CA on appeal from Brighton County Court (His Hon. Judge Lloyd), before Ward LJ, Mantell LJ, Jonathan Parker LJ. 17th March 2004.

JUDGMENT : Lord Justice Ward:

1. McMillan Williams, the appellant, is a three partner firm of solicitors with five offices in Surrey and South London. Sarah Range, the respondent, is a solicitor, admitted in May 1997, who joined the firm as an assistant solicitor in the family law team. The firm had written to her on 23rd March 1999 saying:
"*Your initial advance salary will be £22,000 per annum based on our two year rolling contract system. However you will be paid on a commission only contract and will be paid one-third of all your paid bills.*
We recognise that when fee earners start with us it takes time to generate a flow of paid bills and for that reason in the first two years the expectation is that the billing will be at least three times what has been paid as a "salary". At the end of the two years there is a balancing exercise. Any billing in excess of three times what has been paid is paid by way of six monthly bonus."

2. On 8th April 1999 Miss Range signed the contract of employment presented to her and returned it under cover of a letter in which she stated: *"I also confirm your conversation ... regarding the commission scheme and I understand that any amount I bill over £130,000 per annum attracts commission at 50%."*

   She started work on 26th April 1999.

3. The contract contained this provision for her remuneration:
   "9. Pay -
   (a) you will be paid commission of 33% of all profit costs paid on bills delivered by you or on which a proportion of the profit costs is allocated to you. In anticipation of the commission you will receive you will be paid a monthly advance on your commission equivalent to £22,000 per annum. The amount of the monthly advance may be varied by mutual agreement.
   (b) the first calculation of commission payable to you will be after you have been employed two years (unless your employment is terminated earlier in which case the provisions set out at (d) below apply). The difference between the commission payable to you and the total advance paid will be calculated ("the calculation") and any excess of commission payable over the total advance paid will be paid to you as bonus. Any shortfall is payable by you.
   After the first two year period the calculation will be carried out at the end of each six month period. At the discretion of the partners any shortfall may be carried over to the following six month period.
   (c) any excess or shortfall arising from the calculation is interest free until it exceeds £10,000. Thereafter the whole sum will attract interest at 5% over Bank of Ireland base rate and will be paid either by you or to you at the end of each month that the excess or shortfall exceeds £10,000.
   (d) on the termination of your employment, howsoever occasioned, a final calculation will be carried out. No payment will be made for unbilled work in progress or profit costs that are unpaid. Any excess or shortfall on the final calculation will be paid by you or to you within twenty-eight days and you will accept that as full and final payment under this contract."

4. Her hopes, and no doubt the firm's hopes, that she would build up a successful and lucrative practice were not fulfilled. The work was apparently largely legally aided and so very poorly paid. Her billing was significantly less than £66,000 per annum, the benchmark figure which had to be attained to produce the salary or commission of £22,000 per annum which she was being paid. She felt there was no future for her in private practice as a family lawyer and she resigned with effect from 17'1' November 2000.

5. When the calculation of her commission was made, it revealed a shortfall of some £17,000 and in August 2001 the firm made a claim for £18,333.19 for the overpayment and interest pursuant to clause 9 of the contract of employment.

6. In her defence Miss Range alleged that the firm had negligently misrepresented the volume and quality of work in the family department in suggesting that she would have no difficulty in billing between £80,000 and £90,000 per annum. In her counterclaim she sought damages for these misrepresentations. The defence also took a more unusual point. She contended that the effect of the contract was to make advances to her against future commissions and that consequently it was a

regulated agreement within the Consumer Credit Act 1974 which was unenforceable against her. It is common ground that if it is a regulated agreement then it was not executed in the proper form or in compliance with the formalities required under the Act and the claim would fail.

7. Thus it was decided that a preliminary issue be tried to determine whether the contract was indeed a regulated agreement under the 1974 Act and specifically whether: -
   i) the contract was for the provision of regulated credit within s.8 and s.9 of the 1974 Act, and
   ii) the contract was an exempt agreement within s.16 of the 1974 Act and the associated regulations.

8. That was heard by His Hon. Judge Lloyd sitting in the Brighton County Court on 11th December 2002 when he found for the defendant and dismissed the firm's claim. The firm appeals with permission granted by Tuckey L.J.

The Consumer Credit Act 1974.

9. This was an Act to establish a new system for protection of consumers. The relevant provisions are these:

> *"8.* ***Consumer Credit Agreements.***
> *A personal credit agreement is an agreement between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount.*
> ***(2)*** *A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £25,000.*
> *A consumer credit agreement is a regulated agreement within the meaning of this Act if it is not an agreement (an "exempt agreement") specified in or under s.16.*
>
> ***9. Meaning of credit.***
> ***(1)*** *In this Act "credit" includes a cash loan, and any other form of financial accommodation.*
>
> *10.* ***Running-account credit and fixed-sum credit.***
> ***(1)*** *For the purposes of this Act -*
> *(a) Running-account credit is a facility under a personal credit agreement whereby the debtor is enabled to receive from time to time (whether in his own person, or by another person) from the creditor or a third party cash, goods and services (or any of them) to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit (if any) is not at any time exceeded; and*
> *(b) fixed-sum credit is any other facility under a personal credit agreement whereby the debtor is enabled to receive credit (whether in one amount or by instalments). ..."*

10. Section 16 deals with exempt agreements. Section 60 provides for the form and content of agreements, s.61 deals with the signing of the agreement, s.62 and 63 with the duty to supply copies of the unexecuted and the executed agreement,while s.64 imposes the duty to give notice of cancellation rights. By virtue of s.65 the consequence of improper execution of a regulated agreement is that it is enforceable against the debtor or hirer on an order of the court only. Section 127 sets out in what circumstances the court will enforce such an improperly executed agreement.

The issues.

11. The issues before the judge and before us are these:
   i) Was this an agreement by which the firm provided Miss Range with credit of any amount? If not, it was not a personal credit agreement within the meaning of the Act and it was therefore enforceable according to its terms.
   ii) If, however, it did provide Miss Range with **credit, did** that credit exceed £25,000? That might depend upon whether it provided for running account credit or fixed-sum credit. If the credit exceeded the limit, then it is enforceable.
   iii) If credit under £25,000 was provided was it an exempt agreement?

The first question: did this agreement provide credit?

12. The judge's view was this:
   "Miss Range was being paid sums that she was not earning. That is the monthly sum she was being paid when not her earnings, because of course her remuneration was based on the commission. Clause 9 of the contract

provided for the payment to Miss Range of an advance of £1,833.33 and that was paid each month. The advance was paid to her regardless of whether she had earned any commission or not. ...
I consider the payments of £1,833.33 to the defendant were not her remuneration for services. Under clause 9(a) that remuneration was 33% of the profit costs delivered. These were cash advances until the calculation under 9(b) was to be carried out. ...
I find that the payments of £1,833 per month were on a commonsense view a subsidiary arrangement to assist the defendant financially, i.e. a cash loan which was either repayable in part, and in given circumstances would attract interest, or to be taken into account when paying the remuneration. I find that the agreement entered into does fall within the Consumer Credit Act 1974 ..."

13. Mr David Head on Miss Range's behalf supports the judge's reasoning. He submits in summary that there is no correlation between the monthly advances and the amount actually earned. He points out that there is no entitlement to be paid hour by hour for the time worked but only to the proportion of fees billed and paid. Thus there is a significant time gap between the work done and payment for it. The letter of 23`d March acknowledged that time was needed "to generate a flow of paid bills". The contract itself provided a two year time gap for her billing to get up to speed. Given this disparity it is plain that the "monthly advances" were not payments of money she had earned at the time of payment of the advance and so could not be characterised as remuneration but, consistent with the ordinary meaning of "advances", were properly to be characterised as loans or in the broad language of s.9 as some "form of financial accommodation". Her contractual obligation to repay any shortfall in money was deferred for a significant period. The fact that it was not known whether there would eventually be a shortfall or a surplus was of no consequence: a credit card holder may be in and out of credit from time to time but there was no doubt that credit was provided in that case. Thus at the time of the contract it was clear that credit would be provided for a significant time.

14. Mr Stephen Neville for the appellant submits that the payments in advance were not credit because she was receiving the money in the process of earning it. Her contractual duty was to perform her service to her employer. The contractual intentions were that she was earning her money not incurring a contractual obligation to repay the advances in money which was the hallmark of Professor Goode's analysis of credit.

15. In *Goode. Consumer Credit Law and Practice* the "ingredients of credit" are said in para. 24.8 to involve:
"(a) the supply of a benefit;
(b) attracting a contractual duty of payment;
(c) in money;
(d) the duty to pay being contractually deferred;
(e) for a significant period of time after payment has been earned;
(f) such deferment being granted by way of financial accommodation."

Professor Goode had also suggested this test for identifying "credit":
"Debt is deferred, and credit extended, whenever the contract provides for the debtor to pay, or gives him the option to pay, later than the time at which payment would otherwise have been earned under the express or implied terms of the contract."

That statement of principle was approved by the Court of Appeal in ***Dimond v Lovell*** *[2000] 1 Q.B. 216, 230,* a view with which their Lordships did not disagree when the matter went to the House of Lords reported at *[2002] 1 A.C.* 384, although Lord Hobhouse of Woodborough commented at p.405 that the test would not *"always be a satisfactory one to apply"*.

16. This seems to me to be a case where the test is not entirely easy to apply. It is common ground, and common-sense, that the time at which to judge whether or not credit is being provided is the moment when the agreement is made. That must be so because the parties must know at the time of the agreement whether it falls within or outside the Act if they are to be able to comply with the form and formalities required by the Act. At the time this agreement was made it was not known whether there would be a surplus or a shortfall when the calculation came to be made at the end of two years or on the earlier termination of the agreement. Thus, as it seems to me, one was unable to tell at the material time whether the supply of the benefit, assuming the monthly advances to be such a benefit, attracted

a contractual duty of repayment in money which was being significantly deferred. Unless there was a debt, there was no credit.

17. In my judgment the correct principle is stated in the headnote of ***Nejad v City Index Ltd***. *[2001] GCCR 2461: "Where it is completely uncertain whether the arrangements between the parties will give rise to a debt at all, there is no "credit" merely because those arrangements postpone any obligation to pay until such time as the future possible indebtedness has crystallised."*

18. In that case the respondent accepted bets on the movements of various financial indexes. To place bets, the customer was required to open either a "deposit account", paying in a specified amount as a precondition of participation, or a "*credit account*" based on an assessment of his creditworthiness. In either case the customer would be allowed to place bets until such time as his potential exposure exceeded the deposit of the credit allocated to him. At that point the respondents would be entitled to call for a payment ("the margin") by way of security. Here the appellant was allowed a credit account and in due course his exposure led to the respondent calling for a margin payment. The appellant argued that the debt was unenforceable by reason of the 1974 Act but that argument was rejected by the Court of Appeal. Rattee J., with whose judgment Buxton and Stuart-Smith LJJ. agreed, held: *"... until the closing of the relevant contract between the customer and City Index, it cannot be said that there is a debt at all. It follows, in my judgment, that it cannot be said that the effect of the agreement in providing what was called a "credit allocation" to Mr Nejad was to grant him any credit in respect of what would otherwise be an indebtedness payable at an earlier date. At the stage the contract was entered into there might or might not be an indebtedness in the future. All that was happening, as I have indicated, by the credit allocation was an absolution of Mr Nejad from having to provide security for such possible future indebtedness until such time as his potential loss had exceeded the amount of his credit allocation."*

19. In my judgment that principle applies here. The judge sought to distinguish the case on the basis that in the matter before him there was no element of bet at all, but that is a factual distinction, not one which goes to the point of principle. The judge also concluded that the situation was very different in Miss Range's case because as soon as she received one of the advance payments she was liable to account for it, and to pay it back if she did not earn enough in costs. That, with respect, begs the question whether it could be said at the time of the contract that there would be a debt which had to be repaid.

20. Bearing in mind the need to decide at the time the contract is entered into whether it makes provision for credit or not, the approach of the court must, in my judgment, be to search for the essence of the contract. So one asks is its essential character an arrangement for making loans or for paying remuneration? It seems to me plain that this is a contract, however unusually it may be drafted, providing for the terms upon which this young assistant solicitor was to be remunerated. Clause 9 is headed *"Pay"*. The pay is called *"commission"*. After the calculation *"any excess of commission payable over the total advance paid will be paid ... as bonus"*. *"Bonus"* is the language of remuneration. By providing that *"**in anticipation of** the commission you will receive you will be paid a monthly advance **on your commission**"* [with emphasis supplied by me], the parties were clearly contemplating that the billing target was realistic and it would be strange if they thought otherwise. The firm could not honourably employ a young assistant solicitor and in fact pay her £22,000 per annum if the target was unattainable. Indeed the firm pleads in its reply that *"There was plentiful work, lots of which was turned away"*. The firm's complaint is that the defendant did not work sufficiently hard. Thus it seems to me that the true nature of this contract was for payments to be made in advance of the services to be supplied.

21. That view is consistent with the submission in the *Encyclopaedia of Consumer Credit Law* by A.G. Guest and Michael G. Lloyd, where in the Notes on s.9 of the Act it is stated:
"It is submitted that A does not provide credit to B in the following situations:
(1) A pays to B a sum of money by way of advance or part advance for the supply of goods or services in the future by B to A: Fisher v Raven, ...
(4) A employs B as his agent to sell his (A's) goods on commission and pays B a sum in advance in respect of commission so to be earned (notwithstanding any express or implied provision for repayment to the

extent that commission is not in fact earned): Legal & General Assurance Society v Cooper [1994] C.L.Y 2656."

22. There is no report of the judgment of His Hon. Judge Poulton in the latter case to see how the matter was analysed. ***Fisher v Raven*** *[1964]* A.C. *210* concerned a prosecution under s.13 of the Debtors Act *1869* and *s.155 of* the Bankruptcy Act *1914,* both dealing with obtaining credit. There the appellant, an undischarged bankrupt, contracted with certain private individuals to make paintings for them from photographs. He obtained from each of them part of the agreed money in advance, but failed to carry out the work or to return the money paid to him. It was held he had not obtained credit, an expression which in its ordinary significance connoted the obtaining of credit in respect of the payment or repayment of money and not, as there, as an advance payment for the supply of the paintings. The principle is of some assistance in this case notwithstanding the different facts and statutory language and the different facts did not justify the judge's rejection of this authority as being "of no help". Mr Head has to concede that if the contract before us can be characterised as one where payment is made in advance of services rendered then credit is not given because there is neither an obligation to repay money nor the deferment of such a money obligation.

23. In summary, I see the essential nature of this contract to be one where payment is made in advance of services to be rendered and that does not involve the notion of giving credit. In any event it is impossible to say at the time when the contract is made whether Miss Range would be the debtor or the creditor at the time when the calculation came to be made and thus one simply does not know whether at the moment the parties' obligations were crystallised she would in fact have been provided with credit. In my judgment the judge erred. He should have answered the first specific question in the negative and declared that the contract was not one for the provision of regulated credit within s.8 and *s.9 of* the *1974* Act. It was not, therefore, necessary for him, nor is it necessary for us to consider the subsidiary questions of running-account credit and exemption under *s.16* of the Act and, having decided not to call for argument on these points, I would not wish to express even tentative conclusions about them.

24. In my judgment the appeal should be allowed, the court declaring that the agreement is enforceable.

25. We announced at the conclusion of the hearing that it was our intention so to find for reasons which I have now reduced to writing. We took that course because, according to the costs assessments placed before us, *£50,000* has already been spent in this litigation and we were firmly *of* the view that the parties should not incur further costs by attending on the hand down of the judgment to argue about the costs of this appeal. We therefore received argument then and have since had further written submissions from both sides.

26. Mr Neville submits, unsurprisingly, that costs should follow the event and that the appellant should have its costs here and below. Mr Head responds by submitting that the costs of the preliminary issue in the court below should be reserved so that the trial judge who eventually has to deal with this sorry matter will have a free hand to order costs as may be appropriate in all the circumstances. For reasons which I will develop, he submits there should be no order for the costs of the appeal.

27. Dealing with the costs of the preliminary issue in the court below, I do understand that there may be cases where to reserve the costs there can be an appropriate order: indeed Mr Head relies on a judgment of this court of which I was a member in ***Weill v Mean Fiddler Holdings Ltd.*** **[**2003] EWCA Civ. 1085 where we dismissed an appeal against the trial judge's reserving costs after a preliminary issue. It was a matter which was within his discretion and there could be cases where the judge can properly postpone any decision on costs until the final outcome of the action is known. I do not see this to be such a case. A discrete point was taken by the defendant who wanted the preliminary issue decided. That decision would either mean the end of the claim if she were successful or an arithmetical exercise if she were not. This is quintessentially a case where even if the claim had been tried without bothering with any preliminary issue, nonetheless the costs involved in deciding that discrete issue would have been separately assessed and a costs order made in respect of it. Now that liability has been determined, the court will proceed to decide any outstanding questions of quantum and if there are Part 36 offers relating to that, they can be separately dealt with. So far as the

issue itself is concerned there is no reason in this case why costs should not follow the event. Consequently so far as the costs of the preliminary issue in the court below are concerned, I would order that the defendant pay the claimant's costs thereof.

28. There is then a subsidiary issue as to whether or not those costs should be immediately payable. That is the ordinary rule. Here, however, the claimant is the defendant's former employer in a *financially* much stronger position to bear the continuing costs of the litigation and in order that there is no abuse of a more powerful position, I for my part would grant the defendant the indulgence of directing that those costs, which are to be assessed if not agreed, should be paid at the same time as the *remaining* costs of the claim and of the counterclaim are to be paid.

29. A different point arises so far as the costs of the appeal are concerned. For what must be glaringly obvious reasons, Tuckey L.J. gave this information for or directions to the parties when he granted permission to appeal: *"The costs of further litigating this dispute will be disproportionate to the amount at stake. ADR is strongly recommended."*

The wisdom of those remarks is demonstrated by the revelation that these parties have spent £50,000 on this litigation so far and they still have a battle royal to fight over damages for misrepresentation. My heart sinks. The parties should have written to each other along the lines that, *"Lord Justice Tuckey has very sensibly suggested ADR. My client thinks that is a splendid idea. Please can we get on with it as soon and as cheaply as possible? Despite our different views of the strengths and weaknesses of our respective cases, we should have faith in the process which we know works and just hope for the best."* Instead of that the parties launched into argumentative correspondence, standing on their heads as they each inconsistently proclaimed their total willingness to be reasonable, flexible, commercially realistic and so forth and so on but then adamantly stating that in the light of the strength of their case and the weakness of the other side's case they were not prepared to compromise beyond a certain point. Between the bottom lines of each side was the inevitable yawning chasm. Two days before the date fixed for the mediation, the appellant decided not to proceed because: *"Having reviewed the detail carefully it appears clear beyond any doubt that the mediation will not be successful because neither side are willing to change their position."* (My emphasis is added.)

30. I do not intend to review this tedious correspondence, some of the letters being pages long, in any detail. My attitude is best summed up as "a plague on both your houses". Of course negotiating positions are bound to be taken and asserted prior to and in the course of mediation but the lesson to be learned from the process is that the true bottom line is never known until the mediation is concluded, usually successfully, and unusually when one party finally closes the door of the negotiating chamber. In my judgment this is a case where we should condemn the posturing and jockeying for position taken by each side of this dispute and thus direct that each side pay its own costs of their frolic in the Court of Appeal. I would allow the appeal with no order for costs.

Lord Justice Mantell

31. I agree.

Lord Justice Jonathan Parker

32. I also agree.

Stephen Neville (instructed by Martin Cray & Co.) for the Appellant

David Head (instructed by Messrs DMH) for the Respondent