



Neutral Citation Number: [2016] EWCA Civ 496

Case No: A3/2015/0561

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
**THE HONOURABLE MR JUSTICE TEARE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 June 2016

**Before:**

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**THE RIGHT HONOURABLE LADY JUSTICE SHARP DBE**  
and  
**THE RIGHT HONOURABLE LORD JUSTICE HAMBLÉN**

-----  
**Between:**

**MARK ROBERT ALEXANDER** **Appellant**  
(as representative of the "Property118 Action Group")  
- and -  
**WEST BROMWICH MORTGAGE COMPANY LTD** **Respondent**

-----  
**Michael Ashcroft QC and Mark Smith (instructed by Cotswold Barristers) for the**  
**Appellant**  
**Raymond Cox QC and Chloe Carpenter (instructed by Addleshaw Goddard LLP) for the**  
**Respondent**

Hearing date: 28 April 2016  
-----

**Approved Judgment**

**Lord Justice Hamblen:**

**Introduction**

1. This appeal concerns the proper construction of the contractual documentation relating to a “buy to let” interest only mortgage provided to the appellant, Mr Alexander (“the Borrower”), by the respondent, West Bromwich Mortgage Company Ltd (“the Lender”).
2. The mortgage offer stated that the term of the mortgage would be 25 years, that the interest rate would be fixed at 6.29% until 30 June 2010 and that thereafter it would be at a variable rate of 1.99% above the Bank of England Base Rate. This type of mortgage is commonly known as a “tracker” mortgage.
3. The Lender’s Mortgage Conditions state that the rate of interest specified in the mortgage offer (other than a fixed rate) may be varied by the Lender. They also state that the loan may be repayable in full on the giving of one month’s notice by the Lender.
4. The Borrower contends that these Conditions are inconsistent with the terms of the mortgage offer and are accordingly not incorporated into the contract. The Judge held that they were not inconsistent, were incorporated and so could be relied upon by the Lender. The Borrower appeals against that decision.

**The contractual documentation**

5. The Borrower signed an Application Form on 1 May 2008 for a buy to let mortgage from the Lender.
6. The Lender sent the Borrower an Offer of Loan Letter dated 6 June 2008. With the Offer of Loan Letter was an Offer Document, which set out “the costs, features, terms and conditions of the Loan”. Also included were Special Conditions of Offer and the Lender’s Mortgage Booklet. This included General Information at Section A, Standard Conditions of Offer at Section B and Mortgage Conditions at Section C. In addition there was an Acceptance of Offer letter which the Borrower signed.
7. The Borrower entered into the mortgage contract with the Lender by Mortgage Deed on 15 July 2008. The Mortgage Deed specifically incorporated the terms of the offer of mortgage, including those contained in the Special Conditions, the Standard Conditions and the Mortgage Conditions.
8. The Offer of Loan Letter provided as follows:

“We are pleased to make the attached Offer of Loan, to be secured on the Property to be mortgaged, on the terms set out in this letter. Attached to this letter you will find some important information about your loan. A copy of our booklet “Information you need to know about your Mortgage” is enclosed. It contains important information about your loan,

including the Standard Conditions of Offer and the Mortgage Conditions 2006 (Daily Interest) applicable to your loan .....

Please note that except during the period of any specified fixed rate of interest all rates of interest are liable to change both before and after completion and that monthly payments will vary with the interest rate."

9. Box 3 of the Offer Document stated that the loan amount was £90,299 and the "Term of Mortgage 25 years".

10. Box 4 headed "Description of the Mortgage" stated the "Product Description" to be:

"Buy To Let 6.29% fixed until 30.06.2010 (115% cover). Any applicable change in the Bank of England Base Rate will be applied to your account on the first day of the month following the change..."

The repayment method was described as "interest-only" and the interest rate payable was said to be 6.29%. It then added:

"After 30 June 2010 your loan reverts to a variable rate which is the same as the Bank of England Base Rate, currently 5%, with a premium of 1.99%, until the term end, giving a current rate payable of 6.99%. Any applicable change in the Bank of England Base Rate will be applied to your account on the first day of the month following the change, unless the change is made after the 13th of the month in which case it will be applied on the 1st. day of the second month following the change."

11. Box 6, entitled "What you need to pay each month", provided that the mortgage would start on 1 July 2008 and that there would be 22 payments at a fixed rate, currently 6.29%, of £480.68. It then continued:

"After 22 payments, your fixed rate ends and assuming that interest rates do not change your new payment on your loan will be £534.17.

This new payment will continue for 277 payments at a variable rate which is the same as the Bank of England Base Rate, currently 5%, with a premium of 1.99% until the term end, giving a current rate payable of 6.99%. Any applicable change in the Bank of England Base Rate will be applied to your account on the first day of the month following the change, unless the change is made after the 13th of the month in which case it will be applied on the 1st day of the second month following the change. "

Under the heading "Cost of repaying the mortgage" it provided:

“You will still owe £91,703.48 at the end of the mortgage term. You will need to make separate arrangements to repay this. When comparing the payments on this mortgage with a repayment mortgage, remember to add any money that you may need to pay into a separate savings plan to build up a lump sum to repay this amount.”

12. Box 7 was entitled “Are you comfortable with the risks ?” and provided:

“What if interest rates go up?

The Monthly payments shown in this illustration for your loan could be considerably different if interest rates change. After the fixed rate ends on 30 June 2010 then for one per cent increase in the initial variable rate, your Monthly payment would increase by around £76.42.

**RATES MAY INCREASE BY MUCH MORE THAN THIS  
SO MAKE SURE YOU CAN AFFORD THE MONTHLY  
PAYMENTS.”**

13. Box 8 set out fees payable by the Borrower, including TT Fee, Arrangement Fee, Release of charge, Legal fees and Valuation fee. These were all non-refundable.
14. It was common ground that the Special Conditions of Offer contained no provisions of relevance to the issues on this appeal.
15. Section A of the Booklet (General Information) provided:

“Interest Only Loans

If you select an Interest Only Loan, any Payment that you make to us will cover only interest and not the capital borrowed...It is therefore extremely important to ensure that you have, or will have, the means to repay the Loan (including all capital) at the end of the Mortgage Term...

Whatever arrangements you put in place to repay the Loan, you are reminded that it is generally a long term commitment...it is also important to check regularly the performance of your investment plan to see whether it is likely to be adequate to repay the capital at the end of the Mortgage Term.

....

Interest on your loan

You will be required to pay interest on the amount of the Loan each month. The amount of these monthly payments is detailed in your Offer of Loan Letter.

The rate of interest charged may be varied by us from time to time, except during periods when the Loan is expressed to be at a fixed rate of interest. We will notify you of any variations in the interest rate."

It also referred to "Benefits of Portability" as including "You keep your current fixed, discounted, tracker or capped product".

16. Section B of the Booklet, the Standard Conditions of Offer provided:

"3. Mortgage Terms

You have been provided with a letter (your "Offer of Loan Letter") in which we offer to make the Loan and which contains an offer document setting out the costs, features, terms and conditions of the Loan. Please read the offer document carefully. Part of this booklet contains our Mortgage Conditions 2006 (Daily Interest). These Conditions will apply to your Loan. Please also read them carefully".

11. Payments

All payments which comprise or include interest are subject to variation in accordance with the terms of our Mortgage Conditions (except during periods where Loans are expressed to be at a fixed rate of interest). We may vary our method of calculating interest and monthly payments.

17. The Mortgage Conditions in Section C of the Booklet set out definitions in clause 1 which included:

"Mortgage Deed" means the contract that you will sign before your loan can be completed.

"Mortgage Term" means the length of time that you are given by the Company to pay off the Loan as specified in your Offer of Loan Letter.

"Offer of Loan Letter" means the letter sent to you in which we offer to make the Loan and which contains an offer document.

"Offer of Loan" means the offer of Loan made by us to you consisting of the Offer of Loan Letter, the Special Conditions of Offer and our Standard Conditions of Offer and including any matters that may have been specifically alerted by us in writing to you."

18. Clause 1 further provided:

"These Mortgage Conditions incorporate any terms contained in the Offer of Loan. If there are any inconsistencies between the terms in the Mortgage Conditions and those contained in

the Offer of Loan then the terms contained in the Offer of Loan will prevail. ”

19. Clause 5 dealt with interest and provided:

“5.1 Interest is payable by you...at the rate or rates specified in your Offer of Loan Letter which, except during any period in which interest is expressed to be at a fixed rate, may be varied by the [Lender] at any time for any of the following reasons:

- if there has been, or we reasonably expect there to be in the near future, a change in the Bank of England Base Rate or in interest levels generally;
- if investment interest rates have increased or decreased;
- to reflect market conditions generally;
- to take account of changes in the law, or any decisions, determinations, precedent, compelling guidance, regulations or instructions issued by a relevant governmental body, ombudsman, regulator or similar person or any code of practice with which we intend to comply;
- at the end of any period during which any fixed rate or concession or alternative rate (such as the Bank of England Base Rate) is in force;
- to reflect a change in the way the Property is used or occupied;
- to make sure our business is carried out prudently, efficiently and competitively;
- to make sure we can meet our obligations to third parties.

If any of the above reasons is found to be invalid, we may still vary the interest rate for any of the remaining valid reasons.

5.2 We can also vary the interest rate specified in your Offer of Loan Letter, except during any period in which interest is expressed to be at a fixed rate, for any valid reason other than those set out in condition 5.1 if:

- we give you at least two months’ notice in writing of the variation in interest rate and allow you, should you wish, during the 3 months following such notification of the variation in interest rate, to repay the Loan in full

without paying any Early Repayment Charge (other than all interest accruing in respect of the Loan up to the date of repayment of the Loan and any reasonable costs reasonably incurred by us in connection with such repayment).”

20. Clause 9 headed “How you will repay an Interest Only Loan” provided:

“9.1 Each Payment will consist of interest due under the Mortgage.

9.2 Your last Payment will consist of the aggregate amount of the outstanding balance of your Loan including all unpaid interest and Charges.”

21. Clause 14 provided:

“14 You may be obliged by us to repay the Loan in full together with any accrued interest and unpaid Charges and we will become entitled to exercise all the powers conferred on us under Condition 15 of these Mortgage Conditions immediately if any of the following events occur:

- we give you one month’s notice requiring such repayment;
- any Payment remains unpaid for longer than one calendar month;
- you are in breach of any of the other obligations or conditions contained in these Mortgage Conditions;
- the Property becomes subject to a Compulsory Purchase Order;
- you are made bankrupt;
- you enter into an arrangement with or for the benefit of your creditors or propose to do so;
- you die or become incapable of managing your affairs;
- you do anything which may damage or reduce the value of the Property or you fail to perform any obligation (whether to pay money or otherwise) imposed upon you as the owner of the Property;
- the Guarantor terminates or purports to terminate its obligations under the Mortgage Conditions or becomes insolvent or dies or becomes incapable of managing his affairs.”

22. Clause 15 set out various powers that the Lender became entitled to exercise, and the remedies to which it became entitled, immediately upon the occurrence of the events specified in clause 14. These included extended powers of sale and leasing, a right to appoint a receiver at the Borrower's expense, and rights to do other things such as repairs at the Borrower's expense.
23. The Mortgage Conditions concluded by stating "YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR MORTGAGE."
24. The Mortgage Deed provided:

"2. This Mortgage incorporates the Mortgage Conditions and the offer of Mortgage both of which the Borrower acknowledges having received.

By signing this Mortgage you accept the terms of the Standard Conditions of Offer, the Special Conditions of Offer and the Mortgage Conditions."

#### The factual matrix

25. The Borrower contends that part of the relevant factual matrix is that a tracker mortgage has well-known incidents which includes that the rate is variable only in line with a specified base rate and not for any other reasons. It was common ground that a mortgage such as that in the present case is commonly known as a tracker mortgage.
26. In support of this contention the Borrower referred to passages from *Retail Mortgages: Law, Regulation and Procedure* (1<sup>st</sup> edition) and to definitions of tracker mortgages given by various financial services bodies (although the latter material was available at trial it appears that it was not then relied upon). These included the following:

(1) *Retail Mortgages: Law, Regulation and Procedure* (1<sup>st</sup> Ed):

"Tracker Mortgages

2-15

Interest is charged at a rate which follows, or "tracks", changes in a specified external rate, that is to say, a variable rate which the lender does not control, such as the Bank of England's Official Lending Rate or LIBOR...

...

3-06 Power to vary the interest rate. Not all retail mortgages provide for interest to be charged at a variable rate and not all of those that do provide for the rate to be variable by the



lender<sup>10</sup>. Nevertheless, it remains common to find that a retail mortgage confers power on the lender to vary the interest during all or part<sup>11</sup> of the mortgage term...

10. Interest may, for example, be charged at a tracker rate, which will change to reflect changes in a specified reference rate which is outside the lender's control.

11. It is common for the mortgage to provide for interest to be charged at a fixed or tracker rate for the first few years, and for the rate then to revert to a rate which is variable by the lender (typically, its standard variable rate)."

(2) The Council of Mortgage Lenders website says:

"What types of interest rates deals are there?

Fixed-rate - your interest payments are fixed for a set period of time after which you will be moved on to another rate, such as the standard variable rate or tracker rate.

Standard variable rate - your interest will vary with your lender's mortgage rate.

Tracker rate - your interest rate will move up or down by tracking an external rate such as the Bank of England rate or London interbank rate".

(3) The Money Advice Service, set up by the Government, says:

"Tracker mortgages

Tracker mortgages move directly in line with another interest rate, normally the Bank of England's base rate. So if the base rate goes up by 0.5%, your mortgage rate will go up by 0.5%.

The advantages of tracker mortgages

If the rate is linked to the Bank of England base rate and it falls, you'll know for sure that your mortgage payments will fall.

The disadvantages of tracker mortgages

If the rate being tracked goes up too much, you may struggle to meet your repayments.

You may have to pay an early repayment charge if you want to switch.

Suitable if you're looking for...

The opportunity to pay less when interest rates are low and don't mind the risk that rates might rise".

(4) The Financial Conduct Authority website says:

“Tracker- where the interest rate is guaranteed to move in line with either the Bank of England Base (or repo) Rate (BBR) or another index such as LIBOR (London InterBank Offered Rate).

Capped (and collared) rate mortgage where the interest rate is guaranteed not to exceed a stated maximum rate (the ‘capped’ rate) for specific period of time, but where the standard variable interest rate applies when the rate is lower than the capped rate. Also includes products where the interest rate is subject to a minimum rate (the ‘collared’ rate)”.

27. The Borrower also relied upon the fact that the Lender’s owning company, West Bromwich Building Society (“WBBS”), advertised tracker mortgages in a screen shot in the following terms: “Tracker mortgages give you the certainty of knowing that the rate you pay will move in line with bank base rates”.
28. In relation to the screenshot relied upon, like the Judge, I am not satisfied that this is admissible as part of the factual matrix. The screenshot was on WBBS’s website and related to a product offered by it rather than by the Lender. Further, that product was for residential borrowers only rather than for buy to let borrowers. As the Judge observed, it referred to 2 year tracker mortgages rather than mortgages for 25 years and stated that a choice of variable trackers was offered. In addition, the Lender operated its own website, access to which was restricted to registered intermediaries.
29. As to the other material relied upon, I accept that this shows that it would be reasonably understood that a tracker mortgage generally involves a rate which tracks and thereby only varies in accordance with a specified base rate. As the Judge held at [29]: “tracker mortgages are attractive to customers because they seek to identify and limit the circumstances in which the rate of interest may change.” I say generally because I accept the Lender’s submission that it is not a term of art and that it depends on the particular terms of the tracker mortgage which has been agreed. The mortgage may, for example, have a collar or a cap with the consequence that there comes a time when it no longer changes in line with the benchmark rate. Similarly, as in this case, there may be a period when it does not do so because for a time it is to be at a fixed rate. Equally the contract could provide that the margin charged over and above the benchmark rate may be subject to change. As the Judge held, it ultimately depends on the terms agreed rather than what label may be attached to the type of mortgage in question. That does not mean, however, that the label is irrelevant. It informs the starting assumption of reasonable parties negotiating and agreeing a tracker mortgage, which, as was accepted, is how this mortgage would be commonly known.

### The law

30. Where inconsistency between specially agreed terms and the printed standard terms of a contract is alleged, and the contract contains an inconsistency clause, authoritative guidance as to the proper approach is provided by the Court of Appeal decision in *Pagnan SpA v Tradax* [1987] 3 All ER 565, a case cited and relied upon by the Judge.

31. *Pagnan v Tradax* concerned an absolute and unqualified obligation contained in a special condition for the sellers to obtain an export certificate. The sellers were, however, held to be relieved of that obligation in circumstances where the standard GAFTA force majeure clause applied. That was held to modify or qualify the sellers' general obligation but not to contradict or to conflict with it.
32. In *Pagnan v Tradax* the contract contained an inconsistency clause, in comparable terms to that in the present case, whereby the special conditions were to prevail over the printed standard contract form "in so far as they may be inconsistent".
33. Bingham LJ pointed out (at p574h) that it would be "wrong to approach the contract on the assumption that there is no inconsistency" since "by including the inconsistency clause the parties have acknowledged that there may be".
34. On the other hand, Bingham LJ observed that it would be "wrong to approach this question with any predisposition to find inconsistency" since the clauses are all part of the same contract and the parties chose to make the contract subject to the printed standard conditions.
35. Where there is an inconsistency clause, one should therefore approach the question of inconsistency without any pre-conceived assumptions. One should not strive to avoid or to find inconsistency. Rather one should "approach the documents in a cool and objective spirit to see whether there is inconsistency or not" (per Bingham LJ at p574h).
36. It follows that in such a case the general approach to potential inconsistency summarised in *Lewison on The Interpretation of Contracts* (5<sup>th</sup> edition) at para. 9.13 that the "court is reluctant to hold that parts of a contract are inconsistent with each other" does not apply, as *Lewison* observes at p508 (footnote 206).
37. As to what amounts to inconsistency Bingham LJ explained as follows (at p575a-b):

".....it is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses."
38. In the same case Dillon LJ stated that inconsistency only arises where the provisions "cannot sensibly be read together" (at p578e-f).
39. This approach has been followed and applied in subsequent cases, such as *Cobelfret Bulk Carriers v Swissmarine* [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep. 317 and *Public Company Rise v Nibulon SA* [2015] EWHC 684 (Comm), [2015] 2 Lloyd's Rep. 108.
40. An example of a case where such inconsistency was established is *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea, The Brabant* [1967] 1 QB 588 in which McNair J concluded that there was inconsistency in circumstances where one clause would deprive another "almost entirely" of any effect, thereby effectively, but not completely, emasculating it.

41. An example given by Akenhead J in *RWE Npower Renewables v Bentley* [2013] EWHC 978 (TCC), and relied upon by the Lender, is where one part of the contract required a building to be painted black and another part stated it should be painted white. That is an example of a clear and literal contradiction between clauses. In my judgment, inconsistency is not limited to such cases. As *Pagnan v Tradax* makes clear, it extends to cases where clauses cannot “fairly” or “sensibly” be read together; not merely cases where they cannot literally be read together. One should approach that question having due regard to considerations of reasonableness and business common sense. As Rix J stated in *The Northern Progress* [1996] 2 Lloyd’s Rep. 319 at 330:

“Indeed, it seems to me that the doctrine of the exclusion of terms which do not make sense (and the doctrine of manipulation which is designed to save an appropriate term for incorporation which would otherwise have to be excluded) as well as the doctrine of inconsistency are but aspects of the overall process of arriving at the true intention of the parties in which the concept of rationality and commercial commonsense must play their appropriate and fundamental roles.”

42. On appeal (although not before the Judge) the Borrower contends that a wider interpretation of inconsistency should be given in this case because of the inconsistency clause and the fact that it states that the terms of the Offer of Loan should prevail over the Mortgage Conditions “if there are any inconsistencies” (emphasis added) between them. In this connection the Borrower relies upon *Kuoni Travel Limited v. Boyle* [2013] EWHC 877, at [41] (HHJ Mackie QC).
43. In the *Kuoni* case HHJ Mackie QC observed at [41] that:

“I do not see the case law which discourages the finding of inconsistency in contractual provisions of much application to a specific clause providing for what is to happen in the event of a conflict. In a sense Clause 5.7 simply removes the need to apply that case law when an apparent conflict emerges. Similarly there is no contractual disharmony when a provision like Clause 5.7 exists to remove it”.

44. It is not clear from the judgment whether the Judge was referred to *Pagnan v Tradax* or had it in mind. If he is here saying that one should approach the question of inconsistency without any pre-conceived assumptions such as a predisposition to avoid inconsistency, then that is consistent with the decision in that case. If, on the other hand, he is suggesting that where there is an inconsistency clause a wider meaning should generally be given to inconsistency, or like words, than that given in *Pagnan v Tradax* then I respectfully disagree. *Pagnan v Tradax* is clear Court of Appeal authority as to the proper approach to be adopted where the contract contains an inconsistency clause, such as that in the present case.
45. The Borrower also relies upon the House of Lords decision in *Glynn v Margetson & Co.* [1893] AC 351 in which it was held that a printed standard term must not be construed so as to defeat the main object and intent of the contract. That case involved a bill of lading contract to carry a cargo of oranges from Malaga to

Liverpool. The printed terms contained a wide liberty to deviate clause under which there was liberty to proceed to “any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland”. The main object or purpose of the contract was held to be the carriage of the (perishable) cargo from Malaga to Liverpool. As such, the liberty to deviate clause was to be construed as being limited to ports which were on the course of such a voyage.

46. The Borrower refers in particular to the statement of Lord Halsbury LC at p357 that:

“.. one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract”.

The application of that principle obviously depends upon being able to identify “the main purpose” (per Lord Halsbury) or the “main object and intent” (per Lord Herschell) of the contract, which depends on the construction of the contract as a whole considered in its proper context.

47. *Glynn v Margetson* highlights that the importance or centrality of the specially agreed term being considered may be a relevant consideration. If it sets out what may reasonably be understood to be the main purpose or object of the contract then a printed standard term which is inconsistent with that purpose or object is likely to be found to be a term which cannot “fairly” or “sensibly” be read together with it. It also illustrates that a printed standard term which confers a wide ranging right or liberty may have this consequence. It is no answer to say that the right or liberty may not be exercised, or is only likely to be exercised in certain circumstances. The mere existence of the right or liberty may undermine and be inconsistent with the obligation apparently being undertaken by the special term.

#### **The Issues**

48. The issues for determination on the appeal are:

- (1) Was clause 5 of the Mortgage Conditions a term of the mortgage contract?
- (2) Was the first bullet point of clause 14 of the Mortgage Conditions a term of the mortgage contract and/or, if so, did it permit the Lender to require the Borrower to repay the Loan in full together with any accrued interest and unpaid Charges merely by giving one month’s notice, and absent any default by the Borrower?

#### **Issue 1 - Was clause 5 of the Mortgage Conditions a term of the mortgage contract?**

49. As the contractual documents make clear, it is the Offer Document which sets out the “costs, features, terms and conditions” of the mortgage – see clause 3 of the Standard Conditions and the definition in the Mortgage Conditions of the Offer of Loan Letter.

50. It is in the Offer Document that one finds the specially agreed, bespoke terms which describe and define the particular mortgage contract which is being agreed.

51. Of particular importance within the Offer Document is Box 4 which sets out the "Description of the Mortgage" and the "Product Description". That mortgage product is described as being "Buy to Let" with a fixed rate of interest up until 30 June 2010 and thereafter a variable rate which "is" the same as the Bank of England Base Rate with a premium of 1.99% "until the term end".
52. The interest rates to be charged are part of and integral to the Product Description and (leaving aside the fixed rate period) are said to be a variable rate which is the Bank of England Base Rate plus a premium of 1.99%.
53. That the variable element of the interest rate was to be the Bank of England Base Rate is borne out by other provisions in the Offer Document. Thus Box 4 states how changes to the rate "will be applied". That is to occur where there is an applicable change in the Bank of England Base Rate. Similarly, Box 6 states what the monthly payment "will be" on the assumption that the Bank of England Base Rate does not change. It also states that payments "will continue" until "the term end" "at a variable rate which is the same as the Bank of England Base Rate" with a premium of 1.99%. The applicable variable rate is accordingly defined as being the Bank of England Base Rate.
54. There is no hint in the Offer Document that the rate will, or can ever, be different to the Bank of England Base Rate plus 1.99%. There is no hint there that the rate to be paid will, or can ever, be raised (or lowered) other than by reason of, and strictly in accordance with, a change to the Bank of England Base Rate. The firm indication is that the rate will only be varied in accordance with changes in the Bank of England Base rate, which would be entirely consistent with reasonable parties' general understanding of a tracker mortgage.
55. Clause 5 is drawn in very wide terms. Under clause 5.1 the interest rate may be varied for a broad range of reasons including "to make sure our business is carried out prudently, efficiently and competitively". Under clause 5.2 it can be varied without any specified reason provided it is a "valid reason" and provided that the notice and repayment provisions are observed.
56. It was conceded that the Lender's power or discretion to vary the interest rates would be subject to an implied term not to do so for an improper purpose, capriciously, arbitrarily or in a way which no reasonable mortgagee, acting reasonably, would do – see *Paragon Finance plc v Nash* [2002] 1 WLR 685. As the *Paragon Finance* case makes clear, there is no breach of such a term where a lender's decision is motivated by commercial considerations, as it is likely to be in most cases. Realistically, a commercial lender is only likely to wish to vary interest rates for business reasons and there will therefore nearly always be a justifiable reason for doing so.
57. Subject to that implied term, there is no limitation on the Lender's power to vary the rate. It can, if it wishes, convert the mortgage into a standard variable mortgage by adjusting the resulting rate to match its standard variable rate rather than tracking the Bank of England Base Rate. It can, if it wishes, remove any tracker element at all from the mortgage.

58. In my judgment there are three grounds upon which it may be said that clause 5 is inconsistent with the Product Description set out in the specially agreed Offer Document.
59. First, the mortgage product there described defines how the rate is to be variable. It is to be variable in accordance with changes in the Bank of England Base Rate. The Lender was thereby promising that the interest rate would be varied in accordance with and so as to reflect changes in that Base Rate. It is inconsistent with that specially agreed term to incorporate a printed standard term which provides for an entirely different method of varying the rate. If, for example, clause 5 had stated that rates may be varied in accordance with changes in the LIBOR rate that would be clearly inconsistent with a specially agreed term for variation by reference to changes in the Bank of England Base Rate. Variation at the discretion of the Lender is similarly a different method of varying the rate. It will no doubt be entirely appropriate when the Mortgage Conditions supplement a standard variable rate or similar mortgage product. It is not, however, appropriately incorporated where the method of variation has been agreed in the terms set out in Box 4 of the Offer Document. In my judgment variation of the rate at the discretion of the Lender is a different method of variation to that specially and specifically agreed in Box 4 and is inconsistent with it.
60. Secondly, in Box 4 the parties have agreed a Product Description in clear, absolute and unqualified terms. The wide terms of clause 5 confer on the Lender the right unilaterally to change that product to something else entirely. In my judgment, a printed standard term which confers such a right is inconsistent with the specially agreed Product Description. That is not a matter of qualification or modification; it is a matter of transformation and indeed negation. If the Lender has the right or liberty to replace the mortgage product as described in the specially agreed terms with some other product then there is effectively no enforceable obligation to provide that product.
61. Thirdly, in my judgment the Product Description set out in Box 4 does set out the main purpose or object of the contract, namely to provide a mortgage product of that description. A printed standard term which entitles the Lender to substitute a different product is inconsistent with that purpose or object.
62. As put to Mr Cox QC in oral argument, one way of testing whether clauses can be "fairly" or "sensibly" read together is by seeking to put them together in a single clause. Such a clause would be to the effect that the variable rate is to be the Bank of England Base Rate plus a premium of 1.99%, subject to the Lender's right to vary that rate at any time for broadly specified or unspecified "valid" reasons in accordance with clause 5 of the Mortgage Conditions. Faced with such a clause a reasonable borrower would understandably question what was being agreed and whether there was any obligation to provide the product described in the Offer Document. The answer would be that the Lender is only agreeing to provide such a product unless and until he decides to vary the rate and that accordingly he is effectively under no obligation to provide it. That is negation; not modification or qualification.
63. The main arguments to the contrary advanced by the Lender were:
- (1) In Box 4 it is made clear that once the period of fixed rate of interest came to an

end the rate would be “variable”. Once the interest payments had moved to a rate expressed to be variable then, on the clear wording of clause 5, that clause was applicable.

- (2) The correct question in principle is whether clause 5 can be sensibly read with box 4 and the rest of the terms of the Offer of Loan. The Judge rightly held that it could be. The rate in Box 4 could be varied in any of the circumstances in clause 5. Box 4 does not state that the margin could not thereafter be varied in accordance with the contractual mechanism, or otherwise seek to refer to or exclude clause 5; it simply did not say anything about the mechanism for variation in clause 5.
  - (3) The inconsistency clause only applies if the “Offer of Loan” is inconsistent with the Mortgage Conditions, and the Offer of Loan was defined to include the Special and Standard Conditions. The Standard Conditions of Offer (contained in Part B of the Mortgage Booklet) specifically referred to the right under clause 5 of the Mortgage Conditions to vary the rate except during any period when it was expressed to be fixed (clause 11).
  - (4) It is incorrect to state that it makes no commercial sense if the Lender was able to vary the margin, as the Judge rightly held at [30]. The mortgage was not for a fixed period after the initial period. The mortgage could be terminated early by either of the Borrower or the Lender. If the Borrower did not like the margin as varied, the Borrower was entitled to terminate the loan and remortgage. So from a commercial point of view, the pressure was on the Lender to keep the rate competitive or lose the business.
  - (5) The Lender’s right to vary the interest rate was repeatedly made clear in the documents sent to the Borrower and acknowledged, such as the Application Form, section A of the Booklet and the Acceptance of Offer Letter.
  - (6) The Borrower’s case, if accepted, would have the consequence that clause 5 can never be invoked by the Lender in respect of the Borrower’s mortgage or the many thousands who have mortgages with the same material terms. The Lender would have no power to vary the interest rate for a borrower on such a mortgage, save where such variation is specifically provided for in the Offer of Loan, even if required by law, regulation or code of practice. That is an extreme construction which cannot be correct.
64. As to (1), it is correct that clause 5 is applicable according to its terms – that is how the inconsistency arises.
  65. As to (2), it is correct that the question is whether clause 5 can sensibly be read together with the Offer Document and Box 4 in particular. For reasons already given, I do not consider it can be so read, including that it entitles the Lender to rewrite Box 4 and to provide another product altogether.
  66. As to (3), this argument is circular since clause 11 references the right to vary in the Mortgage Conditions and the Mortgage Conditions themselves state that the terms of



the Offer of Loan will prevail if there is inconsistency. In any event, even if the Borrower was not entitled to rely on the inconsistency clause, he could rely on the established principle that special conditions will prevail over general printed conditions in the event of conflict between them and he can also rely on the *Glynn v Margetson* line of authority.

67. As to (4), from the Borrower's perspective he has secured a mortgage deal on the specific terms set out in the Offer Document and there is no good reason why he should be forced to relinquish the bargain he has secured. In any event, he may not be able to remortgage on comparable terms or at all and there are charges and fees involved in doing so. More fundamentally, the issue of inconsistency does not fall to be addressed by reference to what has in fact happened or to assumed modest alterations to the premium charged; it needs to be addressed by reference to the full range of powers available to the Lender under clause 5.
68. As to (5), it is correct that there are references to the Lender's right to vary the rates of interest. The Offer Document, and the Borrower's case, acknowledges that there is such a right, but only by reference to changes in the Bank of England base rate.
69. As to (6), it is correct that the Lender will not be able to rely on clause 5 where it has agreed in the Offer Document to a tracker mortgage in comparable terms to that in the present case. That would accord with the reasonable expectations of a Borrower agreeing to a tracker mortgage in the terms set out in the Offer Document. If the Lender wished to have a further right to vary the rate that should have been spelt out in the Offer Document, as Sir Brian Leveson P points out in his judgment. If it had been, there could be no complaint about the existence of such a right, although it may well be that it would have led to real difficulties in securing the business. If changes were required by law then different considerations would arise which would not be dependent on the terms of the contract.
70. The Lender also relies on the Judge's judgment. In his careful judgment the Judge clearly sets out the background, the relevant contractual terms, the applicable law and the issues to be decided. I agree with much of his judgment. It is only in his application of the relevant principles to the contract in this case and with his conclusion that clause 5 involves mere modification or qualification that I disagree. It may be noted that Mr Ashcroft QC did not appear at the first instance hearing and that the Judge did not have the benefit of the more wide ranging arguments advanced before this Court. The Judge also did not consider clause 5.2 and the effect of clause 5 taken as a whole.
71. For all these reasons, in my judgment clause 5 is inconsistent with the Product Description and the method of rate variation set out in specially agreed Box 4 in the Offer Document and is accordingly not incorporated.

**Issue 2 - Was the first bullet point of clause 14 of the Mortgage Conditions a term of the mortgage contract and/or, if so, did it permit the Lender to require the Borrower to repay the Loan in full together with any accrued interest and unpaid Charges merely by giving one month's notice, and absent any default by the Borrower?**

72. Clause 14 sets out various “events” which may result in the Borrower being obliged by the Lender to repay the loan in full together with accrued interest and unpaid charges.
73. The “events” set out in clause 14 comprise breaches by the Borrower (the second and third bullet points) or other events which might reasonably give rise to a concern as to the Borrower’s ability to repay. Such events may be described as events of default, and are often contractually so described in loan documentation (although not in this case). The one apparent exception to this is first bullet point which it is said gives the Lender the right to require repayment simply by giving one month’s notice, thereby effectively making the mortgage contract terminable at the Lender’s will.
74. The Borrower contends that the existence of such a right is contrary to the spirit, intent and object of the agreement as a whole and produces a commercially unreasonable, if not absurd, result.
75. The Borrower stresses in particular the following features of the Offer Document:
  - (1) This was an interest only mortgage and the “Mortgage Term” (i.e. the length of time that the Borrower was given to pay off the loan) was 25 years. The terms of the mortgage contract made clear that the principal loan amount (£91,703.48 in total) would be outstanding at the end of the mortgage term, and that the Borrower should make adequate provision to ensure that he could repay that principal loan amount, but only as at the end of the mortgage term (and not at any earlier time).
  - (2) As is apparent from the Offer Document, the Borrower incurred various fees in concluding the mortgage, some of which were added to the loan, and all of which were non-refundable.
  - (3) There is no hint in the Offer Document that the term of the mortgage may be abbreviated by a termination in the absence of any breach or event of default by the Borrower.
  - (4) The capitalised words at the end of the General Conditions – *“YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR MORTGAGE”* – would be highly misleading if the mortgage contract in truth provided that the Lender could call in the full loan and repossess the property, absent any breach or event of default, at any time, merely by giving one month’s notice.
76. Further, once repayment is required under clause 14 then all of the draconian powers/remedies in clause 15 of the Mortgage Conditions, many of which apply at the Borrower’s expense, can be triggered immediately by the giving of the one month’s notice requiring repayment, although the Borrower is not in breach and there has been no event akin to an event of default. As the Borrower points out, even though he is performing fully in accordance with the contract terms and there has been no event which might give rise to concerns as to his ability to repay, he is exposed to the risk of termination at the Lender’s whim and at any time, in circumstances where: (1) he may

not have, and is not required by the contract terms to have, the ability to repay the principal loan amount; (2) he has incurred non-refundable expenses that will be wasted following any such termination; and (3) the termination may result in substantial losses and expenses for which the Borrower will be liable.

77. In addition to these points, I consider the Product Description to be of considerable importance. As Box 4 makes clear, this was a "Buy To Let" interest only mortgage. The contemplated purpose of the mortgage advance was to enable the Borrower to buy a property which would then be let out. The parties would reasonably contemplate that the rental income would then be used to meet the mortgage interest payments and the repayment of the principal loan would be funded by the sale of the property at the end of the agreed term, or earlier if the Borrower so chose. This is borne out by the details of the Borrower's Application Form which highlight the rental income which the property was to provide and that repayment was to be made from sale of the property.
78. Further, the term of an interest only mortgage loan is of central importance. The Borrower will be expected to arrange his affairs on the basis that, absent some default on his part, he will have 25 years before repayment is required.
79. The right to require repayment on one month's notice is unqualified. It does not involve the exercise of a discretion or decision making power conferred under the contract and it is not suggested that it would be subject to a *Paragon Finance* implied term. There is accordingly no restriction on its exercise. It may be exercised whenever the Lender so chooses and for any reason it so chooses.
80. For the Lender to have the right to require repayment on one month's notice at will would give him the right to turn the Borrower's contemplated business arrangements on their head. In many, if not most, cases the Borrower would be required to terminate the letting arrangements and sell the property in order to make the repayment. A property which was to be bought so it could be let could, at the Lender's whim, be required to be unlet and sold. Buy to let becomes sell unlet.
81. For all these reasons, in my judgment there is an inconsistency between the mortgage specially agreed to in the Offer Document and the Lender's right under clause 14 to terminate and require repayment on one month's notice. The existence of that right emasculates the obligations seemingly being entered into by the Offer Document. They are, as far as the Lender is concerned, optional.
82. Further, as already held, in my judgment the Product Description set out in Box 4 does set out the main purpose or object of the contract, namely to provide a mortgage product of that description, which includes a 25 year term. A printed, standard term which entitles the Lender to require repayment on one month's notice is inconsistent with that purpose or object.
83. If one seeks to put the clauses together, such a clause would be to the effect that the Lender shall provide the mortgage loan set out in the Offer Document until the end of the mortgage term of 25 years, subject to the Lender's right at any time and for any reason to require repayment of the loan on one month's notice in accordance with clause 14 of the Mortgage Conditions. Faced with such a clause a reasonable borrower would question what was being agreed and whether there was any

obligation to provide the mortgage loan for 25 years. The answer would be that the Lender is only agreeing to provide the loan for 25 years unless and until he decides to require early repayment and that accordingly he is effectively under no obligation to provide it for that term. That again is negation; not modification or qualification.

84. The Lender points out that the Borrower has the right to make early repayment (subject to various charges) and so clause 14 is doing no more than providing mutuality. Early repayment, however, involves performance of the contract. The contract is discharged through the Borrower's complete performance of it through repayment of the loan, plus interest and any applicable charges. The Lender receives back the principal consideration he has provided, namely the loan. By contrast, required immediate repayment deprives the Borrower of the principal consideration he has bargained for, namely a loan for a 25 year period.
85. There is a world of difference between the consequences of early repayment for the Lender and the Borrower. For the Lender it simply involves receiving repayment of the loan plus all interest due and any applicable early repayment charges. For the Borrower it means being required to make repayment on virtually no notice at any time during the 25 year term. Unless alternative finance can immediately be found, that means seeking to unravel the letting arrangements and property purchase made, which were the *raison d'être* of the mortgage, at a time of the Lender's choosing, on one month's notice, notwithstanding full and proper performance and no event akin to an event of default.
86. The Lender further contends that if, as is accepted, no inconsistency arises in relation to the right to require repayment which arises where there is a breach or event of default (the other clause 14 bullet points) then logically the same applies to the first bullet point. There is, however, a significant difference between a right to require repayment which arises only in specified circumstances within the control or responsibility of the Borrower and one which arises at the Lender's will. The latter can be exercised at any time and for any reason. As with clause 5, it is the wide ranging nature of the right which gives rise to the inconsistency.
87. The Lender makes the further point that 25 years is a long term, that circumstances may change and that it is entirely reasonable for it to have the right to exit the contract, as the Borrower does. But, as already pointed out, the position of the Lender and the Borrower on repayment are not comparable. In any event the Lender has a right to require repayment if there is a breach or an event akin to an event of default and in oral argument Mr Cox QC struggled to identify other circumstances in which the Lender was likely to wish to do so. If there are such circumstances then, as Sir Brian Leveson P points out in his judgment, they could and should have been set out in the Offer Document.
88. The Lender stresses that the Offer Document says nothing about early repayment and therefore there can be no inconsistency with clause 14. That, however, is to take too narrow a view of inconsistency. The issue is whether the Lender's obligation to provide a mortgage of the Product Description for the mortgage term can fairly or sensibly be read together with a right for the Lender to require repayment on one month's notice. For reasons already given, in my judgment they cannot be so read together. For the same reasons I respectfully disagree with the conclusion reached by the Judge, who, it is to be noted, accepted that they were arguably contradictory.

89. The Borrower had an alternative argument that clause 14 does not apply as a matter of construction, namely that the first bullet point is a sweep up provision which has to be construed together with the stated reasons for termination set out in the other bullet points. It is not a free standing provision but only applies where there is a reason for termination similar to but not expressly covered by the other bullet points. In view of my conclusion on the inconsistency issue it is not necessary to address that further argument, which was not raised before the Judge.

### **Conclusion**

90. For the reasons outlined above I would allow the appeal on Issue 1 and Issue 2.

### **Sharp LJ:**

91. I have had the advantage of seeing both judgments in draft. I agree with what is said by Hamblen LJ, and by Sir Brian Leveson, P.

### **Sir Brian Leveson P:**

92. I agree both with the analysis and the conclusions reached by Hamblen LJ. In relation to Issue 1, I add only the observation that it would have been open to the Lender to preserve the power to alter the premium of 1.99% provided that the Offer Document had made that possibility clear (as it did in relation to alterations to the Bank of England Base Rate). As for Issue 2, a mortgage term of 25 years proceeds on the basis that if the Borrower abides by the terms of the mortgage, repayment will only be required at the end of the term. Although I do not rule out the possibility that it might be possible to visualise circumstances in which the Lender could specify an ability to terminate the agreement other than following breach or an event akin to an event of default by the Borrower, such circumstances would have to be clear on the face of the offer and carefully circumscribed so as not to deprive the Borrower of the benefit of the bargain which has been reached.