Neutral Citation Number: [2018] EWCA Civ 676

Case No: A2/2016/1463

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
Mr Justice Picken
QB20150472

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE LINDBLOM
and
LORD JUSTICE LEGGATT

- -

Between:

FORTWELL FINANCE LIMITED	**Claimant/ Respondent**
- and -	
STEWART WAYNE HALSTEAD **DANIELA HALSTEAD**	**Defendants/ Appellants**

- -
- -

Andrew Onslow QC (instructed by Keystone Law) for the Appellants
Simon Popplewell (instructed by Brightstone Law) for the Respondent

Hearing date:13 March 2018

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal, brought with permission granted by Gloster LJ on 25 January 2017, from the Order of Picken J of 15 March 2016. By his order Picken J dismissed the appellants' appeal from the order of 2 October 2015 of HH Judge Lamb QC, sitting in the County Court at Central London. By his order Judge Lamb had refused the appellants' application to set aside an order, made by consent by Deputy District Judge Wallis on 17 February 2015, for possession of property at 15 Cliveden Place, London SW1 ("the Property") and for judgment for the respondent against the appellants in the sum of £3,151,421.99.

(B) Background Facts

2. The proceedings arise out of a one-year loan facility granted by the respondent to the appellants in the sum of £2.36 million to be secured by a first legal charge on the Property, pursuant to an agreement made on 19 August 2013. The loan was arranged for the purpose of refinancing, and in substitution for, the appellants' existing indebtedness also secured on the Property. The loan was completed on 19 August 2013 and the balance outstanding was due and payable a year later on 19 August 2014.

3. The issues on the appeal turn upon the appellants' contention that the loan transaction, and indeed the consent order, fell within the statutory regime for regulated mortgage contracts within the meaning of the Financial Services and Marketing Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order"). As the respondent was not an "authorised person" for the purposes of the Financial Services and Markets Act 2000 ("FSMA 2000"), the appellants argue that the loan agreement and the consent order were/are unenforceable by reason of the provisions of s.26 of the 2000 Act. I return to these provisions hereafter.

4. At the time of the loan by the respondent to the appellant and the granting of the legal charge over the Property, the Property had been for some time divided into three flats, but was in the course of conversion into a single dwelling house. As the appellants put it in their skeleton argument for this appeal, through Mr Onslow QC who appears for them, their "main residence was in Rome, but they kept one flat … (flat 3) furnished and lived in it while in London".

5. From the appellants' further evidence in the proceedings, they say that they acquired flat 1 at the Property in 1988 and at the same time acquired the head-leasehold interest. In 2008, they bought flats 2 and 3: flat 2 in the second appellant's name and flat 3 in the first appellant's name. In March 2013, the appellants surrendered the sub-underleases held by them, leaving only the headlease which they already owned. It is said that the first appellant tended to keep his personal belongings in Flat 3 while the second appellant kept hers in flat 2. At this stage they began the project for the reconversion of the Property into a single dwelling.

6. In his evidence the first appellant says that finance was not needed until 2013 when the recession in Italy gave rise to a need to raise finance for his consultancy business there. Initial funds came from a lender called "Montello Capital", but that lending was found to be insufficient for the appellants' purposes and an approach was made to the respondent for a new loan through a broker. The first appellant said that there was no personal contact between him and anyone for the respondent.

7. The respondent in its evidence, given by Mr Colin Sanders, the Chief Executive, produced copies of some of the underlying documentation, including the application form for the loan, the loan agreement and the legal charge.

8. It is pointed out by Mr Sanders that, in the application form, against the question "Who will live at the property?", the answer "N/A" appears. The form stated that the loan was to facilitate the "continued refurb of the property and purchase of further investment property in Rome". The proposed borrowers' current residential address was given as "Via Lazio 20, 00187 Rome, Italy" at which they were said to have been for 30 years (in the case of the first appellant) and 62 years (in the case of the second appellant). Immediately above the appellants' signatures on the loan application form was a declaration that it was important that the contents of the form were full and accurate and correct and a warning was given that it was a criminal offence knowingly or recklessly to give false information in the form.

9. The loan agreement contained a number of "Special Conditions" at the foot of which the following appeared:

> "It is a condition of this loan that that [sic] neither Borrower nor any family member shall occupy nor is intending to occupy the Property as a dwelling (for the purposes of this condition "family member" means a person connected with the Borrower as defined by S.16C(4) of the Consumer Credit Act 1972 [sic])".

10. Mr Sanders states that, upon receipt of the application, the respondent instructed Savills to prepare a valuation report and to report on the Property's suitability as security. The report (dated July 2013) is produced, including statements that the three flats were in the process of conversion, the total square footage was 2,702 sq. ft. of which 976 sq. ft. comprised flat 3, which (as Mr Sanders points out, although the report did not) amounts to less than 40% of the overall square footage. The final section of the report on "Property Information Factual" ended with the following:

> "There are stated to be no tenancies in existence, and therefore we have valued the Property with the benefit of full vacant possession. At the date of our inspection the property was occupied by the Borrower".

11. Mr Sanders' evidence states further that additional documentation was produced, as part of "due diligence" procedures, including an HMRC self-assessment statement of 23 June 2013 giving the first appellant's address as the address in Italy, a letter from solicitors stating that the writer confirmed that the appellants' primary residence was also at that address at which the writer had stayed on "numerous occasions", a utility bill addressed to the second appellant at the Italian address and a letter from the first

appellant to British Gas of 24 June 2013 stating that Flat 1 was uninhabitable and that gas was supplied only to Flat 3 and said "We are currently living in Rome, Italy and only visit Flat 3 intermittently". The documentation included an extensive curriculum vitae for the first appellant saying that he was qualified as a barrister and solicitor in New Zealand and Australia and as a solicitor in England; it set out extensive legal and commercial experience.

12. Mr Sanders states that on the basis of this material, the respondent "took the view that the loan facility fell outside regulation for the purposes of …the FSMA". He says that it was understood that the appellants would not reside in Flat 3 which would "simply be used intermittently". In paragraph 11 of his witness statement, Mr Sanders said,

> "11. At all material times, it was understood that the Borrowers did not and would not reside at the Property, rather that they simply made infrequent visits to a single part of the Property, using Flat 3 as storage, it being noted that the remaining parts were inhabitable. Based upon representations made by Mr Halstead, and on the facts and documents, Omni took the view that the loan facility fell outside regulation for the purposes of the Financial Services and Markets Act 2000 ('the FSMA'). Omni did not think that the Borrowers would reside in Flat 3; rather, it was understood that Flat 3 would simply be used intermittently." ("Omni" was the respondent's previous name)

13. In contrast to this evidence, the first appellant, after saying that he had no direct contact with anyone from the respondent, says that the appellants signed a loan agreement, with the condition that the Property was not going to be used for residential purposes. He said he queried this with the broker and was told by him that the statement was needed …

> "only so that the [respondent] could avoid the impact of mortgage regulation as it was not regulated for residential mortgage lending, but that it would not affect our continuing to use the Property as our residence. Given that the [respondent's] representative had inspected the Property beforehand, and was bound to have seen that Flats 2 and 3 were used as residences, yet no issue was raised on this by the [respondent], I took this as corroborating what [the previous lender] and [the broker] had told me, a formality that also applied to the [previous loan] when our continuing residence was transparent. (At that time Flat 1 was not in use, having been cleared for renovation). On 19 August 2013 the mortgage to the [respondent] was completed…, at which time the property was a single dwelling unlike the [previous loan] when it was divided into 3 flats".

14. When the loan period expired in August 2014, the loan was not repaid. Demand for payment was made and, in default of payment, receivers were appointed and these proceedings were issued on 19 December 2014.

(C) The Proceedings

15. It appears that, as the loan period was about to expire and thereafter, attempts were being made by the appellants to obtain substitute lending for the debt to the respondent. Following the appointment of the receivers, the first appellant wrote to the respondent's solicitors on 25 November 2014 (in a letter also referring to the potential refinancing) but stating this:

> "Since initiating direct communications with your client, relations between us have been transparent and, collaboratively, in good faith, even accepting the intervention of legal due process in parallel, but a change was heralded today with the arrival of an appointment of a LPR demanding possession.
>
> You know your client cannot do this without a court order where the premises are occupied; the case law is clear on this. To avoid infringement of the Consumer Finance Act (regulated mortgages), the premises can't be occupied for residential purposes in more than 40% of the total and that is why, for both Omni, and Montello before it, that has been restricted to the former Flat 3, as Omni's asset manager was able to confirm, in the company of our broker, John Wheeler, prior to granting the loan.
>
> In reality, we are in occupancy of the entire house, as recorded at the Westminster City Council for tax purposes, but use the former Flats 1 & 2 for storage purposes only as Omni's asset manager can confirm. There are no flats now, just a single residence. So, unless and until your client has a court order, the appointed LPR will be treated as a trespasser, with criminal prosecution if necessary.
>
> Notwithstanding the above, I'll continue in good faith. Omni's best interest is a full recovery which it acknowledges it won't get on the leasehold interest, so our respective interests converge.
>
> …
>
> I have briefed Counsel to oppose any application for a possession order. In short, wisdom counsels a little patience to arrive at the intended solution without raising acrimonious litigation in the interim."

16. The hearing of the respondent's claim in the County Court was scheduled for 17 February 2015. On 13 February 2015, the respondent's solicitors wrote to the respondent stating that it was intended at the hearing to invite the court to make an order for possession "forthwith", but stated the respondent's willingness to allow some further time for the appellants to make orderly arrangements to vacate or to finalise any feasible new lending. They proposed that there be a consent order for judgment for possession of the Property in 28 days and for the sum mentioned above. There is in the bundle a copy letter from the first appellant to the respondent's solicitors and a copy form of consent to the proposed order (the latter signed by both

appellants) both dated 17 February 2015. The order envisaged possession being given in 28 days. The first appellant says in his witness statement in the proceedings that, following service of the proceedings, he had redoubled his efforts to refinance the loan. While these had not been successful by 17 February, he was confident that the loan would be repaid by 17 March.

17. The court duly made the order for possession to be given by 17 March 2015 and for judgment for the sum of money to be paid by the same date. The order records attendance at the hearing by counsel for the respondent only.

18. In the absence of delivery of possession and payment, the respondent applied for a possession warrant which was duly issued, with a date for execution of 22 April 2015. On 17 April 2015 the appellants issued the application for an order setting aside the possession order, staying the order for possession and suspending the warrant. The application for suspension of the warrant came before Deputy District Judge Hughes, as a matter of urgency, on 21 April 2015 and was dismissed. According to the respondent's evidence, the warrant for possession of the property was duly executed on the following day (22.4.15). The application to set aside the consent order had not been dealt with by the Deputy District Judge, merely the application to suspend the warrant.

19. The appellants sought permission to appeal from the order of 22 April 2015. That application came before Mr Recorder Brooke-Smith on 21 May 2015. It seems from the recitals to his order that he dealt with the matter on the papers alone. He gave permission to appeal and gave directions for a hearing on the first open date after 30 June 2015.

20. On 28 August 2015, the respondent contracted to sell the Property as mortgagee in possession.

21. The appeal from Deputy District Judge Hughes' order of 21 April 2015 came before HH Judge Lamb QC on 24 September 2015 and was dismissed. The judge then listed the separate application, which had been made in the Application Notice of 17 April 2015, for the setting aside of the consent order. That application was heard on 2 October 2015 and was refused, the order being entered on 6 October 2015. Judge Lamb also refused permission to appeal. A subsequent application for permission to appeal was granted by Dove J by order of 12 February 2016. It was that appeal which came before Picken J on 15 March 2016. Picken J dismissed the appeal with costs (assessed at £10,000) and, as mentioned, it is from his order that the present appeal is brought. Treacy LJ refused permission to appeal to this court on consideration of the papers, but permission was granted on a renewed application by Gloster LJ.

22. In the meantime, the contract for the sale of the Property by the respondent as mortgagee had been completed in October 2015.

(D) The Statutory Framework

23. Section 19 of the FSMA 2000 provides as follows:

> "19.—(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—

> (a) an authorised person; …
>
> (2) The prohibition is referred to in this Act as the general prohibition."

24. It is common ground that, at no relevant time, was the respondent an "authorised person" for the purposes of that section.

25. Section 22 of FSMA 2000 is (so far as material) in these terms:

> "22.—(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and—
>
> (a) relates to an investment of a specified kind; or
>
> (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind. …
>
> (5) "Specified" means specified in an order made by the Treasury."

26. Section 23 provides for a criminal offence as follows:

> "23.—(1) A person who contravenes the general prohibition is guilty of an offence and liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.
>
> (2) In this Act "an authorisation offence" means an offence under this section.
>
> (3) In proceedings for an authorisation offence it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence."

27. Section 26(1), (2) and (3) of FSMA 2000 is as follows:

> "26.—(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover—

(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement—

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question."

28. Further, the relevant provisions of section 28 are these:

"**28. Agreements made unenforceable by section 26 or 27**.

(1) This section applies to an agreement which is unenforceable because of section 26 …

(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow—

(a) the agreement to be enforced; or

(b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must—

(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); …

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement. …

(7) If the person against whom the agreement is unenforceable—

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

> he must repay any money and return any other property received by him under the agreement. …
>
> (9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27."

29. The relevant statutory instrument is the 2001 Order. At the relevant time this provided that in Article 61 as follows:

> "**61.— Regulated mortgage contracts**
>
> (1) Entering into a regulated mortgage contract as lender is a specified kind of activity.
>
> (2) Administering a regulated mortgage contract is also a specified kind of activity, where the contract was entered into [by way of business] after the coming into force of this article.
>
> (3) In this Chapter—
>
> (a) a contract is a "regulated mortgage contract" if, at the time it is entered into, the following conditions are met—
>
> (i) the contract is one under which a person ("the lender") provides credit to an individual or to trustees ("the borrower");
>
> (ii) the contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom;
>
> (iii) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person; …
>
> (b) "*administering*" a registered mortgage contract means either or both of—(i) notifying the borrower of changes in interest rates or payments due under the contract, or of other matters of which the contract requires him to be notified; and
>
> (ii) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower;
>
> but a person is not to be treated as administering a regulated mortgage contract merely because he has, or exercises, a right to take action for the purposes of enforcing the contract (or to require that such action is or is not taken); …"

(E) The judgment of Picken J

30. Before Picken J the appellants, who appeared by the first appellant (acting in person, but with the benefit of a skeleton argument prepared by junior counsel) argued two grounds of appeal: 1) that the loan agreement was unenforceable by reason of the statutory provisions that I have quoted; and 2) that Judge Lamb had been wrong to find that the point as to the enforceability of the loan had been compromised by the consent order.

31. Picken J addressed those grounds in that order.

32. The judge found, on the evidence, that the Property was a dwelling, even if it was not the appellant's main home. It seems that he was inclined to accept the evidence, to be derived from Savills' report, that two of the flats were not being used as a dwelling. He considered that if that was the case and accordingly less than 40% of the Property was being used as a dwelling by the appellants, that was an end to the matter. However, of more weight in the judge's mind was the special condition whereby the appellants agreed that neither the borrower nor any family member should occupy, nor was any of them intending to occupy, the Property as a dwelling.

33. It had been urged upon the judge by the first appellant that the provisions of FSMA 2000 had been enacted to prevent circumvention of them by the means of such clauses in a loan agreement, in cases in which the lenders were aware of the property being used in fact as a dwelling. The judge did not agree with that submission: he found that the appellants having agreed the special condition could not then raise the points on the FSMA 2000 now being advanced. The judge said that he agreed with the following submission of Mr Popplewell, appearing for the respondent then as now, to this effect:

> "It is submitted that this cannot be the case. Where a person signs a loan agreement containing a term that they would not reside in the property, they cannot then argue the contrary against the creditor unless the creditor was aware that the debtor would not be complying with the term. A representation by the debtor that they would not be residing in the property creates a clear estoppel that would be relied upon by the lender which it acts to its detriment in entering into a loan. As such a debtor, in this case D, cannot go behind the contractual term."

34. The judge felt supported in his conclusion on this point by the decision of Norris J in *Waterside Finance Ltd. v Karim* [2012] EWHC 2999 (Ch) and in particular by paragraphs 19 and 20 of the judgment, which he quoted as follows:

> "19 … that a lender should go to the lengths of specifically drawing the loan agreement to comply with certain conditions and then should proceed with the loan in full knowledge that the conditions were not going to be met seems to me to stretch credulity beyond breaking point.
>
> 20. I therefore turn to the legal argument which is that no matter what the intention was, the fact of the matter is that the

> property was being used as a dwelling by Mr. and Mrs. Karim, whatever the document said. In my judgment this argument has no real prospect of success. It is absolutely plain to my mind that the parties contracted for the loan on a particular footing. That footing is set out in the facility letter. That footing binds each of the parties to the contract unless the contract is rectified on the ground that it does not represent the true intention of the parties. The unrectified contract, recording as I think the true basis of the contract, is that at completion Courtlands would be vacant and for the duration of the loan the borrowers would not use it as their home. Parties can contract that the fact should be treated in whatever manner they agree they should be treated, notwithstanding what the true facts are. They both argue that their relationships shall be conducted on the footing that X is the case even though in truth Y is the case. Even if the true facts were that Mr. and Mrs. Karim occupied Courtlands as their residence, unless they rectify the contract, the contractual factual basis is that the property was vacant and would remain vacant. I therefore do not consider that there is a serious issue to be tried under that head of the argument. It is therefore unnecessary to proceed further with the question of whether or not to grant an injunction on that ground."

35. The judge was also of the view that, whatever the respondent may have known as to the state of the property (or part of it) as a dwelling prior to the loan, the special condition addressed the situation prospectively and the appellants had undertaken not to use the Property as a dwelling for the period of the loan. The judge said that this was supported by the appellants' saying in the application form, in answer to the question, "Who will live at the property?", "N/A". The judge also quoted the first appellant's letter to British Gas to which Mr Sanders referred in his statement.

36. The judge's conclusion on this ground of appeal was this (at paragraphs 45 and 46 of the judgment):

> "45. This again seems to me to confirm the position, which is that flat 3, to the extent that it was lived in, which is intermittently, was the flat which was lived in as opposed to the other flats, so underlining the point concerning the 40% occupancy which I have addressed by reference to the square footage set out in the Savills report.
>
> 46. In the circumstances, I do not consider that it has been established that the bridging facility was unenforceable as I was invited, in effect, by Miss Lacob in her skeleton argument to conclude. Nor do I consider that real prospects have been demonstrated that the 2000 Act-based case would succeed were the consent order to be set aside so warranting setting aside the consent order. This is a conclusion I reach even if the point which I shall come on in a moment to address concerning the consent order did not represent a difficulty for Mr. and Mrs. Halstead, which, as I shall explain, I consider it does."

37. The judge also rejected the second ground of appeal. He found that there was no authority which justified his setting aside the consent order.

38. The judge found that there was a true agreement between the parties to compromise the possession claim in terms of the consent order. At paragraphs 56 to 59 of the judgment, the judge said:

> "56. Here, the parties made an agreement and it seems to me that, as a result, the ability of the Court to interfere with it is very limited, unless it can be shown that there was no agreement, in fact, made and embodied in the consent order, or the agreement is somehow vitiated.
>
> 57. As to whether there was an agreement leading to the consent order in the present case, it is clear to me that there was. Not only was the consent order executed by Mr. and Mrs. Halstead, apparently as a matter of their freewill, but it is important to bear in mind also that in the letter from Brightstone dated 13th February 2015, addressed to Mr. and Mrs. Halstead, and attaching the consent order, it was made clear that, so far as Omni were concerned, they would be asking for an immediate order for possession and, therefore, what they were offering the Halsteads was a respite of 28 days before possession would be executed.
>
> 58. As Mr. Halstead explained in his witness statement in support of the applications at paragraph 14 and in a passage to which I have previously referred, he was "confident that the loan would be repaid" by the expiry of the 28-day period which was being proposed and was included in the draft consent order, and it was on that basis, in effect, that he was content to accept Omni's offer.
>
> 59. In short, I am in no doubt that the consent order represented an agreement, as, indeed, one might have expected, given its title. I do not consider that it can be shown in this case that there was a relevant mistake so as to mean that that agreement was somehow vitiated."

39. The judge recited that in counsel's skeleton argument it was argued that the consent order was vitiated by unilateral or mutual mistake, which the first appellant had not pursued, relying more generally on the public policy which he submitted underlay FSMA 2000. The judge, however, considered the mistake arguments briefly and rejected them. Those arguments were not pursued on the appeal before us.

40. The judge rejected the public policy argument in paragraphs 66 and 67 of his judgment where he said this:

> "66. The difficulty with the public policy argument is, however, this. First, as a matter of principle, I am somewhat doubtful about the public policy argument, given that neither Mr.

> Halstead nor apparently Miss Lacob, as Mr. Halstead explained to me, has been able to identify any authority which states that public policy would lead to the setting aside of a consent order in circumstances such as these. Secondly, I can only accede to it, in my judgment, were I to conclude that the bridging facility was actually unenforceable under the 2000 Act. It is only if I am satisfied about this that public policy falls to be considered at all. It is not sufficient that I conclude that it merely *might* be unenforceable because that would be to interfere, in effect, with the parties' agreement to settle the possession proceedings by entering into the consent order and so not to have any debate concerning enforceability resolved by the court. Any interference, in the circumstances, with the consent order would, as I see it, infringe another public policy, which is the encouragement of agreement settling claims, together with an associated public policy, which is the desirability that there should be finality to proceedings.
>
> 67. The consent order was the compromise of the very dispute, in effect, which Mr. Halstead now suggests he ought to be allowed to re-open, a dispute concerning the enforceability of the bridging facility. This, in circumstances, where, as I have explained, Mr. Halstead was aware of a point concerning 40% occupancy as a dwelling (albeit not, I appreciate and as he has explained, by specific reference to the 2000 Act, as demonstrated by the letter dated 24th November 2015 to which I have referred several times)."

(F) The Appeal

41. On the appeal, the appellants apply for the setting aside of the orders of Picken J dismissing the appeal and ordering the payment of costs. They also apply for an order setting aside the consent order made on 17 February 2015 and/or an order directing a trial of an issue as to whether that order should be set aside.

42. Grounds of appeal were originally drafted by the first appellant and permission to appeal on those grounds was refused, as I have said, by Treacy LJ by his order of 17 May 2016. The original grounds were deleted and new grounds (as settled by Mr Onslow) were substituted pursuant to the permission to appeal order of Gloster LJ.

43. The grounds raise at least two points not previously argued. First, it is said that the consent order itself is unenforceable as infringing the "general prohibition" in FSMA 2000 s.19. Secondly, it is now said that as an alternative to setting aside the consent order, we should return the matter to the County Court for a trial as to whether the order should be set aside.

44. Mr Popplewell resists the attempt to advance these new arguments. First, he says it is simply impermissible to raise the points so late in the proceedings, after the appellants have had numerous opportunities to do so, not only when acting in person, but also when represented (or at least assisted) by counsel. Secondly, as to the second argument, this potentially requires investigation of matters of fact as to occupation of

the Property and its physical configuration which can no longer be satisfactorily resolved five years after the event and when the Property has been sold.

45. Mr Onslow accepts that to succeed on this appeal he must either persuade us to set aside the consent order now or to order a trial of the issue whether the consent order should be set aside. Both those arguments depend upon his submission that the entering into the agreement underlying the consent order on the part of the respondent amounted to "administering a regulated mortgage" for the purposes of Article 61(2) of the 2001 Order. That, of course, assumes that the loan agreement and legal charge themselves amounted to a regulated mortgage or, at least, that there is a triable issue to that effect.

46. In this case, it is clear that at the end of 2014 and the beginning of 2015 there was an issue between the parties as to whether the 2013 arrangements gave rise to a "regulated mortgage", having regard to what the first appellant was contending (in his letter of 25 November 2014) was the appellants' occupation of the entire Property and not just a part of it amounting to less than 40% of the total. In the face of that contention the respondent, while not responding to it expressly, told the appellants, in its solicitors' letter of 13 February 2015, that it would seek a "forthwith" possession order at the hearing on 17 February and offered the 28 day possession order as an alternative, which the appellants accepted.

47. It was not suggested to us that this was not truly a settlement of the proceedings, as Picken J found. However, Mr Onslow's point was that this agreement too was caught, or arguably caught by the FSMA 2000 regime and was, therefore, potentially unenforceable. Assuming that the mortgage transaction itself was a regulated mortgage, the submission depends upon the true construction of the term "administering" a regulated mortgage. Was the respondent's agreement to the consent order "administering" the mortgage? I do not believe that it was.

48. I agree with Mr Popplewell that read alone, "taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower" might include the taking of legal proceedings, if the borrower refuses or neglects to pay. However, it does not seem to me that the making of a compromise of proceedings amounts to a "necessary step". It is never necessary to compromise proceedings; the litigant can always proceed to trial. Further, in my view, the taking of legal proceedings is expressly taken out of the ambit of Article 61(3)(b)(ii) by the words "a person is not to be treated as administering a regulated mortgage contract merely because he…exercises, a right to take action for the purposes of enforcing the contract…". I cannot see how, if the taking of action to enforce the contract is not administering the contract, the compromise of such enforcement action would be an administering of the contract. However, as I say, I agree with Mr Popplewell that the entering into a consent order, in present circumstances, could not be said to have been a "necessary step" in collecting or recovering payments.

49. Mr Onslow sought to persuade us that the only reason that the words of the proviso to Article 61(3)(b)(ii) were included in the Order was to avoid "Special Purpose Vehicles" ("SPVs") and their trustees in securitisation arrangements being caught as "rights holders" in relation to regulated mortgage contracts under an earlier draft of the Order. Mr Onslow took us to the earlier draft and to certain "travaux preparatoires" issued by HM Treasury alluding to such concerns. I have doubts as to

whether any of this material was truly admissible in the process of construction of the Order; it could only be so if the provision was in some way ambiguous. I do not find the words to be ambiguous. Moreover, the wording of the proviso in the final version of the 2001 Order is so far remote from that of the earlier draft that it is impossible to say that the perceived securitisation issue drove the adoption of the wording as finally adopted.

50. Apart from the obvious public interest in enabling the compromise of legal proceedings to which the judge alluded, it seems unlikely that Parliament intended such a compromise to be a criminal offence under FSMA s.23. Yet if Mr Onslow's submission were correct, it would in some cases be effectively impossible for parties to make an agreement to compromise a *bona fide* dispute, in a way which would make the agreement enforceable by the lender and without the lender committing an offence.

51. Assume a case in which, unknown to the lender at the time of the mortgage contract, more than 40% of the land was intended to be used as a dwelling by the borrower, so that the mortgage contract contravened the general prohibition. Suppose that, to avoid having to go court to argue that it is just and equitable in the circumstances of the case to allow the contract to be enforced, the lender enters into a compromise agreement with the borrower. If the making of that agreement was itself treated as part of the regulated activity, it would be unenforceable because of s.26, unless the court was satisfied that it was just and equitable to allow it to be enforced. So the lender would have to go to court anyway to be allowed to enforce the agreement. Moreover, in seeking to rely on s.28(5), the lender would seemingly be in a worse position in trying to enforce the compromise agreement than in trying to enforce the original mortgage contract, as *ex hypothesi* he would now know that he was carrying on a regulated activity when administering the mortgage contract. It would also follow that making the compromise agreement was an offence under s.23, and it is difficult to see how the lender could possibly establish a defence under s.23(3) by showing that he took all reasonable precautions and exercised all due diligence to avoid committing the offence, as his decision to enter into the compromise agreement with the knowledge that he now had would on any view be entirely voluntary.

52. The fact that treating a compromise agreement as an agreement falling within s.26 would have these unreasonable consequences is a further strong reason for rejecting the interpretation of Article 61(3)(b)(ii) contended for by Mr Onslow. I agree with Mr Popplewell's submissions on this point.

53. The appellants' application for the setting aside of the consent order invoked the court's discretion under CPR 3.1(7) and is based upon the premise that the consent order was a "specified kind of activity" because the mortgage itself was a regulated mortgage contract. However, that was an issue that was compromised by the agreement to the consent order. As the respondent argues, the application is premised upon a contention that if the appellants had not compromised the case but had fought it instead, they would have succeeded on that issue. That strikes me as an unattractive approach to the exercise of a discretion in the appellants' favour.

54. Mr Popplewell directed us to this court's decision in *Dickinson & anor. v Acorn Finance Ltd.* [2016] EWCA Civ 1194. The case seems to me to be helpful in resolving the present appeal.

55. In the *Dickinson* case, after defended possession proceedings begun in September 2011, a suspended possession order was made in October 2011. There was an application to set aside the order on the basis of an alleged sub-charge which was said to prevent the lender exercising its rights under the mortgage. After a number of hearings, on 19 July 2013 the application was dismissed by the District Judge who permitted the issue of a possession warrant. An appeal to the Circuit Judge was dismissed on 30 September 2013, but with an order that the possession warrant was not to issue before 28 October 2013. The warrant was then issued for an eviction on 1 November.

56. On 29 October, the borrowers issued new proceedings, contending that the mortgage was unenforceable by virtue of s.26 of FSMA 2000. The lender applied to have the proceedings struck out on the grounds of cause of action and issue estoppel and abuse of process. A different District Judge struck out the action on the abuse of process ground and his decision was upheld by another Circuit Judge.

57. There was a further appeal to this court. The abuse of process relied upon by the lender was of the type identified in *Henderson v Henderson* (1843) 3 Hare 100, requiring that a litigant should bring forward all his claims in one set of proceedings to avoid the opponent being doubly harassed in litigation. As pointed out by Longmore LJ, giving the lead judgment in the *Dickinson* case, the principle is not immutable and has to be applied in accordance with the dictum of Lord Bingham in *Johnson v Gore Wood & Co.* [2002] AC 1, 31 as follows:

> "There should be a broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

58. It was submitted for the borrowers in the *Dickinson* case that the Act (FSMA 2000) was of such importance that it had virtually to dictate the rejection of the abuse of process argument. Longmore LJ considered the Privy Council case of *Kok Hoong v Leong Cheong Mines Ltd.* [1964] AC 993. There a debtor had suffered a default judgment for payment of hire instalments. In later proceedings he raised defences under the Bills of Sale Ordinance 1960 and the Moneylenders Ordinance 1961 which rendered offending transactions "invalid" or "void". The lenders argued that the defendant's argument was estopped by the default judgment. The Privy Council held that there was no estoppel and also that there could, in any event, be no estoppel against the application of the statute.

59. In *Dickinson*, Longmore LJ said that it seemed, therefore, that issue estoppel could not be set up against statutory provisions enacted for the protection of certain vulnerable categories of person. However, that did not mean that the lender in that case could not rely upon the *Henderson v Henderson* principle which was different from the technical doctrines of cause of action estoppel and issue estoppel: the distinction between transactions rendered illegal and those rendered unenforceable might well be important. Longmore LJ pointed to the court's discretion, under FSMA 2000 s.28(3), to enforce an agreement if it was just and equitable to do so, and to s. 28(7) providing that if a defendant "elects not to perform the agreement", "he must

repay any money received by him under the agreement". This showed, said Longmore LJ, that enforceability depended upon the borrower's election. He continued (at paragraph 20):

> "… Again, there is no blanket unenforceability. If there are circumstances in which the agreement can be enforced, it cannot be said that the application of the *Henderson* principle means that the court is enforcing an unenforceable agreement."

He found that FSMA 2000 was not, therefore, "a trump card" nor could it dictate the result of the abuse of process application in that case.

60. Similarly, in my view, the Act cannot dictate the conclusion as to the exercise of the court's discretion in the present case. The point as to the agreement leading to the consent order being caught by FSMA 2000 was not taken before either Judge Lamb or before Picken J. I have summarised the judgment of Picken J. Judge Lamb largely decided the application on the basis that the appellants could not go behind their statement in the special conditions that they did not, nor did they intend to, occupy the Property as a dwelling, relying on the decision of Norris J in the *Waterside Finance* case.

61. Neither party approached this appeal on the basis that the question for this court was whether the judge/judges below had erred in principle in the exercise of his/their discretion. This is perhaps not surprising in view of the shifting arguments raised by the appellants at the various stages of the proceedings.

62. In my judgment, however, it cannot have been wrong for either judge to refuse to set aside this consent order. This was a case where the appellants chose not to contest the issue that they themselves had raised in the letter of 25 November 2014 and entered willingly into an agreement for the consent order because, as the first appellant said, he was confident that the loan would be repaid by new finance by 17 March 2015. It seems to me to be wrong in principle for them now to seek to argue that at a trial they would have won their point. As Picken J held, in the light of the agreement made, the ability of the court to interfere was limited: see *Community Care North East v Durham CC* [2010] EWHC 959 (QB) and *Weston v Dayman* [2008] 1 BCLC 250.

63. Just as in *Dickinson v Acorn Finance* (supra) the appellants had their opportunity to contest the enforceability of the loan agreement and chose, for their own commercial reasons, not to take it. As Longmore LJ pointed out in that case, there are "degrees of unenforceability". The holding of a party to a consent order to preclude further reliance on a possible argument that a mortgage was a regulated mortgage and that the consent order itself was therefore "administering" a regulated mortgage does not appear to me to be an obvious affront to the public policy of FSMA 2000.

64. Further, the case for the appellants has the additional unattractive feature that it depends upon their representations to the respondent at the time of the transaction, as to their intentions, having been knowingly untrue. In my judgment, the evidence said by the appellants to show that the respondent knew that the statements in the application and in the special conditions were false is tenuous in the extreme. Whatever observations were made in the Savills report and whatever it is said may have been capable of being seen by the respondent's unidentified "representative" or

"asset manager" at the Property, with whom the appellants accept they had no contact, there is no evidence of any substance to suggest that the respondent was not entitled to rely upon the positive representations made by the appellants in the documentation that they would not be occupying the Property as a dwelling.

65. I would also decline to direct a trial of an issue as to whether the entry into the mortgage or the consent order were activities regulated by FSMA 2000. This would involve trial of issues of fact as to the appellants' intentions, the state of knowledge of such intentions on the part of the respondent's employees/officers and as to the state of the Property (now sold), now already over 5 years after the relevant events. Such a trial, only ventilated for the first time on this appeal, would be a highly unsatisfactory exercise.

66. I can find no error in the refusal of Judge Lamb and Picken J to set aside the consent order and, in my judgment, they were correct not to do so.

67. I would, therefore, dismiss this appeal.

Lord Justice Lindblom:

68. I agree.

Lord Justice Leggatt:

69. I also agree.