Neutral Citation Number: [2019] EWHC 2279 (QB)

Case No: HQ17X02945

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 23rd August 2019

Before :

Anthony Metzer QC sitting as a Deputy Judge of the High Court

- -

Between :

Aniekan Mary Boyo	**Claimant**
- and -	
Lloyds Bank Plc	**Defendant**

- -
- -

The Claimant appearing in person with a McKenzie Friend, her father, Christopher Boyo
The Defendant represented by Mr Lee Finch of Counsel,
(instructed by TLT Solicitors)

Hearing dates: 9th and 10th July 2019

- -

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.

.....

The Claim and Background Circumstances

1. The Claimant has brought proceedings against the Defendant for defamation (including malicious falsehood); breach of contract and breach of common law duty in respect of a report that the Defendant made to Credit References Agencies which the Defendant maintains took place in January 2013 in relation to an overdraft on the Claimant's student current account.

2. The Claimant held three accounts with the Defendant's banking group – The Student Current Account with the Defendant which I shall refer to as "The Account" was overdrawn in the sum of £987.84 as at 9 August 2012 but she also had two accounts with the Halifax, one of which was £3,795 in credit and the other £117 in credit. The Halifax was part of the Lloyds Banking Group but was structurally a separate entity.

3. On 9 August 2012, the Defendant wrote to the Claimant (Trial Bundle P47) stating:

> "Recent risk assessment on your accounts has highlighted concerns and as a result we have taken the decision to close all the accounts you currently hold with us in two months' time. The two-month notice period is set out in our terms and conditions and starts from the date of this letter. In the meantime, I have placed a block on all of your accounts to stop all transactions. You will need to make other arrangements for any credits, direct debits or standing orders set up on your accounts as no further payments will be made …
>
> "If you are in debt with us on any of your accounts you will need to make arrangements to repay the outstanding balance owed to us. We understand that it may not always be possible for you to repay the full amount within two months. If this is the case, you need to visit one of our branches to discuss this further. Please make sure you take this letter with you as a reference".

4. As a result, the account was blocked as were the Claimant's two other accounts with Halifax.

5. It appears from Paragraph 7 of Mr Richard Cox's witness statement who gave evidence for the Defendant and was not challenged on this that the reason for

blocking the account was "because of concerns over the Claimant's conduct of the three accounts". When he gave oral evidence Mr Cox indicated that at the time there was a suspicion of fraud but was keen to make clear that he was not alleging the Claimant (or anyone connected with her) had carried out any fraudulent activity.

6. The Claimant who was a student at the time was extremely concerned by the letter in consequence of the accounts being frozen and made a complaint. (There is some dispute as to whether that was oral or at a meeting with her father and a representative of the Defendant) – which prompted a further letter from the Defendant dated 14 August 2012 in which the Defendant apologised for the inconvenience caused to the Claimant and reminded her of its terms and conditions when the Claimant had opened her account with the Defendant and informed her that the letter gave the Claimant two months' notice to make other banking arrangements and stating that if the Claimant had not closed her account within that period, a cheque would be sent for the remaining balance whereas if she was overdrawn she would need to repay what she owed by the date shown on the letter. The letter concluded by informing the Claimant that she had the right to contact the Financial Ombudsman Service (FOS) within six months.

7. The Claimant together with her father who assisted her in all material regards, did lodge a formal complain to the FOS on 18 September 2012 but on 26 October 2012, the FOS confirmed that the complaint was not upheld and that as a consequence the Defendant was not required to reinstate the Claimant's bank account. At Page 423(2) of the Trial Bundle, the FOS stated:

> "Whilst it is appreciated Ms Boyo's frustration with this matter, Lloyds TSB's decision to close her account is a legitimate exercise of its commercial judgment. This is not something with the Financial Ombudsman Service ordinarily

investigates and it is not appropriate to do so in this case. The decision is in line with the terms and conditions of the account and therefore there is insufficient evidence of a bank error".

8. The Claimant then wrote further letters both to the Defendant on 15 October 2016 and to Moorcroft Debt Recovery Limited, whom the Claimant agreed was acting on behalf of the Defendant, on 14 October 2016, essentially as Pre-Action Protocol (PAP) letters. Moorcroft Debt Recovery Limited responded on 18 October 2016 making clear that any default applied to the Claimant's credit file would be done by the client (the Defendant).

9. The Defendant responded on 26 October 2016 (Trial Bundle page 66) which stated:

"Where we cannot return an account to order with the customer or no payments are received, we take a decision to close an account and transfer the outstanding balance to Recoveries. Our records show that your account was closed on 4 January 2013 and the sum of £1,080.90 transferred to Recoveries.

For clarity, the benefit to customers when this action is taken is that no further interest and charges are applied; however a default is recorded which remains on your credit file for a period of six years".

10. The Claimant responded with further letters on 3 November 2016 in which she threatened proceedings would be instigated by 18 November 2016 to which Lloyds responded as follows:

"After reading your further comments, I can confirm that a Formal Demand letter was sent to you on 4 December 2012. This notified you that your account would be closed and that a default would be applied to your credit file unless you cleared the arrears or came to an arrangement with us. Our records show you called us on 12 December 2012 and confirmed you had received our letter. I am therefore unsure why you feel we have failed to notify you of the consequences of not repaying the amount owed to the bank.

"I have already explained the default was correctly applied to your credit file when your account was closed and transferred to Recoveries on 4 January 2013. It will remain on your credit file for a period of six years, no mistake has been made in this regard".

11. The Claimant wrote again on 3 January 2017 confirmed that she did not receive a Formal Demand on 4 December 2012 and denied calling the Defendant on 12 December 2012. She wrote again on 7 February 2017 to which the Defendant responded on 10 February 2017 in which the Defendant (then) maintained:

> "As part of the closure process in relation to the above account, we issued a Default Notice. Our Default Notice letters are computer produced and we are not obliged to retain a copy of these. Our records show that this letter was issued by first-class mail to you on 4 December 2012 and this was not returned as undelivered. I believe, therefore, that it is correct for us to consider that this legal document should be deemed as served".

12. The Claimant wrote a further letter as part of Pre-Action Protocol on 3 March 2017 and issued proceedings on 14 August 2017. The amended Particulars of Claim was served on 7 November 2017 to which there was a response by Defence dated 4 December 2017. The Defendant made a Part 18 CPR request on 8 August 2018 to which the Claimant responded.

13. As indicated above, the claims instigated by the Claimant comprise defamation, breach of contract and breach of common law duty. The Defendant denied all the causes of action maintaining in respect of defamation that the report was accurate; that the Claimant consented to the reporting; that the report to the Credit Reference Agency was covered by common law qualified privilege; and that the Defamation claim was time-barred under Section 4 of the Limitation Act 1980. In respect of the breaches of contract / common law duty, the Defendant denied any breach of any contractual obligation or common law duty.

14. The Claimant seeks substantial damages from the Defendant and made an application to increase the value of her claim from around £440,000 to around £1,900,000. That application remains outstanding to be dealt with at the end of a

trial of a number of preliminary issues following the order of Deputy Master Leslie on 3 December 2018 in which he ordered a trial on three preliminary questions:

(1) Does the Claimant have any defamation or malicious falsehood claim against the Defendant;

(2) Has the Defendant breached its contract with the Claimant;

(3) Has the Defendant breached any common law duty it owed to the Claimant?

15. Were all three questions to be answered in the negative, the claim would fail and therefore any questions of quantum would not arise.

Trial Management

16. The Claimant has been assisted throughout by her father, Christopher Boyo. He was permitted to address the court at all stages with the leave of various masters and represented the Claimant in her successful opposition to the Defendant's application for summary judgment to dismiss the claim or strike out or dismiss individual parts of it before Deputy Master Bard gave judgment on 12 July 2018. Mr Boyo was a witness of fact relied upon by the Claimant and provided a witness statement dated 6 March 2019. The matter was canvassed before me and although Mr Finch on behalf of the Defendant indicated a measure of concern given that he was a witness, he did not oppose Mr Boyo continuing in the role effectively of a McKenzie Friend and noted in his skeleton argument that his "witness statement does not add much to the Claimant's own witness statement". And although the point had been raised, the Defendant was happy to be guided by the Court and would consent to him assisting the Claimant in any event if the Court considered it appropriate. The Claimant indicated she wished her father to act for her at the hearing and in the

circumstances I permitted him carrying on that role albeit that he was also a witness on behalf of the Claimant.

17. As far as witness evidence is concerned, there were therefore two witness on behalf of the Claimant. The Claimant herself whose witness statement for the trial was dated 4 March 2019 and that of her father dated 6 March 2019. The only witness called by the Defendant was Richard Cox, referred to above, who provided two witness statements dated 6 March 2019 and 27 June 2019. Their witness statements are to be found in the trial bundle at Pages 508 to 536; 537 to 551(A); 552 to 606(6) and 618 to 652 respectively which includes numerous exhibits and I shall refer to aspects of the witness evidence where in dispute within this Judgment without citing the full extent of their evidence. As I indicated at the trial on a number of occasions, I considered Mr Boyo conducted the case on behalf of his daughter courteously, properly and with considerable skill given that he is a non-lawyer. I was mindful to ensure that the Claimant being a litigant in person would not be disadvantaged given the skills of Mr Finch but was satisfied throughout and ensured throughout that both parties understood exactly what was required to assist me and I was provided with skeleton arguments from both parties which addressed the issues at the outset of the trial and, upon request, both parties provided written closing submissions which were of considerable assistance.

18. The parties agreed at the close of the evidence that I was not required to make any ruling on the question of consent to the reporting which the Defendant conceded it was prepared to abandon and in respect of malicious falsehood as a separate tort which the Defendant accepted was subsumed within the defamation claim. Importantly and at the end of submissions, Mr Finch on behalf of the Claimant

conceded, having taken instructions, that no Default Notice was served upon the Claimant by the Defendant despite earlier correspondence to the contrary.

Approach to the Evidence

19. A considerable amount of the evidence was not in dispute between the parties but there were significant areas of dispute where credibility of the witnesses would need to be determined. The approach I took to the evidence upon hearing oral evidence where there was a conflict between a recollection and contemporaneous documentation was to follow the guidance of Leggatt J (as he then was) in Gestmin SGPASA S.A. v Credit Suisse (UK) Limited 2013 EWHC 3560 (comm) namely:

> "To place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts" (at Paragraph 22).

20. That approach has been followed in Lachaux v Lachaux [2017] EWHC 385 (FAM). The Defendant's case was based upon contemporaneous documentation to a large extent although some of the contemporaneous documentation supported the Claimant. Further, the absence of certain contemporaneous documentation also supported the Claimant but I also noted the case asserted on a number of occasions by the Claimant and, in particular, by her father was that the notes, particularly those of Moorcroft's Debt Recovery Agency were fabricated. I also note the guidance is particularly of assistance where there is a question of reliability of evidence in terms of memory recollection. It is of some assistance but it is to be noted that this is not a case where the Claimant claims her memory is failing but is asserting that aspects of the Defendant's case are false and fraudulent.

The Default Notice Issue

21. Until the close of submissions, the Defendant had maintained that it was possible that the Defendant served a Default Notice upon the Claimant. Early correspondence appeared to suggest that the Defendant had indeed served such a Default Notice which the Claimant specifically denied. In Mr Cox's second witness statement, he stated that some of the correspondence from the Defendant could suggest that but due to passage of time the Defendant had been unable to locate a copy of the Default Notice or specific confirmation of when or even if it was sent. There was reference on the record of a "solicitor's letter" sent on 4 December 2012 which was not copied or retrieved and although the terms of such a note suggested a Default Notice. That appeared to be the position of the Defendant until the concession. I consider that concession was properly made as I would have found in the Claimant's favour that no Default Notice was sent to her but by reason of the concession that is no longer an issue. The central question therefore is not whether or not she received the Default Notice, which it has been accepted by the Defendant she did not, but whether there is a legal requirement to serve a Default Notice prior to reporting a default to a Credit Reference Agency that placed the Defendant in breach of the Consumer Credit Act 1974.

Other Issues

22. There were a number of subsidiary issues which at least formally I am not required to make a ruling upon some of which have troubled the Claimant greatly, for example whether the Defendant was entitled to charge interest upon an overdrawn sum in the account; whether there was a meeting between the Claimant, her father and the representative of the Defendant at the local Billericay branch; whether there had been a formal agreement for the Claimant to repay the £20 per month, which the Claimant undoubtedly did pay until the full sum was repaid and the purport and

the effect of Clause 18.3 of the Defendant's standard terms and conditions as the contract claim relied solely upon Clause 18.6. Other disputes of fact are however necessary to be determined in respect of issues of credibility and limitation.

Factual Points of Dispute

23. One issue was whether the Claimant sought to pay money in to reduce the debt before 27 February 2013. I accept that the Claimant and her father probably went into the local branch on or about 13 August 2012. They certainly made a complaint which prompted the response on 14 August 2012 from the Defendant. I also find that the Claimant through her father was offering to pay £20 per month from a relatively early stage before the final agreement was reached on 27 February 2013. However, I do not find a formal agreement was reached between the Claimant and the Defendant at any earlier date. I make those findings for a number of reasons, most particularly because I find that the contemporaneous diary notes of Moorcroft Debt Recovery are to a very large extent accurate and certainly have not been entered fraudulently. There would be no basis for them to act in that manner and at least some of the entries were accepted by the Claimant and her father in oral evidence. It is noteworthy that the account history makes reference to the offer being accepted on 27 February 2013 and the first payment of £20 per month was made on 4 March 2013. There is no evidence any money was paid in before that date but I accept the evidence of Mr Cox that if the Claimant had attended the local branch with the closure letter as instructed, payment would have been taken no doubt after discussion with the fraud team. The situation would be that sums of money would be taken to reduce the debt as indeed took place but the account was not reopened for any other purposes. I accept the evidence from Mr Cox that it would not be in the Defendant's commercial interest to refuse payment and having

reached a decision on the basis of suspicion of fraudulent activity in the accounts, the Defendant had reached the difficult decision to terminate the relationship with the Claimant. Both parties accepted that the relationship between the Claimant and the Defendant effectively broke down from the date of the first letter of 9 August 2012.

24. I am prepared to accept that the Claimant and her father sought to persuade the Defendant and possibly Halifax too that sums owed to the Defendant could be met by monies credited to the Halifax accounts. However, I accept the evidence of Mr Cox that all three accounts were frozen and Halifax would not have been able to send money to the Account.

25. I further note that both the Claimant and her father gave inconsistent evidence of when the Claimant first made attempts to make payments, initially the Claimant suggested late October and then she said throughout the period from August and there was no detail provided. I reject the evidence from the Claimant that she attempted to pay the full amount save possibly by the route which was not available to her of transferring money from the Halifax accounts. Given the extent of negotiation and disagreement apparent from the Moorcroft Recovery diary, it would be nonsensical to suggest that the full amount was going to be paid by, for example, the Claimant's father or some other source beside the Claimant's accounts. It follows therefore that I also reject the evidence of Mr Boyo that he made repeated attempts to pay money in on his daughter's behalf, again it was non-specific and no payments were accepted and the evidence of Mr Cox was that had the letter of 9 August 2012 been brought along together with a letter of authority from the Claimant he could have done so in cash. Mr Boyo appeared to accept in cross-

examination that he did not take the letter of 9 August with him when he attended the branch.

26. I also take into account that although there were a number of letters of complaint and pre-action protocol letters, there was no detailed letter of complaint regarding a bare refusal to accept funds. The only letter of complaint within the bundle is dated is 12 November 2012 and makes no reference to attempted payments by either the Claimant or her father. Furthermore, the Claimant's clear evidence in cross-examination was that she first attended the branch with the letter on 13 December 2012. Another area of contention is when the Claimant first received a Formal Demand. Although the Defendant claims that the letter of 9 August 2012 requiring repayment is sufficient, the parties were in dispute as to whether a Formal Demand was sent on 4 December 2012. I pause to note a feature of this case is the lack of copies of various aspects of documentation. Mr Cox stated that the Defendant has considerably improved its procedures now in light of a number of other cases involoving disputes about receipt of documentation. The absence of a copy of the Formal Demand is described as a "regrettable". In my view, that is an understatement. Important steps such as the service of a Formal Demand letter is absolutely paramount and the Defendant ought to have kept documentation available to show that a Formal Demand was not only sent but also received, for example by special delivery. I have already observed that there was no default notice served on the Defendant and the absence of copy of the Formal Demand has substantially increased ambiguity and uncertainty. It was clearly open to the Claimant to maintain that she did not receive such a Formal Demand. The difficulty with the Claimant's case is that in maintaining they did not receive the Formal Demand, they have to go further and allege that the Defendant's Records

have been falsified. There would, in my view, be no reasonable basis to assert that contemporaneous entries made by the Defendant were false and there would be no sense in that in any event as Mr Cox explained as this documentation would be important for the Defendant too. The record referred to a "solicitor's letter" dated 4 December 2012 and reference to the recoveries start date being 9 January 2013. It is noteworthy that there is no entry to indicate a Default Notice which the Defendant subsequently conceded and I would have found was never served which adds to the fact that this is, in my view, a genuine record given that it does not assist the Defendant in that material regard. There is also a reference to a Final Demand date of 4 December 2012.

27. A further entry makes reference to a call in on 12 December 2012. There is a reference under the Claimant's account to a female having phoned in after receiving a letter, indicating that her account had been closed for three months to which the response was given that the account was in the process of being closed. The Claimant denied making a telephone call on 12 December 2012 but I find based upon the documents, which I find were not falsified and reliant upon reference of contemporaneous documentation in accordance with Gestmin; Lachaux v Lachaux referred to above and Carmarthenshire CC v Y [2017] EWFC 36 per Mostyn J at Paragraph 7 in which he stated that: "This approach should be applied to all fact finding exercises, especially when the facts in issue are in the distant past".

28. In the circumstances, I therefore find that although the Defendant does not have a copy of the Formal Demand, I find not only was it sent but the Defendant but received by the Claimant in accordance with the Defendant's records.

29. The Claimant maintains that an agreement was reached with the Defendant on 13 December 2012 at a meeting. There is no documentary evidence to support such a meeting and there is nothing on Moorcroft's records. Indeed a formal agreement to pay £20 per month on 13 December 2012 would have been something of substance and I find it inconceivable that there would be no written agreement including copies provided to the Claimant. The Claimant and her father maintain that the Defendant took the terms of the written agreement and they never received them. I reject that evidence as indeed I reject the suggestion that the records are erroneous or fraudulent. There are so many other aspects in which the records were not challenged and it would seem to be no reason brought forward as to why the records would be fabricated or substantially erroneous. I do think it is possible that the Claimant and her father had in mind from December to repay at £20 per month but I do not find that a formal agreement was reached with, or on behalf of, the Defendant. Moorcroft's records indicate that there was still disagreement on 11 February 2013 in which the Claimant and her father were disputing the balance owed as there was a challenge to interest being paid and where the entry records an attempt by the Claimant's father to offer £500 partial settlement which was declined. There is a series of further entries in which the Claimant's father made further offers, ultimately of £700 in full and final settlement, all of which were rejected. On 27 February 2013, the Claimant's father indicated that he or the Claimant was willing to pay £20 per month which was agreed I find on that date as the records record. The following day the account history records agreement and payment of a first £20 was made on 4 March 2013 and thereafter monthly. As I have indicated previously the Claimant made repayment of the full sum at £20 per month over a period of four and a half years without difficulty and that is very

much to her credit. I also accept that Moorcroft did try on a number of occasions to up the repayments per month from the Claimant but all efforts to do that were rejected by the Claimant's father particularly on 20 March 2015 and 29 August 2015. There was some dispute as to when the Claimant obtained employment and I was not wholly satisfied as to when she did indeed obtain a job having been promised by the Claimant's father to receive confirmatory evidence which I did not. Perhaps that matters little as the Claimant's father firmly rejected the attempts by Moorcroft to seek to get the monthly repayments increased.

30. A further issue to be resolved is what the default date was. The Defendant maintains that it was 9 January 2013 as reflected in its records (Trial Bundle Pages 581 and 592).

31. Mr Cox gave evidence which was not challenged as to how the defaults were applied as part of an automatic process at account closure and would be triggered in that regard. The credit report date is 9 January 2013. I accept the evidence of the credit report; the account history and Mr Cox's evidence in regard to how the defaults are applied and find that the default date was indeed 9 January 2013. The Claimant had maintained it was a much later date possibly as late as September 2016 and relied upon the fact that she was able to enter into a high purchase agreement on 16 December 2015 but was unable to take out a telephone contract in September 2016 owing to the issues concerning her credit worthiness. Mr Boyo also confirmed that upon a very recent check, the default no longer showed on the Claimant's credit check undertaken regularly by Experian but given that it would take six years to cease to be shown on the Claimant's records, it would have still been present if it had been registered as late as 2016. The fact that the default is

applied automatically as part of an automated recoveries process would explain the short delay between 4 January 2013 which would have been one month after the Final Demand letter was sent on 4 December 2012 until 9 January 2013.

32. The way that I find the Defendant operated in terms of the application of the default would be in compliance with the relevant ICO guidance in place at the relevant time [Trial Bundle Page 637]. There is a definition that the term 'default' when recorded on a credit reference file should be used to refer to a situation when "the lender in a standard business relationship with the individual decides the relationship has broken down".

33. I note various indicators of a default demonstrating a breakdown including the following:

- The account has been referred to a collection agency or in-house debit collection department
- The lender takes or has taken steps to cut off the service provided (or would do so if they are not prevented on social rather than commercial grounds or by other regulations, codes of practice or statute)
- The customer has not made satisfactory proposals in response to a demand for repayment
- The lender has evidence that an account has been opened or used for fraudulent purposes by the applicant.

34. As indicated above, I consider that the relationship between the Claimant and the Defendant did indeed break down and the consequence was that the account was

referred to a collection agency; the Defendant did take steps to cut off the service provided to the Claimant and as at the date of default, the Claimant has not made satisfactory proposals in response to a demand for repayment and there was evidence that the Defendant had suggested the account may have been used for fraudulent purposes, although there was no suggestion that the Claimant had in fact perpetrated fraud at any stage.

The Law

Consequences of Not Serving a Default Notice

35. As set out above, it is accepted that the Defendant did not serve a Default Notice on the Claimant prior to reporting a default to the Credit Reference Agencies. Section 87(1) of the Consumer Credit Act 1974, lists certain actions which a creditor is precluded from taking (by reason of breach) without first serving a Default Notice. It is clear that reporting to a Credit Reference Agencies is not continued within that list of circumstances. Further, in McGuffick v RBS [2009] EWHC 2386(Comm) Flaux J held at Paragraph 82 that reporting to Credit Reference Agencies did not amount to enforcement. He stated:

> "I do not consider that either reporting to the CRAs or the related activities referred … come anywhere near amounting to enforcement if [other] activities are not enforcement. These activities are concerned with reporting to CRAs or other third parties and are not even steps taken prior to enforcement such as threatening proceedings would be.

36. Even if one accepted (which for reasons given earlier in this Judgment I do not) the Defendant's somewhat pejorative categorisation of reporting to CRAs as being motivated by the desire to pressurise the Claimant into paying the outstanding balance, at its highest that is an attempt by indirect means to persuade the Claimant to pay. If demanding payment directly or through a third party does not amount to

enforcement, it is difficult to see how such indirect means could do so even if the Claimant was right as to the relevant motive of the bank".

37. He concluded at Paragraph 85:

> "It follows that, in my judgment the reporting to CRAs and related activities do not constitute enforcement for the purposes of the Consumer Credit Act".

38. I therefore find that there was no legal requirement upon the Defendant to serve a Default Notice prior to reporting the default to the Credit Reference Agencies.

The defamation claim

39. The parties agreed that the allegation of defamation by the report to the CRAs was made prior to the Defamation Act 2013 coming into force and therefore common law will apply.

40. The Defendant concedes that the three essential elements to commence a cause of action are made out, namely that the Defendant published the report; it identified the Claimant and it would be defamatory of someone to say that she is in default of her obligations in relation to an overdraft debt. This case is close on its facts to a decision in Gatt v Barclays Bank Plc [2013] EWHC2 (QB) an authority which both parties rely upon where it was held at Paragraph 37:

> "At Paragraph 9.1 (C)
>
> … There is no doubt that it is defamatory of someone to say that he is a delinquent or unauthorised overdraft… the defamatory meaning, which includes the inferences that a hypothetical reasonable reader would draw from the literal facts stated would be to the effect that "he had shown serious irresponsibility in financial matters by overdrawing money from his bank in grave excess of the limits it had allowed".

41. The Defendant put forward three defences, namely truth; common law qualified privilege and limitation. Normally it would be expected and logical to take the limitation defence first and I have done so in this case albeit that for reasons that

shall become apparent and based upon authority, the issue of relative prejudice between the parties which involves some examination of the merits means that under Section 32(A) of the Limitation Act 1980 there is some level of inter-connection between the limitation defence and the other defences advanced on behalf of the Defendant.

The Limitation Defence

42. The parties agreed that Section 4A of the Limitation Act 1980 governs the relevant time period for a defamation claim. No action may be brought more than one year after the cause of action accrued. The report was made on 9 January 2013 and the limitation period therefore expired on 10 January 2014 and the Claimant has therefore brought her claim over three and half years out of time.

43. The Claimant seeks to extend the limitation period on the grounds of either Section 32 and/or Section 32A of the Limitation Act 1980. It is for the Claimant to establish on the balance of probabilities that where her claim is time-barred, the circumstances justify disapplication of the primary limitation period.

44. In regard to Section 32 of the Limitation Act 1980, I find no evidence of fraud, concealment or mistake. Although the Claimant relies upon the assertion which I have accepted that she did not receive a Default Notice, and my finding that there was no obligation upon the Defendant to provide the Claimant with a Default Notice prior to registering the default and my further finding that the Defendant did send a Final Demand letter on 4 December 2012 and Mr Cox confirmed that this would have warned the Claimant that a default would be reported to the CRAs if payment was not made, there is no suggestion or evidence of concealment let alone fraud. The absence of a proactive prior warning is not the same as concealment and

although I accept the Claimant and her father did not know about the Credit Reference Report having been made until 2016, if she or her father had obtained a report at an earlier time, that default would have shown up and there is no suggestion that it was concealed. A possible application of Section 32A of the Limitation Act 1980 is more complex and nuanced given that discretion afforded to the Court is generous: See per Steedman v BBC [2001] EWCA Civ 1534. I also take into account that the Claimant has acted as litigant in person herself and through her father. I have already indicated they have acted impressively in conducting litigation in Court and I note further that the pre-action correspondences are comprehensive, measured and focussed. Nonetheless, it is necessary to be perhaps a little less strict in regard to the relatively short time periods being the situation if the Claimant had been legally advised throughout particularly when time periods in view of a claim is threatened passes and in this particular case resulted in further correspondence emanating from the Claimant. I also take into account the unchallenged evidence that the Claimant at the material time was suffering from a number of physical ailments and illnesses, including epilepsy and stress. There were medical records contained within the bundle confirming the medical concerns at the time.

45. Discretion afforded by the Court is largely unfettered and as Steel J stated at Paragraph 15 in Steedman:

> "The discretion afforded by this section is largely unfettered. It requires the Court to balance any prejudices to the Claimant on the one hand and the Defendant on the other in allowing for the action to proceed or otherwise. All the circumstances of the case must be had in regard to assessing the justice of the matter with a particular reference to the length of, and reasons for, the delay and the extent to which passage of time since the expiration of the limitation period has had an impact on the availability or cogency of relevant evidence".

46. Further guidance was given by Hale LJ (as she then was) at Paragraph 33:

> "It is for the Claimant to make out a case for the disapplication, or relaxation, of the normal rule. The reference by Parker LJ in *Hartley v Birmingham District Council* [1992] 1WLR968 at 9.80C to the 'paramount' importance of the effect of the delay upon the Defendant's ability to defend was made in the context of a discussion of what is meant by prejudice to the Defendant in the equivalent of Section 32A(1)(b). This has to be set against the prejudice to the Claimant. Under Section 32A(2), the Court must have regard to the 'the length of, and the reasons for, the delay on the part of the plaintiff', independently of 'the extent to which, having regard to the delay, relevant evidence is likely (i) to be unavailable or (ii) to be less cogent than if the action had been brought within the period…' The effect of the delay upon the Defendant's ability to defend cannot therefore be the only consideration".

47. I take into account that the policy behind the one-year limitation period is clear and that the Claimant should assert and pursue their need for vindication speedily and the claim was not brought for over three and a half years out of time and even when the Claimant did first become aware of the defamation in October 2016 there is a further eleven months before she issues the claim. However, I do take into account the Claimant's level of stress at the time and the fact that there was correspondence passing which indicated her preparedness to issue albeit that the last pre-action letter appears to be in March 2017 before issue in August.

48. In submissions, Mr Finch submitted that I should take into account overall merits of the defences of truth as being relevant both to "all the circumstances of the case" and the respective prejudice upon the party. That is why I have made mention of the possible connection between the limitation defence and the other defences.

49. Having considered the matter with care, I reject Mr Finch's submission in that regard. I do not find that the question of prejudice is about the merits of other possible defences although there were some delay in Claimant issuing the claim. Given that there was no challenge that she only found out about the claim in October 2016 I do find that it would be equitable to extend the limitation period

because this was not a situation where a Claimant sat on her hands and waited for her need for vindication; she was totally unaware that the CRAs had been informed until she tried to obtain her Vodafone contract. I do not find that the issue of prejudice is connected to the merits of other possible defences available to the Defendant and to find otherwise would be in my view to 'put the cart before the horse' particularly given the Claimant's unchallenged health issues and for the reasons set out above, I find that primary limitation period should be dis-applied under Section 32A of the Limitation Act and that this limb of the defence thereby fails.

The Defence of Truth

50. The Claimant maintains that the Defendant made a false statement even maliciously or recklessly in respect of the report of the Claimant to the Credit Reference Agencies and then compounded that malice or recklessness by distorting facts, and providing misleading and inaccurate information. The defamation of the Claimant was false because it was contended the Claimant was not in default at any time as when the Account was frozen she was within her credit limit and was in a position in any event to make payment out of the Halifax accounts. It was also contended that the absence of the Default Notice was fatal to the Defendant although I have made findings in respect of the failure to serve a Default Notice which does not affect the legality of the Formal Demand. The burden of proof is upon the Defendant to establish truth. I find the Defendant has established the truth on the basis that the reporting was accurate. I find that the Claimant was "in default" of her legal obligations under the Credit Card Terms of Agreement which she agreed at the time of opening the account and further "in default" in the sense used on credit file reporting to the Credit Reference Agencies. I find that the Defendant

acted in accordance with the ICO guidance in place at the relevant time as set out in Gatt at Paragraph 9.2 where HHJ Moloney QC concluded:

> "… There would obviously be a serious risk that the words complained of would be found to have been substantially true; I have held above they were literally true, and there is much in the history of his dealings with the Bank, as set out above, which would support the truth of the defamatory inferences spelt out in the meaning at 9.1.C above".

51. The present case is in many respects similar to the Gatt factual situation. In the present case, the history as set above demonstrates that the Defendant wrote to the Claimant on 9 August 2012 explaining that it was closing her account in two months and she would need to make arrangements to repay the outstanding balance. Given the findings that I have reached, the Claimant acted in breach of Clause 18.7 of the Terms of Agreement by failing to make arrangements to repay the balance outstanding at that point and the account remained overdrawn two months later. The Formal Demand was sent to the Claimant on 4 December 2012. The Claimant received that letter and made the telephone call on 12 December 2012. The Claimant did not make repayment to the account and there remained a balance outstanding including interest of £1,080.90 when the account was closed on 4 January 2013. In the circumstances, the Claimant was in breach of Clause 18 and also "in default" of her legal obligations.

52. As I have indicated above, the business relationship between the Claimant and the Defendant broke down from August 2012 onwards and although the Claimant through her father did make a proposal to the demand for repayment in late February 2013 which was accepted by the Defendant, namely £20 per month and which resulted in her first payment being made on 4 March 2013 and continued

until full repayment was made, I find that the report by the Defendant to the CRAs to be true and in the circumstances the Claimant's claim in defamation fails.

Qualified Privilege

53. Although that concludes the defamation claim, I was asked by the parties to give a ruling in relation to qualified privilege should my finding in relation to truth by found to be wrong. In Gatt, there was assistance given in relation to the issue of common-law qualified privilege from Paragraph 9.3 to 9.8.

54. A common law qualified privilege would be a defence to defamation actions and can only be defeated by a Claimant establishing actual malice. Although the burden is upon the Defendant to establish that qualified privilege applied, the Claimant accepted that qualified privilege is applicable to communications between people sharing a legitimate, common and corresponding interest in the subject matter of the communications where it is in the public interest for such privilege to be recognised – see 9.3 of Gatt. At 9.6, HH Judge Maloney QC who was the judge in Gatt stated:

> "In the modern world, it is plainly in the public interest that such authoritative credit information can be obtained and relied on by banks and other financial institutions, provided it is done in a lawful and duly-regulated matter which respects the rights of the general public and the individuals affected… The passing of the present information by Barclays into the CRAs pool, and its onward transmission by the CRAs to the Bank of Scotland and/or any other subscribers who may have accessed it for the purpose of deciding whether or not to accept an application from the Gatts for finance, plainly took place on occasions of common-law qualified privilege. This occasion protects the publications equally where the complaint is made MG and/or CG, subject to the question of express malice …"

55. On the question of express malice, the test is as set out at the next sub-paragraph:

> "Qualified privilege is defeated if the Claimant can prove that the Defendant was actuated by express malice in publishing the words complained of. In this context, what must be shown as a dominant and improper motive i.e. other than the purpose for which the privilege was given; and generally this is proved by showing that the Defendant knew that his words were untrue, or at least did not believe them to be true: See Horrocks v Lowe [1975] AC135. Negligence is not enough, unless it

rises to the point of reckless indifference to truth. Where the Defendant is a corporation, it must also be shown that a particular employee or agent both participated in the publication and had the required malice state of mind: Broadway Approvals v Odhams [1965] 1WLR805".

56. Therefore qualified privilege clearly covers the relationship between CRAs and financial institutions governed by the SCOR Principles of Reciprocity. In the present case the Defendant is a financial institution subscribing to the SCOR system and made the report under that regime. I find that the Claimant cannot establish there was any express malice on the Defendant's behalf collectively or in respect of any particular employee or agent. As I found above from the evidence of Mr Cox, the reporting was an automatic process; there was no requirement for the Defendant to serve a Default Notice before registering the default and the report was made on 9 January 2013 in advance of the agreed date for the arrangement to repay £20 per month made on 27 February 2013.

57. Given my findings that the express malice has not been established, I also find that the Defendant succeeds in respect of its defence to claiming defamation on common-law qualified privilege.

The breach of contract claim

58. As indicated above, the sole claim in breach of contract relates to Clause 18.6 of the Account Terms and Conditions which stated:

"If we end this agreement or stop providing an account or service, we will act in a manner we think is reasonably appropriate for the circumstances and will try to reduce the inconvenience to you".

59. The Claimant maintains that there were breaches of this clause because the Defendant closed the account without a proper explanation and upon a false allegation of fraud; the Defendant refused to take payments to clear the balance; the Defendant improperly added further interest to the account resulting in the sum due

to be a figure of £1,080.90; the Defendant failed to serve a Default Notice; made a report to the CRAs after repayment agreement had been reached and reported the account as being "in default" to the CRAs despite the Claimant not missing any £20 repayment instalment, which was accepted. In the circumstances, the Claimant claims that the Defendant did not act reasonably appropriately in the circumstances.

60. I find that the Claimant does not succeed in her contractual claim. In respect of the closure of the account, it is essentially an allegation that it was closed improperly rather than it acted improperly *after* closing the account. Under Clause 18.3 of the Terms and Conditions, the Defendant is entitled to close the account on two months' notice without giving any reason.

61. Further, I have found that the letter from the Defendant dated 9 August 2012 gave notice of the account closure and informed the Claimant that she would need to repay the outstanding balance and that repayments were not provided until the following March. As Mr Cox noted, it would make no sense for the Defendant to refuse to accept payment if made earlier. The Claimant had relied upon a letter dated 12 November 2012 addressed to the manager of at the Defendant's Billericay branch which was the only formal written complaint in the bundle, complaining that the Defendant did not accept payments from "colleagues". The Claimant and her father gave evidence that colleagues was a wide definition including everyone except the Claimant herself. There was some evidence from Mr Cox that it might have been possible to accept payment from others including the Claimant's father in cash or with a letter of authority provided the letter of 9 August 2012 was provided after consultation with the fraud department. However significantly, there was no record of the Claimant attempting to pay the outstanding balance and the

contemporaneous records from Moorcroft Debt Recovery Agency which I have already accepted were generally accurate and demonstrated that the Claimant did not reach agreement to repay until the following February. There was evidence the Claimant or her father offered to pay a portion of the amount outstanding and there were negotiations which took place over a number of months between them and Moorcroft and in the circumstances I find that the Claimant did not make an offer to pay £20 per month which was accept by the Defendant before 27 February 2013.

62. In respect of the charges and interest upon the sum of £864.72 which took the figure up to £1,080.90, those additional amounts were levied after the Claimant's overdraft was removed but before the Defendant "charged off" the account to its recoveries department. It is noteworthy that no further interest was charged by the Defendant thereafter and when the Claimant provided and the Defendant accepted payments of £20 per month until the full balance had been repaid. It was a relatively short period where charges and interest were added namely £80 of fees and £13.06 in interest.

63. In respect of the other issues raised in relation to the breach of contract claim, as I have already indicated, I find that the report was made on 9 January 2013 but no repayment arrangement was reached until 27 February 2013 and no payment was made until 4 March 2013. I also found that the Defendant reported the report prior to any repayment agreement being reached and it was not inappropriate to continue to report the account as in default when the full balance remained outstanding and overdue given that the Claimant made monthly payments of £20 which took four and a half years for the full repayment to be made. I find the Defendant acted in accordance with the ICO guidance [in the trial bundle at Pages 633 to 652]".

64. In all the circumstances I find that the Claimant has not established that the Defendant did not act reasonably appropriately in all the circumstances once they ended the agreement and stopped providing an account or service to the Claimant.

The Common-Law Duty/Negligence Claim

65. The Defendant accepts that he owed the Claimant a common-law duty to exercise reasonable care and skill when registering defaults and making the report. That duty is clear from Gatt supra where HHJ Maloney QC held that it was right to extend a duty of care to financial institutions making references to CRAs being a natural extension of the decision in Spring v Guardian Assurance [1995] 2AC296, see Paragraph 8.1 and 8.2.

66. In the present case, I find that the Claimant has failed to establish that the Defendant breached its duty of care to the Claimant. I find that the report was made in accordance with the Defendant's obligations under the SCOR data sharing arrangement and it was true and not misleading. As indicated above, the process by which the report was made was automatic and I find that the Defendant acted with reasonable care and skill and did not breach its common-law duty of care owed to the Claimant.

67. In all the circumstances therefore I find that the Claimant's claims against the Defendant in defamation; breach of contract; and breach of duty of care/negligence fail.

Postscript

68. Although I have found against the Claimant in respect of all causes of action, I would wish to add that I consider this to be a highly unfortunate example where the Defendant bank did act lawfully in its conduct towards the Claimant but in certain

important respects, its conduct was regrettable. I have already made observations about the absence of important contemporaneous documentation. I have also noted that the Claimant did make a full repayment. The Defendant has maintained throughout that it was highly unfortunate that the relationship between it and the Claimant broke down on the basis of unspecified but unchallenged concerns that the accounts were at high risk of fraudulent activity, although no such fraud was ever perpetrated.

69. However, this is a case in which at certain stages at least the Claimant and her father tried extremely hard to repair the relationship and to make repayments. The Claimant undoubtedly had the funds to clear the overdraft from her Halifax accounts and from other resources potentially including her father. I do wish to express regret and concern that the bank did not show on the face of it a level of flexibility once the apparent concerns of fraudulent activity appear to have been allayed or tried to resurrect the relationship and avoid highly contentious and costly litigation. Although the Claimant learned bitterly of the risks of litigation of uncertain merit given my findings in relation to the claims, I also hope that the Defendant has learned considerable lessons both in terms of its processes but perhaps more fundamentally inflexible approach which I find operated with the Claimant from 9 August 2012. As I have found, it operated within the law but with the regrettable amount of lack of empathy towards the Claimant and her family, all of whom are highly respectable people who it must be understood would have been bewildered at the Defendant's actions in freezing the account and terminating the relationship at that stage.

70. I shall hear from the parties in respect of consequential orders.

Anthony Metzer QC

Deputy Judge of the High Court