – that there was no power of variation so that Paragraph 9(c) of Schedule 1 was not engaged– or that pleaded in Paragraph 15(e) of the Reply - that if a payment was made earlier than the term repayment date that would constitute an early settlement within the meaning of the Consumer Credit (Rebate on Early Settlement) Regulations 1983 ("the Early Settlement Regulations") and any reduction in the sum payable would be by operation of those regulations and thus did not affect the fixed term nature of the credit that was provided. This is not surprising. The absence of a power of variation is immaterial because paragraph 9(c) of Schedule 1 proceeds by reference to either a power of variation conferred by the terms of the agreement on the creditor or a term that provides for a variation. It is the latter that is relied on by the Defendants not the former. The Early Settlement Regulations are not material either – the point made by the Defendants is advanced by reference to the term of the CCA loan agreements that required the loan to be repaid either at the end of the fixed term or earlier if the underlying claim was settled or compromised. This is not an early settlement but settlement at the time fixed by the agreement. That being so the Early Settlement Regulations are of no application to the circumstances that are relied on by the Defendants.

15. Mr. Dutton's submission was that the point I am now considering took the Defendants nowhere because the CCA loan agreements do not charge interest by reference to a rate but required instead payment of a fixed sum on account of interest. I do not accept that submission. It is noteworthy that SPFL's own advertising material [1/128] refers in terms to one benefit for the client of the firm concerned being *"Competitive Interest Rates"*. A rate is necessarily implicit where a fixed sum is payable by way of interest on a loan repayable at the end of a fixed term. That much is apparent from the fact that SPFL were able to give an APR for each of the CCA loans. If the loan agreement provides that it is repayable either at the end of the term or an identifiable earlier date but the same fixed sum is payable then the implicit rate necessarily increases if repayment is made on the earlier identifiable date. In my judgment this engages Paragraph 9(c) because a provision that requires earlier repayment on a date that is identifiable only after the loan agreement has been entered into is a term that provides for " *… a variation of … the … rate of an[y] … item included in the total charge for credit after the relevant date*".

16. In his oral submissions, Mr. Dutton submitted first that it was not in practice expected by anyone that the loan would be repaid earlier than the end of the term. I do not accept the factual premise of this submission. Had a claim been commenced that was settled in excess of 90 days after a CCA loan agreement had been entered into, there

is no evidence that anyone thought the loan would not be repayable in accordance with its terms. The significance of the 90 day cut off is something I explain below. In essence however, there was an informal agreement between Bakewells and SPFL that if a loan was repaid within 90 days of the date of the relevant CCA loan agreement taking effect, no interest would be charged. The existence of the agreement between Bakewells and SPFL concerning what was to happen if repayment occurred within 90 days of a CCA loan agreement being entered into of itself suggests that the parties contemplated that there may be circumstances in which early repayment could occur.

17. In any event, in my judgment whether it was expected that a loan would in fact become repayable earlier than 18 months after the CCA loan agreement had been entered into is not to the point. The CCA loan agreements expressly provided that repayment earlier than the end of the term could be required where the underlying claim was settled or concluded. It is that which is said to engage the provisions that I am now considering. Whether in fact there was an early repayment is immaterial. The CCA loan agreements are to be tested for compatibility with the Agreements Regulations at the latest on the date when the first statutory copy of the agreement is sent to the borrower.

18. The main point made by Mr. Dutton in his oral submissions was that the relevant rate was the APR identified in each of the contracts or could be deduced from it. He accepted that APR and the rate of interest applicable are separate and different concepts but nonetheless maintained that in this case APR identified the rate of interest that applied by necessary implication. I am not able to accept that submission. As HHJ Waksman QC held in Sternlight and others v. Barclays Bank plc. and others [2010] EWHC 1865 (QB), APR is merely informational and is an average calculated by reference to various assumptions and complex formulae. What was required to be stated if the Agreements Regulations required it was the applicable rate of interest as an *"… inflexible condition of enforceability …"*. If, therefore, Mr. Dutton is correct to characterise the fixed sum payment as an obligation to pay a fixed sum by way of interest whenever in time the loan is in fact becomes repayable in accordance with its terms, I am not able to accept the submission that I should treat the APR that is stated in the relevant CCA loan agreement as satisfying the requirements of Paragraph 9(c) of Schedule 1. In my judgment to adopt such an approach would not merely not satisfy the requirement that there to be a term stating the rate of interest on the credit to be provided under the agreement but would defeat the purpose of such a provision being required, which is to draw to the attention of the borrower the effect of the agreement that he is contemplating entering into.

19. The alternative way in which the Defendants argue this part of the case is to maintain that in any event it is wrong for SPFL to contend that the same sum would be payable by way of interest in the event that the loan became repayable in accordance with its terms earlier than the end of the 18 month term. They contend that a term is to be implied into each CCA loan agreement that required the sum payable by way of interest to be pro-rated according to when in fact the loan was repaid. The implied term point was pleaded in Paragraph 15(c) of the re-amended Defence. No positive case was pleaded in relation to this allegation. In my judgment the Defendant's case as to the implication of a term concerning pro-rating is not merely unanswered by SPFL but is close to being unanswerable applying the principles that apply to the implication of terms summarised by Lord Hoffmann in A-G for Belize v. Belize

Telecom Limited [2009] UKPC 10 [2009] 1 WLR 1988 at [17] to [23] applying Trollope & Colls v. NWMRHB [1973] 1 WLR 601 *per* Lord Pearson at 609 and Equitable Life v. Hyman [2002] 1 AC 408 *per* Lord Steyn at 459. The alternative (that the same fixed sum would be payable whenever the loan became repayable in accordance with its terms) gives rise to potential outcomes that would be obviously absurd. If a claim was settled say 3½ months after the loan had been made because the claim was compromised then the requirement to pay the whole of the fixed sum would result in a payment being made that carried an implicit interest rate that would be extreme. Further, since interest is the sum payable to a lender for loss of the use of his money, the absence of an implied term to the effect contended for by the Defendants would illogically and un-commercially reward more to the lender the earlier the debtor was required to repay the loan in accordance with the terms of the CCA loan agreement, whereas commercially and logically interest should increase the longer the loan is outstanding. The express wording adopted suggests to me a failure to consider the implications of an obligation to repay earlier than the end of the term on an obligation to pay a fixed sum by way of interest. It is to fill this lacuna that it is necessary to imply a term to the effect contended for by the Defendants. If such a term is implied as in my judgment it should be, then both paragraph 9(b) and (c) of Schedule 1 are engaged.

20. All this leads me to conclude that the CCA did not contain all the prescribed terms because it omitted a term specifying the applicable rate of interest as required by Reg. 6 of, and paragraph 4 of Schedule 6 and paragraph 9 of schedule 1 to, the Agreement Regulations and in consequence that the agreements are irredeemably unenforceable by operation of CCA ss. 65(1) and 127(3).

21. *Failure to state how to perform repayment – payment of pro-rata interest*

The point, made in Paragraph 53 of the Defendants' written submissions, is that if the pro-rating term I have referred to above was not express then that amounts to a failure to comply with the obligation requiring a term to be included stating how the debtor is to discharge his obligations. This point is advanced by reference to Schedule 6, Paragraph 5 of the Agreements Regulations. This point was not pleaded but no objection was taken to it on that ground. Paragraph 5 of Schedule 6 provides:

> "A term stating how the debtor is to discharge his obligations under the agreement to make the repayments which may be expressed by reference to a combination of any of the following:
>
> (a) number of repayments;
>
> (b) amount of repayments;
>
> (c) frequency and timing of repayments
>
> (d) dates of repayments
>
> (e) the manner in which any of the above may be determined;

> or in any other way, and the power of the creditor to vary what is payable."

The existence of an implied term that affects the amount of the repayment to be made in the event that repayment takes place earlier than the end of the 18 month term but otherwise in accordance with the terms of the CCA loan agreement means that the term that states that the debtor is to repay the same total sum either at the end of the 18 month term or earlier if the underlying claim is settled is to that extent incomplete. It follows that this provision has not been complied with if and to the extent that there is an implied term to the effect alleged by the Defendants. If, no such term is to be implied and the agreement is to be treated as one that requires the payment of the fixed sum for credit whenever the loan is in fact repaid, then this point does not arise.

22. *Failure to state how to perform repayment – Unwind procedure*

It is common ground that there was an agreement or understanding between Bakewells and SPFL contained in or evidenced by correspondence passing between them that if a CCA loan was repaid within 90 days of the CCA loan agreement concerned being entered into no interest would be payable. This arrangement is not referred to anywhere in the CCA loan agreement. It was submitted on behalf of the Defendants that this constituted a breach of Paragraph 5 of Schedule 6 of the Agreements Regulations.

23. It was contended by Mr. Dutton in the course of his oral submissions that this point took the Defendants nowhere because this was part of the agreement between the Defendants and SPFL. I am not able to accept that submission. The CCA loans were not to Bakewells or from sums lent by SPFL to Bakewells. The loans were to the clients. The capacity to repay within 90 days free of interest was a provision that benefitted or potentially benefitted the borrowers under the CCA loans. It was a provision that was material to what had to be repaid and when. If paragraph 5 of schedule 6 was to be complied with then a term that reflected what in fact had been agreed ought to have appeared in the CCA loan agreements.

24. I am not able to accept the submission made by Mr. Dutton in his written submissions that this issue did not assist the Defendants because in fact none of the CCA loans were repaid within 90 days. Whether in fact there was an early repayment is immaterial. The CCA loan agreements are to be tested for compatibility with the Agreements Regulations at the latest on the date when the first statutory copy is sent to the debtor. It is common ground that there was the arrangement relied on by the Defendants. That being so, to be compatible with the regulations the CCA loan agreements should have recorded this as one of the express terms set out in the agreement.

25. *Incorrect Notice of Cancellation Rights*

The point that arises under this head is whether (as SPFL contend) the CCA loan agreements were "*debtor-creditor*" agreements ("DC agreements") or (as the Defendants contend) are "*debtor-creditor-supplier*" agreements ("DCS agreements"). The reason why this is important is because the notices that appear in the CCA loan agreements are based on Forms 6 and 12 within the Part II of the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 ("the Cancellation

Notices Regulations"). Forms 5 and 11 are those that apply to DCS agreements and notices based on Forms 6 and 12 would be the proper forms only if the CCA loan agreements were DC agreements. In any event, the notices had not been completed as required. SPFL contended that this was irrelevant because the agreements were DC agreements, and as such were not cancellable agreements because there had been no face to face negotiations between the creditor and the debtor.

26. The point is important because by CCA s. 64(1) a notice in the prescribed form had to be included in every copy of the agreement supplied to the debtor under CCA ss. 62 and 63. If that provision was not complied with, then it is common ground that the CCA loan agreements would be irredeemably unenforceable by operation of s. 127(4)(b). The requirements of the Cancellation Notices Regulations must be strictly complied with if these consequences are to be avoided – see Reg. 2(2) of the Cancellation Notices Regulations and Bank of Scotland v. Euclidian (No. 1) [2007] EWHC 1732 [2008] Lloyds Rep. IR 182 *per* Field J at [88]. It was accepted by Mr. Dutton in the light of this authority that if SPFL could not show the agreements to DC agreements there were no other points that could assist SPFL on the cancellation notices issue.

27. CCA s. 12 defines a DCS agreement as being "*… (b) a restricted use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements between himself and the supplier …*" It being common ground between the parties that the CCA loan agreements were restricted use credit agreements that fell within CCA s.11(1)(b), it follows that the sole issue that has to be resolved is whether the CCA loan agreements were made by SPFL " … *under pre-existing arrangements, or in contemplation of future arrangements between …*" SPFL and "*… the supplier …*". Given that it is common ground that there was a pre-existing arrangement between SPFL and Bakewells, it follows that in reality the only question that matters is whether Bakewells were "*… the supplier …*".

28. SPFL submit that Bakewells was not "*… the supplier …*" because the loans the subject of the CCA loan agreements were for the purpose identified in the definition of "*borrower*" in the MoA – that is for "*… payment of legal fees and outlays in respect of the provision of professional services …*" to the borrowing client. SPFL submit that on proper construction this was intended to mean and means the payment of disbursements such as court fees, medico-legal report fees and ATE insurance premiums. It did not cover and was not intended to cover Bakewells' profit costs because the fees to which they were entitled were the subject of conditional fee agreements between Bakewells and each client. SPFL submit that on any ordinary understanding the supplier of the services in respect of which such sums were payable was HMCTS (in respect of court fees), clinicians (in respect of medical report fees) and ATE insurers (in respect of ATE insurance premiums). Since the CCA loan agreements were not made under pre-existing arrangements with any of these entities, nor in contemplation of such arrangements, it therefore followed that the CCA loan agreements were not DCS agreements. The Defendants submit that SPFL's analysis is wrong because the purpose of the CCA loan agreements at least in part was to fund payments that Bakewells were obliged to pay on behalf of their client and in respect of which Bakewells was reimbursed from the sums borrowed by the clients under the CCA loan agreements.

29. The word "*suppler*" is defined in CCA s. 189 in terms that refer back to the meaning given to that word by CCA s. 11(1)(b). This establishes that a supplier is another party to a transaction that is being financed by the relevant loan agreement, other than the creditor. It follows that the Defendants case on this point must fail unless they are able to show that at least in part the CCA loan agreements were intended to finance the transaction between Bakewells and the client borrower.

30. Some reliance was placed by the Defendants on Guest and Lloyd, Encyclopaedia of Consumer Credit Law, Para 2-076 where the role of travel agents as suppliers is given some consideration. The distinction is drawn there between cases where the contract being financed is the agency agreement between the travel agent and the debtor (where the travel agent will be the supplier) and cases where the debtor contracts directly with the hotel or airline or tour operator concerned. Ultimately, the solution will "… *depend upon the precise contractual arrangements between the debtor, the travel agent and the provider of the services in each particular case …*".

31. I consider the distinction mentioned in the previous paragraph assists in resolving the question of who in this case is to be regarded as being "… *the supplier* …". If on proper analysis the obligation to pay disbursements is Bakewells' obligation as between them and the relevant service provider and if the effect of the contract of retainer between Bakewells and their client is one that requires the client to make good disbursements paid by the firm, the contract being financed at least in part will be the contract between Bakewells and the client.

32. The letter sent by Bakewells to their client is instructive. In relation to the CCA loan agreements it says this:

> "The cost of litigation can be expensive. As we have explained above you will need an insurance policy, and other documentation such as medical reports and hospital and General Practitioner's notes.
>
> That list is not exhaustive.
>
> To pay for this we would suggest that you sign the enclosed Consumer Credit Agreement with [SPFL]. This will allow us to draw down … the funds that we require to pay for the reports necessary to prove your case."

This is consistent with the obligation to meet disbursements being that of Bakewells but in respect of which Bakewells would seek reimbursement from their client and proposed doing so, in the cases where CCA loan agreements were entered into, by drawing down from the credit obtained by the client from SPFL. A similar analysis is to be found in the other standard client care letter relevant to industrial disease claims – the claim to be entitled to recover a fee payable to the assessors who introduced the client is of course dubious but that does not matter for present purposes – the letter contemplates that the loan will be used by the solicitors to meet disbursements. It is noteworthy that this letter contemplates that Bakewells would look to the client for money to meet disbursements in cases where a CCA loan agreement was not entered into.

33. The conditional fee agreement is consistent with the primary responsibility for meeting disbursements being Bakewells. Under the heading "*Paying Us*" the conditional fee agreement provides that "*if you win your case, you pay our basic charges, our disbursements and a success fee …*". In relation to cases where interim damages are obtained, the conditional fee agreement provides that Bakewells could require the client to pay part of the basic fee and "*… we may also require you to pay our disbursements and a reasonable amount for our future disbursements*". The Law Society Conditions that are incorporated into the Conditional Fee Agreement provide at Condition 3(f):

> "*Our Disbursements*
>
> Payment we make on your behalf such as:
>
> - Court fees
>
> - Expert fees
>
> - Accident report fees
>
> - Travelling expenses"

Clauses 4 and 5 refer throughout to '*our disbursements"*. All of this material is consistent with the idea that Bakewells incur a liability to make the payment to the service provider concerned – for example the clinician who carries out an examination and prepares a medical report for use as evidence – and will claim reimbursement from the client.

34. This approach reflects what has been understood to be the position for many years. As it is put in Paragraph 3.6 of the current edition of Cook on Costs:

> "Disbursements have been defined as 'such payments as the solicitor in the due discharge of his duty is bound to make whether his client furnishes him with money for the purpose, with money on account, or not, as for example court fees, counsel's fees, expenses of witnesses agents and stationers"

This principle applies also to the payment of fees charged by experts – see Principle 20.01 of the Code of Conduct then applicable to solicitors and the notes thereto.

35. In my judgment the items identified as being " … *our disbursements …"* in the Conditional Fee Agreements and client care letters were payments that Bakewells were obliged to discharge on behalf of their client as a incident of the contract of retainer between Bakewells and their client. Since the client was obliged to reimburse Bakewells and that obligation was financed by the CCA loan agreements to that extent the transaction being financed was the transaction between the debtor and Bakewells, being the contract of retainer between them, and SPFS had a pre-existing arrangement with Bakewells. In those circumstances, in my judgment Bakewells was to be regarded as "*… the supplier ...*" and the CCA loan agreement a DCS agreement. In those circumstances it was accepted that the relevant notices did not appear in the

CCA loan agreements and that in those circumstances the agreements were irredeemably unenforceable.

36. There were a number of other CCA points that were taken but in light of the conclusions I have reached so far I do not consider that it would be helpful to the parties or otherwise necessary or desirable that I should attempt to resolve those that remain. On the basis of the conclusions that I have reached so far, the CCA loan agreements were irredeemably unenforceable. I should mention CCA s.82 because some reliance was placed upon it. The effect of this provision is that where a regulated agreement is modified, the varied agreement has to be documented in terms that comply with CCA s.61(1). If that does not occur then the loan is unenforceable. It is not necessary I consider this point further in light of the conclusions I have reached so far. Where it remains material, I mention the point in passing hereafter.

The Effect of Clause 5.1 of the MoA

37. *The MoA's Express Terms*

In the MoA, the expression "the First Party" refers to SPFL and the expression "the Second Party" refers to Bakewells. In so far as is material, the MoA provides as follows:

> " …
>
> **ONE Definitions and Interpretations**"
>
> …
>
> "Borrower" means a client of the Second Party who has entered a Loan Agreement with the First Party for the purposes of payment of legal fees and outlays in respect of the provision of professional services to them by the Second Party and in the event of more than one client entering into a particular Loan Agreement, shall include reference to all of them.
>
> "CCA" means the Consumer Credit Act 1974 and all orders and regulations made pursuant or supplemental to that Act.
>
> …
>
> "Consumer Loan Agreement" means standard style loan agreement for loans made by the First Party to Borrowers who are individuals or partnerships.
>
> "Company Loan Agreement" means standard style loan agreement for loans made by the First Party to Borrowers who are limited companies incorporated under the Companies Acts.
>
> "Loan Agreement" means Consumer Loan Agreement or Company Loan Agreement as herein defined.
>
> **TWO**

2.1. (a) Subject to the terms of this Agreement the total sum allotted by the First Party as a provision which may be available to clients of the Second Party in respect of the Legal Fees Loan Fund is £250,000. The amount of the provision will be reviewed annually.

(b) Subject to the terms of this Agreement the maximum sum which may be provided as a loan from the Legal Fees Loan Fund to a Borrower shall be £2,000.

2.2 The First Party shall provide the Second Party with the appropriate standard Consumer Loan Agreement or Company Loan Agreement for execution by a Borrower in connection with the Legal Fees Loan Fund. The Loan Agreement shall *inter alia* provide that the purpose of the loan is for payment of legal fees and outlays to the Second Party incurred by the Borrower for professional services in relation to the Claim and that the Amount of the Credit or Loan in the Loan Agreement is mandated by irrevocable mandate to the Second Party for payment of legal fees and outlays.

2.3. The First Party agrees that on their execution of the Loan Agreement they, at the request of the Second Party and subject to the terms of this Agreement will pay the Amount of the Credit or Loan due in terms of the Loan Agreement to the Second Party...

…

THREE

3.1 The Second Party shall use all reasonable endeavours to advise Borrowers of the financial provisions provided by the First Party.

3.2 The Second Party shall ensure that the documentation in respect of each Loan Agreement is enforceable against the Borrower in accordance with its terms and in particular, but without limitation, that:

3.2.1 the terms of and obligations under the Loan Agreement are fully explained to the Borrower prior to the Borrower entering into the Loan Agreement;

3.2.2 such documentation is duly completed and validly executed;

3.2.3 copies of the Loan Agreement are supplied to the Borrower in accordance with the CCA; and

3.2.4 the Borrower is supplied with such information, or such copies of documents, as may from time to time be requested by the Borrower in accordance with the CCA, or as the First Party may from time to time require.

…

FIVE

5.1 In the event of any breach of the Loan Agreement by the Borrower or in the event that the Loan Agreement is unenforceable against the Borrower at the instance of the First Party, the Second Party hereby agrees to pay the First Party immediately upon demand the amount of the Total Amount Payable under the Loan Agreement which remains unpaid at the date of such breach or unenforceability together with any accrued interest and charges which remain unpaid. A certificate signed by the Accountant for the time being of the First Party shall ascertain and constitute conclusively the amount due in terms of this Clause by the Second Party to the First Party and such Certificate shall be final and binding on the Second Party.

5.2 The Second Party shall advise the First Party in writing as soon as reasonably practicable after it becomes aware of any breach of the Loan Agreement by the Borrower under the Loan Agreement.

SIX

…

6.4 The First Party shall be entitled to assign this Agreement and its rights and obligations there under. The Second Party shall be prohibited from assigning this Agreement or any of its rights under this Agreement.

…

6.6 The Second Party represents and warrants that: -

(a) The services provided or to be provided by them shall be provided to Borrowers in accordance with their agreement with Borrowers.

(b) Borrowers have been provided with full details of the cost of the service provided or to be provided.

6.7 Neither the First Party nor the Second Party is the Agent of the other and the First Party shall not be liable to any

> Borrower for any action, omission, negligence or breach of contract of the Second Party and the Second Party shall indemnify and keep indemnified the First Party against all claims, awards of damages, expenses and all losses or liabilities incurred by the First Party arising out of any such action, omission, negligence or breach of contract of the Second Party.
>
> ...
>
> 6.9 The Second Party shall supply to the First Party, within 9 months after each financial year end of the Second Party, a copy of the audited profit and loss account and balance sheet of the Second Party for such financial year (consolidated if, during such financial year the Second Party has had any subsidiaries) together with related directors' and auditors' reports.
>
> …
>
> 6.13 These presents shall constitute the entire Agreement and understanding between the Parties with respect to all matters to which they refer and these presents supersede and invalidate all other undertakings, representations and warranties relating to the subject matter thereof which may have been made by the parties either orally or in writing prior to the date thereof, and which shall become null and void from the date of delivery or deemed delivery hereof."

38. *The Issues*

The Defendants contend that:

i) Clause 5.1 of the MoA creates a guarantee obligation and thus cannot be enforced against the Defendants because

   a) There was no enforceable obligation on the clients to pay because the CCA loan agreements were irredeemably unenforceable for at least the reasons set out earlier in this judgment; and/or

   b) Variations to the CCA loan agreements (principally agreeing to an extension of the term of a loan) had the effect of releasing the Defendants as guarantors;

ii) If and to the extent that clause 5.1 creates a primary obligation on the part of the Defendants in favour of SPFL:

   a) The obligation does not arise where unenforceability results from SPFL's default in failing to ensure that its own CCA loan agreements were enforceable against the borrowers; and/or

   b) Clause 5.1 does not entitle SPFL to succeed in the circumstances of this case because the CCA loan agreements were unenforceable from the

outset and at a time therefore when no sum was unpaid by the borrowers because the obligation to repay had not arisen; and/or

iii) SPFL is not entitled to succeed because Clause 2 of the MoA contains a warranty that the forms supplied by SPFL would be *"appropriate"* which meant amongst other things that they would comply with the requirements of the CCA and the Regulations made thereunder and if otherwise they are liable the Defendants have suffered loss and damage by reason of the breach of that provision, in the sum that is otherwise due to SPFL from Bakewells, which the Defendants are entitled to set off.

There is a final issue that will need consideration if otherwise Bakewells is liable to SPFL as claimed. SPFL seeks to recover interest at the rate of 16.3% from the date when repayment should have occurred under each relevant CCA loan agreement. It is submitted by the Defendants that there is either no contractual basis for such a claim or the attempt to recover interest in whole or part fails by reason of the failure to comply with CCA, s. 77A. I consider this issue at the end of this judgment to the extent that it is necessary to do so.

39. *The Relevant Construction Principles*

i) The core principles applicable to a construction exercise of this sort are those identified by Lord Hoffmann in ICS v. West Bromwich BS [1998] 1 WLR 896 at 912H-913E which in summary are:

a) The true meaning of a document is what it would have conveyed to a reasonable person with all the background knowledge which would reasonably have been available to the parties down to the date when the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent) which a reasonable man would have considered relevant to the way in which the language used in the document would have been understood by a reasonable man– see principles (1) to (3) and BCCI v. Ali [2002] 1 AC 251 at [39]; and

b) If the words used in their natural and ordinary meaning result in an outcome that (in a commercial context) flouts business common sense, then that meaning must be made to yield to business commonsense – see principles (4) and (5);

ii) These principles apply to any type of contract – see BCCI v. Ali (ante) *per* Lord Nicholls at [26]-[29] and Static Control Components (Europe) Limited v. Egan [2004] EWCA Civ 392 [2004] 2 Lloyds Rep. 429 *per* Arden LJ at [27];

iii) It follows from the principles identified at (i) above that merely because the document has an apparently clear meaning on its face does not mean that the court cannot or should not look at the background but on the contrary should, precisely for the reasons identified by Lord Hoffmann in principles (4) and (5) in ICS v. West Bromwich BS (ante) – see Static Control Components (Europe) Limited v. Egan (ante) *per* Arden LJ at [27], though having carried out that exercise it may be that there is nothing in the background material that

assists on the construction questions that arise – see by way of example Conister Trust Limited v. Hardman & Co [2008] EWCA Civ 841; and

iv) It follows from (i) to (iii) above that construing Clause 5.1 of the MoA, means ascertaining the meaning the clause would convey to a reasonable person having all the background knowledge reasonably available to the parties to the MoA down to the date when it became binding between them – see Bank of Scotland v. Euclidian (No. 1) Limited (ante) *per* Field J at [31]

40. *Relevant Factual Background*

There is no significant disagreement as to the relevant factual background though in my judgment the assistance to be obtained from it in construing the MoA in general and Clause 5.1 in particular is limited.

41. Bakewells were and are a small firm of solicitors. Neither the third nor fourth defendant has any personal injury litigation experience. The second defendant was the partner responsible for the personal injury litigation department within the firm at all times material to these proceedings. There is no evidence that either he or any of the other partners or professional staff at the firm was a consumer credit law specialist or even had any relevant knowledge of that area of legal activity.

42. Mr Sutherland formed SPFL after a long career in commercial and retail banking. SPFL operated by borrowing money wholesale from banking lenders and lending it on to personal injury litigants for the purpose of enabling no win no fee personal injury litigation to be conducted on their behalf by solicitors with whom SPFL have entered into facility agreements such as the MoA.

43. The business model under which such firms operated was that which I have described already and was the model adopted by Bakewells. Bakewells acted for such clients under conditional fee agreements whereby no profit costs were payable unless the claim succeeded as success was defined by that agreement. An ATE insurance policy was taken out by the client which was meant to insure the client against the risk that in the event the underlying claim was lost the client would have to meet the costs of the defendant in the underlying proceedings or the cost of repaying the loan that was made to the client under the CCA loan agreements. The loans the subject of the CCA loan agreements were taken out in order that the client could reimburse Bakewells in respect of the disbursements the firm would incur in the course of conducting the underlying litigation including but not limited to court fees and medical and other expert fees and counsel's fees where counsel was not acting under a conditional fee agreement.

44. The loan was not and was not intended to meet the profit costs of the firm either in whole or in part. In the event that the claim was successful, the firm was entitled to recover its normal profit costs (the base costs) together with a 100% "mark up". The primary responsibility for meeting these fees remained with the client but subject to the recovery of costs from the defendant in the underlying litigation. In the event that the client was not successful as success was defined in the conditional fee agreement, then the firm recovered nothing other than the reimbursement of its disbursements and a claim was made against the ATE policy in order that the litigation costs of the other party to the personal injury litigation could be discharged without recourse to the

client and the loan the subject of the CCA loan agreement could be discharged, again without recourse to the client.

45. Overall, (a) this type of personal injury litigation would be profitable for the firm as long as the cases they took on had a better than 50% chance of success; (b) SPFL's lending of this type would be profitable for SPFL because of the margin that existed or should have existed between the cost to it of borrowing the money it lent and the interest it received on repayment; and (c) it should have been profitable for the ATE insurer because the premium income should have been greater than the sums that would have to be paid out under the policies assuming the cases concerned had a greater than 50% chance of success at the time the policy was underwritten. This method of operation was of benefit to clients who could not otherwise afford to litigate because it enabled them to recover damages and costs or most of the costs of the litigation if the claim succeeded and to avoid the costs or most of the costs that would otherwise be payable by them in the event that the claim did not succeed.

46. However, if a claim was lost or could not be started and the ATE insurer avoided the ATE policy, then SPFL could only obtain repayment from the debtor unless its agreement with Bakewells was drafted so as to enable it to recover its outlay from them. It could not recover its outlay from the debtor if either the debtor did not have the means to pay (something that the parties foresaw as likely to be so in at least some cases) or the CCA loan agreement was not enforceable for any reason.

47. It was reasonably foreseeable to at least Bakewells and its partners and SPFL that in at least some cases where the client debtor did not succeed the ATE insurer might avoid liability or the ATE insurer might fail and that if that happened it was unlikely that SPFL would be able to recover its outlay from all such clients. In the brochure issued by SPFL advertising this particular financial product to solicitors, the purpose of the scheme was advertised as one for use "*… where the client is unwilling/unable to make payments towards outlays in the interim period*". That suggests a belief on the part of SPFL that many and perhaps most clients who took advantage of this scheme would not be able to repay the loan other than from the damages and costs agreed or awarded to them in respect of their claim or from the proceeds of a claim under the ATE policy.

48. There is no evidence that Bakewells undertook an examination of the CCA loan documentation for compliance with the terms of the CCA either before the MoA was entered into or otherwise. I do not consider that to be material. They were or should have been aware that this was area and had been for many years a highly regulated area that was the subject of highly prescriptive legislation and they were or should have been aware of the terms of the MoA that SPFL were asking the Defendants to agree to. There is no evidence that the Defendants did not have a reasonable opportunity to take advice if they had wanted to.

49. Although Mr Sutherland said initially in the course of his oral evidence that he would not have been prepared to negotiate on the terms of the CCA documentation because it had been drafted for SPFL by a law firm that was ostensibly a specialist and experienced in the field, later in his evidence he was prepared to accept that if it had been suggested to him that the documentation might not be enforceable for a technical

reason he would have consulted those solicitors rather than reject the point out of hand. I accept this evidence as self evident commercial good sense.

50. *Issue 1 - The Guarantee Issue*

The first construction issue that arises is whether Clause 5.1 of the MoA creates a guarantee obligation or a primary obligation to pay the sums identified in the clause in certain defined events.

51. Clause 5.1 creates an obligation to pay in one of two events. The events are (a) any breach of the Loan Agreement by the debtor; or (b) that the Loan Agreement is unenforceable against the debtor "… *at the instance of* …" (meaning "by") SPFL. If the first event occurs then Bakewells' obligation is to pay SPFL the Total Amount Payable under the relevant CCA loan agreement which remains unpaid at the date of the breach. If the second event occurs, then Bakewells' obligation is to pay SPFL the Total Amount Payable under the relevant CCA loan agreement which remains unpaid "*… at the date of such … unenforceability*".

52. Mr Dutton submits that on proper construction the clause creates a primary obligation to pay a defined sum in certain defined events, not a guarantee obligation. The essential indicia of a guarantee were described by Lord Diplock in Moschi v. Lep Air Services Limited [1973] AC 331 in these terms:

> "It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation to see to it that another person, the debtor, does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only."

In consequence:

> "… whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor's liability to the creditor is also the measure of the guarantor's."

The obligation is a secondary one because:

> "It was the debtor's failure to perform his primary obligation … that constituted a failure by the guarantor to perform his own primary obligation to the creditor to see that the instalments were paid by the debtor, and substituted for it a secondary obligation of the guarantor to pay to the creditor a sum of money for the loss he thereby sustained. It is the guarantor's own secondary obligation, not that of the debtor, that the

> creditor is enforcing in his claim for damages for breach of his contract of guarantee"

This is to be distinguished from a contract of indemnity, which is a primary obligation to make good a loss suffered by another. That liability is wholly independent of any liability that might arise as between the debtor and creditor. The purpose of such an arrangement is to protect the creditor against the possibility that the underlying transaction becomes unenforceable. The effect of Mr Dutton's submission is that is precisely what Clause 5.1 does.

53. In my judgment Clause 5.1 creates a primary obligation to pay the sums defined if the relevant identified event occurs, and is not a guarantee. I say that for the following reasons.

54. First, there is nothing in the language of the parties that suggests that what was intended was that Bakewells would undertake to see that the debtor would perform his, her or its primary obligations under the relevant CCA loan agreements. There is no reason why the court should strain to construe an obligation of this nature as a guarantee. There is nothing within the factual background that would justify construing the words used by the parties as having been intended to create a guarantee obligation notwithstanding the words that have been used.

55. Secondly, the language actually used suggests positively that creating a guarantee obligation was not the intention because the obligation arises not merely in the event of a breach but in the event that an obligation of the debtor has become unenforceable. It is difficult to see how the obligation can be an obligation to see that the debtor complies with his obligations if those obligations have become unenforceable by operation of law as between the debtor and SPFL, even in the sense contended for by the Defendants.

56. Thirdly, all parties knew at all times that a CCA loan agreement to which the MoA applied would only come into existence if there was a relationship of solicitor and client between the debtor and Bakewells or such a relationship was about to come into existence and thus that the issue concerning unenforceability would or at least could arise at a time when that relationship was still subsisting. It is difficult to see how a solicitor could properly take on an obligation, or reasonably be expected to take on an obligation, to see that a client performed an obligation to a third party in circumstances where that obligation was not enforceable as a matter of law against that client by that third party and the solicitor would be required so to advice his or her client. To my mind this is a critical point because this point ceases to be a cause for concern once it is accepted that the provision on true construction creates a liability that is independent of that which may subsists between the debtor and creditor. If the obligation was one of guarantee then a situation of potential conflict would exist from the outset. Such a situation would not exist from the outset if the obligation was of the sort contended for by SPFL.

57. Fourthly, the language is consistent only with a primary obligation to pay an ascertainable sum on the occurrence of either trigger event, not to pay damages for breach of an obligation to see to it that the debtor complies with his obligations under the CCA loan agreement concerned. Had it been a guarantee, it would not have been

necessary to spell out the obligation to pay a sum of money. Whilst this point is perhaps not one that of itself would enable a final conclusion to be reached, it one that assists when taken together with the other points I have mentioned.

58. *Issue 1(a) - no enforceable obligation*

This issue would have been material only if I had considered that Clause 5.1 created a guarantee obligation. It does not and thus this issue does not arise. Had I concluded that Clause 5.1 created a guarantee obligation, this issue would have required me to consider whether the obligation under the guarantee could arise in respect of an obligation that was not itself enforceable by SPFL against the debtor.

59. This is an issue of some difficulty. It did not arise in Conister Trust Limited v. Hardman & Co (ante) because the Court of Appeal held (see [65]) that the obligation there being considered was not a guarantee. It is true to say that the Court went on to construe the word "*liability*" as used in Clause 4.5 of the relevant agreement in that case as meaning something that was enforceable. However, the language used was different from that used in clause 5.1 and, unlike clause 5.1, the provision being construed in that case did not expressly apply to sums due under a loan agreement that was unenforceable against the debtor.

60. Eldridge and Morris v. Taylor [1931] 2 QB 416 is a Court of Appeal authority relied on by the Defendants for the proposition that a guarantee could not be enforced against a guarantor where the primary obligation was unenforceable by operation of the now repealed s.6 Moneylenders Act 1927. The language used by the Judges in Eldridge and Morris v. Taylor (ante) is consistent with them having thought that the effect of unenforceability was that the primary liability had "*gone*" as Scrutton LJ put it at 420. Greer LJ appears to have thought that the failure to supply the relevant document discharged the liability of the principal debtor so that the surety was discharged as well (422) and Slesser LJ also appears to have considered that unenforceability was equivalent to the principal debtor ceasing to be liable (423). However in Orakpo v. Manson Investments [1978] AC 95, Lord Diplock said of this provision at 236C that "… *agreements …that are unenforceable are not devoid of all legal effect…*". Scrutton LJ appears to have entertained some doubt about the position as he had described it in Eldridge and Morris v. Taylor (ante) by the time he came to decide Temperance Loan Fund Limited v. Rose [1932] 2 KB 522 because he decided that case on a point that meant he did not have to reconsider the effect of unenforceability – see 529, and Slesser LJ clearly had doubts about the point – see 533-534. Greer LJ considered himself bound by Eldridge and Morris v. Taylor (ante).

61. The effect of unenforceability was most recently considered by Flaux J in McGuffick v. RBS [2009] EWHC 2386 (Comm) [2010] Bus LR1108 where at [67] he said that

> "… the effect of unenforceability under section 65 is that the rights of the creditor and corresponding liability or obligations of the debtor do exist but are unenforceable, rather than that those rights were never acquired or that the creditor was deprived of those rights whilst the agreement was unenforceable … the creditor cannot enforce the agreement. Its rights continue but cannot be enforced".

Flaux J was not concerned with the (now for me hypothetical) question of whether a guarantee would be enforceable notwithstanding that the primary obligation of the debtor could not be enforced by the creditor.

62. I am inclined to think that ultimately this issue will depend whether the surety will be entitled to claim an indemnity from the principal debtor notwithstanding that the primary liability between the principal debtor and the creditor is unenforceable. This in turn will depend on whether the mere unenforceability of the underlying obligation is sufficient to bar such a claim or whether there is a public policy reason for not permitting enforcement of a guarantee of a principal obligation that is made unenforceable by operation of the CCA. This is a point of some difficulty particularly given the state of the authorities and I prefer to leave it to be decided in a case where the point is determinative.

63. *Issue 1(b) - Variations to the CCA loan agreements*

This issue does not arise because of my conclusion that Clause 5.1 of the Agreement creates a primary obligation to pay a defined sum on the occurrence of defined events, not a guarantee obligation. The point that would have arisen had I not reached this conclusion is whether the agreement between the second defendant and SPFL whereby the length of the term of the CCA agreements was extended had the effect of discharging Bakewells' liability under Clause 5.1 by reference to the rule that any material variation to the terms of the principal contract will discharge the surety.

64. Given that this issue does not arise on my construction of the effect of Clause 5.1 again I prefer to express no concluded view on the question However, one recognised exception to this rule is that it will be of no application where the variation that is said to trigger such a discharge is unenforceable. If, as the Defendants have argued in Paragraphs 78-80 of their skeleton submissions, the effect of CCA s.82 is that the variation created a new agreement that had to be documented in a CCA complaint form, the result is that the CCA loan agreements once varied could not be enforced because no new documentation was prepared. If CCA s. 82 has that effect (and I consider that it does) then the question of the effect of the principle I am now considering will depend on whether unenforceability would prevent enforcement of a guarantee. If it does, then the point I am now considering does not arise. If that is not the case then it would appear that the effect of the principle I am now considering would be to discharge a guarantor who had guaranteed the due performance of the debtor. However, as I have said this issue does not arise and I express no concluded view about it.

65. *Issue II(a) – Assuming clause 5.1 creates a primary and not a guarantee obligation, does liability arise under clause 5.1 if unenforceability is the result of the CCA loan agreements not being CCA compatible forms?*

SPFL's submissions on this issue are straight forward: the obligation on the part of the Defendants to pay is triggered wherever and whenever a relevant CCA loan agreement is unenforceable by SPFL against the debtor thereunder and that the effect of the language used by the parties means that there is no limit to the reasons why the relevant CCA loan agreement is unenforceable before Clause 5.1 can take effect in accordance with its terms.

66. I start by considering the effect of the MoA as a whole. Clause 2.2 imposed on SPFL an obligation to provide "… *appropriate standard …"* CCA loan agreement forms to Bakewells. Clause 3.2 required Bakewells to "… *ensure that the documentation in respect of each* … [CCA loan agreement] … *is enforceable against the Borrower in accordance with its terms and in particular but without limitation …"* would ensure that the provisions of Paragraphs 3.2.1-3.2.4 were complied with. Clause 5.1 is in the terms described already.

67. The Defendants argue that the effect of Clause 3.2 is to limit Bakewells' role in relation to the CCA loan agreements to that identified in sub-paragraphs 3.2.1-3.2.4 and that the effect of that provision whether of itself or in combination with Clause 2.2 is to limit Bakewells' liability under clause 5.1 in the event that a CCA loan agreement is unenforceable to cases where the enforceability is the result of a failure on the part of Bakewells or those for whom they are responsible to carry out competently the tasks referred to in sub paragraphs 3.2.1-3.2.4. It is said that this construction coincides with the background evidence that Bakewells did not have skill or experience in consumer credit law, the relevant forms were supplied to them on a take it or leave it basis and that no one thought for a moment that Bakewells would check the forms for CCA compliance. All this leads the Defendants to submit that even if the language used in the MoA suggests a different outcome, it should nonetheless be construed in the sense for which they contend.

68. I do not accept that the construction for which the Defendants contend is correct for the following reasons. First it ignores the true nature of the obligation imposed by clause 3.3. The sub-paragraphs cannot be read in isolation from the text that precedes them. The key phrase is "… *shall ensure that the documentation in respect of each Loan Agreement is enforceable against the Borrower in accordance with its terms and in particular, but without limitation* …". This language is entirely clear. It imposes an obligation on Bakewells to make certain that each CCA loan agreement was enforceable against the debtor. The words in the sub-paragraphs describe tasks that come within the scope of the earlier general words. They are not words that limit the scope of the preceding general words. I do not accept that the position of SPFL was that it would not have listened to any comments concerning the forms. I accept the evidence given by Mr Sutherland towards the end of his evidence that if it had been suggested by Bakewells that for any reasons the forms might not be enforceable in accordance with their terms he would have returned to the solicitors who had drafted the forms. This is self evident commercial common sense. This is an area of commercial activity that is permeated by technicality. It would have been absurd for someone in the position of Mr Sutherland to simply have ignored advice as to unenforceability had it been offered.

69. I do not accept either the suggestion made on behalf of the Defendants that their submission is supported by the terms of Clause 2.2. The Defendants submit that the obligation on SPFL to "… *provide* … [Bakewells] … *with the appropriate standard Consumer Loan Agreement or Company Loan Agreement for execution by a Borrower* …" was an obligation to provide forms that were CCA compliant. I do not accept that is the correct meaning of the words used. It is a submission that concentrates on the word "*appropriate*" but ignores both the words that follow and the definitions contained in clause 1. The phrases "*Consumer Loan Agreement*" and "*Company Loan Agreement*" are both defined phrases. As clause 1 of the MoA says:

> "Consumer Loan Agreement" means standard style loan agreement for loans made by the First Party to Borrowers who are individuals or partnerships.
>
> "Company Loan Agreement" means standard style loan agreement for loans made by the First Party to Borrowers who are limited companies incorporated under the Companies Acts"

70. Thus the word "*appropriate"* is referring to the Loan Agreement that is appropriate for the particular Borrower. That this is so is apparent from the definition of "*Borrower"* and "*Loan Agreement*", both of which are defined phrases. "*Borrower*" means a client of Bakewells " … *who has entered a Loan Agreement with* …" with SPFL and "*Loan Agreement*" means " … *Consumer Loan Agreement or Company Loan Agreement as* …" defined in the MoA being the definitions to which I have referred above. The word "*appropriate"* in context means whichever of a Consumer Loan Agreement or a Company Loan Agreement is appropriate to the particular Borrower under consideration. There is nothing about the meaning of the word "appropriate" when read in the context in which it is used in the MoA to justify the assertion that it is referring to anything other than one of the two types of Loan Agreement referred to in the MoA.

71. All this leads me to conclude that the obligation to ensure – that is to make certain - that any CCA loan agreement that was entered into by a client was enforceable was one that was imposed by the terms of the MoA on Bakewells. There is nothing in the language of clause 2.2 that suggests it imposed any obligation on SPFL other than to supply to Bakewells the type of Loan Agreement as defined that was suitable for the particular client. Which would be appropriate would depend on whether the client was a company or an individual. When read against that background it is not surprising that clause 5.1 does not qualify the phrase "… *unenforceable against the Borrower …"*. That provision is entirely consistent with clause 2.2 and 3.2 when those clauses are properly understood, not inconsistent with it as the Defendants have submitted.

72. It was suggested by the Defendants that a term should be implied into the MoA to qualify the otherwise unqualified language of clause 5.1. It was said that such a term should be implied applying the principles summarised by Lord Hoffmann in A-G for Belize v. Belize Telecom Limited (ante) at [17] to [23] in order to take account of what was said to be the common assumption of the parties that the CCA forms proffered by SPFL were CCA compatible.

73. In my judgment, no such term is to be implied. The language of the parties is clear for the reasons that I have explained. The language used by the parties firmly placed the risk of such an occurrence with Bakewells. The fact that the parties are working under a common assumption does not preclude or prevent the parties from agreeing what is to happen in the event that the assumption proves to be misplaced. That is what the parties have done here. The term that the Defendants seek to have implied would contradict the plain language of the parties in clause 3 and 5 of the MOA. As Lord Hoffmann said in Paragraph 16 of his judgment in A-G for Belize v. Belize Telecom Limited (ante), *"(t)he court has no power to improve upon the instrument which it is called upon to construe… it cannot introduce terms to make it fairer or more reasonable. It is concerned to only to discover what the instrument means …"*

Critically he added at Paragraph 17 *"… implication arises only when the instrument does not expressly provide for what is to happen when some event occurs…."*.As he concluded, *"… the implication of a term is not an addition to the instrument. It spells out what the instrument means."*.

74. *Issue II(B) – Assuming clause 5.1 creates a primary and not a guarantee obligation does liability arise under clause 5.1 if the CCA loan agreements were unenforceable from the outset?*

The Defendants contend that even if clause 5.1 is capable of imposing on Bakewells contractual responsibility for any defects in the forms produced by SPFL, it is not triggered in the circumstances of this case because the obligation imposed by clause 5.1 in the event of unenforceability is to pay "… *immediately upon demand the amount of the Total Amount Payable under the Loan Agreement which remains unpaid at the date of such … unenforceability …"* The Defendants further submit that the CCA loan agreements were all unenforceable from the start and so before any money was in fact advanced and thus at a time when there was no sum that was unpaid.

75. In my judgment this is not the effect of Clause 5.1. Such an outcome would be commercially absurd if the purpose of Clause 5.1 in combination with clause 3.2 is to shift contractual responsibility for unenforceability on to Bakewells. Such a construction would produce absurd consequences. It would mean that Bakewells would be liable for unenforceability arising after sums had been advanced under the relevant CCA loan agreement (as for example might arise as a result of the modifying agreement provisions contained in CCA s.82) even though on Bakewells' case SPFL was responsible for unenforceability as a result of modification of the original CCA loan agreement by extending the loan. On the other hand, if this part of Bakewells' construction case was correct, it would mean that there would be no liability under clause 5.1 for unenforceability resulting for example from a failure on the part of Bakewells to comply with clauses 3.3.2 – 3.3.4 notwithstanding that Bakewells accept that they would be liable for such a breach. If that is correct, then presumably a claim for breach of clauses 3.3.2 – 3.3.4 would have to be advanced as a claim in damages for breach of clause 3 rather than as a claim for payment under clause 5.

76. All these artificialities are avoided however if clause 3.2 and 5.1 are read together as in my judgment they should be. The phrase "*Total Amount Payable under the Loan Agreement*" is the sum shown in the relevant CCA loan agreement in Line E of Part 2 as is apparent from clause 2.2 of the standard terms of each CCA loan agreement. Clause 3.1 creates the obligation and clause 5.1 provides for the consequences of a breach of that obligation. The phrase "… *the amount of the Total Amount Payable under the Loan Agreement which remains unpaid at the date of such … unenforceability…"* defines what is payable by Bakewells. In my judgment the key words are "… *remains unpaid …"* because that focuses attention on what is meant by "*unenforceability"* in this context. The only relevant obligation of the debtor to the creditor for these purposes is the obligation to pay in accordance with the terms of the CCA loan agreement concerned. Thus unenforceability can only arise when (a) an obligation on the part of the debtor to pay has arisen under the terms of the relevant CCA loan agreement and (b) that obligation is unenforceable. Those two conditions

can only arise after an agreement had been entered into and an obligation to repay has arisen. Under the terms of the CCA loan agreement that obligation arose only either

i) 18 months after the date of the CCA agreement or prior to that date when the claim was settled or concluded – see Part 2 of the Schedule to each CCA loan agreement and clause 2.2 of the standard terms of each CCA loan agreement ("standard terms"), which provided:

> "You agree to pay to us the Total Amount Payable by the instalments detailed at Part 2 of the Schedule and at the times shown in the Schedule. It is critical to the terms of this Agreement that every payment is made on the date it is due"

or

ii) if an event of default occurred – see clause 3 of the standard terms which provided:

> "3.1 On the occurrence of any of the following events you will be held to be in default and the full balance outstanding with interest accrued thereon less any applicable rebate will, subject to the Consumer Credit Act 1974, become immediately due and payable: -
>
> 3.2 if you fail to make payment of any sum due under this Agreement, time of payment being critical; or
>
> 3.3 if you fail to perform or observe any term of this Agreement or any other obligation undertaken by you relative to this Agreement; or
>
> 3.4 if any of the information provided by you to us either before or after your signature to this Agreement is discovered to be untrue; or
>
> 3.5 if you apply for an interim order or enter into a voluntary arrangement or informal arrangement or composition with or execute a deed of assignment or trust for the benefit of your creditors or any of them for the purposes of rescheduling your debts or a petition for bankruptcy is presented by or against you or you are or become apparently insolvent, or
>
> …;
>
> 3.6 if, for any reason, you end your association with, and/or cancel your instructions to, the Solicitors."

77. It was suggested on behalf of the Defendants that the effect of irredeemable unenforceability was to prevent non repayment from being a breach of the agreement by the debtor. I do not accept this submission. First, as I have said earlier in this

judgment, there is a distinction to be drawn between the existence of an obligation and its enforceability. The inability of the creditor to enforce an obligation to pay does not mean that the debtor is not in breach of his repayment obligation by not repaying as and when he is required to do so by the terms of the CCA loan agreement. Secondly, even if this is wrong, the effect of clauses 3.2 and 5.1 is to impose a payment obligation on Bakewells irrespective of whether the non payment is a breach of the agreement or not. The obligation imposed on Bakewells is an obligation to pay either in the event of breach by the debtor or in the event that the relevant CCA loan agreement is unenforceable.

78. *Issue III – Does clause 2 of the MoA contain a warranty by SPFL that the forms supplied to Bakewells would be CCA compliant?*

It does not for the reasons set out in paragraphs 69-71 above.

The Interest Issues

Two issues arise – first the degree to which if at all SPFL would be entitled to recover default interest from the principal debtor; and secondly whether any limit on what could notionally be recovered from the debtor by way of interest applies to a claim under clause 5.1 made against Bakewells.

79. *Default Interest as between the debtor and SPFL*

CCA s. 77A provides that:

> "(1) The creditor under a regulated agreement for fixed-sum credit must give the debtor statements under this section.
>
> ...
>
> (4) The creditor is not required to give the debtor any statement under this section once the following conditions are satisfied–
>
> (a) that there is no sum payable under the agreement by the debtor; and
>
> (b) that there is no sum which will or may become so payable.
>
> (5) Subsection (6) applies if at a time before the conditions mentioned in subsection (4) are satisfied the creditor fails to give the debtor–
>
> (a) a statement under this section within the period mentioned in subsection (1E)
>
> (6) Where this subsection applies in relation to a failure to give a statement under this section to the debtor–
>
> (a) the creditor shall not be entitled to enforce the agreement during the period of non-compliance;

> (b) the debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it; and
>
> (c) the debtor shall have no liability to pay any default sum which (apart from this paragraph)–
>
> (i) would have become payable during the period of non-compliance; or
>
> (ii) would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period (whether or not the breach continues after the end of that period)."

80. It is common ground that no annual statements were supplied by SPFL. In consequence it follows that the CCA loan agreements are unenforceable though this particular defect can be rectified but, critically, s.77A(6)(b) provides that "*the debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it*" and s.77A(6)(c) provides that " *the debtor shall have no liability to pay any default sum which … would have become payable during the period of non-compliance …*". The Defendants submit that the effect of these provisions is that any default interest otherwise recoverable under the terms of the CCA loan agreements is not recoverable for any period after 1st October 2009. Aside from this difficulty created by these provisions the term that would entitle SPFL to recover default interest under the relevant CCA loan agreements is clause 2.4 which provides:

> "If any sum payable by you under this Agreement is not paid by its due date, without prejudice to our other rights, we may require you to pay to us default interest. Default interest will be calculated at the rate of interest used to calculate the interest detailed at Part 2 of the Schedule from the date the payment was due until it is paid."

It is common ground that this requirement has not been complied with to date. In those circumstances, the debtors concerned are not liable to SPFL for default interest from the date relied on by the Defendants.

81. *Default Interest as between Bakewells and SPFL*

As I have said already, the sum recoverable under clause 5.1 is the "…*Total Amount Payable under the Loan Agreement …*" . Part 2 of the Schedule to the CCA loan agreements defines the Total Amount Payable as being the sum of the principal and the total charge for credit by providing as follows:

Part 2 Particulars of Loan

A Amount of the Credit **£**	The Administration Fee **B** is

B Administration Fee **£**	
C Interest **£**	
D Total Charge for Credit (**B+C**) **£**	
E Total Amount Payable (**A+D**) **£**	**APR** **%**

There is no provision within the definition of the Total Amount Payable for default interest. This might be oversight but there is a discernible commercial logic to this approach because SPFL had a choice whether to pursue the debtor under the CCA loan agreement or to make a claim against Bakewells under the MoA. There is however no logic in requiring Bakewells to pay more in the event that SPFL elected to pursue the debtor and in consequence default interest accrued that could have been avoided by claiming against Bakewells.

82. Even if this point is wrong and on proper construction any default interest that becomes payable as between the debtor and SPFL is to be treated as coming within the scope of the Total Amount Payable, it is nonetheless not payable in this case for the reasons I have given already. This is not an unenforceability issue - no default liability can arise if and to the extent that the statutory provisions to which I have referred apply. In those circumstances no liability to pay default interest arises as against the debtor; and in consequence such interest cannot on any view form part of the Total Amount Payable even if in principle such interest if due could form part the Total Amount Payable. Since Bakewells' liability under clause 5.1 is capped at the amount of the Total Amount Payable remaining due, they can be no more liable for default interest than can the debtor.

83. SPFL's only answer to this point is to rely on the certification provision within clause 5.1. The relevant part of the clause provides|:

> "A certificate signed by the Accountant for the time being of the First Party shall ascertain and constitute conclusively the amount due in terms of this Clause by the Second Party to the First Party and such Certificate shall be final and binding on the Second Party."

SPFL relies on a letter dated 9 February 2013 from CLB Coopers and the attachment thereto as the certificate for these purposes. The relevant part of the letter is as follows:

> "We have examined the relevant ledger for Bakewells solicitors as set out in the schedule hereto. In accordance with Paragraph 5.1 of the …[MoA] … we certify that the Total Amount

> Payable including principal sums, accrued interest and charges unpaid thereon … has been correctly extracted from the company's books and records as at 12 January 2010 … "

84. The Defendants do not accept that this document is a certificate for the purposes of Clause 5.1 and thus it does not establish conclusively the sum due as at that date or at all and is not final or binding on the Defendants. In my judgment the Defendants case on this point is to be preferred. The letter relied on by SPFL does not purport to perform the function that clause 5.1 required if a certificate was to be conclusive. The accounts were required to ascertain and then certify the amount due under clause 5.1. The certificate did not purport to do that. What it purported to do was confirm that what appeared in the Schedule to the letter reflected what appeared in the books of SPFL. That however was not the issue. What was required was that the accountants consider the clause and then resolve what sums were recoverable and then certify those sums. That has not been done. This of itself is sufficient to resolve this issue.

85. Nothing that I have said in this section of the judgment affects the interest that SPFL is otherwise entitled to recover under s.35A of the Senior Courts Act 1985.

Conclusions

86. SPFL is entitled to recover from Bakewells under clause 5.1 of the MoA the total of the Total Amount(s) Payable under the unenforceable CCA loan agreements but not any sum by way of default interest. SPFL is entitled to recover interest at a rate and for a period to be assessed after hand down of this judgment on the judgment sum resulting from these conclusions pursuant to s.35A of the Senior Courts Act 1985.

APPENDIX

SUTHERLAND PROFESSIONAL FUNDING LIMITED

CREDIT AGREEMENT REGULATED BY THE CONSUMER CREDIT ACT 1974
Cancellable Agreement : Principal

OFFICE USE ONLY
Client Reference
Solicitor's Reference

This Agreement is made between Us, Sutherland Professional Funding Limited, having our registered office at 22 Chester Street, Edinburgh EH3 7RA, our successors and assignees, ("the Lender") and You (whose name and address appear in the Schedule below) ("the Borrower") upon the Terms and Conditions set out on this and overleaf which together constitute this Agreement.

THE SCHEDULE:

Part 1 Your Details

Full Name	Date of Birth
Address	Postcode
Full Name	
Address	Postcode

Part 2 Particulars of Loan

A Amount of the Credit	£	The Administration Fee B is due one month after the date the Amount of credit is paid to the Solicitors. The Total Amount Payable E is payable months after the Date of this Agreement or in the event that your claim is settled or concluded prior to the due date.
B Administration Fee	£	
C Interest	£	
D Total Charge for Credit (B+C)	£	
E Total Amount Payable (A+D)	£	APR %

Part 3 Borrower's Solicitor

Name	("the Solicitors")
Place of Business	

YOUR RIGHT TO CANCEL

Once you have signed this agreement, you will have for a short time a right to cancel it. Exact details of how and when you can do this will be sent to you by post by the Lender.

We may send you information by post or contact you by telephone about other products or services we supply and we consider may be of interest to you. YOU HAVE A RIGHT AT ANY TIME TO STOP US FROM CONTACTING YOU FOR THESE PURPOSES. PLEASE WRITE TO US AT 22 CHESTER STREET, EDINBURGH, EH3 7RA OR TELEPHONE US ON 0131 226 4041 IF YOU WISH US TO STOP.

I confirm that I have read the information sheet "Use of Your Personal Information" and agree that the information I have provided in this agreement may be processed and disclosed in the ways described.

This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms.	Signature on behalf of the Lender
Signature(s) of Borrower(s)	
Date(s) of Signature	Date of this Agreement

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Terms and Conditions

1 **Agreement**

1.1 This Agreement shall not be treated as having been made until it is signed by you and by or on our behalf.

2 **Payment**

2.1 You authorise us to pay the Amount of the Credit ("the loan"), to the Solicitors.

2.2 You agree to pay to us the Total Amount Payable by the instalments detailed at Part 2 of the Schedule and at the times shown in the Schedule. It is critical to the terms of this Agreement that every payment is made on the date it is due.

2.3 You irrevocably authorise us to obtain from the Solicitors, all sums payable to you under any claim or settlement which shall be paid towards discharging any sums due under this Agreement.

2.4 If any sum payable by you under this Agreement is not paid by its due date, without prejudice to our other rights, we may require you to pay to us default interest. Default interest will be calculated at the rate of interest used to calculate the interest detailed at Part 2 of the Schedule from the date the payment was due until it is paid.

2.5 You shall pay to us on demand all legal and other costs, charges and expenses incurred by us in consequence of your breach of this Agreement. These expenses will include but not be limited to the expense of taking steps, including court action, to obtain payment, tracing you and communicating with you when you are in breach of this Agreement.

3 **Default**

3.1 On the occurrence of any of the following events you will be held to be in default and the full balance outstanding with interest accrued thereon less any applicable rebate will, subject to the Consumer Credit Act 1974, become immediately due and payable:-

3.2 if you fail to make payment of any sum due under this Agreement, time of payment being critical; or

3.3 if you fail to perform or observe any term of this Agreement or any other obligation undertaken by you relative to this Agreement; or

3.4 if any of the information provided by you to us either before or after your signature to this Agreement is discovered to be untrue; or

3.5 if you apply for an interim order or enter into a voluntary arrangement or informal arrangement or composition with or executes a deed of assignment or trust for the benefit of your creditors or any of them for the purposes of rescheduling your debts or a petition for bankruptcy is presented by or against you or you are or become apparently insolvent; or

3.6 if in Scotland, you become insolvent or suffer sequestration or a receiver, judicial factor or trustee to be appointed over any of your estate or effects or suffer an arrestment, charge, attachment, exceptional attachment order or diligence to be issued or levied on any of your estate or effects or suffer any exercise or threatened exercise of a landlord's hypothec; or

3.7 if, for any reason, you end your association with, and/or cancel your instructions to, the Solicitors.

4 **Agency**

4.1 The Solicitors are not our agent and we shall not be liable to you for any action, default or omission by them.

5 **Joint and several liability**

5.1 Where there are more than one of you, each is separately responsible for performing all of the obligations of the Borrower under this Agreement.

6 **Waiver**

6.1 No time or indulgence extended to the Borrower nor any waiver of any breach of this Agreement by the Borrower shall prejudice, affect or restrict our rights and powers.

IMPORTANT - YOU SHOULD READ THIS CAREFULLY

YOUR RIGHTS

The Consumer Credit Act 1974 covers this agreement and lays down certain requirements for your protection which must be satisfied when the agreement is made. If they are not, we cannot enforce the agreement against you without a court order.

The Act also gives you a number or rights. You have a right to settle this agreement at any time by giving notice in writing and paying off all amounts payable under the agreement which may be reduced by a rebate.

If you would like to know more about the protection and remedies provided under the Act, you should contact either your local Trading Standards Department or your nearest Citizens' Advice Bureau.

SUTHERLAND PROFESSIONAL FUNDING LIMITED

CREDIT AGREEMENT REGULATED BY THE CONSUMER CREDIT ACT 1974
Cancellable Agreement : Solicitors' copy

OFFICE USE ONLY
Client Reference
Solicitor's Reference

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Full Name	Date of Birth
Address	Postcode
Full Name	
Address	Postcode

Part 2 Particulars of Loan

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B Administration Fee	£	
C Interest	£	
D Total Charge for Credit (B+C)	£	
E Total Amount Payable (A+D)	£	APR %

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Name	("the Solicitors")
Place of Business	

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We may send you information by post or contact you by telephone about other products or services we supply and we consider may be of interest to you. YOU HAVE A RIGHT AT ANY TIME TO STOP US FROM CONTACTING YOU FOR THESE PURPOSES. PLEASE WRITE TO US AT 22 CHESTER STREET, EDINBURGH, EH3 7RA OR TELEPHONE US ON 0131 226 4041 IF YOU WISH US TO STOP.

I confirm that I have read the information sheet "Use of Your Personal Information" and agree that the information I have provided in this agreement may be processed and disclosed in the ways described.

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Terms and Conditions

1 **Agreement**
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2.2 You agree to pay to us the Total Amount Payable by the instalments detailed at Part 2 of the Schedule and at the times shown in the Schedule. It is critical to the terms of this Agreement that every payment is made on the date it is due.
2.3 You irrevocably authorise us to obtain from the Solicitors, all sums payable to you under any claim or settlement which shall be paid towards discharging any sums due under this Agreement.
2.4 If any sum payable by you under this Agreement is not paid by its due date, without prejudice to our other rights, we may require you to pay to us default interest. Default interest will be calculated at the rate of interest used to calculate the interest detailed at Part 2 of the Schedule from the date the payment was due until it is paid.
2.5 You shall pay to us on demand all legal and other costs, charges and expenses incurred by us in consequence of your breach of this Agreement. These expenses will include but not be limited to the expense of taking steps, including court action, to obtain payment, tracing you and communicating with you when you are in breach of this Agreement.
3 **Default**
3.1 On the occurrence of any of the following events you will be held to be in default and the full balance outstanding with interest accrued thereon less any applicable rebate will, subject to the Consumer Credit Act 1974, become immediately due and payable:-
3.2 if you fail to make payment of any sum due under this Agreement, time of payment being critical; or
3.3 if you fail to perform or observe any term of this Agreement or any other obligation undertaken by you relative to this Agreement; or
3.4 if any of the information provided by you to us either before or after your signature to this Agreement is discovered to be untrue; or
3.5 if you apply for an interim order or enter into a voluntary arrangement or informal arrangement or composition with or executes a deed of assignment or trust for the benefit of your creditors or any of them for the purposes of rescheduling your debts or a petition for bankruptcy is presented by or against you or you are or become apparently insolvent; or
3.6 if in Scotland, you become insolvent or suffer sequestration or a receiver, judicial factor or trustee to be appointed over any of your estate or effects or suffer an arrestment, charge, attachment, exceptional attachment order or diligence to be issued or levied on any of your estate or effects or suffer any exercise or threatened exercise of a landlord's hypothec; or
3.7 if, for any reason, you end your association with, and/or cancel your instructions to, the Solicitors.
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4.1 The Solicitors are not our agent and we shall not be liable to you for any action, default or omission by them.
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5.1 Where there are more than one of you, each is separately responsible for performing all of the obligations of the Borrower under this Agreement.
6 **Waiver**
6.1 No time or indulgence extended to the Borrower nor any waiver of any breach of this Agreement by the Borrower shall prejudice, affect or restrict our rights and powers.

IMPORTANT - YOU SHOULD READ THIS CAREFULLY
YOUR RIGHTS
The Consumer Credit Act 1974 covers this agreement and lays down certain requirements for your protection which must be satisfied when the agreement is made. If they are not, we cannot enforce the agreement against you without a court order.
The Act also gives you a number or rights. You have a right to settle this agreement at any time by giving notice in writing and paying off all amounts payable under the agreement which may be reduced by a rebate.
If you would like to know more about the protection and remedies provided under the Act, you should contact either your local Trading Standards Department or your nearest Citizens' Advice Bureau.

SUTHERLAND PROFESSIONAL FUNDING LIMITED

CREDIT AGREEMENT REGULATED BY THE CONSUMER CREDIT ACT 1974
Cancellable Agreement : Second Statutory Copy

OFFICE USE ONLY
Client Reference
Solicitor's Reference

This Agreement is made between Us, Sutherland Professional Funding Limited, having our registered office at 22 Chester Street, Edinburgh EH3 7RA, our successors and assignees, ("the Lender") and You (whose name and address appear in the Schedule below) ("the Borrower") upon the Terms and Conditions set out on this and overleaf which together constitute this Agreement.

THE SCHEDULE:

Part 1 Your Details

Full Name	Date of Birth
Address	Postcode
Full Name	
Address	Postcode

Part 2 Particulars of Loan

A Amount of the Credit	£	The Administration Fee B is due one month after the date the Amount of credit is paid to the Solicitors. The Total Amount Payable E is payable months after the Date of this Agreement or in the event that your claim is settled or concluded prior to the due date.
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C Interest	£	
D Total Charge for Credit (B+C)	£	
E Total Amount Payable (A+D)	£	APR %

Part 3 Borrower's Solicitor

Name	("the Solicitors")
Place of Business	

YOUR RIGHT TO CANCEL

You have a right to cancel this agreement. You can do this by sending or taking a WRITTEN notice of cancellation to Sutherland Professional Funding Limited, 22 Chester Street, Edinburgh EH3 7RA. You have FIVE DAYS starting with the day you received this copy. You can use the form provided.

If you cancel this agreement, any money you have paid [and any property given as security][2] must be returned to you. You will still have to repay any money lent to you. But if you repay all of it before your first instalment is due – or, if you are not paying by instalments, within one month after cancellation – you will not have to pay interest or other charges.

We may send you information by post or contact you by telephone about other products or services we supply and we consider may be of interest to you. YOU HAVE A RIGHT AT ANY TIME TO STOP US FROM CONTACTING YOU FOR THESE PURPOSES. PLEASE WRITE TO US AT 22 CHESTER STREET, EDINBURGH, EH3 7RA OR TELEPHONE US ON 0131 226 4041 IF YOU WISH US TO STOP.

I confirm that I have read the information sheet "Use of Your Personal Information" and agree that the information I have provided in this agreement may be processed and disclosed in the ways described.

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Terms and Conditions

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3.3 if you fail to perform or observe any term of this Agreement or any other obligation undertaken by you relative to this Agreement; or
3.4 if any of the information provided by you to us either before or after your signature to this Agreement is discovered to be untrue; or
3.5 if you apply for an interim order or enter into a voluntary arrangement or informal arrangement or composition with or executes a deed of assignment or trust for the benefit of your creditors or any of them for the purposes of rescheduling your debts or a petition for bankruptcy is presented by or against you or you are or become apparently insolvent; or
3.6 if in Scotland, you become insolvent or suffer sequestration or a receiver, judicial factor or trustee to be appointed over any of your estate or effects or suffer an arrestment, charge, attachment, exceptional attachment order or diligence to be issued or levied on any of your estate or effects or suffer any exercise or threatened exercise of a landlord's hypothec; or
3.7 if, for any reason, you end your association with, and/or cancel your instructions to, the Solicitors.
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4.1 The Solicitors are not our agent and we shall not be liable to you for any action, default or omission by them.
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5.1 Where there are more than one of you, each is separately responsible for performing all of the obligations of the Borrower under this Agreement.
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6.1 No time or indulgence extended to the Borrower nor any waiver of any breach of this Agreement by the Borrower shall prejudice, affect or restrict our rights and powers.

IMPORTANT - YOU SHOULD READ THIS CAREFULLY
YOUR RIGHTS
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The Act also gives you a number or rights. You have a right to settle this agreement at any time by giving notice in writing and paying off all amounts payable under the agreement which may be reduced by a rebate.
If you would like to know more about the protection and remedies provided under the Act, you should contact either your local Trading Standards Department or your nearest Citizens' Advice Bureau.

CANCELLATION FORM

(Complete and return this form **ONLY IF YOU WISH TO CANCEL THE AGREEMENT**)

To: Sutherland Professional Funding Limited, 22 Chester Street, Edinburgh EH3 7RA.

I/We* hereby give notice that I/We* wish to cancel the agreement No.

Signed _____

Date _____

* Delete as appropriate

SUTHERLAND PROFESSIONAL FUNDING LIMITED

CREDIT AGREEMENT REGULATED BY THE CONSUMER CREDIT ACT 1974
Cancellable Agreement : First Statutory Copy

OFFICE USE ONLY
Client Reference
Solicitor's Reference

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Full Name	
Address	Postcode

Part 2 Particulars of Loan

A Amount of the Credit	£	The Administration Fee B is due one month after the date the Amount of credit is paid to the Solicitors. The Total Amount Payable E is payable months after the Date of this Agreement or in the event that your claim is settled or concluded prior to the due date.
B Administration Fee	£	
C Interest	£	
D Total Charge for Credit (B+C)	£	
E Total Amount Payable (A+D)	£	APR %

Part 3 Borrower's Solicitor

Name	("the Solicitors")
Place of Business	

YOUR RIGHT TO CANCEL

Once you have signed, you will have for a short time a right to cancel this agreement. You can do this by sending or taking a WRITTEN notice of cancellation to Sutherland Professional Funding Limited, 22 Chester Street, Edinburgh EH3 7RA.

If you cancel this agreement, any money you have paid [and any property given as security][2] must be returned to you. You will still have to repay any money lent to you. But if you repay all of it before your first instalment is due – or, if you are not paying by instalments, within one month after cancellation – you will not have to pay interest or other charges.

We may send you information by post or contact you by telephone about other products or services we supply and we consider may be of interest to you. YOU HAVE A RIGHT AT ANY TIME TO STOP US FROM CONTACTING YOU FOR THESE PURPOSES. PLEASE WRITE TO US AT 22 CHESTER STREET, EDINBURGH, EH3 7RA OR TELEPHONE US ON 0131 226 4041 IF YOU WISH US TO STOP.

I confirm that I have read the information sheet "Use of Your Personal Information" and agree that the information I have provided in this agreement may be processed and disclosed in the ways described.

This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms. Signature(s) of Borrower(s) Date(s) of Signature	Signature on behalf of the Lender Date of this Agreement

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Terms and Conditions

1 **Agreement**
1.1 This Agreement shall not be treated as having been made until it is signed by you and by or on our behalf.
2 **Payment**
2.1 You authorise us to pay the Amount of the Credit ("the loan"), to the Solicitors.
2.2 You agree to pay to us the Total Amount Payable by the instalments detailed at Part 2 of the Schedule and at the times shown in the Schedule. It is critical to the terms of this Agreement that every payment is made on the date it is due.
2.3 You irrevocably authorise us to obtain from the Solicitors, all sums payable to you under any claim or settlement which shall be paid towards discharging any sums due under this Agreement.
2.4 If any sum payable by you under this Agreement is not paid by its due date, without prejudice to our other rights, we may require you to pay to us default interest. Default interest will be calculated at the rate of interest used to calculate the interest detailed at Part 2 of the Schedule from the date the payment was due until it is paid.
2.5 You shall pay to us on demand all legal and other costs, charges and expenses incurred by us in consequence of your breach of this Agreement. These expenses will include but not be limited to the expense of taking steps, including court action, to obtain payment, tracing you and communicating with you when you are in breach of this Agreement.
3 **Default**
3.1 On the occurrence of any of the following events you will be held to be in default and the full balance outstanding with interest accrued thereon less any applicable rebate will, subject to the Consumer Credit Act 1974, become immediately due and payable:-
3.2 if you fail to make payment of any sum due under this Agreement, time of payment being critical; or
3.3 if you fail to perform or observe any term of this Agreement or any other obligation undertaken by you relative to this Agreement; or
3.4 if any of the information provided by you to us either before or after your signature to this Agreement is discovered to be untrue; or
3.5 if you apply for an interim order or enter into a voluntary arrangement or informal arrangement or composition with or executes a deed of assignment or trust for the benefit of your creditors or any of them for the purposes of rescheduling your debts or a petition for bankruptcy is presented by or against you or you are or become apparently insolvent; or
3.6 if in Scotland, you become insolvent or suffer sequestration or a receiver, judicial factor or trustee to be appointed over any of your estate or effects or suffer an arrestment, charge, attachment, exceptional attachment order or diligence to be issued or levied on any of your estate or effects or suffer any exercise or threatened exercise of a landlord's hypothec; or
3.7 if, for any reason, you end your association with, and/or cancel your instructions to, the Solicitors.
4 **Agency**
4.1 The Solicitors are not our agent and we shall not be liable to you for any action, default or omission by them.
5 **Joint and several liability**
5.1 Where there are more than one of you, each is separately responsible for performing all of the obligations of the Borrower under this Agreement.
6 **Waiver**
6.1 No time or indulgence extended to the Borrower nor any waiver of any breach of this Agreement by the Borrower shall prejudice, affect or restrict our rights and powers.

IMPORTANT - YOU SHOULD READ THIS CAREFULLY
YOUR RIGHTS
The Consumer Credit Act 1974 covers this agreement and lays down certain requirements for your protection which must be satisfied when the agreement is made. If they are not, we cannot enforce the agreement against you without a court order.
The Act also gives you a number or rights. You have a right to settle this agreement at any time by giving notice in writing and paying off all amounts payable under the agreement which may be reduced by a rebate.
If you would like to know more about the protection and remedies provided under the Act, you should contact either your local Trading Standards Department or your nearest Citizens' Advice Bureau.