# General Form of Judgment or Order

| In the Chester County Court | |
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| **Claim Number** | 9CH05795 |
| **Date** | 27 November 2012 |

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| MR WILLIAM BRIAN GRACE AND MRS MARGARET GEORGE | **1st Claimant Ref** |
| BLACK HORSE LTD | **1st Defendant Ref** DNJ 21935/327 |

Before His Honour Judge Halbert sitting at Chester County Court, Chester Civil Justice Centre, Trident House, Little St John Street, Chester, CH1 1SN.

**IT IS ORDERED THAT**

1. The order hereto is approved.

Dated 27 November 2012

IN THE CHESTER COUNTY COURT

BETWEEN:-

CLAIM NO. 9CH05795

(1) MR WILLIAM BRIAN GRACE

(2) MRS MARGARET GEORGE

Claimants

-v-

BLACK HORSE LIMITED

Defendant

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**NOTE OF ORDER**

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Before His Honour Judge Derek R. Halbert, sitting at the Chester County Court, Chester Civil Justice Centre, Trident House, Little St John St, Chester CH1 1SN on 21st November 2012

1. Judgment on the claim for the Defendant.
2. Judgment on the Counterclaim for the Defendant to the extent of the delivery up of the caravan (which has already been effected) with money claim adjourned generally with liberty to restore after the sale of the caravan.
3. Costs of the claim and the Counterclaim be the Defendants to be the subject of a detailed assessment if not agreed.
4. This is a final decision in a multi-track claim from which the route of appeal is to the Court of Appeal.
5. An application for permission to appeal was made and was refused on the grounds that it has no real prospect of success and there is no other compelling reason why it should be heard.

6. Time to lodge an appeal is extended to 28 days from today's date.

Dated this 21st day of November 2012

9CH05795

IN THE CHESTER COUNTY COURT

Between:

(1) WILLIAM BRIAN GRACE
(2) MARGARET GEORGE

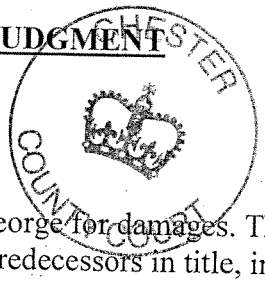
Claimants

And

BLACK HORSE LTD

Defendants

**NOTE OF JUDGMENT**




## 1. INTRODUCTION

1.1. This is a claim by Mr Grace and Mrs George for damages. They both complain of defects by the Defendants, and their statutory predecessors in title, in their handling of three credit agreements to which one or other of the Claimants were parties. The main claim is made under section 13 of The Data Protection Act 1998 ('DPA'). In the Claim Form [1-2], only the DPA and a claim for damages for breach of Article 8 of the European Convention On Human Rights ('ECHR') are referred to. In the Re-Amended Particulars of Claim [4-17] there are also claims under Consumer Credit Act 1974 (as amended) ('CCA'). The Defendants counterclaim for the payments due under the third agreement and return of the goods (a static caravan).

1.2. The claims under the CCA refer variously to sections 140, 140A and 140B. Section 140 was repealed in 2007 by the CCA 2006. It was only concerned with the construction of sections 137 to 139 and is entirely irrelevant to this case. Sections 140A and 140B were added by CCA in 2006 and give the Courts power to make Orders in respect of agreements where the relationship is judged to be unfair. I have therefore taken any reference by the Claimants to section 140 as intended to be a reference to sections 140A and 140B.

1.3. Mr Grace and Mrs George have been living together as partners for many years. They are now in their middle 70s. They both appeared in person, though in reality Mr Grace conducted the entire case. There was at one stage pre trial, some question over whether Mrs George had legal capacity but this was dealt with by a medical report produced at trial and her legal competence was confirmed.

1.4. The background facts can be fairly simply stated. It is also of note that there is very little dispute about the essential facts in this case. Where there is a dispute, this is indicated in the recital which follows.

## 2. THE TRIAL

2.1. The trial was listed to last four days starting on Monday 28th August 2012. The evidence and submissions were completed in three days and I then reserved this judgment, stating that I would deliver it as soon as possible, and in any event, within 6 weeks. Actually,

it has taken rather less than that. It will now (26th September 2012) be sent electronically to the parties who are invited to suggest any minor corrections they consider necessary. When this has been done, and the corrections, if any, have been made, a date will be fixed for formally handing the judgment down.

2.2. As Mr Grace and Mrs George were in person (the case was conducted entirely by Mr Grace), I was obliged to enter into the trial process rather more than I would normally consider appropriate, in order to ensure that the case the Claimants were trying to put was adequately argued and presented. This drew no protest from Counsel for the Defendants who conducted the matter with conspicuous ability and from a knowledge of her case which betrayed many hours of detailed preparation.

2.3. With my assistance and her acquiescence in what I did, I am satisfied that the case for the Claimants was fully put and fully argued.

## 3. THE BASIC FACTS

3.1. Until about 1998 or 1999, Mr Grace was in business as an auto electrician. He had, so far as is relevant, three bank accounts: a business account, a personal account and a savings account (which at some stage was used to purchase an annuity). All three accounts were held at the Royal Bank of Scotland ('RBS').

3.2. On 2nd September 1997, Mr George bought his grandson a laptop computer. He did so by entering into a hire purchase agreement with Chartered Trust Plc ('CTP'), the Defendant's predecessors in title ('Agreement 1') [245]. It was countersigned on behalf of CTP on 15th September 1997.

3.3. Within a few days of the signing of the agreement, CTP sent Mr Grace what purported to be a copy of the agreement in discharge of their duty under Section 63 of the Consumer Credit Act 1974 [246].

3.4. The document concerned is NOT a copy of the document signed by Mr Grace. The figures are the same but the interest rate and the APR quoted are different.

3.5. Mr Grace alleges that because of this, section 63 has been breached; the agreement is "*not properly executed*" and hence is void. The Defendants accept that Section 63 has been breached but point out that the contract is not void, but unenforceable, because of the provision in Section 65 of the Act:

> "*An improperly executed regulated agreement is enforceable against the debtor or hirer on an order of the Court only.*"

3.6. This was the case despite the fact that, at that time, the now repealed section 127(3) of the Act provided that the Court could not make an Order under section 65(1) in these circumstances. The agreement was "*irremediably unenforceable*". It was not void.

3.7. In 1999, Mr Grace had a disagreement with RBS and as a result he closed the business account from which the payments under the hire purchase agreement were made. The documentation indicates that RBS sent several notifications to CTP telling them that the Direct Debit requests would now have to be made in respect of the personal account but that

CTP failed, repeatedly, to take heed of this information and to transfer their Direct Debit requests. They continued to request payment from the defunct business account. After a while, RBS simply ceased to make the payments and the account fell into arrears. Mr Grace was not aware this had happened until CTP complained of the default. By then they had imposed various "penalty charges" which, despite the fact that the situation (at first, at least) was their own fault, they subsequently refused to remove. Mr Grace later ceased to make any payments at all.

3.8. On a date I do not have (but which must have been in the early part of 2000), CTP commenced proceedings in respect of the laptop debt. The proceedings were more than 10 years ago and the Court file had been destroyed long before the present action commenced but some of the documentation has survived in the possession of the parties. Mr Grace failed to respond to the initial papers (the reason does not matter but it seems probable that they were sent to the wrong address) and on 10th April 2000 judgment was entered in default. This judgment was registered against Mr Grace, though not by the Defendants. The registration was subsequently vacated but not until 22nd January 2003 [207].

3.9. On 11th May 2000 the matter was before District Judge Harrison who ordered that the judgment dated 20th April 2000 be set aside, that a Defence be deemed to be served that day and that the matter be allocated to the Small Claims Track. A copy of this order has survived [21].

3.10. The matter was next before the Court on 14th June 2000 when the claim was struck out and CTP were ordered to pay £50 in costs. It seems unlikely that this was a decision on merit because the claim was subsequently reinstated (the Re-Amended Particulars of Claim paragraph 3 (d) gives the date as 28th July 2000 [5]) and on 4th October 2000 it came before District Judge Newman. No copy of the Order he made has survived but a note made by Counsel who appeared for CTP is in the papers [417]. When the District Judge was shown the two copies of the agreement which give different figures for the APR [245 and 246], he made the observation:

> "*If this* [246] *was a genuine document - which it appeared to be, the original contract would in fact be void and illegal*".

I am not sure on what basis District Judge Newman made this remark. As I have already observed, section 65 of the Act seems to me to make it clear that the contract was unenforceable but not void. Counsel's note goes on to record that the Order made was that the claim was dismissed and that the Part 20 counterclaim be re-listed. The costs were reserved. Mr Grace also alleges, and I accept, that an undertaking was given to have the registration of the default judgment vacated [6]. As stated in paragraph 3.8, this was not done for some time.

3.11. Finally, the counterclaim was tried by District Judge Newman on 5th December 2000. The Order has survived [23]. The counterclaim was dismissed though the Defendants in the present case, who were the Claimants and the Defendants to the counterclaim in that case, were ordered to pay the costs and the reserved costs. Mr Grace claims that the counterclaim was dismissed because, although the contract was void, the computer could not be returned so *restitutio in integrum* was not possible. The Defendants say it is because the contract was clearly unenforceable and the fact that it was not void is reflected in the fact that the Court did not order any repayment. While I am in no doubt that Mr Grace is genuine in the belief he expresses, it seems clear that the Defendants must be right

3.12. What CTP did then is the subject of Mr Grace's main complaint. They did not pay the costs. They added the amount of costs they had been ordered to pay to the amount for which the judgement (subsequently set aside) had been obtained. They added some other charges and thus reached a total of £928. They then wrote off the debt and altered their own records to show the amount outstanding as nil. They then, on 31st May 2001, filed an entry with credit reference agencies alleging that Mr Grace had defaulted in May 2000, in repayments of a loan to the tune of £928 [26]. Mr Grace says that this was a clear breach of at least one of the principles of Schedule 1 of the DPA.

3.13. On 5th July 2001 CTP was re-named Black Horse Finance ('BHF') [180]. Mr Grace alleges that the credit reference record [26] establishes that the default was registered on 31st May 2001 in a corporate name which did not then exist because the change of name did not occur until July and the registration took place at the end of May. This assertion is clearly incorrect because the credit reference record [26] was not obtained until 2011 and by then would have been updated to take account of the change. It does not establish that the wrong name was used when the default was originally registered.

3.14. Mr Grace sought to have the default removed from his credit record on the basis that the debt was unenforceable and had been written off by BHF. There is a letter written by Experian on 11th December 2003 [25] which shows that the matter was under investigation. The default was eventually removed on 5th January 2004 [178].

3.15. There is, at this stage, a potential cause of confusion between the registration of the default judgment (shortly after 10th April 2000) which was vacated on 22nd January 2003 [207] and the registration on 31st May 2001 of a default in payment of a loan which was vacated from the CRA records on 5th January 2004 [178]. This is extensively referred to in the papers as "the default registration". The distinction between "registration of the default judgment" and "the default registration" needs to be kept in mind.

3.16. Despite the removal of the credit reference agency record, it is clear that Lloyds TSB Group (which is now part of the HBOS empire and includes BHF), retained their own record of the default because during 2004, Mr Grace was refused a bank account other than a simple cash account. He raised this repeatedly with Lloyds. BHF acknowledged on 5th February 2004 [27] that the default had been incorrectly recorded and that he should not be adversely affected. However, he was unable to obtain a bank account for some time, eventually doing so in October 2004 (see exhibits B and C to Mr Grace's Skelton Argument received by the Court on 22nd August 2012. The documents are not in the numbered bundles). Mr Grace alleges that, as a result of inadequate access to banking facilities, he has suffered loss, damage, distress and inconvenience. Details are set out in his second witness statement [141-2] and in the Re-Amended Particulars of Claim at paragraph 34 [14].

3.17. The claim by Mrs George has a similar basis. In 2002 she entered into a hire purchase agreement for the acquisition of a static caravan at Talacre Beach in North Wales ('Agreement 2'). Only part of the agreement has survived [99].

3.18. In 2003 she part exchanged the original caravan for a Lyndhurst static caravan on the same site. She entered into another HP agreement with the First Defendants [90 to 93] ('Agreement 3').

3.19. The APR on the 2002 agreement was 10.5%. The APR for the 2003 agreement was 17.9%. When, in March 2006, Mr Grace (writing on behalf of Mrs George) asked CTP why there was the difference he received a letter dated 29th March 2006 [28]. So far as relevant, the letter reads as follows:

> *"With reference to your request for an explanation as to the reason the interest rate on your new Capital Bank HP agreement...is a higher rate than your previous agreement...it is Capital Bank's policy to carry out new searches on information held by credit reference agencies...the resultant search showed unfavourable information on a Mr William B Grace residing at the same address. This would have been taken into consideration on the decision to accept your application at the higher rate, a fact that I must point out you accepted."*

3.20. On this basis, it is alleged on behalf of Mrs George that the inappropriate registration during 2003 must have been the cause of the extra interest charged because it was the only detraction from Mr George's creditworthiness. It is further alleged that the loss is substantial. Precise arithmetic based on an APR is very difficult but the agreement [90] was for a purchase price of £42,665 less a deposit of £17,667, leaving a balance to be financed on £24,998 over 10 years so an additional APR of 7.4%, would cost something of the order of £10,000. The figure actually claimed is £11,607.53 [16].

3.21. Mr Grace also alleges, on Mrs George's behalf, that the second agreement was arranged by Talacre Beach Caravan Sales Ltd ("TBCSL"), the company who sold Mrs George the caravan. This company held a license under the Consumer Credit Act 1974. The license was issued on 1st April 1992 [419-420]. The name TBCSL does not appear on the agreement [91]. The dealer is there entered as "The New Pines".

3.22. At the pre-trial stage, Mr Grace had researched on the internet and in 2011 he obtained a printout from the OFT website, of a list of event details in relation to TBCSL's licence (this is not in the numbered bundles but appears at exhibit J of his Skeleton Argument). This, he says, establishes that the name "*The New Pines Caravan Holiday Home And*" was not added to the Consumer Credit License until 24th May 2004, well after the second caravan hire purchase agreement had been executed. On this basis, he alleges that TBCSL were trading without a licence and hence that the agreement, reached through an unlicensed intermediary, is unenforceable as a result of CCA section 149.

3.23. This was not adequately contradicted by the Defendant's witness, Mr John Blore, whose statement dated 14th March 2012 exhibits the same printout. At paragraph 10 of the statement Mr Blore says:

> *"The Claimants have taken issue with the status of Talacre as a consumer credit license holder. Also attached at JB1 is an extract from the register of license holders confirming that Talacre Beach held a valid license and added The New Pines Caravan as a trading name on the license in July 2003."*

3.24. In fact, July 2003 is the date the application for the change was made; the name was not actually added to the license until May 2004. However, with the consent of both parties during the course of the trial, I contacted the Office of Fair Trading and they were able to supply a copy of the license originally granted to TBCSL on 1st April 1992 [419-420], which shows that the additional trading name of "*The New Pines Caravan Holiday Home and*

*Leisure Centre*" was on the license from the outset. Mr Grace still argues that because this form of the name is not word for word the same as the form indorsed on the agreement, the intermediary was carrying on unlicensed trading and the agreement is unenforceable. I shall return to this argument in due course.

3.25. On the basis of his allegation that the agreement had been reached through an unlicensed intermediary, Mr Grace advised Mrs George to stop paying the instalments under the agreement and she took his advice. This has resulted in the Defendants bringing a counterclaim in this action for the sums they say are due under the agreement and for the return of the caravan. Since Mr Grace and Mrs George no longer want the caravan, have ceased to pay the site rent for it and are under pressure from the site owners to remove it, they agreed to my making an order for its recovery by the Defendants on the last day of the trial and I did so.

3.26. The Defendants claim to have served various notices in respect of the non-payment of the second caravan agreement:

3.26.1. The first was a default notice; they say was sent on 29th June 2011. There is what purports to be a copy at [69]. Mr Grace is adamant that this was never received. He relies on a computer record from the Defendant's documents [425] which seems to record that the document "*should not have been issued*". There is no definitive record as to whether it was or not.

3.26.2. The second notice, which undoubtedly was received, is dated 4th October 2011 [113]. Mr Grace alleges that this was not validly served. I shall examine the reasons later.

3.26.3. Next, there was what purported to be a termination notice dated 4th October 2011 [72, 118-119].

3.26.4. Finally, a third default notice was served only very recently (it is dated 17th August 2012) [423-424].

3.27. The amount now alleged to be outstanding on the agreement, and counterclaimed from Mrs George, is £17,131 [426]. There is also the claim for the return of the caravan which was granted by consent on the last day of the trial.

3.28. Mr Grace alleges that no valid default notice has ever been served in respect of the second caravan agreement. He also avers that the static caravan is materially mis-described in the agreement as a "*vehicle*".

3.29. On 30th May 2006, Mr Grace made a Subject Data Request to the Defendants under the DPA. There was absolutely no response. When the statutory period of 40 days had expired, on 27th July 2006, Mr Grace made a complaint to the Information Commissioner ('IC'). On 14th September 2006, the IC replied [29-30] saying that principle 6 had been contravened but that no further investigation was proposed. The material requested by Mr Grace was eventually provided but well outside the 40 days.

3.30. On or about 28th July 2006, someone in one of the Defendants' offices made a credit search in respect of Mr Grace [31]. The culprit has never been identified nor the reason for

the search ascertained. Mr Grace alleges [10] that this search was unauthorised, unlawful and illegal under the DPA. He also alleges that sections 140A and 140B of the CCA are engaged.

3.31. It has emerged, relatively recently, that TBCSL were paid a commission of £5249.58 for their part in arranging the second caravan agreement [104]. This was not disclosed to Mr Grace or Mrs George and they now allege breach of trust for which they say not only TBCSL but also the Defendants are responsible.

3.32. There is a very large volume of subsequent correspondence in the numbered bundles. Some of it is referred to in section 7 of this Judgment but otherwise none of it appears to be relevant to any issue I have to try.

## 4. THE ORAL EVIDENCE

4.1. The three witnesses called to give oral evidence were Mr Grace, Mrs George and Mr Blore.

4.2. Mr Grace was an obviously truthful witness. There is no doubt whatever that he genuinely believes every point he takes is valid, and that his cause is a just one. Nevertheless, he was trying to recall matters about ten years ago now and inevitably he confused matters and his memory is not 100% reliable.

4.3. He is also sometimes very muddled in his thinking. One glaring example is that in the course of argument, he insisted that because the Defendants had written off the debt owed on the computer agreement, HM Revenue and Customs had compensated the Defendants for the loss involved. He seemed to be convinced that HMRC run some sort of insurance scheme in relation to unpaid debts. I tried in vain to explain to him that the paper exercise of writing off the debt would enable the Defendants to recover any Corporation Tax or VAT they had paid or would otherwise have paid in respect of the money he owed them but would not otherwise enable them to recover the unpaid sum.

4.4. Mrs George was also obviously telling the truth but I have very grave doubts about the reliability of her memory. She was hopelessly vague and very confused and often could not remember even the most basic facts of the case, not even details which appear to be set out clearly in her witness statement.

4.5. I have no reason to doubt the evidence of Mr Blore. His evidence was confined to the production of the records and paperwork in relation to the caravan agreements from the files held by the Defendants. He had no personal knowledge of the case at all. He had apparently been required to attend because Mr Grace was unable to establish which branch of the HBOS empire employed him. This is not a matter which is relevant to any issue I have to try. In the weeks before the trial, Mr Grace made a great deal of this point and many of these "additional issues" he tried to introduce (see paragraph 7.0.2 below) were concerned with this aspect. However, it simply is not relevant.

4.6. Since there is little or no relevant dispute as to the essential facts, the quality of the oral evidence matters very little. The only significant factual dispute is to the validity and service of the default notice in relation to the caravan agreement and that issue, in so far as it is factual, is fully covered by the surviving documents.

## 5. THE CLAIM AND COUNTERCLAIM

5.1. The claim is (apart from the issue dealt with in paragraph 5 (3) below) set out in the Re-Amended Particulars of Claim ('RAPoC') [4 to 17]. It was drafted by Mr Grace who has no legal training though he could fairly be described as an experienced litigant in person. I made no complaint or criticism of either but the document is rather long and at times difficult to understand. In essence, Mr Grace and Mrs George make complaints about 4 significant items:

(a) The registration with credit reference agencies of the default judgement in 2000, and the subsequent failure to remove it promptly after it was set aside and indeed after the claim was dismissed. This, it is alleged, meant that Mr Grace was unable to obtain banking facilities which caused him loss, damage, inconvenience and distress. The claim is made under the DPA section 13 alleging breach of principles 1, 2, 3, 4, 5, and 7. It is also made under the CCA sections 140A and 140B and under article 8 of the ECHR. The factual basis of the claim is set out in paragraphs 1 to 4, 6, 7, 11 to 15, 33, 34 and 35 of the RAPoC.

(b) The registration with credit reference agencies, on 31st of May 2001, of the allegation that, in May 2000, Mr Grace had defaulted in payments of a loan in the sum of £928. This erroneous registration was maintained until early 2003 and, it is alleged, caused Mr Grace an inability to obtain banking facilities which again caused him loss, damage, inconvenience and distress. He also alleges that because of it he was unable to enter into a joint contract with Mrs George in relation to the second static caravan. It is further alleged that this was the cause of the additional rate of interest charged in relation to the second caravan agreement (agreement 3). This claim too is made under the DPA, the CCA, and article 8 of the ECHR. The factual basis of this aspect of the claim is set out in paragraphs 5, 6, 12, 13, 23 and 33 to 37 of the RAPoC.

(c) The failure of the Defendants to respond on time to the Subject Data Access Request made by Mr Grace in 2006. The claim is made under the DPA. The factual bases are set out in paragraphs 16 to 18 of the RAPoC.

(d) The making, in July 2006, of an unauthorised search into Mr Grace's credit record. This claim is made under the DPA and the CCA and article 8 of the ECHR. The factual basis is set out in paragraphs 19 to 32 of the RAPoC.

5.2. The losses claimed are not in the main attributed to the factual complaints. The figure of £11,607.53 claimed in paragraph 37 is clearly an attempt to calculate the extra interest charged on the second caravan agreement (agreement 3). The other sums claimed amount to £8000 for each Claimant for damage and distress under section 13 of the DPA (paragraph 38 and 39) and £3000 each for damage and distress under article 8 of the ECHR (paragraph 40). These sums are not in any way related to the damage suffered and there is no explanation in relation to either figure.

5.3. The allegation is not pleaded in the RAPoC but at a later stage Mr Grace has raised, in relation to the second caravan agreement (agreement 3), the payment of a substantial undisclosed commission paid to TBCSL. This, he alleges, was a breach of fiduciary duty by TBCSL for which, he alleges, the Defendants are also liable. Despite the lack of any formal pleading, this aspect is included in the agreed list of issues.

5.4. In addition, in relation to the claim, the Defendants have earlier this year, raised limitation issues. I granted permission for them to amend their pleadings to add this averment.

5.5. There is also the counterclaim by the Defendants for the money due under the second caravan agreement and for the return of the caravan. In relation to this, Mr Grace (on behalf of Mrs George) alleges:

(a) A misrepresentation for the purposes of the Misrepresentation Act 1967 ("MA")
(b) The lack of any valid default notice or termination notice required under the CCA.
(c) That the second caravan agreement was a "modifying agreement" for the purposes of the CCA, that as such it was inaccurate and unenforceable without an Order of the Court.
(d) That the agreement did not provide for some of the charges imposed by the Defendants after payments under the agreement ceased.
(e) That the agreement was not validly assigned to the Defendants.

5.6. As can be seen, apart from the ECHR claims, which are dealt with in section 6 of this judgment, the matters raised are encapsulated in the agreed list of issues which are dealt with in section 7.

## 6. THE ECHR CLAIM

6.1. The ECHR is imported into domestic law by the Human Rights Act 1998 ('HRA'). The relevant provisions are:

| | |
|---|---|
| Section 3 | Requires domestic legislation to be read in a way which is compatible with the ECHR wherever possible |
| Section 4 | Which enables an application for a declaration of incompatibility to be made in cases where domestic legislation cannot be so read |
| Section 6 | Which makes it unlawful for a public authority to act in a way which is incompatible with a convention right unless bound to do so by primary legislation |
| Section 7 | Which enables a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6 to either bring proceedings against the authority under the act in the appropriate Court or tribunal or to rely on the ECHR rights in any legal proceedings, but only if he is (or would be) a victim of the unlawful act |

6.2. There is no provision in the HRA which creates a direct cause of action against a Defendant other than a public authority. The Defendants in the present case are not a public authority.

6.3. There is no suggestion in any of the pleadings that any insufficiencies of the causes of action available under domestic law are such as to contravene the Convention and there is no request for any declaration of incompatibility (which could not be pursued in the County

Court in any event). The provisions of Article 8 are of relevance when considering the case as a whole, but they create no independent cause of action available in this case.

## 7. THE ISSUES

7.0.1. Before the trial, the parties were able to agree a list of the relevant issues [376 to 378]. They are as follows:

**Time Bar**

**1. Are C1 and C2's claims (or any one of them) for loss arising out of the default registration of 31.05.01 time barred?**

**2. In respect of any remaining issues.**

**C1's claim for damages**

**3. C1's claim under section 13 DPA 1998:**

**(a) Can C1 prove a contravention of any of principles 1 to 5 or 7 of Schedule 1 of the DPAas a result of the matters alleged? (The default registration of 31.05.01, the "unauthorised" credit search in 2006 and the late response to his DSAR)**

**(b) If so, has C1 suffered damage? (Non-availability of bank accounts, credit cards, mobile phone, ordering of goods and paying of bills)**
**(c) If so, has that damage been caused by D's contravention?**
**(d) If so, is the damage too remote?**
**(e) If damage has been suffered, has distress also been suffered?**

**4. C1's claim under s 140A of the CCA:**

**(a) Is agreement 1 a completed agreement?**
**(b) If not, is the relationship between C1 and D arising out of agreement 1 unfair to C1?**

**C2's claim for loss and damage**

**5. C2's claim under s 13 DPA 1998**

**(a) Can C2 prove a contravention of any of principles 1 to 5 or 7 of schedule 1 of the DPA as a result of the matter complained of? (The default registration of 31.05.01)**
**(b) If so, has C2 suffered damage? (Higher APR on Agreement 3)**
**(c) If so, has that damage been caused by D's contravention?**
**(d) If so, is the damage too remote?**
**(e) If damage has been suffered, has distress also been suffered?**

**6. C2's Claim under s 140A of the CCA**

**(a) It is agreed that C2 cannot claim under this head given that she was not a party to Agreement1**

D's Counterclaim

**7. Was there an actionable misrepresentation in respect of the description of the caravan?**

**8. Assignment of Agreement 3**

**(a) Was agreement 3 transferred from Capital Bank Plc to BOS?**
**If so, was a notice of assignment necessary in respect of this transfer?**
**If so, was there a notice of assignment in this regard?**

**(b) Was notice of assignment of Agreement 3 from BOS to D given to C2?**
**If not, should BOS be joined to the proceedings?**

**9. Was a valid default notice served on C2 in respect of Agreement 3?**

**10. Was Talacre/New Pines an unlicensed broker?**
**If not, was the New Pines a trading name on the licence?**
**If not, does that affect the enforceability of Agreement 3?**

**11. Was agreement 3 a modifying agreement?**

**12. Was the deposit on Agreement 3 inaccurate?**
**If so, should the agreement be enforced?**

**13. Did Agreement 3 provide for the charges debited to C2's account on Agreement 3?**

**14. Was there a fiduciary relationship between C2 and Talacre/New Pines?**
**If so, did Talacre breach its fiduciary duty to C2 by not disclosing any commission paid to it?**
**If so, did D procure that breach and was D aware of the alleged fiduciary relationship?**
**Is D liable to account for any commission paid to Talacre?**

7.0.2. At a very late stage, Mr Grace attempted to introduce two further lists of issues which were not agreed. There was a substantial degree of duplication between the two lists. The points raised were either:

(a) Allegations that criminal offences had been committed
(b) Procedural complaints; or
(c) Additional arguments in relation to the agreed issues

7.0.3. The criminal offence allegations are simply not relevant. Mr George is convinced that if a civil wrong is also a criminal offence, this alters both the substantive civil law and the rules of procedure in ways which are not provided for in the statutes, the case law

or the CPR. I tried to explain to him that this is not the case, but I was not successful. The points he made are nevertheless considered on merit in the contexts in which they arise.

7.0.4. The additional arguments have also been considered in the context to which they relate.

7.0.5. Most of the procedural points were concerned with the failure of the Defendant's solicitors to comply on time with Orders I had made for the production of documents, bundles etc. Most had already been dealt with as procedural issues earlier in the case and, with one exception, none are actually relevant to any issue I have to try.

7.0.6. I began the trial by taking Mr Grace through them one by one and pointing out what had been done in relation to each and why it was not necessary for me to deal with them in the course of the trial. Having done so, I do not propose to include them in this judgement.

7.0.7. The one exception is that Mr Grace pointed out that the Defendants had raised the Limitation Act very late in the proceedings. This was acknowledged by the Defendants and it has obvious potential relevance in relation to costs.

7.0.8. I shall now deal in turn with each of the numbered issues.

**7.1. ISSUE 1 Time Bar.**

**1. Are C1 and C2's claims (or any one of them) for loss arising out of the default registration of 31.05.01 time barred?**

7.1.1. The recital of the agreed issues does not mention it but I will also deal, under this head, with limitation as it relates to the registration of the default judgment.

7.1.2. In this context, it is very important to emphasise that the two claims (the registration of the default judgment and the default registration of 31st May 2001) are exclusively for statutory relief. They are pleaded and advanced under section 13 of the DPA and sections 140A and 140B of the CCA. (I have already dealt with the HRA point). The MA arises only in relation to the counterclaim. There is no claim in the tort of negligence, no claim in the tort of defamation and no claim in breach of contract. It follows that the relevant limitation period is that fixed by section 9(1) of the Limitation Act 1980:

> *"An action to recover any sum recoverable by virtue of any enactment shall not be brought more than six years from the date when the cause of action accrued."*

7.1.3. There is no discretion whatever. There is no element of personal injury in this case so section 33 is irrelevant. The tort of negligence is not pleaded so the extension available under section 14A relating to date of knowledge has no application; the six year period is fixed by reference to the accrual of the cause of action and nothing else.

7.1.4. In respect of the claims based on inability to obtain any real banking facilities until October 2004, this action was commenced on 12th December 2009. It follows that any inability to obtain a bank account prior to 12th December 2003 is not actionable. This means that any inability arising from the registration of the default judgment is out of time because the registration was removed in January 2003. The only relevant inability is therefore Mr

Grace's attempts to obtain an account with Lloyds TSB between the end of 2003 and October 2004.

7.1.5. Neither side referred to it in argument but I am aware of the case of **PATEL V PATEL [2009] EWHC 3264** in which it was held that a cause of action under section 140A and 140B does not accrue when the agreement is made but subsists throughout the period during which the relationship arising from the agreement subsists. Even this is no help because the relationship arising from the computer agreement was certainly over, at the latest, when the counterclaim was dismissed in December 2000.

7.1.6. The claim based on the extra rate of interest on the second static caravan is also affected. The cause of action (if any) in this respect accrued when the liability to pay the additional interest was incurred, i.e. the date when the second caravan contract was executed. This was in early 2003 well before December. It follows that the claim to the additional interest is wholly statute barred.

7.1.7. This is where one of the "criminal offence" allegations arises. Mr Grace attempts to argue (paragraph 10 of his skeleton argument) that the limitation on the prosecution of summary offences is 10 years and that this time limit should be applied.

7.1.8. He cites no authority for the 10 year limit. In fact, the general time limit for the prosecution of summary offences in the Magistrate's Court is in section 127 (1) of the Magistrates Courts Act 1980:

> *"127 Limitation of time.*
> *(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose."*

7.1.9. He refers to False Accounting which is not a summary offence. "It is triable either way". For prosecutions in the Crown Court there is no general fixed limitation period at all (though there are fixed periods in respect of some specific offences). The prevention of the prosecution of a stale offence is achieved by reference to whether a fair trial is possible. This depends very substantially on the nature of the evidence in an individual case. In an affray where the oral evidence is critical, 18 months may be too long. In fraud cases where most of the evidence is documentation, periods of much more than 6 years have been permitted.

7.1.10. In civil cases, there is no time limit for an action based on fraud but fraud is not pleaded in this case. Nevertheless, Mr Grace attempts to argue that because the actions of the Defendants in relation to unlicensed trading are alleged to be criminal offences, it follows that there should be a ten year time limit in this case. The argument, if valid, would impose no fixed time limit on an offence triable on indictment.

7.1.11. His argument has its superficial attractions. It is a general proposition of law that a perpetrator should not be permitted to profit from the commission of a criminal offence. Nevertheless, his argument is entirely devoid of any supporting authority and is flatly contradicted by the terms of section 9(1). If Parliament had wished to dis-apply limitation periods when criminal conduct is involved, the statute could have said so. It does not.

7.1.12. I have considered whether the claim by Mrs George could be salvaged by regarding it as a set-off against the counterclaim for payment of the money due under the agreement. This would at best be a very artificial construct because it was Mrs George who began the claim. However the strategy would fail in any event because of the provisions of section 35 of the Limitation Act 1980:

> *"(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced:*
>
> *(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and*
>
> *(b) in the case of any other new claim, on the same date as the original action.*
>
> *(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either:*
>
> *(a) the addition or substitution of a new cause of action; or*
>
> *(b) the addition or substitution of a new party;*
>
> *and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.*
>
> *(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.*
>
> *For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action."*

7.1.13. On any basis therefore, the best which could be achieved is to consider the position when this claim was first filed. By then, Mrs George's cause of action was well over six years old. The time bar cannot therefore be overcome.

**7.2. ISSUE 2: Time Bar: 2. In respect of any remaining issues.**

7.2.1. No limitation issues were raised in relation to any other aspect of the case

**7.3. ISSUE 3: C1's CLAIM FOR DAMAGES**

**3. C1's Claim under Section 13 of the Data Protection Act 1998:**

**(a) Can C1 prove a contravention of any of principles 1 to 5 or 7 of Schedule 1 of the Data Protection Act as a result of the matters alleged?**

**(The default registration of 31.5.01, the "unauthorised" credit search in 2006 and the late response to his DSAR)**

**(b) If so, has C1 suffered damage? (Non-availability of bank accounts, credit cards, mobile phone, ordering of goods and paying of bills)**

**(c) If so, has that damage been caused by D's contravention?**

**(d) If so, is the damage too remote?**

**(e) If damage has been suffered, has distress also been suffered?**

7.3.1. Section 13 of the DPA reads (so far as relevant):

*"13. Compensation for failure to comply with certain requirements.*

*(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*

*(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—*

*(a) the individual also suffers damage by reason of the contravention"*

7.3.2. Section 4 (4) of the DPA places a duty on any data controlled to comply with the data principles set out in Schedule 1 of the Act. The section reads:

*"4. THE DATA PROTECTION PRINCIPLES.*

*(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.*

*(2) Those principles are to be interpreted in accordance with Part II of Schedule 1.*

*(3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.*

*(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller."*

7.3.3. "Personal data" is defined in section 1 of the Act as:

*"Personal data" means data which relate to a living individual who can be identified—*

*(a) from those data, or*
*(b)from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*

It is clear that the data held about Mr Grace fits this definition but there has never been any suggestion that it was "sensitive personal data".

7.3.4. The Data Protection Principles with which the data controller is required to comply, are set out in schedule 1 of the Act as follows (again, so far as is relevant):

*"THE PRINCIPLES*

*1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*
*(a) at least one of the conditions in Schedule 2 is met, and*

*2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.*

*3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.*

*4 Personal data shall be accurate and, where necessary, kept up to date.*

*5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.*

*6 Personal data shall be processed in accordance with the rights of data subjects under this Act.*

*7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*

7.3.5. The conditions set out in Schedule 2 of the Act are (so far as relevant):

*"CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA*

*1 The data subject has given his consent to the processing.*
*2 The processing is necessary—*
*(a) for the performance of a contract to which the data subject is a party; or*
*(b) for the taking of steps at the request of the data subject with a view to entering into a contract.*
*3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*

*4 The processing is necessary in order to protect the vital interests of the data subject."*

7.3.6. It is clear beyond argument that the Defendants are in breach of several of the Principles. Principle 4 was breached because the data supplied to the credit reference agencies in early 2001 was not accurate. The agreement Mr Grace had failed to pay was not a loan and the amount outstanding was not £928. Principle 5 was broken because the incorrect data carried on being registered and updated. Principle 7 was broken because the circumstances of the unauthorised search disclosed that there were no adequate protection mechanisms in place. In addition, the SDAR was not dealt with within the statutory 40 days.

7.3.7. The alleged pecuniary loss arising from the lack of banking facilities is entirely unquantified but probably did occur. It usually is more expensive to use a "pay as you go" mobile telephone than one on a monthly contract. It is more expensive to pay bills by postal order than by cheque. However, the problem for the claim is to identify any loss **resulting from the breach.** It is clear from the decision of the Court of Appeal in **Johnson v MDU [2008] Bus LR** at page 532 that the "damage" referred to in section 13 means pecuniary loss:

*"Because of the terms of section 13, distress damages are only available if damage in the sense of pecuniary loss has been suffered"* (paragraph 75)

Mr Grace attempts to argue (at paragraph 17 of his skeleton argument) that it is not necessary to prove financial loss. He cites KOPRAHOR V WOOLWICH BUILDING SOCIETY [1996] 4 AER 119 in which a claim based on an unpaid cheque resulted in an award of £4500 for damage to the Claimant's credit. However, this was a case brought in breach of contract, it has no application to a claim under section 13.

7.3.8. The agreement for the computer was not void, it was unenforceable but the debt still existed and it had not been paid. In **MC GUFFICK v ROYAL BANK OF SCOTLAND [2009] EWHC 2386 (Comm)**, Flaux J held 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 while the agreement was unenforceable. Similarly under section 113 (2) the creditor's security rights exist but are unenforceable. In the event that the court makes an order on the section 127(1) the creditor can enforce its rights under the agreement and in relation to the security. If the court declined to make an order or section 127 (3) precludes the court from making an order, then the creditor cannot enforce the agreement. Its rights continue but cannot be enforced."* (Paragraph 67)

*In my judgement the reporting to CRAs and related activities do not constitute enforcement for the purposes of the Consumer Credit Act"*

7.3.9. The effect of this judgement is that where an agreement is unenforceable under the provisions of the CCA, the debt nonetheless subsists. If payments are made under it they cannot be recovered and if the payments are not made there is a default in payment and the debtor is free to report the default to a credit reference agency if it has a legitimate reason to do so and the sharing, between credit providers, of information about the credit worthiness of potential borrowers is a legitimate reason.

7.3.10. There is therefore no basis for a complaint about the registration of the default on 31st May 2001 as such. The alleged breach of the DPA principles is that the data was inaccurate in that it described the agreement as a loan when in fact it was a hire purchase contract and the sum in default was misstated by about hundred pounds. However, it must be the case that just as much damage to the credit worthiness of Mr Grace, and hence just as much damage to his ability to obtain adequate banking facilities would have been done had the registration been accurate. It can scarcely be argued that he would have been able to obtain a bank account if he had been recorded as being in default of a hire purchase agreement for £800 but that because the registration referred to a loan and £900 he could not. The result is that there has been no pecuniary loss **arising from the breach.**

7.3.11. So far as the unauthorised search and the late reply to the data access request are concerned, no financial loss is alleged at all. It follows that there is no sustainable basis for any of the three claims. It is not necessary to decide the other sub-issues.

**7.4. ISSUE 4: C1's claim under s 140A of the CCA:**

**(a) Is agreement 1 a completed agreement?**

**(b) If not, is the relationship between C1 and D arising out of agreement 1 unfair to C1?**

7.4.1. A completed agreement is defined as one in which no sum is still payable or can in the future become payable. In view of the fact that the Defendant's position in relation to the registration of the default in May 2001 is that the sums due under that agreement are still payable. It is probably not a completed agreement.

7.4.2. The terms of section 140A are very wide indeed and enable the Court to take into account the terms of the agreement itself and the behaviour of the parties both at the time of the contract and afterwards. The act makes no attempt to define "unfair". However, in two cases it has been held that the provisions of section 140A are coextensive with the factual or statutory regime of the principal aspects of the case. The first is **McGuffick** which I cited earlier. At the very end of the judgement appears the following:

> *"The suggestion in Mr Moran's submissions that there could be a valid claim under section 140A even if his arguments under section 77 (4) were not accepted is misconceived sense for the case for the claimant of an unfair relationship relies upon the same allegations as I have rejected in relation to the other aspects of the case. Just as the claim to injunctive relief must fail so this alternative claim must fail."*

7.4.3. The same approach was adopted in the case of **HARRISON v BLACK HORSE LTD [2011] EWCA Civ 1128.** In that case the principal claim was for breach of the Insurance Conduct of Business Rules ("ICOB") which, like the data protection principles, give rise to a statutory right to damages if they are broken and loss results. Both His Honour Judge Waksman in the first tier appeal and the Court of Appeal subsequently held that if the claim under the ICOB rules failed, so did the claim under section 140A. The Court of Appeal judgement was quite emphatic that where there is a statutory regime considerations of fairness under section 140A should be based on that statutory regime:

*"If the "things done or not done by the creditor before the making of the agreement", cf s 140A (1) (c) of the Act, are in compliance with and involve no non-compliance with the statutorily prescribed regime, it is not easy to see from where unfairness in the relationship is to be derived".* (paragraph 33)

7.4.4. In the present case the claims under the DPA and under section 140A of the CCA rely on exactly the same facts. There is a distinction from the case of **HARRISON** in that, in **HARRISON** no breach of the ICOB rules was found, whereas in the present case there are clear breaches of the data protection principles. The claim under the DPA fails because there is no loss resulting from any of the breaches.

7.4.5. I have to consider therefore whether would be feasible to grant a remedy under section 140A on the basis that the relationship is unfair even though there is no remedy available under the principal legislation. Given the decisions in **MCGUFFICK** and **HARRISON** I do not consider that it is feasible to do so. The DPA claim and the section 140A claim rely on identical facts so if the former fails, the latter must necessarily do so.

7.4.6. I am aware that the Supreme Court has granted permission to appeal in the case of **HARRISON** but I do not consider it appropriate to adjourn this case to await the outcome of the appeal.

**7.5. ISSUE 5: C2's claim for loss and damage**

**5. C2's claim under section 13 DPA 1998**

**(a) Can C2 prove a contravention of any of principles 1 to 5 or 7 of schedule 1 of the DPA as a result of the matter complained of? (The default registration of 31.05.01)**

**(b) If so, has C2 suffered damage? (Higher APR on Agreement 3)**

**(c) If so, has that damage been caused by D's contravention?**

**(d) If so, is the damage too remote?**

**(e) If damage has been suffered, has distress also been suffered?**

7.5.1. This claim is based solely on the increased rate of interest in relation to the second caravan agreement. As I have already found that the claim is wholly barred by the Limitation Act, it is not actually necessary to decide this issue. However, were I to do so, it would fail on exactly the same grounds as Mr Grace's claim under the same head. The loss claimed was caused entirely by the inaccurate registration on 31st May 2001. The only complaint which can be made about it is that it was inaccurate and precisely the same result on the interest rate would have come about had the registration been accurate. It follows that there is no loss **arising from the breach.** The other sub-issues are again irrelevant.

**7.6. ISSUE 6: C2's Claim under s 140A of the CCA**

**(a) It is agreed that C2 cannot claim under this head given that she was not a party to Agreement 1**

7.6.1. Given the way this paragraph is worded, it is clear that this is no longer an issue which needs to be decided.

## 7.7. ISSUE 7: D's Counterclaim

**7. Was there an actionable misrepresentation in respect of the description of the caravan?**

7.7.1. This can be dealt with relatively quickly. The static caravan is described in the second agreement as a "vehicle". The case put by Mr Grace is that this is an actionable misdescription for the purposes of the Misrepresentation Act. To the extent that a static caravan is clearly not a "vehicle", he is clearly correct.

7.7.2. However, it is trite law to say that in order to be actionable, a misrepresentation must actually mislead. Mr Grace and Mrs George in their oral evidence agreed without reservation that they both knew what the article the subject of the agreement was and that they were not in any way misled by the description in the agreement. This precludes any relief under the Act.

7.7.3. Mr Grace also alleges that this was a sale by description. This is also negated by the oral evidence. It was the sale of a specific caravan, a specific article which they had seen and which was outside the showroom when Mrs George signed the agreement.

## 7.8. ISSUE 8: Assignment of Agreement 3

**(a) Was agreement 3 transferred from Capital Bank Plc to BOS?**
**If so, was a notice of assignment necessary in respect of this transfer?**
**If so, was there a notice of assignment in this regard?**

**(b) Was notice of assignment of Agreement 3 from BOS to D given to C2?**
**If not, should BOS be joined to the proceedings?**

7.8.1. Mr Grace alleges that no notice of either assignment was received. In relation to the transfer from CBP to BOS this is certainly correct since there was no assignment as such. The change was affected by statute. It was done by section 10 of the HBOS Group Reorganisation Act 2006 the preamble to which states that is objects include:

> *"To provide for the transfer of the undertakings of Capital Bank plc, Halifax plc and HBOS Treasury Services plc to the Governor and Company of the Bank of Scotland"*

7.8.2. Section 10 of the Act provides (so far as relevant):

> *"10. Vesting of undertakings in the Bank*
>
> *(1) On an appointed day the appointed undertaking shall, by virtue of this Act and without further assurance, be transferred to the Bank to the intent that the Bank shall succeed to the relevant undertaking as if in all respects the Bank were the same person as the transferor company."*

7.8.3. It follows that no notice of assignment is required.

7.8.4. As to the assignment from BOS to the Defendants, the matter is dealt with by Mr Blore in his witness statement at paragraph 6. He refers to the Defendants records which do indeed show that a notice was sent on 5th May 2010. Mr Grace insists that it was never received but I accept that it was sent. In my view, the most probable explanation for the dispute is that Mr Grace has forgotten it. It is clear that by 24th January 2011 he was well aware that BH were dealing with the matter and that it had been assigned because his letter on behalf of Mrs George dated 24th January 2011 [273-276] refers specifically to the assignment:

> *"Much correspondence has been entered into with the BOS prior to the assignment of Mrs George's loan to Black Horse Ltd."*

Moreover, he goes on specifically to say:

> *"No assignment notice was received by Mrs George when it was assigned to BOS from Capital Bank Plc"*

He does not refer to any such absence in relation to the assignment from BOS to the Defendants.

7.8.5. I therefore find as a fact that an adequate notice was in fact served.

**7.9. ISSUE 9: Was a valid default notice served on C2 in respect of Agreement 3?**

7.9.1. I recited in paragraph 3.26 the efforts the Defendants made to serve appropriate notices in relation to this agreement. Assuming that Mr Grace is correct that the first notice was never received, it is nevertheless accepted that the second notice dated 4th October 2011 did arrive on 10th October 2011 [81]. Mr Grace however alleges that what purported to be a subsequent copy of this notice does not have the same signature. This is another case in which he alleges criminal offences (Forgery and Perverting Public Justice). Having examined the evidence I see no basis for alleging a criminal offence of any description. Moreover, if a valid notice was served on 10th October 2011 (which appears to be admitted), it is difficult to understand how subsequent conduct, however reprehensible, could negate this. I therefore find as a fact that a valid notice of default was served.

**7.10. ISSUE 10: Was Talacre/New Pines an unlicensed broker?**
**If not, was The New Pines a trading name on the licence?**
**If not, does that affect the enforceability of Agreement 3?**

7.10.1. It is obvious from the fact that the licence is in the papers [419-420] that TBCSL was not unlicensed. However, section 24 of the CCA states:

> *"A standard licence authorises the licensee to carry on business under the name or names specified in the licence, but not under any other name."*

7.10.2. The point taken by Mr Grace was originally the one dealt with in paragraphs 3.22 and 3.23 i.e. that the dealer was referred to in the agreement as "The New Pines" and that no form of this name was on the licence until 24th May 2004. As has already been demonstrated, this

is not correct. A form of the name including "The New Pines" was on the licence from the outset. Nevertheless, Mr Grace continues to argue that because "*The New Pines*" and "*The New Pines Caravan Holiday Home and Leisure Centre*" are not word for word the same, this constitutes unlicensed trading and the agreement is unenforceable because of section 149 of the CCA which provides:

> "*A regulated agreement made by a debtor or hirer who, for the purposes of making that agreement, was introduced to the creditor or owner by an unlicensed credit-broker is enforceable against the debtor or hirer only where...the OFT has made an order...*"

No order by the OFT has been made in this case.

7.10.3. Mr Grace argues by reference to WILSON V HOWARD 2005 EWCA Civ 147 CCLR 2, which was a money lender's case in which a pawnbroker had (among other defects in his manner of trading) traded in a name other than his own without a license to do so and all the agreements between him and his customer were held to be unenforceable.

7.10.4. However, that case is not really helpful because it was unquestionably the case that the pawnbroker had traded in a name which was not his own and which was not licensed (as well as other major breaches of the CCA as it then stood (sections 140A and 140B had not at that time been added)). The case is no help as to whether there is unlicensed trading in the present case.

7.10.5. The only questions I have to answer are:

> (a) Was this unlicensed trading?
> (b) If so, does it, pursuant to section 149, render the agreement unenforceable?

7.10.6. Mr Grace argues that in some contexts a corporate name must be stated exactly. He points to the heading of a claim form or particulars of claim which are required to be exact. However, as in other walks of life, the law requires high levels of precision at some times but not at others.

7.10.7. Professor Goode, in the Encyclopaedia of Consumer Credit Law and Practice issue 25 paragraph 27.341 recites:

> "*(i) Slight discrepancies between the name used and the licensed name (e.g. discrepancies arising from a slight misspelling of the name) will not be considered to contravene the statutory requirements* ***if they are not such as to mislead****. On this basis, the Court felt able in PEIZER V LEFKOWITZ to overlook a description of the lender in a promissory note as "Westminster Loan and Discount Company" when the registered name was "Westminster Loan and Discount Office". The same case decided that the materiality of a discrepancy for this purpose is a question of law, not a question of fact."*
>
> *(ii) Not every act done in furtherance of a business transaction constitutes the carrying on of a business. There is a distinction between the carrying on of the business and the carrying out of transactions which make up the business. If the business as a whole is carried on in the licensed name, the mere fact that, for*

*example, a different name was used in a visit to the debtor in the course of completing a transaction would not contravene the statutory provisions. As Lord Atkinson put it in KIRKWOOD V GADD "it will I think suffice if such important portions, or such an important portion of the dealing are or is transacted there [i.e. the authorised address] by communication, verbal or written, as will necessary reveal to the borrower the identity of the money lender.""*

7.10.8. In my view, the use of "The New Pines" on the agreement form does not constitute unlicensed trading. It was obviously an abbreviation of a name which was on the licence. There was no risk that anybody would be misled. The agreement was completed at the premises of TBCSL. There is no evidence whatever to indicate that TBCSL carried on business in any other way using any other name. It cannot feasibly be said that one use of an abbreviated form of the name which was on the license constituted unlicensed trading.

7.10.9. This is yet another context in which Mr Grace alleges commission of a criminal offence because unlicensed trading is an offence under section 39 of the CCA which provides:

*"(1) a person who engages in any activities for which a licence is required when he is not a licensee under a licence covering those activities commits an offence.*

*(2) a licensee under a standard licence who carries on business under any name not specified in the licence commits an offence."*

7.10.10. Again, the fact of the existence of criminal sanctions is not directly relevant. However, on this occasion, because of section 170 (1) of the Act which provides:

*"(1) A breach of any requirement made (otherwise than by any court) by or under this Act shall incur no civil or criminal sanction as being such a breach, except to the extent (if any) expressly provided by or under this Act."*

- the criminal sanctions can be used in order to draw a conclusion about the applicability of s 149, though the result is the opposite of Mr Grace's argument. The proposition is explained by Professor Goode at paragraph 27.342:

*"A licensee who carries on business under a name not specified in the licence commits an offence. However, it would seem that he does not thereby become an unlicensed trader. It is true that CCA 1974 section 189 (1) defines "licensed", in relation to any act, as authorised by a license to do the act and section 23 provides that a license covers all "lawful" activities done in the course of a licensed business. However, it is apparent from section 39 that a distinction is to be drawn between unlicensed activities and an unlicensed name, the former being an offence under section 39(1) and the latter an offence under section 39(2). Accordingly, a person is licensed if the business and activities in which he engages are covered by the license even if he carries on that business and its activities under an unlicensed name. It follows that agreements entered into by the licensee are not rendered unenforceable under section 40 merely because entered into by the licensee under a name or in the course of a business conducted under a name not specified in the license. As such, the only sanctions for trading under an unlicensed name are the criminal penalty*

*prescribed for so doing and the suspension or revocation of the license by the OFT on the grounds of unfitness to continue to hold it".*

7.10.11. It would follow from the lack of engagement of section 40 that section 149 would also not be engaged even if the trading were unlicensed, and this view is also expressed in the Encyclopaedia of Consumer Credit at paragraph 2-040:

> *"It is submitted that the commission of a criminal offence under sub-section 2* (of section 39) *does not render agreements entered into by the licensee void for illegality as was the case under section 1(3)(b) of the Money Lenders Act 1927 (and its predecessor section 2(1)(b) of the Money Lenders Act 1900) see section 170(1). Nor does it render regulated agreements unenforceable under section 40, 148 or 149...this was the view taken in BOOTH & PHILIPS GARAGES LIMITED V MILTON [2000] CLY 2601 Oxford County Court."*

7.10.12. The answers to the questions this issue poses therefore are:

> Was Talacre/New Pines an unlicensed broker? – No there was a license.
> If not, was "The New Pines" a trading name on the license? – No but it was an abbreviated form of a name which was on the license and its use did not constitute unlicensed trading.
> If not, does that affect the enforceability of agreement 3? – This question is not strictly relevant in the light of the answers to the first two questions, but the answer in any event is – No.

## 7.11. ISSUE 11: Was agreement 3 a modifying agreement?

7.11.1. The issue is whether the second caravan agreement was a modification of the first caravan agreement or whether it was a new independent contract. Mr Grace argues that it is a modified agreement under section 82 (2) of the CCA. He relies on the fact that both are on the same standard form and are therefore identical except for the individual details filled in by hand.

7.11.2. That assertion is correct but it does not establish that the second caravan agreement was a modification of the first. It is clear beyond argument that what happened is that Mrs George bought a new caravan, used the old caravan as a deposit and the amount outstanding under the first caravan agreement was taken into account in the calculations and paid off. It was essential to discharge the payments on the first caravan agreement because it was a hire purchase agreement and title for the caravan would not pass to her until she had paid all that was due. She had to do this in order to be able to give good title to the first caravan and hence to use the first caravan as a deposit for the second.

7.11.3. I can see no reason whatever to regard this as a modifying agreement.

## 7.12. ISSUE 12: Was the deposit on Agreement 3 inaccurate? If so, should the agreement be enforced?

7.12.1. The agreement itself stated that the deposit is £17,667 [90]. Mr Grace is quite correct that the computer printout obtained on 14th June 2011 [102] recites that a deposit of £17,828 was paid. He goes on to assert that this proves that the deposit stated in the agreement is not

correct. I do not see the logic behind this assertion. It is equally possible that the computer printout is in error. Indeed the latter is much more likely. After all, the agreement was completed in the presence of Mrs George and Mr Grace and the salesman who would all have known what the salesman offered by way of a part exchange allowance for the old caravan.

7.12.2. Moreover, several of the other figures on page 102 are wrong. 77 payments of £427.08 makes a total of £32,885.16, not £33,885.16. In any event, there were not 77 payments due, there were 119. If £532.05 is then added, (bringing the total instalments to £33,417.05) plus a deposit of £17,828, the total is £51245.21 as shown on the printout. However, this does not correspond with the figures on the agreement which show the balance due as £51,411 and the total payable as £68,076. Also, the agreement says that the monthly payments are £427.05 not £427.08. As to this, the agreement is unquestionably correct because the payments made [95 -96] were indeed £427.05 and the opening balance is shown as £51,411 not £33,417.05.

7.12.3. I therefore find as a fact that the deposit on Agreement 3 is accurately stated. Even if it had not been, I would readily have granted an Enforcement Order in respect of such a trivial error, albeit on terms as to giving credit for the additional deposit.

### 7.13. ISSUE 13: Did Agreement 3 provide for the charges debited to C2's account on Agreement 3?

7.13.1. This is relatively straightforward. On the reverse of the second caravan agreement [67] there is a box labelled "Notice to Customer" which says:

> *"By signing this agreement you acknowledge that:*
> *(a) if you do not keep up the payments due under this agreement you will become liable to pay any additional costs incurred by us in accordance with clause 3 of the terms and conditions"*

7.13.2. Clause 3 of the terms and conditions [92] is quite specific that in the event of default in payment the Defendants are entitled to charge costs expenses and interest.

7.13.3. I therefore find as a fact that the agreement did provide for the charges debited to C2's account.

### 7.14. ISSUE 14: Was there a fiduciary relationship between C2 and Talacre/New Pines?
### If so, did Talacre breach its fiduciary duty to C2 by not disclosing any commission paid to it?
### If so, did D procure that breach and was D aware of the alleged fiduciary relationship?
### Is D liable to account for any commission paid to Talacre?

7.14.1. Mr Grace argues, in his skeleton argument, (paragraphs 38-40) that the cases of:

> **HURSTANGER V WILSON [2007] EWCA Civ 299;** and
> **IMAGEVIEW LTD V KEVIN JACK [2009] 2 AER 666**

*"Confirm a fiduciary duty existed between New Pines and C2".*

7.14.2. The two cases cited most certainly do **not** confirm the existence of a fiduciary duty in the present case. In **HURSTANGER** both a broker and a lender were held liable where a commission was paid to the broker by the lender and the fact, but not the amount of the commission, was disclosed. However, that was a case where the broker was paid a fee by the borrowers and, more particularly, the contract between the borrowers and the broker stated **expressly** that the broker was the agent of the borrowers so the existence of a fiduciary duty was unarguable. It was also clear that the lenders knew of that relationship. The payment of a commission in those circumstances was a breach of trust unless the borrowers had given informed consent. They were told that commission had been paid but not how much. The decision of the Court of Appeal was that because this was a non-status loan (a class of borrowing where borrowers are likely to be particularly vulnerable) they could not give an informed consent unless they had been told the amount of the commission. The decision is therefore critically dependent both on the undoubted existence of an express agency and on the fact that it was non-status lending.

7.14.3. **IMAGEVIEW v JACK** was also a case involving an **express** agency. The statement of the facts in the headnote of the report makes this quite clear:

> *"The Defendant was Trinidad and Tobago's international goalkeeper. He wished to play professionally in the United Kingdom. He contacted a football club and asked B, whom he knew, to negotiate with the club. B agreed that he (via the claimant company) would act as his agent. If the negotiations with the club were successful, the Defendant was to pay the club 10 percent of his monthly salary"*

7.14.4. Mr Grace he goes on to refer also to **MOORE STEPHENS V STONE ROLLS LTD [2009] UKHL 39** and claims that this case is a parallel. However, the facts are very different. Stone Rolls Ltd was a company wholly controlled and owned by a Mr S. Mr S used the company as a vehicle for fraud. Moore Stephens were auditors who failed to discover the fraud. Action by one of the fraud victims bankrupted the company which went into liquidation. It was then controlled by the creditors who tried to bring an action for negligence against the auditors in the name of the company. The House of Lords held that since the company had been controlled by one man, his actions were those of the company so the company had been involved in the fraud and that having been involved in the fraud the company could not now bring an action based on its own illegal conduct.

7.14.5. Mr Grace alleges fraud in his skeleton argument but fraud is not pleaded and there is no evidence to support an allegation of fraud against the Defendants in the present case. IF there was an agency and IF the Defendants were aware of it when they paid the commission, they might well be responsible for inducing a breach of trust but that would not be fraud. In HURSTANGER, because of the breach of fiduciary duty, the Court could have rescinded the entire agreement but declined to do so. The only remedy ordered against the lenders was an Order that they should pay the borrowers an amount equivalent to the commission plus interest since the date it was paid.

7.14.6. However, the main point is that none of these cases is any help in answering the critical questions whether there was a fiduciary duty and, if so, whether the Defendants were aware of it.

7.14.7. In the present case, the relationship was that of vendor and purchaser, which does not normally give rise to a fiduciary relationship. The dealer also arranged the loan and so acted as "credit broker" to that extent. Does that create a fiduciary duty? If Mr Grace and Mrs George had gone to an independent broker and asked him to arrange a loan for them, it very well might. (Though even in those circumstances, His Honour Judge Milwyn Jarman sitting in Mold County Court held recently in the unreported case of **SEALEY & WINFIELD V LOANS UK & GE MONEY** that, because the brokers had given the clients a document stating that a commission would be paid, it was clear that he had not undertaken an undivided loyalty to them and there was no fiduciary duty). However, where a salesman selling a caravan (or more commonly a car) to a customer also arranges finance for it, it would not be normal to regard him as the agent of the customer or as owing them a fiduciary duty. This is a very common combination of circumstances yet I know of no case (and certainly none was cited in argument) which has held that the salesman was the agent of, or owed a fiduciary duty to the customer.

7.14.8. This view is reinforced by the existence of subsections 56 (1) (c) and 56 (2) of the CCA. Section 56 reads (so far as relevant):

*56 Antecedent negotiations.*

*(1) In this Act "antecedent negotiations" means any negotiations with the debtor or hirer—*

*(a)*

*(b)*

*(c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),*

*and "negotiator " means the person by whom negotiations are so conducted with the debtor or hirer.*

*(2) Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.*

*(3) An agreement is void if, and to the extent that, it purports in relation to an actual or prospective regulated agreement—*

*(a) to provide that a person acting as, or on behalf of, a negotiator is to be treated as the agent of the debtor or hirer,*

7.14.9. Sections 11 and 12 of the CCA reads (so far as relevant):

*"11 Restricted-use credit and unrestricted-use credit.*

*(1) A restricted-use credit agreement is a regulated consumer credit agreement—*

*(a)*

*(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor, or*

*(c)*

*and "restricted-use credit " shall be construed accordingly*

*12. Debtor-creditor supplier agreements.*

*A debtor-creditor-supplier agreement is a regulated consumer credit agreement being—*

*(a)*

*(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"*

7.14.10. These provisions make it clear that, at least for the purposes of negotiation, the salesman, or the supplier, is regarded as the agent of the lender not the buyer and that an attempt to make him the agent of the buyer is void. These provisions would be difficult to reconcile with a general proposition that the salesman or the supplier owes a fiduciary duty to the borrower.

7.14.11. The answer to the first question of this issue is, therefore, - No. That being the case, the remaining questions are redundant.

## 8. RESULT

8.1. The Defendants have thus succeeded on all issues. There will be judgment for the Defendants on both the claim and the counterclaim. I will take submissions on the precise form of the Order and as to costs when I hand down this judgment.

Derek R Halbert
Designated Civil Judge, Cheshire.
16th September 2012.