IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
APPEALS (ChD)
On appeal from the County Court at Central London
HHJ Wulwik – Order of 30 July 2018
[2019] EWHC 278 (Ch)

Appeal Ref: CH-2018-000222

Rolls Building

Wednesday, 16 January 2019

Before:

MR JUSTICE NUGEE

B E T W E E N :

GREENLANDS TRADING LTD & Anor — Claimants/Respondents

- and -

GIROLAMA PONTEARSO — Defendant/Appellant

Mr Julian Gun Cuninghame (of Counsel) appeared on behalf of the Appellant.

Mr Jonathan Lewis (of Counsel) appeared on behalf of the Respondents.

J U D G M E N T

MR JUSTICE NUGEE:

1 This is an appeal to the High Court against a decision of HHJ Wulwik, sitting in the County Court at Central London, dated 30 July 2018. The claimants brought a claim for possession of a property at 12 Lexden Road, London W3 9NZ (which I will refer to as "the residential property" or as "Lexden Road") on the basis of a second mortgage which the two claimant companies jointly held over the residential property.

2 By his order of 30 July, HHJ Wulwik granted the claimants possession and gave them a money judgment against the defendant, Ms Girolama Pontearso, in the sum of £296,448.79. The substantive question on the appeal, in which Ms Pontearso has been represented by Mr Julian Gun Cuninghame, is whether the judge had wrongly failed in certain respects to characterise the claimants' mortgage as giving rise to an unfair relationship under the powers contained in s.140A of the Consumer Credit Act 1974.

3 That section applies to mortgages which are not regulated mortgages, and it is common ground between the parties that the mortgage in question has never been a regulated mortgage. I was told by Mr Gun Cuninghame that until a directive called the Mortgage Credit Directive (which came into force in March 2016), regulated mortgages were confined to mortgages which were first charges on residential property where the property was at least 40% owner occupied, and that the regulation of mortgages was not extended to second mortgages until the Mortgage Credit Directive. I will have to look at the terms of s.140A in due course.

4 Permission to appeal was granted by Arnold J on 24 October 2018.

5 The background facts can be relatively shortly stated. Ms Pontearso is the registered proprietor of the residential property which is a freehold property. It is subject to a first mortgage in favour of the Bank of Scotland (trading as Halifax), and the judge found that at the date of the judgment, the amount outstanding on the mortgage was £250,000, the property then being said to be valued at £750,000.

6 She had bought it in 2007, and I was told by Mr Gun Cuninghame that she did so under the Right to Buy local authority properties.

7 She also owned two other properties, one (which I will call "the commercial property" or "Churchfield Road") is a freehold property at 76 Churchfield Road, Acton, London W3. She had previously been the lessee of the property and ran a pet shop on the ground floor.

8 In 2001 she bought the freehold of the property. She converted it to create various other spaces, including flats, and it is now let out for a Greek café on the ground floor and a number of flats elsewhere in the property.

9 At the time of his judgment, HHJ Wulwik said that Churchfield Road was said to be valued also at £750,000 and be subject to a first mortgage from InterBay, then of £230,000.

10 The third property which the defendant owns (which I will call "the maisonette") is a maisonette at 47 Kennington Road London W7 which was bought as a buy-to-let property. It is rented out. It was said before the judge to be worth about £300,000 and to be subject to a mortgage of £155,000 to £160,000.

11 In December 2014 the defendant came to an arrangement with a Mr Issa Eleker who was a builder who had done some work for her. He was in financial difficulties and owed mortgage arrears and was facing repossession. She agreed to purchase 50% of his property, which was in Wembley, for the sum of £270,000, the intention being that part of the money would be used to discharge his mortgage arrears and part would be used by him to acquire an old post office in Yorkshire which he was going to develop into an hotel. Ms Pontearso, as well as acquiring a 50% interest in the Wembley property for her £270,000, was also going to share in some unspecified way in the post office venture in Yorkshire. In order to come up with the £270,000 she needed to raise the money from her properties.

12 She initially tried to raise money on the residential property but, because she no longer had the pet shop as I understand it, that plan fell through as her existing lender was not interested in extending the mortgage on the residential property for that purpose. So she met a broker who told her that they only arranged commercial mortgages, and that it would take three to four months to complete such a commercial mortgage on the commercial property.

13 Mr Blood of the broker (a firm called "Genie Lending Limited") nevertheless told the defendant that she could raise £100,000 at short notice by way of a six month bridging loan against the residential property. That was in the event what she did, the intention being at the time of taking out "the first bridging loan" (as I will call it) that she would use the six months to re-mortgage the commercial property and so be in a position to repay the first bridging loan.

14 The loan was in the sum of £132,000. It was for a fixed period of six months. It was granted on 19 February 2015 which meant it matured on 19 August 2015, and it was subject to an interest rate of 1.35% per month with a default rate of 3% per month. She did not receive the whole of the £132,000 because there were various fees and charges and costs to be met, and the net sum she received was some £112,000.

15 I have seen a receipt in which Mr Eleker acknowledges receipt of the sum of £100,000, refers to the fact that a further £170,000 was to be paid in due course, and provides that in the event of his death those sums were to be repaid from the eventual proceeds of sale of the Wembley property.

16 Unfortunately, by the time it came to 19 August 2015 the defendant had not re-mortgaged the commercial property and was not in a position to pay off the first bridging loan. Matters were not made any easier for her by the fact that her father died in August 2015 at just about the time that the loan matured. She had had some offers of loans, which I will have to look at in more detail in due course, but they were not acceptable to her.

17 The lender under the first bridging loan (called "Fourth Bridgefast Partnership") was represented by a finance broker called "Bridgefast Finance Limited". On 8 August 2015 Ms Pontearso asked Bridgefast Finance for a one month extension, saying that she was at that moment in the process of obtaining the commercial loan on the commercial property and asking for an extension so she could finalise the deal she had at the moment. The lender was not however willing to do that.

18 However, around the beginning of September 2015 a representative of Bridgefast Finance telephoned Ms Pontearso to offer her a further six months' bridging loan in the sum of £160,000. That would have the advantage that instead of paying the default rate of 3% which was currently payable under the first bridging loan, a new six month loan would be entered into at a rate of 1.45%, again with a default rate of 3% a month if she defaulted.

19 Mr Gun Cuninghame, who has done some calculations, demonstrated – and it was accepted by Mr Lewis, who appears for the respondents, demonstrated correctly – that in actual fact most of the advantage of the lower interest rate would be absorbed by the extra fees and charges and costs in taking out the second bridging loan and that if, as in the event has happened, she did not repay on the maturity of the second bridging loan, she would be worse off than if she had stuck with the first one. As I say that is not disputed. Nevertheless, the offer was made to her to re-finance the first bridging loan with a second loan of £160,000 which is the loan in question which in fact came not from the same lender but from two different lenders in the same stable, who are the respondents and were the claimants in this action, Greenlands Trading Limited and Wargrave Trading Limited. The terms were, again, a loan for six months fixed. The loan was taken out on 24 September 2015 and matured on 24 March 2016. The interest rate, as I have said, was 1.45% per month, rising to 3% a month in the event of default, and the loan provided for a number of other fees and charges.

20 Ms Pontearso did not want to instruct a solicitor, but Bridgefast Finance advised her that she should, and she did consult a solicitor, Mr Curtis-Raleigh of Sayer Moore, and on 11 September he wrote to the defendant with advice on the re-mortgage and he drew attention, among other things, to the fact that:

> "you must carefully consider and calculate your repayment strategy both in terms of the monthly interest and the capital repayments at the end of each loan term"

and that:

> "The interest on the Loan is at a rate of 1.45% per month - 17.4% per annum, which is much higher than for a normal residential mortgage"

and, at para.4.3 of his letter, the following:

> "If you do not pay any sum to the lender on the due date you have to pay an administration fee of £1,995 (the Default Administration Fee), and in addition interest shall immediately accrue on the overdue amount (including any interest) at a rate of 3% per month (equivalent to £4,800 a month on the principal amount of £160,000)".

21 In the event Ms Pontearso went ahead with that second bridging loan on the residential property on 24 September 2015 as I have already referred to.

22 She was not able to repay it on its maturity on 24 March 2016 and on 16 September 2016 the claimants issued the claim form in this action seeking possession and a money judgment.

23 The judge's judgment sets out the background facts in some detail (and no criticism has been advanced before me in relation to his recital of the facts) and then sets out the relevant law, namely the Consumer Credit Act 1974. Again, no criticism has been made before me of his statement of the law, and indeed, subject to one point, there is no dispute between the parties as to the law.

24 The one point on which there is some dispute is one that I will come to in due course, but even there by the end of the argument it did not seem to me that there was really very much between counsel.

25 I should at this stage refer to the statutory provisions. Section 140A of the Consumer Credit Act 1974 reads as follows:

Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

I need not read the rest of the section, just noting that section 140A(5) expressly excludes regulated mortgages. But, as I have already said, this mortgage, it is common ground, was not a regulated mortgage.

26 Section 140B then sets out the powers of the court in relation to unfair relationships as follows:

Powers of court in relation to unfair relationships

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

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

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

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement…

I need not read the rest of sub-section (1).

(2) An order under this section may be made in connection with a credit agreement only—

(a) on an application made by the debtor or by a surety;

(b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement ….

And then I need not read the rest of that sub-section.

27 The leading case on these provisions is now the decision of the Supreme Court in *Plevin v Paragon Personal Finance* [2014] UKSC 61 in which the judgment was given by Lord Sumption, and HHJ Wulwik in his judgment referred to two paragraphs in particular which were the paragraphs to which my attention was also drawn, namely [10] and [17]. They read as follows:

> "10 Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone".
>
> "17 The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB Rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB Rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB Rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB Rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor

> relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB Rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB Rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters".

28 Having referred to that case and some other law, HHJ Wulwik turned to the particular allegations of unfairness which had been pleaded on behalf of the defendant.

29 The first one was the interest rate of 3% per month and the default fee of £1,995 which were said to be a penalty because they imposed a detriment on the defendant out of all proportion to any legitimate interest of the claimants in the enforcement of repayment of a second bridging loan within its term. He dealt with this as follows. He first referred to the evidence in the following terms:

> "60 Mr Darren Adams, a director of Bridgefast Finance Limited, a finance broker acting for the first lender Fourth Bridgefast Partnership and the second lender the claimants, gave evidence that the interest rate was determined by the average rate in the industry and was an attempt to be competitive. According to Mr Adams, the default interest rate of 3% per month followed the industry standard set by their peer lenders. The default rate was primarily there as a deterrent but also went towards covering costs if the borrower defaulted. The majority of the 3% rate went to the investor. There was a substantial risk of the equity and the security being eroded in the event of default.
>
> 61 Mr Jonathan Gain, a director of the claimants, gave evidence that the 3% default rate was partly a deterrent but also to reflect a change in the risk of the lender if the borrower defaulted. The lender's cashflow was affected by a default and his ability to reinvest.
>
> 62 There was no expert evidence dealing with the default interest rate of 3% per month, or the default administration fee of £1,995".

30 He then at [63] referred to a case called *Chubb and Bruce v Dean & Anor* [2013] EWHC 1282 (Ch), which I will have to come back to, and at [64] gave his conclusion on this aspect of the case as follows:

> "I accept on the evidence before me that the default interest rate of 3% per month followed the industry standard and, while high, was not penal or unfair. However, there was no attempt to justify the default administration fee of £1,995. That appears to me to have been both penal and unfair, imposing a detriment on the borrower out of all proportion to any legitimate interest of the claimants. The claimants were protected by the costs provisions in the loan agreement".

31 He then deals with a number of other pleaded points and continued as follows:

> "67 Paragraph 14(3) of the amended defence alleges that:
>
> "The Claimants failed to make any, or any adequate, assessment to satisfy themselves that the Defendant was able to repay the second bridging loan within its term of six months, thereby making it inevitable that the defendant would pay the default rate of interest of 3% per month and the default fee of £1,995".
>
> 68 The Defendant, in taking out the first bridging loan, had stated 'Re-mortgage of other commercial property in progress'. She reiterated in her letter to Mr Adams of Bridgefast Finance Limited dated 8 August 2015 that she was in the process of obtaining a commercial loan on her property in Churchfield Road. The defendant had the possibility of re-mortgaging or taking further loan on her residential property or her commercial property. There was, on the face of it, an exit strategy for the defendant. It was not inevitable the defendant would default on the second bridging loan.
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> 69 Paragraph 14(4) of the amended defence alleges that:
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> "Any assessment of affordability of the first bridging loan and/or second bridging loan to the Defendant was based not on the Defendant's ability to repay the second bridging loan within six months, but on the equity in 12 Lexden Road with a view to the claimants obtaining a possession order against the defendant in respect of 12 Lexden Road and enforcing it, whereby the defendant, her husband, son and grandson would lose their home.
>
> 70 Mr Adams accepted that the claimants were asset backed lenders and did not concern themselves too much with credit rating or income. As Mr Gain put it in his evidence, the equity in the property was the backstop. However, as he said, there was a clear re-finance option being pursued by the defendant. Had the defendant re-financed, there would have been no necessity for possession proceedings.
>
> 71 Paragraph 14(5) of the amended defence alleges that:
>
> "There was no strategy for repaying the first bridging loan and/or second bridging loan other than by obtaining and enforcing possession of 12 Lexden Road".
>
> 72 The defendant had a strategy for repaying the first bridging loan and the second bridging loan. The strategy had been the re-mortgage of the defendant's commercial property. The defendant had the possibility of re-mortgaging or taking a further loan on her residential property, or her commercial property".

32 And then he concluded that the only aspect of the relationship between the claimants and defendant which he found was unfair was the imposition of a default administration fee of 1995, and he therefore altered the terms of the second bridging loan by discharging the liability to pay that fee. But, subject to that, he made no other alteration to the terms and made an order for possession.

33 That order is the order under appeal, and was stayed pending this appeal, again by Arnold J, on 30 August 2018.

34 I should add that there had been another issue which the judge had to deal with which was a factual issue as to whether the mortgage for the second bridging loan had been signed by the defendant, but the judge resolved that against the defendant and no appeal was brought in relation to that and I need say no more about it.

35 Mr Gun Cuninghame has put forward seven grounds of appeal. The first is really as he describes it, "an over-arching ground". It is that the judge was wrong to find that the relationship was not unfair to the appellant (apart from the default fee of £1,995). He accepted that that was dependent on the remaining grounds, or some of them, being made out.

36 The second ground concerns the 3% default rate interest and is as follows:

> "That the learned judge was wrong to accept the evidence of Darren Adams and Jonathan Gain, witnesses called on behalf of the Respondents, that a default rate of 3% per month was standard in the bridging loan market, when it was self-serving evidence because Mr Adams was a director of Bridgefast Finance Ltd, an agent of the Respondents, and Mr Gain was a director of the Respondents, it was unsupported by any other evidence and by any disclosure by the Respondents".

37 As a matter of fact, I was told that what happened was that although the defendant had in her Defence referred to the 3% default rate as penal, and although that was put in issue in general terms by the Reply, there had been no specific plea by the claimants in the Reply seeking to justify the 3% default rate. No attempt was made by either party to suggest that expert evidence would be required at the trial. Nothing was said in the witness statements served on behalf of the claimants seeking to justify the 3% default rate. But when Mr Adams was called to give evidence, Mr Lewis, who appeared for the claimants at the trial, sought, and was granted, the opportunity to ask some supplemental questions of Mr Adams in chief, and asked him some questions which elicited the answers referred to by the judge in the paragraph which I read at [60] from his judgment to the effect that the interest rate was determined by the average rate in the industry and was an attempt to be competitive and follow the industry standard set by their peer leaders – as well as the fact that it was primarily intended as a deterrent but also went towards covering costs if the borrower defaulted.

38 Mr Gun Cuninghame did not seek to stop Mr Lewis from asking questions in chief, although he told me that after it had gone on for some while he did object that it had been going on too long. He also told me that he thought that he did cross-examine Mr Adams on this point. Although I have a transcript of most of the hearing below, for some unexplained reason the transcript does not in fact cover Mr Adams' evidence, and Mr Gains' evidence, which *is* dealt with in the transcript, was taken much more shortly. But, again, Mr Gains was asked some supplemental questions in chief by Mr Lewis, that being allowed by the judge.

39 It seems to me that there are three separate questions on analysis which arise on this aspect of the appeal. The first is whether the judge should have permitted Mr Adams and Mr Gains to give supplemental answers in chief. With hindsight it can be seen that the result of that was that evidence was adduced which was not formal expert evidence (as the judge accepted, there was no expert evidence); which went to a point which, although technically in issue on the pleadings, had not been flagged up on the pleadings; and which left the defendant in some difficulty in that she had no evidence of her own to counter it with, no

opportunity of adducing expert evidence and in circumstances where, as Mr Gun Cuninghame said, it was not realistic in a case like this for her to seek an adjournment.

40 Nonetheless, it does seem to me that the judge was entitled to make what was in effect a case management decision to allow the evidence to be adduced and, as I have said, there was in fact no objection to it being adduced at the time. The judge undoubtedly should have taken into account in deciding what weight to give to that evidence the rather belated and unchallenged way in which it came out, but I do not think that I can now say that his decision to allow the witnesses to supplement their witness statements by answers given in chief was one that was outside the generous ambit of the discretion given to him. Case management decisions, as is well known, are difficult to criticise on appeal. It is for a trial judge to manage his or her trial as he or she thinks fit. So, so far as that aspect is concerned, therefore, I do not think there is any sustainable criticism of the judge for allowing the evidence to be called.

41 The second question is whether, that evidence having been called, the judge was entitled to reach the conclusion he did, namely that, as I read from [64] of his judgment, he accepted on the evidence before him that the default interest rate of 3% per month followed the industry standard. That is a finding of primary fact based on the evidence of Mr Adams and Mr Gains.

42 Mr Lewis drew my attention to some recent statements of the well-known difficulties of an appellate court disturbing findings of fact by the trial judge. They are found in *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 in the judgment of Hamblen LJ at [29] to [31], and in an earlier decision of the Court of Appeal, *Cook v Thomas* [2010] EWCA Civ 227, at [48]. It is not necessary for me to read into this judgment the entirety of those passages, but I have read them and they enunciate principles that are very familiar, and indeed there is also well-known authority that the disadvantages which an appellate court has in reversing a decision on questions of primary fact by a trial judge who has seen live evidence are very difficult to overcome, and indeed I believe it has been said that the court should not do it unless satisfied that the judge was plainly wrong. The particular principles which Mr Lewis drew from those two cases were:

(1) that the question is whether the decision under appeal is one that no reasonable judge could have reached, and that interference can only be justified where a critical finding of fact is unsupported by the evidence and where the decision is one which no reasonable judge could have reached (see *Haringey v Ahmed* at [30], [31]); and

(2) that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue. It is not irrelevant that in this case the judge made positive findings as to credibility of the witnesses, saying (at [8]) that he found the claimant's witnesses entirely credible and honest.

It does seem to me that despite the way in which the evidence came out at the last moment, despite the fact that it was inevitably self-serving evidence and not objective expert evidence, and despite the fact that the defendant was undoubtedly at some disadvantage in having this last minute evidence sprung upon her, it is impossible, loyally following the guidance from the Court of Appeal as to the circumstances in which an appellate court can overturn a finding of primary fact, for me to say that the judge was plainly wrong, or reached a decision that no judge could properly reach, or that he had no evidence to support his conclusion that the default interest rate followed the industry standard. In those circumstances, it does seem to me that the submission by Mr Gun Cuninghame that HHJ

Wulwik should have rejected this evidence is one that I cannot accept.

43 There does seem to me to be a third aspect of this question, which is once the judge has found the primary facts, whether he was justified in reaching the conclusion that the rate was not penal or unfair. That is not a finding of primary fact, but it is what I regard as an evaluation – what Lord Sumption said in the *Plevin* case at [17] involved a large element of forensic judgment – and, again, I do not think it is possible for me to interfere with the conclusion, based on his finding of primary fact that the rate of 3% per month followed the industry standard, that that was not unfair. Indeed, I do not understand Mr Gun Cuninghame to put that forward as a separate ground but it is, in any event, well established that not only in relation to findings of primary fact, but in relation to evaluation of the evidence and reaching conclusions which involve evaluation of the evidence, an appellate court should be slow to interfere with the decision of a trial judge; and I do not think the current circumstances are such as to justify interfering with the conclusion that the rate of 3% was not unfair. I say that on the basis of ground 2 alone. There is, as I will come to, a separate ground in grounds 4 and 5 relating to the reliance, or lack of it, that the judge placed on *Chubb v Dean*, which actually goes to the same point, which I will come to next. But, simply looking at the question whether the evidence before him justified both his primary conclusion and his evaluative judgment, it does not seem to me for the reasons I have sought to express that I am in a position, sitting as an appellate court, to reverse the decision of the trial judge on those issues.

44 I come then next to the *Chubb v Dean* points, and these are in fact put forward as two separate grounds of appeal but really form a single ground of appeal, and that is as follows. First, ground 4:

> "The learned judge attached too much weight to *Chubb v Dean* as a decision of general application as to the level of a default rate of interest in short term bridging loans that would give rise to an unfair relationship under section 140A of the Act when the proper test was to consider all the facts in the case and decide whether the relationship as a whole (not particular aspects of the relationship) was unfair".

And ground 5:

> "The learned judge failed to take into account that the judge in *Chubb v Dean* had determined the issue of an unfair relationship wrongly by reference to the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations") and *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 which was a decision under the 1999 Regulations".

45 This needs a little bit of explanation, but I should first refer to what the judgment actually says. Having referred to the evidence, as I read earlier at [60] to [62], and before coming to his conclusion (at [64]) the judge says this at [63]:

> "In *Chubb and Bruce v Dean and Another* [2013] EWHC 1282 (Ch) HHJ Cooke sitting as a High Court Judge was dealing with a short-term bridging loan where the interest rate was 1.85% a month compounded on a monthly basis, and what was described as a facility fee of 1.25% per month which was waived if the loan was repaid in full by a set date. The defendant argued that the facility fee amounted to additional interest and that the fee either in itself or in combination with the contractual interest made the relationship between the parties unfair At paragraph 26 of the judgment, Judge Cooke stated:

> "The rate of interest, whether one adds the facility [fee] to it or not, is high. It is not however, it seems to me, even in combination so high that it would lead the court to the conclusion that the relationship between the two parties to such an agreement was unfair even if the consumer was fully aware of all the terms that he was entering into. There may, of course, be such cases but it seems to me that that would require a very much higher interest rate than even the combination of these two amounts gives rise to in this case. What the defendants signed up to was a stiff commercial bargain, no doubt but it was not in my judgment an unfair one and the relationship that it created was not unfair by virtue of those terms".

That is immediately followed by [64] which I read earlier, starting off:

> "I accept on the evidence before me that the default interest rate of 3% per month followed the industry standard and, while high, was not penal or unfair".

46 Mr Gun Cuninghame's point is this: that when one reads the judgment the placing of that paragraph ([63]) with its reference to *Chubb v Dean* and citation from HHJ Cooke's judgment, coming just before the conclusion that the 3% per month followed the industry standard and was not penal or unfair, leads one to suspect that it formed part of the grounds for HHJ Wulwik's decision that the 3% rate did not contribute to the unfair relationship, and Mr Gun Cuninghame says that the problem with *Chubb v Dean* is that although it was a decision under s.140A of the Consumer Credit Act 1974, it is a decision which pre-dates the decision of the Supreme Court in *Plevin*, and therefore mis-dates the relevant test. What HHJ Cooke did in *Chubb v Dean*, not having the guidance of the Supreme Court in *Plevin*, was to refer to the *First National Bank* case (the reference to which I gave earlier) which was not a decision, as HHJ Cooke was well aware, on the 1974 Act, but was a decision on the Unfair Terms in Consumer Contracts Regulations 1999. He cited from the judgment of Lord Bingham in the *First National Bank* case, who said this at [17]:

> "A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith.
>
> (…)
>
> The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations".

47 Having cited that passage from the *First National Bank* case, HHJ Cooke goes on to say (at [25]):

> "Now, the regulations there were the Unfair Terms [in] Consumer Contracts Regulations but it seems to me that those words are equally applicable to the

determination of whether there is an unfair relationship for the purposes of the Consumer Credit Act".

Mr Gun Cuninghame says that that can now be seen to be wrong, because the exercise which Lord Sumption indicates should be undertaken in a Consumer Credit Act case is rather different from the exercise that Lord Bingham is referring to in the 1999 Regulations type of case – and that that therefore undermines any reliance that the judge placed on *Chubb v Dean*. It should not have informed any part of his judgment on this issue.

48 He indeed told me that he was the one who brought *Chubb v Dean* to the attention of HHJ Wulwik and that he did so because it had been relied on by a lender in another case and he wished to guard against the possibility of too much reliance being put on it. And indeed it is apparent from the transcript that he did make this point to HHJ Wulwik as follows:

> "MR GUN CUNINGHAME: … that [that is *Chubb v Dean*] was decided before *Plevin*, and even at that stage the Court of Appeal had got unfair relationships wrong because they were going on the regulatory being the touchstone for unfair relationship, so in my submission you have to be very careful about a pre-*Plevin* judgment before Lord Sumption's explanation of the breadth of the unfair relationship test, when HHJ Cooke was looking at it from a different perspective. He was saying the unfair relationship test is like the test for fairness in the Unfair Terms in Contracts Regulations. You can see the Contracts Regulations which is all about transparency of the terms.
>
> JUDGE WULWIK: Yes.
>
> MR GUN CUNINGHAME: So, in my submission, whilst obviously I brought that to your attention because it's clearly a relevant decision, in my submission you have to be careful with it because it's not, it's a pre-*Plevin* decision based on different facts.
>
> JUDGE WULWIK: Yes. I follow what you say."

And then Mr Lewis said that Mr Gun Cuninghame had quite rightly pointed out that the judge was deciding *Chubb v Dean* pre-*Plevin*, but referred to the fact that the combined rate in that case was 3.1% which is very much aligned with what Mr Adams said, that the default rate is around 3%.

49 I accept that it is now apparent that the exercise of determining whether a relationship is unfair for the purposes of s.140A of the Consumer Credit Act 1974 is not identical to the exercise of determining whether a term is unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999, and that to some extent one can see that in the breadth of the considerations which Lord Sumption identifies in *Plevin* as being relevant to the question, compared to the specific list of matters which Lord Bingham had referred to in the *First National Bank* case. Indeed, the very exercise is a different exercise in that, as Lord Sumption emphasises, the question is whether the relationship is unfair rather than whether any particular term is, and in that it goes much wider than any specific term, as is illustrated by the fact that s.140A(1) refers to three matters which can make the relationship unfair, only one of which is the terms of the agreement, the others being "(b) the way in which the creditor has exercised or enforced any of his rights…" and "(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement …)", whereas the 1999 Regulations are specifically focused on individual terms

and indeed contain in Regulation 5(1) a specific test of what makes a contractual term unfair as follows:

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

50 It is of course the case that the test now to be applied, and that can now be seen is the test to be applied, is that to be derived from the judgment of Lord Sumption in *Plevin* rather than, as HHJ Cooke turned to guidance for, that of Lord Bingham in *First National Bank*. Nevertheless, although I accept that entirely, and although I accept that there may be many things which make a relationship unfair for the purposes of s.140A of the Consumer Credit Act 1974 which would not meet the test in Regulation 5 of the Unfair Terms in Consumer Contracts Regulations, it does not seem to me that that is necessarily conclusive of the question whether the judge went wrong in the instant case.

51 There are two reasons for that. Firstly, it is not at all apparent to me from the way in which the judge structures his judgment that he placed any particular reliance on *Chubb v Dean* at all. It is no doubt a matter of fair comment that if he was not going to place any reliance on *Chubb v Dean*, it is not immediately apparent why he referred to it at all. But it is possible, as Mr Lewis suggested, that the reason he was referring to it was as an illustration of the fact that in another case – admittedly only one other case – a default rate of 3.1% had been found, although high, to be the default rate, thereby illustrating that Mr Adams' evidence that 3% as a matter of fact followed the industry standard was to some extent supported by that.

52 But, even if he went further than that and did in fact, although without saying so expressly, treat HHJ Cooke's decision in that case as some support for his conclusion that the rate was not penal or unfair, it does not seem to me that that is to be regarded as having been an impermissible part of his judicial thinking. It is well established that judgments are not to be construed by appellate courts too harshly, particularly if they have been given either immediately or in short order – in this case HHJ Wulwik took the third day of the trial to write his judgment, and it so was delivered quite quickly after the hearing. And, as is set out in **The White Book** at §52.21.5 at p.1859:

> "Reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account."

And there is then reference to *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 per Lord Hoffman.

53 In the present case it can be seen from the transcript that the point that this was a pre-*Plevin* case was not only identified by Mr Gun Cuninghame but accepted by Mr Lewis and that the judge appears to have taken that on board because he said, "Yes. I follow what you say." In those circumstances it seems to me that even if he placed some reliance on it, one should assume in accordance with the guidance in *Piglowska v Piglowski* that the judge knew what he was doing, which is that he was not slavishly following a previous decision on different facts as if it bound him to reach the conclusion that the 3% was not unfair, but was at most looking to it for some support for the conclusion that he reached for the reasons he actually said, which was that the default interest rate followed the industry standard.

54 And I would add this, that although the tests, as I have set out, are I accept different, when one looks at the factors which HHJ Cooke in fact relied on in *Chubb v Dean* for his conclusion that the relationship was not unfair in that case, they are as follows (at [26]):

> "[The rate was] clear on the face of the documents. It cannot be said to be buried in small print. It is there to be seen on the face of the documents in very legible print … The defendants were legally advised. [The borrower] Mr Dean is himself a lawyer... He and his wife are clearly intelligent consumers and able both to read and understand the documents themselves and to absorb the effect of the advice that they were given. They, therefore, must be taken to have known the bargain that they made and it seems to me they cannot say, and have not sought to say, that they were in any way misled by the documentation or did not understand what they were signing up for".

And then he continued with the passage which I have already referred which HHJ Wulwik cited in his judgment, leading to the conclusion that:

> "What the defendants signed up to was a stiff commercial bargain no doubt but it was not, in my judgment, an unfair one, and the relationship that it created was not unfair by virtue of those terms".

55 Those sort of considerations – the fact that the rate was clear and not buried in small print, that the borrowers knew what they were doing and were legally advised, that they were intelligent consumers and not misled – seem to me to be precisely the sort of considerations which were likely among other things to be relevant to the assessment of whether a relationship is unfair by virtue of a particular term and to have foreshadowed in advance, as it were the list of matters which Lord Sumption specifically refers to at [17] of *Plevin*:

> "… the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was and should have been aware of these matters".

56 In this case too, the judge found as facts – and it has not been suggested that he was wrong to do so – not only that the defendant was legally advised (and I referred earlier to the specific advice drawing attention to the £4,800 that would be payable if she defaulted), but also that (this is from [9]):

> "She appears to know her own mind and is certainly not naïve when it comes to lending and mortgages, albeit that she may not have taken out a bridging loan before these two bridging loans. She knew that they were short term loans which had to be repaid."

And, again (at [21]) he found that the defendant told her solicitor that she was a businesswoman, and that although he explained it was a bridging loan and was risky "she was very keen to get the loan"; that she had significant property assets; and that "on her own evidence" (this is at [66]) "she knew that the interest rate and other charges were high" and she "was experienced in mortgaging properties to raise funds and appears to have had some knowledge of the lending industry, changing mortgage providers for a better interest rate. She has a number of properties and was certainly not naïve or unsophisticated."

57 In those circumstances, it does seem to me that even if – which is not in fact clear from the judgment – HHJ Wulwik was looking to the decision of HHJ Cooke in *Chubb v Dean* as

providing support for his conclusion that the 3% rate was not penal or unfair, it was not in the circumstances of this case impossible for him to find some support for his conclusion in a case which in certain respects was analogous, and the fact that HHJ Cooke had placed reliance on what Lord Bingham had said in the *First National Bank* case does not undermine the cogency of the conclusion that HHJ Cooke came to on the application of the test in s.140A of the Consumer Credit Act 1974.

58 That deals with grounds 4 and 5 which, as I say, all go – together with ground 2 – to question the 3% rate. It does not seem to me that it is open to me, sitting as an appellate court, to reverse the conclusion of HHJ Wulwik at [64] that the default rate of 3% a month was not penal or unfair.

59 That leaves as a separate ground, ground 3, which is as follows:

> "The learned judge was wrong to find that the appellant had a workable exit strategy from the loan of £160,000".

60 Mr Gun Cuninghame pointed to the fact that by the time, in September 2015, the defendant took on the second bridging loan, she had already failed to re-finance the first bridging loan of £132,000 over the period of six months, or in fact by then seven months, since it was taken out. She was now taking on a liability for a larger amount of £160,000 and he suggested there was no real possibility, looking at the matter objectively, of her being able to re-finance £160,000 and, as I referred to earlier, as a matter of arithmetic she would be in a financially worse position if at the end of six months she was unable to repay the second loan than if she had just left the first loan to be in default.

61 His submission was that the claimants as prospective lenders should have been assessing the exit strategy that the defendant proposed to rely on and that that therefore was something which can be brought within s.140A(1)(c) namely:

> "any other thing done (or not done) by, or on behalf of, the creditor"

particularly in a case such as the present where the loan is a short term loan and the default rate is a high one.

62 He drew my attention to the fact that Mr Gain in cross-examination said that they will only go into these loans with an agreed exit strategy, although it is fair to say that his answer continued:

> "So our focus is that there – Ms Pontearso, as you pointed out to Mr Adams, had asked for more time. We ended up accommodating that and gave her even more time to conclude the appropriate exit strategy. So we think we were very fair in not pursuing the default and coming to terms for a further six months to give her more time to execute her disposal re-finance strategy. That was a very fair thing to do".

63 Mr Lewis pointed to the judge's findings of fact that in fact it was not the case that there were no offers made to the defendant at all. At [26] of his judgment HHJ Wulwik referred to an offer from a lender called, "Cambridge and Counties Bank", who had offered to lend £360,000 if one of the defendant's children provided a guarantee, the judge saying that a re-mortgage of 76 Churchfield Road should have been sufficient to pay off the bridging loan on 12 Lexden Road. And then in July 2015 there was a private lender who offered a loan of £338,000 which the judge said would have been enough to pay off the existing mortgage on

76 Churchfield Road and the bridging loan on 12 Lexden Road but not to buy a 50% share in Mr Eleker's house. It was an interest-only loan for 20 years with a monthly payment of £5,000 which the defendant refused. As Mr Lewis says, those loans were available to her, and it was her choice not to take them up. That may have been a reasonable decision, given that she did not want to ask her daughter to provide a guarantee, and that the interest rate on the second loan was a high one for a 20 year loan. But they do illustrate the fact that there were attempts to find commercial loans available to enable the bridging loan to be paid off.

64 Mr Gun Cuninghame drew my attention to the fact that, although she had written on 8 August asking for a one month extension so as to finalise a commercial loan, shortly afterwards, on 11 August, a Mr Coulson of her brokers, Genie Lending Limited, told Mr Adams of the claimant's brokers that the defendant was adamant that her daughter would not be added as a guarantor and added "so I am back to the drawing board"; he suggested that really there was no objective possibility of her re-financing.

65 What the judge found appears from the passages I have already read: that the defendant had the possibility of re-mortgaging or taking a further loan on her residential property or her commercial property; there was on the face of it an exit strategy for the defendant; it was not inevitable that the defendant would default. He also referred to Mr Gain's evidence that there was a clear re-finance option being pursued by the defendant; and to the defendant's strategy which was the re-mortgage of the defendant's commercial property; and to the defendant having the possibility of re-mortgaging or taking a further loan on her residential property or her commercial property.

66 I do not think that the judge has conflated the first and second bridging loans in the way that Mr Gun Cuninghame suggested. The judge distinguishes between the strategy of the first bridging loan and the second bridging loan at [72], and [68] deals, again, both with the first bridging loan and the position at the time of the second bridging loan.

67 I do not think, sitting as an appellate court, that I am in a position to substitute my own views as to the likelihood in September 2015 of her being able to re-mortgage her commercial property on terms that would enable her to repay the bridging loan. The judge had the advantage of being immersed in the facts of the trial in much more depth than an appellate court ever can. There was a striking phrase in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, cited by Hamblen LJ in *Haringey v Ahmed* at [30], where Lewison LJ says this:

> "In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping".

I do not think that I can properly say that the judge was wrong to conclude that the possibility of either re-financing or taking a further loan on her residential property or her commercial property in September 2015 was so remote and so impossible that the claimant should be regarded as at fault or as acting unfairly in not pointing that out to her. There was no particular reason for them to conclude that the exit strategy was doomed.

68 Quite apart from that, as the judge points out at the beginning of his judgment, she had another property, namely the maisonette, and the combined equity of her three properties was in excess of £1m, and it does not seem to me to be surprising that the claimants took her at face value when she said that she wanted time to organise her re-financing in such a way as to be able to pay off the bridging loan. And, when she had asked for a month, to give her

six months does not seem to me, as Mr Gain said, to be taking unfair advantage of the relationship between them.

69 No doubt if a lender sets out to deliberately trap a borrower into an unequal credit agreement in the expectation that the borrower will default and trigger very high default charges, that could be something that could be characterised as unfair, but that seems, as Mr Lewis says, a very long way from the facts of this case. On the facts of this case the lender in the same stable who granted the first bridging loan did so in the expectation that the defendant would be able to re-finance within the six months because that is what she expected and that is what she told them. As we have seen, there were in fact offers within the six months which would have enabled her to do that, but she was unwilling to proceed with them partly because of their terms, but partly because what she wanted was to raise enough money to proceed with the arrangement she had come to with the builder, Mr Eleker, as appears from answers that she gave in evidence, and it was that which persuaded her to pay the claimants' high interest rates.

70 In those circumstances, when it came to the re-financing and the second bridging loan where she had asked for a month to finalise her re-mortgaging and was granted six months, I think that I have no sufficient material to go behind the judge's conclusion that the proposed exit routes were matters that were realistic possibilities, and that it was not inevitable that the defendant would default, and that she did have a strategy for repaying the second bridging loan.

71 In those circumstances, I do not think that I can reverse the judge's conclusion that in this respect as well the relationship was not unfair.

72 That deals, effectively, with the substantive grounds of appeal. Ground 6 really repeats ground 1 that the learned judge ought to have found on all the evidence that the relationship was unfair, and ground 7 deals with what the judge should have done in exercising his powers under s.140B of the Act had he found the relationship unfair.

73 It follows that I propose to dismiss this appeal.

74 I add one footnote which is on the point which Mr Gun Cuninghame said gave rise to a difference on the law between Mr Lewis and himself. The point is this: one of Mr Lewis's points, articulated at some length in his skeleton argument, is that it would be surprising if the court would conclude that a relationship was unfair because of a term – in this case the 3% default rate – when the borrower herself had not in evidence suggested that she, either at the time or in hindsight, regarded that as unfair.

75 Mr Gun Cuninghame took from that that what Mr Lewis was suggesting was that the assessment of whether the relationship was unfair or not was to be determined among other things by the borrower's own subjective perception of whether it was fair, and he said that that was wrong as a matter of law because the court has to form its own objective assessment on the basis of all the facts and not be trammelled by the subjective perception of the borrower.

76 Put like that, I think Mr Gun Cuninghame is right that the question whether a relationship is unfair is not limited by the perception of the borrower. Some borrowers may not have the insight, even with hindsight, to identify what makes the relationship between them and their lenders unfair, and I agree with Mr Gun Cuninghame that what Lord Sumption refers to is an assessment calling for the exercise of forensic judgement in regard to all the relevant facts, including the standard of commercial conduct reasonably to be expected of a creditor

and the degree of sophistication or vulnerability of the borrower. It cannot be the case that the more vulnerable the borrower and the less the borrower understands about the nature of the contract they have entered into, the more difficult it is to establish that the relationship is unfair.

77 But I do not think that Mr Lewis was really suggesting that the guiding principle was what the borrower herself perceived as unfair. I think what he was suggesting was no more than that it was a relevant factor that the borrower – in this case not a naïve or unsophisticated borrower – did not complain, either at the time or when giving evidence in hindsight, about the rates of interest she was asked to pay, and that that was something that the court could take into account in its overall – or, to use Mr Gun Cuninghame's word, "holistic" – assessment of the fairness or unfairness of the relationship. In those circumstances I do not think there was really a significant point of law between the parties at all.

78 It is unnecessary for me to say whether in this case the borrower did not complain about, and was quite happy with, the default rate. I was shown some questions from the transcript, in which she was asked what it was she had complained about, to which she said she wasn't complaining about the rates of interest, but about the fact that the loan had taken so long to come. But there are two difficulties with that. One is that she may have been there referring to the standard rate of interest rather than specifically the default rate of interest; and the other is that it is clear from her answer that she was thinking about the first bridging loan, whereas the actual question in the case is whether the second bridging loan was unfair or not.

79 Had she been expressly asked in terms whether she thought the 3% default rate on the second bridging loan was too high or unfair or penal, and had she said no, she was entirely happy with it, that no doubt would have been a relevant matter for the court to take into account in its overall conclusion. However those were not the questions she was asked or the answers that she gave, and the most that it comes to is that when asked what it was she complained about, she did not reference the default rate.

80 In any event, HHJ Wulwik does not appear on my reading of the judgment, to have placed any particular weight on this aspect, and I do not think it is necessary for me to say any more about it.

81 For the reasons I have sought to give, the grounds of appeal which have been advanced are not, in my judgment, made out and this appeal falls to be dismissed.

CERTIFICATE

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