Case No: HC-2015-002626

Neutral Citation Number: [2015] EWHC 3727 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before :

DAVID CASEMENT QC
Sitting as a Deputy High Court Judge

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Between :

(1) Mr John Christopher Burrell **(2) Mrs Sandra Elizabeth Burrell** **(3) Mr Alistair Robert Sinclair Bassett Cross** **(4) Mrs Margaret Victoria Bassett Cross** **(5) Mrs Evelyn Winifred Morris** **(6) Mr Frank Ralph Morris** **(7) Mr Frank Vernon Ogden** **(8) Mrs Marilyn June Ogden**	**Claimants/ Respondents**
- and -	
Helical (Bramshott Place) Limited	**Defendant/ Applicant**

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Jonathan Steinert and Paul Skinner (instructed by **Gosschalks**) for the **Claimant**
Ian Mill QC, Hanif Mussa and Kate Urell (instructed by **Mishcon De Reya**) for the **Defendant**

Hearing dates: 14 and 15 December 2016

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Judgment

David Casement QC :

Background

1. The Defendant carries on a business in the development of real property. It owns the freehold to a retirement village developed and situated at Bramshott Place, Liphook ("Bramshott Place"). So far as relevant for present purposes, Bramshott Place consists of approximately 151 separate dwellings as well as a range of central facilities and amenities, including a clubhouse.

2. The Claimants are comprised of four married couples who each entered leases and are either current or former residents at Bramshott Place. Each was initially granted a long lease to a dwelling at Bramshott Place ("the Leases"). More particularly:

    i) On 24 April 2009, the First and Second Claimants entered into a lease for a property having paid a premium of £475,000. They remain in residence at their property.

    ii) On 19 May 2009, the Third and Fourth Claimants entered into a lease for a property, having paid a premium of £445,000. On 10 January 2013, they subsequently assigned their lease to third parties. Upon that assignment, which was effected for a purchase price of £540,000, arrangements were made for the payment of a fee to the Defendant.

    iii) On 26 August 2009, the Fifth and Sixth Claimants entered into a lease for a property having paid a premium of £290,000. On 7 September 2013, they subsequently assigned their lease to third parties. Upon that assignment, which was effected for a purchase price of £325,000, arrangements were made for the payment of a fee to the Defendant.

    iv) On 22 June 2010, the Seventh and Eighth Claimants entered into a lease for a property, having paid a premium of £492,500. They remain in residence at the property.

3. The Leases are in identical terms save for the consideration payable and insofar as relevant those terms are set out below.

4. There are presently two sets of proceedings brought by the Claimants. By a claim form dated 17 April 2014 the Claimants issued proceedings ("the UTCCR Claim") asserting that key provisions in the Leases were unenforceable pursuant to the provisions of The Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations"). In summary the Claimants contend in paragraph 7 of the Amended Particulars of Claim in the UTCCR Claim that clauses 2.13 (d), 2.13(e), 2.13.3(g), 4.3 and 4.6 of the Leases ("the Transfer Fee Provisions") are unfair pursuant to the Regulations and by reason of Regulation 8(1) thereof not binding upon them.

5. In the UTCCR Claim the Claimants set out the circumstances in which they came to enter into the Leases. The Claimants contend in all the circumstances including the events and statements leading up to the execution of the Leases, notwithstanding the fact that they had independent solicitors acting for them, were such that the Transfer Fee Provisions are unfair. The Defendant takes issue with the factual averments of the

Claimants and in any event disputes the assertion that the relevant provisions of the Leases are unfair.

6. On 28 November 2014 the Claimants issued County Court proceedings ("the CCA Claim") under the Consumer Credit Act 1974 ("the Act") asserting the Transfer Fee Provisions amounted to the provision of credit and that the Leases are consumer credit agreements within the meaning of sections 8 and 9 of the Act. The Claimants contend that by reason of the leases falling within section 8 and 9 of the Act the Transfer Fee Provisions are unenforceable. The Defendant did not at the relevant time hold a Consumer Credit Licence and therefore if the Transfer Fee Provisions constitute a regulated agreement it is asserted that they are unenforceable. Further the Leases do not contain the requisite information and protections required by the Consumer Credit (Agreements) Regulations 1983/1553 ("the 1983 Regulations") and are therefore said to be unenforceable in the absence of an order of the Court. Further, the Claimants contend that the relationship arising out of the Transfer Fee Provisions is unfair under section 140A such that relief may be granted under section 140B of the Act.

7. The Defendant by its Defence in the CCA claim denies that there is any provision of credit under the Transfer Fee Provisions and contends that the Act has no application.

8. On 5 May 2015 Master Teverson ordered the transfer of the CCA Claim to the High Court and gave directions in respect of both claims.

9. A notice of trial date was issued on 12 June 2015 listing the trial of both cases in what will be a ten day trial to be filed in a window between 11 July and 28 July 2016.

10. On 2 November 2015 the Defendant issued its summary judgment/strike out application ("the Application") in respect of the CCA Claim. On 5 November 2015 Master Teverson directed that the Application be heard before a Judge and adjourned the costs management. It is clear that the outcome of the Application may have a significant effect on both the length of the trial and also the amount of costs which will be incurred, which will in any event be substantial. In any event if either the claim or the defence in the CCA Claim do not have reasonable prospects of succeeding there is, absent reasons to the contrary, good reason to dispose of it at the earliest stage. Such would enable the parties to focus their efforts and resources on the UTCCR Claim which is not the subject of the Application and to consider their prospects of success afresh in the light of that decision.

Application

11. This hearing of the Application has been listed by order. In the Application the Defendant is seeking summary judgment pursuant to CPR r 24.2 and/or strike out of the Claim Form and Particulars of Claim pursuant to CPR r 3.4(2)(a). The Claimants are represented by Jonathan Steinert of Counsel leading Paul Skinner of Counsel. The Defendants are represented by Ian Mill QC leading Hanif Mussa and Kate Urell, of counsel.

12. The Application relates solely to the CCA Claim. In seeking summary judgment pursuant to CPR r 24.2 an applicant must establish that the respondent has no real prospect of succeeding on the claim or issue and also that there is no other compelling

reason why the case or issue should be disposed of at trial. Real prospects of success means prospects which are more than fanciful and it is clear that the Court must not engage in a mini trial. However where there is a short point of law including a point of construction which can properly be dealt with on the materials available such a case may be suitable for summary judgment. It is a notable feature of this case that whereas the Defendant has brought the Application the Claimants also contend that I should grant summary judgment in their favour. In submissions Mr Steinert on behalf of the Claimants said this was a "gentle request" on behalf of the Claimants for summary judgment and of a secondary nature, his primary submission was that the Application should be refused.

13. The overall burden of proof in respect of CPR r 24.2 rests upon an applicant to establish the respondent has no realistic prospect of succeeding on the claim or the defence to the claim and that there is no other compelling reason for the claim or defence to go to trial.

14. CPR r 3.4(2)(a) empowers the Court to strike out a statement of case if it appears to the Court that the statement of case discloses no reasonable grounds for bringing or defending the claim. In the event that the Court strikes out the statement of claim it may enter judgment against the respondent pursuant to Practice Direction 3A, paragraph 4.2.

15. One important issue that I must consider is whether the Application should be dealt with at this stage at all bearing in mind the UTCCR Claim will proceed to trial in any event. It is also clear that the background to the Claimants entering the Leases will also be considered at some length during the trial. If there is a significant part of the background factual matrix that is unclear and which may impact upon the CCA Claim then the appropriate course would be to either dismiss the Application or to adjourn it to the trial.

16. In my judgment the issues arising in the Application are such that I am able to come to a clear view as to whether the claim has a real prospect of succeeding and/or whether it discloses reasonable grounds for bringing or defending the claim. I am satisfied that it is appropriate to deal with the Application substantively in circumstances where there has been full argument before me by experienced counsel and I am satisfied that there is no reason to consider that matters would be better determined at a trial. The Claimants' suggestion that there may be more documents that will emerge through the disclosure process is just that, a suggestion and in fairness Mr Steinert put it no higher in his submissions.

Relevant terms of the Leases

17. The Leases are in identical terms and the relevant provisions for the purposes of the Application are as follows:

Clause 1

"*IN consideration of the Premium now paid by the Tenant to the Landlord (the receipt whereof the Landlord acknowledges) and of the covenants on the Tenant's part contained herein the Landlord with full title guarantee DEMISES to the Tenant the Demised Premises TOGETHER WITH the rights referred to in Part I of the Schedule but subject to the exceptions and reservations referred to in Part 2 of the Schedule TO HOLD unto the Tenant for the Term (subject to the provisions for earlier determination contained in this Lease) PAYING to the Landlord during the said Term annually in advance on the 1 April for the first 25 years of the Term the yearly rent of two hundred and fifty pounds (£250.00) such yearly rent to double on every twenty-fifth anniversary of the term commencement date and so in proportion for any broken period of a year where the Demised Premises include a Garage and additional 10% of the yearly ground rent figure is payable by the Tenant*"

Clause 2

"*THE Tenant COVENANTS with the Landlord as follows:-*

…

2.13.3 Not to assign the Demised Premises as a whole save in accordance with each and every one of the following provisions:

*(a) the person to whom the Demised Premises is assigned (**"the Assignee"**) shall be a single individual, or if more than one individual shall be limited to two individuals who are either married or living together as if they were married or to two individuals who are related by blood*

…

*(d) such assignment shall be effected for a premium (**"the premium"**) which shall represent, at the date of such assignment, the open market value of the residue of the term of this lease as agreed between the Landlord and the Tenant and which shall be consistent with the sale price of other like properties on the Village at that time AND any dispute concerning this clause shall be determined in accordance with the Arbitration Act 1996 or any statutory modification thereof for the time being in force such arbitration shall be a Qualifying Surveyor or Estate Agent of at least ten years standing and shall if possible be familiar with property values on the Village and shall be appointed on the application of either party by the President of the Royal Institution of Chartered Surveyors and such arbitration shall be conducted*

by means of written representations and written counter representations with no oral hearing

(e) the marketing of the Demised Premises shall be effected on behalf of the Tenant only through such an agent as the Landlord shall from time to time reasonably require, and such agent shall be employed at the expense of the Landlord

…

(g)

(i) no assignment shall be effected save to an Assignee who prior to or contemporaneously with any assignment to him or them (a) pays the relevant percentage of the premium to the Landlord, to the intent that the remaining balance thereof be payable to the Tenant, and (b) executes and delivers to the Landlord a Deed of Covenant in the form required by the Landlord as is referred to in Clause 2.4 hereof and (c) executes and delivers to the Landlord a deed with the Landlord in the form set out in Part 6 of the Schedule

(ii) relevant percentage means:-

5% of the premium if the assignment occurs within three years from (as the case may be) the date of this Lease or of the Assignment of the Lease to the Assignor increasing to 10% of the premium for the next seven years and increasing to 15% of the premium beyond ten years…"

Clause 4.3

"*If during the said term the following events or any of them occur, namely:-"*

4.3.1 the Tenant's affairs are made the subject of the jurisdiction of the court of protection

4.3.2 the marriage or re-marriage by the Tenant to a person who is not a Qualifying Person

4.3.3 any person other than a Qualifying Person being in occupation of the Demised Premises for a period in excess of 28 days

4.3.4 the Tenant or any spouse of the Tenant being by reason of his medical condition (whether physical or psychological) unfit to remain in occupation of property being part of the Village bearing in mind the interests of each of the other occupiers of the Village, each of the staff employed by the

Management Company and the nature of the services supplied by the Management Company

then unless the Tenant or Trustee (as the case may be) has applied to assign the Lease pursuant to Clauses 2 (13) hereof the Landlord shall at any time after the occurrence of such an event or events be entitled to determine the term hereby granted by giving 2 months' previous notice in writing and thereupon this demise shall absolutely determine without prejudice to the rights of either party hereunder in relation to any antecedent breach of covenant and without prejudice to the Tenant's rights under Clause 4.6 of this Lease…"

Clause 4.6

"*Within two calendar months of vacant possession of the Demised Premises being give to the Landlord and determination of this Lease (however determined) and the delivery to the Landlord of the original Lease and the Land Registry fee the Landlord shall immediately repay to the Tenant or his personal representatives or trustee in bankruptcy or receiver or other persons entitled to receive the same a sum equal to the open market value of the residue of the term of the Lease as at the date of determination as agreed between the Landlord and the Tenant less the relevant percentage that would have been payable to the Landlord pursuant to clause 2.13.3 (g) (ii) had a permitted assignment occurred on the date of the vacant possession of the Demised Premises and which shall be consistent with the sale price of other like units of accommodation within the Village at that time AND any dispute concerning this clause shall be determined in accordance with the Arbitration Act 1996 or any statutory modification thereof for the time being in force and such arbitrator shall be a qualified surveyor or estate agent of at least ten years standing and shall if possible be familiar with property values in the Village and shall be appointed on the application of either party by the President of the Royal Institution of Chartered Surveyors and such arbitration shall be conducted by means of written representations and written counter representations with no oral hearing on the open market*

ALWAYS PROVIDED that the Landlord shall be entitled to retain from the said monies:-

4.6.1 such sum as may be due and owing at the date of determination or giving up of vacant possession whichever shall be the later in respect of arrears of rent and also such sum as may be required to put the Demised Premises in good

decorative repair and condition and in a clean and tidy condition

4.6.2 such sum as may be due and outstanding from the Tenant to the Management Company in accordance with Clause 3 of the said Deed of Covenant

4.6.3 such sum as may be payable to H M Revenue and Customs in respect of stamp duty land tax (or any replacement tax or levy) on the repayment made to the Tenant under Clause 4.6 hereof

Vacant possession shall mean the vacation of the Demised Premises by the Tenant and the removal of all of the Tenant's furniture carpets and personal effects and belongings from the Demised Premises and the surrender up of the keys of the Demised Premises to the Landlord and any dispute concerning any provisions of this Clause 4.6 shall be determined by a single arbitrator in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof for the time being in force appointed on the application of either party by the President of the Royal Institute of Chartered Surveyors and such arbitration shall be conducted by means of written representations and written counter representations with no oral hearing"

18. It can be seen that Clause 1 sets out the consideration for the Leases which it defines as the Premium, a defined term, and of the covenants on the Tenant's part.

19. Clause 2 provides for the covenants that must be complied with by the Tenants. Under clause 2.4 the Tenant was obliged to agree immediately upon execution of the lease to enter into a Deed of Covenant, in the form annexed to the lease, with a management company Bramshott Place Management Limited. The deed of covenant provided for the management company to provide various services and amenities.

20. Clause 2.13 of the Leases is concerned with voluntary assignment. The covenant is expressed in negative terms. There is an absolute covenant prohibiting assignment of part of the Demised Premises: clause 2.13.1. Clauses 2.13.2 and 2.13.3 both contain a prohibition against assignment save in accordance with the provisos and the provisos to the provisos set out thereunder. The main provisos are as set out in clauses 2.13.3 (a) to (i). It is clear on a plain reading of the Leases that there is a prohibition against assignment, with which the Tenant is obliged to comply, unless each of the provisos is made out. By way of example the Assignee must meet the conditions at (a) and (b). Further under the proviso at (c) the Assignee shall be one who satisfies the reasonable criteria applied by the Landlord for the benefit protection and well being of the other residents of the Village at the time of the assignment.

21. Of particular importance in the present case are clauses 2.13 (d) and 2.13(g). Clause 2.13(d) imposes a restriction on the premium that can be charged for an assignment, namely it must be the open market value as agreed with the Landlord or as determined. Clause 2.13(g) states, emphasising the negative nature of the proviso,

that no assignment shall be effected save to an Assignee who has paid or pays at the time of the assignment the "relevant percentage" of the premium to the Landlord, to the intent that the remaining balance shall be paid to the Tenant. The provision also requires the execution and delivery to the Landlord of a Deed of Covenant as identified in clause 2.4 and the execution and delivery to the Landlord of a deed in the form set out in Part 6 of the Schedule. The term "relevant percentage" has the meaning set out in clause 2.13(g)(ii) with an increasing percentage depending on the number of years that have passed since the date of the lease.

Statutory background

22. Counsel have both referred to the Consumer Credit Act 1974 and the authorities thereunder. The following sections of the Act are particularly relevant

Section 8 Consumer Credit Agreements

(1) A consumer 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 for any amount.

Section 9 Meaning of credit

(1) In this Act "credit" includes a cash loan, and any other form of financial accommodation.

Section 40 Enforcement of agreements made by an unlicensed trader

(1) A regulated agreement is not enforceable against the debtor or hirer by a person acting in the course of a consumer credit business or a consumer hire business (as the case may be) if that person is not licensed to carry on a consumer credit business or a consumer hire business (as the case may be) of a description which covers the enforcement of the agreement.

23. Sections 140A of the Act provides that the Court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement is unfair to the debtor because of one or more of the factors identified in the section. The orders that may be made by the Court under section 140B are wide-ranging.

24. The 1983 Regulations set out the requirements in respect of a regulated consumer credit agreement in respect of the information and format that should be contained therein. The Claimants at paragraph 40 of the Particulars of Claim identify the numerous respects in which they contend that the 1983 Regulations, assuming they apply, have been breached by failing to contain information and statements of the protection and remedies available to debts either under requisite headings or at all.

25. The principal issue that arises in the present case is whether section 8 and 9 of the Act apply in the present case and that turns on whether the Defendant has extended credit to the Claimants under the Transfer Fee Provisions.

Defendant's submissions

26. Mr Mill contends that summary judgment should be granted in favour of the Defendant or alternatively the claim form and Particulars of Claim should be struck out and judgment granted in favour of the Defendant. On behalf of the Defendant the following points are advanced in summary:

    i) The relevant provisions of the Leases on which the Claimants rely do not relate to any obligation of the Claimants to make payment of money to the Defendant.

    ii) The Claimants have failed to explain (and cannot explain) how those provisions provide for the contractual deferral of any payment that would otherwise have been due earlier.

    iii) Furthermore, at the date of entry into the Leases, it was not certain that any payment obligation under the relevant provisions would be engaged at all.

27. It was submitted by Mr Mill that clause 1 of the Leases provide for the Premium that is to be paid for the Lease at the outset and notes that there is nothing in clause 1 that obliges anyone let alone the Claimants to make payment of a further Premium or any sums on a deferred basis. Clause 1 obliges the Claimants to comply with the covenants and that includes the covenants against assignment at clause 2.13. Those covenants in clause 2.13 did not impose any obligation upon the Claimants to make any payment of any sums of money at the outset of the Leases and therefore there can be no suggestion of any such obligation being deferred.

28. At most, it was submitted, the payment of the "relevant percentage" under clause 2.13 (g) is one of the conditions precedent to the operation of the proviso which avoids the operation of the covenant against assignment. In no sense could that be said to place an obligation on the Claimants to make payment at all and certainly could not be said to be an obligation to make payment from the outset of the Leases. Therefore the Leases did not extend credit under this first part of the Transfer Fee Provisions. Mr Mill developed his argument in the following way:

    i) the decision to make a payment of the agreed percentage was at all times a voluntary one because it was a matter for the Claimants whether or not they sought to assign and then sought to get around the covenant against assignment by fulfilling the provisos, even then it is entirely voluntary. True it is that there would be no entitlement to assign without the provisos being complied with but that is not the same as an obligation to make payment;

    ii) in that event the proviso at clause 2.13(g) provided for the Assignee and not the Claimants to make the payment of the relevant percentage to the Landlord. Nowhere in the Leases are the Claimants obliged to make payment even at the time when they seek to assign the Leases;

    iii) when the relevant percentage was to be paid namely at the time of or prior to the assignment the payment being made was in fact to fulfil the provisos under the covenant against assignment, that is to say to allow the assignment to proceed. On that basis there was no significant deferment or any deferment

amounting to the granting of credit because the benefit being received is not the Leases themselves, perhaps granted years earlier, but the fulfilment of the proviso to allow assignment to take place.

29. As part of Mr Mill's case he has asserted that there are two routes under which the relevant percentage may be payable namely those concerned with voluntary assignment and in particular Clause 2.13 and those concerned with the situation where there is a termination by the Landlord under clause 4 and in particular clause 4.6. There is no obligation, and certainly not one which exists at the commencement of the Leases, on the Claimants to make payment under those routes. However even if it is uncertain that only one of those routes would be applicable, there is no certainty of obligation in respect of a debt at the outset of the Leases and therefore there cannot be any granting of credit.

30. In his submissions Mr Mill drew my attention to the meaning of credit as considered by the Court of Appeal in Dimond v Lovell [2000] QB 216 at [56] and [57] ("Dimond"), where Sir Richard Scott held for the Court as follows:

> "*56. In Goode Consumer Credit Legislation 1999 vol 1, para 437, p205 contains a discussion of 'The ingredients of credit.' Credit involves, in the view of the editor, Profession Goode:*
>
> *'…(a) the supply of a benefit; (b) attracting a contractual duty of payment; (c) in money; (d) the duty to pay being contractually deferred; (e) for a significant period of time after payment has been earned; (f) such deferment being granted by way of financial accommodation.'*
>
> *Each of these elements is present under the agreement between Mrs Dimond and Ist Automotive. In para 443 the following general principle is expressed:*
>
> *'…debt is deferred, and credit extended, whenever the contract provides for the debtor to pay, or gives him the option to pay, later than the time at which payment would otherwise have been earned under the express or implied terms of the contract.'*
>
> *57. This principle, in my judgment correctly expresses the test for identifying 'credit' for the purposes of the 1974 Act.*"

31. There was no dissent from that view of the law when the case went to the House of Lords, although Lord Hobhouse observed that Professor Goode's test might be unduly generous to those seeking to establish that credit is provided since frequently there will be reasons for postponing the time for payment under a contract other than the provision of credit: Dimond v Lovell [2002] 1 AC 384 at p.405D.

32. The test formulated by the Court of Appeal in Dimond has been repeatedly applied in subsequent cases. In one such case, it was held that the fact that the remuneration under an agreement was not all paid up front did not imply that credit was provided:

rather, it had to be ascertained whether, on the proper interpretation of the agreement, a payment obligation in respect of the whole period was incurred at the outset (see OFT v Ashbourne Management Services Ltd [2011] EWHC 1237).

33. The following principles are submitted by Mr Mill to be derived from the authorities:

  i) The Court considers the position at the time of entry into the agreement, since it must be possible to identify whether credit is being provided at that date so that the parties are able to ensure compliance with any applicable provisions of the CCA 1974: see McMillan Williams v Range [2004] 1 WLR 1858 (CA), at [16] and [20].

  ii) The question of whether credit is provided must be addressed by reference to the substance of the contractual obligations rather than the economic consequences of the transaction: see Lavin v Johnson [2002] EWCA Civ 1138.

  iii) If at the date of entry into the agreement it is uncertain whether a debt will arise at all, in that it might or might not arise depending on the circumstances, there is no provision of credit in respect of that debt: see McMillan Williams, at [17]; Maple Leaf Macro Volatility Master Fund v Rouvroy and another [2009] 1 Lloyds Rep 475, at [280].

  iv) Credit is only provided under an agreement to a person who is subject to an obligation to make a payment, and whose obligation to pay is deferred by the agreement: see, for example, Maple Leaf at [280].

34. It was also submitted on behalf of the Defendant that the requirements under the 1983 Regulations are entirely inapposite for the Transfer Fee Provisions. In particular it is not possible to calculate at the outset the alleged credit amount and the overall price because the relevant percentage is calculated on the open market value at a future date: both the date of the future sale and the open market value at that point are unknown at the outset. It is submitted this is a significant pointer that no credit was being extended at all.

Claimant's submissions

35. Mr Steinert for the Claimant contends that the reason the CCA Claim was brought when it was is because of what is said to be an admission by the Defendant at paragraph 9.2.6 and 9.2.6(a) of the Re-Amended Defence in the UTCCR Claim which addresses the question of "significant imbalance" under the Regulations:

> "*The Transfer Fee Provisions, in the context of the contract as a whole, do not cause any "significant balance" in the parties' rights and obligations. The revenue from transfer fees is the return on the capital invested by the Defendant in the provision of the central amenities and facilities at its villages. Although residents pay for the day to day running of such facilities through a service charge, the return on the capital investment in those facilities is received through the Transfer Fee. This means that:*

> *(a) Purchasers such as the Claimants can afford to buy properties on a luxury development, and enjoy the facilities the Defendant has created, without having to meet the costs of those facilities up-front in the initial purchase price*."

36. On behalf of the Claimant it is asserted that this is an admission by the Defendant that part of the purchase price has been deferred to a later date and which becomes payable in accordance with the terms of the Transfer Fee Provisions. I was shown several items of solicitors' correspondence in the context of the UTCCR Claim in which the Defendant's former solicitors referred to the monies payable under the Transfer Fee Provisions as an "Exit Fee" and that it was a way of funding the purchase of the various Leases.

37. It was submitted that it is irrelevant that under the Leases a party other than the Tenant may make the payment namely the Assignee. It was further submitted that there is no need for the party who receives the payment under a loan to be under any obligation to repay as opposed to a another party being obliged to pay and reliance was placed on Levett v Barclays Bank plc [1995] WLR 1260.

38. The reality of the situation was emphasised by Mr Steinert namely that it is clear that by one of the two routes set out in the Transfer Fee Provisions there has got to be paid the relevant percentage. It matters not that it cannot be calculated at the outset other than by way of a formula but it is clear that it must be paid because the length of the term under the Leases is 125 years and either there will be a voluntary assignment or there will be a termination during that period. In the latter it will be the Landlord who effects the sale and deducts various amounts due including the relevant percentage. Mr Steinert correctly noted that, for the purposes of the Application only, the Defendant does not contend that there will be no deduction of the relevant percentage in the event of death.

39. The points asserted by the Defendant in support of its contention that there is no obligation to pay at the outset of the Leases nor is there is a deferment of part of the purchase price are said to be assertions of form over substance. The alleged admission in paragraph 9.2.6 and 9.2.6(a) set out above is said to show "what is really going on." The substance is said to be that credit has been granted to the Claimants and that the Leases are a regulated credit agreement and fall foul of the provision of the Act or at least the Leases are a credit agreement which is subject to section 140A and 140B of the Act.

Findings

40. It is common ground between the parties that if there is no credit provided in the Transfer Fee Provisions the CCA action must fail.

41. The primary question in the present case is whether the relevant percentage which may be paid under the Transfer Fee Provisions was an obligation to pay that sum at all and if so whether it was an obligation to pay at the outset of the Leases which was then deferred for a significant period, namely until assignment or termination followed by sale.

42. This is a matter of construction of the Transfer Fee Provisions, construing them against their background factual matrix and in the context of the Leases as a whole and paying particular attention to the natural and ordinary meaning of the words used by the parties to the Leases. It is not suggested that there is ambiguity in the words used in the Leases. The invitation from the Claimants is to look at the reality of the transaction but that submission is made without there being any suggestion let alone pleaded case asserting that the Leases are a sham. The parties are free to structure agreements as they choose and in my judgment the structure and wording of the Leases is clear.

43. Clause 1 provided for the consideration for the Leases which comprises the Premium and compliance with the covenants set out in the Leases. The Premium is a sum certain which is expressly set out at LR7 in the Leases. Where there is a garage which is also the subject of the Leases that figure is separately set out at LR7 so that it is also part of the Premium. The covenants are also clearly identified and expressly stated at clause 2 which is headed "Tenant's Covenants THE Tenant COVENANTS with the Landlord as follows…". There are 19 covenants including by way of example the covenant to pay rent under clause 2.1 and to pay charges for telephone service, television, gas and electricity at clause 2.2 and so forth. The covenant at clause 2.13 consists of negative covenants in respect of assignment of the Demised Premises. The covenant is followed by a series of provisos some of which carry sub-provisos.

44. However nowhere in clause 1 or in clause 2.13 or anywhere else in the Leases is there any obligation upon the Claimants to make any payment of the relevant percentage. There is certainly no deferment of the purchase price ie the Premium under clause 1 or any other provisions. The relevant percentage is not part of the Premium as defined. There is no obligation to assign placed upon the Claimants and there is no obligation to make any payment to the Defendant in the event there is an assignment. On a plain reading of the Leases there is no deferment of any obligation to pay part of the purchase price as alleged by the Claimants.

45. It is quite correct that there is a covenant against assignment which is subject to various provisos and I accept for present purposes that in reality the Leases will likely either be assigned under clause 2.13 or they will be terminated in accordance with the provisions of clause 4.6. However that does not mean there is a deferral of the purchase price for the Leases. Furthermore it does not mean that there is an obligation from the outset placed upon the Claimants to pay the relevant percentage. Quite the contrary, there is no obligation at all for there to be any payment of the relevant percentage on anyone, whether it be the Claimants, an Assignee or anyone else. It is simply a condition precedent to be able to achieve an assignment if and when that is sought to be done.

46. Furthermore, the relevant percentage under clause 2.13(g) is to be paid by an Assignee. There is no provision that permits let alone obliges the Claimants to make that payment. In practice it may be the Claimants that make the payment but that is not what the Lease provides for. In any event the point is clear that the Claimant is under no obligation pursuant to the Leases to make the payment.

47. Under clause 4.6 likewise there is no obligation upon the Claimants to make payment of the relevant percentage or any sum. The retention of monies under the provisions of clause 4.6 only arises in the event that the Landlord elects to terminate the Leases

following the events identified at clause 4.3. As Mr Mill rightly pointed out there is no automaticity in respect of the termination provision, it is provided that "the Landlord shall at any time after the occurrence of such an event or events <u>be entitled</u> to determine the term hereby granted by giving 2 month's previous notice in writing…" (underlining added). In the event of termination and following two calendar months of vacant possession, delivery of the original lease and the Land Registry fee it is the Landlord who is immediately obliged to make a payment to the Tenant of a sum equal to the open market value of the residue of the term of the Lease less the relevant percentage that would have been payable to the landlord pursuant to clause 2.13.3(g) as well as an entitlement to withhold other monies as set out in the proviso at clause 4.6.1 and following.

48. As with clause 2.13.3(g) the monies that may be paid under clause 4.6 do not constitute an obligation upon the Claimants to pay any monies and certainly do not amount to an obligation which existed at the commencement of the Leases to make payment and which obligation has been deferred. Whether clause 4.6 would ever be used is entirely uncertain when viewed from the outset. It is clear that the monies that are retained by the Landlord following the various contingencies in clause 4.6 are not part of the purchase price for the Leases the consideration for which is clearly identified in clause 1.

49. The Claimant's reliance upon paragraph 9.2.6 of the Re-Amended Defence in the UTCCR Claim is not well placed. In the UTCCR Claim the parties are concerned with the fairness of the contractual provisions and may be entitled to address issues including the clarity of the terms used, the reasonableness of the fees charged or the method for calculating how they are charged, the explanations and information provided to the Tenants in advance. In short the matters in issue in the UTCCR are wide ranging and are significantly different from the narrow issue which arises in this Application. As Mr Mill said paragraph 9.2.6 is concerned with economic consequences in so far as they are relevant to fairness and the alleged "significant imbalance" between the parties. That does not justify a similar approach to the question of whether, on a proper construction of the Leases, credit has been extended to the Claimants by reason of the Transfer Fee Provisions.

50. The clear point of difference between the Claimants and the Defendant in their approach to the CCA Claim and the Application is that the Claimants urge the Court to look at the commercial purpose of the Transfer Fee Provisions and to look at "what is really going on," as Mr Steinert put it. The Defendant urges the Court, in the absence of an allegation of sham, to construe the terms of the Leases and to identify if there was an obligation at the commencement of the Leases to pay a debt which was then deferred. In my judgment the Defendant's approach is clearly correct and I adopt the submissions set out above but in respect of which I engage further as set out below.

51. In Maple Leaf v Rouvroy at [280] and [281] Smith J said this:

> "*The 'debtor' under the 'credit agreement' must be an individual if these provisions of the 1974 Act are to apply. The defendants were not debtors: their obligations to pay might or might not arise under the funding agreement, and without a debt owed by the defendants, there was no credit provided to*

> *them: see Nejad v City Index [2001] GCCR 2461 and McMillan Williams (a firm) v Range [2004] EWCA Civ 294 at [16]-[[18], [2004] 1 WLR 1858 at [16]-[18].*
>
> *[281] The defendants say that the purpose of the agreement was to provide funding to them and that accordingly its purpose was to provide credit to them. This does not seem to me to answer the claimants' point. I do not consider that, unless the arrangements that the parties made were a sham (and it is not suggested that the funding agreement was a sham), the court must consider the structure of the arrangements that were agreed between the parties in order to determine whether the funding agreement is a 'credit agreement.' As Lightman J observed in Wire TV Ltd v CableTel (UK) Ltd [1998] CLC 244 at 258, when examining an agreement that is not a sham, the court recognizes that the parties have a choice as to how a contract is structured and pays appropriate respect of the structure adopted by the parties."*

52. The focus on the structure or substance of the contract between the parties, derived through the proper construction of its terms was also emphasised in the decision of Kitchin J in The Office of Fair Trading v Ashbourne Management [2011] EWHC 1237 (Ch) at [97]. In that case the determination of whether the standard forms in question involved the provision of credit was said to be "an issue which must depend upon the proper interpretation of the agreements irrespective of how the defendants have behaved." Further at [104], "In this case the agreement may or may not involve the provision of credit. It all depends upon whether, on the proper interpretation of the agreement, a payment obligation in respect of the whole period is incurred at the outset."

53. In the case of Lavin v Johnson [2002] EWCA Civ 1138 Lord Justice Robert Walker was concerned about the difference between a sale and lease-back agreement and a mortgage. The Court distinguished between substance on the one hand and form on the other but emphasised that in identifying whether there is provision of credit the Court is not concerned with an analysis of economic consequences: "But to say that the identification of a mortgage is a matter of substance, not form, is not to say that any transaction which is expected to produce the same economic consequences as a mortgage must be a mortgage in the eyes of the law" [82].

54. The Claimants' approach in the CCA Claim does not involve an analysis of the structure and substance of the bargain struck by the parties in the form of the Leases. It is not an analysis of the terms of the Leases to discern their true meaning. The CCA Claim is, when properly analysed, based upon what are said to be the economic consequences of the Leases such that money is obtained at the time of assignment or termination of the Leases rather than up-front in the form of a Premium and it should all be construed as the consideration for the Lease. At that level of abstraction it is difficult to form a concluded view at this stage but that approach is not what is required nor is it permissible under the authorities.

55. In the present case the consideration for the Leases is clear on their terms and the Premium is payable at the outset. There is no deferment of the Premium or deferment of any consideration for the Leases. In order to enable an assignment to take place the provisos to the covenant against assignment must be complied with otherwise there can be no assignment but there are two important matters that are clear. First of all, there is even at the time of the assignment no obligation upon the Claimants or anyone else to make payment. Secondly, even if there was a relevant obligation to make payment it is a payment to enable the assignment to take place, not a payment for the Lease, and therefore there is no deferment.

56. Likewise with the termination provisions under clause 4.6 there is an obligation on the Landlord, if the various contingencies occur, to pay the open market value it has an entitlement to deduct monies including the relevant percentage. That is not deferred consideration for the purchase price of the Leases. Furthermore there was no obligation on the Claimant to pay those monies at any time, the obligation only being on the Landlord to pay, and certainly there was no obligation to pay at the outset of the Leases. In relation to the latter the circumstances in which any monies may be retained can only be after the various contingencies have occurred and there is no question of there being any deferment of any obligation to pay.

57. It follows from the above that there was no provision of credit under the Transfer Fee Provisions.

58. I have not found it necessary to deal in detail with the subsidiary arguments that where advanced and argued before me. The assertion on behalf of the Claimants that the Assignee stands in the shoes of the Tenant and takes on an obligation to pay under the Transfer Fee Provisions is misplaced. The Assignee never takes on any existing obligation under the Lease in respect of the relevant percentage, there being none, but rather when he makes payment thereunder he does so of his own volition to enable the assignment to proceed.

59. It was submitted on behalf of the Claimants that it was unnecessary to demonstrate that it was the Tenant that had the obligation to pay any deferred amount which was due and it could be that another party, in this case the Assignee that was obliged to pay. Given that I have found there was no obligation to pay at the outset and therefore no deferment which could form the basis of the provision of credit it is not strictly necessary to address this. However it will be apparent from the reasoning above that I conclude that there was no obligation upon any party, whether the Tenant or the Assignee, to make any payment deferred or otherwise.

60. I have considered the post-contractual solicitors correspondence referred to by the Claimants as well as the information sheet both of which are said to be background factual matrix and are said to assist in construing the Leases in the manner suggested by the Claimants. The correspondence is not background factual matrix, it is post-contractual and sets out various assertions in the context of the UTCCR Claim and provides no assistance as to construction of the Leases. The Information Sheet is a document which is pre-contractual but there is a dispute as to whether it was ever served on the Claimants, they say not but ironically the Claimants for these purposes wish to rely upon it. In my judgment it provides no assistance at all in construing the Leases, whether it was served or not, and does not impact upon the clear meaning of the terms of the Leases.

Conclusion

61. For the reasons set out above I conclude that the Defendant did not provide credit to the Claimants in the Transfer Fee Provisions and therefore the Claimants have no real prospect of succeeding on the CCA Claim and there is no other compelling reason why the matter should proceed to trial. There will be summary judgment for the Defendant. I will hear the parties' submissions in respect of all consequential matters including costs. If the parties are unable to agree on all consequential matters any outstanding matters can be dealt with by way of a telephone hearing.