Neutral Citation Number: [2015] EWCA Civ 751

Case No: A3/2015/0150

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE BURTON
[2014]EWHC 4174 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE RICHARDS

and
LADY JUSTICE GLOSTER

- -

Between :

NRAM PLC	**Appellant**
- and -	
1) JEFFREY PATRICK MCADAM	**Respondent**
2) ANN HARTLEY	

- -
- -

Mr Malcolm Waters QC & Mr Patrick Goodall QC (instructed by **Ashurst LLP**) for the **Appellant**
Mr John Taylor QC & Mr James McClelland (instructed by **Simmons & Simmons LLP**) for the **Respondents**

Hearing dates: Monday 27th April 2015
Tuesday 28th April 2015

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Approved Judgment

Lady Justice Gloster :

Introduction

1. This is the judgment of the court to which all members have contributed. The Consumer Credit Act 1974 ("the 1974 Act") introduced a new and comprehensive structure of regulation covering all forms of consumer credit. One of its many important provisions was that an improperly executed agreement could not be enforced by the lender without the leave of the court. Most of the provisions of the Act did not become operative until May 1985 when it applied to agreements to lend sums under £15,000. This ceiling was later increased to £25,000 with effect from 1st May 1998 and, by the Consumer Credit Act 2006 ("the 2006 Act"), removed altogether in respect of consumer credit and hire agreements with effect from 6th April 2008. In spite of the existence of the ceiling of £25,000 before 2008, some lenders, including the Northern Rock PLC, used the same documentation for pre-2008 loans over £25,000 as well as for loans of sums less than £25,000; typically such documentation was headed by the statement

> "Fixed sum loan agreement regulated by the Consumer Credit Act 1974"

and stated that the 1974 Act laid down requirements for the protection of the borrower. The question on this appeal is whether such statements had contractual (or any other legal) force and, if so, what effect they had. This question has come into critical focus because another section of the 2006 Act (which has become section 77A of the 1974 Act) provides with effect from 1st October 2008 that, if periodic statements, in a form prescribed by the Consumer Credit (Information Requirements etc.) Regulations 2007 ("the 2007 Regulations"), are not given to the borrower, the borrower is to be under no liability to pay any interest or default sum in respect of the period of non-compliance.

The Facts

2. The appellant ("NRAM"), previously known as Northern Rock PLC, is the successor company to which Northern Rock Building Society transferred its business in 1997. It was nationalised in February 2008 and is indirectly wholly owned by HM Treasury. Since nationalisation it has not undertaken any new lending, but holds a substantial book of historic residential mortgages and unsecured lending, dating back before nationalisation.

3. Between 1999 and March 2008 NRAM entered into a large number of unsecured credit agreements, as part of a product called the "Together Mortgage". This allowed borrowers to borrow up to 95% of the value of their home on a secured basis, and in addition to take out a fixed sum unsecured loan of up to 30% of the value of their home, capped at £30,000. It was an advantageous feature of the product that, for so long as the secured loan remained outstanding, interest on the unsecured loan was charged at the same rate as in respect of the secured loan.

4. Jeffrey McAdam and Ann Hartley, the original defendants to the action, (whom we shall refer to as "the respondents" or "the borrowers") are two of those who borrowed on such basis, their unsecured loan being the maximum of £30,000 and, therefore, in

excess of the ceiling for regulated agreements. The action is in the nature of a test case and is brought against them to enable the court to resolve a dispute between NRAM and some 41,000 other borrowers who stand in the same position as the respondents in relation to similar loan agreements; the respondents' legal costs are being paid by NRAM. Although the respondents have not been formally appointed as representative defendants under CPR 19.6, as the judge recognised, and as was common ground, the result of these proceedings will almost inevitably predicate the outcome for the other borrowers who stand in the same position as the respondents.

5. NRAM did not implement the requirements of section 77A and the 2007 Regulations correctly – a fact of which it became aware in late 2012. In particular the statements provided to borrowers (provided by NRAM in the same form whether or not the amount of credit exceeded £25,000) did not state the amount of credit originally provided to the borrower under the agreement as required in relation to a regulated agreement by paragraph 3(b) of Schedule 1 to the 2007 Regulations. In relation to borrowers who had regulated agreements, and who received statements since 2008 which also did not comply with the requirements prescribed in the 2007 Regulations, NRAM has provided redress by furnishing them with a set of corrected statements and by re-crediting to their account any sum wrongly debited on account of interest and default sums in respect of the period of non-compliance, repaying those sums insofar as they had already been paid out by those borrowers to NRAM.

6. However, NRAM has not provided the same (or any) redress to borrowers who entered into agreements before 6th April 2008 under which the amount of credit provided exceeded £25,000, such as the respondents, on the basis that such agreements were not regulated by the 1974 Act, and, accordingly, such borrowers did not have any rights under s. 77A.

7. Some 277 complaints have been received by NRAM from borrowers who entered into unsecured (Together) loan agreements which, although the amount of credit provided exceeded £25,000, were documented as if they were regulated by the 1974 Act. If NRAM is obliged to provide redress to the approximately 41,000 borrowers in the same position as the respondents, the current cost of doing so is said to be about £258 million. By his order made on 10th December 2014 Burton J, sitting in the Commercial Court, has held that they are obliged to provide this redress and NRAM now appeals to this court.

The Relevant Documents

8. The documents are in the form used for all borrowers during the period from 31st May 2005 until the withdrawal of the Together Mortgage product in March 2008, whether borrowing an unsecured amount of less than £25,000 or more than £25,000.

9. The material passages are as follows:

i) **Pre-contract information**

After setting out the lender and the borrowers and other financial information, there is then a box under the heading "Key Information" which includes the following passage:

> "IMPORTANT – READ THIS CAREFULLY TO FIND OUT ABOUT YOUR RIGHTS –
>
> The Consumer Credit Act 1974 lays down certain requirements for your protection, which should have been complied with when this agreement was made. If they were not, we cannot enforce the agreement against you without a court order.
>
> The Act also gives you a number of rights. You can settle this agreement at any time by giving notice in writing and paying off the amount you owe under this agreement. Examples indicating the amount you might have to pay appear in this agreement.
>
> If you would like to know more about your rights under the Act, contact either your local Trading Standards Department or your nearest Citizen's Advice Bureau."

There is then a further box, headed up "YOUR RIGHT TO CANCEL":

> "Once you have signed this agreement, you will have a short time in which you can cancel it. The Lender will send you exact details of how and when you can do this."

ii) The secured part of the loan was the subject of a **Mortgage Application**, which contained the following passage:

> "37. Regulated Mortgage Contracts … Mortgages where less than 40% of the land used as security is used as or in connection with a residential dwelling and all unsecured loans, are not classed as FSA Regulated Mortgage Contracts, although all unsecured loans will be regulated under the provisions of the Consumer Credit Act 1974."

iii) The **Offer of Loan**, which dealt primarily with the mortgage offer, provided in section 3 "Your Mortgage requirements" the following: "You also wish to borrow £30,000.00 as an unsecured loan – see section 12 for details". Section 3a included the provision: "You are under no obligation to accept this Offer of Loan or to enter into the Consumer Credit Agreement, or any other agreement with us". The Section 12 to which attention was drawn by section 3 reads under "Unsecured borrowing":-

> "An unsecured loan of up to £30,000.00 is also available with this mortgage. The interest rate for the unsecured borrowing is the same as that charged for the secured mortgage … This additional feature is not regulated by the Financial Services Authority, but is regulated under the Consumer Credit Act 1974. You will receive separate documentation regarding this additional feature, describing the detailed terms on which this borrowing is available."

iv) This leads to the unsecured **Loan Agreement** itself, which is headed "Fixed-sum loan agreement regulated by the Consumer Credit Act 1974". There is then the same "Key Information" as was provided in the Pre-contract information set out in (i) above, in identical terms, including the rubric "IMPORTANT – READ THIS CAREFULLY TO FIND OUT ABOUT YOUR RIGHTS", followed by the same notice setting out "YOUR RIGHT TO CANCEL". The reference to the 1974 Act is then repeated over the borrower's signature, namely: "This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms." We refer to these statements as "the relevant statements".

v) In addition the Loan Agreement set out examples of the "Amounts payable on early settlement" which were calculated in accordance with the statutory rebate provisions. It also stated as follows:

> "The Act also gives you a number of rights. You can settle this agreement at any time by giving notice in writing and paying off the amount you owe under this agreement. Examples indicating the amount you might have to pay appear in this agreement."

vi) Finally there was sent to the borrowers, seven days after the signature by them of the Loan Agreement, a "Statutory Notice Relating to a Regulated Consumer Credit Agreement", relating to the right to cancel (expressly given, as set out above, in the Loan Agreement (and the Pre-contract information)), namely the right to cancel provided in respect of a regulated agreement by section 67 of the 1974 Act and required to be included in regulated agreements by Regulation 2(3) of, and paragraph 5 of Part 1 of Schedule 2 to, the Consumer Credit (Agreements) Regulation 1983 ("the 1983 Agreements Regulations").

The submissions

10. In broad terms Mr John Taylor QC for the borrowers submitted to the judge (as he did to us):

i) the contractual documentation incorporated the terms of the 1974 Act into the loan agreement between the borrowers and NRAM; any provision of the 1974 Act which could not be incorporated into the agreement would be rejected as inapposite and thus inapplicable;

ii) alternatively the true effect of the agreement was that the loan was to be treated as if regulated by the 1974 Act and, again, any inapposite provision would be inapplicable; and

iii) if neither of these conclusions was correct, the same result could be reached by relying on the doctrines of contractual estoppel, estoppel by convention, estoppel by representation or promissory estoppel.

11. The judge's first reaction on reading the papers was that the statements in the contractual documents constituted a warranty in the contractual documents that the agreement was regulated and that, since the loan agreement was not in fact regulated,

there was a breach of that warranty. In the event, however, he accepted the borrowers' submissions and made no decision that there was a breach of warranty. He accordingly decided that the borrowers were not liable for interest (or default sums) on their loans and that statements charging them with such interest had been wrongly prepared. He made declarations accordingly.

12. In so doing he rejected the submissions of Mr Malcolm Waters QC for NRAM, which were then (and now) broadly as follows:-

    i) the statements in the contractual documentation were only statements that the loan agreement was a contract regulated by the 1974 Act; they constituted at most a representation to that effect which was wrong but could not be the subject of legal redress unless section 2 of the Misrepresentation Act 1967 applied; if that Act did apply or if (as the judge first thought) the statements constituted a warranty that the contracts were regulated by the 1974 Act and that warranty was broken, any such cause of action was likely to be time-barred because the representation was made or the warranty was broken before 6th April 2008;

    ii) on no view was the 1974 Act expressly or impliedly incorporated into the loan agreement, nor could the loan agreement be construed as a promise to treat it as if the Act applied when, in fact, it did not; the statements about the 1974 Act were merely statements of information not promises on NRAM's part;

    iii) in any event, the regulatory nature of the 1974 Act made it inapposite to treat the statements about it as promising that the Act would apply; and

    iv) if there was no agreement that the 1974 Act applied, doctrines of estoppel (however formulated) could not create a liability which had never been agreed.

    Mr Waters expressly accepted that, if the 1974 Act was incorporated into the loan agreement or if there was otherwise an agreement that the borrower would have the protections given by the Act, the fact that section 77A was enacted after the loan agreements was made would not prevent it from applying to the loan agreement.

13. In the light of the respective submissions of the parties, we formulate the topics or issues which we need to address as follows:

    i) the relevant provisions of the 1974 Act and whether it is possible to "contract in" to the Act;

    ii) whether on the true construction of the loan agreement the provisions of the 1974 Act were incorporated;

    iii) whether NRAM expressly or impliedly agreed that the borrower was to have the protection of the 1974 Act as if it applied to the loan agreement, irrespective of whether it did or not;

    iv) if the statutory wording in the relevant statements did not constitute a contractual term, was it nonetheless capable of giving rise to an estoppel binding on NRAM which prevented it from denying that the borrowers had the

rights conferred by some or all of the provisions of the 1974 Act upon borrowers under regulated agreements;

v) whether there was a representation or warranty that the loan agreement was a regulated agreement when it was not.

14. Issue 4 above (the estoppel issue) is based on paragraph 11(c) of NRAM's amended details of claim, which - effectively - sought negative declarations that neither the relevant statements nor NRAM's conduct in providing regular statements to the borrowers estopped NRAM from denying:

i) that the borrowers were entitled to the protections afforded under the 1974 Act in effect from time to time (and in particular section 77A rights); and/or

ii) that NRAM would treat the respondents *as if* the matters in sub-paragraph (i) above were indeed the case.

It was common ground that the judge would not be invited to make any findings in the action brought under CPR Part 8 as to whether an estoppel arose as a result of any other facts beyond those stated above, or as to whether, if the judge found that the relevant statements did indeed provide the basis for an estoppel, there had been any reliance by the respondents upon such statements.

(1) Issue (1): the 1974 Act and whether it is possible to "contract in" to its provisions

15. It is necessary now (we fear at some length) to set out a number of the provisions of the 1974 Act as it was at the time the loan agreement was made, as well as the new section 77A:-

> "**8. Consumer credit agreements**
>
> "(1) 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].
>
> (3) 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 section 16.
>
> **55. Disclosure of information**
>
> (1) Regulations may require specified information to be disclosed in the prescribed manner to the debtor or hirer before a regulated agreement is made.

(2) A regulated agreement is not properly executed unless regulations under subsection (1) were complied with before the making of the agreement.

60. Form and content of agreements

(1) The Secretary of State shall make regulations as to the form and content of documents embodying regulated agreements, and the regulations shall contain such provisions as appear to him appropriate with a view to ensuring that the debtor or hirer is made aware of –

(a) the rights and duties conferred or imposed on him by the agreement;

(b) the amount and rate of the total charge for credit (in the case of a consumer credit agreement);

(c) the protection and remedies available to him under this Act, and

(d) any other matters which, in the opinion of the Secretary of State, it is desirable for him to know about in connection with the agreement.

(2) Regulations under subsection (1) may in particular –

(a) require specified information to be included in the prescribed manner in documents, and other specified material to be excluded; and

(b) contain requirements to ensure that specified information is clearly brought to the attention of the debtor or hirer, and that one part of a document is not given insufficient or excessive prominence compared with another."

61. Signing of agreement

(1) A regulated agreement is not properly executed unless –

(a) 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 or hirer and by or on behalf of the creditor or owner, and

(b) the document embodies all the terms of the agreement, other than implied terms, and

(c) the document is, when presented or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible. …

62. Duty to supply copy of unexecuted agreement

(1) If the unexecuted agreement is presented personally to the debtor or hirer for his signature, but on the occasion when he signs it the document does not become an executed agreement, a copy of it, and of any other document referred to in it, must be there and then delivered to him.

(2) If the unexecuted agreement is sent to the debtor or hirer for his signature, a copy of it, and of any other document referred to in it, must be sent to him at the same time.

(3) A regulated agreement is not properly executed if the requirements of this section are not observed.

63. Duty to supply copy of executed agreement

(1) If the unexecuted agreement is presented personally to the debtor or hirer for his signature, and on the occasion when he signs it the document becomes an executed agreement, a copy of the executed agreement, and of any other document referred to in it, must be there and then delivered to him.

(2) A copy of the executed agreement, and of any other document referred to in it, must be given to the debtor or hirer within the seven days following the making of the agreement unless –

(a) subsection (1) applies, or

(b) the unexecuted agreement was sent to the debtor or hirer for his signature and, on the occasion of his signing it, the document became an executed agreement.

(3) In the case of a cancellable agreement, a copy under subsection (2) must be sent by an appropriate method.

(4) In the case of a credit-token agreement, a copy under subsection (2) need not be given within the seven days following the making of the agreement if it is given before or at the time when the credit-token is given to the debtor.

(5) A regulated agreement is not properly executed if the requirements of this section are not observed.

64. Duty to give notice of cancellation rights

(1) In the case of a cancellable agreement, a notice in the prescribed form indicating the right of the debtor or hirer to cancel the agreement, how and when that right is exercisable, and the name and address of a person to whom notice of cancellation may be given –

(a) must be included in every copy given to the debtor or hirer under section 62 or 63, and

(b) except where section 63(2) applied, must also be sent by an appropriate method to the debtor or hirer within the seven days following the making of the agreement.

…

(5) A cancellable agreement is not properly executed if the requirements of this section are not observed.

65. Consequences of improper execution

(1) An improperly-executed regulated agreement is enforceable against the debtor or hirer on the order of the court only.

(2) A retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement.

67. Cancellable agreements

A regulated agreement may be cancelled by the debtor or hirer in accordance with this Part if the antecedent negotiations included oral representations made when in the presence of the debtor or hirer by an individual acting as, or on behalf of, the negotiator, unless,

(a) the agreement is secured on land, or is a restricted-use credit agreement to finance the purchase of land or is an agreement for a bridging loan in connection with the purchase of land, or

(b) the unexecuted agreement is signed by the debtor or hirer at premises at which any of the following is carrying on any business (whether on a permanent or temporary basis) –

(i) the creditor or owner;

(ii) any party to a linked transaction (other than the debtor or hirer or a relative of his);

(iii) the negotiator in any antecedent negotiations.

76. Duty to give notice before taking certain action

(1) The creditor or owner is not entitled to enforce a term of a regulated agreement by –

(a) demanding earlier payment of any sum, or

(b) recovering possession of any goods or land, or

(c) treating any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred,

except by or after giving the debtor or hirer not less than seven days' notice of his intention to do so.

(2) Subsection (1) applies only where –

(a) a period for the duration of the agreement is specified in the agreement, and

(b) that period has not ended when the creditor or owner does an act mentioned in subsection (1),

but so applies notwithstanding that, under the agreement, any party is entitled to terminate it before the end of the period so specified.

(3) A notice under subsection (1) is ineffective if not in the prescribed form."

77A. Statements to be provided in relation to fixed-sum credit agreements

(1) The creditor under a regulated agreement for fixed-sum credit must give the debtor statements under this section.

(1A) The statements must relate to consecutive periods.

(1B) The first such period must begin with either –

(a) the day on which the agreement is made, or

(b) the day the first movement occurs on the debtor's account with the creditor relating to the agreement.

(1C) No such period may exceed a year.

(1D) For the purposes of subsection (1C), a period of a year which expires on a non-working day may be regarded as expiring on the next working day.

(1E) Each statement under this section must be given to the debtor before the end of the period of thirty days beginning with the day after the end of the period to which the statement relates.

(2) Regulations may make provision about the form and content of statements under this section.

…

(3) The debtor shall have no liability to pay any sum in connection with the preparation or the giving to him of a statement under this section.

(4) The creditor is not required to give the debtor any statement under this section once the following conditions are satisfied –

(a) that there is no sum payable under the agreement by the debtor; and

(b) that there is no sum which will or may become so payable.

(5) Subsection (6) applies if at a time before the conditions mentioned in subsection (4) are satisfied the creditor fails to give the debtor –

(a) a statement under this section within the period mentioned in subsection (1E) or

(6) Where this subsection applies in relation to a failure to give a statement under this section to the debtor –

(a) the creditor shall not be entitled to enforce the agreement during the period of non-compliance;

(b) the debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it; and

(c) the debtor shall have no liability to pay any default sum which (apart from this paragraph) –

(i) would have become payable during the period of non-compliance; or

(ii) would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period (whether or not the breach continues after the end of that period).

(7) In this section 'the period of non-compliance' means, in relation to a failure to give a statement under this section to the debtor, the period which–

(a) begins immediately after the end of the period mentioned in subsection (5); and ends at the end of the day on which the statement is given to the debtor or on which the conditions mentioned in subsection (4) are satisfied, whichever is earlier.

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), or

(b) section 105(7)(a) or (b) (improperly executed security instruments), or

(c) section 111(2) (failure to serve copy of notice on surety), or

(d) section 124(1) or (2) (taking of negotiable instrument in contravention of section 123),

the court shall dismiss the application if, but (subject to subsections (3) and (4)) 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 of culpability for it; and

(ii) the powers conferred on the court by subsection (2) and sections 135 and 136.

(2) If it appears to the court just to do so, it may in an enforcement order reduce or discharge any sum payable by the debtor or hirer, or any surety, so as to compensate him for prejudice suffered as a result of the contravention in question.

(3) The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).

(4) The court shall not make an enforcement order under section 65(1) in the case of a cancellable agreement if –

(a) a provision of section 62 or 63 was not complied with, and the creditor or owner did not give a copy of the executed agreement, and of any other document referred to in it, to the debtor or hirer before the commencement of the proceedings in which the order is sought, or

(b) section 64(1) was not complied with.

(5) Where an enforcement order is made in a case to which subsection (3) applies, the order may direct that the regulated agreement is to have effect as if it did not include a term omitted from the document signed by the debtor or hirer.

129. Time orders

(1) Subject to subsection (3) below, if it appears to the court just to do so –

(a) on an application for an enforcement order, or

(b) on an application made by a debtor or hirer under this paragraph after service on him of –

(i) a default notice, or

(ii) a notice under section 76(1) or 98(1); or

(c) in an action brought by a creditor or owner to enforce a regulated agreement or any security, or recover possession of any goods or land to which a regulated agreement relates,

the court may make an order under this section (a "time order").

(2) A time order shall provide for one or both of the following, as the court considers just -

(a) the payment by the debtor or hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times, as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable;

(b) the remedying by the debtor or hirer of any breach of a regulated agreement (other than non-payment of money) within such period as the court may specify."

135. Power to impose conditions, or suspend operation of order

(1) If it considers it just to do so, the court may in an order made by it in relation to a regulated agreement include provisions –

(a) making the operation of any term of the order conditional on the doing of specified acts by any part of the proceedings;

(b) suspending the operation of any term of the order either –

(i) until such time as the court subsequently directs, or

(ii) until the occurrence of a specified act or omission.

(2) The court shall not suspend the operation of a term requiring the delivery up of goods by any person unless satisfied that the goods are in his possession or control.

(3) In the case of a consumer hire agreement, the court shall not so use its powers under subsection (1)(b) as to extend the period for which, under the terms of the agreement, the hirer is entitled to possession of the goods to which the agreement relates.

(4) On the application of any person affected by a provision included under subsection (1) the court may vary the provision.

141. Jurisdiction and parties

(1) In England and Wales the court shall have jurisdiction to hear and determine –

(a) any action by the creditor or owner to enforce a regulated agreement or any security relating to it;

(b) any action to enforce any linked transaction against the debtor or hirer or his relative,

and such an action shall not be brought in any other court.

(2) Where an action or application is brought in the High Court which, by virtue of this Act, ought to have been brought in the county court it shall not be treated as improperly brought, but shall be transferred to the county court."

173. Contracting-out forbidden

(1) A term contained in a regulated agreement or linked transaction, or in any other agreement relating to an actual or prospective regulated agreement or linked transaction, is void if, and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in this Act or in any regulation made under this Act.

(2) Where a provision specifies the duty or liability of the debtor or hirer or his relative or any surety in certain circumstances, a term is inconsistent with that provision if it purports to impose, directly or indirectly, an additional duty or liability on him in those circumstances.

…"

16. It can at once be seen that the 1974 Act contains many provisions emphasising the importance of both regulations made under the 1974 Act and the role of the court in enforcing any regulated agreement. Some provisions require a court to refuse enforcement (sections 127(3) and (4), as well as section 77A itself); other provisions state that, in certain events, regulated agreements are enforceable only on the order of court (sections 65 and 127). It is, of course, forbidden to parties to contract out of the 1974 Act (section 173). But it is a question whether parties can contract into the 1974 Act if the loan agreement is an unregulated agreement particularly when the

jurisdiction given to the court by section 141 is to hear and determine any action by the lender to enforce a regulated agreement or a linked transaction. On the face of it, the 1974 Act has no application to unregulated agreements such as loan agreements for sums in excess of £25,000 made before 6th April 2008.

17. The question whether it is conceptually possible expressly to contract into the 1974 Act is not an easy question to answer. It certainly seems to have been assumed (if not expressly decided) that parties could not contract into the old Rent Acts because that would be to give a jurisdiction to the court which it did not possess, see: *J & F Stone Lighting and Radio Ltd v Levitt* [1947] A.C. 209, 215-216 per Lord Thankerton. Mr Waters did not, however, contend that it was conceptually impossible to agree to contract into the 1974 Act so we will assume that it is possible. His argument was that the parties had not, in fact, agreed to do so, because very clear words would be required to achieve such a result.

18. In the light of the highly technical provisions of the Act including particularly the role of the court in enforcing regulated agreements, we agree with Mr Waters' submission that it would require very clear words before one could conclude that the parties agreed to give the court power to enforce the agreements in the limited circumstances given by the 1974 Act and in no other circumstances. It would be very unusual to give a court a discretionary power to enforce an agreement and still more unusual to import mandatory requirements such as those imposed on the court by (among other sections) section 127 which are peculiarly inapt to be imposed by agreement, as are the powers to make time orders, to impose conditions or to suspend the operation of an order as provided for by sections 129 and 135. This must all the more be the case when the parties would be uncertain whether a judge of the county court would even accept he had jurisdiction to make any necessary order in the first place. As Professor Goode said in paragraph 23.9 of the version of his commanding book, *Consumer Credit Law and Practice*, which was in print before the decision at first instance:-

> "Realism compels one to admit that, judicial conservatism being what it is, the reaction of the average County Court Judge is likely to be: 'if they cannot lawfully contract out of [the 1974 Act], they cannot contract into it either'."

19. It is therefore against this background that the court has to decide whether the borrowers and the lender have agreed either expressly or impliedly to incorporate the provision of the 1974 Act into the contract or to give the borrowers the protection afforded by that Act.

Issue (2): whether on the true construction of the loan agreement the provisions of the 1974 Act were incorporated

20. There is no express incorporation of the 1974 Act. This, to our mind, suffices to distinguish the cases relied on by Mr Taylor. In *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] A.C. 133 the question was whether the United States Carriage of Goods by Sea Act, which applied to bills of lading evidencing contracts of carriage of goods by sea to and from United States ports, applied to a consecutive voyage party. A number of type-written clauses were attached to the document constituting the charterparty and were expressed to be "deemed incorporated in this charterparty". One of those clauses expressly agreed that what was called a

Paramount Clause as attached was "to be incorporated in this charterparty". The paramount clause was also attached on a typed slip in the terms:-

> "This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States … which shall be deemed to be incorporated herein."

The majority of the House of Lords held that the United States Act had been incorporated into the charterparty. Viscount Simonds (page 152) said:-

> "The clause provides that the provisions of [the Act] "shall be deemed to be incorporated herein". "Herein" can only mean "in this contract". The contract must therefore be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits."

Incorporation had therefore been achieved by express contractual wording both of the clause applying the paramount clause to the charterparty and of the paramount clause itself. The fact that the paramount clause itself referred to "this bill of lading" did not displace that express incorporation but, according to the maxim "falsa demonstratio non nocet cum de corpore constat", fell to be disregarded.

21. The same is true of *Larusso-Chigi v CS First Boston Ltd* [1998] CLC 277 in which the transaction was said to be "governed by" a code of conduct established by the Bank of England. The judge (paragraph 16(i)) comments that that phrase is not far distant from "regulated by" as used in the loan agreement but the phrase "regulated by" is, to our mind, a statement of fact rather than a word of incorporation. The phrase "governed by" is a statement of obligation which is rather different. In *Brandeis (Brokers) Ltd v Black* [2001] 2 All E.R. (Comm) 980 the terms of the contract were provided to be "subject to SFA Rules" which were likewise clear words of incorporation.

22. In all three of these cases, the judges said that the fact that some parts of the incorporated terms were inapplicable did not mean that the incorporation was ineffective. Mr Taylor attempted to build on that by saying that the fact that some of the provisions of the 1974 Act could not be legitimately incorporated such as the provision saying that in some circumstances (such as improper execution) the agreement could only be enforced by court order did not prevent the incorporation of other provisions (such as section 77A). But that argument loses its force if, on a true construction of the contract, there was no agreement that the 1974 Act was to be incorporated in the first place.

23. This argument, moreover, proves too much. The provisions as to enforcement are fundamental to the regulatory scheme envisaged by the 1974 Act. If the provisions about enforcement only by order of the court are to be disregarded as inapposite, one asks what is the point of incorporating the 1974 Act at all. The consequence of disregarding those provisions means that the contract is enforceable without an order of the court despite the fact that it has not been properly executed and one of the main purposes of the 1974 Act will be frustrated at the same time as the parties are, on Mr Taylor's argument, stating that it is intended to apply.

24. Moreover the language of the express references to the 1974 Act in the relevant statements is not consistent with an intention on the part of the lender and borrower to incorporate some, but not all, of the provisions of the Act. The language could not be clearer: the rights arise under the 1974 Act (by virtue of the regulated status of the agreement), not by virtue of a term of the contract.

25. For these reasons we are satisfied that the parties cannot have intended to incorporate the provisions of the 1974 Act into their loan agreement.

Issue (3): whether NRAM expressly or impliedly agreed that the borrower was to have some or all of the protections of the 1974 Act as if it applied to an unregulated agreement, irrespective of whether it did or not

26. We turn now to consider the issue whether NRAM expressly or impliedly agreed that the borrower was to have some or all of the protections of the 1974 Act, as if it applied to an unregulated agreement.

27. The judge appears to have concluded (see paragraph 26 of the judgment) that, on the construction of the agreement it was an express or implied term that, whether or not it was a regulated agreement, NRAM would treat the borrowers *as if* they had the protections of the 1974 Act, irrespective of whether such protections applied or not. He also appears to have accepted that such a term would have operated only to apply some, but not all, of the relevant provisions of the 1974 Act. In other words he appeared to accept Mr Waters' submissions that, on any basis, the execution and enforceability provisions contained in sections 61–63 and 65 and 127 could not be applicable despite the express or implied term which the judge concluded was part of the contract. Thus he said: "I do not see insuperable difficulties in the fact that the paraphernalia of the regulated agreement would not entirely apply". It is not altogether clear whether the judge reached his conclusion on the basis of an express term incorporating the provisions of the 1974 Act (so far as applicable) or by means of an implied term.

28. We cannot agree with the judge that the agreement should be construed as including any such term, whether express or implied, that NRAM would treat the borrowers as if they had the protections of the 1974 Act, irrespective of whether such protections applied or not. Our reasons may be summarised as follows.

29. We accept, as Mr Waters, despite his initial submissions to the contrary, finally submitted, that the language used in the agreement, which we have quoted extensively above, amounts to a contractual representation or warranty that the agreement was indeed one which was regulated by the 1974 Act. If, as was the case in relation to loan agreements over £25,000, that statement was untrue, it entitled borrowers to claim damages for misrepresentation under the Misrepresentation Act 1967 and/or for breach of contractual warranty, subject to any relevant limitation or other defences. The existence of this representation is the subject of issue 5 above.

30. Section 189(1) of the 1974 Act defines the term "regulated agreement" to mean:

> "a consumer credit agreement, or consumer hire agreement, other than an exempt agreement, and "regulated" and "unregulated " shall be construed accordingly".

It was common ground that when the term "regulated agreement" is used in the 1974 Act, it is clearly confined to an agreement as so defined, from which it follows that prima facie none of the statutory provisions applicable to "regulated agreements" apply to agreements that do not fall within that definition, i.e. non-regulated agreements.

31. However it was also (correctly) common ground that it was conceptually possible for parties to a contract, as a matter of contractual intention, to agree that their loan agreement (albeit not "regulated" within the meaning of the 1974 Act) should have the protections which the Act confers on "regulated agreements" - insofar as that was contractually possible: see *Encyclopaedia of Consumer Credit Law, Guest and Lloyd*, editor Professor Lomnicka, version May 2014 (prior to the decision of Burton J) at paragraph 2-009. Thus it was common ground that the parties could expressly set out statutory rights and immunities as contractual terms of their unregulated agreement - for example the right for the debtor to effect early settlement at any time - in which case those rights and immunities would be available to the debtor, not by virtue of the Act, but as express provisions of the contract: see *Goode: Consumer Credit Law and Practice*, version August 2014 (likewise prior to the decision of Burton J), at paragraph 23.10. Indeed that was the case here in relation to the provisions relating to early settlement, the amounts payable on early settlement and the right to cancel, which Mr Waters accepted had been spelled out as freestanding express contractual terms. These provisions had been expressly stated in the loan agreement because of the requirement to do so in relation to regulated agreements imposed by the 1983 Agreements Regulations. But whilst Mr Waters accepted that it was conceptually possible in a particular case for parties to agree that their unregulated loan agreement should have certain protections which the Act confers on regulated agreements, what Mr Waters did not accept was that, in the present case, the presence of the relevant statements meant that parties had expressly or impliedly agreed that any other provisions of the 1974 Act would apply as terms of the agreement.

32. Both text books (in their versions before the decision of Burton J) address the effect of statements such as the relevant statements in the present case. *Guest and Lloyd* suggest that, by stating that the agreement is "regulated by the Consumer Credit Act 1974", the parties would be taken to have agreed that, subject to certain important exceptions, the debtor was intended to have the rights and protections conferred by the 1974 Act. They state:

> "*Non-regulated agreements stated to be "regulated"*
>
> The question then arises whether the Act applies to such (non-regulated) agreement to the same extent as if they were "regulated" agreements. …….
>
> It is suggested (see the similar argument in relation to so-called "contractually cancellable agreements", noted above) that, as the term "regulated agreement" is defined in s.189(1) to mean (essentially) a non-exempt consumer agreement, when the term "regulated agreement" is used *in the Act* it is confined to an agreement as so defined. So prima facie none of the statutory provisions applicable to "regulated agreements" apply to agreements that do not fall within that definition (i.e. non-

regulated agreements). However it is clearly possible for the parties, as a matter of contractual intention, to agree that their agreement (although not "regulated" within the meaning of the Act) should have the protections that the Act confers on "regulated agreements" - in so far as this is contractually possible. The question then resolves itself into (a) what protections did the parties intend to apply (bearing in mind the *contra proferentem* rule) and (b) are there any protections that cannot be so extended to non-regulated agreements by contract.

As to (a), the statutory form of regulated agreement refers to a number of statutory rights (see especially ss.75, 75A and 94) and hence it seems clear that the parties would be regarded as having agreed that these rights are conferred on the debtor or hirer. **More problematic are rights or protections conferred by the Act but not referred to in the statutory form of the agreement (see, for example, s.56 - not referred to in the Agreements Regulations 2010 (S1 2010/1014)). It is suggested that (especially in the light of the *contra proferentem* rule), by stating that the agreement is "regulated by the Consumer Credit Act 1974" the parties would be taken to have agreed that (subject to (b), below) the debtor or hirer is intended to have the rights and protection conferred by that Act.**

As to (b), it is clear that criminal liability cannot be voluntarily undertaken. Moreover, it is suggested that the parties cannot, by agreement, confer jurisdiction on the court to make enforcement orders under s.127 and hence that all the provisions (e.g. s.65) that might result in an application under that section cannot, by agreement, be rendered applicable to non-regulated agreements. Alternatively, given that the court has no statutory jurisdiction to enforce such agreements (the relevant provisions being confined to "regulated agreements" as defined), the parties cannot be regarded as having agreed that their agreements are unenforceable except on an order of court, given that the court does not have statutory jurisdiction to enforce them. The other provisions in Part IX of the Act ("Judicial control", see especially ss.129, 130, 131, 132, 133. 134) are in terms (or by reference to other provisions) confined to "regulated agreements" and again it is suggested that the relevant jurisdiction only applies to "regulated agreements" as defined in the Act (and hence cannot apply to non-regulated agreements). The *Rankine* case law cited at para.2-068, below (albeit concerned with "contractually cancellable agreements" and (the now repealed) s.l27(4)) appears to confirm such an approach.

For an alternative analysis primarily based on the principles of estoppel by convention/acquiescence that reaches similar

> conclusions, see Goode, *Consumer Credit Law and Practice*, Vol.lC, para.23.8-23.10." (Our emphasis.)

33. *Goode*, on the other hand, reaches a similar result by analysing the matter on the basis of estoppel. The editors suggest (at paragraph 23.8) that such a statement prevents the lender from resiling from his representation that the agreement is indeed subject to the protections afforded by the 1974 Act. However, like Professor Lomnicka, they also state that this does not mean that the agreement is to be treated as regulated agreement for all purposes of the 1974 Act:

> "[23.8] ……However, this does not mean that the agreement is to be treated as a regulated agreement for all the purposes of the Act. In the first place, the estoppel could not have had the effect of exposing the creditor to criminal sanctions for offences applicable only in relation to regulated agreements, such as failure to supply copies of documents under ss 77 or 78 of the CCA 1974. Secondly, the estoppel cannot operate to confer on the court jurisdiction to make orders which under the Act can be made only in relation to regulated agreements, such as a time order under CCA 1974, s129, a protection order under s131, an order for financial relief of a hirer under s132 or a variation order under s136. Thirdly, since the agreement is not in fact a regulated agreement it cannot be held unenforceable as being improperly executed for want of compliance with the statutory formalities for a regulated agreement."

> "[23.9] It is suggested that the principle to be applied is as follows: the creditor is estopped from resiling from all express statements as to the debtor's rights and immunities (whether expressed directly or by reference to the CCA 1974) which could validly have been made terms of the agreement and which represent the common assumption of the parties.
>
> With regard to terms which are not expressly spelled out in the agreement, the position is more doubtful. If the estoppel principle were to be taken to its logical conclusion, the debtor might be entitled to avail himself of:
>
> - the deemed agency provisions of s 56 of the CCA 1974;
> - any right of withdrawal or cancellation specified in a statutory notice;
> - any right given against the creditor under s 75 or s 75A in respect of misrepresentations or breaches of contract where the agreement would, if regulated, be a debtor-creditor-supplier agreement;
> - a right of early settlement (including partial settlement) and the statutory rebate for early settlement;

- any statutory right of termination by the debtor or hirer;
- any applicable statutory restrictions on liability;
- (much more doubtfully) any right to require the creditor to obtain an order of the court before recovering protected goods, and any remedy against the creditor for repossession without such an order.

> That said, however, it is right to warn the reader that there is, as yet, no reported case in which a debtor or hirer, finding himself in possession of an agreement which would otherwise be unregulated but has been made on a printed form applicable to regulated agreements, has successfully raised any of the arguments or asserted any of the rights listed above. Realism compels one to admit that, judicial conservatism being what it is, the reaction of the average County Court Judge is likely to be: 'if they cannot lawfully contract out of the CCA, they cannot contract into it either."

34. With respect to the views contained in these highly respected text books, it is in our judgment impossible - at least without doing unjustified violence to the language - to construe such statements (for example, "Fixed-sum loan agreement regulated by the Consumer Credit Act 1974" and "This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms.") as an *additional* contractual agreement or promise that, *even if the agreement was not a regulated agreement*, NRAM would treat unregulated borrowers as if they had the benefit of unspecified, but not all, of the statutory protections afforded to regulated borrowers by the Act. In the context of a regulated agreement, the relevant text was doing no more than simply stating and warranting what the position was - namely that the agreement was regulated under the 1974 Act and that that Act conferred certain additional rights on borrowers. But such statements were not imposing or conferring another layer of contractual obligations or rights, in addition to the specific terms set out in the agreement or in the statute itself. It is difficult to see why, in the context of a non-regulated agreement, the relevant wording should be regarded as having the additional function of imposing an obligation on NRAM to treat an unregulated borrower in the event that the former's statement as to the application of the 1974 Act was incorrect, as though he or she were a regulated borrower, in relation to certain, but not all, of the, provisions of the 1974 Act, throughout the duration of the contract and irrespective of any changes to the statutory regime. Not only is there no linguistic basis for construing the language used to amount to any such express contractual term, but the implication of such a term, namely that the borrowers are to be treated as if the agreement were regulated, even though it was not, is plainly inconsistent with the express warranty or representation that the agreement is indeed regulated by the 1974 Act. Put another way, on their face, the statements are simply asserting, wrongly, that the agreement is regulated by the 1974 Act and that, by reason of the agreement's regulated status, the borrowers have certain rights *under* the Act; they do not reflect any bilateral agreement between the parties that they intend to apply the provisions of the 1974 Act by contract to an

agreement that lies outside its scope, in the event that the representation is untrue. To construe the relevant statements as an agreement that, whether or not the agreement was regulated, the borrowers would be treated by the lender as if they had an uncertain selection of some, but necessarily not all, of the rights set out in the statute, as if the agreement was regulated, would in our view amount to a wholesale rewriting of the contract between the parties.

35. In reaching his conclusion in paragraphs 26 and 28 of the judgment that, on the proper construction of the loan agreement, the parties had agreed that, whether or not it was a regulated agreement, the agreement was to be treated as if it was one, the judge placed considerable reliance on the decision of this court in *Daejan Properties Ltd v. Mahoney* (1996) 28 HLR 498 and dicta of Chadwick LJ in *Wroe v Exmos Cover Ltd* [2000] 1 EGLR 66 at pages 69-70. In summary he concluded *Daejan* provided sufficient justification for construing a statement that X is the case as meaning that, whether or not X is in fact the case, X is to be treated as if it is the case.

36. *Daejan* was not actually a decision on whether a particular contractual term had been expressly or impliedly agreed, but on estoppel. However Mr Waters accepted that the reasoning of the Court of Appeal in that case was potentially relevant to the construction of the relevant statements in the present case, or would be, if a similar factual background could be established, which he submitted it could not. *Daejan* was a case which depended on its own very special facts where the landlords, by their agents, had clearly, in writing, recognised the appellant and her mother as joint tenants. The relevant part of the headnote reads:

> "Facts
>
> In 1963, the applicant landlords granted a tenancy of a basement flat to the defendant's father. Following termination of the contractual tenancy, he held over as a statutory tenant under what is now the Rent Act 1977. On his death in 1976, his widow (Mrs Mahoney) succeeded to the statutory tenancy. She lived in the flat with the defendant, her daughter. As Mrs Mahoney's health deteriorated, she and the defendant applied for council accommodation.
>
> On enactment of the Housing Act 1988, the defendant became concerned as to her rights in the flat on the death of her mother. Accordingly, at her behest, her mother requested that the tenancy should be transferred into joint names. This request was refused by the then managing agents. In 1991, the request was put to a new managing agent who confirmed in writing that the tenancy was held in the joint names of Mrs Mahoney and her daughter. Following a further change of agents, further confirmation was obtained in April 1991 that records had been adjusted to reflect a joint tenancy and future rent demands were addressed to both Mrs. Mahoney and the defendant.
>
> Also in April 1991, the defendant and her mother received an offer of council accommodation. Having considered the matter, they decided to refuse the offer. In coming to the decision, they

were influenced by the fact that they had now been recognised as joint tenants. At the end of 1991, an application to increase the fair rent was made by the managing agents, naming both the defendant and her mother as tenants. In February 1992, they wrote to Mrs Mahoney saying that an error had been made in transferring the tenancy into joint names and that their records would be amended to show Mrs Mahoney alone as the tenant. The defendant wrote to challenge this. During the course of this correspondence, her mother died.

The landlords issued an originating summons seeking determination of the issue of whether the defendant held the flat upon a statutory tenancy within the Rent Act 1977 or under an assured tenancy within the Housing Act 1988. At first instance, the judge found for the landlords, on the basis, *inter alia*, that a statutory tenancy could not be held jointly. The defendant appealed.

Held (allowing the appeal)

(1) On the termination of a protected tenancy there can be more than one statutory tenant; joint statutory tenants are two or more persons, each of whom has a personal right to remain in occupation;

(2) Although it was possible for a joint statutory tenancy to be deemed to exist in accordance with para. 13(5) of Schedule 1 to the Rent Act 1977, the tenancy had not been transferred to the defendant within the terms of para. 13 of Schedule 1; the agreement in the letters did not purport to transfer the statutory tenancy but was seeking confirmation of an allegedly existing state of affairs; nor did it contain a written agreement between the defendant and her mother;

(3) (*Per Bingham M.R and Saville L.J.*) Since the defendant could not become a statutory tenant by an agreement not satisfying para. 13, the landlords could not be estopped from denying that the appellant was not in law a statutory tenant; Parliament having clearly prescribed the way in which a statutory tenancy can arise or be transmitted, a statutory tenancy could not arise or be transferred in any other way; an estoppel cannot have the effect of giving rise to a state of affairs which would indirectly confer on the court a jurisdiction denied by Parliament; since the defendant did not become a joint statutory tenant by an agreement in the only form sanctioned by Parliament, she could not have become such by estoppel;

(4) (*Per Bingham M.R. and Saville L.J.*) The landlords by their representation, on which the defendant and her mother relied, had estopped themselves from denying that the defendant and

> her mother would be treated as joint tenants and so as joint statutory tenants, since a statutory tenancy was the only tenancy in existence at the time;
>
> (5) (*Per Hoffman[n] L.J.*) A party cannot be estopped from denying something to which, on the proper construction of the statute, he could not have agreed in the first place; in respect of those matters upon which the parties are at liberty to agree, however, there is no reason why the ordinary doctrine of estoppel should not prevent a party from denying that he has so agreed; the agent's letter represented that the landlord recognised the defendant and her mother as joint statutory tenants; that was a state of affairs to which the landlord could lawfully agree under paragraph 13; that representation estopped the landlord from denying that it did so; the landlord must be deemed to have waived the formality of written agreement between the ingoing and outgoing tenants by the representation that the joint statutory tenancy existed."

37. The reasons given by Sir Thomas Bingham MR (with whom Saville LJ agreed) for allowing the appeal appear at pages 505 – 506 of his judgment. He in effect construed the representation by the landlords as one that the appellant and her mother would be treated by them *as if* they were joint statutory tenants, notwithstanding that they were not. He said:

> "It is, I think, true that a party cannot achieve by estoppel what he could not achieve by express agreement to the same effect. A statutory tenancy is, as the name makes clear, a creature of statute and it is of course a personal interest, not strictly an interest in land. Statute provides that such a tenancy arises when a qualifying contractual tenant holds over and may be transmitted either on the death of a statutory tenant by succession to a spouse or other member of the statutory tenant's family residing with him for the requisite period before his death (section 2(1)(b) and Part I of Schedule I of the Rent Act 1977) or by an agreement satisfying the requirements of paragraph 13 of Part II of Schedule I of the 1977 Act. Neither of the first two situations is applicable here, and it has already been shown that the agreement made did not satisfy the requirements of paragraph 13. Since the appellant could not become a statutory tenant by an agreement not satisfying paragraph 13, the landlords cannot be estopped from denying that the appellant is in law a statutory tenant. Parliament having clearly prescribed the way in which a statutory tenancy can arise or be transmitted, a statutory tenancy cannot arise or be transferred in any other way and the judge quite rightly held that an estoppel cannot have the effect of giving rise to a state of affairs which would indirectly confer on the court a jurisdiction denied by Parliament. Since the appellant did not become a joint statutory tenant by an agreement in the only

> form sanctioned by Parliament she could not become such by estoppel. So the judge was quite right.
>
> But have the landlords, by their representation on which the appellant and her mother relied, estopped themselves from denying that the appellant and her mother would be treated by them as if they were joint tenants (and so joint statutory tenants, since a statutory tenancy was the only tenancy in existence at the relevant time)? That seems to me a natural and unstrained construction of what the landlords said, and this construction is not subject to the vice already described because it is implicit in it that the appellant and her mother were not joint statutory tenants but would be treated as if they were. Such an approach appears to have commended itself in principle to Mr R.E. Megarry, commenting on *Rogers v. Hyde* [1951] 2 K.B. 923 in "The Rent Acts and the Invention of New Doctrines" (1951) 67 LQR 505 at 506. He there wrote:
>
> "A subsidiary point was that the agreement expressly provided that the tenancy was 'to be within the Rent Acts'. The tenant did not seek to contend that this provision took effect according to its tenor, and Lord Asquith of Bishopstone (with whom Birkett L.J. concurred) said that 'the parties are attempting by a contractual provision to bring the house within the protection of the Rent Restrictions Acts. This, in my view, they cannot do. Parties cannot of their own volition oust or reduce the jurisdiction of the courts to grant orders for possession'. With respect, this seems to require some qualification. There seems no reason why a landlord of premises within the Rent Acts should not by contract deprive himself of the right to seek possession on one or more of the grounds set out in the Acts. Again, even if the premises or letting is outside the Acts, why should not the landlord by contract give the tenant the same protection as if the Acts applied? It has, indeed, been said that the court may make an order for possession of an entire house conditional upon the landlord giving the tenant such protection for part of the house. The difference is between saying, 'The Acts shall apply' and saying, 'I agree to your having by contract the same rights as if the Acts applied'. However, in *Rogers v. Hyde* the tenant advanced no argument that the agreement was to be construed in the latter sense, and so the point must await decision in some other case."

38. Hoffmann LJ, on the other hand, did not base his conclusion on the construct that the landlords had effectively represented that the appellant and her mother would be treated by the landlords *as if* they were joint statutory tenants, even though they were not; he held that the representation was one that the landlords *recognised* the appellant and her mother as actual joint tenants, from which it necessarily followed that they were joint statutory tenants, which was a representation from which they were not entitled as a matter of estoppel to resile. Accordingly he held that the landlords had

effectively waived the requirements for formal transfer of the statutory tenancy and that the appellant was entitled to a declaration that she was in fact a statutory tenant. At pages 511 to 512 he said as follows:

> "This brings me to the alternative argument for Josephine, namely that the landlords are estopped from denying that she was a joint statutory tenant. She says that the letters from Mr Saxby and Mr Stevens were representations made on behalf of the landlords, on the strength of which she acted by refusing the offer of a council flat. There was a challenge to Mr Saxby's authority which the judge rejected. He also held, accepting Josephine's evidence, that she had acted in reliance upon his statement in deciding to reject the council flat and thereby lost her priority. But he said that she could not rely upon estoppel because this would be to "compel the landlords to recognise a state of affairs which Parliament itself has forbidden", citing *J. & F. Stone Lighting and Radio Ltd v. Levitt* [1947] A.C. 209, 216.
>
> If the judge had been right in thinking that joint statutory tenants were conceptually impossible and therefore could not come into existence by agreement, then I would agree that they could equally not be brought into existence by estoppel. The true principle, as it seems to me, is that a party cannot be estopped from denying something to which, on the proper construction of the statute, he could not have agreed in the first place. Parties cannot contract out of the Rent Act and therefore cannot be estopped by a representation that the Rent Act will not apply. Likewise, the rent officer only has jurisdiction in respect of regulated tenancies and the parties cannot agree or be estopped from denying that he shall have jurisdiction over a tenancy which is not regulated. But in respect of those matters upon which the parties are at liberty to agree, there seems to me no reason why the ordinary doctrine of estoppel should not prevent a party from denying that he has so agreed. Mr Saxby's letter was a representation that the landlords recognised Mrs Mahoney and Josephine as joint statutory tenants. That was a state of affairs to which the landlord could under paragraph 13 have lawfully agreed. In my judgment the representation upon which Josephine acted estops them from denying that they did so.
>
> It is true that the effect of the estoppel is to allow the transfer of the statutory tenancy to take place without the written agreement between outgoing and incoming tenant required by paragraph 13(1). It seems to me, however, that this is a formality for the protection of the individual parties rather than one imposed in the public interest. The parties are therefore entitled to waive it: compare *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] A.C. 850 and see

> Spencer Bower and Turner, Estoppel by Representation (3rd edn. 1977) at pp. 138–144. Mrs Emma Mahoney has no further interest in the matter. Josephine plainly has no wish to rely on the absence of writing and the landlords must in my view be deemed to have waived the formality by their representation that the joint statutory tenancy existed.
>
> I would therefore allow the appeal and declare that Miss Josephine Mahoney is a statutory tenant."

39. In our view, as a matter of analysis, the approach of Hoffmann LJ is to be preferred. But even if we are bound by the ratio of the majority approach in *Daejan*, we do not consider that it assists us in our approach to the present case. *Daejan* was a decision, on its own particular facts, as to the meaning to be given to a particular set of assurances about whether a particular *factual* position existed, i.e. whether or not there was a joint tenancy. If there was a joint tenancy, or the landlords were estopped from denying that there was a joint tenancy, it necessarily followed that there was a statutory joint tenancy.

40. In contrast, in the present case there is no contextual background to justify reading the relevant statements that the agreement is "regulated", as meaning anything other than their *prima facie* meaning that the agreement falls within the scope of statutory regulation of the 1974 Act and that the borrowers have the rights conferred by that Act. There is no factual matrix that supports the judge's approach that the representation should be construed as an agreement on the part of the parties that, irrespective of whether the agreement was in fact regulated, the parties agreed that the borrowers would be treated "as if" the agreement was regulated. The fact that the respondents in this case, and, as one might suppose, many borrowers in the other 41,000 cases, thought they had entered into regulated agreements which had the protection of the 1974 Act, or alternatively thought that, irrespective of whether their loan agreement was actually a regulated agreement, they nonetheless had the protections of the 1974 Act, is of itself no basis to justify the inclusion of the term found to exist by the judge. For these purposes we are prepared to assume (although there was no evidence on the point) that NRAM was well aware that agreements where the sum borrowed was in excess of £25,000 were not agreements regulated by the 1974 Act and adopted the arrangements which it did merely for administrative convenience. In our judgment, the judge was wrong to have treated the majority decision in *Daejan* effectively as establishing a rule of construction that a statement that X *is* the case should be construed as meaning that the parties are agreeing to treat X *as if* it is the case.

41. Support for this approach is found in the decision of this court in *Tomlin v. Reid* (1963) 185 EG 913 to which Burton J also refers. Unfortunately this case was not cited to the Court of Appeal in *Daejan*, although, in the event, we do not think it would have made any difference to the outcome in the latter since the circumstances were so different. *Tomlin v. Reid* was a case where the landlord's agent had made a representation to the tenant that the particular premises were controlled under the Rent Acts. As a result, the defendant, relying on what he had been told, gave up possession of his previous house, on the basis that he was satisfied by the representation that he would have whatever security of tenure was given by the then Rent Restriction Acts. In fact the new premises were not rent controlled, because the rateable value was in

excess of the relevant figure that attracted protection. The judge at first instance had decided that, whether or not the premises were controlled, "the parties had intended and effected a letting with equivalent security of tenure to a controlled dwelling." The judge went on to say:

> "If necessary I said I should further have held that the landlord was estopped by Hawkes' conduct from denying that the dwelling was subject to control."

42. The Court of Appeal allowed the landlord's appeal. It rejected an argument that the representation amounted to a contract that the landlord would afford the tenant the same security as if the Rent Acts applied. It also rejected an argument based on estoppel. Ormerod LJ did not expressly address the "*as if*" argument. He said as follows at page 915 in relation to the argument that the representation amounted to a contractual term:

> "My view of that evidence is that it creates no contractual obligation of any kind, and that there was no intention that it should. Therefore there was neither a contract for a tenancy which would embody the provisions of the Rent Restriction Acts, nor was there any form of contract that the Rent Restriction Acts would not be invoked by the plaintiff if he wished to have possession. That, I think, is sufficient to dispose of that part of the case. As at present advised, I am bound to say, having regard to the authorities, and in particular the words of Asquith LJ in *Rogers v Hyde*, [1951] 2 K.B. 923, that, even if there was a contract that the plaintiff would not invoke the provisions of the Rent Acts, such a contract would not have the force of law because it would have the effect of ousting the jurisdiction of the Court. That question has not been argued, and, in the circumstance. I propose to say nothing more about it."

43. In relation to the estoppel argument, Ormerod LJ dismissed the claim on the basis that there could not be an estoppel based on a representation as to the law. That of course is no longer the case; it was common ground before this court that an estoppel may be based on a representation as to the law: see *The Vistafjord* [1988] 2 Lloyd's Rep 343.

44. Upjohn LJ rejected the contractual analysis that the parties had agreed that the landlords would afford the tenant the same security as if the Rent Acts applied. He emphasised that not only would such a contract be a complicated agreement but that it necessarily involved the underlying factual basis that the parties knew that the premises were not rent controlled. He said at pages 915-917:

> "I agree that this appeal must be allowed. It is now common ground, in spite of the learned judge's judgment, that this tenancy of 68, Althorp Road, Luton, which the defendant holds of the plaintiff, is a tenancy which is not subject to the Rent Restriction Acts. The first point that has been taken is that, although that is so, the parties expressly agreed, or impliedly agreed, that the landlords, the plaintiffs, would afford to the

> tenant, the defendant, the same security as if the Rent Acts applied. It may be theoretically possible - though it is certainly not necessary finally to decide that matter today - for parties to enter into a contract which will give them a lease which has much the same incidence as a tenancy under the Rent Restriction Acts. But I think it is quite plain that there is no such contract in this case. As Willmer LJ pointed out in *Kingswood Estate Company Limited v Anderson* [1962] 3 WLR 1102, such a contract would be a most complicated document. There is no sign of any such contract here, but I think this point can be answered even more shortly. The parties never contracted at all upon the footing that the landlords would afford the same security to the defendant as if the Rent Acts applied. Such a contract necessarily involves the underlying basis that the parties knew that the premises were not rent-controlled; whereas in fact it is quite clear, and the learned judge so found, that the contract was on the footing that the premises were rent-controlled. He said: "Hawkes" - that is the plaintiff's agent, of course - "appeared to me both to have thought and to have asserted to the defendant that the new tenancy was of a controlled dwelling." That is saying as plainly as it can be said that the parties thought that the premises were controlled and it was quite inconceivable that they should enter into any agreement such as is suggested that the premises were to be treated as if the Rent Acts applied although in in fact they did not do so."

45. Upjohn LJ also rejected the arguments based on estoppel. His first reason for doing so was that, in circumstances where the parties could not contractually agree that the Rent Acts should, or should not, apply, as the case might be, so they could not, by the application of the doctrine of estoppel, confer upon the court jurisdiction where it did not otherwise exist. He then went on also to decide the estoppel issue on the separate basis that the representation was one as to the law, and therefore was not available. His first ground for rejecting the estoppel argument is relevant to the present case. He said at page 517:

> "The next point is that if there was no contractual term, there was the representation by Hawkes to the same effect, namely, that the tenancy was subject to the protection of the Rent Acts. I am quite prepared to agree that such a representation was made. I do not think the precise terms in which it was made matter very much. But, as my Lord has pointed out, Mr. Turner-Samuels relies most strongly on the words: "He" - that is Hawkes - "said we would enjoy a controlled tenancy." It is said that that estops the landlords in this action from maintaining their claim for possession. We have been referred to a number of authorities, and it seems to me that they make two matters abundantly clear. The first one is that parties cannot agree validly that a tenancy which is in fact subject to the protection of the Rent Acts shall be treated as though it was

> not so subject. The court must exercise its jurisdiction under the Rent Acts in every case in which it is found that the tenancy is entitled to have protection, and the parties cannot agree to contract out. Equally it is clear that they cannot agree to contract in, that is to say, if the tenancy is not subject to the Rent Restriction Acts, they cannot agree that it shall be treated as though it were subject. In other words, the agreement of the parties cannot confer upon the Court the jurisdiction to entertain applications under the Rent Restriction Acts unless the tenancy is in fact subject to the protection of those Acts. That is, I think, perfectly clearly settled, and I only mention one authority in support of that proposition, *Rogers v Hyde*, [1951] 2 K.B. 923. Secondly, it seems to me quite clear that, if the parties cannot agree either that the Acts shall or shall not apply, as the case may be, so one cannot by estoppel confer upon the Court jurisdiction where it does not exist any more than one can by estoppel oust the jurisdiction of the Court where in fact it applies. What the parties in brief, cannot do by agreement, cannot be done by estoppel. In other words, if parties by consensual conduct cannot enlarge or limit the jurisdiction of the Court, equally that cannot be done by the conduct of one. That seems to me quite clear from two cases. One is *Solle v Butcher* [1950] 1 K.B. 671, and the other is the rather earlier case of *J&F Stone Lighting and Radio Limited v Levitt* [1947] A.C. 209.
>
> That is in itself an answer to the argument based on estoppel."

Davies LJ agreed with both judgments.

46. In our judgment the judge was wrong to approach the question of construction on the basis that *Tomlin v. Reid* and *Daejan* were somehow in conflict with each other, or that Upjohn LJ, in the earlier case, had not addressed the "*as if*" construction on the basis of proper argument. In every case the question which has to be answered when interpreting an ambiguous, or potentially ambiguous, provision in a contract or other document is:

> "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.":

see per Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at paragraph 14. The answer to the question necessarily depends on the contextual background. In the present case, as in *Tomlin v. Reid*, there was no contextual background to support the conclusion that the parties had entered into what necessarily would have been a complicated contract that afforded the borrower some, but clearly not all, of the protections afforded by the 1974 Act, whether as then in force, or which might be subsequently enacted. As in *Tomlin v. Reid*, the clear assumption of the language used in the representations contained in the relevant statements in the present case was that the full panoply of the provisions contained in

the 1974 Act (including the criminal sanctions and the relevant powers of the court in circumstances where the agreement had not been executed in accordance with the statutory requirements) indeed applied; an agreement that the parties would treat the loan as if the borrower had some but not all of those protections is wholly inconsistent with the simple assumption of the relevant representations.

47. Nor in our judgment can any assistance be derived from the dicta of Chadwick LJ (with whom Clarke LJ agreed) in *Wroe v Exmos Cover Ltd* [2000] EGLR 1 66 at pages 69-70, to which the judge referred at paragraph 24 of his judgment, namely:

> "In relation to security of tenure and the restrictions on any increase in rent, at the least, there is no reason why the landlord should not agree to treat the tenant as having the same protection as he or she would have if the tenancy fell within the Act; and so no reason why the tenant should not be able to rely on an estoppel to the same effect – provided, of course, that the other requirements for an estoppel are met."

That statement does no more than simply refer to the conceptual possibility which Upjohn LJ had already addressed in *Tomlin v. Reid* in the passage at page 915, which we have already cited above. The critical issue is whether any such agreement had indeed been reached in the present case. Likewise, the judge's reference in paragraph 25(iii) to the statement of Willmer LJ in *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169 at 178-9 does not provide any basis for entitling the judge to reach the conclusion which he did. All that Willmer LJ was doing in that passage was recognising the theoretical possibility of parties making an agreement under which a tenant had the like incidents as a statutory tenancy under the Rent Acts, but emphasising the point that, given the very "loose oral arrangement" which had been concluded in that case, it was impossible to spell out the type of carefully drawn agreement which would have been required if the tenant was to be afforded some, but not all, of the benefit of the protections of the Rent Acts.

48. For similar reasons, there is in our judgment no basis for the judge's apparently alternative ground of decision, as set out at paragraph 26 of the judgment (last sentence), for the implication of a term to the same effect as the express term we have just been considering. Following the judgment of the Privy Council in *Attorney General of Belize v. Belize Telecom Ltd* [2009] 1 WLR 1988, the test for the implication of a term into a contract has been largely assimilated with the process of construing the contract. As Lord Hoffmann said, delivering the judgment of the Board, at paragraph 21:

> "It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean."

Since in our view the admissible background available to NRAM and the respondents did not provide a sufficient basis for construing the statutory wording as having the 'whether or not' meaning, there can also be no proper basis for implying a term into the agreement which bore the same meaning.

49. Finally, we should say that, contrary to the views expressed in *Guest*, we do not consider that this is an appropriate case for the application of the *contra proferentem* rule. That principle only applies in cases where doubt remains as to the meaning of the term after it has been construed applying the normal principles of construction: see *The Interpretation of Contracts,* Fifth Edition, by Sir Kim Lewison at page 367, paragraph 7.08 and cases there cited.

50. For the above reasons the judge was wrong to conclude that it was a contractual term of the agreement that the borrowers would be treated as if they had the benefit of certain, but not all, of the protections of the 1974 Act conferred upon borrowers under a regulated agreement. In particular he was wrong to conclude that the borrowers had no obligation to pay interest during periods when NRAM had failed to give statements which complied with the form set out in section 77A of the 1974 Act.

Issue (4): if the statutory wording did not constitute a contractual term, was it nonetheless capable of giving rise to an estoppel binding on NRAM which prevented it from denying that the borrowers had the rights conferred by some or all of the provisions of the 1974 Act upon borrowers under regulated agreements

51. It is not altogether clear from the judgment itself precisely what the judge held was the foundation for the estoppels which he held precluded NRAM from denying that the respondents had the benefit of the rights conferred by section 77A of the 1974 Act. Paragraph 8 of his order dated 10 December 2014 states:

> "The [relevant statements] were sufficient to give rise to a shared assumption between [NRAM] and the [respondents] or to constitute representations to the effect that, whether or not the Agreement was regulated under the Act in force from time to time, it was to be treated as if it were and, so far as possible, the [respondents] had the rights and remedies applicable to a regulated agreement."

52. At paragraph 29 of his judgment the judge held that the shared assumption in question capable of giving rise to an estoppel by convention and/or a contractual estoppel, by reference to the content of the agreement, was:

> "whether or not the agreement was a regulated agreement, it would be treated as such, and, so far as possible, the Defendants would have the protection and rights conferred by the legislation".

Thus, the shared assumption found to exist by the judge in the relevant statements, and which formed the basis for his conclusion that there was a contractual estoppel or estoppel by convention, was precisely to the same effect as the contractual term which earlier (in paragraph 26) he had held had, either expressly or by implication, been incorporated into the loan agreement: namely, that the parties had agreed that, whether or not the agreement was regulated, the respondents would have the rights under and benefits of a regulated agreement. Given his prior conclusion in relation to the construction of the contract, it was not surprising that he came to such a conclusion. For the reasons which we have already given above in relation to the issue

of construction, similarly, in the estoppel context, the relevant statements are in our view simply not capable of being regarded as a shared assumption that, whether or not the agreement was a regulated agreement, it would be treated *as if* it were and *as if*, so far as possible, the respondents would have the protection and rights conferred by the relevant legislation in force from time to time. As we have already said, the terms of the relevant statements are wholly inconsistent with such an assumption.

53. It also appears to be the case, from what the judge said in the first sentence of paragraph 30, and in the last sentence of paragraph 31, of his judgment, that he also held that the documentation gave rise to a representation, from which NRAM was estopped from resiling, to the effect that the loan agreement *was* a regulated agreement and that the respondents would be "entitled to the rights and benefits endowed on a party to a regulated agreement, in so far as that party could take advantage of them". (We have already pointed out that such a representation is inconsistent with the contractual term as found by the judge.) Whilst we agree that the loan agreement indeed contains a representation that it *was* an agreement regulated by the 1974 Act, and that a borrower thereunder had the benefit of all the rights and protections contained in the 1974 Act (which is the point which arises under issue (5) below), such a statement is incapable in our judgment of constituting a basis for an estoppel by representation in the present case.

54. That is because, whilst the cases (and indeed the article by Mr Robert Megarry (as he then was) referred to by Sir Thomas Bingham MR in *Daejean Properties*) to which we have referred above, do not rule out the possibility that parties can, by appropriate wording in their contract, agree that particular provisions of, for example, the Rent Acts may be incorporated into their contracts, with the result that one party will be treated *as if* he enjoyed particular rights conferred by the relevant Act, parties cannot, as it were on a wholesale basis, validly contract that the agreement *is* regulated by the 1974 Act and that the provisions apply. As Mr R.E. Megarry said in the article:

> "The difference is between saying, 'The Acts shall apply' and saying, 'I agree to your having by contract the same rights as if the Acts applied'."

For similar reasons NRAM cannot be estopped from asserting that the loan agreement is not in fact regulated or that the borrowers do not enjoy the rights conferred by the 1974 Act. That is clear from the judgments in *J & F Stone Lighting and Radio Limited v. Levitt* at pages 215-216; *Tomlin v. Reid* at page 917; and *Daejan Properties* at page 511, to which we have already referred. That conclusion reflects the legal reality of the position: the loan agreement is not regulated and the borrowers do not enjoy the protections afforded by the Act. As we have already said, the only rights conferred by the 1974 Act which have been incorporated as contractual terms are those actually set out in the agreement itself: namely the right of early settlement and cancellation. The scope of any estoppel cannot in our judgment extend any wider.

55. A further reason is that, again as we have already stated, the language of the express references to the 1974 Act in the relevant statements is not consistent with a joint assumption on the part of the lender and borrower, or a representation by the lender, that some, but not all, of the provisions of the 1974 Act apply. As the relevant textbooks make clear, on any basis a borrower would not be entitled to invoke the

doctrine of estoppel to engage the court's jurisdiction to refuse to make enforcement orders under section 127 of the 1974 Act, in circumstances where a non-regulated agreement had not been executed in compliance with the proper execution provisions applicable to a regulated agreement (for example: section 55 and the Consumer Credit (Disclosure of Information) Regulations 2004; section 61(1) of the 1974 Act and the 1983 Agreements Regulations; sections 62 and 63; or, in the case of an agreement which was cancellable by the debtor under section 67 of the 1974 Act, section 64.) Given that such is the case, it would in our judgment produce a surprising and uneven result, if nonetheless, by the application of the doctrine of estoppel, a non-regulated borrower could invoke the rights, conferred under section 77A and the other sections introduced into Part VI of the 1974 Act by the 2006 Act, to receive post-contract information and the consequential entitlement not to have to pay interest in respect of periods where the relevant statements were not supplied, despite the fact that he was not entitled to enforce what might be regarded as the far more important obligations of the lender to ensure proper execution of the original agreement by means of opposition to an enforcement order under section 127. So, if an estoppel were to arise in the present case (limited to those rights under the 1974 Act which could have been included and enforced as contractual rights in an unregulated agreement), the estoppel would not reflect – in the sense that it would be much narrower in scope - the breadth of the representation, which was not limited in any such way. There is no justification in our view for "reading down" the representation to limit it to those rights which could have been included and enforced as contractual rights in an unregulated agreement.

56. For all the above reasons, in our judgment the judge was wrong to conclude that, if no relevant contractual term was incorporated in the loan agreement, nonetheless NRAM was estopped on the basis of some sort of contractual estoppel, estoppel by convention or estoppel by representation from denying that the respondents had the benefit of some, but not all, of the protections contained in the 1974 Act and in particular those contained in section 77A.

Issue (5): whether there was a representation or warranty that the loan agreement was a regulated agreement when it was not

57. As we have already said in earlier passages in this judgment, in our view the relevant statements on any basis amounted to a representation by NRAM that the loan agreement was an agreement regulated by the 1974 Act and that the borrowers were entitled to the protections afforded by the Act to borrowers under such regulated agreements. That representation, as Mr Waters accepted, indeed had legal effect in the sense that, if, as was the case, it was false, the borrower would be entitled to sue for misrepresentation under the Misrepresentation Act 1967. Given the context and prominence of the relevant statements, we take the view that they are to be construed not merely as representations but also as contractual warranties and that the borrowers would have been entitled to sue for breach of contractual warranty.

58. No argument was addressed to us that there would be any difference in remedy depending on whether the claim was simply a claim in misrepresentation or for breach of contractual warranty. Both Mr Taylor and Mr Waters accepted that, on either basis, a breach would have occurred at the time the relevant loan agreement was entered into and it may therefore be that, in such circumstances, limitation defences might be

available to bar any claims for misrepresentation or breach of contractual warranty. That issue does not, however, arise for decision in the present case.

Disposition

59. For the above reasons, the appeal will be allowed. Counsel should endeavour to agree the precise terms of any declarations and consequential orders which the court will be invited to make. If agreement cannot be reached, the court will resolve any dispute on the basis of written submissions.