Neutral Citation Number: [2013] EWHC 4047 (Ch)

Case No. 10844 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2013

IN THE MATTER OF LONDON SCOTTISH FINANCE LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

THE CHANCELLOR OF THE HIGH COURT
SIR TERENCE ETHERTON

B E T W E E N :-

(1) THOMAS JACK	Applicants
(2) SIMON ALLPORT	
(In their capacity of administrators of London Scottish Finance Limited)	
-and-	
(1) KEITH CRAIG	Respondents
(2) JACQUELINE GALLAGHER	
(3) STEPHEN DUNNE	
(4) ANN DUNNE	

- -
- -

Felicity Toube QC and Simon Popplewell (instructed by **Denton UKMEA LLP**) for the **Applicants**
Bradley Say (instructed by **Stephensons**) for the **Respondents**

Hearing dates: 3rd December 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE CHANCELLOR OF THE HIGH COURT

The Chancellor of the High Court, Sir Terence Etherton :

1. This is my judgment on an application dated 29 June 2012 by Thomas Merchant Burton and Simon Allport, who were appointed joint administrators of London Scottish Finance Limited ("LSF") on 3 December 2008. The application is for directions arising out of loan agreements made or acquired by LSF before the administration began, under which secured loans were made to consumers but which were unenforceable because they contravened provisions of the Consumer Credit Act 1974 ("the Act").

2. The administration of LSF is currently being conducted by Mr Allport and Thomas Andrew Jack ("the Joint Administrators"), the latter having replaced Mr Burton as one of the administrators.

Background

3. LSF carried on an unsecured and a secured lending business. The unsecured lending business had a total book value at the date of administration of approximately £36 million (on an amortised cost basis). The secured lending business had a mortgage book totalling £51 million (on an amortised cost basis) at the date of administration. The security comprised a combination of regulated and unregulated first charges (£5 million) and second charges (£46 million).

4. As well as making its own loans, LSF also acquired loan books from other companies, one of which, relevant to the present application, was Dean House Financial Services Limited ("Dean House").

5. The present application concerns LSF's secured lending business regulated by the Act, pursuant to which loans were either made by LSF itself or were made by Dean House and then bought by LSF from Dean House. They concern, in particular, loans offered to customers through a credit broker. The way the broker's fee was recorded in the loan agreements in question was contrary to the Act. This affects their enforceability. The legal consequences differ according to whether or not they were entered into before 6 April 2007. There are a total of 1694 loans affected by tbis issue, of which 699 were entered into prior to that date.

6. The total outstanding balance in respect of all loans affected by the issue is approximately £23.5 million. The Joint Administrators have received payments with a total value of £19 million in respect of those loans.

7. The respondents are persons to whom such loans were made. The first respondent and his partner, the second respondent, took out loans from LSF after 6 April 2007. The third respondent and his wife, the fourth respondent, took out their loan from Dean House before 6 April 2007 and the benefit of the loan agreement with them was subsequently acquired by LSF.

The legal setting

8. The loans in issue are all regulated agreements as defined by section 8 of the Act, namely 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 and which is not an exempt agreement.

9. Section 60 of the Act provides for the Secretary of State to make regulations as to the form and content of documents embodying regulated agreements. Section 61(1) provides that a regulated agreement is not properly executed unless a document in the prescribed form, itself containing all the prescribed terms and conforming to regulations under section 60(1), is signed in the prescribed manner both by the debtor and by or on behalf of the creditor. Section 65(1) provides that an improperly executed regulated agreement is only enforceable against the debtor on an order of the court.

10. At the time the loans were made to the respondents the regulations made by the Secretary of State pursuant to section 60 of the Act were the Consumer Credit (Agreements) Regulations 1983 ("the Regulations"). By virtue of regulation 6(1) and paragraph 2 of schedule 6 of the Regulations "a term stating the amount of the credit" is a prescribed term.

11. Section 9 of the Act specifies that, for the purposes of the Act, "credit" includes a cash loan and any other form of financial accommodation. Section 9(4) provides that "an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment". The effect of regulation 4(b) of the Consumer Credit (Total Charge for Credit) Regulations 1980 is that, at the time of the loans to the respondents, a fee payable to a credit broker was part of the total charge for credit within section 9(4) of the Act and so could not be included in the amount of credit required to be stated in the regulated agreement.

12. In the case of the respondents' loans, as in the case of all other loans to which the present application is relevant, the broker's fee was included in the amount of credit stated in the loan documentation. It was included in the wrong box on the documentation. That error had no impact on the accuracy of the other terms. In particular, the annual percentage rate of charge ("the APR") was correctly calculated. Nevertheless, by virtue of section 65(1) of the Act, the error made the respondents' loan agreements unenforceable without an order of the court.

13. The error did not render the loan agreements void or voidable but merely unenforceable without an order of the court: see *McGuffick v Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm), [2010] Bus LR 1108 and the cases cited in it. Section 127(1) of the Act provides that tbe court shall dismiss an application for an enforcement order under section 65(1) only if it considers it just to do so having regard to (among other things) the prejudice caused to any person by the contravention in question and the degree of culpability for it.

14. Section 127(3) of the Act formerly provided that the court could not make an enforcement order under section 65(1) unless there was a document signed by the debtor containing all of the prescribed terms. Section 127(3) was repealed for agreements entered into on or after 6 April 2007. It follows that the third and fourth respondents' loan is not enforceable. In the language commonly used in this area of the law, their loan is "irredeemably unenforceable". In the case of the first and second respondents, however, their loans are enforceable if, but only if, the court makes an enforcement order pursuant to its power under section 127 of the Act.

15. Relevant provisions of the Act are set out in the Appendix to this judgment.

The application

16. The Joint Administrators seek the directions of the court to assist them in making decisions as to what to do about the unenforceable secured loan agreements made by or acquired by LSF both in respect of outstanding amounts due to LSF and in respect of money already received by LSF pursuant to those agreements.

17. The respondents have been joined as being typical of certain categories of borrowers, namely those whose loans were taken out before 6 April 2007 and those whose loans were taken out on or after that date. Their costs are to be paid out of LSF's assets.

18. The respondents are not, however, representative respondents in any formal sense. No order has been made pursuant to CPR Ord. 19.6 that they be representatives of other past or present debtors of LSF so as to make this judgment or any consequential order binding on others. Accordingly, the Joint Administrators must decide for themselves the extent to which the decisions which I make in this judgment are properly applicable to persons other than the respondents. Equally, it will be open to other debtors to argue that my decisions are not correct or are not binding on them.

19. Furthermore, as will be apparent, the ultimate right of the Joint Administrators to recover sums outstanding on unenforceable loans or the right of debtors to recover sums received by LSF in full or partial discharge of unenforceable loans will turn on the particular facts of each case. The directions which I have been asked to give are pitched at a limited range of issues and a level of generality which avoids any dispute of fact between the Joint Administrators, on the one hand, and the respondents, on the other hand.

20. It would seem that some of the matters on which I have been asked to give directions do not concern the respondents but are relevant to other debtors whose loans, for example, have been completely repaid or whose property was charged by way of security and has been sold. Mr Bradley Say, counsel for the respondents and a specialist in consumer credit law, has been most helpful in making submissions on those matters also. In effect, the Joint Administrators have argued the case for creditors of LSF who would benefit from the greatest reduction in claims by present and past borrowers based on contraventions of the Act. Mr Say has argued the case for such borrowers. I am content, for the assistance of the Joint Administrators, to take a practical approach and give guidance to the Joint Administrators on those matters rather than adjourning the application to enable a suitable debtor to be added as a respondent. It would, however, be entirely understandable if the debtors concerned are cautious about accepting the reliability of decisions made by the court without any one of them being a respondent to the application for directions.

The issues

Section 140A: unfair relationship

21. The first disputed issue is whether the respondents are entitled to an order under section 140B of the Act for repayment of money paid by them to LSF under their loan

agreements. This turns on whether there was an unfair relationship between the respondents and LSF within section 140A(1).

22. It is common ground that the mere fact that the credit figure in the documentation was misstated is not, of itself, sufficient to give rise to an unfair relationship between LSF and the respondents for the purposes of section 140A(1). As I have said, that error did not undermine the accuracy of the stated APR or any other recorded financial details of the loans.

23. Mr Say, who submitted that section 140A is engaged, relies on letters sent to the respondents by LSF demanding payment of arrears under the loans and containing the following threat:

> "If your arrears continue to increase we will consider taking legal action against you, which could lead to you losing your home."

24. The first and second respondents received such letters from about February 2009. The third and fourth respondents received such letters from November 2006. The evidence of the respondents is that they made payments to LSF because of the threats contained in those letters.

25. Mr Say relied upon the following description of good faith, as an aspect of fairness, given by Lord Bingham in *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, at 494F-G in relation to another area of consumer protection, namely the Unfair Terms in Consumer Contracts Regulations 1994:

> "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the term should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice".

26. Mr Say also relied on the Office of Fair Trading ("OFT") guidance entitled "Irresponsible lending – OFT guidance for creditors", March 2010 (updated February 2011), OFT 1107, and in particular the following statement in Chapter 2 under the heading "General Principles of Fair Business Practice":

> "2.2 In general terms creditors should:

> - not use misleading or oppressive behaviour when advertising, selling, or seeking to enforce a credit agreement...
>
> 2.3 In addition to the above there should be:
>
> - **transparency** in dealings between creditors and borrowers, with information and documentation directed at – or provided to –borrowers being compliant with relevant legislative requirements and not being in any way misleading."

27. At the end of the day, this is a very short point. There was nothing unfair merely in the fact that LSF requested payment of arrears: see *McGuffick* at [117] and [118]. As I have said, the respondents' loan agreements were not void or voidable even though unenforceable.

28. There was nothing untrue or misleading about the threat contained in the letters from LSF to the first and second respondents. The loans to the first and second respondents were enforceable if LSF obtained an enforcement order of the court under section 127 of the Act. In his written skeleton argument Mr Say submitted that, even though LSF's error in the loan documentation was not deliberate and was not made to obtain a cynical commercial advantage, the court would have refused and would now refuse to make an enforcement order because the error should not have been made. I do not agree. Nor did I understand Mr Say to be taking that draconian position in his oral submissions.

29. The effect of section 127(1) is that an enforcement order could be refused if it would be just to do so having regard to the prejudice caused to the first and second respondents by the technical error in the loan documentation and the degree of culpability for it and bearing in mind certain powers of the court (which are not material). Absolutely no prejudice, however, has been caused to the first and second respondents by the technical error. Not only, therefore, has there been and is there now no basis for the court to refuse to make an enforcement order by reason only of the technical error, but there was not and is not now any basis for the court to grant the first and second respondents a declaration under section 142(1)(b) of the Act (declaration that the creditor has no right to do a particular thing enforcing the loan agreement) by reason only of the same error. If an enforcement order were obtained, it could indeed have led, as the letters to the first and second respondents said, to the loss of their home. I reject, therefore, the argument for the first and second respondents that there was an unfair relationship within section 140A(1) between themselves and LSF merely by virtue of the letters sent to them by LSF requesting payment. Accordingly, they are not entitled, by virtue only of the same matters, to an order for repayment under section 140B(1)(b).

30. On the other hand, the threat contained in the letters to the third and fourth respondents was untrue. Their loan was irredeemably unenforceable. LSF could not have obtained an order of the court for payment of the loan. There was no legal action which LSF could have taken which would have resulted in the third and fourth respondents losing their home. In view of the policy objective of the Act to provide protection for consumers I consider that, if the threat in the letters was a cause of the

third and fourth respondents' decision to make payments to LSF, even though not the only cause, there was an unfair relationship between LSF and the third and fourth respondents. The court would have power under section 140B(1)(a) to order repayment of such sums to the third and fourth respondents.

31. It was common ground that the court would also have power under section 140B(1)(b) to order LSF to pay interest on the sums to be repaid to the third and fourth respondents at such rate, and whether compound or simple interest, as the court considered appropriate in all the circumstances. Strictly, that is not interest on a debt within the Insolvency Rules 1986 r. 4.93.

32. The Joint Administrators submit that such a claim by the third and fourth respondents is provable in the administration and any future liquidation whether payment was made by the third and fourth respondents before or after the administration began. They say that such claims are provable under the Insolvency Rules 1986 r. 13.12(1)(b), even if paid after the administration, since the claims arise out of the fact that the loans were incorrectly executed before the administration began. Mr Say did not contend to the contrary, and specifically he did not argue that the obligation of LSF to make any such repayment is an expense of the administration or would be an expense of the liquidation if payments were made to LSF by the third and fourth respondents after the administration began.

33. For the sake of completeness, I should add that the Joint Administrators and Mr Say are all in agreement that an unfair relationship claim is not available in respect of any agreement entered into prior to 6 April 2007 which became a completed agreement (viz. discharged by full payment) prior to 6 April 2008: see paragraphs 1 and 14 of schedule 3 to the Consumer Credit Act 2006. That point would seem to be irrelevant to the respondents since their loan agreements with LSF were not completed prior to 6 April 2008.

Restitution

34. In the respondents' written skeleton argument it was contended that the respondents have a claim in unjust enrichment in respect of payments made by them to LSF as a result of the threat in the letters mentioned above.

35. During the course of oral submissions Mr Say accepted that such a claim is either unnecessary (in the case of the third and fourth respondents on the assumed facts) or does not arise (in the case of the first and second respondents absent special facts yet to be established). The third and fourth respondents have a claim for repayment under sections 140A and 140B, and a claim in unjust enrichment would add nothing of practical value to them. The first and second respondents have no claim because, in the absence of some special facts yet to be established, the threat in the letters to them was not misleading or untrue when the letters were sent.

The rule in *ex parte James*

36. The principle in *ex parte James* was summarised by Lord Neuberger as follows in *Re Nortel Gmbh (in administration); Re Lehman Brothers International (Europe) (in administration)* [2013] UKSC 52; [2013] 3 WLR 504, at [122]:

> "...there are a number of cases, starting with *In re Condon Ex p James* (1874) LR 9 Ch App 609, in which a principle has been developed and applied to the effect that 'where it would be unfair' for a trustee in bankruptcy 'to take full advantage of his legal rights as such, the court will *order* him not to do so', to quote Walton J in *In re Clark (a bankrupt)* [1975] 1 WLR 559, 563. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287, quoting Slater J in *In re Wigzall, Ex p Hart* [1921] 2 KB 835, at 845: 'where a bankrupt's estate is being administered ... under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right', which 'should be exercised wherever the enforcement of legal right would ... be contrary to natural justice'. The principle obviously applies to administrators and liquidators – see *In re Lune Metal Products Ltd* [2007] 2 Bus LR 589, para 34."

37. As in the case of restitution, there is no scope for the application of the principle in *ex parte James* in the absence of some particular further facts. So far as concerns the third and fourth respondents, the principle in *ex parte James* would add nothing of practical value to their claim for repayment under sections 140A and 140B. So far as concerns the first and second respondents, Mr Say accepted that the mere fact that the broker's fee was included in the wrong box in the loan documentation is not, of itself, sufficient to engage the principle in *ex parte James*. As I have said, in the absence of any special further facts, no culpability arises from the letters of demand sent to tbe first and second respondents since the threat contained in them was not untrue or misleading.

Section 106

38. Where a thing can only be done by a creditor on an enforcement order, and either the court dismisses (except on technical grounds) an application for an enforcement order or no such application is made or such an application has been dismissed on technical grounds only, and the court makes a declaration under section 142(1) that the creditor is not entitled to do that thing, section 106 applies to any security provided in relation to the agreement: see section 113(3)(d) of the Act. Section 106(d) provides that any amount received by the creditor on realisation of the security shall, so far as it is referable to the agreement, be repaid to the surety. "Surety" is defined in section 189(1) of the Act to mean the person by whom any security is provided, or the person to whom his rights and duties in relation to the security have passed by assignment or operation of law.

39. I am asked to give directions in relation to two issues concerning section 106. As matters stand at present, it is unclear whether either of them is relevant to the respondents since neither of the respondents has yet obtained a declaration under section 142(1) and, until it is clear what further material facts may or may not be established, it is unclear whether either of them could obtain such a declaration in the future. Nor, so far as I am aware, has any security provided to the respondents been realised.

40. The first issue is whether, in respect of a secured loan to which section 106(d) applies, the effect of that provision is that the debtor is entitled to recover all payments made under the loan whether or not those payments were made out of the proceeds of realisation of the security. Mr Say contended that, in the case of a secured loan to which section 106(d) applies, its provisions catch all sums paid by the debtor in discharge of the loan.

41. This issue turns on the meaning of the words "realisation of the security" in section 106(d). Neither the Act nor any associated legislation contains a statutory definition of the term "realisation" applicable to section 106(d). Mr Say relied on *Wilson v Howard* [2005] EWCA Civ 147. In that case the claimant entered into 67 successive agreements with the defendant pawnbroker, under which she successively pawned 13 groups of objects. Under the arrangements, she was treated as periodically paying off the capital and interest purportedly due under each agreement and at the same time re-pledging the goods under a fresh agreement. A feature of the defendant's system was that the claimant was charged a full month's interest for a period short of a month – sometimes a single day – often calculated from a foreshortened redemption date. The use of the fresh agreement would then enable the defendant to set off against the principal notionally advanced under the new agreement the debt (including interest) owed under the previous agreement. The trial judge held that each successive agreement was a fresh agreement and not merely a variation of the prior agreement. He held that eight of the agreements were unenforceable because they contravened the principles of fair dealing and for other reasons. He ordered the return of the goods purportedly pledged under the agreements and awarded the claimant a sum equal to all the amounts notionally paid to the pawnbroker by each "rolling up" even though in actual fact the claimant had only made a single payment.

42. The Court of Appeal dismissed the defendant's appeal. Mr Say relied on the following passage in the judgment of Sedley LJ, with which Potter LJ agreed:

> "13. As to these, the claimant submits that section 106 of the Consumer Credit Act 1974 is unequivocal. It provides that in circumstance such as obtained here 'the security ... shall be treated as never having effect'; property lodged as security shall be returned; and 'any amount received by the creditor ... on realisation of the security ...' is to be repaid. Realisation in Mrs Wilson's submission includes receipt of payment from the debtor as well as sale by the creditor. The word is not defined in the Act but it seems to me that the submission must be correct. If it were not, a diligent debtor would be worse protected than a dilatory one. Professor Goode's annotation of the section takes a similar view."

43. Mr Say also relied on *Wilson v Robertsons (London) Ltd* (No. 2) [2006] EWCA Civ 1088, [2007] CCLR 1. In that case the claimant, who had also been the claimant in *Howard*, pawned several items or groups of items in return for seven loans. Under each loan agreement the claimant did not pay off the capital sum but the capital sum was rolled over to the new agreement. The agreements were regulated agreements and were defective and unenforceable against the claimant. It was common ground that the claimant was entitled to the return of the pawned goods, to retain the loan made to her and to repayment of the interest which she had paid under the agreements. The trial judge rejected, however, the claimant's claim, based on *Howard*, that on the making of each new agreement the outstanding loan was deemed

to have been repaid and a new loan entered into by her and that she was, therefore, entitled to recover the amount of each of the successive loans which she was deemed to have repaid on each renewal. Mr Say relied upon a concession, apparently made by the defendant's counsel in *Robertsons* (recorded at [18]) that, to the extent that the claimant had repaid the loan by a payment of money, that would have been an amount received by the defendant "on realisation of the security" and would be repayable to her as "surety".

44. The Court of Appeal dismissed the claimant's appeal. Carnwath LJ, who gave the lead judgment, with which Moses LJ agreed, distinguished *Howard* on the basis that, unlike the position in *Howard*, the claimant in *Robertsons* did not pay off the capital sum outstanding under any of the agreements but rather only paid the interest, the capital sum being transferred from the old agreement to the new agreement.

45. Mr Say further submitted, by way of analogy, that any payment made in reduction of a mortgage loan is, to that extent, a redemption of the mortgage and a realisation of the security. He said that similarly any payment made in reduction of a secured debt under a regulated agreement is also a "realisation of the security" within section 106(d).

46. I agree with Ms Felicity Toube QC, for the Joint Administrators, that *Howard* is a very special case which turns on its own facts and is readily distinguishable from the present case. In that case the outstanding capital and interest under the prior agreement were notionally paid off when each new agreement was made. Since no actual money was paid by the debtor on the occasion of each new agreement, the funds notionally paid to discharge the outstanding capital and interest could only have come from a notional realisation of the pawned objects.

47. Neither that notional realisation nor the notional payment off of the outstanding capital and interest when each new agreement was made had anything to do with redemption. Despite Mr Say's submission, I cannot see any analogy between the "realisation" of a security within section 106(d) and the redemption of a mortgage. In conventional legal terms the realisation of a security is something carried out by or on behalf of a creditor to release the value of the security so that the value can be applied in discharge of the debt. Redemption is something done by a debtor (viz. payment of what is outstanding) in order to obtain the return of the secured property. I can see no good reason why "realisation" of the security for the purposes of section 106(d) should bear any meaning other than its conventional meaning. Sections 120 and 121 of the Act support that conclusion. Section 120 sets out the circumstances in which "the pawn becomes realisable by the pawnee" where the pawn has not been redeemed at the end of the redemption period. Section 121, which is headed "Realisation of pawn", provides for the pawn to be "realisable" by the pawnee selling it.

48. That conventional interpretation of section 106(d) is consistent with a coherent legislative policy to preclude a creditor from circumventing the need to obtain an enforcement order by simply "realising" the security. That policy is apparent from sections 142(1) and 113(3)(d) which are the gateways to section 106(d). Furthermore, that conventional interpretation achieves the policy - expressly stated in section 113(1) - that the security provided in relation to a regulated agreement cannot be enforced so as to benefit the creditor to any greater extent than would be the case if the security were not provided. The respondents' interpretation, on the other hand,

would put a debtor who has provided security in a far better position than a debtor who has not provided security. Expressed differently, contrary to the policy objective stated in section 113(1), it would put the creditor in a worse position than if no security had been provided. On the respondents' argument, the debtor who has provided security is entitled under section 106(d) to repayment of all money paid by the debtor to discharge the debt and interest whether or not the money has come from the proceeds of sale of the security. A debtor who has not provided security, on the other hand, cannot recover any money paid in discharge of the debt unless he or she falls within the unfair relationship provisions of section 140A. There is no good policy reason justifying such a discrepancy as regards sums voluntarily paid by the debtor pursuant to the loan agreement. The debtor who has provided security would obtain a windfall. The debtor who has not provided security would not.

49. For those reasons, I accept the contention of the Joint Administrators that section 106(d) does not oblige them to repay sums which are not the proceeds of sale of the security but were voluntarily paid by the respondents in repayment of their loans.

50. The second issue under section 106 concerns the application of section 106(d) where the security has been realised and, whether from the proceeds of the security alone or from those proceeds and other payments made by the debtor, the entire debt has been discharged. The Joint Administrators say that section 106(d) has no application in those circumstances. Mr Say, for the respondents, submits the contrary.

51. As I have said, the route to section 106(d) lies via section 113(3)(d) and so via section 142(1). It is said, on behalf of the Joint Administrators, that the language of section 142(1) envisages that there is some indebtedness outstanding in respect of which the creditor needs to obtain an enforcement order. Ms Toube relied on the reasoning and the decision on the same point of HH Judge Stewart in *Watson v Progressive Financial Services Ltd* [2009] CCLR 10 at [13] to [17]. His reasoning was set out in paragraph [17] as follows:

> "i) The use of the present tense in s.142(1): the power to make a declaration that the creditor or owner is not entitled to do that thing."
>
> ii) The following words in the subsection: '... and thereafter no application for an enforcement order in respect of it shall be entertained' is a consequence of any declaration and therefore is an integral part of the declaration because it is the very purpose of it. This consequence cannot follow where an agreement is closed.
>
> iii) Some support for the construction contended for by the defendant is provided by the words in s.113(3)(d) where the cross-reference to a s.142(1) declaration is referred to as 'refusal of enforcement order.'
>
> iv) It may well be that the remedy provided for in s.106(d) is then of restricted scope if a declaration cannot be made in respect of a closed agreement but:

a) That does not permit the words of s.142(1) - however purposively construed - to allow the construction for which the defendant contends.

b) Section 142(1) is entirely coherent as a provision without stretching the language beyond breaking point. It permits a court to make a declaration where a creditor applies for an enforcement order and it is dismissed. It also permits an interested party, including a debtor, to apply for a declaration so as to deal with a situation where a creditor or owner does not apply for an enforcement order and, absent s.142(1)(b), the regulated agreement and any security would remain in being though unenforceable.

c) While statutes may clearly empower the courts to make a declaration which is not one of subsisting legal rights, it seems to me that clear terminology would be expected in those circumstances, especially when seen against the backdrop of the general reluctance of the courts to do so (as to which see *Civil Procedure 2009* Vol.2 para 9A-77)."

52. The Joint Administrators also rely on the commentary to section 142(1) in The Encyclopedia of Consumer Credit Law by Guest and Lloyd (ed Eva Lomnicka) that:

> "Once the debt or hirer has fulfilled his obligations (and hence the creditor or owner no longer needs an enforcement order) it seems clear that an order under s.142(1) can no longer be made."

53. I acknowledge the clarity and force of Judge Stewart's reasoning but I respectfully do not agree with his decision on this point or the view expressed in the Encyclopedia of Consumer Credit Law. I agree that, read literally, the language of section 142(1) supports the interpretation that it can only apply when there is something outstanding for which the creditor requires an enforcement order. That produces, however, a highly anomalous result, which is inconsistent with the manifest intention of Parliament to provide protection generally for debtors in respect of consumer credit agreements and specifically to prevent secured creditors avoiding the protections conferred on consumers under the Act by the self-help step of realising the security and using the proceeds of the realisation to discharge the debt. Mr Say's submission that section 142(1) extends to completed agreements is, on the other hand, consistent with a legitimate purposive interpretation in the light of the Act as a whole.

54. The Joint Administrators accept that section 106(d) applies where, in the case of an irredeemably unenforceable regulated agreement, a creditor has sold the security and the proceeds of sale are insufficient to discharge the entire debt. The Joint Administrators also accept that the route by which the debtor achieves that relief is by means of a declaration under section 142(1) and by section 113(3)(d). It was not

contended by Ms Toube that section 106(d) could not apply in a case of a partial repayment of the debt merely because, at the date of the declaration under section 142(1), the security had already been realised.

55. It is impossible, in those circumstances, to understand the rationale of a policy which discriminates between the granting of relief under section 106(d) and section 142(1) where the proceeds of the security have discharged the entire debt and where it has discharged only part of the debt. It would mean, for example, that, where a debtor applies for a declaration under section 142(1), the creditor can frustrate the obtaining of relief merely by the expedient of selling the security and using the proceeds to discharge the entire debt. Ms Toube suggested that the answer was simply to rely on the provisions of section 140A. That section, however, and the related provisions of section 140B and 140C were only introduced by the Consumer Credit Act 2006. Under transitional provisions section 140A has no application to agreements made before 6 April 2008. Sections 106, 113 and 142, however, formed part of the original Act and the question is what was the legislative intent when they were enacted.

56. Furthermore, unlike section 140A which is of a very general nature with reference to unfair relationships between creditors and debtors, section 106(d) and section 113(3)(d) are specifically directed to the provisions of a remedy for the wrongful sale of security. It is impossible to understand why, in that context, a debtor should be provided with a greater remedy the smaller the security in proportion to the loan. In effect, the more culpable the creditor's conduct, in avoiding the consumer protection in the Act by resorting to self-help in realising the security to discharge the debt, the more limited the relief under sections 106, 113 and 142. The Joint Administrators' interpretation would also mean, as Mr Say emphasised, that section 106(d) is unlikely to apply in the majority of cases where the security has wrongly been sold in breach of the provisions of the Act since the assumption must be that creditors will generally seek to ensure that their security is not less than the value of the loan and usually greater.

57. The irrationality of a distinction under section 106(d), and hence section 142(1), between the sale of a security which discharges the entire debt and a sale where it discharges only part of the debt is further underlined by a concession of Ms Toube that a debtor can obtain repayment from the creditor if the creditor has wrongly obtained a possession order and, with the benefit of that possession order, has sold the security and applied the proceeds in discharge of the entire debt. She suggested that, in addition to or as an alternative to a remedy under section 140A, the debtor could belatedly appeal the possession order. That, however, is a remedy entirely outside the scope of the consumer protection which the legislature provided for consumers under the Act and would be both unpredictable and dependent on a number of procedural and other conditions.

58. Read literally, only the word "is" in the expression "is not entitled to do that" at the end of section 142(1) is inconsistent with Mr Say's purposive interpretation. Bearing in mind all the matters I have mentioned, I consider that the expression "is not entitled to do that" should not be read in a temporal sense but rather as describing the unlawfulness of the "thing" in the first line of section 142(1), that is to say the creditor's action in issue and whether the "thing" lies in the past or the future. I do not consider that is stretching the wording of section 142 beyond the permissible limits of interpretation.

59. In any event, even if that is wrong, I consider that so far as concerns agreements made on or after 6 April 2008 the proceeds of any wrongful realisation of security applied in discharge of the debt ought in principle to be recoverable by the debtor pursuant to sections 140A, 140B and 140C. If a creditor unlawfully avoids the requirement to obtain an enforcement order by resorting to the self-help remedy of selling the security, the relationship between the creditor and the debtor is unfair to the debtor for the purposes of section 140A. Ms Toube conceded as much as regards sales of property where the creditor wrongly obtained a possession order. I do not see why the position should be different where the creditor has unlawfully realised security without a possession order.

Notification to other debtors

60. As Ms Toube pointed out in the course of her submissions, an administrator is normally under no obligation to notify any person that they have or may have a claim against the company.

61. I consider that the position is different in the present case. The potential claims of debtors against LSF under regulated agreements arise under consumer protection legislation which imposed and imposes on LSF an obligation to act fairly. The OFT's guidance, to which I have referred earlier, is consistent with an obligation of the Joint Administrators, as officers of the court, to be frank and transparent about the potential claims under the Act of present and past debtors as outlined in this judgment. That can be achieved by drawing the attention of potential claimants to this judgment.

Appendix

Provisions of the Consumer Credit Act 1974

"106 Ineffective securities.

Where, under any provision of this Act, this section is applied to any security provided in relation to a regulated agreement, then, subject to section 177 (saving for registered charges)—

(a) the security, so far as it is so provided, shall be treated as never having effect;

(b) any property lodged with the creditor or owner solely for the purposes of the security as so provided shall be returned by him forthwith;

(c) the creditor or owner shall take any necessary action to remove or cancel an entry in any register, so far as the entry relates to the security as so provided; and

(d) any amount received by the creditor or owner on realisation of the security shall, so far as it is referable to the agreement, be repaid to the surety.

"113 Act not to be evaded by use of security.

(1) Where a security is provided in relation to an actual or prospective regulated agreement, the security shall not be enforced so as to benefit the creditor or owner, directly or indirectly, to an extent greater (whether as respects the amount of any payment or the time or manner of its being made) than would be the case if the security were not provided and any obligations of the debtor or hirer, or his relative, under or in relation to the agreement were carried out to the extent (if any) to which they would be enforced under this Act.

(2)In accordance with subsection (1), where a regulated agreement is enforceable on an order of the court or the OFT only, any security provided in relation to the agreement is enforceable (so far as provided in relation to the agreement) where such an order has been made in relation to the agreement, but not otherwise.

(3) Where—

(a) ...

(b) ...

(c) in relation to any agreement an application for an order under section ... 65(1) ... is dismissed (except on technical grounds only), or

(d) a declaration is made by the court under section 142(1) (refusal of enforcement order) as respects any regulated agreement,

section 106 shall apply to any security provided in relation to the agreement."

" 120 Consequence of failure to redeem.

(1)If at the end of the redemption period the pawn has not been redeemed—

(a) notwithstanding anything in section 113, the property in the pawn passes to the pawnee where

(i)the redemption period is six months,

(ii)the pawn is security for fixed-sum credit not exceeding £75 or running-account credit on which the credit limit does not exceed £75, and

(iii)the pawn was not immediately before the making of the regulated consumer credit agreement a pawn under another regulated consumer credit agreement in respect of which the debtor has discharged his indebtedness in part under section 94(3); or

(b)in any other case the pawn becomes realisable by the pawnee."

"121 Realisation of pawn.

(1)When a pawn has become realisable by him, the pawnee may sell it, after giving to the pawnor (except in such cases as may be prescribed) not less than the prescribed period of notice of the intention to sell, indicating in the notice the asking price and such other particulars as may be prescribed."

"127 Enforcement orders in cases of infringement.

(1) In the case of an application for an enforcement order under—

...

(a) section 65(1) (improperly executed agreements),

... .

the court shall dismiss the application if, but. . . only if, it considers it just to do so having regard to—

(i) prejudice caused to any person by the contravention in question, and the degree ..."

"140AUnfair 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).

(3) ...

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended. "

"140B Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following—

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) ...;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

..."

"142 Power to declare rights of parties.

(1) Where under any provision of this Act a thing can be done by a creditor or owner on an enforcement order only, and either—

(a) the court dismisses (except on technical grounds only) an application for an enforcement order, or

(b) where no such application has been made or such an application has been dismissed on technical grounds only, an interested party applies to the court for a declaration under this subsection,

the court may if it thinks just make a declaration that the creditor or owner is not entitled to do that thing, and thereafter no application for an enforcement order in respect of it shall be entertained.

..."