finance & credit law

e-signatures – what's the big deal?

In the era of the "digital economy" (with nearly a third of shopping done on-line and 44% of UK on-line[1] payments made using a mobile device[2]), companies are increasingly questioning why their contracts and customer/supplier interactions cannot be moved to an entirely paperless model.

Banks, insurance companies, retailers, telcos, utility providers, software/app vendors and airlines have all been successful in shifting some (if not all) of their consumer contracting to an on-line model; ticking a box sufficient to confirm a transaction and accept associated Ts&Cs.

To tackle the B2B market, providers of e-signatures have proliferated, encouraged by favourable regulatory regimes in Europe, the US and further afield. DocuSign claim that 50 million customers in 188 countries use their service[3]; Adobe assert that an e-signature solution can "cut the cost and hassle of paper-based tasks" and "speed business transactions[4]."

However the absence of globally harmonised legislation, coupled with cumbersome local laws, have led to uncertainty around the scope of application and validity of e-signatures. Likewise "Cloud" delivery models (employed by the majority of service providers) present challenges, particularly from the point of view of data security and data residency.

We seek to address some of those issues in this article.

What is an e-signature?

The "eIDAS" Regulation[5] cryptically defines an electronic signature as "data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign". Under eIDAS, e-signatures can be "simple[6]" , "advanced" or "qualified". This complex designation hides a much simpler reality - most users may not realise that they are "signing" contracts electronically by:

- chip & pin or contactless transactions
- ticking "I accept[7]" or "submit" in online purchases
- signing their name at the end of an email[8]
- using biometric signatures (fingerprint and facial recognition).

In the business environment, e-signatures can be used as a vehicle to expedite, simplify and manage the contract execution process. Electronic contracts can be circulated, signed, authenticated and loaded in a matter of minutes.

Parties to an agreement can select the e-signature method which best suits their authentication requirements. Good practice[9] dictates that advanced[10] or qualified signatures should be used for high value or strategic agreements as they:

- identify the signatory with a high degree of certainty
- limit the risk of 3rd party interference or fraud

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- limit the risk of subsequent amendment or revocation
- and thus enable the parties to validate the integrity of the signature and, in turn, the enforceability of the contract.

"Qualified[11]" electronic signatures supplement "advanced" e-signatures by mandating the use of software or hardware tools to create codes or cryptographic keys (certificates) issued by trust service providers and used to validate the authenticity of the signature. The devices and trust service providers must be "qualified" – that is to say they must meet the requirements of eIDAS, be registered with the supervisory body in the relevant Member State[12] and notified to the European Commission.

e-signatures and the legal landscape

In 1999 the European Union[13], Australia and the United States[14] were amongst the first to codify the treatment of electronic signatures. All recognised the validity of e-signatures for the conclusion of contracts and their admissibility as evidence in legal proceedings; all stipulate that a contract cannot be denied legal effect solely on the grounds that they are in electronic form.

So far so good. However:

- the EU and the US model required states or member states to adopt the legislation; in Europe in particular this created a fractured legislative landscape[15];
- the legislation (in the interests of being technology neutral) did not stipulate what it regarded as an "electronic signature" but defined them by a set of qualifying criteria;
- the European Directive established a two-tier process for "simple" and "advanced" e-signatures which introduced uncertainty as to the legal effect of the poorer sibling;
- the legislation was subordinate to existing legislation applicable to specific legal instruments (for example property transfers).

The position in the European Union changed in July 2016 when eIDAS came into force. eIDAS is directly enforceable across member states and replaces the existing Directive. eIDAS is designed firstly to ensure a more harmonised approach with respect to the recognition and enforceability of e-signatures. eIDAS is also designed to build a consistent framework for secure electronic authentication by defining mutually recognised, pan-EU rules for:

- electronic signatures (simple, advanced and qualified)
- electronic identification schemes (classified low, substantial, high)
- electronic seals (simple, advanced and qualified)
- trust services (simple, advanced and qualified)
- electronic time stamps (simple and qualified)
- electronic registered delivery services (simple and qualified)
- electronic documents (simple)
- website authentication (qualified)

Law Society Guidance

In response to eIDAS, the Law Society of England and Wales (with input from counsel) published a practice note16 which recognises the validity of electronic signatures for commercial contracts and provides some guidance on the extent to which e-signatures satisfy the requirement for documents to be "in writing" and "signed". The practice note also provides some guidance on documents which still require a wet-ink signature, as well deeds, originals, counterparts and conflict of laws issues. Importantly, given the complexity of the subject matter, the Law Society recommend that advice is taken on the individual circumstances and nature of the documents to be executed.

Law Commission Programme

In December 2017, the Law Commission published their Thirteenth Programme of Law Reform[17] which highlights Electronic Signatures as an area that requires significant reform. The Law Commission stated that e-signatures could "boost Global Britain and help enhance the UK's competitiveness as we leave the EU"[18] but recognised that further work was necessary to eliminate uncertainty over the validity of e-signatures for the execution of certain types of agreements and instruments.

Benefits of e-signatures

e-signature service providers underline numerous benefits when executing contracts electronically[19]:

- **Speed of execution** - e-signatures enable contracts to be executed and returned in a matter of minutes, on any device by geographically- dispersed signatories;
- **Security** – contracts executed by e-signature, particularly when overlaid with authentication tools, are inherently more secure and harder to forge than paper-contracts;
- **Traceability** – signatures are traceable and auditable; workflow tools enable companies to track the status of contracts in real-time;
- **Integration** – e-signature solutions can be integrated with existing CRM, procurement, accounting, HR and document management systems to provide end-to-end workflow management;
- **Ease of use** – execution processes are technology neutral, intuitive and culturally accepted by the digital generation;
- **Cost** – whilst there will be inevitable up-front/ongoing charges for implementing an e-signature solution, vendors argue these will be offset by closing contracts more quickly, introducing certainty, saving management time, facilitating contract management and eliminating courier fees.

Barriers to adoption of e-signatures

Under the new EU legislative framework, and with technology embedded in popular culture, most documents can be executed electronically – from confidentiality agreements, to contracts of employment. Indeed retail banks routinely use electronic signatures for the execution of consumer credit agreements[20], loan and mortgage applications.

However there remain some barriers to the use of e-signatures for certain documents in some jurisdictions, for example:

- deeds[21], wills and trust documents;
- enduring powers of attorney;
- guarantees[22];
- certain real estate agreements[23];
- marriage, birth, divorce and death certificates;
- other official documents required to be submitted in paper form (although this is expected to change under eIDAS); and
- agreements which stipulate that they can only be signed or varied by agreement "in writing and signed by hand".

It is advisable to seek advice and develop a policy which addresses local law requirements in relevant jurisdictions.

Selecting an e-signature platform

There are a myriad of e-signature service providers. The big players include DocuSign, Adobe, Silanis, ARX, and Dealflo[24].

Some suppliers offer an "on-premise" solution (i.e. where the software is hosted by the customer) but most are cloud-based. Many are compatible with mobile devices (enabling tablet or smart phone signatures), and offer custom branding so they can be white-labelled or "integrated" with existing CRM systems. Most offer multiple authentication options (from public/private keys to biometric signature verification). Many warrant that they are compliant with existing legislation (including eIDAS and the US ESIGN Act).[25]

Given the range of vendors and features, it will be important to conduct detailed due diligence and vendor selection taking into consideration:

- functionality and ease of use
- pricing plans and options
- performance and availability requirements
- integration and compatibility with existing CRM/ERP systems
- scalability and flexibility
- data privacy, data security and data residency requirements
- compliance with SYSC[26]/Solvency II[27]
- other applicable terms and conditions

Basic Contractual Principles Apply

It must not be forgotten that traditional legal principles apply to contracts concluded electronically (offer, acceptance, consideration, certainty of terms and an intention to be bound). As such it is important to define a solution or a process which enables: the incorporation of applicable terms; validation that signatories have adequate capacity and delegated authority; certification that the agreement has not been varied; and an actionable change-control process.

Some Practical Considerations

For clients deploying an e-signature solution, it will be important to manage the risk of contracts being inadvertently disclosed or mistakenly (or maliciously) executed. Robust security procedures and HR policies should control the risk of physical IT assets being left unsecured or the sharing of passwords and access keys. Clients should also allow for a review of existing contractual arrangements – supplier/customer/ employee Ts&Cs may need to be adapted to allow for electronic signatures. The same applies to internal governance procedures, ensuring that contracts or purchase orders have been authorised and signatories have appropriate delegated authority.

Future Developments – Digital Passports (UK)

Whilst e-signatures can be used by financial institutions to transact with existing customers, digital verification tools are not yet widely used for KYC/AML checks on new customers. The use of traditional identification processes (which may require an applicant to visit a physical branch) are regarded as both a failure to meet changing customer expectations and a barrier to entry for Fintechs and Challenger Banks in some jurisdictions.

In the UK at least, the FCA recognises this challenge[28] and has undertaken to work with Government departments[29] and industry bodies[30] to develop suitable regulation and infra-structure for digital identities and e-verification.

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Endnotes

1. IMRG Capgemini e-Retail Sales Index 2016.
2. Adyen Mobile Payments Index 2015.
3. *www.docusign.co.uk/company*
4. *https://acrobat.adobe.com/us/en/documents/esignatures.html*
5. Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, repealing Directive 1999/93/EC.

6. We use the term "simple" to distinguish those identification or trust services to which no special conditions apply; for further detail on "advanced" or "qualified" e-signatures, please see below.
7. *Bassano v Toft* [2014] EWHC 377 (QB).
8. *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and another* [2012] EWCA Civ 265.
9. For guidance refer to Department for Business Innovation and Skills, Guide on Electronic Signatures, September 2014.
10. eIDAS article 26.
11. eIDAS article 28 – an "advanced" e-signature based on a "qualified certificate" created by a "qualified electronic signature creation device" and issued by a "qualified trust service provider".
12. In the UK, tScheme Limited manages the register on behalf of the Secretary of State; accreditation is provided by UKAS.
13. Electronic Signature Directive 1999/93/EC.
14. US Electronic Signatures in Global and National Commerce Act (ESIGN), 30 June 2000; US Uniform Electronic Transactions Act (UETA) July 1999; Australian Electronic Transactions Act 1999.
15. The applicable UK legislation is the Electronic Communications Act 2000 and the Electronic Signatures Regulations 2002.
16. Practice note on execution of a document using electronic signature by the Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, July 2016.
17. Law Commission Thirteenth Programme of Law Reform 13 December 2017
18. Project status and objectives of the 13th Programme of Law Reform
19. This is a summary of the perceived benefits and do not reflect the view of Eversheds Sutherland – actual benefits will depend upon individual circumstances.
20. Consumer Credit (Agreements) Regulations 2010; see regulation 4(5) for example.
21. In England Wales it had been widely thought that e-signatures were unsuitable for executing documents to take effect as deeds. However, provided that practical considerations around witnessing can be satisfied, it is now thought e-signatures can be used to execute deeds. Note that where deeds are to be registered at the UK Land Registry or certain other specialist asset registries, e-signatures will not be acceptable.
22. Statute of Frauds Act 1677. However English case law suggests that even simple e-signatures will be recognised for guarantees - *Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) (obiter); *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and another* [2011] EWHC 56 (Comm); *WS Tankship II BV v The Kwanju Bank Limited and another* [2011] EWHC 3103.
23. Law of Property (Miscellaneous Provisions) Act 1989. Note also Land Registry Practice Guide 8 requires manual signature "in ink or some other indelible medium".
24. Forrester Research, Inc. No data was available on comparative market share as at the date of publication.
25. Though it is not always clear whether their products satisfy the requirements for "qualified" e-signatures.
26. Senior Management Arrangements, Systems and Controls set out in the FCA Handbook and the PRA Rulebook.
27. Directive 2009/138/EC which harmonises risk and capital requirements for insurers.
28. FCA Feedback Statement (March 2016): Regulatory barriers to innovation in digital and mobile solutions.
29. See for example *www.gov.uk/verify*.
30. Including the Joint Money Laundering Steering Group (JMLSG) and working groups of The Tax Incentivised Savings Association (TISA).

Unfair debtor-creditor relationships and s.140A and 140B Consumer Credit Act 1974 – is the position clearer after Holyoake v Candy?

The media circus surrounding the revelations in the much awaited trial of the £130m damages claim brought by Mark Holyoake against Nick Candy and his brother Christian Candy was a banquet for the tabloid press. The spectacle of the creators of One Hyde Park exchanging accusations with Nick Candy's former University friend was always going to pick up the gossip writers interest with headlines to match. There was plenty of interest for the lawyers too. Numerous visits were made to court for interlocutory orders, disputed disclosure, a notification injunction and alleged Data Protection breaches and, of course, millions in legal fees. The case had everything.

Such celebrity spats are not often the place to look for meaningful clarification of the law – and that is largely true in this case – but parts of the judge's judgment in *Holyoake and another v Candy and another* [2017] EWHC 3397 Ch -

where Holyoake's claims were ultimately dismissed – are worth examining in the context of the ongoing development of an area of law that has seen more court time than many others over the last decade – statutory consumer protection against "unfair" relationships between borrowers and lenders.

The background facts

The dispute had its origins when Mark Holyoake sought out his old University friend Nick Candy in 2011 to help him push a property investment and redevelopment project over the line. Holyoake's plan to purchase and redevelop Grosvenor Gardens House in Belgravia was short of cash and this led him to enter discussions with the Candy brothers with a proposal to borrow at high interest rates and with a profit share from the redevelopment. The result was a loan to Holyoake and his development company of £12 million from Christian Candy's CPC Group Ltd.

The relationship appeared, from the judge's findings, to turn sour very quickly after the purchase of the property. Holyoake found himself entering into supplemental agreements with CPC to avoid almost being liable to effect immediate repayment of the loan due to a series of alleged defaults including non-payment. Holyoake was unable to proceed with the development and was forced to sell the property without seeing through its proposed redevelopment. He was obliged to repay CPC, Christian Candy's Guernsey incorporated company some £37 million – around 300% of the original loan – which included a minimum profit return to CPC of £10 million in addition to capital and interest and "extension fees" which kept the facility alive during the sale process. A number of smaller investors were not paid out. Holyoake alleged that the burdensome terms of the various agreements he had signed with CPC had effectively deprived him of a redevelopment profit in excess of £100 million. He sued the Candy brothers and CPC for £132 million for lost profits, legal costs and damages.

The judge ultimately found for the lenders – an appeal was apparently being considered by Holyoake. Legal costs are said to be huge.

The Consumer Credit Act 1974 and its protection for borrowers

One of Holyoake's grounds for re-opening the part of the lending arrangement relating to the payment of loan extension fees was based on the provisions of the Consumer Credit Act 1974 ("the Act") (which was amended and updated by the 2006 Act). In particular, s.140A of the Act provides as follows:

" Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

S.140B then provides the court with a range of powers to require the creditor to pay or take action to remedy the unfair treatment.

The court's approach to s.140A over the years

For many years banks and other lenders were extremely wary of the potential for borrowers to avoid liability for borrowing by seeking s.140B relief.

In *Patel v Patel* [2009] EWHC 3264 (QB), the claimant creditor had advanced £56,450 to the defendant over a four year period ending in 1983 on terms that were varied in 1992 so that interest would accrue on the then outstanding balance of £207,465 at 20% per annum with monthly rests. By the date that the claimant issued proceedings that figure had, with interest, risen to £4,556,181 and by the time the claim came to trial in 2009 the amount claimed had grown to an eye watering £6 million. At one stage the loan – intended to support defendant's business – would have been considered a high risk credit and the loan represented a something of a joint venture relationship. However over the years the business had done well and had ceased to be a difficult credit risk. When the creditor sued for the full amount the debtor resisted, relying on the provisions of the Act to claim that the relationship had in fact become "unfair".

The judge held that the claimant could recover no more than the £207,465 which is the sum that had been due at the time when the terms changed dramatically in 1992. In the ensuing period the claimant had never provided the debtor with a calculation of interest, having only once required an interim repayment (£20,000 in 1991 prior to the change in terms) and the defendant had assumed that the 1992 terms would not be enforced.

Plevin – the Supreme Court looks at s.140A

Fast forward to 2014 when the Supreme Court considered the appeal of Mrs. Plevin in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 6. Mrs. Plevin received a leaflet from LLP Processing (UK) Limited (LLP), a credit broker through whom she was given the details of Paragon Personal Finance Limited (Paragon) which was one of several credit providers on LLP's books. Mrs. Plevin was persuaded that any borrowing she entered into would be supported by a PPI policy. She then entered into a loan agreement with Paragon in March 2006 for a total amount of £39,780 which comprised a loan of £34,000 together with a PPI premium of £5,780. However, the PPI premium was, unknown to Mrs. Plevin, being shared by the insurer with others with 71.8% of the total premium being paid out in commission. LLP took £1,870 and Paragon kept £2,280 themselves.

Mrs. Plevin's claim was dismissed at first instance and in front of the Court of Appeal following the earlier decision in the similar case of *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128 where the court had held that there could be no "unfairness" where no regulatory breach by the lender had taken place.

The Supreme Court reversed the decision in Harrison and provided the following guidance for assessing "unfairness" pursuant to s.140.

1. It is the relationship between the lender and the borrower that has to be "unfair". If the terms of the agreement themselves are not unfair then there could still be unfairness in a one-sided relationship which actually limits the borrower's ability to make a choice;
2. In considering Section 140A(2) matters relating to both the lender and the borrower have to be taken into account. Elements of a transaction which may appear unfair in the sense that they prejudice the debtor might not add up to an unfair relationship as a whole where those elements protect a legitimate interest of the creditor;
3. The unfairness has to arise from one of the three categories of cause listed in Section 140A(a)-(c) of the Consumer Credit Act;
4. Most creditor –debtor relationships are inherently unequal – but that does not make them unfair. A whole range of factors which are case dependent have to be considered in making that assessment.

Mrs. Plevin's case was then referred back to the Manchester County Court so that the relief pursuant to s.140B could be assessed. Lenders were broadly heartened by the decision because of the court's clear statement that in reality the relationship between the lender and borrower is not an equal one(and this is in turn mirrored in an inevitable imbalance in bargaining power and the fact that many terms favour the lender). However this inequality in itself did not translate into an automatic finding of "unfairness". At the same time lenders were on notice that, even where no regulatory rule was broken, a finding of unfairness could still be made.

What factors need to be considered?

That range of factors had been summarized by Mr. Justice Hamblen in his judgment in *Deutsche Bank (Suisse) SA v Khan & Ors* [2013] EWHC 482 (Comm), a case where the defendant, Mr. Khan, his family and family owned companies had unsuccessfully fought a claim for repayment of loans by the bank alleging breach by the bank of various extra-contractual promises as to the management of the loan and mis-selling of financial products provided by the bank. The loan was a high value loan being granted to support commercial activities. Hamblen J posed the following checklist to determine whether a debtor was entitled to relief under s.140B Consumer Credit Act 1974. In determining whether the credit agreement or matters arising from it were "unfair" to the debtor the following factors had to be considered:

(1) In relation to the fairness of the terms themselves:
  a. whether the term is commonplace and/or in the nature of the product in question
  b. whether there are sound commercial reasons for the term
  c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position
  d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face
  e. the scale of the lending and whether it was commercial or quasi-commercial in nature
  f. the strength (or otherwise) of the debtors bargaining position
  g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis

(2) In relation to the creditor's conduct before and at the time of formation:
  a. whether the creditor applied any pressure on the borrowers to execute the agreement

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors

c. whether the creditor had any reason to think that the debtor had not read or understood the terms

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision"

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor

The judge dismissed Mr. Khan's claim. He found that Mr. Khan and his family had gone into the loan arrangement with a clear idea of what lay ahead.

Holyoake – the relationship was tough but not 'unfair'

What emerged from the evidence in *Holyoake and others v Candy and others* [2017] EWHC 3397 (Ch) was an engrossing story of hard-nosed commercial dealing in which Holyoake was obliged to pay extension fees of £2.5 million to keep the highly-priced borrowing on track. The sums paid were clearly high but was the relationship, in the context of the dealings between the parties, "unfair"?

The judge said that the statutory question under s. 140A(1) is whether the Court determines that the relationship is unfair, and in assessing that the Court could have regard to anything it considered relevant under s. 140A(2). The matters that seemed most relevant to the judge were as follows:

1. Mr. Holyoake was not a naïve consumer who did not understand what he was doing, but was a sophisticated borrower who had borrowed money for commercial purposes in order to try and make a profit from a business venture.
2. He understood exactly what sums CPC were stipulating as the price for the extensions. He was only in the position of having to ask for extensions because of his defaults, which were the latest in a very long line of broken promises.
3. Although he protested at the sums demanded, he agreed to them and was obviously willing to pay the price, and if he thought the price was too high, he could have refused.
4. What he was buying was not so much credit for a few more days, but the opportunity to continue to try and achieve a sale at a significantly better price than would otherwise have been achieved even if it meant entering into highly priced borrowing arrangements. That was a price that the judge held that Mr. Holyoake considered worth paying.
5. In those circumstances even though the extension fees may have been steep, the relationship between the parties as a whole was not in the view of the judge "unfair". He did not think the Consumer Credit Act was in general intended to enable the Court to intervene in what is effectively a commercial negotiation between parties who are well able to look after themselves.

Mr. Holyoake's claim was dismissed.

Where are we now?

Parliament brought in the new test of "unfairness" to replace the test of "extortionate credit bargain" which had applied before the amendments introduced by the 2006 Act and which was seen as overly favouring creditors. The Act deliberately avoided a prescribed approach to identifying what was "unfair" instead leaving it to the courts to decide on a case by case basis. As the then Minister responsible for the passage of the Act said:

"It is important that the test does not constrain or impede the courts' ability to do justice in every case. That is why I will not try to define an unfair relationship. It is for the courts to determine such things according to the relevant facts of each case. Unfairness is not a new concept for the industry, and fair lenders have nothing to fear from its introduction."

Parliament therefore imported a concept which is a relative stranger to English contract and commercial law. Legislation such as the Unfair Contract Terms Act 1977 contain detailed guidance as to how the circumstances of the parties (e.g. "dealing as a consumer") or the nature of the term (the "reasonableness" test) affect the outcome. In the case of the Act it seems that the draftsman took a conscious decision that the concept of "unfairness" was well understood (and therefore offered no guidance). We have, therefore, probably not seen the last exploration of s.140A in the courts. That is almost ensured by the way the Act allocates the burden of proof in showing whether unfairness exists. Once "unfairness" is alleged the burden of proof falls on the creditor to show why the relationship was not unfair rather than the other way round. A claimant has the advantage of putting a case which in part the creditor must disprove – contrary to normal English law procedural expectations. However, even that hurdle did not prevent the Candy brothers and their companies from defeating

Holyoake's claim – though the costs in the case demonstrate just what can be involved – particularly where the sums in issue are as large as these.

Should the lending industry at large fear a deluge of further cases on s.140A of the Act to rival the PPI litigation spree? Perhaps in the case of personal loans to well advised and switched on businessmen Holyoake will have made a point – though each case will be worthy of separate examination on its facts. The high-water mark of court intervention under s.140A and s. 140B in loans which have an underlying commercial purpose may well have been reached in *Patel v Patel*. However, lenders who advance monies to a private borrower regardless of the background and underlying purpose of the loan without extensive research into both affordability and suitability run the risk of being caught and most if not all commercial lenders now go to great lengths to do this in order to avoid the potential re-opening of loans by debtors.

There will always be some lenders, however, who do not follow best practice. A less commercially well informed borrower than Mr. Holyoake (as viewed by the judge) might, it appears, have had more return on a s.140A claim. What struck Mr. Justice Nugee at the end of the day was that Mr. Holyoake was the kind of borrower who could "look after himself" – and on the basis that he could do so then the courts would not themselves intervene to look after him. Lenders should not, however, take this as a signal that commercially experienced borrowers are incapable of being in an "unfair" relationship. The reality of credit information sharing in today's market may mean that once a borrower is locked in with a particular lender and has a less attractive credit profile due to the total size of borrowing when viewed against income and assets, it may be very difficult to exercise any independent choice going forward on renewal or extension of a credit line. In a market where your choice is restricted to the lender who has you chained through lack of alternatives to an expensive loan arrangement even the most experienced businessman may find it difficult to look after himself properly.

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