parties' knowledge remains quite distinct in contract and tort, in the way explained above.

What, however, if the parties to a negligence action are not total strangers? By definition, for liability to arise *vis-à-vis* pure economic loss, there must have been an "assumption of responsibility" by the defendant, upon which the claimant relied. Lord Mustill has forcefully argued that "mutuality" is the hallmark of duty of care in this context, lamenting its absence and dissenting in *White* v. *Jones* [1995] 2 A.C. 207. This is surely correct; indeed, there is a distinctly contractual flavour to the very phrase "assumption of responsibility", especially given that modern English contract law grew out of the action on the case for *assumpsit*. It follows that the contractual approach to remoteness should be adopted in such cases. We might, accordingly, doubt the readiness in *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145 to apply the more favourable tort rules on limitation of actions, given liability concurrent with contract. The approach to remoteness suggested above is reminiscent of Lord Denning M.R.'s distinction between physical and economic loss in *Parsons* v. *Uttley Ingham*, above. Physical damage is paradigm tort, whereas to recover economic loss requires a relationship "equivalent to contract"—or indeed straightforwardly contractual. The relevant rules should apply in each case.

JONATHAN MORGAN

YOUR FLEXIBLE FRIEND?

THE Consumer Credit Act 1974, section 75(1) ("CCA 1974") establishes a regime of connected lender liability. This provision applies when a financial institution (or "creditor") provides finance to its customer (or "debtor"), by means of a "debtor-creditor-supplier agreement", for the purchase of goods or services from a third party (or "supplier"). Its effect is to render the creditor jointly and severally liable to the debtor for any losses caused by the supplier's misrepresentation or breach of the underlying supply contract. The creditor may, however, seek an indemnity from the supplier in respect of its liability to the debtor (CCA 1974, section 75(2)). In *Office of Fair Trading* v. *Lloyds TSB Bank plc* [2004] EWHC 2600 (Comm), [2005] 1 All E.R. 843, the OFT sought declarations clarifying the extent to which CCA 1974, section 75(1) rendered card-issuing banks liable to their customers for breaches of supply contracts financed by credit card. Two distinct issues arose.

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The first issue was whether "four-party" credit card transactions, like their "three-party" counterparts, constituted "debtor-creditor-supplier agreements" as required by CCA 1974, section 75(1). Whilst a "three-party" transaction involves direct contractual relationships between cardholder and supplier, between cardholder and card-issuer and between card-issuer and supplier, the card-issuer in a "four-party" transaction does not assume any contractual obligation to reimburse the supplier directly for goods or services supplied to the cardholder. This is because the issuer in a "four-party" credit card transaction employs the services of a "merchant acquirer", whose role includes recruiting suppliers to the card network in question and reimbursing them for any supplies to the cardholder. Under such an arrangement, the card-issuer's only obligation is to reimburse the merchant acquirer. Gloster J. concluded, however, that this difference did not prevent "four-party" transactions satisfying the three requirements for a "debtor-creditor-supplier agreement". These requirements are that the cardholder's purchases be "financed" by his agreement with the card-issuer (CCA 1974, section 11(1)(b)), that there exist "arrangements between" the card-issuer and the supplier (CCA 1974, section 12(b)) and that the card-issuer does not hold himself out as willing to pay "suppliers in general" (CCA 1974, section 187(3)).

As to the first requirement, Gloster J. concluded that there were a number of ways in which the card-issuer could "finance" the underlying supply contract other than by undertaking a direct obligation to reimburse the supplier. Accordingly, any form of financial accommodation provided by the card-issuer which enabled the cardholder to obtain goods or services on credit would suffice. This clearly occurred in "four-party" arrangements. As regards the second requirement, Gloster J. held that, even in the absence of a direct contractual relationship, there could be an "arrangement" between the card-issuer and the supplier if there was a sufficient mutuality between the obligations undertaken by each of them. The requisite mutuality would apparently exist when one party fulfilled its obligations in the expectation that the other party would do likewise. Gloster J. held that this occurred in a "four-party" credit card transaction where both the card-issuer and supplier were subject to the rules and settlement processes common to all participants in the particular card network. Finally, the third requirement was satisfied as the card-issuer was only prepared to deal with suppliers who had a subsisting agreement with a member of the credit card network.

As the distinction between "three-party" and "four-party" credit card transactions is somewhat technical, Gloster J.'s robust

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approach to CCA 1974, section 75(1) is to be welcomed. Indeed, the same approach has now been adopted in relation to "five-party" credit card arrangements (*Governor and Company of the Bank of Scotland* v. *Alfred Truman* [2005] All E.R. (D) 306). Given that both types of transaction operate in an identical manner and perform essentially identical functions, most consumers would not appreciate the distinction between them. It is only fair, therefore, that consumers receive the same protection irrespective of the type of transaction involved. Indeed, any other conclusion would create arbitrary and anomalous gaps in the scheme of consumer protection. Equally, given that card-issuers in "four-party" transactions are able to exercise control over which suppliers are admitted to their card network through the screening and monitoring processes carried out by the merchant acquirer and are able to eject rogue suppliers from that network, there is little unfairness in imposing connected lender liability upon them.

The second issue concerned the application of CCA 1974, section 75(1) when a consumer used his credit card to pay a supplier pursuant to an agreement which constituted a "foreign transaction", namely a cardholder-supplier agreement which was wholly concluded abroad, was governed by a foreign law and involved the supply of goods or services abroad. Gloster J. denied that card-issuers would be liable in such circumstances. The justifications for this conclusion are unconvincing. First, Gloster J. stressed that one consequence of imposing connected lender liability in respect of "foreign transactions" would be that CCA 1974, section 75 would operate extra-territorially, as card-issuers would be entitled to claim an indemnity from foreign suppliers in respect of breaches of contract or misrepresentations committed abroad. As Parliament had failed to indicate whether that provision applied beyond the purely domestic sphere, Gloster J. construed it in accordance with the presumption that legislation is not intended to have extra-territorial effects (*Clark* v. *Oceanic Contractors Inc.* [1983] 2 A.C. 130). Undue weight appears to have been given to this extra-territoriality principle, which is merely a rule of construction that may be ignored in appropriate cases (*Air-India* v. *Wiggins* [1980] 1 W.L.R. 815). It will usually be disapplied if the legislation is not of a penal or revenue nature (Dicey & Morris, *The Conflict of Laws*, 13th ed. (2000), para. 1–034). Indeed, it has been stressed that, in construing the CCA 1974 specifically, a court should bear in mind that consumer protection is the underlying purpose of that legislation (*McGinn* v. *Grangewood Securities Ltd.* [2002] EWCA Civ 522). The policy of maximizing consumer protection by construing CCA 1974, section 75(1) purposively

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should outweigh the desire to avoid any possible extra-territorial effects of that provision. Accordingly, it should be construed as applying to "foreign transactions".

Secondly, Gloster J. suggested that CCA 1974, section 75(1) could not apply to a cardholder-supplier agreement which constituted a "foreign transaction" because it would be governed by a foreign law of which CCA 1974 formed no part. With respect, this focuses on the wrong relationship. Given that CCA 1974, section 75(1) is concerned with the relationship between card-issuer and cardholder, its application should be determined by the law applicable to that relationship rather than the cardholder-supplier relationship. As this will be domestic law, CCA 1974, section 75(1) should apply even in respect of "foreign transactions". Even if Gloster J. was correct to focus on the law applicable to the cardholder-supplier agreement, her approach assumes that that law will invariably be foreign. This overlooks the fact that, as against the supplier, the cardholder will often be entitled to rely upon the law of his habitual residence, either because it governs their relationship (Rome Convention 1980, Art. 5(3)) or because it contains mandatory rules which apply regardless of the applicable law (Rome Convention 1980, Art. 5(2)).

Thirdly, Gloster J. considered that, if CCA 1974, section 75(1) applied to "foreign transactions", card-issuers would encounter difficulties in seeking indemnities from foreign suppliers, as these would not be amenable to English jurisdiction. This overlooks the possibility of the card-issuer joining the supplier as a third party to any domestic proceedings commenced against it by the cardholder, whether that supplier is domiciled within the EU (Council Regulation 44/2001, Art. 6(2)) or not (CPR Part 6.20(3)). Indeed, it seems odd to accord greater importance to the card-issuer's possible jurisdictional difficulties in pursuing the foreign supplier than to those that will otherwise be encountered by the cardholder in pursuing the same party. It is surely in the context of foreign supply transactions, that a cardholder needs the protection afforded by CCA 1974, section 75(1) most. The usual suggestion that such protection would expose card-issuing banks to a flood of claims is as unconvincing as ever.

These criticisms aside, there remains one particularly troubling aspect to the *OFT* decision. This is the fact that the declaration in that case was limited to situations involving "foreign transactions". Whilst Gloster J. suggested that CCA 1974, section 75(1) would remain inapplicable in circumstances where the supply contract was only partly concluded abroad or where the goods were only despatched abroad, a number of issues were left open. In

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particular, it is unclear whether CCA 1974, section 75(1) applies when the cardholder-supplier agreement does not possess *all* the characteristics of a "foreign transaction". Equally, the possible relevance of other factors, such as the *situs* of the goods or the currency of payment, remains uncertain. Given the extent to which credit cards are used to finance purchases abroad or over the internet, much clearer guidance is required.

CHRISTOPHER HARE

CONFLICTING DUTIES OWED BY SOLICITORS ACTTNG FOR MULTIPLE CLIENTS

MR. Bromage persuaded Mr. Hilton to purchase a property, develop it and then sell the developed property to Bromage. Bromage paid a deposit but failed to complete, and so Hilton rescinded. Barclays Bank, which had lent Hilton money so that he could realize the development, enforced its security and sold the property, leaving a shortfall. Hilton's attempts to obtain redress from Bromage proved fruitless when legal aid was withdrawn. Throughout the transaction, Hilton had been represented by a solicitor (Mr. Scott) from the firm Barker Booth & Eastwood ("BBE"). Bromage was also represented, by a partner in the same firm (Mr. Gorman). Gorman terminated BBE's representation of Hilton when Hilton told Scott that he wished to rescind the contract with Bromage. BBE had not informed Hilton that Bromage had earlier been made bankrupt. Nor had BBE informed Hilton that they had defended Bromage, unsuccessfully, against prosecution for fraudulent trading and various bankruptcy offences and that Bromage had only recently been released from prison when he first approached Hilton. Nor had BBE informed Hilton that BBE had lent the entire deposit to Bromage so as to clothe Bromage with the appearance of wealth.

Unsurprisingly, Hilton sued BBE for damages. Very surprisingly, the High Court and Court of Appeal awarded him no such damages. In *Hilton* v. *Barker Booth & Eastwood* [2002] EWCA Civ 723, [2002] Lloyd's Rep. 500, the Court of Appeal held that BBE should not have acted for Hilton, and were liable to him for breach of contract in having failed until too late to refuse to act. However, the court did not consider that BBE were obliged to disclose Bromage's history to Hilton, as this was confidential and was therefore impliedly excluded from their retainer. Damages were therefore assessed by comparing Hilton's position with the position

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