



Neutral Citation Number: [2019] EWCA Civ 1337

Case No: B5/2019/0406

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT NOTTINGHAM
(HHJ Godsmark QC)
Case E6PP2346

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON

and

MR JUSTICE SNOWDEN

Between:

NOTTING HILL FINANCE LIMITED

Appellant

- and -

NADEEM SHEIKH

Respondent

Robert Brown (instructed by **Viceroy Legal**) for the **Appellant**
Robin Kingham (instructed by **Attwood & Co**) for the **Respondent**

Hearing date: 10 July 2019

Approved Judgment

Mr. Justice Snowden :

1. This appeal concerns the circumstances in which a defendant against whom an order for possession is made on a summary basis under CPR Part 55 may be permitted to raise a new point on appeal.

The facts

2. The facts are not in dispute. On 9 January 2018, the Defendant and the Claimant entered into a loan agreement under which the Claimant loaned the Defendant the sum of £50,000 for a term of 6 months at an interest rate of 30.04% per annum. The loan was secured by a third mortgage over the Defendant's home in Buxton. Under the agreement, the aggregate sum of £71,000, comprising the principal sum (£50,000) plus contractual interest and charges (£21,000) was repayable on 10 July 2018. Clause 7(e) of the loan agreement provided that in the event of default by the Defendant, the interest rate would rise to 12% compounding monthly, i.e. a rate of 289.6% per annum.
3. The Defendant did not repay the sums due to the Claimant on 10 July 2018. On 3 August 2018, the Claimant commenced proceedings against the Defendant under CPR 55. The claim form and particulars of claim were in prescribed form (forms N5 and N120 respectively). They sought an order for possession and a money judgment of £79,520, being the amount said by the Claimant then to be due. Paragraph 6(g) of the particulars of claim stated that the interest rates which had been applied to the mortgage loan to arrive at that amount were 30.04% and 289.60%.
4. The claim was listed to be heard before District Judge Hill in the County Court at Derby on 20 September 2018. The Defendant did not instruct lawyers or file a completed Defence Form N111M in accordance with CPR 55A PD 1.5. However, he attended the hearing in person and was represented by the duty solicitor. In addition to the claim form and particulars of claim, the only evidence before the District Judge was a two page witness statement from the Claimant which, on the second page, stated that the amount due as at the date of the hearing was £99,749.00. The breakdown of that figure was given in a statement of account towards the end of an 85-page exhibit containing the relevant contractual documents and correspondence.
5. The hearing before the District Judge took seven minutes. At the outset, the District Judge asked the Claimant's representative for "some figures", which elicited the response that "the only figure that is relevant is a balance outstanding of £99,749". The Claimant's representative then reported that after having spoken to the duty solicitor, he understood that the Defendant conceded that an order for possession would inevitably be granted. The Claimant's lawyer said that the only difference between the parties was whether the order should require possession to be given within 28 or 42 days in order to give the Defendant more time to seek new finance to clear the loan and two other prior charges on the property. After having heard brief argument, the District Judge rejected the Defendant's request for more time, and ordered possession to be given by 18 October 2018. The District Judge also entered judgment against the Defendant in the sum of £99,749, such judgment not to be enforced without permission of the court.

6. After the hearing, the Defendant instructed solicitors, who lodged an appeal against the District Judge's order within time on 11 October 2018 on the basis that the term providing for default interest of 289.6% per annum in clause 7(e) of the loan agreement was a penalty and unenforceable. The application for permission to appeal was listed to be heard by a Circuit Judge as a "rolled up" hearing with the appeal to follow immediately if permission was granted.
7. Prior to that appeal hearing, on 21 December 2018 the Defendant's solicitors also issued a separate application to set aside the District Judge's order under CPR 3.1(7) on the basis of the penalty argument and an additional argument that the relationship between the Claimant and the Defendant was unfair within the meaning of section 140A(1) of the Consumer Credit Act 1974 (the "CCA"), and that the court was entitled to delete the term as to default interest under section 140B of the CCA. That application was listed to be heard together with the appeal.
8. The hearing of the appeal and set aside application took place on 10 January 2019 before HHJ Godsmark QC. The Defendant did not seek to overturn the order for possession or the money judgment in relation to the sum of £71,000, but contended that there was an arguable defence that the default interest provision was a penalty or contrary to the CCA. The argument advanced by counsel was that the failure of the District Judge to address these points made his decision "unjust because of a serious procedural or other irregularity" so that the appeal should be allowed under CPR 52.21(3)(b).
9. For its part, the Claimant accepted that if the issue of whether the provision for default interest was a penalty had been raised before the District Judge, it would have amounted to a genuine dispute on grounds which appeared to be substantial, and the District Judge would probably not have granted a monetary judgment for that amount, but would have given case management directions for the issue to be determined under CPR 55.8(1)(b). However, the Claimant contended that because such a challenge had not been raised before the District Judge, it was too late for the Defendant to raise it on appeal.

The Judgment of HHJ Godsmark QC

10. In a reserved judgment, HHJ Godsmark QC allowed the Defendant's appeal in relation to the issue of default interest, and varied the District Judge's order to grant judgment limited to £71,000. HHJ Godsmark QC gave permission for the Defendant to file a Defence and Counterclaim contesting the provision for payment of default interest, remitted the claim to the multi-track, and gave further directions for that issue to proceed to trial.
11. In relation to the question of whether it was too late for the point on default interest to be raised on appeal, the Judge stated that he had been referred to the authorities cited in the notes in Civil Procedure (the White Book) at paragraph 52.17.3, and in particular to the following passage from the judgment of May LJ in *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 314 ("*Jones*") at [52]:

"Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to

confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed.”

12. HHJ Godsmark QC went on to observe that authorities after *Jones* have recognised that an appellate court has a discretion whether to entertain a point not taken below. He gave, as an example, a case in which a pure point of law is raised on appeal which does not require determination of additional facts. The Judge concluded,

“It seems to me that an appellate court can entertain on appeal a point not taken in the court below but the circumstances will be unusual if not exceptional. Finality of litigation is a powerful consideration.”

13. HHJ Godsmark QC then identified a number of features of the case which he considered relevant to the exercise of his discretion. These were,
- i) the hearing before the District Judge under CPR 55 was a summary hearing, not a full trial;
 - ii) little time is spent on such hearings;
 - iii) the Defendant was, in effect, a litigant in person;
 - iv) the Defendant attended the hearing;
 - v) there is a need for finality in litigation which should be weighed heavily in any application to set aside any final order of the court;

- vi) the order of the District Judge was challenged very quickly after the hearing; and
 - vii) the Claimant acknowledged that if the enforceability of the default interest rate had been raised before the District Judge, then it was probable that the District Judge would have given case management directions for that issue to be determined.
14. On the basis of these factors, HHJ Godsmark QC held (i) that the instant case was exceptional and that the Defendant should be permitted to raise the penalty/CCA points on appeal, and (ii) that the failure to identify these points was a serious procedural or other irregularity in the proceedings in the lower court which justified him allowing the appeal under CPR 52.21(3)(b).
15. The core of the HHJ Godsmark QC's reasoning appears in the following passage of his judgment,

“35. The dictum of May LJ in *Jones* lends powerful support to the Claimant's argument. Certainly with a set piece trial with statements of case from each side and case management directions there is every opportunity for parties to make considered decisions about what points to raise and how to present a case. If that case fails then an unsuccessful party should not then be permitted to return and try a different tack to get a better outcome. But this was not a trial. It is a procedure designed to get the parties swiftly before the court without the need for the filing of a defence. The judge is then left, within a few minutes, to deal with the issues in the case.

...

37. What is sought now by the Defendant is not an opportunity to advance a new case on a different basis but rather the opportunity to have considered a point which ought to have been advanced below but which was not. Default interest was not considered at all. As May LJ recognised, there may be exceptional cases in which the general principle would not apply.

38. In my judgment this is one such case. The summary nature of the hearing and the lack of opportunity for either duty solicitor or District Judge to consider whether there might be a defence to the money claim advanced indicate that this is not the sort of hearing contemplated by May LJ.

39. I also bear in mind the reality of what District Judges in particular face on a day-to-day basis. Litigants in person are a dominant feature of judicial life in the civil courts. Most have little or no legal knowledge. Whereas judges are entitled to expect that litigants provide a concise factual narrative of their case, it increasingly lies with judges to identify what areas of law are engaged. In a dispute between parties a judge may identify a

legal principle which is fatal to one side or the other, albeit unknown to both. In this case [the Defendant] was a litigant in person with no idea about penal contract clauses, section 140A [CCA] or similar. He acquired last-minute representation at court but a duty solicitor is in no position to probe the detail of the case.

40. This is a case where the District Judge made an order which might have the effect of providing an unlawful windfall to the Claimant. I have no doubt that had this possibility been drawn to his attention he would not have made the order that he did. The Defendant did not have the knowledge to raise the point; in a busy possession list the District Judge had precious little opportunity to identify the point for himself.

41. In my judgment there was a serious procedural or other irregularity in the proceedings in the lower court. That irregularity (whether one calls it “procedural” or “other”) is the failure to identify a defence which potentially renders part of the claim unlawful. That led to an order giving a money judgment to the Claimant part of which might be unlawful.”

16. Permission for a second appeal to this Court was given by Asplin LJ on the basis that the Claimant had a realistic prospect of success on the issue of whether there had been a serious procedural or other irregularity in the lower court; that this was linked to the question of whether the points concerning default interest should have been permitted to be taken for the first time on appeal; and that taking the two issues together, there was an important point of principle in relation to the application of CPR 52.21(3)(b) in cases in which arguments are not taken by a party who is unrepresented, or for all practical purposes is unrepresented, before the lower court.

The arguments before this Court

17. Before this Court, Mr. Brown stressed the concluding words of May LJ in the extract from *Jones* to which I have referred, namely,

“Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis.”

18. Mr. Brown contended that this was a principle of general application, whether or not there had been a trial. He submitted that HHJ Godsmark QC was right to require “exceptional” circumstances to justify disapplying the general principle, but contended that he was wrong to regard the facts of the instant case as exceptional. Mr. Brown submitted that the failure by a defendant to prepare or advance a defence for a first hearing under CPR 55 is “entirely routine”.

19. Secondly, Mr. Brown contended that the reference in CPR 52.21(3)(b) to a “serious procedural or other irregularity in the proceedings” referred to some obvious injustice in the way that the process had been conducted by the lower court, such as a refusal by the judge to hear argument from one party. He said that the District Judge had done nothing wrong in this case. He contended that litigation in England and Wales is based upon the adversarial system, and the District Judge could not be faulted for not having taken the penalty point or the CCA point of his own motion. Put another way, Mr. Brown contended that the Defendant could not rely upon his own failure to advance a defence as an “irregularity” which would justify an appeal court overturning the money judgment against him.
20. For the Defendant, Mr. Kingham essentially supported HHJ Godsmark QC’s decision for the reasons that he gave.

Analysis

Was HHJ Godsmark QC correct to allow the new points to be raised on appeal?

21. There is no dispute that an appellate court has a general discretion whether to allow new points to be taken on appeal.
22. In seeking to identify more specifically how the court should approach this exercise of discretion, HHJ Godsmark QC relied heavily on the extract from May LJ’s judgment in *Jones* to which I have referred above. This passage features prominently and is quoted verbatim in the relevant notes in the White Book to which the Judge was referred.
23. Surprisingly, however, those notes do not refer to the most authoritative and frequently applied statement of the approach of an appellate court to the question of whether to permit a new point to be taken on appeal. That statement appears in the judgment of Nourse LJ in *Pittalis v Grant* [1989] QB 605 at page 611,

“The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v. Knight* (1889) 14 App. Cas. 194 and *The Tasmania* (1890) 15 App. Cas. 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:

"the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of

law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.”

24. The same principles were applied to interlocutory decisions in *Rana v Ealing LBC* [2018] EWCA Civ 2074, where Underhill V-P stated,

“Those observations were made in the context of an appeal from a decision following a trial, but the underlying principles are the same where the appeal is from an interlocutory decision, though of course such a decision is less likely to depend on disputed evidence.”

25. The principles were also recently restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18],

“15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).”

26. These authorities show that there is no general rule that a case needs to be “exceptional” before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have

changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irreparable prejudice in the meantime.
29. Although it was therefore unnecessary for HHJ Godsmark QC to ask whether the facts of the instant case were “exceptional”, in my judgment he correctly identified the main factors of the instant case which were relevant to the exercise of his discretion.
30. In particular, the main point made by HHJ Godsmark QC was that the first hearing of the claim for possession under CPR Part 55 before the District Judge was not in any real sense a trial at which any disputed factual evidence was led or tested by cross-examination. The limited nature of the first hearing of a possession claim was described by Warren J in *Forcelux v Binnie* [2009] EWCA Civ 854 at [32]-[36],

“32. The judge (in practice the district judge) is given, expressly, two options under CPR 55.8(1). He may either decide the claim or he may give case management directions. Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions are to be given, including allocation to a track. The aim of such directions must be to bring about a final disposal of the claim. Unless allocated, by agreement, to the small claims track, case allocation will be either to the fast track or the multi-track...

33. If the first option – deciding the claim – is adopted it can only be because the judge considers that he is able to decide the case on the evidence before him. In an exceptional case, it may be that he could, then and there, conduct a hearing on the merits. Thus, suppose his list has collapsed and he has half a day spare; suppose both sides are present and represented; and suppose that both sides have all their evidence available and agree that the matter should proceed. In these circumstances, the hearing could properly be called a trial. The judge would in effect be exercising his case management powers and bringing forward the trial to the date of the hearing.

34. But that would be an exceptional sort of case. The more usual sort of case, in a busy possession list with perhaps 5 to 10 minutes allowed for each case, will be an undefended case where the defendant, if he attends at all, has nothing to say. The judge

will look at the evidence from the claimant – probably all the evidence there is – and make a determination and decision: he will satisfy himself that the case is made out on the claimant's evidence and satisfy himself that any necessary statutory requirements are fulfilled; he will make a possession order (suspended or not as the case may be).

35. The defendant might not appear at the hearing. This might be because he simply decides not to do so, knowing he has no defence; or he may, as in the present case, not know of the proceedings at all even though he has been served in accordance with the Rules. Where a defendant does not appear at all, the task of the judge is entirely straightforward and routine once he is satisfied that service has been properly effected. He looks at the evidence and, having no material which would suggest that the defendant has a case at all, let alone one which is genuinely disputed on grounds which appear to be substantial, he makes an order for possession.

36. I do not consider that such a process of determination and decision can sensibly be called a trial as a matter of the ordinary use of the word....”

The hearing before the District Judge in the instant case very much followed the format described by Warren J.

31. Secondly, as HHJ Godsmark QC noted, it is also significant that it was accepted by the Claimant that if the penalty/CCA points had been raised, the District Judge would almost inevitably have given case management directions. As such, although investigation of whether clause 7(e) of the loan agreement is unenforceable might now require a limited factual inquiry, that is not an inquiry that would have taken place at the hearing on 20 September 2018 in any event.
32. Accordingly, given the very limited nature of the initial hearing and the binary decision to be made at it, the most weighty reason identified in the authorities as to why a new point should not be permitted to be advanced on appeal – namely that it would subvert an evidential process which has already taken place at a full trial in the lower court – is simply not present in the instant case.
33. Thirdly, and as HHJ Godsmark QC also identified, the Defendant acted quickly to raise the new points after the judgment against him was given, and the Claimant suffered no prejudice in acting in reliance on the fact that the points had not been taken before the District Judge. As I have indicated above, the appeal was filed in time and the order for the monetary judgment was subject to a proviso that it could not be enforced without permission of the court. No such permission was sought by the Claimant in the time before the appeal was lodged.
34. Fourthly, although it was not a point expressly mentioned by the Judge, the failure to raise the penalty point did not mean that the hearing before the District Judge was wasted. The possession order and monetary judgment for the principal amount of the

mortgage debt were unchallenged and the Defendant's appeal was limited to the amount of the default interest.

35. Against these points, HHJ Godsmark QC referred to, and plainly did not lose sight of, the policy of finality in litigation. However, and again in contrast to the situation which May LJ addressed in *Jones*, the weight of that factor is diminished in a case in which the litigation process has been very short-lived and is summary in nature, so that the time and resources that have been committed to the case by the parties or the court have been very limited.
36. Although HHJ Godsmark QC also referred to the fact that the Defendant acted in effect as a litigant in person when attending the hearing, for my part I consider that this factor carries little weight in the equation. As Lord Sumption said in *Barton v Wright Hassell LLP* [2018] UKSC 12 at [18], the rules and procedures of court apply equally to represented and unrepresented parties, and the fact that a party is unrepresented can at most have a limited effect in increasing the weight to be given to some other, directly relevant, factor. In this case, the CPR 55 procedure and the defence forms to which I have referred are designed to be straightforward and accessible to litigants in person, and the other factors to which I have referred have sufficient weight on their own. Accordingly, I do not consider that the Defendant's arguments are materially enhanced by the fact that he was effectively unrepresented before the District Judge.
37. I would therefore hold that HHJ Godsmark QC was correct to permit the new points as regards penalty and the CCA to be taken on appeal.

Was there "a serious procedural or other irregularity in the proceedings" before the District Judge?

38. HHJ Godsmark QC held that the "failure to identify" the defences based on penalty or under the CCA in the lower court was "a serious procedural or other irregularity in the proceedings" which rendered the decision of the District Judge "unjust" within the meaning of CPR 52.21(3)(b). HHJ Godsmark QC's formulation in paragraph [41] of his judgment did not specify whether he regarded the failure as being only on the part of the Defendant, or also on the part of the District Judge.
39. Although HHJ Godsmark QC's approach reflected the way in which the matter was argued before him, in my judgment there was no need for him to approach matters in this way at all. CPR 52.21(3) enables an appeal court to allow an appeal where the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. This provision must be interpreted purposively in a case where a new point is permitted to be taken on appeal.
40. In a case in which, for example, there has been a hearing conducted with scrupulous fairness and complying with all relevant rules in the lower court, but the appeal court permits a new point of law to be taken on appeal which it decides in favour of the appellant, the appeal court must obviously have the power to give effect to the decision that it has made. It would not, however, be sensible to allow the appeal on the basis that the lower court decision was "unjust because of a serious procedural or other irregularity in the proceedings". In the example given, there would have been no such defect in the lower court proceedings in any normal sense of the language used in CPR 52.21(3)(b). In my view, the appeal in such a case would be allowed simply because,

admittedly with the benefit of the new argument, the appeal court can see that the decision of the lower court was not the decision that should have been made, and hence that it was the “wrong” decision within the meaning of CPR 52.21(3)(a).

41. This analysis exactly fits what occurred in the instant case. As it now appears, the relevant decision for the Deputy Judge at the initial hearing was whether to give judgment for the Claimant for default interest at the rate of 289.6% per annum, or to give case management directions leading to determination of the penalty/CCA points at a subsequent hearing. Those points having been permitted to be raised by the Defendant on appeal, it is now clear that the District Judge’s decision to grant judgment for the Claimant for default interest, rather than to give case management directions, was the wrong option.
42. When we put this point in argument to Mr. Brown for the Claimant, he very fairly and realistically accepted that if such were the view we took of CPR 52.21(3)(a), he could not seek to sustain the appeal on the basis that HHJ Godsmark QC was wrong to have relied upon CPR 52.21(3)(b).
43. That conclusion is sufficient to dispose of the appeal in this case. Accordingly, in my view, the question identified by Asplin LJ when giving permission to appeal of whether, and if so, to what extent, district judges hearing possession cases are under any duty to unrepresented litigants to identify points in their favour, and whether a failure to do so amounts to a serious procedural or other irregularity within the meaning of CPR 52.21(3)(b), should await a case in which it needs to be decided.
44. That said, I would observe that one of the questions which is posed to defendants in the standard Defence Form N111M in relation to regulated mortgages is,

“Do you want the court to consider whether or not the terms of your original loan agreement are fair?”

This serves to emphasise the type of defence that might be available in mortgage possession actions.

45. In the instant case, the default interest rate of 289.6% per annum was, on any view, remarkably high for a secured loan. That rate was clearly stated in the particulars of claim. It was also apparent that the mortgage debt on a scheduled payment on maturity of £71,000 was claimed to have risen by over £20,000 in the space of a little over six weeks between the issue of proceedings and the hearing. Those numbers are sufficiently striking that I would have expected them to have rung alarm-bells for the District Judge, even given his busy list. Whilst I do not express any view as to whether the District Judge was under any positive duty to do so, in my view he could not possibly have been criticised if he had raised the issue of whether such a term was penal or unfair to the Defendant of his own motion.

Disposal

46. For the reasons that I have given, I would dismiss the appeal.

Stay of the order for possession

47. By an application dated 10 May 2019, the Defendant seeks a stay of the order for possession for 14 days from the date of hand-down of this judgment in the event that the appeal is dismissed. Longmore LJ granted an interim stay on 20 June 2019 until the hearing of the appeal, and we continued that interim stay whilst judgment was reserved.
48. The Defendant's stated reason for seeking a stay is to facilitate his continuing attempts to obtain refinance to discharge the debt owed to the Claimant and the two prior chargees of the property. He says that those efforts will be more likely to bear fruit once it is known that the Claimant's appeal has been dismissed. Mr. Kingham also argued that a short stay would enable the parties to take stock after the outcome of the appeal, and might enable settlement discussions to be progressed concerning the level of default interest.
49. The application for a stay is resisted by the Claimant on the basis that a stay was refused by HHJ Godsmark QC on 15 April 2019, there has been no appeal against that decision, and nothing else has changed.
50. I am not altogether convinced of the logic of the Defendant's grounds for seeking a stay in circumstances in which he did not contest the possession order on the appeal to HHJ Godsmark QC. Moreover, the dismissal of the Claimant's appeal to this Court does not amount to a decision that the default interest clause is a penalty or unfair within the meaning of the CCA: we have simply affirmed HHJ Godsmark QC's directions that those matters must go to a full hearing in due course.
51. Nonetheless, there has been a change of circumstances in that it is now finally clear that the Claimant cannot rely upon the judgment for default interest which it obtained from the District Judge, and the enforceability of clause 7(e) of the loan agreement will now fall to be examined at a full hearing. It is also of some significance that the Claimant has at no time taken any active steps to enforce its order for possession, and it would be unlikely to be able to accomplish much in that regard over a short 14-day period. The Claimant will therefore suffer no real prejudice if such a limited stay is ordered.
52. Accordingly, and for essentially pragmatic reasons, I would be prepared to grant the Defendant a stay of the order for possession for 14 days following the formal hand-down of this judgment.

Lord Justice Peter Jackson:

53. I agree.

Lord Justice Longmore:

54. I agree also.