Claim No: BL-2019-BHM-000122

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST
Before His Honour Judge Rawlings Sitting as a High Court Judge

B E T W E E N:-

RAJINDER KUMAR

Claimant

-and-

LSC FINANCE LIMITED

Defendant

-and-

MANJIT KUMARI

Third Party

-and-

LALIT RAM VERMA

Fourth Party

Counsel for the Claimant, Third Party and Fourth Party – Mr Say
Counsel for the Defendant – Mr Pomfret
Trial 11-14 April 2023
Handed down 9 June 2023

INTRODUCTION

The Parties and associated companies

1. The Claimant, Rajinder Kumar (Mr Kumar") was married to the Third Party Manjit Kumari ("Mrs Kumari") until 1997, when they divorced, but they have cohabited together since their divorce. Mr Kumar and Mrs Kumari are respectively the father and mother of the Fourth Party, Lalit Ram Verma ("Mr Verma").

2. Mr Kumar and Mrs Kumari are the only directors and shareholders of Aureation Developments Limited ("ADL").

3. Mr Kumar and Mr Verma are the only directors and shareholders of Aureation Construction Limited ("ACL").

4. Mr Kumar and Mrs Kumari, as business partners, ADL and ACL have all engaged in the business of acquiring and developing real property.

5. The Defendant, LSC Finance Limited ("LSC") is an unregulated lender (that is it is not authorised under the Financial Services and Markets Act 2000 ("FSMA") to make loans regulated under FSMA or the Consumer Credit Act 1974 ("CCA")). LSC provides unregulated short term finance particularly for the purchase and development of real property and has provided loans to ADL, ACL, Mr Kumar, Mrs Kumari and Mr Verma.

The case in summary

6. LSC advanced loans to ADL and ACL and one loan each to Mr Kumar, Mrs Kumari and Mr Verma to acquire land for development and/or to develop it ("Pattingham Loans").

7. Mr Kumar, Mrs Kumari and Mr Verma say that three loans advanced to them to purchase three adjoining plots of land at Redhill Poultry Farm, Spoonly Gate, Pattingham, Wolverhampton (I will refer to the plots collectively as "the Pattingham Land"; the plot purchased by: Mr Kumar as "Plot 1"; Mrs Kumari "Plot 3"; and Mr Verma "Plot 2"; the three loans as "the Pattingham Loans" and the agreements pursuant to which the Pattingham Loans were advanced as the Pattingham Loan Agreements"):
    (a) were Regulated Mortgage Contracts under FSMA ("RMC" and "RMCs") because Mr Kumar told LSC that the plan was to build one home for the personal use of each of Mr Kumar, Mrs Kumari and Mr Verma on each of the three plots of adjoining land to be acquired and developed by them with the use of funds advanced to them by LSC. They say that, because LSC is not authorised to conduct regulated business, the Pattingham Loan Agreements are unenforceable under Section 26 of FSMA;

(b) in the alternative, it was represented and/or agreed by LSC that the time for payment of the Pattingham Loans would be extended beyond the 12 months allowed in the Pattingham Loans Agreements; and

(c) the Pattingham Loan Agreements give rise to an unfair relationship under Sections 140A-B CCA.

8. By its Counterclaim against Mr Kumar and by Additional Claims against Mrs Kumari and Mr Verma, LSC seek to recover:

(a) the balance which LSC says is owing by Mr Kumar and Mr Verma for money advanced to them by LSC to purchase and develop Plot 1 and Plot 2 respectively (LSC's position, as against Mrs Kumari being that the debt owed by her to LSC for monies advanced by LSC for the purchase of Plot 3 was discharged from the proceeds of sale of the Pattingham Land, sold by the Receivers appointed by LSC);

(b) the balance owing by Mr Kumar to LSC for money advanced by LSC to ADL and ACL which LSC say Mr Kumar promised to pay to LSC under deeds of guarantee and indemnity executed by Mr Kumar in favour of LSC for the obligations of ADL and ACL to LSC;

(c) the balance owing by Mrs Kumari to LSC for money advanced by LSC to ADL which LSC say Mrs Kumari promised to pay to LSC under a deed of guarantee and indemnity executed by Mrs Kumari in favour of LSC for the obligations of ADL to LSC; and

(d) the balance owing by Mr Verma for money advanced by LSC to ACL which LSC say Mr Verma promised to pay to LSC under a deed of guarantee and indemnity executed by Mr Verma in favour of LSC for the obligations of ACL to LSC.

9. Mr Verma defends the claim against him for monies advanced to him by LSC for Plot 2 on the same three bases as Mr Kumar advances in his claim against LSC (see paragraph 7 (a) – (c) above).

10. Mr Kumar, Mrs Kumari and Mr Verma say that in respect of the underlying loans made to ADL and ACL, it was represented by LSC and/or LSC agreed that the date for repayment of the various loan agreements would be extended and contrary to those representations/agreements, LSC did not extend the date for repayment and instead demanded payment of them.

BACKGROUND

11. In setting out the background to the various claims I will set out only the dates on which loan agreements and guarantees and indemnities were entered into, when the written loan agreements said that the loans were repayable and details of any written variations to those agreements. I will set out what Mr Kumar says about oral representations made to him on behalf of LSC and oral agreements he says LSC entered into when setting out a summary of Mr Kumar/Mrs Kumari/Mr Verma's case.

12. Between 20 May 2016 and 10 February 2017 three loan agreements were entered between LSC of the one part and Mr Kumar and Mrs Kumari of the other part for LSC to advance funds to assist Mr Kumar and Mrs Kumari to acquire a property at 13 - 14 Church Green, Bilston ("Church Green") and construct 4 bungalows on it. The date for repayment of the loans was stated to be 19 May 2017 (12 months after the date of the first agreement). All 3 loans were repaid on 27 June 2017, no written agreement extending the date for repayment of the 3 loans was entered into, Mr Kumar says that an extension was agreed verbally by telephone. Mr Kumar retained in his name a small piece of land, not used for the construction of the 4 bungalows which were on the corner of Church Green and Emerald Close ("Emerald Close").

13. In 2012 Mr Kumar purchased, in his own name, land at 230 and 232 Lichfield Road, Willenhall which was a former haulage yard ("230/232 Lichfield Road"). Mr Kumar proposed to develop the site. 230/232 Lichfield Road was transferred by Mr Kumar to ADL for the purposes of the proposed development.

14. On 6 April 2017 a loan agreement was entered into between LSC and ADL pursuant to which LSC agreed to advance the total sum of £1,342,500 to ADL (known as Loan 440) to assist in funding the costs of constructing 23 flats on 230/232 Lichfield Road, to be drawn down in stages as the development progressed. Loan 440 (or so much of it as had been drawn down) was stated to be repayable on 5 April 2018. Mr Kumar and Mrs Kumari each executed a Deed of Guarantee and Indemnity in relation to all monies owed by ADL to LSC on 6 April 2017 ("the ADL Guarantees").

15. On 3 August 2017 a loan agreement was entered into between LSC and ADL pursuant to which LSC agreed to advance the total sum of £914,000 to purchase and build 8 houses on a site at Daley Road, Bilston ("Daley Road") (known as Loan 466). Loan 466 (or so much of it as had been drawn down) was stated to be repayable on or before 3 August 2018.

16. On 3 November 2017 a loan agreement (Loan 494) was entered into between LSC and ACL pursuant to which LSC agreed to advance the sum of £119,000 to enable ACL to purchase 236 Lichfield Road, a property directly in front of 230/232 Lichfield Road (Loan 494). Mr Kumar planned to acquire 234 Lichfield Road as well, in due course and then to demolish the houses built on 234 and 236 Lichfield Road and build a further 15-18 flats in their place. Loan 494 was stated to be repayable on or before 3 November 2018. Mr Kumar and Mr Verma executed a Deed of Guarantee and Indemnity in relation to all monies owed by ACL to LSC ("the ACL Guarantees").

17. On 29 November 2017 a second loan agreement was entered into between LSC and ADL to assist ADL with the construction of the 23 flats at 230/232 Lichfield Road (known a Loan 505) for the sum of £140,500 to be advanced by LSC in stages. Loan 505 was stated to be repayable on 10 August 2018.

18. On 9 January 2018 a third loan agreement was entered into between LSC and ADL for the sum of £104,500 to be advanced by LSC in stages to assist with the construction of the 23 flats at 230/232 Lichfield Road (known as Loan 517). Loan 517 was repayable on 10 August 2018.

19. On 17 January 2018 the Pattingham Loan Agreements were entered into between LSC and: (a) Mr Kumar for the sum of £309,000 to assist him to purchase and develop Plot 1 (Loan 524); (b) Mrs Kumari for the sum of £309,000 to assist her to purchase and develop Plot 3 (Loan 525); and (c) Mr Verma for the sum of £615,000 to assist him to purchase and develop Plot 2 (Loan 526). All 3 loans were repayable on 17 January 2019.

20. On 14 March 2018 a loan agreement was entered into between LSC and ADL for the sum of £156,000 to be advanced by LSC to fund the additional costs of constructing 6 of the 8 houses as 4 bedroom houses, instead of 3 bedroom houses at Daley Road (known as Loan 546). Loan 546 was stated to be repayable on 3 August 2018.

21. On 27 April 2018, by a letter signed on behalf of ADL and LSC the date for repayment of the loans for 230/232 Lichfield Road (Loans 440, 505 and 517) was extended so that they became repayable on 10 August 2018.

22. On 17 May 2018 a loan agreement was entered into between LSC and ADL for LSC to advance the sum of £53,000 to fund costs of construction at Daley Road (known as Loan 583). Loan 583 was stated to be repayable on or before 3 August 2018.

23. On 25 June 2018 a loan agreement was entered into between LSC and ACL for LSC to advance the sum of £94,500 to assist with the cost of constructing a bungalow on the Emerald Close Land (see paragraph 12 above) (Loan 587). Loan 587 (or so much of it as had been advanced) was stated to be repayable on 25 June 2019.

24. 3 August 2018 was the date for repayment of the three Daley Road loans (Loan 466, Loan 546 and Loan 583) in accordance with the written terms of those loans.

25. 10 August 2018 was the date for repayment of the three loans for 230/232 Lichfield Road (Loan 440, Loan 505 and Loan 517) in accordance with the written terms of those loans, as extended by the letter of 27 April 2018.

26. On 14 August 2018 Mr Kumar made a drawdown request for costs of developing the Pattingham Land. By e mail dated 17 August 2018 LSC stated that ADL must make a payment of interest of £15,000 immediately for August 2018 and on 1 September 2018 a further payment of interest of £15,000 for September 2018, otherwise default interest would be charged on the three loans advanced to ADL for 230/232 Lichfield Road and that funding on all other sites would be suspended until the construction of the flats at 230/232 Lichfield Road was brought to a satisfactory conclusion and Loans 440, 505 and 517 repaid.

27. On 12 November 2018 LSC served demands on ADL and ACL for all monies advanced to them and demanded payment from Mr Kumar and Mrs Kumari under the ADL Guarantees of the sum owed by ADL and from Mr Kumar and Mr Verma, under the ACL Guarantees of the sums owed by ACL.

28. On 15 November 2018 LSC appointed Receivers over 230/232 Lichfield Road, 236 Lichfield Road and Daley Road.

29. 17 January 2019 was the date for repayment of the Pattingham Loans advanced to Mr Kumar, Mrs Kumari and Mr Verma for them to acquire and develop Plot1, Plot 2 and Plot 3 respectively in accordance with the written terms of the loan agreements of 17 January 2018.

30. On 29 January 2019 LSC served demands upon Mr Kumar, Mrs Kumari and Mr Verma for the monies advanced to them pursuant to the Pattingham Loan Agreements entered into between them and LSC for Plot 1, Plot 2 and Plot 3 respectively (Loans 524 - 526).

31. On 31 January 2019, LSC appointed Receivers over the Pattingham Land.

32. On 25 March 2019 LSC sold Emerald Close as mortgagee in possession for £60,000**.**

33. On 27 August 2019 the Pattingham Land was sold for £380,000, by its Receivers.

MR KUMAR/MRS KUMARI/MR VERMA'S CASE

The Pattingham Land

34. The Pattingham Loans form the subject matter of: (a) Mr Kumar's claim against LSC: and (b) part of LSC's counterclaims against Mr Kumar and claims against Mr Verma, but not Mrs Kumari (LSC having apportioned the proceeds of sale for the Pattingham Land of £380,000 equally between Plot 1, Plot 2 and Plot 3, resulting in Mrs Kumari's Pattingham Loan being repaid in full).

35. LSC's claims in relation to Loans 524, 525 and 526 advanced or partly advanced to Mr Kumar, Mrs Kumari and Mr Verma are as follows:

(a) it advanced to Mr Kumar, under Loan 524, for Plot 1: (i) £49,000 towards the purchase of Plot 1; and (ii) £155,000 towards the cost of developing the Pattingham Land. As at the date of demand (25 January 2019) LSC say that Mr Kumar owed it £241,140.66 for principal, interest and costs and that interest has continued to accrue thereafter;

(b) it advanced to Mrs Kumari, under Loan 525, for Plot 3, £49,000 to assist Mrs Kumari in purchasing Plot 3. As at the date of demand (25 January 2019) LSC say that Mrs Kumari owed it £60,957.48 for principal, interest and costs and that interest continues to accrue thereafter. That debt was repaid out of the proceeds of sale of the Pattingham Land apportioned by it to Plot 3; and

(c) it advanced to Mr Verma, under Loan 526, for Plot 2, £95,500 to assist Mr Verma to purchase Plot 2. As at the date of demand (25 January 2019) LSC say that Mr Verma owed it £118,400.61 in relation to principal, interest and costs.

36. Mr Kumar, in his trial witness statement says that LSC knew that the plan was to build houses on the Pattingham Land for the personal use of Mr Kumar and his family (Mr Kumar to use the house built on Plot 1, Mr Verma the house built on Plot 2 and Mrs Kumari the house built on Plot 3). In making that assertion, Mr Kumar refers to:

(a) a telephone conversation he says he had with Mr Turner in late September/early October 2017 when he says Mr Turner telephoned him and asked him if he wanted to borrow any more money. Mr Kumar says that he told Mr Turner that he was looking at the Pattingham Land to provide personal homes for himself, his wife and his son and that he did not want the Pattingham Land to be acquired and developed in the name of a limited company, because he did not want the personal homes of himself, his wife and his son to be owned by a limited company. Mr Kumar says that Mr Turner responded by saying that it would be difficult to arrange for funding in the names of individuals, rather than a limited company, but that he would revert to Mr Kumar. Mr Kumar says that he later received a telephone call from Mr Turner, who confirmed that LSC could provide the funding but he would need Andrew Taylor ("Mr Taylor") of ACS Surveyors Ltd ("ACS") to value the Pattingham Land before LSC could decide whether they would provide funding for it to be purchased/developed;

(b) in early October 2017 at a meeting at the Pattingham Land, Kumar showed Mr Taylor the plans for the three plots on the site and told him that the houses were

intended as family homes. Mr Kumar says that he believes Mr Taylor will have told LSC about his intention to build family homes on the site; and

(c) on 18 December 2017 Mr Kumar met with Mr Turner and Mr Morley and told them that he was buying the Pattingham Land to construct personal homes on and would be seeking planning permission for this.

37. Mr Kumar and Mr Verma say that as the purpose of the Pattingham Land Loans was to build personal homes for Mr Kumar, Mrs Kumari and Mr Verma and LSC knew this, the Pattingham Land loans were RMCs under Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO") because:

(a) credit was provided to Mr Kumar, Mrs Kumari and Mr Verma as individuals;

(b) the obligation to repay was secured on the Pattingham Land;

(c) at least 40% of the land for each of the three plots was intended to be used in connection with a dwelling; and

(d) whilst the Pattingham Loan Agreements contain declarations that the loans were for business purposes:

(i) the declarations refer to Articles 60 C and 60 D of the RAO (applying to regulated consumer credit agreements and regulated consumer hire agreements) and not to Article 61 (applying to RMCs); and

(ii) LSC knew or had reason to suspect that the Pattingham Loans were not being entered into predominantly for business purposes because:

- LSC had previously arranged lending to Aureation Properties Limited ("APL"), ADL and ACL but the Pattingham Loans were made to Mr Kumar, Mrs Kumari and Mr Verma as individuals;
- clause 12 of the General Terms refer to the "Borrower" being a limited company, demonstrating that it was unusual for LSC to lend monies to individuals; and
- LSC was made aware of the purposes of the loans on numerous occasions.

38. Mr Kumar and Mr Verma plead that, if the Pattingham Loans were not Regulated Mortgages then they were Regulated Credit Agreements under the CCA, however, at the start of the trial, Mr Say accepted that the Pattingham Loan Agreements could not be Regulated Credit Agreements.

39. Mr Kumar and Mr Verma further plead that LSC is not a regulated lender and the Pattingham Loans, as RMCs, are unenforceable under Section 26 of FSMA and Mr Kumar, Mrs Kumari and Mr Verma are entitled to damages for the losses they have suffered as a result of LSC taking enforcement action.

40. Mr Kumar says that representations were made to him by LSC, at a meeting between him, Mr Turner and Mr Morley on 18 December 2017, that the date stated in the Pattingham Loan Agreements for repayment of the Pattingham Loans (17 January 2019) would be extended. He says that at that meeting, he told Mr Turner and Mr Morley that he would find it difficult to get the planning permission changed (from the existing live/work planning permission) to unrestricted residential planning permission and complete the construction of the three properties by January 2019. Mr Morley replied "you know we are flexible we will give you extra time to complete your project".

41. Mr Kumar and Mr Verma say that what was said by Mr Morley at the meeting on 18 December 2017 amounted to:
    (a) a representation that LSC would extend the date for repayment of the Pattingham Loans to enable the planning permission to be changed and the three properties to be constructed; and/or
    (b) an agreed variation to the written terms of the Pattingham Loans as to the date of repayment; and/or
    (c) a collateral agreement to extend the date for repayment of the Pattingham Loans.

42. Mr Kumar also says that, on 17 November 2018, Mr Morley told Mr Kumar that LSC would allow Mr Kumar a further 10 months to refinance the Pattingham Loans (and the outstanding ADL/ACL Loans). He says that that amounted to a binding agreement to vary the date for repayment of the Pattingham Loans.

43. LSC demanded repayment of the Pattingham Loans on 29 January 2019 and appointed Receivers over the Pattingham Land on 31 January 2019. The Receivers sold the Pattingham Land for £380,000 on 27 August 2019. Mr Kumar claims that the sale of Plot 1 was at an undervalue and that he suffered a loss of its development value. Mr Verma (but not Mrs Kumari) claims for the sale of Plot 2 at an undervalue and loss of development value. At the start of the trial, Mr Say accepted that the Receivers acted as agents of Mr Kumar/Mrs

Kumari/Mr Verma in selling the Pattingham Land and on that basis he withdrew the claims of Mr Kumar/Mr Verma against LSC for the sale of the Pattingham Land at an undervalue.

44. Mr Kumar says that the relationship between him and LSC was an unfair relationship for the purposes of Section 140A – B of the CCA in that:

    (a) Mr Kumar was re-assured that the date for repayment of the Pattingham Loans would be extended beyond 12 months as LSC was aware that Mr Kumar would require more than 12 months to complete the building work on the Pattingham Land;

    (b) from August 2018, LSC refused to allow further drawdown of monies under the Pattingham Loan Agreements causing further delay in completion of the building work. There were no proper grounds for such refusal;

    (c) LSC unfairly appointed Receivers to take possession of and sell the Pattingham Land;

    (d) LSC allowed the Pattingham Land to be sold at an undervalue; and

    (e) the interest payable under the Pattingham Loan Agreements to LSC, under clause 6.4 of the General Term was compound interest of 3% per month.

45. Mrs Kumari and Mr Verma "reserve their right" to claim that there is an unfair relationship as a result of the interest charged on their Pattingham Loans.

230/232 Lichfield Road

46. By counterclaim against Mr Kumar and an additional claim against Mrs Kumari, LSC seeks, pursuant to the ADL Guarantees entered into by Mr Kumar and Mrs Kumari on 6 April 2017, payment of the outstanding debts which LSC say is owed to them by ADL, including Loans 440, 505 and 517 advanced by LSC to ADL in relation to 230/232 Lichfield Rd. LSC says it issued demands against ADL and Mr Kumar and Mrs Kumari on 12 November 2018 for payment of £1,941,429.79 said to be owing under Loan 440; £192,534.86 said to be owing under Loan 505 and £171,865.44 said to be owing under Loan 517.

Loan 440

47. Mr Kumar says that in January 2017, Mr Turner told him that whilst the facility agreement for Loan 440 would state that it was for 12 months only, it would be extended for a further 12

months and LSC would work with Mr Kumar and be flexible. Mr Turner also said that Mr Kumar should not worry about the "legals" because LSC would work with Mr Kumar, this was repeated by Mr Turner on other occasions.

48. Mr Kumar and Mrs Kumari say that the representations made by Mr Turner, on behalf of LSC, to Mr Kumar in January 2017:
    (a) amount to express or implied terms of the agreement for Loan 440 and the ADL Guarantees that the term of Loan 440 would be extended to 24 months (expiring on 5 April 2019) ; alternatively
    (b) Mr Kumar/Mrs Kumari relied on those representations to their detriment in entering into loan 440 and the ADL Guarantees and in consequence, LSC is estopped from seeking the repayment of Loan 440 before 5 April 2019.

49. By demanding repayment of Loan 440 on 12 November 2018, LSC:
    (a) breached the terms of that loan which prevented ADL from completing the development of 230/232 Lichfield Rd and repaying the loan;
    (b) committed a repudiatory breach of the ADL Guarantees;
    (c) breached the implied term of the ADL Guarantees that LSC would not render performance of the ADL Guarantee impossible;
    (d) made an actionable misrepresentation entitling Mr Kumar and Mrs Kumari to set aside the ADL Guarantees; and
    (e) breached the estoppel by representation.

50. Accordingly Mr Kumar and Mrs Kumari say that no sum is due under the ADL Guarantees and they are entitled to rescind the ADL Guarantee.

Loan 505

51. Mr Kumar says that, prior to the Loan 505 agreement being entered into on 29 November 2017, Mr Turner said that LSC would work with Mr Kumar and the repayment date for Loan 505 would be extended to April 2019.

52. Mr Kumar and Mrs Kumari say that the representations made by Mr Turner, on behalf of LSC in relation to Loan 505:

(a) amount to express or implied terms of the agreement for Loan 505 and the ADL Guarantees that the term of Loan 505 would be extended to 5 April 2019; alternatively;

(b) Mr Kumar/Mrs Kumari relied on those representations to their detriment in causing ADL to enter into Loan 505, increasing their liability under the ADL Guarantee and LSC is therefore estopped from seeking the repayment of Loan 505 before 5 April 2019.

53. By refusing to extend the date for repayment of Loan 505 beyond 10 August 2018, LSC:

(a) breached the terms of Loan 505 which prevented ADL from being able to complete the development of 230/232 Lichfield Road by April 2019 and repay Loan 505;

(b) breached the implied term of the ADL Guarantees that it would not render performance of the ADL Guarantees impossible ; and

(c) breached the estoppel by representation.

Loan 517

54. Mr Kumar says that, prior to loan 517 being entered into, on 9 January 2018, Mr Turner told him not to worry about the paperwork and said that LSC would work with him and the repayment date for loan 517 would be extended to April 2019.

55. Mr Kumar and Mrs Kumari repeat the points made in paragraph 52 above in relation to the effect of the representations which Mr Kumar says that Mr Turner made in relation to Loan 517 and assert that, by refusing to extend the date for repayment of Loan 517 beyond 10 August 2018, LSC breached the terms of Loan 517, the implied term in relation to the ADL Guarantees and the estoppel, in the same way as it did in relation to Loan 505 as recorded in paragraph 53 above.

Daley Road-Loan 466

56. By counterclaim against Mr Kumar and an additional claim against Mrs Kumari, LSC seeks, pursuant to the ADL Guarantees, payment of the outstanding debt which LSC says is owed to it by ADL for Loan 466. LSC demanded that ADL repay Loan 466, Loan 546 and Loan 583 advanced by LSC to ADL in relation to Daley Road on 12 November 2018, later on 5 August 2020, LSC issued demands pursuant to the ADL Guarantees entered into by them. LSC

accept that Loan 546 and Loan 583 advanced by LSC to ADL have been repaid from realisations from the sale of Daley Road paid to LSC, but claims from Mr Kumar and Mrs Kumari the balance of Loan 466, which at the date of the demands on 12 November 2018 amounted, according to LSC, £1,239,891.24.

57. Mr Kumar says that on 11 July 2017, Mr Turner telephoned him to enquire why it was being proposed that Loan 466 should be put through a different limited company than ADL and that Mr Turner said that if Loan 466 was put through ADL it would run concurrently with a Loan 440 (230/232 Lichfield Rd) and therefore ADL would have 21 months to repay Loan 466 (i.e until 5 April 2019).

58. Mr Kumar and Mrs Kumari repeat the points noted in paragraph 52 above (in relation to Loan 505) as to the effect of the representation which Mr Kumar says that Mr Turner made in relation to Loan 466 and assert that, by refusing to extend the date for repayment of Loan 466, beyond 3 August 2018, LSC breached the terms of Loan 466, the implied term in relation to the ADL Guarantees and the estoppel, in the same way as it did in relation to Loan 505 as recorded in paragraph 53 above.

236 Lichfield Road – Loan 494

59. By counterclaim against Mr Kumar and an additional claim against Mr Verma, LSC seeks, pursuant to the ACL Guarantees, payment of the outstanding debt which LSC says is owed to it by ACL, under Loan 494. LSC demanded that ACL repay Loan 494 advanced by LSC to ACL in relation to 236 Lichfield Road on 12 November 2018, , pursuant to the ACL Guarantees entered into by them. At the date of the demands the amount said by LSC to be owing by ACL for Loan 494 was £144,632.20.

60. Mr Kumar says that on 25 September 2017, Mr Turner sent a formal offer for a loan to enable ACL to acquire 236 Lichfield Road, which was repayable 12 months after it was advanced. Mr Kumar sent an e mail to Mr Turner, copied to Mr Morley, in which he said “terms are still for 12 months and would certainly mean a default in this timescale. I will need the repayment time increased.” Mr Kumar says that Mr Turner and Mr Morley then had a telephone conversation with him during the course of which: (a) Mr Turner stated that LSC would give ACL 18 months to repay the loan, to allow planning permission to be obtained to develop the site, after which LSC intended to grant a development facility to ACL and a loan to clear

Loan 494, from the uplift in the value of the land created by the obtaining of planning permission; and (b) Mr Morley and Mr Turner told Mr Kumar "we will work with you these are not hard dates, they are extendable and we will grant you a new facility to clear the current loan and to build the new block of flats." Mr Turner then sent him an amended form of offer on 26 September 2017 under cover of an email which stated "please see amended form offer attached. It is a 12 month term that can be extended to 18 months with no extension fee but monthly interest must be serviced after month 12".

61. Mr Kumar and Mr Verma say that they relied upon those representations in causing ACL to enter into Loan 494 and in entering into the ACL Guarantees. They say that the representations made by Mr Turner and Mr Morley:

    (a) give rise to express or implied terms of Loan 494 that the date for repayment of that loan would be extended to 18 months; alternatively
    (b) ACL, Mr Kumar and Mr Verma acted to their detriment in reliance on the representations in causing ACL to enter into Loan 494 and in entering into the ACL Guarantees and that LSC is estopped from seeking payment any sooner than 18 months from the date of Loan 494 (i.e. prior to 3 May 2019).

62. Mr Kumar and Mr Verma say that the refusal of LSC to extend Loan 494 beyond 12 months was:
    (a) a breach the terms of Loan 494, which prevented ACL from obtaining planning permission and increasing the value of 236 Lichfield Road to enable ACL to refinance it;
    (b) a repudiatory breach of the ACL Guarantees entitling Mr Kumar and Mr Verma to repudiate them;
    (c) a breach of the implied term of the ACL Guarantees that LSC would not render performance of the ACL Guarantees impossible;
    (d) an actionable misrepresentation entitling Mr Kumar and Mr Verma to set aside the ACL Guarantees; and
    (e) a breach of the estoppel by representation.

Emerald Close Loan 587

63. By counterclaim against Mr Kumar and an additional claim against Mr Verma, LSC seeks, pursuant to the ACL Guarantees, payment of the outstanding debt which LSC says is owed to it by ACL under Loan 587. On 12 November 2018, LSC demanded that ACL repay Loan 587 advanced by LSC to ACL in relation to Emerald Close. At the date of the demands the amount said by LSC to be owing by ACL for Loan 587 was £68,162.62. The written terms of Loan 587 provided for it to be repayable 12 months after it was advanced, that is on 25 June 2019.

64. In demanding payment of Loan 587 on 12 November 2018, prior to its stated repayment date, LSC, in the demand letters relied upon ACL having failed to pay Loan 494 by what LSC said was its repayment date of 3 November 2018, this, stated LSC in the demands, was an Event of Default under Loan 494 which resulted in Loan 587 becoming due and payable.

65. Mr Kumar and Mr Verma deny that Loan 587 was repayable on 12 November 2018, because they say ACL had not failed to pay Loan 494 on its repayment date for the reasons set out in paragraphs 61 and 62 above.

66. Mr Kumar and Mr Verma say that LSC wrongly took possession of the Emerald Close site and sold it at an undervalue.

Agreement of 17 November 2018

67. Finally Mr Kumar says that, on 17 November 2018, after LSC issued demands (on 12 November 2018) to ADL/ACL, Mr Morley told Mr Kumar that LSC would allow ADL/ACL a further 10 months to refinance the outstanding ADL/ACL Loans. Mr Kumar/Mrs Kumari/Mr Verma rely on this as being a binding agreement.

LSC'S CASE IN RELATION TO MR KUMARI'S CLAIM AND MR KUMAR/MRS KUMARI/MR VERMA'S DEFENCE TO LSC'S COUNTERCLAIMS/ADDITIONAL CLAIMS

The Pattingham Loan Agreements

68. LSC accepts that it is an unregulated lender but it says that the Pattingham Loan Agreements are not RMCs. So far as it was concerned, the Pattingham Loans were advanced for the purpose of developing houses on the Pattingham Land which would be sold as part of a business venture and not used as houses for Mr Kumar, Mrs Kumari and Mr Verma to live in. LSC say that:

    (a) Mr Kumar/Mrs Kumari/Mr Verma did not tell LSC that they intended to build houses on the Pattingham Land for their personal use;

    (b) the loan offers of 28 October 2017 state that neither the borrowers nor any connected party had any intention to occupy the Pattingham Land;

    (c) the Pattingham Loan Agreements declared that the borrowers were entering into those agreements for business purposes and they would not have the protection and remedies available to them if they were regulated agreements under FSMA or the CCA. Mr Kumar/Mrs Kumari/Mr Verma are estopped by those representations from asserting that the loans are RMCs;

    (d) the valuation prepared by Mr Taylor makes no mention of any intention by the borrowers to occupy the Pattingham Land and says that less than 40% of the total land at the date of inspection was being used in connection with a dwelling. Whilst this confirms the position at the date of the valuation, its purpose was to confirm the regulatory position (ie that the loans would be unregulated) had Mr Taylor been aware (as Mr Kumar asserts he was) of the intention of the borrowers to occupy the houses as their personal homes, then Mr Taylor could be expected to have referred to this in his valuation, because it would be relevant to the valuation of the Pattingham Land and the regulatory status of the loans;

    (e) in a subsequent application to refinance the Pattingham Land it was represented to the prospective lender, by Mr Kumar, that he, Mrs Kumari and Mr Verma did not intend to live on the Pattingham Land;

    (f) the development plans for the Pattingham Land and Mr Taylor's valuation report refer to 4/5 houses being built on the Pattingham of land and not 3;

    (g) Mr Henry Morris ("Mr Morris") Mr Kumar's architect, has confirmed that he was not told that it was the intention of the borrowers to live in the houses to be built on the Pattingham Land (other than Mr Kumar in the house to be built on Plot 1); and

    (h) Mr Kumar said, at the time that the Pattingham Loans were advanced, that the reason why the Pattingham Land was to be put in the individual names of Mr Kumar, Mrs Kumari and Mr Verma was to assist in obtaining the removal of the

existing planning restriction which required the occupants of the houses to live and work on the Pattingham Land.

69. As for the representation alleged to have been made on 18 December 2017, that LSC would extend the date for repayment of the Pattingham Loans:
    (a) the meeting took place on 14 December 2017;
    (b) the alleged representations could not amount to express or implied terms of the loan agreements because they are contradicted by the written loan agreements which provide that the loans must be repaid within 12 months. Mr Kumar/Mrs Kumari/Mr Verma have not applied to rectify the loan agreements and the parole evidence rule prevents them from asserting that the terms of their loan agreements with LSC are different from the written terms of the loan agreements; and
    (c) the alleged representations could not amount to a collateral agreement because: (i) at most they are a statement of future intent made before the formal agreements were entered into which agreements do not mention them; (ii) clause 2.6.1 of the General Terms incorporated into each loan agreement requires any amendments to be in writing and signed by all the parties; and (iii) any extension of time to repay loans advanced by LSC was always dealt with by formal written amendment as evidenced by: - the loan agreement for Loan 494 which, at clause 4.5 of the written terms stated that the borrower could seek a six-month extension of the date for repayment which could be granted at the sole discretion of LSC; and - Loans 440, 505 and 517 for 230/232 Lichfield Road which were extended by a side letter signed by all the parties.

70. The alleged representations are based on the Pattingham Loans being repayable 12 months after they were advanced, but LSC allegedly agreeing to extend the date for repayment of the loans thereafter, however:
    (a) The alleged representations can be no more than an indication of future intention and there is no evidence that, if the representations were made, the representor did not believe at the time the representation was made, that the loans would be extended; and
    (b) the effect of the pleaded variations or collateral agreements could only be, at most, that LSC would have a discretion to extend.

71. As to the allegation that LSC wrongly refused to honour drawdown requests for the Pattingham Loans:
    (a) The only failure to honour a drawdown request which has been identified is the drawdown request that was made on 14 August 2018. At that time the final date for repayment of Loans 494, 505 and 517 for 230/232 Lichfield Rd and Loans 466, 546 and 583, for Daley Road had expired without any repayment being made. LSC was entitled to refuse to advance further funds against drawdown request in relation to the Pattingham Loans as a result of those Events of Default in relation to the 230/232 Lichfield Road and Daley Road Loans;
    (b) LSC responded to the drawdown request on 17 August 2018 by saying that future drawdowns had been suspended pending a satisfactory conclusion of the position in relation to 230/232 Lichfield Road (completion of the flats and repayment of the loans); and
    (c) Mr Turner has confirmed that LSC became aware at that time that the groundworks contractor had not been paid in respect of various sites and Mr Kumar has admitted not paying that contractor, further justifying LSC's refusal to honour the drawdown request made on 14 August 2018.

72. There was no agreement allowing a further 10 months for the Pattingham Loans to be refinanced and in any event any such representation or "agreement" would amount to a mere waiver which could be withdrawn by LSC at any time;

73. The relationship between LSC and Mr Kumar/Mrs Kumari/Mr Verma is not an unfair relationship for the purposes of Section 140A CCA because:
    (a) the argument that they do amount to unfair relationships is based upon the argument that LSC had given assurances that they would extend the Pattingham Loans beyond the 12 month terms set out in Pattingham Loan Agreements, which LSC denies;
    (b) there was no agreement allowing a further 10 months for the Pattingham Loans to be refinanced and even if some such representation was made, it would amount to a mere waiver which could be withdrawn by LSC at any time and it would not be unfair for LSC to do so; and
    (c) the appointment of Receivers would not be unfair if LSC was entitled, as it was, to take enforcement action.

The Claims under the ADL/ACL Guarantees

74. The ADL/ACL Guarantees contain both a guarantee and an indemnity. The indemnity provides that if LSC is unable to recover from ADL/ACL the monies owing to it by them, for any reason, then the guarantors (Mr Kumar and Mrs Kumari for ADL and Mr Kumar and Mr Verma for ACL) will be jointly and severally liable to make good that loss. The indemnity makes Mr Kumar, Mrs Kumari and Mr Verma liable even if they are not, for any reason, liable under as guarantors.

75. There is no basis for implying terms into the ADL/ACL Guarantees that the date for repayment of the ADL/ACL Loans would be extended, because such a term is a matter for the loan agreements and not the ADL/ACL Guarantees and would contradict the express terms of the loan agreements.

76. LSC says that Mr Kumar/Mrs Kumari/Mr Verma cannot reasonably have relied upon the oral representations allegedly made, given that:
    (a) Mrs Kumari/Mr Verma cannot rely upon misrepresentation or estoppel by representation, unless they can show that representations were made to them on behalf of LSC and no representations were made to them (Mrs Kumari says that representations were "forwarded to her" but does not say how);
    (b) Mrs Kumari says that she entered into the ADL Guarantees in reliance on representations, so only representations made in relation to Loan 440 to ADL can be relevant as all other alleged representations in relation to loans to ADL were made after Mrs Kumari entered into her ADL Guarantee. Similarly Mr Verma can only have relied on representation made in relation to Loan 494 made to ACL as all other alleged representations in relation to loans to ACL were made after Mr Verma entered into his ACL Guarantee;
    (c) the ADL/ACL Guarantees contain a notice advising the guarantor entering into them to take legal advice before signing the guarantee;
    (d) the alleged oral representations conflict with the written terms of: (i) Loan 440 entered into by ADL on the same date as the ADL Guarantees; and (ii) Loan 494 entered into by ACL on the same date as the ACL Guarantees; and
    (e) an independent solicitor provided a letter in respect of each guarantee confirming that he had advised the guarantor upon the terms and effect of the ADL/ACL Guarantees.

77. As for the claims that the ADL/ACL Loans and Guarantees have been varied by the representations or that they amount to a collateral agreements, LSC say:
    (a) LSC relies on the written terms of the ADL/ACL Loan agreements which provide that they can only be varied if the variation is in writing and signed by all the parties and the asserted oral variations/collateral agreements in respect of the ADL/ACL Loans would conflict with the written terms of the ADL/ACL Loan agreements;
    (b) there is no basis for finding that the ADL Guarantees have been varied or are subject to collateral agreements, because the date for repayment of the loans is a matter for the ADL loan agreements and not the ADL Guarantees and would contradict the express terms of the ADL Loan Agreements; and
    (c) as for the ACL Guarantees: (i) Loan 494 for 236 Lichfield Road was extendable by its terms for 6 months but ACL did not serve a notice under clause 1.5 requesting an extension of the loan for 6 months (such a request could have been refused in any event by LSC in its absolute discretion); and (ii) no representation or agreement to extend Loan 587 for Church Green/Emerald Close is asserted. LSC say that it was entitled to demand repayment of this loan on 12 November 2018 in spite of the fact that its final date for repayment was 25 June 2019, because there was an Event of Default in relation to other facilities (including on ACL's Loan 494).

78. As for the interest claimed by LSC:
    (a) LSC contended that it is entitled to charge normal interest as well as interest at the Default Rate from the date of demand; and
    (b) LSC contended that it is entitled, under the terms of the ADL Guarantees and the ACL Guarantees to claim against Mr Kumar/Mrs Kumari/Mr Verma for increases in the debt owed to it by ADL/ACL after LSC demanded payment from them under the ADL Guarantees and ACL Guarantees.

REPRESENTATION

79. At trial, Mr Kumar. Mrs Kumari and Mr Verma were represented by Mr Say and LSC were represented by Mr Pomfret.

THE ISSUES

80. The issues that it was agreed (prior to closing arguments) that I needed to resolve were split into: (a) those issues relating to Mr Kumar's claims against LSC in relation to the Pattingham Loan Agreements (issues (1) – (8)); (b) those issues that relate to LSC's counterclaims against Mr Kumar and claims against Mrs Kumari and Mr Verma (issues (9) – (15)); and (c) Mr Verma's claims against LSC (issues (16) – (17)). The 17 issues were as follows:

(a) Mr Kumar's claims against LSC

1. Are the Pattingham Loan Agreements or any one of them RMCs under FSMA and therefore unenforceable?
2. Was there a variation of the Pattingham Loan Agreements or collateral agreement that had the effect of extending the term of the agreements?
3. If so, did LSC breach the varied agreements or collateral agreements?
4. Did LSC induce Mr Kumar, Mrs Kumari and Mr Verma to enter into the Pattingham Loan Agreements in relation to the Pattingham Land as a result of misrepresentation?
5. Is the enforcement action taken in respect of the Pattingham Loan Agreements unlawful? What is the effect of the same if so?
6. Is LSC entitled to claim interest and default interest from C on a compounded basis in light of the agreements entered into between the parties?
7. Is there an unfair relationship between the parties?
8. To what relief are the parties entitled in relation to the Pattingham Loans if the relationship is unfair?

(b) LSC's counterclaim and additional claims against Mrs Kumari and Mr Verma

9. What interest rate is payable on the ADL/ACL indebtedness under the guarantees?

10. What amounts are due to LSC under the Pattingham Loan Agreements and the guarantees in relation to the indebtedness of ADL and/or ACL, subject to any defences?

11. Were Mr Kumar and/or Mrs Kumari and/or the Mr Verma induced to enter into the ADL/ACL Guarantees by misrepresentations by LSC?

12. Were any of the guaranteed loans subject to a term that they would be extended by 12 months?

13. Was LSC estopped by representation from enforcing any of the guaranteed loans?

14. Did LSC prevent repayment of the guaranteed loans by acting contrary to the above alleged term or estoppel and, if so, how does that affect LSC's right to recover under the guarantees?

15. In respect of Loan 587, was the demand valid and/or are Mr Kumar, Mrs Kumari and Mr Verma entitled to any relief by reason of their allegation that LSC sold the mortgaged property (Emerald Close) at an undervalue?

(c) Mr Verma's additional claim against LSC

16**.** In the event that Mr Verma's mortgage in respect of Plot 2 of the Pattingham Land is held to be an RMC and/or Issues (2) and (3) above are established in relation to the Mr Verma's Pattingham Loan, what relief is Mr Verma entitled to?

17**.** What if any claim does the Mr Verma have against LSC in relation to the appointment of receivers over the Pattingham Land and its subsequent sale?

Concessions in closing arguments

81. At the start of his closing argument, Mr Say said that:

(a) the claims of Mr Kumar/Mrs Kumari/Mr Verma that the oral representations that Mr Kumar said were made to him by Mr Turner and Mr Morley on behalf of LSC which amounted to: (i) variations to the loan agreements; (ii) collateral contracts; (iii) actionable representation; or (iv) an estoppel were not pursued. As a result of Mr Say's concession that those matters would not be pursued it is no longer necessary for me to determine issues 2- 4 and 11 – 14 inclusive or the first part of issue 15 (in respect of Loan 587, was the demand valid);

(b) Issue 5 (Is the enforcement action taken in respect of the Pattingham Loan Agreements unlawful? What is the effect of the same if so?) is only pursued on the basis that the Pattingham Loan Agreements were RMCs; and

(c) Issue 17 was no longer pursued other than as part of Issues 8 and 16.

82. Mr Pomfret accepted that:

(a) for the purposes of Issue 6, following a default, LSC was only entitled to charge Default Interest and not Default Interest and Standard Interest; and

(b) for the purposes of Issue 9 the liabilities of the guarantors crystallised at the date of demand such that their guarantee liabilities should be calculated as the sum owed by ADL/ACL to LSC at the date of demand plus interest thereafter at the rate of 3% per month. This means that any debt incurred by ADL/ACL to LSC after the date of demand under the guarantees is not to be added to the guarantee liabilities of Mr Kumar/Mrs Kumari/Mr Verma.

WITNESSES

83. Mr Kumar/Mrs Kumari/Mr Verma relied upon witness statements from:

(a) Mr Kumar;

(b) Mrs Kumari;

(c) Mr Verma;

(d) Rimmal Dhillon ("Mr Dhillon");

(e) Harpreet Singh ("Mr Singh"); and

(f) Ragbhir Singh Kang ("Mr Kang").

84. LSC relied upon witness statements from:

(a) Mr Turner;

(b) Mr Morley; and

(c) Mr Morris

85. All witnesses attended trial for cross examination.

Mr Kumar

86. Mr Kumar was the only person who dealt, for the borrowers, with representatives of LSC and other relevant parties in relation to the loans advanced to ADL, ACL. It is Mr Kumar who alleges that: (a) he made Mr Turner and Mr Morley of LSC and others aware of the intention of Mr Kumar/Mrs Kumari/Mr Verma to build houses for their personal use on their

respective plots of the Pattingham Land (although Mr Verma says that he was present when Mr Kumar told Mr Turner and Mr Morley of this intention on 18 December 2017); (b) oral representations were made to him by Mr Turner and/or Mr Morley that time for repayment of the Pattingham Loans, the ADL Loans and the ACL Loans (except for Loan 587 to ACL) would be extended; and (c) Mr Morley agreed on 17 November to allow a further 10 months for the Pattingham/ADL/ACL Loans to be refinanced.

Mrs Kumari

87. Mrs Kumari confirms that she never met or spoke to anyone at LSC and never received any communications from LSC. Mrs Kumari says she had nothing to do with any of the developments and that: (a) Mr Kumar told her about the proposal to build 3 houses for her, Mr Kumar and Mr Verma on the Pattingham Land and that the loans would be for 2 years; (b) Mr Kumar told her, before she entered into the ADL Guarantee, that LSC are flexible and wanted to work with him and would agree to Loan 440 for 230/232 Lichfield Road being repayable after 2 years and that Loans 505 and 517 for the same site would be repayable at the same time as Loan 440; and (c) she believes that Mr Kumar told her that Loans 466 and 546 for the Daley Road site were for 2 years.

Mr Verma

88. Mr Verma confirms that he had no contact with LSC and relied on what Mr Kumar told him about representation made on behalf of LSC, other than:
    (a) in respect of Loans 524, 525 and 526, for the Pattingham Land he went to the meeting on 18 December 2017 with his father and Mr Turner/Mr Morley at which he says Mr Kumar made it clear that the houses to be built on the Pattingham Land would be for the personal use of Mr Kumar/Mrs Kumari/Mr Verma and Mr Turner said that the loans could be extended to 24 months if required;
    (b) in relation to Loan 494 for 236 Lichfield Road, Mr Kumar told him that the loan offer for Loan 494 was for 12 months but that Mr Turner had said that LSC would extend it to 18 months but would allow 24 months if planning permission had been obtained for the development of 15 - 18 flats within the 18 months; and
    (c) He overheard a telephone conversation between Mr Turner and Mr Kumar when Mr Turner said that LSC would be flexible and the term of the loan could be extended.

Mr Dhillon

89. Mr Dhillon confirms that Mr Kumar is his uncle and that Mr Kumar introduced him to LSC as a company that may be able to lend him money to build an extension to his domestic property. Mr Dhillon says that he spoke to Mr Turner who told him that LSC could not lend money to him as an individual, but LSC could lend money to his company, Olympia Transport Limited which he could then utilise for the purpose of his home extension. Mr Dhillon says that LSC did then make a loan to Olympia Transport Limited, which he used to build the extension and he provided a personal guarantee to LSC for that loan and a charge over his domestic property to support the personal guarantee.

Mr Singh

90. Mr Singh says that he was employed as a handy man by Mr Kumar in 2017. In around October 2017 he went to the Pattingham Land to erect fencing around the site at the request of Mr Kumar. Whilst he was there, Mr Kumar, Mr Taylor and Mr Morris came to the site. Mr Singh says that Mr Kumar pulled some site plans out of his car and showed them to Mr Taylor and Mr Morris and told them that the first plot would be a house for him to live in, the second plot would be for his son's house and the third plot would be for his wife's house.

Mr Kang

91. Mr Kang says that he is Mr Kumar's brother in law and that he is a building control officer, he says he acted for Mr Kumar in relation to the Church Lane, Emerald Road and Daley Road sites. Mr Kang says that he was travelling with Mr Kumar, in Mr Kumar's car, in late 2017 when Mr Kumar received a telephone call from someone that Mr Kumar referred to as "Adam". The discussion concerned Mr Kumar's property projects and he says that "Adam" asked Mr Kumar if he needed to borrow any money for any new projects. Mr Kumar and "Adam" then discussed the Pattingham Land, he recalls "Adam" saying that he could not lend to Mr Kumar in his personal name, but to leave it with him and he would come back to him. Mr Kang suggests that based on the conversation he overheard, LSC was aware that the Pattingham Land was for Mr Kumar's own personal use.

Mr Turner

92. Mr Turner confirms that he is a director of LSC and that LSC is an unregulated lender.

93. Mr Turner says that:

(a) initially it was intended that the lending for the Pattingham Land would be made to a limited company, however the Pattingham Land had existing planning permission for four houses with a restriction that the occupants must both live and work on the Pattingham Land. Mr Kumar wanted to remove the live/work planning restriction and to do this he wanted to acquire the Pattingham Land in the personal names of himself, his wife and his son, so that separate applications could be made to remove of the work/live planning restriction for each plot. Mr Kumar would go first and apply for removal of the planning restriction for the house to be built on his plot, if that application was granted, then his wife and his son would apply to remove the restriction from their plots;

(b) LSC normally provides loans repayable after 12 months. If after 12 months everything is proceeding satisfactorily and the borrower seeks an extension, LSC will assess that request and may grant it, however if things are not proceeding satisfactorily then an extension will not be granted;

(c) Mr. Turner and Mr Morley met with Mr Kumar at Whitaker Park on 14 December 2017, no promise was made at that meeting that LSC would allow Mr Kumar enough time to finish the Pattingham Land development. At no point during that meeting did Mr Kumar say that the Pattingham Land was going to be for his family home or homes, LSC would not have lent to him, if he had said this;

(d) LSC first refused to allow further drawdowns of the Pattingham loans when it found out that groundworks company was owed over £100,000 for work done on that site, which LSC was funding the development of. If people on site were not being paid then this meant that the money advanced by LSC to pay them was being diverted elsewhere;

(e) Mr Kumar tried to refinance the Pattingham Loans with various companies and he had a decision in principle from a lender to advance money to a limited company to refinance the LSC loans, rather than to individuals;

(f) Loans 440/505/517 - 230/232 Lichfield Road; (i) he does not recall any conversation before Loan 440 was entered into about extending the loan. The terms of each loan are set out in formal documents and he would not say anything that deviated from

those formal documents. He does not recall saying not to worry about the paperwork or that the loan will be extended. LSC grants extensions in writing, it would never do so verbally; (ii) Loan 440 was meant to cover the whole cost of constructing the flats, but as construction neared the end ADL was short of money to complete it which led to LSC agreeing to advance Loan 505 and then Loan 517 to fund the costs of completing the construction of the flats; and (iii) ADL defaulted on repayment of Loans 440/505/517 and it became clear that there were problems on both the 230-232 Lichfield Road site and the Daley Road site. ADL could not refinance the loans and had missed payments. The flats at 230-232 Lichfield Road had still not been completed in spite of the extra loans being advanced.

(g) Loan 466 - Daley Road: LSC considered extending the term of the loan but never did because it was apparent that there were problems in finalising the flats at 230-232 Litchfield Road. He has no recollection of a telephone call at some point after 11 July 2017 when it is alleged that he agreed that the term of the loan would be extended;

(h) Loan 494 - 236 Lichfield Road: (i) the loan was advanced to redevelop a house and large garden into flats; (ii) the loan was called in together with the other loans when payments to the ground workers were missed; and (iii) he does not recall saying that dates for repayment are not "hard dates". The date for repayment of the loan was not extended; and

(i) Loan 587 - Emerald Close: (i) Mr Kumar got planning permission to construct a bungalow; and (ii) LSC agreed to advance money to fund the construction work, this was part way through when the loan was called in because it was cross collateralise with other loans that were called in.

Mr Morris

94. Mr Morris says that:

(a) he is an architect who has been involved in working for Mr Kumar on a number of projects;

(b) one of those projects involved the Pattingham Land; and

(c) Mr Kumar asked him to sign a witness statement in opposition to an application by LSC for summary judgment but he refused to do so because the draft witness statement produced by Mr Kumar for him to sign was not true. Contrary to the content of that draft witness statement: (i) he has never met Mr Taylor or Mr Turner

in person; (ii) he was never involved in a conversation with Mr Taylor about the valuation of the Pattingham Land; and (iii) he was aware that Mr Kumar had mentioned he wanted Plot 1 for a house for himself and his family to live in, but Plot 2 was not for his son, it was a business project with Mr Kumar intending to retain Plot 1 for himself.

Mr Morley

95. Mr Morley says that:
    (a) he is the Managing Director of LSC.
    (b) he does not recall a meeting with Mr Kumar in December 2017, or saying that LSC would be flexible and give him extra time to complete the build on the Pattingham Land. If that had been agreed it would be documented he would never agree anything like that verbally;
    (c) Mr Kumar did not say that the Pattingham Land would be used for his families' homes, that would be a regulated lend which LSC would never have entered into;
    (d) he did not agree to give a 10 month extension for the repayment of all outstanding loans; and
    (e) he did not agree verbally to extend the time for repayment of Loan 494 for 236 Lichfield Road. Everything LSC does is documented.

HONESTY/CREDIBILITY OF WITNESSES

96. Before turning to consider the credibility and honesty of the factual witnesses, I will refer to the comments of Mr Justice Leggatt (as he then was) in *Gestmin SGPS S.A. v Credit Suisse UK Limited and others [2013] EWHC 3560 (comm).*

97. Mr Justice Leggatt's comments concern oral evidence and the fallibility of witnesses' memories and how their recollection can be affected by their recalling past events as part of the litigation process, particularly if they have a vested interest in the result and he compares the reliability of witnesses recollection with the reliability of the content of contemporaneous documents.

98. In paragraphs 15-21 of his judgment Leggatt J said as follows:

> "*15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*
>
> *18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*
>
> *19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
>
> *20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness*

does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22 In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

99. The comments of Leggatt J are pertinent in this case where:

(a) the relevant events happened some years ago;

(b) Mr Kumar's relies on what he says he discussed and agreed with Mr Turner, Mr Morley and others; and

(c) LSC places its reliance upon the documents as contradicting Mr Kumar's evidence and lack of documentary evidence to support it.

100. I will now set out my conclusions as to the honesty and credibility of each witness.

Mr Kumar

101. Whilst Mr Say withdrew the claims advanced that there were oral variations of the written contracts, collateral contracts, misrepresentations and estoppels based upon oral discussions and agreements that Mr Kumar (and some of his witnesses) refer to, Mr Kumar still relies upon oral discussions and agreements he says he was a party to in claiming that the Pattingham Loans: (a) were RMCs (Issue 1); and (b) amounted to unfair relationships between Mr Kumar/Mrs Kumari/Mr Verma and LSC (Issue 7). In assessing the honesty/credibility of Mr Kumar as a witness at this stage, I will only consider the credibility of Mr Kumar's assertions that Mr Turner/Mr Morley agreed orally to extend or that they would extend the various loans (or gave assurances to that effect) which remains relevant to Issue 7. I will consider whether Mr Kumar told Mr Turner/Mr Morley (as he asserts he did and they deny) or Mr Taylor, before the Pattingham Loan Agreements were entered into, that it was intended to build one house on each of the three plots to be acquired respectively by Mr Kumar, Mrs Kumari and Mr Verma for them to live in which is relevant to Issue 1.

102. In summary Mr Kumar says that the following oral representations were made on behalf of LSC regarding repayment of the loans advanced by LSC:

(a) Loan 440 dated 6 April 2017 for 230-232 Lichfield Road – £1,342,500. Mr Kumar says that in January 2017 Mr Turner told him that the loan agreement would say that Loan 440 was for 12 months but LSC would extend it for a further 12 months and will work with Mr Kumar and be flexible and the Mr Kumar should not worry about the "legals";

(b) Loan 466 dated 3 August 2017 for Daley Road – £914, 000. On 11 July 2017 Mr Turner phoned him and said that if Loan 466 were put through ADL it would run concurrently with a Loan 440 and so ADL would have 21 months to repay it;

(c) Loan 494 dated 3 November 2017 for 236 Lichfield Road- £119, 000. On 25 September 2017, Mr Turner sent a formal offer for a loan to enable ACL to acquire 236 Lichfield Road, which was repayable 12 months after it was advanced. Mr Kumar sent an e mail to Mr Turner, copied to Mr Morley, in which he said "terms are still for 12 months and would certainly mean a default in this timescale. I will need the repayment time increased." Mr Turner and Mr

Morley then had a telephone conversation with Mr Kumar, during the course of which: (a) Mr Turner stated that LSC would give ACL 18 months to repay Loan 494, to allow planning permission to be obtained to develop the site, after which LSC intended to grant a development facility and a loan to clear Loan 494, from the uplift in the value of the land created by the obtaining of planning permission; and (b) Mr Morley and Mr Turner told Mr Kumar "we will work with you these are not hard dates, they are extendable and we will grant you a new facility to clear the current loan and to build the new block of flats." Mr Turner then sent Mr Kumar an amended formal loan offer on 26 September 2017 under cover of an email which stated "please see amended formal offer attached. It is a 12 month term that can be extended to 18 months with no extension fee but monthly interest must be serviced after month 12".

(d) Loan 505 dated 29 November 2017 for 230-232 Lichfield Rd - £140, 500 to develop 2 additional flats. Prior to the loan being entered into Mr Turner said that LSC would work with Mr Kumar and the repayment date will be extended to April 2019;

(e) Loan 517 dated 9 January 2018 for 230-232 Lichfield Rd - £104,500, additional funds needed to complete the flats. On 9 January 2018, Mr Turner told him not to worry about the paperwork, LSC would work with him and the repayment date for Loan 517 would be extended to April 2019;

(f) Loans 524, 525 and 526 dated 17 January 2018 for the Pattingham Land - £309,000 to Mr Kumar to purchase and develop Plot 1, £615,000 to Mr Verma to purchase and develop Plot 2; and £309,000 to Mrs Kumar to purchase and develop Plot 3. On a number of occasions before entering into the loan agreements reassurances were given to Mr Kumar that the 12 month period would be extended to allow completion of the development and on 14 December 2017, Mr Kumar told Mr Morley that he would find it difficult to get planning permission changed and complete the construction of three houses by January 2019. Mr Morley replied "you know we are flexible we will give you extra time to complete your project";

(g) Loan 587 dated 25 June 2018 for Emerald Close - £94,500. In his defence to LSC's claim, Mr Kumar asserted that when LSC made demand for repayment loan 587 it was not due for payment. At trial, Mr Kumar was asked whether he asserted that any representation was made that Loan 587 would be extended. Mr

Kumar said that he was not asserting that any such representation was made. As Loan 587 was advanced on 25 June 2018 and was repayable on 24 June 2019 (according to the terms of the loan agreement) time for repayment had not passed when LSC demanded that ACL repay loan 587 on 12 November 2018. In demanding repayment of Loan 587, LSC relied on the failure of ACL to repay the loan 494 on its due date of 3 November 2011 ; and

(h) on 17 November 2018, Mr Morley agreed that LSC would allow Mr Kumar 10 months to refinance all the outstanding loans.

103. Whilst I do not find that the evidence of Mr Kumar, that assurances were given to him that LSC would be flexible or that it would work with him is incredible, I have come to the conclusion that Mr Kumar's evidence that oral representations were made by Mr Turner and Mr Morley to him in respect of all of the loans, the subject matter of the proceedings, except Loan 587, to the effect that the date for repayment would be extended to 2 years or to specific dates beyond the dates for repayment set out in the loan documentation (or in the case of the Pattingham Loans for a sufficient time to enable him to complete the project) when looked at as a whole, is not credible. I have come to this conclusion for the following reasons:

(a) as I mention in more detail in (c) below, the evidence of Mr Kumar of those representations being made is not referred to in any document and the only witness who supports Mr Kumar's case that any of the representations were made is Mr Verma (Mr Kumar's son) who says that he recalls Mr Morley making the representation set out at paragraph 102 (f) . I have commented on the reliability of the evidence of Mr Verma below, where I find that his evidence provides little support for Mr Kumar's evidence of what Mr Morley said.

(b) whilst Mr Kumar claims to have a good memory of the representations made to him by Mr Turner and Mr Morley about extending the period for repayment of loans, the credibility of that assertion was undermined by:

(i) Mr Kumar's evidence about the meeting in December 2017 with Mr Morley and Mr Turner which forms an important part of Mr Kumar's case. Mr Kumar says he told Mr Morley/Mr Turner about intending to build 3 houses on the Pattingham Land to be occupied by him and his family and he asserts that Mr Morley made the representation referred to in paragraph 102 (f) above. The meeting is not however mentioned at all in Mr Kumar's original Particulars of Claim and the witness statements of Mr Kumar and Mr Verma assert that the

meeting took place on 18 December 2017, whereas in cross examination they both accepted that it had taken place on 14 December 2017;

(ii) Mr Kumar was asked whether the alleged representation referred to in paragraph 49.7 of his witness statement, that Mr Kumar should not worry about the legals was made in relation to Loan 505 and 517, as it was unclear which, Mr Kumar said he could not recall;

(iii) at the start of his evidence, Mr Kumar said that he wished to amend paragraph 59 of his trial witness statement, which referred to representations made on behalf of LSC in relation to Loan 466. Mr Kumar said that the first part of that paragraph was correct in referring to Loan 466, but the second part should refer to Loan 505. The second part of paragraph 59 says that Mr Kumar asked Mr Turner why the repayment date was being brought forward and Mr Turner said that rather than have two different repayment dates for the same company, for which, Mr Kumar says, repayment terms of up to 24 months had already been agreed, all the loans would be documented as repayable on the same date but then extended simultaneously by 12 months to be repayable on the same date. It was pointed out to Mr Kumar that paragraph 49.23 of his Amended Reply and Defence to Re-amended Defence and Counter Claim appeared to make the same mistake, in referring to Mr Turner saying that Loan 466 would run concurrently with Loan 440 and ADL would have 21 months to pay it. Mr Kumar said that he had made the mistake because he had just come out of hospital and had got things mixed up. This may be true for what Mr Kumar accepted was a mistake either in Mr Kumar's Amended Reply and Defence to Re-amended Defence and Counter Claim or his witness statement, but not both, because the pleading was signed in June 2021 and the witness statement in September 2022. Confusion about which alleged conversation related to which loan undermines the credibility of Mr Kumar's evidence as to the content of oral conversations; and

(iv) in paragraph 243 of Mr Kumar's trial witness statement he refers to e mailing Mr Turner and Mr Morley on 31 August 2018 to request a meeting, which subsequently took place. When asked in cross examination, Mr Kumar could not recall where the meeting had taken place.

(v) looking at the oral evidence in isolation, I prefer the evidence of LSC's witnesses, Mr Turner and Mr Morley to that of Mr Kumar and Mr Verma. Mr Turner and Mr Morley broadly accepted that they could not recall the content of

their conversations with Mr Kumar but gave evidence as to LSC's practice of only to agreeing to extend the date for payment of loans in writing. Their evidence as to this practice does not require Mr Turner or Mr Morley to recall what was actually said during the course of their conversations with Mr Kumar and is not subject to the factors noted by Leggatt J in *Gestmin* as making the recollection of witnesses of oral conversations unreliable. In this case the unreliability of Mr Kumar's evidence as to the content of the index conversations with Mr Turner and Mr Morley is illustrated by the matters I refer to in (i) – (iii) above;

(c) the documentary evidence in the bundle, both in what it does contain and in what it does not contain, contradicts or is inconsistent with Mr Kumar's evidence that the representations referred to in paragraph 102 above were made and is consistent with Mr Turner and Mr Morley's evidence as to LSC's practice of only agreeing to extend the date for repayment of loans in writing:

(i) there are written agreements for each loan made to ADL/ACL/Mr Kumar/Mrs Kumari/Mr Verma consisting of a formal loan offer and a loan agreement. Each loan offer and each loan agreement has been signed on behalf of LSC as lender and by or on behalf of each of the borrowers. Each formal loan offer clearly states that the date for repayment of the loan is 12 months after the date of the first drawdown. Each loan agreement consists of Specific Terms that apply only to that loan and General Terms. The Specific Terms provide that the date for repayment of the loan is 12 months after the date of first drawdown and the General Terms provide that no amendment to the terms of the loan is valid unless in writing and signed by or on behalf of LSC and the borrower. The scheme of the documents is therefore that the date for repayment is stated in the written loan documents and can only be altered by a written document signed by or on behalf of the borrower and LSC (consistent with what Mr Turner and Mr Morley say is LSC's policy);

(ii) Mr Kumar accepts that he was advised by his own solicitors on all of the loans which are the subject matter of the proceedings, except loan 517, and upon entering into the ADL Guarantee and the ACL Guarantee and that his solicitors were provided with the formal loan offers, loan agreements, ADL Guarantee and ACL Guarantee. Mr Kumar suggested however that his solicitors were instructed simply to "deal with the paperwork" rather than to advise upon the terms of the

loans. It is not entirely clear what Mr Kumar meant by this, but he said in cross-examination that he did not tell his solicitors that LSC had orally agreed to extend the dates for repayment of the loans beyond the 12 month period specified in the loan documentation and therefore he was not advised that, as those oral agreements were inconsistent with the written loan documentation, the oral agreements might prove to be unenforceable;

(iii) none of the alleged oral representations/agreements are referred to in any email or other correspondence passing between LSC and Mr Kumar or Mr Kumar and LSC (there being no correspondence between LSC and Mrs Kumari/Mr Verma) and no document refers to any of the oral representations/agreements alleged by Mr Kumar. This is all the more remarkable given that:

- ADL applied to LSC for an additional £140,500 to build two additional flats at 230-232 Lichfield Road, which application became the subject matter of Loan 505. On 15 November 2017 Mr Turner emailed Mr Kumar to ask him whether ADL required additional time to complete the two flats as well as the additional funds. Mr Kumar did not respond to this email. Mr Kumar was asked about his failure to respond and he initially suggested that he did not respond because extra time was not needed, because Mr Turner, in his email, was referring to whether ADL needed extra time beyond 5 April 2019. However after he was taken to other documents, Mr Kumar conceded that Mr Turner must be asking in his email whether ADL needed additional time beyond 5 April 2018 (the date for repayment specified in the signed loan offer and loan agreement). As it was Mr Kumar's case that he knew that 12 months would be insufficient to complete the construction of the flats at 230- 232 Lichfield Road and Mr Turner agreed, before Loan 440 was completed that LSC would extend the time for repayment by a further 12 months, it is inconsistent with Mr Kumar's case for him not to have responded to Mr Turner's e mail of 15 November 2017 that ADL would need the 12 month extension to 5 April 2019 which Mr Turner had agreed it would grant or at least some extension to 5 April 2019;

- on 2 August 2018 Mr Turner sent an email to Mr Kumar in which he said that the Daley Road loans (466, 536 and 583) fell due for payment the following day and he suggested LSC could only offer a three month extension to the date for repayment. Mr Kumar accepts that he did not respond to that email to point out that, on his case, LSC had agreed to extend the Daley Road loans to April 2019.

Mr Kumar said he did not do so because he did not want to "wind LSC up" by pointing this out to them;

- In August 2018 Mr Kumar offered to pay £1.6m to LSC (backed by an offer of refinance from Lloyds Bank for £1.5m) to redeem the LSC loans advanced to fund 230 - 232 Lichfield Road (Loans 440, 505 and 517). LSC rejected that offer, however Mr Kumar did not point out that LSC, on his case, had reneged on its agreement to extend the time for repayment of those loans to 5 April 2019. Mr Kumar said that LSC had got him "under their thumb" and for that reason he did not mention that they had reneged on their promise to extend time for repayment; and

- Mr Kumar said that he met with Mr Morley and Mr Turner at the beginning of September 2018 (he could not remember where). I asked Mr Kumar whether, at that meeting he had complained to Mr Morley/Mr Turner that they have agreed to extend time for repayment of the three 230-232 Lichfield Road loans to 5 April 2019. Mr Kumar said that he had done so, but they said they would not extend time for repayment of the loans and he did not refer to the promise to extend time for repayment of the loans after the meeting because there was "no point". I find it incredible that Mr Kumar would not mention, to Mr Turner or Mr Morley, in any of his emails sent in August or September 2018 that they had agreed to extend the date for payment of loans for 440, 505 and 517 by 12 months, if they had in fact done so;

(iv) the time for repayment of loans 440, 505 and 517 was extended from 5 April 2018 to 10 August 2018 by side letter dated 27 April 2018 which was signed on behalf of LSC and on behalf of ADL by Mr Kumar. Mr Kumar was asked in cross-examination why, if on his case LSC had agreed that they would grant a 12 month extension to the date for repayment of loans 440, 505 and 517, the side letter only provided for a four-month extension. Mr Kumar replied (unconvincingly in my view) that the 12 month extension was being provided in stages and that he signed the letter because he been asked to do so;

(v) Mr Turner sent to Mr Kumar a formal offer letter for Loan 494 (236 Lichfield Road) showing that it was repayable 12 months after the first advance. On this occasion Mr Kumar did respond to that email to say that he needed longer than 12 months to repay the loan. The Loan Offer was then amended to provide that ACL could apply for a 6 month extension to the date for repayment of the loan 494,

which LSC could, at its sole discretion grant. This is inconsistent with Mr Kumar having told LSC, as he says he did, that he needed more time to repay the loans for 230-232 Lichfield Road, Daley Road and the Pattingham Land and LSC agreeing orally that it would extend the time for repayment (to the extent noted by me in paragraph 102 above). It is inconsistent, because the written Loan Offers and Loan Agreements, state the date for repayment is 12 months from first drawdown and do not even provide an option for the borrowers to ask for an extension as they did on Loan 494;

(vi) Mr Say referred to the three loans that LSC advanced to Mr Kumar and Mrs Kumari in partnership, to develop the land at Church Green having been repaid 1 month and 8 days after the date stated in the loan documents as the date for repayment. Mr Say says there was no side letter extending the time for repayment of these loans so the date for repayment must have been extended by oral agreement, contrary to the evidence of Mr Turner and Mr Morley that LSC's practice was only to extend time for repayment of a loan by written agreement signed on behalf of LSC and the borrower. However, Mr Kumar accepted that LSC had charged default interest on the three loans for the 1 month and 8 days. LSC would only be entitled to do that, if the loan was in default and it would not be in default if LSC had orally extended time for the repayment of this loan to the date of its actual repayment. Mr Kumar accepted that he had paid the default interest charged by LSC without complaint, he said he did so because it was only a few thousand pounds and it was not worth disputing in light of his ongoing relationship with LSC. Far from being a point in favour of the Mr Kumar's case, the redemption of the three loans advanced by LSC for the development of the land at Church Green and the charging of default interest for one month and 8 days is consistent with the evidence of Mr Turner and Mr Morley that LSC only ever agreed to extend the time for repayment of a loan by written agreement signed on behalf of LSC and the borrower.

(d) it is, in my judgment, inherently unlikely that Mr Turner or Mr Morley would agree or represent, on behalf of LSC, before loan documents were signed and loans advanced, that LSC would extend the date for repayment of the loans by 12 months (or for long enough to enable the Pattingham development to be completed) after the date specified for repayment in the loan documents (12 months) without knowing what the circumstances would be on the anniversary

of the first advance of those loans. That they would not do so is supported by the term included in Loan 494 that ADL could request an extension of the date for repayment of 6 months which LSC could grant or refuse in its absolute discretion;

(e) it is unlikely that Mr Kumar would have a very reliable memory of precisely what was said to him by Mr Morley/Mr. Turner in 2017/2018 as he purports to have. Mr Kumar said, in cross examination, that the reason why he had such a good memory of at least some of the conversations was because they had changed his life but, assuming in Mr Kumar's favour that what he was relating to the court is his honest recollection of those conversations:

(i) as Leggett J noted in paragraph 16 of his judgement in *Gestmin*, it is an error to suppose that the stronger the witnesses recollection appears to be the more accurate it is;

(ii) the conversations which Mr Kumar says that he had with Mr. Turner/Mr Morley, on the face of it, do not appear to have been treated by him as important at the time (for example he took no steps to ensure that they were reflected in the loan documents that he signed or refer to them in his email correspondence with them). They only became important when, on Mr Kumar's case, LSC reneged on those representations/agreements sometime after the conversations took place, by not extending the date for repayment of the loans, even then, Mr Kumar did not send any communication to Mr. Turner or Mr Morley complaining that they had reneged on the representations/agreements that Mr Kumar said they made and he did not even raise this verbally (see paragraph 103 (c) (iii) above) until a meeting in September 2018, long after LSC demanded repayment of the relevant loans; and

(iii) Mr Kumar's recollection of conversations may well have been "overwritten" by the process of engaging in these proceedings resulting in Mr Kumar "recollecting" representations/agreements being made that were not in fact made, which suit his case that Mr Turner and Mr Morley misled him. For example Mr Kumar did not include reference to what on his case was the important meeting of 18 December 2017 (in fact taking place on 14 December 2017) in his initial Particulars of Claim. Mr Kumar's explanation, in cross examination, that he was acting as a litigant in person when the Particulars of Claim were drafted and when

he instructed solicitors, they wanted far more detail from him, is unconvincing given the importance of what Mr Kumar claims was said at the meeting; and

(f) I have noted that Mr Kumar's assertion that he had a good memory of the oral agreements/representations is undermined by the matters mentioned by me in paragraph 103 (b) above and critically the documentary evidence strongly supports LSC's case that the date for repayment of the loans was as recorded in the loan documents and any agreed extension of that date would be recorded in a document signed by or on behalf of LSC and the borrower. The absence of any reference at all, in any document, to the oral representations/agreements that Mr Kumar alleges were made, including no contemporaneous written complaint by Mr Kumar that LSC had reneged on those oral representations/agreements strongly suggests that those oral representations/agreements were not made.

Mrs Kumari

104. Mrs Kumari was a director of ADL, her evidence was that, in spite of this, it was Mr Kumar who ran ADL and not only did she not have any contact with anyone from LSC (which is common ground) but she never knew how much the loans were for or what they were for. Nonetheless, Mrs Kumari said that she had asked Mr Kumar, before each of those loans were entered into, when Loan 440 for 230-232 Lichfield Road and Loan 466 for Daley Road were repayable and that Mr Kumar had told her in each case that they were repayable after 2 years. I found that evidence not to be credible, because:

(a) in her witness statement in support of her application to set aside a statutory demand served upon her by LSC, Mrs Kumari did not assert that Mr Kumar had told her that Loan 440 was repayable after two years, but only that the loan was not due when receivers were appointed by LSC;

(b) during his cross examination, Mr Kumar accepted that he had sent an e mail to Mr Turner, in November 2017 telling him that he anticipated completing the construction of the flats at 230-232 Lichfield Road and repaying Loan 440 in December 2017/January 2018 (some 9 or 10 months after first draw down). Mr Kumar said that he had said that because the works were going well at the time. It is unlikely that Mr Kumar would have told Mrs Kumari that ADL had 2 years to repay Loan 440 from first draw down when, according to the Loan Agreement dated 6 April 2017, for Loan 440 signed by Mr Kumar on behalf of ADL, ADL

only had 12 months and Mr Kumar anticipated, 7 months after Loan 440 was entered into that it would be repaid after 9/10 months; and

(c) it is inherently unlikely that Mrs Kumari took no interest in how much Loan 440 or 466 were for or what they were for, but only when they were repayable.

Mr Verma

105. Mr Verma said that he relied on what his father, Mr Kumar said about his discussions with LSC but that:

(a) he went to a meeting which he said took place on 18 December 2017 with his father and Mr Turner/Mr Morley at which he says that Mr Kumar made it clear that the houses to be built on the Pattingham Land would be for the personal use of Mr Kumar/Mrs Kumari/Mr Verma and Mr Turner said that the loans could be extended to 24 months if required; and

(b) in relation to Loan 494 for 236 Lichfield Road, he overheard a telephone conversation between Mr Turner and Mr Kumar when Mr Turner said that LSC would be flexible and the term of the loan would be extended.

106. I do not consider that Mr Verma's evidence as to what was said at the December 2017 meeting was credible because:

(a) Mr Verma, like his father claimed to have a good recollection of what was said at the meeting, but he got the date of the meeting wrong, he accepted that it had taken place on 14 December 2017, not 18 December 2017, undermining the reliability of his memory;

(b) it was the evidence of Mr Turner and Mr Morley that, they both knew that lending to individuals to purchase or develop houses for those individuals to occupy, rather than to sell as part of a business, was regulated lending which LSC was not authorised to carry on and that therefore, had Mr Kumar told them that he intended to build homes for him and his family to occupy on the Pattingham Land they would not have agreed that LSC would lend money to Mr Kumar/Mrs Kumari/Mr Verma for that purpose. I consider it likely that Mr Turner and Mr Morley would both have known (for reasons I explain in more detail in considering their credibility below) in September/October 2017, that lending to individuals to purchase or develop houses for those individuals to occupy was regulated lending which LSC was not authorised to carry out and for

that reason it was unlikely that they would have agreed to LSC lending money to Mr Kumar/Mrs Kumari/Mr Verma for this purpose;

(c) Mr Verma signed an Offer Letter dated 28 October 2017 and a Pattingham Loan Agreement dated 17 January 2018. The Offer Letter stated that it was a condition precedent to monies being advanced that Mr Verma confirmed that neither he nor any connected party will occupy the property or plan to occupy the property in the future. The Pattingham Loan Agreement contained a declaration (see paragraph 134 below) that Loan 526 to Mr Verma was for business purposes. Mr Verma was advised on the content of the Loan Agreement for Loan 526 by Murria & Co solicitors, on the face of it, including upon the declaration in the Loan Agreement that he was entering into the Loan Agreement for Loan 526 wholly or predominantly for the purposes of a business and would not therefore have the benefit of protections afforded by FSMA/CCA; and

(d) there is a difference between the representation that Mr Kumar says was made at the meeting in December 2017 about extending the date for repayment of the Pattingham Loans and who made it and the representation that Mr Verma says were made. Mr Kumar says that Mr Morley said "you know we are flexible we will give you extra time to complete your project", whereas Mr Verma says that it was represented by Mr Turner that the date for repayment of the Pattingham Loans would be extended to 24 months if required. Those differences undermine the reliability of Mr Verma's evidence and therefore the support that it provides for Mr Kumar's evidence (or vice versa). In addition, the documentary evidence (or lack of it) which I consider to be more reliable (for the reasons articulated by Legatt J (as he then was) in *Gestmin*, than what Mr Verma says is his recollection of what was said, does not support Mr Kumar/Mr Verma's evidence that any oral promise or representation was made, that the date for repayment of the Pattingham Loans would be extended beyond the 12 months allowed in the Pattingham Loan Agreements (as noted in paragraph 103 (c) above).

107. I do not consider that Mr Verma's evidence, that his father told him that LSC had agreed to extend Loan 494 for 12 months or that he overheard Mr Turner telling his father that LSC would be flexible and the term of the loan would be extended is credible because:

(a) when Mr Verma was asked about the conversation that he said he overheard between his father and Mr Turner and how he knew which loan it related to he said

that he "imagined" it would be about 236 Lichfield Road, but he did not explain why he imagined that;

(b) the Offer Letter and Loan agreement dated 3 November 2017 for Loan 494 confirmed that the loan was repayable 12 months after drawdown but could be extended at LSC's sole discretion for 6 months. The Offer Letter was amended to provide that it could be extended for 6 months after Mr Kumar had told Mr Turner (see paragraph 103 (c) (v) above) that he did not believe that he could complete the development of 236 Lichfield Road and pay back the loan within 12 months. Mr Kumar then signed both the Offer Letter and the Loan Agreement for Loan 494 on behalf of ACL, it is unlikely in those circumstances that Mr Kumar would have told Mr Verma that LSC had agreed to extend the date for repayment of Loan 494 for 12 months or that Mr Verma would have overheard Mr Turner telling Mr Kumar that Loan 494 would be extended, when the option to extend it for 6 months was, according to the Loan Agreement to be at LSCs sole discretion; and

(c) Higgs & Sons, solicitors were provided with the ACL Loan Offer, ACL Loan Agreement for Loan 494 and ACL Guarantees, for Mr Kumar and Mr Verma to sign to guarantee the debt owed by ACL to LSC. Higgs & Sons provided a letter dated 10 November 2017 to confirm that they had advised Mr Verma on the content of his ACL Guarantee and its implications. Mr Verma said that he imagined that he would have told Higgs & Sons that Mr Kumar had told him that Loan 494 would be extended by LSC by 12 months, if he did, then it is inconceivable in my judgment that Higgs & Sons would not have told him that any oral agreement made on behalf of LSC to extend the term of Loan 494 (which Mr Verma was guaranteeing) was unlikely to be enforceable.

Mr Dhillon

108. I am not satisfied that Mr Turner did suggest to Mr Dhillon that lending that he required solely for the purpose of extending his domestic property should be disguised as a loan to Olympia Transport Limited in order to get round the problem of that loan being a RMC, if it was made to Mr Dhillon personally:

(a) when it was put to Mr Dhillon that, as a solicitor, he ought to know that causing the company of which he was a director to borrow money, which was not for the benefit of the company, but for his personal benefit, was a breach of the duty that he owed to that company as its director, Mr Dhillon said that the loan was for the

benefit of the company because part of the extension to his house was occupied as an office for the benefit of its business, saving it substantial amounts of rent. In re-examination, upon being encouraged to do so, Mr Dhillon sought to play down the amount of the benefit that the company derived from the loan, saying that it occupied only a small proportion of the extension. Mr Dhillon's evidence therefore seemed to change according to the point that he was trying to make;

(b) the loan documents for the loan to Olympia Transport Limited were not disclosed and therefore I have been unable to consider what is said in the loan documents (which it appears Mr Dhillon signed on behalf of Olympia Transport Limited) about the purpose of the loan. I cannot determine therefore what was said in the loan documents about the purpose of the loan and whether, on Mr Dhillon's evidence, he misrepresented the purpose of the loan in the loan documents and Mr Dhillon could not be cross examined on the content of the loan documents; and

(c) in the final paragraph of Mr Dhillon's witness statement, he says "In lieu of this, I believe the defendant was aware that I would be using the funds raised against my company (Olympia Transport Ltd) to allow me to complete my personal home extension project". Mr Dhillon agreed that "In lieu of this" should read "In view of this" and this was an error in his statement which he claimed to have typed himself (except for the standard wording of the statement of truth, confirmation of compliance and certificate of compliance sections which were, he said, added to what he had typed). The difficulty with that is that exactly the same mistake is made in the final paragraph of Mr Kang's statement and for reasons that I will explain in dealing with the credibility of Mr Kang's evidence, I am satisfied that Mr Kumar produced at least the last paragraph at least of Mr Dhillon and Mr Kang's witness statements in spite of Mr Dhillon and Mr Kang giving evidence that they typed the text of their own witness statements, this undermines the credibility of Mr Dhillon's evidence.

Mr Singh

109. I do not consider that Mr Singh's evidence (that he saw Mr Kumar meeting with Mr Taylor and Mr Morris at the Pattingham Land in early October 2017 and saw Mr Kumar pointing to plans that he showed to Mr Taylor and Mr Morris and overheard Mr Kumar telling them that the first plot was to be his house to live in, the second plot would be for his son's house and the third house would be for his wife) is credible for the following reasons:

(a) when he was asked, in cross examination, about the plans that he saw Mr Kumar show to Mr Taylor and Mr Morris in October 2017 at the Pattingham Land, Mr Singh initially said that they were architects plans, but when he was shown architects plans in the bundle attached to the valuation of ACS dated 18 October 2017 (showing four houses rather than three), Mr Singh then suggested that the plans Mr Kumar had were more basic than that. It was then suggested to Mr Singh that what he might have seen was the land registry plans for the Pattingham Land as they existed at the date of the site visit (October 2017) with three derelict farm buildings on it. Mr Singh then appeared to be unclear as to what he had seen and, as I will mention in due course, no plans have been produced with drawings of three (rather than four) houses on them;

(b) Mr Kumar/Mrs Kumari/Mr Verma did not complete their purchase of the Pattingham Land until January 2018. It is unclear therefore why Mr Singh would have been erecting fences around the Pattingham Land, on the instructions of Mr Kumar, three months before the Pattingham Land was purchased, which is the explanation given by Mr Singh, in his witness statement for being there in October 2017;

(c) Mr Morris, in his witness statement says he has never met Mr Taylor and, as I will explain in due course, I found Mr Morris to be a credible witness and I accept his evidence on this point; and

(d) the ACS valuation of the Pattingham Land dated 18 October 2017 states that it is based on a site visit that took place on 3 October 2017. Mr Kumar says that this is when he, and therefore Mr Singh went to the Pattingham Land. The content of the ACS Valuation (which I refer to in some detail in paragraph 153 below) is inconsistent with Mr Kumar having told Mr Taylor, during that inspection that he intended to build 3 houses on the Pattingham Land, because the valuation refers to four houses being built and attaches plans for 4 houses, one on Plot 1, two on Plot 2 and one on Plot 3.

Mr Kang

110. In his witness statement, Mr Kang says that he overheard a telephone conversation between "Adam" (which Mr Kumar says was Mr Turner) and Mr Kumar whilst sitting in Mr Kumar's car and that "Adam" confirmed that he could not lend to Mr Kumar in his personal name (in connection with the Pattingham Land) but Mr Kumar should leave it with him and he would come back to him. In the final paragraph of his witness statement, Mr Kang says "In lieu of this, I believe the Defendant (LSC) was aware that the Claimant (Mr Kumar) was using the site at Pattingham for his own personal use."

111. I do not consider that Mr Kang's evidence provides any support for Mr Kumar's contention that, during the telephone call which Mr Kang witnessed, he told Mr Turner that he wanted to acquire the Pattingham Land to build personal houses for himself and his family. I find this because:

(a) the wording of the first part of the final paragraph of Mr Kang's witness statement is identical to the first part of the final paragraph of Mr Singh's witness statement (containing the same mistake in saying "In Lieu of this" instead of "In view of this"). In the case of Mr Kang there is a record of the history of the creation of his witness statement which records: (i) "document created by Rajinder Kumar 2022-09-17 12:07; (ii) document e mailed to rakang@hotmail.com - 2022-09-2017 – 12:08 and ragkang@hotmail.com entered name as signing 2022-09-17 1:35. Mr Kang sought to explain that he had e mailed the witness statement that he typed to Mr Kumar so that Mr Kumar could create a PDF copy of it for him to sign. I found that explanation unconvincing because it was not offered until Mr Kang was taken to the record of the history of the creation of the witness statement and Mr Kang was unable to explain why he needed a PDF copy of his witness statement as opposed to a word copy and why he could not create his own PDF. It also did not explain why the first part of the final paragraphs of both the witness statement of Mr Kang and Mr Sing is identical and contains the same mistake. I am satisfied, in the case of Mr Kang, that Mr Kumar created his witness statement, contrary to Mr Kang's evidence that he created it himself, this is consistent with the record of the creation of his witness statement which says it was created by Mr Kumar and

explains why the same mistake appears in the final paragraph of the witness statements of Mr Kang and Mr Sigh; and

(b) the mere fact that, according to the evidence of Mr Kang, reference was made, during the phone call, by Mr Kumar to the lending being in Mr Kumar's personal name (and it is common ground that the Pattingham Loans were made to Mr Kumar, Mrs Kumari and Mr Verma personally, rather than to a limited company) does not imply that the houses to be built on the Pattingham Land were to be occupied by Mr Kumar, Mrs Kumari and Mr Verma, even though, in the final paragraph of Mr Kang's witness statement (in my judgment written by Mr Kumar) Mr Kang says that he believes that it does.

Mr Turner

112. I found Mr Turner to be an honest witness giving the court his honest recollection of events, although he fairly accepted that he had had numerous conversations with Mr Kumar and could not recall the content of them. In rejecting Mr Kumar's evidence that Mr Turner and Mr Morley had verbally agreed, before loans were advanced that LSC would extend the date for repayment, Mr Turner fell back on what he says was his and LSC's practice of never agreeing to extend the date for repayment of a loan, before the loan was advanced and never agreeing to extend the date for repayment orally (he said any agreements to extend the date for repayment were agreed in writing by a side letter signed on behalf of LSC and the borrower).

113. In rejecting Mr Kumar's evidence, that he had told Mr. Turner and Mr Morley that he intended to construct houses on the Pattingham Land to use as homes for himself and his family, Mr Turner said that he was well aware, in 2017/2018 that loans to individuals for this purpose were regulated loans which LSC was not authorised to enter into and for that reason, had Mr Kumar said that he intended to construct houses on the Pattingham Land to use as homes for himself and his family, he would not have agreed to LSC making the Pattingham Loans.

114. Mr Turner confirmed that, prior to commencing his employment at LSC, in around 2015, he had no experience of lending to property developers, he had worked in his father's cash and carry business until it was sold and then in a bathroom showroom,

although he said that his family owned a large portfolio of properties. Mr Turner's lack of experience, makes it more possible that he would not have known, in 2017/2018 what regulated loans were and what the consequences were, for LSC, as an unregulated lender, if it made a regulated loan.

115. I am not satisfied that Mr Turner strictly followed every aspect of the lending policies which he sets out at paragraph 7 in his first witness statement, although the thrust of that witness statement was that he did. At paragraph 7.3 he says that any new borrower (one that LSC has not had previous dealings with) is required to complete an application form and provide all necessary supporting information. However Mr Kumar, Mrs Kumari and Mr Verma were new borrowers of the Pattingham Loans (LSC had previously lent to Mr Kumar and Mrs Kumari, but as business partners) and they were not required to complete application forms. It was Mr Turner's evidence that if a borrower did not repay a loan on the repayment date, then LSC, if it did not extend the loan by a side letter signed by both parties or demand repayment of the loan, would issue a reservation of rights letter, to reserve its position. However none of those three things happened in relation to the Church Green Lane loans where Mr Kumar and Mrs Kumari repaid the loans 1 month and 8 days after the repayment date (see paragraph 103 (c) (vi) above.

116. Given that Mr Turner does not appear to have followed what he says were LSC's lending procedures and practices strictly, this makes Mr Turner's evidence that he did not agree verbally with Mr Kumar that loans would be extended and would in any event not agree, before a loan agreement was entered into that the repayment date set out in it would be extended less reliable than it would have been if there were no evidence of him not following what he said were the practices and procedures of LSC.

Mr Morley

117. Mr Morley, in his trial witness statement, said that he had no recollection of the meeting that Mr Kumar said took place in December 2017 and did not remember saying that he would be flexible and give Mr Kumar extra time to complete his build. He also said that he did not agree, on 17 November 2018, to extend time for repayment of the outstanding loans by 10 months.

118. In his witness statement, Mr Morley said that he could not recall the meeting on 14 December 2017 but, in cross examination Mr Morley said that he did recall the meeting and it was just a general chat about the existing lending to Mr Kumar and his companies and the "pipeline" (that is possible future lending requirements).

119. Mr Morley said that he was not involved in the day to day operations of LSC, this was Mr Turner's responsibility.

120. I am satisfied that Mr Morley was an honest witness, although I am not satisfied that he does recall the meeting on 14 December 2017 or its content, given the discrepancy between Mr Morley's witness statement and the evidence he gave in cross examination on this point. Mr Morley's evidence, like that of Mr Turner is broadly based upon what he says he would and would not have done rather than on his recollection of what he did do.

121. In the case of Mr Morley it is his family's money that provides LSC's capital and he established LSC. He explained that LSC had been set up initial with the intention that it would make small payday loans which would be regulated credit agreements but it moved away from those loans into bridging loans and stopped carrying on regulated business giving up its regulated business authorisations. Mr Morley was asked whether LSC had a compliance officer who ensured that it complied with relevant regulations, he confirmed that it did not and relied upon its solicitors to keep it up to date with the relevant regulations. I have a concern that the solicitors keeping LSC up-to-date with the relevant regulations may have drafted LSC's General Terms which contain a declaration appropriate to loans and hire agreements with individuals, but not mortgages with individuals (see paragraph 134 – 143 below) and that the terms relating to default interest do not make it clear whether default interest is charged instead of or in addition to standard interest (see paragraphs 194 - 201) However, given Mr Morley's experience, I am satisfied that he at least knew, in 2017/2018 what regulated loans were, that LSC could not make regulated loans and that therefore it could not lend money to Mr Kumar/Mrs Kumari/Mr Verma to acquire the Pattingham Land, and construct houses on it, if the purpose was to construct homes for themselves to occupy.

Mr Morris

122. Mr Morris says that he was instructed by Mr Kumar to produce a plan for the purposes of the development of Plot 1 which he exhibits to his witness statement. The plan is dated May 2018 and is headed “Building Control Application Drawing”. The First Floor is divided into the “Raj Wing and “The Lalit Wing” and the ground floor is divided into the “Live Element” and the “Work Element”. In his witness statement, Mr Morris says that he was aware that Mr Kumar wanted Plot 1 for himself but Plot 2 was, from his knowledge, never for his son. Mr Morris says that he was led to believe that Mr Verma would live with his mother and father in the house built on Plot 1. Mr Morris explained that this was evidenced by the reference to the “Lalit wing” in the plan that he drew of the house to be built on Plot 1 (Lalit being Mr Verma's first name).

123. Mr Morris says that Mr Kumar sent him a witness statement to sign, but that he did not sign it because its content was untrue. Mr Morris says that, as at March 2020, he had never met Mr Taylor or Mr Turner and therefore the content of the witness statement prepared by Mr Kumar for him to sign is untrue insofar as it refers to a meeting attended by him and Mr Taylor at the Pattingham Land and the suggestion that Plot 2 would be for Mr Verma’s use.

124. During his cross examination, Mr Morris was taken to his e mail correspondence with Mr Kumar concerning the witness statement that Mr Kumar had prepared for him. It was put to Mr Morris that:

(a) he had approached LSC to obtain finance for a proposed joint venture between him and Mark Worthington (the site manager at 230-232 Lichfield Road) to develop land at “Marble Alley” and he had used Mr Taylor to produce a valuation of Marble Alley;
(b) he had carried out professional work for LSC as an architect after being introduced to them by Mr Kumar;
(c) he was angry about Mr Kumar not paying professional fees that were due to him of around £8,000; and
(d) he therefore saw LSC as a potential source of both finance and professional work and was angry with Mr Kumar and this motivated him to refuse to sign the witness statement that Mr Kumar sent to him and instead sign the witness statement sent by LSCs solicitors.

125. I am satisfied that Mr Morris was an honest witness and that the evidence that he gave is credible and reliable. Mr Morris readily accepted that he had approached LSC to fund Marble Alley (although he said the development did not proceed) and that he has done some professional work for LSC (he said around seven small jobs). Mr Morris also accepted that his professional fees of around £8,000 were left unpaid by Mr Kumar or his companies. I am not satisfied that there is or has been any substantial commercial advantage to Mr Morris in providing a witness statement to LSC, or refusing to provide a witness statement to Mr Kumar.

126. Whilst Mr Morris prevaricated in dealing with Mr Kumar's request that he sign the witness statement that Mr Kumar sent to him, I accept his evidence, given in cross examination, which in substance was that he did not want to get involved by providing a witness statement at all and was certainly not prepared to sign a witness statement which he felt was untrue. It is inconsistent with Mr Morris not wanting to get involved that he ended up providing a witness statement for LSC to support its case, but again I am not satisfied that this casts any doubt upon the truth of what is contained in Mr Morris's signed witness statement.

127. I am satisfied that the content of the witness statement that Mr Morris signed (including the parts that point out where the draft witness statement prepared for him by Mr Kumar are untrue) is based upon Mr Morris's honest recollection of events.

ISSUE 1 Are the Pattingham Loan Agreements or any one of them RMCs under FSMA and therefore unenforceable?

What is a RMC?

128. It is common ground that the question of whether or not the Pattingham Loan Agreements, or any of them are RMC's is determined by Article 61 (3) RAO which provides:

> *"(3) In this Chapter—*

(a) ...a contract is a "regulated mortgage contract" if, at the time it is entered into, the following conditions are met—

(i) the contract is one under which a person ("the lender") provides credit to an individual or to trustees ("the borrower");

(ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA;

(iii) at least 40% of that land is used, or is intended to be used—

(aa) in the case of credit provided to an individual, as or in connection with a dwelling;

but such a contract is not a regulated mortgage contract if it falls within article 61A(1) or (2)."

129. The only relevant exception in Articles 61A(1) or (2) is an "investment property loan" which is defined in article 61A(6)as:

"investment property loan" is a contract that, at the time it is entered into, meets the conditions in paragraphs (i) to (iii) of article 61(3)(a) and the following conditions—
(a) less than 40% of the land subject to the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person; and
(b) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower;"

130. Article 61A(3) provides that:

" For the purposes of this article, if an agreement includes a declaration which—
(a) is made by the borrower, and
(b) includes—
(i) a statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower,
(ii) a statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that would be available to the borrower under the Act if the agreement were a regulated mortgage contract under the Act, and
(iii) a statement that the borrower is aware that if the borrower is in any doubt as to the consequences of the agreement not being regulated by the Act, then the borrower should seek independent legal advice,
the agreement is to be presumed to have been entered into by the borrower wholly or predominantly for the purposes specified in sub-paragraph (b)(i) unless paragraph (4) applies."

131. Article 61A(4) states:

"(4) This paragraph applies if, when the agreement is entered into—
(a) the lender (or, if there is more than one lender, any of the lenders), or
(b) any person who has acted on behalf of the lender (or, if there is more than one lender, any of the lenders) in connection with the entering into of the agreement, knows or has reasonable cause to suspect that the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."

132. It is common ground that:
(a) the conditions set out in Article 61 (3) (a) (i) – (iii) are met by all of the Pattingham Loan Agreements;
(b) the question I need to decide is whether the Pattingham Loan Agreements, or any of them are investment property loans as defined by article 61A (6) ("Investment Property Loans");
(c) if the presumption under Article 61(3) does not apply, then LSC must prove, on the balance of probabilities, that it was the intention of Mr Kumar and/or Mrs Kumari and/or Mr Verma of the one part and LSC of the other part that the Pattingham Loan Agreements or some of them would be Investment Property Loans; and
(d) if I decide that the presumption under article 61A (3) applies (that the Pattingham Loan Agreements were entered into wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower) then that presumption is rebutted if Mr Kumar and/or Mrs Kumari and/ or Mr Verma persuade me, on the balance of probabilities, of the matters set out in Article 61A (4) and LSC must still prove that less than 40% of the land subject to the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower.

My approach to Issue 1

133. I will approach issue 1 as follows:
(a) I will decide if the declaration contained in each of the Pattingham Loan Agreements (which are in identical form) complies with Article 61A(3);
(b) I will decide if Article 61A (4) applies; and
(c) I will decide whether the Pattingham Loans or any of them were in fact Investment Property Loans, applying the burden of proof as summarised in paragraph 132 (c) and (d) above.

Do the declarations in the Pattingham Loans comply with Article 61A (3) ?

134. Each of the Pattingham Loan Agreements contain declarations just below the signatures of the borrowers as follows**:**

Declaration for exemption relating to business (if an individual) (articles 60C and 60O of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001)"

- "I am entering into this agreement wholly or predominantly for the purposes of a business carried on by myself or intended to be carried on by myself.
- I understand that I will not have the benefit of the protection of any remedies that would be available to me under the Financial Services and Markets Act 2000 or under the Consumer Credit Act 1974 if this agreement were a regulated agreement under those acts.
- I understand that this declaration does not affect the powers of the court to make an order under section 140 B of the Consumer Credit Act 1974 in relation to a credit agreement, where it determines that the relationship between the lender and the borrower is unfair to the borrower.
- I am aware that, if I am in any doubts as to the consequences of the agreement not being regulated by the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974, then I should seek independent legal advice.
- By signing these Specific Terms you confirm that you have been given the opportunity to seek legal advice on the nature and extent of the liabilities and obligations assumed by you as the borrower under the General Terms and these Specific Terms….".

135. Mr Say says that the declarations are defective in that they do not refer to regulated mortgage contracts (RMC) under Article 61A but to regulated agreements, referring, in the heading, to Articles 60C and 60O of the RAO. Article 60C relates to regulated credit agreements and article 60O to regulated consumer hire agreements.

136. Mr Pomfret accepts that the heading to the declaration refers to the wrong Articles of the RAO and it is common ground that: (a) Articles 60C and 60O provide for declarations to be made in a prescribed form and that the declaration in the Pattingham Loan Agreements is in that prescribed form; but (b) Article 61A (3) does not require the declaration under that Article to be in a prescribed form.

137. Neither counsel referred me to any authority in which guidance is given as to what the essential ingredients of a valid Article 61A (3) declaration are which would assist me in deciding whether the declaration appearing in the Pattingham Loan Agreements satisfies Article 61A (3).

138. I am satisfied that the heading to the declarations (which refers to Articles 60C and 60O) and the form of the declarations, following as they do the precise wording required by those articles were drafted originally, in whatever context, to comply with Articles 60C and 60O of RAO and not Article 60A (3). Given however that there is no prescribed wording for the form of the declaration for the purposes of Article 60A (3) it is possible that the wording of the declarations in the Pattingham Loan Agreements could comply with Article 60A (3) in spite of not having been designed to do so.

139. I am satisfied that the requirement of Article 61A (3) (i) are met (that is that the declarations in the Pattingham Loan Agreements include a statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower) in that the declaration state "*I am entering into this agreement wholly or predominantly for the purposes of a business carried on by myself or intended to be carried on by myself*." Effectively mirroring the requirements of Article 61A (3) (i).

140. I am satisfied that the requirements of Article 61A (3) (iii) are met (a statement that the borrower is aware that if the borrower is in any doubt as to the consequences of the agreement not being regulated by the Act, then the borrower should seek independent legal advice) in that the declarations state "*I am aware that, if I am in any doubts as to the consequences of the agreement not being regulated by the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974, then I should seek independent legal advice" (*the Act is defined in the RAO as FSMA).

141. The difficulty lies with the requirements of Article 61A (3) (ii) which requires the declaration to contain a statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that would be available to the borrower under the Act if the agreement were a regulated mortgage contract under the Act. The only part of the declaration in the Pattingham Loan Agreements which could satisfy that

requirement is the statement that – *"I understand that I will not have the benefit of the protection of any remedies that would be available to me under the Financial Services and Markets Act 2000 or under the Consumer Credit Act 1974 if this agreement were a regulated agreement under those acts."*

142. The declarations refer to a "regulated agreement" under FSMA and the CCA, thereby using a description which, in my judgment, is capable of referring to regulated credit agreements, regulated consumer hire agreements and RMCs. I am satisfied however that, the description "regulated agreement" when taken together with the heading of the declaration which refers to Articles 60C and 60O (and not 61A) would lead the objective reader to conclude that the declarations, in referring to regulated agreements are referring to consumer credit agreements under Article 60C and regulated consumer hire agreements under article 60O, but not RMCs under Article 61A, . The presumption for which Article 61A (3) provides does not therefore apply and the burden falls upon LSC to prove that the Pattingham Loans (or some of them) are "Investment Property Loans" as defined in Article 61A(6).

143. As I have found that the presumption in Article 61A (3) does not apply it is not strictly necessary for me to consider whether the exception to that presumption, set out in Article 61A (4), applies. I will nonetheless for completeness (and because it may be relevant to the question of whether the Pattingham Loan Agreements in fact amount to Investment Property Loans) consider whether, had the declarations complied with Article 61A (3) the exception to Article 61A (3) set out in Article 61A (4) would have applied, that is that LSC or someone acting on its behalf had " *reasonable cause to suspect that the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."*

Does Article 61A (4) of RAO apply?

144. Mr Kumar says that LSC knew or had reasonable cause to suspect that Mr Kumar and/or Mrs Kumari and/or Mr Verma were not entering into the Pattingham Loan Agreements for the purpose of a business carried on or intended to be carried on by them because:

(a) Mr Kumar says that during his first conversation with Mr Turner in late September/early October 2017 about LSC lending money to acquire and develop the Pattingham Land, he told Mr Turner that he wanted to acquire the Pattingham Land in personal names, rather than in the name of a limited company, to build personal houses on for himself and his family. Mr Kumar's evidence is supported by the evidence of Mr Kang who says that he was in Mr Kumar's car when the index conversation took place between Mr Kumar and Mr Turner;

(b) at a meeting 3 October 2017, at the Pattingham Land, when Mr Taylor was valuing the Pattingham Land, between Mr Taylor (valuer), Mr Morris (architect) and Mr Kumar, Mr Kumar showed Mr Taylor plans for the construction of three houses on the Pattingham Land and told Mr Taylor that the houses were to be occupied by him and his family and he believes that Mr Taylor will have passed this information on to LSC. Mr Kumar's evidence is supported by the evidence of Mr Singh who says that he was present during the meeting and overheard Mr Kumar telling Mr Taylor about his intentions and showing him plans for three houses; and

(c) at the meeting which Mr Kumar says took place on 18 December 2017 (in fact 14 December 2017) with Mr Turner and Mr Morley, Mr Kumar told Mr Turner and Mr Morley that he planned to build personal houses for himself and his family on the Pattingham Land. This evidence is supported by Mr Verma.

145. In his witness statement, Mr Kang says that he overheard a telephone conversation between "Adam" (which Mr Kumar says was Mr Turner) and Mr Kumar whilst sitting in Mr Kumar's car and that "Adam" confirmed that he could not lend to Mr Kumar in his personal name (in connection with the Pattingham Land) but Mr Kumar should leave it with him and he would come back to him. In the final paragraph of his witness statement, Mr Kang says "In lieu of this, I believe the Defendant (LSC) was aware that the Claimant (Mr Kumar) was using the site at Pattingham for his own personal use".

146. I have dealt with the credibility of Mr Kang's evidence in paragraphs 110 -111 above and have concluded, for the reasons set out in those paragraphs, that his evidence is not credible. For those reasons, Mr Kang's evidence provides no support for Mr Kumar's evidence that he informed Mr. Turner, during a telephone conversation in late

September/early October 2017 that he wanted to acquire the Pattingham Land to build personal houses for himself and his family.

147. Mr Singh says that he went to the Pattingham Land, in October 2017, at Mr Kumar's request, to fix the fencing around it and that, whilst he was there, Mr Taylor and Mr Morris came to the site and met with Mr Kumar. He says that Mr Kumar showed Mr Taylor plans of three houses to be built on the site and told Mr Taylor and Mr Morris that the first plot was going to be his house to live, the second plot would be for his son's house and the third house would be built for his wife.

148. I have dealt with the credibility of Mr Singh's evidence in paragraph 109 above and have concluded for the reasons set out in that paragraph, that his evidence is not credible. For those reasons, Mr Singh's evidence provides no support for Mr Kumar's evidence that, at a site visit in October 2017, Mr Kumar showed Mr Taylor plans to build 3 houses on the Pattingham Land and told him that the 3 houses were for himself and his family to occupy.

149. In his witness statement, Mr Verma says that he was present at the meeting on 18 December 2017, between Mr Kumar and Mr Turner/Mr Morley and heard Mr Kumar tell Mr Turner/Mr Morley that he intended to build family homes on the Pattingham Land. I have dealt with the credibility of Mr Verma's evidence in paragraphs 105 - 107 above. For those reasons I do not consider that Mr Verma's evidence provides material support for Mr Kumar's assertion that he told Mr Turner and Mr Morley, in the meeting in December 2017, that he intended to build 3 houses on the Pattingham Land for himself and his family to occupy.

150. The contemporaneous documentary evidence (that is documents which existed on 19 January 2018, when the Pattingham Loan Agreements were completed) of what was to be built on the Pattingham Land and for what purpose consist of: (a) three Loan Offers signed on behalf of LSC and by Mr Kumar, Mrs Kumari and Mr Verma; (b) the three Pattingham Loan Agreements signed on behalf of LSC and by Mr Kumar, Mrs Kumari and Mr Verma; and (c) the valuation report of ACS dated 18 October 2017 in respect of the Pattingham Land ("the ACS Valuation").

151. The Loan Offers are dated 28 October 2017 and were signed by Mr Kumar, Mrs Kumari and Mr Verma accepting their terms. Each loan offer contains a Specific condition precedent to the advance of the loans "8.5 confirmation that neither the borrower nor any connected parties will occupy the property or land or occupy it at any point in the future".

152. Each of the Pattingham Loan Agreements are dated 19 January 2018 and set out the terms on which the loans were being advanced to Mr Kumar, Mrs Kumari and Mr Verma, which each of them signed, in the presence of a solicitor from Murria & Co (who were acting for Mr Kumar, Mrs Kumari and Mr Verma). The Pattingham Loan Agreements consist of the Specific terms that relate to those loans, which are signed on behalf of LSC and by Mr Kumar, Mrs Kumari and Mr Verma, for their respective loans and General Terms, which the Specific Terms provide will apply, save to the extent that they are inconsistent with the Specific Terms. The Specific Terms of each Pattingham Loan Agreement contain, just below the signatures, the declarations set out by me in paragraph 134 above.

153. The ACS Valuation of the Pattingham Land dated 18 October 2017 was signed by Mr Taylor and Alastair Proctor on behalf of ACS. That valuation contains the following relevant information regarding the development to be undertaken at the Pattingham Land:

(a) "In accordance with recent written instructions from Rajinder Kumar…. to provide a market valuation report for and on behalf of LSC …"

(b) "Extending to two acres or thereabouts, the site, a former egg production unit with three brick built poultry sheds constructed thereon….. these have planning consent in place for conversion to form two number detached and two semi-detached dwelling houses which will each be a live work unit, with residential accommodation and business space attached thereto. It is the borrowers intention to re-submit this planning consent to remove the live-work use, however this will not be a straight forward exercise and will require each unit to be held on separate titles, and further each will require an application to be submitted.";

(c) "Floor Area:"…Block one- 5,100 sq ft to single dwelling; Block two- 4,400 sq ft to 2 dwellings; Block 3 three- 3,500 sq ft to a single dwelling";

(d) "Mortgage Regulation: less than 40% of the total land area at the date of inspection being used as or in connection with a dwelling";

(e) "The borrower has taken advice and believes that once purchased, and based upon advice he believes that with the backing of the parish council, there is a strong chance that the individual units can each be converted to pure residential use."; and

(f) three separate plans are attached of what was proposed to be built upon each of the three plots showing one building on each of Plot 1 and Plot 3 with residential space and work space and (contrary to the description in the valuation of two semi-detached properties on Plot 2) two detached properties with a gap between them are shown on the plans for Plot 2, with residential space and work space in each of the detached properties.

154. I am satisfied that, not only was LSC (by Mr. Turner, Mr Morley or otherwise) never told, before the Pattingham Loan Agreements were completed on 19 January 2018, that it was intended that Mr Kumar, Mrs Kumari and Mr Verma would build a house for themselves on their respective plots of the Pattingham Land but that, as at 19 January 2018 it was not the actual intention of Mr Kumar, Mrs Kumari or Mr Verma to do so. Instead it was their intention to build: one house on Plot 1; two houses on Plot 2; and one house on Plot 3, to sell those houses to third parties and to use the proceeds to repay the Pattingham Loans advanced by LSC. I have come to this conclusion for the reasons that follow.

155. As to Mr Kumar's evidence that he told Mr Turner in late September/early October 2017 and Mr Turner and Mr Morley in December 2017, that he intended to build homes on the Pattingham Land for himself and his family to occupy:

(a) I have found that (in spite of the lack of experience of Mr Turner at the time) both Mr Turner and Mr Morley would have known, in January 2018, that LSC was not authorised to make loans to individuals for them to use to build houses for their own occupation. As Mr Turner and Mr Morley did agree that LSC would make the Pattingham Loans to Mr Kumar/Mrs Kumari/Mr Verma, I consider that it is unlikely that Mr Morley and Mr Turner would have agreed that LSC would make those loans, if Mr Kumar had told them that it was intended that the houses to be built on the Pattingham Land, once built would be occupied by Mr Kumar, Mrs Kumari and Mr Verma;

(b) I have found that Mr Kang's evidence provides no support for Mr Kumar's evidence that he told Mr Turner, in late September/early October 2017 that he

intended to build homes on the Pattingham Land for himself and his family to occupy;

(c) I have found that Mr Verma's evidence provides no material support for Mr Kumar's evidence that he told Mr Turner and Mr Morley at a meeting in December 2017, that he intended to build three houses on the Pattingham Land for himself and his family to occupy; and

(d) in assessing the credibility of Mr Kumar's evidence I have dealt at some length with the evidence he gave about representations and agreements being made and entered into by Mr Turner and Mr Morley, on behalf of LSC, that the date for repayment of loans advanced by LSC would be extended. I concluded that Mr Kumar's evidence was unreliable although I made no finding that he gave dishonest evidence. In relation however to Mr Kumar's assertions that he told Mr Turner in late September/October 2017 and Mr Turner and Mr Morley in December 2017 that the houses which were to be constructed on the Pattingham Land would be used by Mr Kumar and his family for their own occupation, I have come to the conclusion that this does not represent his honest recollection for the reasons set out in paragraphs 156 – 163 below.

156. I have found Mr Morris to be honest and reliable witness and I prefer his evidence, to the effect that he did not meet with Mr Kumar and Mr Taylor at the Pattingham Land, in October 2017 (and indeed has never met Mr Taylor) to the evidence of Mr Kumar, supported by Mr Singh that such a meeting did take place for the following reasons:

(a) Mr Morris was adamant that he has never met Mr Taylor. I have accepted that evidence. Mr Morris says that he produced a drawing for Mr Kumar, in May 2018, of the house to be built on Plot 1, on Mr Kumar's instructions, and he says that Mr Kumar told him that that house would be occupied by Mr Kumar and his son. Mr Morris produces a copy of the drawing and I have already explained that the drawing which Mr Morris exhibits to his witness statement, shows a "Lalit" wing of the house to be built on Plot 1, which I have accepted indicates the part of the house to be occupied by Mr Verma, consistent with Mr Morris's evidence that Mr Kumar told him, in May 2018 that at least Mr Kumar and Mr Verma would occupy the house to be built on Plot 1;

(b) I have found that the evidence of Mr Singh provides no support for Mr Kumar's assertions that a meeting took place on 3 October 2017 at the Pattingham Land between Mr Kumar, Mr Morris and Mr Taylor and that Mr Kumar told Mr

Taylor/Mr Morris at that meeting about his intention that the houses on the Pattingham Land would be occupied by Mr Kumar and his family;

(c) As for Mr Kumar's evidence:

(i) he has never produced any drawing showing three houses to be built on the Pattingham Land, notwithstanding that he says that he showed such a drawing to Mr Taylor/Mr Morris at the meeting in October 2017;

(ii) he accepts that the planning permission in place in October 2017 and January 2018 was for four houses to be built on the Pattingham Land (two on Plot 2) and that even after Shropshire County Council revoked that planning permission, because the three dilapidated poultry sheds had been demolished, he re-applied for planning permission for four houses (two on Plot 2) rather than three houses;

(iii) the ASC Valuation says that it was prepared following a visit to the Pattingham Land on 3 October 2017. Mr Kumar say that he (and Mr Singh) met Mr Taylor and Mr Morris at the Pattingham Land when Mr Taylor was carrying out his inspection for the purposes of his valuation. The ACS Valuation dated 18 October 2017 is inconsistent with Mr Taylor having been shown plans by Mr Kumar with three houses on them and being told that those houses are to be occupied by Mr Kumar and his family;

(iv) on 30 October 2018, Bridging Loans Limited made an offer to APL to lend it the sum of £1,600,000, of which £600,000 would be advanced to enable APL to acquire the Pattingham Land (by redeeming the LSC Pattingham Loans) and the balance of £1m was to be released in stages to fund development work. Clause 12 of the loan offer says it has been made on the basis of representations that it is not the intention of APL or a related person to use at least 40% of the property as or in connection with a dwelling. Mr Kumar accepted that he procured this offer, intending to use the funds to repay the Pattingham Loans and build out the site and acceptance of it would mean that the houses, once built on the Pattingham Land could not be occupied by him or his family. He explained that, in order to refinance the Pattingham Loans he had had to give up his plan that he and his family would occupy the houses to be built on the Pattingham Land. I did not find this explanation convincing and find that the loan offer procured by Mr Kumar from Bridging Loans Limited is inconsistent with his case that he/Mrs Kumari/Mr Verma intended, 9 months earlier to occupy the houses intended to be built on the Pattingham Land; and

(v) Mr Kumar has not produced a single document (including correspondence) which refers to there being an intention to build three house instead of four on the Pattingham Land and the only document produced which suggests that any of the houses to be built on the Pattingham Land were intended to be occupied by Mr Kumar or his family is the plan produced by Mr Morris, in May 2018, 5 months after the Pattingham Loan Agreements were entered into, which I have accepted only reflects a proposal that Mr Kumar and his family would occupy the house to be built on Plot 1 and not the other plots.

157. The documents signed by Mr Kumar/Mrs Kumari/Mr Verma, in connection with the Pattingham Loans are inconsistent with their case that it was intended, in January 2018, that the houses to be built on the Pattingham Land would be occupied by them:

(a) the formal loan offers dated 28 October 2017 state that confirmation is required that neither the borrower nor any connected parties will occupy the Pattingham Land at any point in the future. Mr Kumar said that he did not read that part of the offer letter. Mrs Kumari and Mr Verma signed offer letters in identical terms containing the same requirement. It is unlikely that none of them read that requirement before signing the offer letters, which requirement they clearly could not meet if they really intended to occupy the house(s) to be built upon their respective plots; and

(b) the Pattingham Loan Agreements themselves contain the declarations that I have already referred to that "I am entering into this agreement wholly or predominantly for the purposes of a business carried on by myself or intended to be carried on by myself." Whilst I have found that the declaration as a whole does not comply with the requirements of Article 61A (3) this part of the declaration is inconsistent with Mr Kumar/Mrs Kumari/Mr Verma intending to occupy their respective plots of the Pattingham Land as their homes. Whilst I note the existing planning permission for the Pattingham Land, to construct four houses, was subject to the restrictions that the occupants of those houses must both live and work there and if that planning permission were complied with there would be an element of business use, nonetheless it was the stated intention of Mr Kumar, in the ACS Valuation, which he did not resile from, that he intended to apply to remove the work /live restriction so that the occupation would be purely residential. It formed no part of any of Mr Kumar/Mrs Kumari/Mr Verma's cases that they intended to carry on any business from the

houses they said that they intended to occupy on the Pattingham Land and the declaration signed by each of them in the Pattingham Loan Agreements are inconsistent with the houses to be built on their respective plots being intended to be their domestic homes.

158. The ACS Valuation dated 18 October 2017 refers to planning consent being in place to convert the existing three poultry sheds to four houses and plans are attached to the valuation of the four houses. The valuation says that the borrower intends to apply to remove the live/work restriction on the existing planning permission to pure residential use. There is no suggestion that it was intended to seek planning permission for three houses to be built instead of four. In cross-examination, Mr Kumar suggested that an amendment to the planning permission would not be required in order to build one house rather than two on Plot 2 (although he said he intended to apply for an amendment to formalise the position). I consider it unlikely that no amendment to the planning permission would be required for Plot 2, if for no other reason than that planning permission had been given to build two detached houses, on Plot 2, with a gap between them whereas, if there were only to be one detached house on Plot 2 there would be no gap (there is also no evidence of what the intended floor area of the single detached property on Plot 2 was intended to be. In any event as I have observed, Mr Kumar never sought such an amendment to the planning permission, even when he applied for planning permission to be reinstated, when the permission was revoked as a result of Mr Kumar demolishing the dilapidated poultry sheds. Mr Kumar suggested he did not do so at that stage, because it would be easier to get planning permission reinstated in its original form. If however, as Mr Kumar said, in cross examination, the obtaining of planning permission to build one house instead of two on Plot 2 was a mere formality which he intended to apply for in any event, then applying to reinstate the original planning permission in its original form (two houses on Plot 2 instead of one) would not be materially easier than applying for planning permission to include two houses on Plot 2.

159. Clause 12.17 of the general terms incorporated into each of the Pattingham Loan Agreements states that the borrower at the date of each Pattingham Loan Agreement "represents and warrants that all information supplied by it or on its behalf to the Valuer for the purposes of each valuation was true and accurate as at its date or (if appropriate) as at the date (if any) which it is stated to be given. It has not omitted to supply any information to the valuer which, if disclosed, would adversely affect the valuation". It is clear that the factual information set out in the ACS Valuation was provided to ACS by Mr Kumar, because the

valuation confirms that it has been supplied in accordance with the written instructions of Mr Kumar and he was the only source of information as to what was to be built on the Pattingham Land. The ACS Valuation does not however reflect Mr Kumar's assertion that three houses rather than four were to be built upon the Pattingham Land or that it was intended that Mr Kumar and members of his family would occupy those properties, yet Mr Kumar says that he told Mr Turner in late September/early October 2017 and Mr Taylor at a meeting on 3 October 2017 at the Pattingham Land (before the ACS Valuation was issued on 18 October 2017) that three houses were to be built on the Pattingham Land (not four) and they would be for the personal use of him and his family.

160. The building of three houses instead of four would, I am satisfied, make a difference to the likely build cost for the development and ultimately the value of the completed development, both of which were estimated in the ACS Valuation, based upon four houses being built. Mr Turner confirmed that LSC would not normally lend more than 70% of the value of the land upon which it had security (the value increasing as the development progressed). Mr Kumar/Mrs Kumari/Mr Verma's case nevertheless means that LSC went ahead and entered into the Pattingham Loan Agreements, in January 2018, based upon a valuation that Mr Turner knew had been prepared on the wrong basis (three houses instead of four and the houses being for the personal occupation of Mr Kumar/Mrs Kumari/Mr Verma rather than being sold to third parties). That is, in my judgement, inherently unlikely.

161. I asked Mr Turner why he had not insisted upon Mr Kumar/Mrs Kumari/Mr Verma filling out an application form and providing details of their income and assets. Mr Turner said that LSC was not relying upon the assets or income of Mr Kumar/Mrs Kumari/Mr Verma to repay the Pattingham Loans, but upon them refinancing those loans with another lender or selling the houses. There is no evidence that Mr Kumar/Mrs Kumari/Mr Verma ever provided details of their income or assets to LSC and I accept Mr Turner's evidence both that they did not do so and that LSC were relying upon the Pattingham Loans being refinanced or the property being sold to repay those loans. If it was planned that Mr Kumar/Mrs Kumari/Mr Verma would occupy the houses themselves, then their income and assets would be very relevant, because the most likely means by which they would be able to repay Pattingham Loans would be by obtaining long-term mortgages for which purposes their income would be relevant or out of their assets, or both. As I will note in paragraph 164 below, had details of Mr Kumar/Mrs Kumari/Mr Verma's income and assets been disclosed then, on the face of it

they would have disclosed very little in the way of income or future prospects of generating income to repay any long-term mortgage.

162. Mr Say, says that Mr Kumar's assertion that the Pattingham Loan Agreements were entered into in the personal names of Mr Kumar/Mrs Kumari/Mr Verma, because the houses to be built upon their respective plots were to be for their personal occupation is at least as plausible as Mr Turner's evidence that Mr Kumar told him that the properties were being put into personal names, to assist in the process of trying to have the work/live planning restrictions removed. I disagree because:

(a) Mr Turner's evidence, that Mr Kumar told him that Mr Kumar believed that acquiring the Pattingham Land in the names of three individuals rather than a single limited company would assist in obtaining the removal of the work/live planning restriction is supported by the ACS Valuation which says "It is the borrower's intention to re-submit the planning consent to remove the live – work use, however this will not be a straightforward exercise and will require each unit to be held on separate titles, and further each will require an application to be submitted."; and

(b) prior to the Pattingham development, Mr Kumar's practice was (apart from the first development which he undertook at Church Lane in partnership with Mrs Kumari) to carry out developments through limited companies. It would not be necessary for the Pattingham Land to be acquired in the names of Mr Kumar/Mrs Kumari/Mr Verma (and for them to borrow money from LSC to acquire those plots and build houses upon them, at their own risk) in order for them to acquire ownership of the properties built upon them. The site could have been acquired by ADL or ACL or another company controlled by the family, the houses built and mortgages taken out by Mr Kumar/Mrs Kumari/Mr Verma to acquire the houses, if they could afford them (as they would have to do in order to repay the Pattingham Loans in any event).

163. Finally, stepping back, I find the assertions of Mr Kumar/Mrs Kumari/Mr Verma that they intended, in January 2018 to build separate houses upon their respective plots of the Pattingham Land to be occupied by them to be implausible because:

(a) at the time that Mr Kumar, Mrs Kumari and Mr Verma entered into the Pattingham Loan Agreements (January 2018) they lived together and for reasons I explain further below I am not satisfied that any of them provided a plausible reason as to

why, in January 2018, they each wanted very large and expensive, detached houses to live in on the Pattingham Land;

(b) the plan produced by Mr Morris in May 2018 showed a wing of the property to be built on Plot 1 was to be occupied by Mr Verma (identified as "the Lalit wing"). When this point was put to Mr Kumar in cross examination he did not deny that the plan was created in May 2018, on his instructions, or that it showed a wing of the house to be built on Plot 1 to be occupied by Mr Verma. Mr Kumar said that although Mr Verma would live in the same house on Plot 1 as Mr Kumar and Mrs Kumari initially, Mr Verma would need a separate home of his own when he got married. There was no suggestion however that, in January 2018, there was any prospect of Mr Verma getting married in the foreseeable future. Building an expensive house for Mr Verma to occupy at some point in the future if and when he got married would only be a tenable thing to do if Mr Kumar and/or Mrs Kumari and/or Mr Verma were extremely wealthy and in my judgment, on the evidence, in January 2019, they were very far from that;

(c) Mr Verma was asked what his income was in January 2018 and he said that the income he received from his father, Mr Kumar, was around £12,500 per annum, but he supposed that he would have to have a substantial salary increase (from his father) in order to cover the mortgage upon the property to be built on Plot 2. That answer did not ring true. If Mr Verma truly intended to bear the financial burden of refinancing the Pattingham Loan made to him by LSC of £615,000 plus interest, merely so that he could have a house to move into if and when he got married, then he would have to have a better plan than that as to how he was going to afford it;

(d) it was not suggested that Mrs Kumari would be living separately from Mr Kumar, rather Mrs Kumari said that she wanted "personal space" for herself where family and friends could visit her separately from Mr Kumar. She suggested that she needed this personal space because of the care she had to provide for Mr Kumar, because of his poor health. In January 2018, Mrs Kumari was studying Public Health at Wolverhampton University and so had no income and she does not suggest that, she stood any chance of obtaining a job with a substantial income, once she completed that course. On that evidence there was no realistic prospect of Mrs Kumari obtaining a mortgage based on her income to pay back the £309,000 lent to her by LSC plus interest, to acquire a very large detached house, merely to give her "personal space"; and

(e) Mr Kumar did not suggest that he had any income, in January 2018, other than from the property development projects being undertaken by ADL/ACL. Whilst, in January 2018, it may have appeared that those projects would produce substantial profits for ADL/ACL which could be paid to Mr Kumar/Mrs Kumari/Mr Verma in salary or dividends (perhaps even enough to fund the repayment of the Pattingham Loans plus interest) those profits would be nothing like enough, in my judgement, to make it plausible that Mr Kumar/Mrs Kumari/Mr Verma really intended, in January 2018, to build one house for each of them on the Pattingham Land when one of those houses clearly was big enough to accommodate all of them.

Were the Pattingham Loans or any of them in fact Investment Property Loans?

Estoppel

164. Mr Pomfret argued that Mr Kumar/Mrs Kumari/Mr Verma are estopped from arguing that the Pattingham Loan Agreements were not Investment Property Loans (and therefore unregulated loans) because each agreement contains a declaration to the effect that the loan is an unregulated loan. Mr Pomfret referred to the case of *Peekay Intermark Limited v Australia & New Zealand Banking Group Limited [2006] EWCA Civ 386* and *Chitty on contracts 34th edition at paragraph 6.121* in support of that proposition.

165. Mr Say says that because the declarations in the Pattingham Loan Agreements do not comply with Article 61A (4) they do not amount to declarations that the loans are not RMCs.

166. The effect of the estoppel by convention, for which Mr Pomfret contends, is to prevent a party from denying a fact which has been assumed by both parties to their contract. In *Peekay,* a manager of the defendant misdescribed the nature of an investment to the claimant's representative, but later written terms and conditions correctly describing the nature of the investment were sent to the claimant's representative and signed by him. The written terms and conditions contained statements that "You should ensure that you fully understand the nature of the transaction and contractual relationship into which you are entering" and "The issuer assumes that the customer is aware of the

risks and practices described herein, and that prior to each transaction the customer has determined that such transaction is suitable for him". The claimant alleged that it had entered into the investment in reliance upon the oral misrepresentation of the defendant's manager as to the nature of that investment and its representative had not read the written terms and conditions which he had signed and had assumed that they would be consistent with what he had been told verbally by the Defendant's manager. The Court of Appeal decided that the claimant was estopped from denying that he did understand the risks and practices which were described in the written terms and conditions and therefore the claim that the claimant had relied upon the oral representations must fail.

167. I have found that the declarations appearing in the Pattingham Loan Agreements do not satisfy the requirements of Article 61A (3) of RAO and that therefore the presumption provided for by that Article that the Pattingham Loan Agreements were Investment Property Loans (and therefore not RMCs) does not apply. In my judgement, that means that, there is no acknowledgement by Mr Kumar/Mrs Kumari/Mr Verma that the Pattingham Loan Agreements amount to unregulated loans and therefore Mr Kumar/Mrs Kumari/Mr Verma are not estopped from asserting that the Pattingham Loan Agreements amount to RMCs.

168. Mr Pomfret and Mr Say agree that, in deciding whether the Pattingham Loan Agreements in fact amount to Investment Property Loans and are therefore not RMCs it is necessary to construe the Pattingham Loan Agreements in accordance with the normal rules for the construction of contractual documents.

169. In *Arnold v Britton*, Lord Neuberger gave the following guidance on interpreting written contracts (where relevant):

> "15. *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean… And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions…, (iii) the overall purpose of the clause,,,, (iv) the facts and circumstances known or assumed by the parties at the time that the*

document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances ….should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision……

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning…. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a Specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point…. is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made….

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…..

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties….

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that

intention…." [the seventh point was only relevant to the Specific clause in the contract before the Supreme Court].

170. In *Wood v Capita Insurance Services Limited*, Lord Hodge was concerned to point out that there was, in his view, no inconsistency between the Supreme Court decision in *Rainy Sky SA v Kookmin Bank [2011] UKSC 50* (which appeared to place greater emphasis on the factual background to the interpretation of the relevant contractual clauses than Lord Neuberger did in *Arnold v Britton)* and the judgment of Lord Neuberger in *Arnold v Britton* . Lord Hodge said:

> "13. *Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…..*
>
> 14. *On the approach to contractual interpretation, the Rainy Sky and Arnold cases were saying the same thing*".

171. My first task is to determine what the contractual documents to be interpreted are. Three documents were signed by Mr Kumar/Mrs Kumari/Mr Verma: (a) the written Loan Offers dated 28 October 2017; (b) the Pattingham Loan Agreements themselves; and (c) the legal charges executed by Mr Kumar/Mrs Kumari/Mr Verma over Plot 1, Plot 3 and Plot 2 respectively. Mr Pomfret and Mr Say agree that the written Loan Offers were replaced by the Pattingham Loan Agreements and that therefore the contractual documents are the three Pattingham Loan Agreements, consisting of the Specific terms and the general conditions and the three legal charges. All the Pattingham Loan Agreements and all the charges are in identical form.

172. Mr Pomfret refers to the following terms of the Pattingham Loan Agreements as showing that it was the intention of the parties that the Pattingham Loans would be Investment Property Loans for the purposes of RAO Article 61A (3) (in that they were intended to fund the construction of houses on the Pattingham Land to be sold to 3rd parties rather than occupied by the borrower):

(a) Mr Pomfret placed most reliance upon the declaration appearing under the signatures of the parties in the Specific Conditions which I have already set out in full in paragraph 134 above. His case is that the declaration alone makes it clear that it was the intention of the parties to the Pattingham Loan Agreements at the time they were entered into that they would be Investment Property Loans and that the remaining provisions to which he refers are consistent with that intention;

(b) clause 3 of the Specific Terms sets out conditions precedent to the drawdown of funding subsequent to the first drawdown (to fund the development). Clause 3.1 refers to the borrower providing LSC with a copy of the Agreed Plan defined as "the detailed architects drawings and specifications for the development in form and content acceptable to and approved by or on behalf of the Lender (as may be updated or varied from time to time with the approval of the Lender)"; and clause 3.2 "a copy of the Development Planning Permission" is defined as "the planning permission relating to the development delivered to the Lender as a condition precedent to the first drawdown";

(c) clause 17 .1 (b) of the General Terms provides "Where the facility is to be drawn down by the Borrower in respect of a development the Borrower will procure that the development is carried out: …(b) in accordance with the Agreed Plans, Requisite Consents, Development Planning Permission, Development Budget and Construction Documents;

(d) clause 12.17 of the General Terms which I have set out in paragraph 159 above;

(e) clause 12.25 of the General Terms which provides that "the Borrower represents and warrants at the date of the agreement that…. Each of the representations and warranties in this clause 12…. is deemed to be repeated by the Borrower… at the date of each Drawdown Request, the date of any Drawdown and on each date that interest is payable or capitalised under the agreement…. by reference the facts and circumstances existing on each such date.";

(f) clause 17.13 of the General Terms provides "The Borrower may not make any variation to the Agreed Plans….. or the Development Budget without the written consent of the

Lender unless [certain conditions are met]; and "…the Borrower notifies the Lender of the variations in advance";

(g) clause 17.18 of the General Terms which provides "the borrower must not amend or vary the Development Planning Permission or apply for any such amendment or variation without prior written consent of the Lender"; and

(h) clause 18.2 of the General Terms provides "Each of the events or circumstances set out in this clause 18…is an Event of Default…. there is a breach of …. clause 17".

173. Mr Say said that:

(a) The Pattingham Loan Agreements satisfy the requirements of Article 61A (3) of RAO and are therefore RMCs. The declaration set out under the signatures of the parties in the Specific Terms do not satisfy the conditions of Article 61A (3) of RAO and therefore cannot be relied upon to show that it was the intention of the parties that the Pattingham Loan Agreements would be Investment Property Loans under Article 61A and therefore an exception to Article 61(3). The intention of the parties was therefore that the Pattingham Loan Agreements would be RMCs;

(b) Clause 12.17 of the General Terms only requires the valuation to be accurate at the date of the valuation;

(c) Clause 17.1 of the General Terms, in referring to "Agreed Plans" could refer to the plan of Plot1 prepared by Mr Morris which shows that the house to be built on Plot 1 was to be occupied by the borrower (Mr Kumar); and

(d) Clause 15.9 of the General Terms provides that "the Borrower must ensure all buildings and erections from time to time upon the Property and all fittings, plant and machinery on the Property are in, and are maintained in:…..(b) such repair, condition and order as to enable them to be let in accordance with all applicable laws and regulations……". This says Mr Say is inconsistent with the development being sold to a third party, as LSC maintain was the intention of the parties.

174. In my judgment, a reasonable person considering only the wording of the declaration in the Pattingham Loan Agreements would conclude that it was the intention of the parties to those agreements that they would be Investment Property Loans within the meaning of Article 61A(6) of RAO. I come to that conclusion for the following reasons:

(a) I start from the premise that it must have been the intention of the parties that some purpose would be served by the declaration;

(b) it is common ground that the declaration is in precisely the form that it would be required to be in in order to be exempt an agreement from the regulations in RAO relating to consumer credit agreements and consumer credit hire agreements (if the

Pattingham Loan Agreements were consumer credit agreements or consumer hire agreements, which they are not) ;

(c) Article 61A (6) of RAO (see paragraph 129 above) provides that an Investment Property Loan is a contract which meets the conditions in Article 61 (3) for a RMC but:: (i) less than 40% of the land, subject to the mortgage is used or intended to be used as a dwelling by the borrower; and (ii) the agreement is entered into wholly or predominantly for the purpose of a business;

(d) I have found that the declaration does not satisfy the requirements of Article 61A (3) (which, if satisfied would mean that there would be a presumption in favour of LSC that the requirements of Article 61A(6((ii) are met) for the reasons set out in paragraphs 134 – 143 above. The question of whether the reasonable reader of the declaration would think the intention of the parties was that the Pattingham Loan Agreements would meet the conditions of Article 61A(6) is however different from the question of whether the declaration complies with Article 61A (3);

(e) the first paragraph of the declaration says that "I am entering into this agreement wholly or predominantly for the purposes of a business carried on by myself or intended to be carried on by myself." I am satisfied that this statement clearly shows that it was the intention of the parties to the Pattingham Loan Agreements that they would satisfy the requirement of Article 61A (6) (ii) namely that the agreements were entered into wholly or predominantly for the purpose of a business carried on by the borrower; and

(f) Mr Say argued that, even if the Pattingham Loan Agreements were intended to be entered into wholly or predominantly for the purpose of a business, it was still possible that the requirement of Article 61A (6) (i), namely that: "less than 40% of the land, subject to the mortgage is used or intended to be used as a dwelling by the borrower" may not be met. Whilst I would accept that it is theoretically possible for the parties to have intended that the Pattingham Loan Agreements should be entered into wholly or predominantly for the purpose of a business, but yet 40% or more of the land subject to the mortgage would be used as a dwelling by the borrower: (i) a reasonable person, in my judgement, would conclude that using or intending to use 40% or more of the property for a dwelling would not be consistent with the property being used wholly or predominantly for business purposes, absent there being anything at all in the Pattingham Loan Agreements suggesting that the borrowers intended to use the Pattingham Land for a dwelling at all (and there is no such suggestion, Mr Say has not contended that there is); and (ii) it has never formed any part of Mr Kumar and/or Mrs Kumari and/or Mr Verma's case that they intended to use their respective plots of the Pattingham Land for any business purpose.

175. I will now consider briefly whether the other provisions of the Pattingham Loan Agreements referred to by counsel support or undermine my conclusion that the declaration contained in each Pattingham Loan Agreement, looked at in isolation clearly show that the parties to them intended that they would be Investment Property Loans.

176. Having considered the content of the Specific Terms and the General Terms which make up the Pattingham Loan Agreements, it is clear that they are both in standard form. The General Terms are not amended to reflect the individual circumstances of particular loans, whereas the Specific Terms reflect the circumstances of individual loans by including details such as: the name and address of the borrower, the amount of the loan, the facility fee, the purpose of the loan, details of any guarantors and details of the property. The vast majority of those individual details are inserted in the definitions contained in the Specific Terms.

177. Some of the clauses and definitions in the General Terms in particular (but also to an extent in the Specific Terms) constituting the Pattingham Loan Agreements have not therefore been drafted to reflect the particular circumstances of the Pattingham Loan. In particular the General Terms anticipate that the borrower may be a limited company, rather than an individual and therefore caution is needed in deciding the applicability and meaning of clauses particularly within the General Terms. With those words of caution, I now turn to consider the particular clauses of the Specific Terms and the General Terms referred to by counsel.

178. Clause 39 of the Specific Terms sets out a list of conditions precedent to be met prior to any drawdown being made, after the first drawdown. These include that LSC must be provided with a copy of the Agreed Plans and the Development Planning Permission. The Agreed Plans are defined in the General Terms as "the detailed architects drawings and specifications for the Development in form and content acceptable to and approved by or on behalf of the Lender (as may be updated or varied from time to time with the approval of the Lender) (lender is defined as LSC). The Development Planning Permission is defined as "the planning permission relating to the Development delivered to the Lender as a condition precedent to first drawdown. Mr Pomfret suggests that the Agreed Plan and the Development Planning Permission are those attached to or referred to in the ACS Valuation. Mr Say suggest that the Agreed Plans may be, or include the plan produced by Mr Morris in May 2018, at least for Plot 1 to which that plan relates.

179. There is no evidence of LSC approving any plans for the development or any Development Planning Permission. Although therefore the plans attached to the ACS Valuation and the planning permission referred to in the ACS Valuation could have been approved by LSC at the

date of the Pattingham Loan Agreements (17 January 2018) whereas Mr Morris's plan of Plot 1 dated May 2018 could not, I am not satisfied that LSC approved the plans attached to, or the planning permission referred to in the ACS Valuation. Therefore I find that clause 3 of the Specific Terms does not assist me in deciding whether the parties intended that the Pattingham Loan Agreements would be Investment Property Loans.

180. Clause 17.1 (b) of the General Terms provides that if monies are to be drawn down by the borrower for a Development then the Borrower must procure that the Development is carried out"…. In accordance with the Agreed Plans, Requisite Consents, Development Planning Permission, Development Budget and Construction Documents…". As with clause 3 of the Specific Terms, there is no evidence before me identifying what any of the documents referred to in clause 17.1 (b) actually are, in relation to the Pattingham Loan Agreements and therefore whether they are consistent or inconsistent with the Pattingham Loan Agreements being Investment Property Loans.

181. Clause 12 of the General Terms provides that the Borrower represents and warrants to LSC, on the date of the agreement, that: ….. 12.17 all information supplied by it or on its behalf to the Valuer for the purposes of each Valuation was true and accurate as at its date or (if appropriate) as at the date (if any) at which it is stated to be given. It has not omitted to supply any information to the valuer which it disclosed, would adversely affect the valuation". "Valuation" is defined as a valuation of the property by the Valuer supplied at the request of LSC addressed LSC and prepared on the basis of market value…". I am satisfied that the ACS Valuation dated 18 October 2017 satisfies the definition of Valuation the purposes of clause 12.17 of the General Terms, it is addressed LSC and prepared on the basis of market value. It is common ground that the ACS Valuation was prepared for LSC for the purpose of it considering whether or not to enter into the Pattingham Loan Agreements.

182. In paragraph 159 above I have concluded that I am satisfied that Mr Kumar provided to Mr Taylor the information contained in the ACS Valuation. A reasonable person with the background knowledge available to both parties on 17 January 2018 would be aware of the content of the ACS Valuation which is dated 28 October 2017. The ACS Valuation is consistent with the parties intending that the Pattingham Loan Agreements would be Investment Property Loans in that it provides strong evidence that the intention was to use the Pattingham Loans to build houses to be sold to third parties and not for the occupation of Mr Kumar and/or Mrs Kumari and/or Mr Verma. That strong evidence is that the ACS Valuation: (a) records that the existing planning permission is the four houses (not three with one to be occupied by each borrower as asserted by

Mr Kumar/Mrs Kumari/Mr Verma); (b) confirms that the borrower intends to re - submit the planning consent to remove the live-work use restriction (but not to change the planning permission from four houses to three houses); (iii) plans of the four houses to be constructed on Pattingham Land, including residential and work areas are included in the valuation; and (iv) the valuation states that the valuer has been provided with indicative costings for the completion of the project, such indicative costings can only have been supplied by Mr Kumar and supplied on the basis of four houses, rather than three being constructed on the Pattingham Land, otherwise those costings would have been inconsistent with the content of the valuation.

183. Whilst Mr Say, says that clause 12.17 of the General Terms only requires the Valuation to be accurate at the date of the Valuation, clause 12.25 provides that each representation and warranty given in clause 12 is deemed to be repeated on the date of any Drawdown Request, the date of any Drawdown pursuant to such request and on each day when interest is payable or capitalised…., by reference to the facts and circumstances existing on each such date. It is common ground that there were drawdown requests and drawdowns provided under the Pattingham Loan Agreements after 17 January 2018 and until August 2018, when LSC refused a drawdown request. Therefore the accuracy of the ACS Valuation was represented and warranted as remaining accurate, absent any different information being provided to LSC and there is no evidence of any different information being provided to LSC after 17 January 2018.

184. Clause 17.13 of the General Terms provides: "…the Borrower may not make any variation to the Agreed Plans or the Development Budget without the prior written consent of the Lender unless [certain conditions are met] and the Borrower notifies the Lender of the variations in advance. Clause 17.18 provides that "the Borrower must not amend or vary the Development Planning Permission or apply for any such amendment or variations without the prior written consent of the Lender. I have concluded that, if there were any Agreed Plans, Development Budget or Development Panning Permission for the purposes of the Pattingham Loan Agreements it is unclear what they are, I am unable to conclude therefore that the lack of any written consent from LSC to their alteration, or of LSC being notified of an intention to vary the Agreed Plans or Development Budget support the conclusion that the Pattingham Loans were Investment Property Loans.

185. Clause 18.2 provides that a breach of clause 17 is an Event of Default which will entitle LSC to refuse further drawdowns and to demand repayment of the Pattingham Loans. This emphasises

the importance of compliance by the borrower with clause 17, but does not assist me in the interpretation of those provisions.

186. Clause 15.9 of the General Terms provides "the Borrower must ensure that all buildings and erections on the Property…. are maintained in…. (b) such repair, condition and order as to enable them to be let in accordance with all applicable laws and regulations….." Mr Say, says that this is inconsistent with the houses to be built on the Pattingham Land being sold to third parties. I do not consider that clause 15.9 implies that the houses to be built on the Pattingham Land would be let, it merely establishes a standard which must be met in terms of repair and condition. Even if clause 15.9 did imply that the houses would be let, this would be inconsistent with Mr Kumar/Mrs Kumari/Mr Verma's case that they intended to occupy the houses themselves and consistent with the Pattingham Loan Agreements being Investment Property Loans.

187. I conclude that some of the remaining provisions of the Pattingham Loan Agreements, referred to by counsel tend to support the conclusion I have reached as to the meaning and effect of the declaration in the Pattingham Loan Agreements (that the Pattingham Loan Agreements would be Investment Property Loans) and none undermine that conclusion.

188. If there is doubt as to the meaning of the declaration in each Pattingham Loan Agreement, then I am entitled to look at its underlying purpose. Notwithstanding that I am satisfied (see paragraph 138) that there is an error in the declaration in referring to Article 60C (consumer credit agreements) and Article 60O (consumer hire agreements) and that the declaration should instead refer to article 61A (RMC) the purpose of the declaration is clear and that is to exempt the Pattingham Loan Agreements from being regulated loans under FSMA. Given that purpose, I am satisfied that a reasonable person would conclude that the intention was that the Pattingham Loan Agreements would be Investment Property Loans for the purposes of Article 61A (6) and therefore exempted from the protections and benefits provided under FSMA for borrowers. This supports my conclusion as to the meaning the declaration.

189. Finally, if I had found that the meaning of the declaration in the Pattingham Loan Agreements, read in conjunction with the other clauses of the Pattingham Loan Agreements was not sufficiently plain, I would be entitled to have regard to the facts and circumstances known to or assumed by the parties at the date that the Pattingham Loan Agreements were entered into (17 January 2018).

190. In paragraphs 144 – 162 above I considered whether the exception in Article 61A (4) to Article 61A (3) would have applied, if Article 61A (3) applied (which I found it did not). The question I need to answer, in order to determine whether Article 61A (4) applied was whether LSC knew or had reasonable cause to suspect that Mr Kumar and/or Mrs Kumari and/or Mr Verma were not entering into the Pattingham Loan Agreements for the purpose of a business carried on or intended to be carried on by them. In considering that question, I considered whether the Pattingham Loan Agreements were in fact intended to be for business purposes, because, of course, if that were the intention, then it was implausible that Mr Kumar would (as he said he did) tell Mr Turner/Mr Morley and/or Mr Taylor (see paragraph 144 above) that he and his family intended to occupy the houses to be built on the Pattingham Land.

191. The matters set out in paragraph 144 – 162 constitute my findings as to the relevant background facts known to the parties to the Pattingham Loan Agreements, when they were entered into (save for the Bridging Loan Ltd offer made to APL on 30 October 2018 (see paragraph 156 (c) (iv) and the plausibility of Mr Kumar/Mrs Kumari/Mr Verma's assertions (see paragraph 163) which represent matters only known to them and not LSC on 17 January 2018). Those findings as to the relevant background facts strongly support my conclusion that the Pattingham Loan Agreements were intended to be Investment Property Loans.

ISSUE 5 Is the enforcement action taken in respect of the Pattingham Loan Agreements unlawful? What is the effect of the same if so?

192. As noted in paragraph 81 (a) above, inclosing argument, Mr Say confirmed that Issue 5 would only be pursued on the basis that the Pattingham Loan Agreements were RMCs. I have found that the Pattingham Loan Agreements are not RMCs and therefore Issue 5 does not need to be determined by me.

ISSUE 6 Is LSC entitled to claim interest and default interest from Mr Kumar on a compounded basis in light of the agreements entered into between the parties?

193. In closing, Mr Pomfret accepted that LSC could not charge standard interest for which the Specific Terms provide at the rate of 1.2% per month and default interest, for which the General Terms provide, at the rate of 3% per month. Mr Pomfret's case is that, if there is an Event of Default, then the rate of interest payable increases from 1.2% per month to 3% per month.

194. Mr Say's case is that

(a) clause 1.3 of the Specific Terms provides that interest shall accrue at the Interest Rate

(b) "Interest Rate" is defined in the Specific Terms as 1.2% per month;

(c) clause 1.2 of the Specific Terms provides that, in the event that any Specific Term contradicts any General Term, the Specific Term shall apply;

(d) clause 6.1 of the General Terms provides that the Borrower shall pay interest on the Loans at the Interest Rate and clause 6.2 that interest shall accrue daily at the Interest Rate and shall be payable in accordance with the Specific Terms;

(e) only clause 6.4 the General Terms provides for 3% per month to be paid. It provides that "If the Borrower fails to make any payment due under a Finance Document on its due date for payment interest on the unpaid amount shall accrue daily, from the date of non-payment to the date of actual payment ….. at 3% per month; and

(f) clause 6.4 does not however say that the rate of 3% per month replaces the Interest Rate in the events set out in that paragraph and clause 6.4 of the General Terms is therefore contradicted by clause 1.3 of the Specific Terms and clause 1.3 of the Specific Terms prevails over clause 6.4 of the General Terms, in accordance with the provisions of clause 1.2 of the Specific Terms.

195. The same rules of contractual construction apply to determine Issue 6 as applied to determine whether the parties to the Pattingham Loan Agreements intended the Pattingham Loans to be Investment Property Loans (see paragraphs 169 – 170 above).

196. The meaning of the words in clause 6.4 of the General Terms is clear and that is that interest at 3% per month will be charged on the outstanding loan if a payment is not paid on its due date.

197. Clause 1.3 of the Specific Terms, without qualification states that interest will accrue at the Interest Rate. Which is defined in those Specific Terms as being 1.2% per month and clauses 6.1 and 6.2 of the General Terms confirm that the Borrower must pay interest at the Interest Rate in accordance with the Specific Terms.

198. The first paragraph of the Specific Terms makes it clear that the loan offered is offered on the terms set out in the Specific Terms and the General Terms and the Specific Terms and the General Terms therefore together constitute the Pattingham Loan Agreements. Clause 1.2 of the Specific Terms provides that if a Specific Term contradicts a General Term the Specific Term shall apply.

199. Looking at clauses 6.1 – 6.4 of the General Terms together as a whole, it seems to me that it is clear that the intention of the parties was that interest of 1.2% per month should be paid by the Borrower on the outstanding loan, but that a higher rate of interest would be payable by the Borrower if the Borrower fails to pay a sum when it falls due for payment. The difficulty (looking at clauses 6.1 – 6.4 in isolation) is that they do not specify whether the sum of 3% per month for which clause 6.4 provides is to be instead of or in addition to the payment of 1.2% per month which is the Interest Rate as defined in the Specific Terms. Mr Pomfret has conceded that, in the circumstances specified in clause 6.4 of the General Terms, interest at 3% per month is payable instead of, rather than in addition to the Interest Rate of 1.2% per month and as that is the only uncertainty posed by the drafting of clauses 6.1 – 6.4 of the General Terms, I am satisfied that, looked at in isolation the meaning of clause 6.4 when read together with clauses 6.1 – 6.3 (of the General Terms) is that, in the circumstances set out in paragraph 6.4 the Borrower (Mr Kumar/Mrs Kumari/Mr Verma) must pay interest on the outstanding loan at the rate and subject to the terms of clause 6.4 (3% per month).

200. There remains the question of whether clause 6.4 of the General Terms is contradicted by clause 1.3 of the Specific Terms (in which case clause 1.2 of the Specific Terms provides

that clause 1.2 of the Specific Terms will prevail). In my judgment, it is not, clause 6.2 provides for interest to be paid at the Interest Rate (defined in the Specific Terms) and in accordance with the Specific Terms (that is in accordance with clause 1.3 of the Specific Terms). The effect of clause 6.2 of the General Terms is therefore simply to make it clear that the interest payable on the loan is determined by clause 1.3 of the Specific Terms. I have already found that clauses 6.1 – 6.4 when read together (and in light of Mr Pomfret's concession) means that, in the circumstances set out in paragraph 6.4, the Borrower (Mr Kumar/Mrs Kumari/Mr Verma) must pay interest on the outstanding loan at the rate and subject to the terms of clause 6.4, but otherwise at the Interest Rate of 1.2% per month. Clause 1.3 of the Specific Terms does not therefore contradict clause 6.4 of the General Terms, they apply in different circumstances (clause 6.4 if there is a failure to pay a sum when it falls due for payment and in all other circumstances, clause 1.3).

ISSUE 7 - Is there an unfair relationship between the parties?

201. Section 140A of the CCA provides as follows:

> *"(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)."*

202. Section 140B of the CCA provides:

> *…*
> *(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."*

203. Mr Kumar asserts that the Pattingham Loan Agreement that he entered into gives rise to an unfair relationship between him and LSC in that:

(a) Mr Kumar was re-assured that the date for repayment of the Pattingham Loans would be extended beyond 12 months, as LSC was aware that Mr Kumar would require more than 12 months to complete the building work on the Pattingham Land;
(b) from August 2018, LSC refused to allow further drawdown of monies under the Pattingham Loan Agreements causing further delay in completion of the building work. There were no proper grounds for such refusal;
(c) LSC unfairly appointed Receivers to take possession of and sell the Pattingham Land;
(d) LSC allowed the Pattingham Land to be sold at an undervalue; and
(e) the interest payable under the Pattingham Loan Agreements to LSC, under clause 6.4 of the General Term was compound interest of 3% per month.

204. In paragraph 54 of their Defences to LSC's claim against them and their Counterclaims against LSC, Mrs Kumari and Mr Verma say that they reserve their right to claim that the unreasonable interest claimed and ongoing amounted to an unfair relationship. I pointed out to Mr Say, in closing, that this did not actually amount to a pleading that the relationship between Mrs Kumari Mr Verma and LSC amounted to an unfair relationship for the purposes of Section 140A CCA, they appeared merely to be reserving their right to advance such a claim. In LSC's Reply and Defence to the Counterclaim of Mrs Kumari and Mr Verma, LSC do not plead to paragraph 54. I am satisfied that, however badly drafted, it is the intention of Mrs Kumari/Mr Verma in their respective Counterclaims to claim that their relationship with LSC is unfair, because the interest charged is unreasonable. LSC have prepared to meet that case, notwithstanding that it did not plead to it in its Defences to the Counterclaims of Mrs Kumari and Mr Verma. I will, for those reasons allow Mrs Kumari/Mr Verma to pursue a claim that the interest chargeable under the Pattingham Loan Agreements is unreasonable and amounts to an unfair relationship between them and LSC.

205. Mr Kumar/Mrs Kumari/Mr Verma have the burden of proving that the factual allegations which underpin their allegations of an unfair relationship are true, but then, in accordance Section 140B (9) CCA, LSC has the burden of proving that, based upon the factual allegations which I find have been proved, the relationship between LSC and Mr

Kumar/Mrs Kumari/Mr Verma is not unfair. I will determine first therefore to what extent Mr Kumar has proved the factual allegations which underpin the five matters which he says make his relationship with LSC unfair.

Re-assurance that the date for repayment of the Pattingham Loans would be extended beyond 12 months

206. In considering the honesty and reliability of Mr Kumar as a witness, I dealt, in paragraphs 102 – 103 above with his allegations that representations were made by Mr Turner and Mr Morley that LSC would extend time for payment of the Pattingham Loans to enable the development to be completed and would extend time for payment of other loans. I concluded that those allegations were incredible. I did not however find that Mr Kumar's assertions that Mr Morley and/or Mr Turner said that LSC would be "flexible" were incredible. I also have found that the evidence of Mr Verma that Mr Morley said at the meeting in December 2017 that the date for repayment of the Pattingham Loans would be extended to 24 months, if necessary, was unreliable and did not support Mr Kumar's evidence that promises/representations had been made on behalf of LSC about extending the date for repayment of the Pattingham Loans.

207. On the balance of probabilities I am satisfied that either or both of Mr Morley and Mr Turner told Mr Kumar at some point or points that LSC were "flexible". I am not however satisfied, again on the balance of probabilities, that they said that, in connection with extending the date for repayment of the Pattingham Loans. My reasons for those findings are that: (a) it is plausible that Mr Taylor and Mr Morley would describe LSC as "flexible", that phrase may genuinely have stuck in Mr Kumar's mind as something that he was told: (b) Mr Verma refers to overhearing a conversation between his father and Mr Turner, during the course of which Mr Turner said that LSC would be "flexible" (Mr Verma said that Mr Turner also said that LSC would extend the time for repayment of Loan 494 for 236 Lichfield Road, but for the reasons explained in paragraph 106 above I found that evidence unreliable); and (c) given the number of loans made by LSC to Mr Kumar and companies associated with him and his confusion over what was said to him about what loan (see paragraph 102 (b) (iii) above) and about the date of the December 2017 meeting with Mr Morley and Mr Turner in December 2017, I am not satisfied that Mr Kumar has

any genuine recollection of being told that LSC would be flexible in relation to the date for repayment of the Pattingham Loans, as opposed to other loans.

Refusing to allow further drawdown of monies under the Pattingham Loan Agreements from August 2018

208. Clause 4.6 of the General Terms provides that where the facility is to be drawn down by the borrower for the purposes of a development the amount of any proposed drawdown of a loan under the facility must be an amount which is not more than the lower of: (a) the available Commitment; (b) the amount of the Development Costs confirmed by the Monitoring Surveyor, in the Monitoring Surveyor's Report (if applicable); and (c) the maximum amount as shall ensure that following the borrowing there will be sufficient sums remaining under the Facility to meet such of the Development Costs as will remain unpaid.

209. On 14 August 2018 Mr Kumar made a drawdown request for £13,500. On the same day, Mr Morley sent an email back to Mr Kumar to say that Mr Kumar needed to speak to ACS before any payment could be made. On 15 August 2018, Mr Taylor of ACS produced a Monitoring Surveyor's Report which stated that £13,500 had been expended on the Pattingham Land since the last inspection and that monies remaining after allowing for that drawdown would be sufficient to meet the remaining development costs. By e mail dated 17 August 2018 sent by Morley to Mr Kumar, Mr Morley stated that ADL must make a payment of interest of £15,000 immediately for August 2018 and on 1 September 2018 a further payment of interest of £15,000 for September 2018, otherwise default interest would be charged on the three loans advanced to ADL for 230/232 Lichfield Road and that funding on all other sites would be suspended until the construction of the flats at 230/232 Lichfield Road was brought to a satisfactory conclusion and Loans 440, 505 and 517 repaid.

210. Mr Turner suggests in his witness statement, that because drawdowns were requested in arrears (that is that the work had to be carried out and/or materials supplied before they could be made the subject matter of a drawdown request) and that substantial sums were due to the ground workers this must mean that Mr Kumar had not been paying the ground workers sums which were the subject matter of drawdowns. Mr Turner offered that as a justification for LSC refusing Mr Kumar's drawdown request of 14 August 2018. That was

not however the reason given by Mr Morley for suspending drawdown payments in his email of 17 August 2018. Mr Morley's e mail, in simple terms said that LSC was unwilling to honour any drawdown requests on any of the ADL/ACL loans or upon the personal loans of Mr Kumar/Mrs Kumari/Mr Verma until the construction of the flats at 230/232 Lichfield Road, by ADL was brought to a satisfactory conclusion and Loans 440, 505 and 517 repaid.

211. Although Mr Kumar accepted that money was due to the ground workers, he suggested that this was because LSC were not allowing drawdown of funds which would enable them to be paid. I have no evidence before me that would enable me to conclude that Mr Kumar had made drawdown requests under the Pattingham Loan Agreements and drawdowns had been paid by LSC for work done by the groundworks contractors on the Pattingham Land, which were not then paid to the groundworks contractor by Mr Kumar.

212. I am satisfied that the reason why LSC refused the drawdown request made by Mr Kumar on 14 August 2018 for £13,500 was, as Mr Morley's e mail dated 17 August 2018 stated, because LSC was unwilling to honour any drawdown requests on any of the ADL/ACL loans or upon the personal loans of Mr Kumar/Mrs Kumari/Mr Verma until the construction of the flats at 230/232 Lichfield Road was brought to a satisfactory conclusion and Loans 440, 505 and 517 repaid.

213. On the face of it, on 15 August 2018 the conditions set out in clause 4.6 of the general terms for allowing a drawdown of the Pattingham Loans were met. The issues raised in Mr Morley's email of 17 August 2018, in relation to the loans made by LSC to ADL for 230-232 Lichfield Rd, which I am satisfied is the reason why LSC refused Mr Kumar's drawdown request of 14 August 2018, were not matters entitling LSC, in accordance with the Pattingham Loan Agreements, to refuse a drawdown request. The matters raised by LSC in its defence to Mr Kumar's claim (that the groundworks contractor had not been paid) does not feature as a reason given by LSC, at the time, for refusing Mr Kumar's drawdown request of 14 August 2018 and I am not satisfied, on the evidence, that drawdowns had been released to Mr Kumar of sums including for works done by the groundworkers on the Pattingham Land which Mr Kumar had not paid to the groundworkers. It follows that Mr Kumar has proved, on the balance of probabilities, that

LSC have given no good reason for refusing his drawdown request of 14 August 2018 once it was supported by Mr Taylor's Monitoring Surveyor's Report of 15 August 2018.

LSC unfairly appointed Receivers to take possession of and sell the Pattingham Land.

214. The contractual date for repayment of the Pattingham Loans was 17 January 2019, in accordance with the terms of the Pattingham Loan Agreements. LSC demanded repayment of the Pattingham Loans on 29 January 2019 and appointed Receivers over the Pattingham Land on 31 January 2019. The factual basis for Mr Kumar's allegation of unfairness is therefore made out.

LSC allowed the Pattingham Land to be sold at an undervalue

215. Mr Say, at the start of the trial, withdrew a stand-alone claim that the Pattingham Land had been sold at an undervalue, because he accepted that, in selling the Pattingham Land, the Receivers acted as agents of the borrowers and not LSC and therefore LSC were not responsible for the price at which the Pattingham Land was sold. It was nonetheless necessary for LSC to release its security over the Pattingham Land in order for the Receivers to sell it and Mr Say says that, in doing so, LSC allowed the Pattingham Land to be sold at an undervalue, which forms part of what Mr Kumar says was an unfair relationship between him and LSC.

216. During the period from the appointment of Receivers on 31 January 2019 up to 27 August 2019, when the Receivers completed a sale of the Pattingham Land for £380,000, the following relevant events occurred:

(a) prior to marketing the Pattingham Land for sale the Receivers agreed to allow Mr Kumar, until 17 April 2019 to pay the sums owed to LSC under the Pattingham Loans;

(b) on 11 April 2019, Mr Kumar's solicitors notified the Receivers that Mr Kumar had an offer of funding to purchase the Pattingham Land for £492,000. The Receivers removed the Pattingham Land from an auction due to take place on 25 April 2019 and sent an e mail to Mr Kumar's on 26 April 2019 stating that

completion of Mr Kumar's purchase must take place no later than 22 May 2019 as the property would be placed in a further auction due to take place on 23 May 2019 ;

(c) on 13 May 2019 Mr Kumar's solicitors confirmed that he would purchase the Pattingham Land on or before 22 May 2019, but on the basis that his offer would be reduced to £400,000, but then on 23 May 2019 Mr Kumar's solicitors notified the Receivers that he was unable to purchase the Pattingham Land; and

(d) the Receivers sold the Pattingham Land, on 27 August 2019, by private sale for £380,000.

217. Mark Morison of Berry's, a Chartered surveyor, was appointed as joint valuation expert to provide an opinion as to the market value of the Pattingham Land as at 27 August 2019. In summary, Mr Morison's opinion was that the value of the Pattingham Land as at 27 August 2019 was £418,000. That is a difference of £38,000 between what the Pattingham Land was sold for and the value attributed to it by Mr Morison.

218. Mr Kumar has not satisfied me, on the balance of probabilities, that LSC allowed the Pattingham Land to be sold at an undervalue because:

(a) Mr Kumar was allowed a reasonable opportunity to bid for the Pattingham Land himself;

(b) there is no criticism of the steps taken by the Receivers to obtain the best price reasonably obtainable for the Pattingham Land, as at 27 August 2019;

(c) any valuation represents an opinion of the valuer as to the value of the land at a given date (here 27 August 2019). Ultimately the value of land depends upon what purchasers with the funds to pay for a property are willing to pay for it. Absent any case as to how the Receivers failed to take reasonable steps to obtain proper market value, the difference of £38,000 between Mr Morison's opinion as to what the Pattingham Land was worth on 27 August 2019 and the price actually obtained does not lead me to conclude that the Receivers sold the Pattingham Land at an undervalue and therefore that LSC allowed the PAttingham Land to be sold at an undervalue.

The interest payable under the General Terms was compound interest of 3% per month.

219. Mr Say confirmed that the claim of Mrs Kumari and Mr Verma, that the interest rate charged by LSC under their Pattingham Loan Agreements is unreasonably high, refers to the interest chargeable if a sum owing under the Pattingham Loan is not paid on its due date and not the standard Interest Rate of 1.2% per month. The complaints of Mrs Kumari and Mr Verma about LSC charging an unreasonably high rate of interest are therefore aligned with Mr Kumar's complaint that the default interest charged gives rise to an unfair relationship between him and LSC.

220. I have found (paragraphs 193 – 200 above) that, the intention of clause 6 of the General Terms when read in conjunction with clause 1.3 of the Specific Terms and the definition of Interest Rate in the Specific Terms is that, if the borrower fails to pay any sum on the date that it falls due for payment, then interest is payable at 3% per month on the outstanding balance of the loan, compounded.

Summary of factual findings

221. In summary my findings in respect of the factual allegations that underpin that matters that Mr Kumar says amount to an unfair relationship (and in respect of the allegations of Mrs Kumari/Mr Verma that the interest rate charged is unreasonably high) are:

(a) I am not satisfied that Mr Morley or Mr Turner provided any reassurance to Mr Kumar that the date for repayment of the Pattingham Loans would be extended beyond 12 months;

(b) LSC did refuse a drawdown request made by Mr Kumar on 14 August 2019 which was supported by a Monitoring Surveyors Report of 15 August 2018. LSC was not contractually entitled to refuse the drawdown request.

(c) LSC appointed Receivers over the Pattingham Land on 31 January 2019 after demanding payment of the Pattingham Loans on 29 January 2019. LSC were entitled to do so, in accordance with the Pattingham Loan Agreements;

(d) Mr Kumar has not however proved that the Pattingham Land was sold at an undervalue and therefore he has not proved that LSC allowed it to be sold at an undervalue; and

(e) in the event that a sum of money which fell due for payment under the Pattingham Loan Agreements was not paid on its due date, interest was chargeable under clause 6.4 of the General Terms at 3% per month, compounded.

Unfair Relationship – The Law

222. Counsel are agreed that the leading case on unfair relationships under Section 140A of CCA is *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 [2014] 1 WLR 4222 where Lord Sumption said at [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 paras (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."*

223. In *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482, at [346] Hamblen J, as he then was, summarised those matters that he considered were relevant to deciding whether there was an unfair relationship by reference to each of the three categories listed in paragraphs (a) – (c) of Sectio140 (1):

> *"(1) In relation to the fairness of the terms themselves:*
>
> *a. whether the term is commonplace and/or in the nature of the product in question;*
>
> *b. whether there are sound commercial reasons for the term;*
>
> *c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position;*
>
> *d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face;*
>
> *e. the scale of the lending and whether it was commercial or quasi-commercial in nature (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and*
>
> *f. the strength (or otherwise) of the debtors bargaining position;*
>
> *g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis;*
>
> *(2) In relation to the creditor's conduct before and at the time of formation:*
>
> *a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor);*
>
> *b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors;*
>
> *c. whether the creditor had any reason to think that the debtor had not read or understood the terms; and*
>
> *d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms.*
>
> *(3) In relation to the creditor's conduct following formation and leading up to enforcement:*
>
> *a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision";*
>
> *b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals); and*
>
> *c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor.*

224. Mr Say referred to three authorities which dealt with the question of whether the interest rate charged, in those cases gave rise to an unfair relationship between the lender and the borrower.

225. In *Chubb v Dean* [2013] EWHC 1282 (Ch), there was contractual interest of 1.85% and a facility fee of 1.25%, which was expressly waived if the loan was repaid in full on its due date. His Honour Judge Cooke (sitting as a High Court Judge) stated at paragraph 26:

> *"In the case of the two provisions that are at issue here by virtue of the master's order, it seems to me that individually and particularly together they impose a high charge at a high rate for the use of this facility but it is a rate that is 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 and something that can be clearly evaluated by somebody entering into those documents. In the present case, the defendants were legally advised. There is a separate certificate of a solicitor to the effect that he has advised them upon the contents of the document they were signing. Mr Dean is himself a lawyer, a barrister in private practice although not in the civil field. 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 have 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. 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 he was entering into. There may, of course, be such cases but it seems to me that they 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 it created was not unfair by virtue of those terms."*

226. In *Greenlands Trading Ltd v Pontearso* [2019] EWHC 278 (Ch), there was a contractual interest rate of 1.45% per month and a default rate of 3% per month. At paragraph 54 of his judgment, Nugee J set out parts of paragraph 26 of the judgment in *Chubb v Dean* and at paragraphs 55 to 57 stated:

> *"55. These sorts 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 … but also that ….:

> *"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, … 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" … "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…."

227. *Kerrigan v Elevate Credit International Ltd (t/a Sunny)* [2020] EWHC 2169 (Comm) [2020] CTLC 161 concerned high cost short term (HCST) credit under regulated credit agreements where the interest rate was 29% per month rather than a bridging loan. His Honour Judge Worster (sitting as a Judge of the High Court) referred, at paragraph 195 of his judgment, to *Chubb v Dean*:

> *"Again there are some significant differences between that case and this. The borrowers in that case were said to be clearly intelligent, they were legally advised and Mr Dean was a barrister, albeit practising in a different area of law. The rate was the contractual rate and it was not "hidden away in the small print". The borrowers were fully aware of the bargain they had made, and that appears to have*

been an important issue. At [26] HHJ David Cooke referred to the rate of 1.85% per month, or 3.1% when combined with a facility fee on a short term bridging loan as "high". It was a "stiff commercial bargain" but, where the parties knew the bargain they were making, it was not unfair. It would require a "very much higher interest rate" for him to reach that conclusion. The rates being considered in that case were, however, very much lower than the rates being considered here."

and stated at paragraph 198:

"Given that I do not intend working through the issue of relief in the individual cases, it may assist if I summarise the factors that I have found relevant to unfairness when considering the interest rate (and any other charges).

(i) First there is the absolute level of the rate. I do regard 29% per month as very high. I appreciate that this is a high risk market for lenders, and the overall return has to justify the overall risk of lending. But that is not an answer in the individual case.

(ii) Secondly the relative rate. I agree with Ms Bala that the court should look at the market rate. This is to include charges so that the real costs rather than the headline interest rate is considered.

(iii) Thirdly, where the borrower was "fully aware" of the rate. No HCST borrower is going to have the benefit of legal advice, but HHJ Cooke's approach in Chubb reflects an important point. A rate which is high may not lead to an unfair relationship if the borrower knows or ought to know the bargain they are making, but the position may be different if they do not. Here it is relevant to look at how the rates are presented to the borrower in the course of the application process. The Defendant does quite a good job. The use of the tick box without the need to scroll down and the fact that none of the claimants reads the terms is a worry. But the overall cost of this borrowing is made plain.

(iv) Fourthly the potential for the borrower to suffer harm, particularly when that is something which was or ought to be known by the lender. Higher rates are likely to create a greater risk of harm for those who are marginally eligible. That in turn will affect the fairness of the relationship.

That is not an exhaustive list, and there may be other matters which arise in individual cases. The Claimants do not suggest that any unfairness arises from any of the other terms."

228. I take the following general principles from the authorities concerning unfair relationships for the purposes of Section 140A (*Plevin* and *Deutsche Bank (Suisse))*:

(a) it is the relationship between the lender and the borrower which must be unfair;

(b) although the court is looking at the hardship caused to the debtor, it will also take into account factors affecting the creditor;

(c) the unfair relationship must arise from one or more of the three categories mentioned in Section 140A (1) (a) – (c) namely: (i) the terms of the loan

agreement; (ii) the way in which the creditor exercises their rights under the loan agreement; or (iii) any other thing done or not done by the creditor before or after the loan was entered into;

(d) Hamblin J (as he then was) in *Deutsche Bank (Suisse)* sets out a number of matters, by reference to those three categories that he considered may be relevant to deciding whether the relationship is unfair; and

(e) the fact that the creditor is likely to have greater financial knowledge and expertise than the debtor does not of itself make the relationship unfair.

229. I take the following factors, from the authorities, to be relevant in deciding whether the relationship is unfair because of the interest rate charged (*Chubb v Dean; Greenlands; and Kerrigan):*

(a) is the interest rate charged clear on the face of the loan documents;

(b) did the debtor obtain legal advice before entering into the loan agreement;

(c) the sophistication of the debtor and in particular whether they should be taken to understand the terms relating to interest contained in the loan agreement;

(d) was the rate of interest so high that it was unfair, even if the debtor was aware of and understood its terms; and

(e) the court may look at the market rate for similar loans.

230. Of the five matters which Mr Kumar says makes his relationship with LSC unfair, in relation to the Pattingham Loan Agreement he entered into, I have found that he has proved the factual basis for three of them, namely:

(a) LSC refused a drawdown request made by Mr Kumar on 14 August 2019 which was supported by a Monitoring Surveyors Report of 15 August 2018. LSC have not shown why they were contractually entitled to refuse that drawdown request;

(b) LSC appointed Receivers over the Pattingham Land on 31 January 2019 after demanding payment of the Pattingham Loans on 29 January 2019. LSC were entitled to do so, in accordance with the Pattingham Loan Agreements; and

(c) in the event that a sum of money which fell due for payment under the Pattingham Loan Agreements was not paid on its due date, interest was chargeable under clause 6.4 of the General Terms at 3% per month, compounded.

LSC refusing to allow the drawdown request made on 14 August 2018

231. In my judgment the refusal of Mr Kumar's drawdown request of 14 August 2018 for £13,500, once it was supported by the ACS Monitoring Surveyors Report of 15 August 2018 gave rise to an unfair relationship between LSC and Mr Kumar, because it was not justified (contractually or otherwise) by the failure of ADL to comply with its loan agreements with LSC concerning 230-232 Lichfield Rd, which I have found to be the reason why the drawdown request was refused.

The appointment of Receivers to take possession of and sell the Pattingham Land

232. After the date for repayment of the Pattingham Loans expired, on 17 January 2019, LSC was entitled, in accordance with the Pattingham Loan Agreements, to issue demand for repayment of the Pattingham Loans on 29 January 2019 and to appoint Receivers over the Pattingham Land on 31 January 2019. LSC was entitled, in accordance with the Pattingham Loan Agreements to take those steps, but that does not mean that they did not give rise to an unfair relationship. The burden is upon LSC to prove that they did not (Section 140B (9)).

233. In *Deutsche Bank (Suisse) SA Hamblin J,* as he then was referred to three matters which the court may take into account in deciding whether the behaviour of the lender/borrower , after formation of the contract and in the period running up to enforcement may give rise to an unfair relationship*:*

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision";

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor.

234. LSC referred to the following steps which were taken before it demanded repayment of the Pattingham Loans and appointed Receivers in January 2019:

(a) 11 August 2018, Mr Kumar confirmed by email that he had put the Pattingham Land up for sale;

(b) on 17 August 2018 Mr Kumar's drawdown request of 14 August 2018 was refused because (I have found) of the failure of ADL to repay the loans made to it in relation to 230/232 Lichfield Rd and I have found that that refusal amounts to an unfair relationship between Mr Kumar and LSC);

(c) on 30 October 2018, Mr Kumar sent an email to Mr Turner forwarding to him an offer to refinance the Pattingham Loans from Bridging Loans Limited and an email from Mr Kumar's broker confirming that the refinance should be completed before the end of November 2018, however the refinance did not complete.

235. Following the appointment of Receivers Mr Kumar was given an opportunity, by the Receivers, until 17 April 2019 (three months from demand) to repay the Pattingham Loans and he was also given the opportunity, by the Receivers to bid for the purchase of the Pattingham Land (see paragraph 216 above).

236. Whilst LSC did move rapidly to demand repayment of the Pattingham Loans, after the contractual date for repayment of 17 January 2019 had passed and to appoint Receivers, I am not satisfied that doing so gave rise to an unfair relationship between it and Mr Kumar because:

(a) Mr Kumar had, according to his e mail of 11 August 2018, been attempting to sell the Pattingham Land himself, he provided no evidence that he had achieved any success in doing so;

(b) it appears that Mr Kumar was, broadly contemporaneously with seeking a purchaser for the Pattingham Land, also seeking to refinance the Pattingham Loans, he obtained an offer of refinance but that offer did not proceed;

(c) by the time that LSC issued its demand and proceeded to appoint Receivers, Mr Kumar had been attempting to both sell the Pattingham Land and refinance the Pattingham Loans for several months but without success. There is no evidence that LSC was unwilling to accept a sale of the Pattingham Land or a refinance that repaid the Pattingham Loans;

(d) the Receivers gave Mr Kumar 3 months from the date of LSC's demand to refinance the Pattingham Loans and thereafter withdrew the Pattingham Land from auction, at least on one occasion, to allow Mr Kumar time to fund a purchase of the Pattingham Land; and

(e) I am satisfied that Mr Kumar was allowed a fair opportunity, taking into account the time he had both before and after demand and the appointment of Receivers to repay his Pattingham Loan, but he was unable, for whatever reasons to do so, and that, in those circumstances, the making of demand and appointment of Receivers in January 2019 did not give rise to an unfair relationship between Mr Kumar and LSC.

The rate of interest charged

237. Mr Say says that the default interest chargeable under the Pattingham Loan Agreements gives rise to unfair relationships because the fact that default interest was chargeable at all was not clear, because: (a) it was hidden away in the General Terms, rather than appearing in the Specific Terms, where the Interest Rate is defined as 1.2% per month; and (b) the provisions of the Specific Terms and General Terms, when read together are unclear as to whether default interest can be charged at all, and if so whether in addition to or instead of the Interest Rate of 1.2%.

238. I have determined that, in the event that any sum due under the Pattingham Loan Agreements are not paid on their due dates, then the default rate of 3% per month is charged on the outstanding loan, replacing the interest rate of 1.2% which is payable at all other times.

239. The interest charged under the Pattingham Loan Agreements is relied on by Mr Kumar, Mrs Kumari and Mr Verma as amounting to an unfair relationship between them and LSC. I will consider each of their position separately, but I will deal first with some points which are common to all three of them.

240. I am satisfied that Mr Kumar/Mrs Kumari/Mr Verma were all represented by Murria & Co solicitors in completing their respective Pattingham Loan Agreements. They each sought to minimise the involvement of Murria & Co in advising them upon the contents of

the Pattingham Loan Agreements, suggesting that they simply handled the formalities of completing the loans, rather than advising them upon the terms of them. I am unable to come to any firm conclusion as to whether Murria & Co will have pointed out to Mr Kumar and/or Mrs Kumari and/or Mr Verma what the rate of default interest was or when it would apply.

241. Each of Mr Kumar/Mrs Kumari/Mr Verma signed a formal offer letter dated 28 October 2017. The offer letter sets out the principal terms of the proposed Pattingham Loan Agreements and item 5.6 states "a default interest rate of 3% per month will be charged should the loan amount (including fees/costs etc) not be fully repaid within the Loan Period (including any fees/costs incurred during the period) or from when the loan becomes in default. The repayment date is 12 months after drawdown of the loan (can be extended at the Lender's sole discretion). We can at any time demand payment in full if the loan becomes in default or following the repayment date….".

242. I am satisfied that, if Mr Kumar/Mrs Kumari/Mr Verma were aware that the default interest chargeable under the Pattingham Loan Agreements was 3% per month and that it was chargeable if any sum was not paid on its due date, then the rate of 3% per month is not sufficiently high to mean that the relationship between LSC and Mr Kumar/Mrs Kumari/Mr Verma would be unfair. I note that in *Chubb v Dean* and *Greenland Trading Ltd* the court found that similar rates of interest did not give rise to an unfair relationship in circumstances where the borrower was clearly aware of what that interest rate was and when it applied.

243. I have no evidence before me as to what the normal or market default interest rate may be in relation to bridging loans.

244. I am not satisfied that the default interest charged on Mr Kumar's loan gives rise to an unfair relationship between Mr Kumar and LSC because:

(a) I accept that, looking at the Pattingham Loan Agreements (the Specific Terms and the General Terms) alone that it is difficult to determine if default interest is payable in addition to or only instead of the interest rate of 1.2% per month set out in the Specific Terms and defined as "the Interest Rate". As I have found however that default, interest, if it applies, applies in substitution for the standard rate of

interest of 1.2% per month and not in addition to, I do not consider that that uncertainty gives rise to an unfair relationship, particularly when, in the case of Mr Kumar, he knew what rate of interest was charged when an LSC loan was not paid on time (see (b) below);

(b) as noted, the offer letter dated 28 October 2017, which Mr Kumar signed, does make it clear that default interest at 3% per month will be charged if the loan is not paid within the Loan Period, or the loan is in default;

(c) in paragraph 103 (c)(iv) above I refer to three loans advance by LSC to Mr Kumar and Mrs Kumari acting in partnership to develop land at Church Green. I noted that LSC had charged Mr Kumar/Mrs Kumari default interest of 3% per month for the one month and eight days which Mr Kumar/Mrs Kumari were late in repaying those loans. This means that even before signing the formal offer letter for the Pattingham Loans, Mr Kumar was aware both of the rate of default interest and when it was charged (and had personal experience of it being charged);

(d) Murria & Co acted for Mr Kumar in connection with completion of the Pattingham Loan Agreements and were at least available to advise Mr Kumar upon the terms of that agreement;

(e) although I would not describe Mr Kumar as a very experienced property developer, he had, before entering into the Pattingham Loan Agreements entered into eight agreements with LSC on behalf of ADL/ACL, or in partnership with Mrs Kumari and he was therefore accustomed, not only borrowing money on bridging finance terms to fund developments, but more particularly with borrowing money from LSC on its terms; and

(f) I have already explained that the default interest chargeable of 3% per month would not, of itself, make the relationship between LSC and the borrower unfair, if the borrower was aware of the rate and circumstances in which it would be charged. I am satisfied, in the case of Mr Kumar, that those conditions are met and that therefore the default interest of 3% per month does not give rise to an unfair relationship between LSC and Mr Kumar.

245. The difference between Mr Kumar and Mrs Kumari is that I accept that Mrs Kumari was not as sophisticated as Mr Kumar in carrying out developments and obtaining finance to fund them, notwithstanding that she was a director of ADL and, acting in partnership with Mr Kumar, entered into three loans with LSC to fund the development of the Church

Green land. I am satisfied that Mrs Kumari was not as sophisticated or familiar with the development loan financing as Mr Kumar, because Mr Kumar took the lead in the negotiations with LSC and in organising the development of the various properties. I am satisfied however that Mrs Kumari did know, because it is clear on the face of the offer letter of 28 October 2017 which she signed and because she was represented by solicitors in completing the Pattingham Loans, that default interest was chargeable at 3% per month and of the circumstances in which it was chargeable. For those reasons I am satisfied that the default interest of 3% per month does not give rise to an unfair relationship between LSC and Mrs Kumari.

246. As for Mr Verma, he was not a party to the Church Green loans and therefore I am not satisfied that he had any experience of LSC charging default interest on loans which were not paid on their due date. In addition, Mr Verma was not a party to the discussions with LSC about the Pattingham Loans or ACL's loans (notwithstanding that he was a party to one of the Pattingham Loans and a director of ACL and guarantor of its loans). Nonetheless, as with Mrs Kumari, I am satisfied that the formal loan offer dated 28 October 2017, which Mr Verma signed made it clear what the rate of default interest chargeable was and the circumstances in which it would be charged and therefore on the balance of probabilities, Mr Kumar was aware of those matters. In those circumstances, the rate of default interest charged was not such as to give rise to an unfair relationship between LSC and Mr VermaDunn.

ISSUE 8 - To what relief are the parties entitled in relation to the Pattingham Loans if the relationship is unfair?

247. I have found that LSC's refusal of Mr Kumar's drawdown request of 14 August 2018, once it was supported by a Monitoring Surveyors Report, on 15 August 2018, gave rise to an unfair relationship between Mr Kumar and LSC, but that none of the other allegations of unfair relationship are made out. I must therefore decide what remedy should be granted to Mr Kumar to deal with that unfair relationship.

248. Section 140B of the CCA provides that:

> *"(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 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;*
> *(d) direct the return to a surety of any property provided by him for the purposes of a security;*
> *(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*
> *(f) alter the terms of the agreement or of any related agreement;*
> *(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons."*

249. The drawdown request which Mr Kumar made, on 14 August 2018, was for £13,500 and Mr Kumar made no drawdown requests thereafter. The Monitoring Surveyor's Report issued by ASC on 15 August 2018, reported that the balance of the construction budget available for drawdown after the £13,500 had been paid was £930,000 (the vast majority of the construction budget) and the report provides photographs of site showing that the chicken sheds had been demolished and the site partially cleared, but that no construction work had been carried out beyond that.

250. I have no evidence, nor even an assertion from Mr Kumar as to what would have been done in relation to progression of works on the Pattingham Land had the drawdown request of 14 August 2018 been met (other than that the refusal of the drawdown request "caused further delay in completion of the building works"). The evidence, such as it is suggests that very little progress would have been made, if the drawdown request had been met, because:

(a) in the Monitoring Surveyor's Report, ASC had to certify that the value of the works carried out since the last inspection matched or exceeded the value of the drawdown request;
(b) there is the evidence of Mr Turner and the acceptance by Mr Kumar that a large amount of money was owed to the groundworks contractor and the groundworks contractor appears to have been unwilling to carry out further work without getting paid;

(c) Mr Kumar appears to have been able unable to fund the progress of works on the Pattingham Land other than from drawdowns provided by LSC; and

(d) so the evidence, sparce as it is supports the conclusion that very little progress would have been made towards completion of the Pattingham development if LSC had released the £13,500.

251. I am not satisfied that Mr Kumar suffered any financial loss as a result of LSC not allowing Mr Kumar to drawdown £13,500 in August 2018 (the debt owed to LSC would have increased by £13,500). Section 140B is not however restricted to compensating the consumer for loss they have suffered, nor did Mr Pomfret suggest that it was. Loss suffered by the borrower would nonetheless, in my judgment be necessary to justify a substantial remedy. The order I make is that the debt owed by Mr Kumar to LSC should be reduced by £13,500 as at 15 August 2018 (with consequent reductions in interest charged on that figure to date). That is the sum that I have found LSC should have released to Mr Kumar and had no good excuse for doing so and it represents what I consider to be a proportionate remedy for the element of an unfair relationship between Mr Kumar and LSC which I have found.

ISSUE 10 - What amounts are due to LSC under the Pattingham Loan Agreements and the guarantees in relation to the indebtedness of ADL and/or ACL, subject to any defences?

The Commitment Point

Introduction

252. In response to my circulating a draft of this judgment to both counsel, Mr Say pointed out that it did not deal with the point raised at paragraphs 111 and 112 of his skeleton argument. The point that Mr Say raised in paragraphs 111 and 112 of his skeleton argument was that the amounts claimable by LSC, from Mr Kumar and Mrs Kumari under the ADL Guarantees that they entered into is limited by clause 2.3 of the ADL Guarantees to the "Commitment" (which Mr Say says means the aggregate of the advances made by LSC to ADL) plus interest at 3% per month from the date of demand ("the Commitment Point"). The Commitment Point is important because, if the liability of Mr Kumar/Mrs Kumari is limited in this way, then LSC cannot claim all the interest which accrued on the ADL Facility Agreements from the advance of the monies to ADL, up to the date that LSC demanded payment from Mr Kumar/Mrs Kumari under their ADL Guarantees. Mr Say says

that the difference is significant, he says that, as at the date of demand (5 August 2020) the amount of the ADL Guarantee liabilities of Mr Kumar and Mrs Kumari would be £5,568,395.61 if the ADL Guarantees are not limited to the "Commitments" and £2,501,500 if they are.

253. Mr Say accepted that he may not have dealt with the Commitment Point in his closing argument and my note of his closing argument indicates that he did not do so. I directed that each counsel should provide written submissions on the Commitment Point, with Mr Say providing his written submissions by 4pm on 17 May and Mr Pomfret his written submissions in response by 4pm on 23 May. Each counsel met those deadline and I am grateful for their submissions on the Commitment Point.

254. Mr Say accepts that the Commitment Point is not specifically pleaded, either in Mr Kumar's Amended Reply and Defence to the Re-Amended Defence and Counterclaim or in Mrs Kumari's Defence, but he says that both pleadings put LSC to proof as to the amount LSC claims to be due to it under their ADL Guarantees and he submits that this is sufficient to raise the Commitment Point. In the alternative, Mr Say seeks permission to amend Mr Kumar and Mrs Kumari's pleadings, to plead the Commitment Point. Mr Pomfret says that the Commitment Point is not sufficiently pleaded and that I should not give Mr Kumar/Mrs Kumari permission to raise it by way of amendment to their pleadings.

255. I will decide the Commitment Point as follows:

(a) I will set out what Mr Say says about the Commitment Point;
(b) I will set out Mr Pomfret's response to the Commitment Point;
(c) I will decide whether Mr Kumar/Mrs Kumari's existing pleadings entitle them to raise the Commitment Point;
(d) if I decide that Mr Kumar/Mrs Kumari are not entitled to pursue the Commitment Point, based upon their existing pleadings, I will decide whether to grant Mr Kumar/Mrs Kumari permission to amend their pleadings to enable them to do so; and
(e) if I find that Mr Kumar/Mrs Kumari are entitled to pursue the Commitment Point, either: (i) under their existing pleadings; or (ii) by amending their pleadings I will decide whether or not Mr Say's argument succeeds.

Mr Say's submissions on the Commitment point

256. Mr Say put his case as follows:

(a) Clause 2.3 of the ADL Guarantees provides that: "The maximum liability of the Guarantor under this clause shall not exceed the amount of the "Commitment" under the Facility Agreement plus interest, costs and expenses and other sums due under the remaining clauses of this Guarantee";

(b) the ADL Guarantees define the Facility Agreement as: "the facility agreement made between the Borrower and the Lender dated on or around the date of this guarantee";

(c) the Facility Agreement referred to in the ADL Guarantees is the agreement for Loan 440 because the ADL Guarantees are dated 6 April 2017 and the Loan Agreement for Loan 440 is also dated 6 April 2017;

(d) the General Terms incorporated into the Loan Agreement for Loan 440 define the "Commitment" as "the maximum aggregate amount of all monies available to the Borrower to be drawn down under the agreement as specified in the specific terms to the extent not cancelled, reduced or transferred by the lender under the agreement";

(e) the Specific Terms for Loan 440 define "commitment" as "£1,342,500 (One Million Three Hundred and Forty Thousand Five Hundred Pounds Stirling";

(f) the maximum liability under the ADL Guarantees at the date of execution of those guarantees was therefore £1,342,500;

(g) thereafter Loans 466, 505 and 517 were made to ADL and each of the Loan Agreements for those loans contained a declaration signed by Mr Kumar and Mrs Kumari that: "The guarantors each hereby confirm and acknowledge the terms of this agreement and that their respective liabilities and obligations under and pursuant to their guarantees extend to this agreement. Each guarantor further agrees and acknowledges that the lender has given each of them the opportunity to seek independent legal advice as to their respective liabilities and obligations under and pursuant to this agreement and their respective guarantees and that acknowledge the same of their own free will." (I will refer to these statements collectively as "the Confirmations and Acknowledgments");

(h) the effect of the Confirmations and Acknowledgments at the end of Loans 466, 505 and 517 was to extend the definition of "Commitment" to include the

"Commitment" as defined in the Facility Agreements for each of those loans. In aggregate the cumulative amount of the Commitments under Loans 440 (£1,342,500), 466 (£914,000), 505 (£140,500) and 517 (£104,500) is £2,501,500; and

(i) although the ADL Guarantees provide that the guarantor is also liable for "costs, expenses and any other sums due under the remaining clauses of this Guarantee", LSC has not claimed any such sum and so at the date of the demands issued to Mr Kumar/Mrs Kumari (5 August 2020) only £2,501,500 was payable.

Mr Pomfret's submissions on the Commitment Point

257. Mr Pomfret says, in response to Mr Say's substantive case on the Commitment Point that:

(a) clause 2.3 of the ADL Guarantees properly interpreted provides that the maximum liability under those guarantees is the Commitments, plus interest, costs and expenses under the various ADL Facility Agreements and any other sums due under the remaining clauses of the ADL Guarantees;

(b) the ADL Guarantees contain a guarantee and a separate indemnity and clause 4.1 of the ADL Guarantees provides for the guarantor to pay LSC 3% per month interest from the date of demand or if earlier the date on which the relevant damage, losses, costs or expenses arose (my underlining added). The underlined words, says Mr Pomfret, show, bearing in mind that the ADL Guarantees operate as a guarantee and an indemnity, that interest runs under the ADL Guarantees from the date of default by ADL. This, says Mr Pomfret, is inconsistent with clause 2.3 limiting Mr Kumar/Mrs Kumari's liability under the ADL Guarantees to the Commitment, without interest; and

(c) clause 4.3 of the ADL Guarantees operates to ensure that interest charged to the guarantor is not charged to the guarantor both under the ADL Facility Agreements and the ADL Guarantees, to prevent double recovery, which Mr Pomfret suggests is also inconsistent with Mr Kumar/Mrs Kumari's liability under the ADL Guarantees being limited to the Commitment, without interest.

Have Mr Kumar/Mrs Kumari sufficiently pleaded the Commitment Point?

258. Mr Say submits that, in their pleadings, Mr Kumar and Mrs Kumari have put LSC to proof of the amounts set out in the statements of account attached to their pleadings and that this is sufficient to put the Commitment Point in issue.

259. Mr Pomfret says that the Commitment Point is not pleaded by either Mr Kumar or Mrs Kumari, despite their pleadings being extensive and having been amended on a number of occasions.

260. I am satisfied that the Commitment Point is not sufficiently pleaded by Mr Kumar/Mrs Kumari. The function of pleadings is to enable the defendant to understand the claims that the claimant makes and the basis upon which he makes those claims and the claimant to understand which of the claims the defendant disputes and the extent to which and basis on which he disputes those claims. Simply putting LSC to proof of the amounts set out in the statements of account attached to the Particulars of Claim does not enable LSC to understand that Mr Kumar/Mrs Kumari intend to argue that clause 2.3 of the ADL Guarantees imposed a limit (the aggregate of the original advances under the ADL Facility Agreements) on the debt, owed by ADL to LSC, which LSC is entitled to demand payment of from Mr Kumar/Mrs Kumari.

Should I grant permission to Mr Kumar/Mrs Kumari to amend their pleadings?

261. Mr Say sets out a proposed amendment to Mr Kumar's Re-Amended Defence and Counterclaim and Mrs Kumari's Defence ("the Commitment Point Amendment") in the following terms:

> "The Claimant [or Third Party as the case may be] denies that the Defendant is entitled to the sums claimed pursuant to the statements of account appended to the Re-Amended Defence and Counterclaim, as the amount claimed in respect of the ADL guarantee exceeds the amount that the Defendant is entitled to claim pursuant to that guarantee. It is the Claimant's [or Third Party's] case that the amount that can be claimed under the ADL guarantee is capped by Clause 2.3 of the same to the amount of the commitment (i.e. the loan amounts). The maximum that could be demanded under the ADL guarantee at the date of that demand on 5 August 2020 was £2,501,500."

262. Mr Say acknowledges that the application to amend is very late, however, he says the court has power to permit an amendment for which permission is sought after judgment has been given but before an order recording that judgment has been drawn up and sealed and he refers to CPR 17.3.9.

263. Mr Says says that granting permission to amend would be consistent with the overriding objective (CPR 1.1) to deal with the case justly and at proportionate cost because:

a. the amount involved is significant;

b. the Commitment Point is important, because the question of what limit (if any) is imposed by Clause 2.3 of LSC's standard form guarantee upon LSC recovering against a guarantor who has signed that standard form guarantee may be important to other proceedings involving the same standard form guarantee;

c. the case as a whole has involved a significant number of factual issues and the Commitment Point raised by the amendments does not add significantly to the complexity of the case overall;

d. the court's resources have already been allocated to deal with the Commitment Point, by virtue of the direction I made on 12 May for counsel to file and serve written submissions and in any event the financial value of the Commitment Point justifies the allocation of those resources;

e. no significant expense will be incurred in dealing with the Commitment Point.

f. LSC is not prejudiced by the late amendment as it involves a short point of pure law. No evidence is required;

g. the point was raised in Mr Say's skeleton argument on 4th April 2023, which was sufficient time for LSC to deal with it at trial;

h. the effect of denying permission to amend, if the point is well founded, is that LSC's claim under the ADL Guarantees will be grossly inflated, unjustly enriching LSC; and.

i. any prejudice can be cured by a costs order.

264. Mr Pomfret says that Mr Kumar/Mrs Kumari should not be given permission to amend their pleadings to include the Commitment Point Amendment because the application is simply made far too late.

265. The commentary at CPR 17.3.9 refers to two situations in which permission may be sought, to amend a pleading: (a) after the trial but before judgement is handed down; and (b) after judgement has been handed down, but before an order has been drawn up and sealed reflecting that judgement. In this case Mr Say responded to my sending out of a draft of this judgment by pointing out that I had not dealt with the Commitment Point raised in his skeleton argument. I directed that each counsel should provide written submissions on the Commitment Point. In this case permission to amend it sought after the trial concluded but before this judgement was handed down. I do not consider that the note at CPR 17.3.9 is of much assistance to me (other than to confirm that I have jurisdiction to entertain an application for permission to amend Mr Kumar/Mrs Kumari's pleadings, even at this late stage).

266. In *Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm)* Carr J (as she then was) summarised, at paragraph 38 the principles applying to determine whether or not a late application for permission to amend should be granted, as follows:

> " (a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> (b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately and that the courts enable them to do so."

267. I am satisfied that, if I grant permission for the Commitment Point Amendment, there would be no material prejudice or unfairness to LSC because:

(a) the Commitment Point Amendment raises an issue of construction of the contractual documents entered into between the parties, there is no disagreement about which those documents are or what they say;

(b) evidence as to the subjective intention of the parties is not permissible as an aid to interpretation of contractual documents (see *Arnold v Britton* at paragraph 169 above) and whilst the factual background known to the parties at the date of execution of the relevant document would be admissible as an aid to their interpretation, Mr Pomfret

has not suggested that there would have been any scope for relevant evidence of the background circumstances known to LSC/Mr and Mrs Kumar to have been produced as an aid to interpretation of the Commitment Point, had it been pleaded well before trial;

(c) Mr Pomfret has had an opportunity to consider the written submissions of Mr Say on the Commitment Point before making his own written submissions in response; and

(d) Mr Pomfret does not suggest in his written submissions that LSC has suffered or would suffer any prejudice in terms of responding to the Commitment Point, if I allow the Commitment Point Amendment, compared to the position LSC would have been in, if the Commitment Point had been pleaded long before the trial took place, he merely says that the application to amend is made far too late.

268. I find that the relevant factors for and against allowing the Commitment Point Amendment are as follows:

(a) Mr Pomfret is right that Mr Kumar/Mrs Kumari's pleadings are extensive and have been amended on a number of occasions. There is no good excuse for their delay in seeking permission to include the Commitment Point Amendment in their pleadings. The reason for the late application to amend appears to be that the point occurred to counsel (Mr Say) when he was preparing his skeleton argument. That is not a good reason;

(b) enforcing compliance with rules, practice directions and orders militates against granting permission, because if permission is granted too readily, then parties are not discouraged from failing to comply;

(c) some additional costs have been incurred by both parties in dealing with the Commitment Point and the application for permission to amend Mr Kumar/Mrs Kumari's pleadings to include the Commitment Point Amendment, in the form of the written submissions from counsel, and some additional court resources have been utilised in dealing with the Commitment Point/application to amend;

(d) I have found that there has been no prejudice to LSC in terms of putting forward its case in response to the Commitment Point, for the reasons already explained; and

(e) having considered the Commitment Point below, I have come to the conclusion (see paragraphs 271 – 291) that, if I grant permission for Mr Kumar/Mrs Kumari to make the Commitment Point Amendment, then this partial defence to LSC's claim against them under the ADL Guarantees would succeed reducing their liability under those guarantees, as at the date of demand (5 August 2020) by £3,066,895.61, from £5,568,395.61 to £2,501,500 and with a consequent reduction in interest charges applied by LSC thereafter.

269. I must balance the factors that I have identified in paragraph 268 in order to determine whether or not to grant Mr Kumar/Mrs Kumari permission to make the Commitment Point Amendment to their pleadings, bearing in mind that, due to the lateness of the application they bear a very heavy burden in persuading me to give them permission.

270. Whilst I will proceed, as I have just said, on the basis that this is a very late application for permission to amend, if permission had been sought, shortly before trial, or even at trial to amend Mr Kumar/Mrs Kumari's pleadings to include the Commitment Point Amendment, then in my judgment, the granting of permission would not have resulted in the loss of the trial date, because, for the reasons set out in paragraph 267 above, I consider that no additional evidence would have been required for the trial to deal fairly and adequately with the Commitment Point. Applying for permission at that stage would not therefore have satisfied Carr J's definition of "a very late application to amend" in *Quah Su Ling* (see paragraph 266 (c) above). In any event the amount of additional costs involved in dealing with the Commitment Point has been relatively insignificant in relation to the costs incurred by the parties in dealing with the other issues (short written submissions from both counsel) and the amount of the courts resources used up in dealing with the Commitment Point (considering the written arguments and adding these paragraphs to my reserved judgment) has similarly been relatively insignificant when compared to the court's resources committed to the other issues raised by the parties pleadings and dealt with at trial and In this judgment. Whilst those additional costs and resources are factors against granting permission, given their relative insignificance, they are not strong factors against granting permission.

271. I have noted that there is no good excuse for making the application to amend so late and that refusing permission may encourage other parties to ensure that they bring forward their claims and defences to claims at an earlier stage and in compliance with the CPR. I have found that LSC has not been materially prejudiced in terms of its ability to respond to the Commitment Point by the very late application to amend (if granted) and when I balance the factors against granting permission to amend (including the additional costs and use of the courts resources caused by dealing with Commitment Point) I consider that they are outweighed by the injustice of entering a judgment against Mr Kumar and Mrs Kumari in relation to their liability under the ADL Guarantees for over £3m more than I consider their actual liability to be, as at the date of demand taking the Commitment Point into account (with additional interest added to that figure after the date of demand).

Does the Commitment Point succeed (on the basis that I have given permission for the Commitment Point Amendment)?

272. I have set out in paragraphs 169-170 above the guidance provided by the Supreme Court in *Arnold v Britton* and *Wood v Capita Insurance Services Limited* for construing contracts. I will use that guidance in construing the ADL Guarantees and the Facility Agreements for loans 440, 466, 505 and 517 which contain the contractual provisions relevant to determining the Commitment Point. I also bear in mind that the ADL Guarantees and the Facility Agreements are LSC's standard form documents and that in those circumstances, if there is ambiguity about the wording of the relevant clauses, such ambiguity should be resolved in favour of Mr Kumar/Mrs Kumari.

273. I have set out in paragraph 256 above, Mr Say's case as to how he says that the ADL Guarantees are limited to the Commitment and as to what "the Commitment" is. Mr Say's submissions fall into two parts: (a) as to the maximum liability of Mr Kumar/Mrs Kumari for Loan 440 made by LSC to ADT (paragraphs 256(a) – (f)); and (b) the maximum guarantee liability of Mr Kumar/Mrs Kumari for loans 466, 505 and 517 (paragraph 256 (g) – (h)). My judgement on the Commitment Point will similarly be divided into Mr Kumar/Mrs Kumari's liabilities for Loan 440 and separately their liabilities for Loans 466, 505 and 517.

Liability for Loan 440

274. I am satisfied that Mr Kumar/Mrs Kumari's liability for Loan 440 made by LSC to ADL is limited to £1,342,500 at the date upon which LSC issued demands to Mr Kumar/Mrs Kumari to discharge their liabilities under the ADL Guarantees (5 August 2020). My reasons for that conclusion are set out in the paragraphs that follow.

275. Clause 2.1 of the ADL Guarantees provides "In consideration of the Lender entering into the Finance Documents, the Guarantor guarantees to the Lender, whenever the Borrower does not pay any of the Guaranteed Obligations when due, to pay on demand the Guaranteed Obligations.",

276. In the ADL Guarantees, the "Lender" is LSC, the "Borrower" is ADL, "Finance Document" is defined as having the meaning in the "Facility Agreement" and "Facility Agreement" is defined as "the facility agreement between the Borrower and the Lender, dated on or around the date of this guarantee". The "Guaranteed Obligations" are defined as "all present and future payment obligations and liabilities of the Borrower due, owing or incurred under the Finance Documents to the Lender (including without limitation, under any amendment, supplement or restatement of the Finance Documents, or in relation to any new or increased advances or utilisations).".

277. Clause 2.2 of the ADL Guarantees provides that the Guarantor has a separate obligation under clause 2.1 to indemnify the Lender against any loss it may suffer as a result of the Guaranteed Obligations not being recoverable.

278. Clause 2.3 of the ADL Guarantees is the clause upon which Mr Say relies in submitting that Mr Kumar/Mrs Kumari's liability for Loan 440, advanced by LSC to ADL, is limited to £1,342,500 as at 5 August 2020 (the date of the demand). Clause 2.3 provides "The maximum liability of the Guarantor under this Clause shall not exceed the amount of the "Commitment" under the Facility Agreement plus interest, costs, expenses and any other sums due under the remaining Clauses of this Guarantee.".

279. The clear purpose of clause 2.3 is to provide for a limit upon the liability of the Guarantor under the ADL Guarantees. That limit is "the "Commitment" under the Facility Agreement "plus interest, costs, expenses and any other sums due under the remaining Clauses of this Guarantee". Whilst Mr Pomfret does not challenge Mr Say's submissions as to what the

"Commitment" is under Loan 440 it is appropriate that I should determine what the "Commitment" is before going on to consider Mr Pomfret's submissions about what "interest, costs expenses and other sums" clause 2.3 is referring to.

280. There is only ambiguity as to what "the Commitment" is if, it is either unclear what the Facility Agreement is and/or the Facility Agreement does not make it clear what the "Commitment" is. As to that:

(a) I am satisfied that the "Facility Agreement" is the facility agreement for Loan 440. I am satisfied of this because: (i) the definition of Facility Agreement in the ADL Guarantees is "the facility agreement" in the singular indicating a single facility agreement, rather than multiple facility agreements; and (ii) the facility agreement for Loan 440 is dated 6 April 2017, the same date as the ADL Guarantees, whereas Loans 466, 505 and 517 are dated 3 August 2017, 29 November 2017 and 9 January 2018 respectively. Only the facility agreement for Loan 440 therefore answers the description in the definition of Facility Agreement in the ADL Guarantees of "the facility agreement between the Borrower and the Lender, dated on or around the date of this guarantee";

(b) the Facility Agreement for Loan 440 consists of the Specific Terms and the General Terms. The General Terms define the Commitment as "…the maximum aggregate amount of all monies available to the Borrower to be drawn down under the Agreement as specified in the Specific Terms to the extent not cancelled, reduced or transferred by the Lender under the agreement. " The Specific Terms define the "Commitment" as "….£1,342,500….". I am satisfied that the "Commitment" under Loan 440 is £1,342,500.

281. As I have said, Mr Pomfret does not dispute that the Commitment for the purposes of Loan 440 is £1,342,500. Mr Pomfret says that clause 2.3 of the ADL Guarantees properly interpreted provides that the maximum liability under those guarantees for Loan 440 is the Commitment, plus interest, costs and expenses due under the Loan 440 Facility Agreement.

282. Two documents are referred to in clause 2.3, the ADL Guarantees (referred to as "the Guarantee" and "the Facility Agreement" (see paragraph 276 above)). Looking purely at the

wording of clause 2.3, if, as Mr Pomfret contends, the intention of clause 2.3 is that the guarantors maximum liability for Loan 440, will not exceed the Commitment plus interest, costs and expenses as set out in the Facility Agreement (my underlining added) for Loan 440 (and not as set out in the ADL Guarantees) , then: (i) "under the Facility Agreement" should appear after rather than before "plus interest, costs and expenses"; (ii) the word "plus" should not appear after "Facility Agreement"; and (iii) there should be an "and" rather than a comma between "costs" and "expenses". As I read clause 2.3 only the "Commitment" is as set out in the Facility Agreement, the "plus interest, costs and any other sums due under the remaining Clauses of this Guarantee" are "interest, costs and any other sums" for which the ADL Guarantees provide.

283. Mr Pomfret refers to clause 2.2 of the ADL Guarantees which provides a separate obligation for Mr Kumar/Mrs Kumari to indemnify LSC against "all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Lender arising out of, or in connection with, the Guaranteed Obligations not being recoverable for any reason or any failure of the Borrower to perform or discharge any of its obligations or liabilities in respect of the Guaranteed Obligations". Mr Pomfret says that clause 4.1 provides for the Guarantor to pay interest at 3% per month from the date of demand under the guarantee or "…if earlier the date on which the relevant damages, losses, costs or expenses arose in respect of which demand is made…". Mr Pomfret says that LSC incurred loss as a result of ADL failing to pay sums falling due under the ADL Facility Agreements, that loss is recoverable under clause 2.2 and that, in accordance with clause 4.1 interest at 3% per month is payable from the date of such loss. These clauses, suggests Mr Pomfret, put the meaning of clause 2.3 beyond doubt, because they show that interest is intended to be charged to the guarantor from the date on which LSC incurs a loss and not only from the date of demand.

284. I am entitled to take into account other clauses of the ADL Guarantees in construing clause 2.3 (see paragraph 169 above). Clause 2.3 states that the maximum liability of the Guarantor under clause 2 (which contains the guarantee at clause 2.1 and the indemnity at clause 2.2) is, not to exceed what is set out in that clause. I accept that Mr Pomfret is right that interest at 3% per month can be charged from a date prior to the date of the demand, in accordance with clause 4.1 and for present purposes I will accept that Mr Kumar/Mrs Kumari may be liable to indemnify LSC in respect of any loss it suffers as a result of ADL failing to pay sums due under Loan 440. This does not however prevent clause 2.3 from being construed objectively to be

intended to impose a maximum liability or cap upon Mr Kumar/Mrs Kumari's liability at a lesser sum than would otherwise be their full liability under the ADL Guarantees under clause 2.1 (Guarantee) and clause 2.2 (indemnity) indeed I have found that that is the whole purpose of clause 2.3. I do not see how therefore the meaning of clause 2.3 is put beyond doubt, by clauses 2.2 and 4.1 read together, and must mean that LSC can recover from Mr Kumar and Mrs Kumari the Commitment and interest chargeable to ADL on the Commitment under the ADL Facility Agreement. LSC may be entitled to recover interest prior to the date of demand under clause 2.2, when read in conjunction with clause 4.1, but this does not mean that Mr Kumar/Mrs Kumari's maximum liability under the ADL Guarantees for Loan 440 cannot exceed, the Commitment in accordance with clause 2.3.

285. Finally, Mr Pomfret refers to clause 4.3 of the ADL Guarantees which he says operates to ensure that interest is not charged to the guarantor under both the ADL Facility Agreements and the ADL Guarantees so as to prevent double recovery. Clause 4.3 of the ADL Guarantees provides that "The Lender shall not be entitled to recover any amount in respect of interest under both this guarantee and any arrangements entered into between the Borrower and the Lender in respect of any failure by the Borrower to make any payment in respect of the Guaranteed Obligations." In my judgment clause 4.3 of the ADL Guarantees operates to prevent LSC from recovering interest for the same period from both ADL under the ADL Facility Agreements and the guarantors (Mr Kumar/Mrs Kumari) under the ADL Guarantees and not to prevent LSC from recovering from Mr Kumar/Mrs Kumari under both the ADL Facility Agreements and the ADL Guarantees, because Mr Kumar/Mrs Kumari have no liability to LSC under the ADL Facility Agreements. I do not consider that clause 4.3 has any bearing upon the proper construction of clause 2.3 which creates a maximum limit upon Mr Kumar/Mrs Kumari's liability under the ADL Guarantees.

286. I am satisfied that the meaning of clause 2.3 is clear, I will deal with the remaining aids to construction relatively briefly:

> (a) although not an aid to construction I note that, if I had found that the meaning of clause 2.3 was ambiguous, such ambiguity should be resolved in favour of Mr Kumar/Mrs Kumari;

(b) I have no evidence before me of any facts or circumstances known to the parties when the ADL Guarantees were executed, relevant to the proper construction of clause 2.3 of the ADL Guarantees;

(c) commercial common sense does not dictate that the limit which may be demanded under the ADL Guarantees should be anything other than £1,342,500 (plus interest, costs, expenses and any other sums due under the ADL Guarantees);

(d) LSC has not claimed that any costs or interest or other sums are due to it under the ADL Guarantees, prior to demand; and

(e) whilst LSC may have intended that the ADL Guarantees should cover interest accruing on the sum of £1,342,500 advanced under Loan 440 from the date of the advance of the funds, up to the date of demand, as Lord Neuberger made clear in *Arnold v Britton*, evidence of the subjective intention of the parties must be disregarded.

Liability for Loans 466, 505 and 517

287. I have set out in paragraph 256 (g) above the text of the Confirmation and Acknowledgements all of which appear at the end of each of the Facility Agreements for Loans 466, 505 and 517, which are in identical form. I have to construe the Confirmation and Acknowledgements to determine what Mr Kumar/Mrs Kumari's liability for Loans 466, 505 and 517 made by LSC to ADL is.

288. Mr Pomfret makes no separate submissions in relation to Loans 466, 505 and 517, he relies on his general submission that clause 2.3 was not intended to restrict LSC to demanding only the Commitment as defined in the Facility Agreements for Loans 440, 466, 505 and 517, but rather to the Commitment plus interest and costs falling due under those Facility Agreements.

289. I find that it is clear that the purpose of the Confirmation and Acknowledgements signed by Mr Kumar and Mrs Kumari as guarantors is to confirm that their liability under the ADL

Guarantees is to extend, in some form, to Loans 466, 505 and 517 advanced by LSC to ADL. What I need to decide, objectively, is whether the intention of the parties (that is LSC, Mr Kumar and Mrs Kumari) was that Mr Kumar and Mrs Kumari's liability to guarantee loans 466, 505 and 517 would be limited to the amount of the Commitment specified in each of those loans or would extend to all liabilities and obligations of ADL to LSC under the Facility Agreements for loans 466, 505 and 517. In other words does the wording of the Confirmation and Acknowledgments mean that the liability of Mr Kumar/Mrs Kumari for Loans 466, 505 and 517 is any different, and if so how is it different, from their liability for Loan 440 (in particular, is it restricted to the "Commitment" as defined in the Facility Agreements for Loans 466, 505 and 517 as I have found it is for Loan 440?).

290. I am satisfied, for the following reasons, that Mr Kumar/Mrs Kumari's liability as guarantors under the Confirmation and Acknowledgments when read in conjunction with the ADL Guarantees is limited to the "Commitment" specified in the Specific Terms of the Facility Agreements for each of the Loans 466, 505 and 517 (plus interest, costs, expenses and any other sums due under the remaining Clauses of the ADL Guarantees (in respect of which interest, costs and expenses I have already noted, that nothing is claimed by LSC, prior to demand)):

(a) the Confirmation and Acknowledgements at the end of the Facility Agreements for Loans 466, 505 and 517, merely state, in general terms, that " The Guarantors each hereby confirm and acknowledge the terms of this agreement and that their respective liabilities and obligations under and pursuant to their guarantees extend to this Agreement.";

(b) The "respective liabilities and obligations" of Mr Kumar and Mrs Kumari under the ADL Guarantees is defined as the "Guaranteed Obligations" which, at the date of execution of the ADL Guarantees was limited to "the Commitment" being the amount advanced by LSC to ADL under Loan 440 only (see paragraph 2 above). It is difficult to see how the parties can have objectively intended that the Confirmation and Acknowledgements of Mr Kumar and Mrs Kumari that their respective liabilities and obligations under the ADL Guarantees, which I have found are limited, by clause 2.3, to the amount of advance in relation to Loan 440, should not be so limited in relation to Loans 468, 505 and 517. The

"Commitment" as defined in the Facility Agreements for Loans 466, 505 and 517 is: 466 - £914,000; 505 - £140,500; and 517 - £104,500);

(c) in so far as there is ambiguity about whether Mr Kumar/Mrs Kumari's liability under the ADL Guarantees was intended to be limited to the amount of the Commitment specified in each of the Facility Agreements containing the Confirmation and Acknowledgements, that ambiguity should be resolved in favour of Mr Kumar/Mrs Kumari, by limiting their liability to the Commitments under the Facility Agreements for Loans 466, 505 and 517;

(d) I have no evidence before me of any facts or circumstances relevant to the construction of the Confirmation and Acknowledgements when read in conjunction with the terms of the ADL Guarantees;

(e) commercial common sense does not assist me in determining whether the parties intended that the Confirmation and Acknowledgements would be limited to the Commitments under Loans 466, 505 or 517 or not so limited. It would make commercial sense both for the liability of Mr Kumar/Mrs Kumari under the ADL Guarantees to be limited to the Commitments (plus interest, Costs, expenses and any other sums due under the remaining Clauses of the ADL Guarantees") or to encompass all of the liabilities of ADL to LSC under those Facility Agreements; and

(f) as noted for Loan 440, whilst LSC may have intended that the ADL Guarantees should not be limited to the amount of the original advances, I must disregard evidence of LSC's subjective intent.

The remaining points on Issue 10

291. Subject to my findings in relation to the Commitment Point, which relates only to the ADL Guarantees entered into by Mr Kumar and Mrs Kumari:

(a) interest should be charged on the ADL/ACL debts guaranteed by Mr Kumar/Mrs Kumari/Mr Verma, at 1.2% per month compounded from the date of the relevant advances until the date upon which the loans fell due for repayment, in accordance with the contractual terms and thereafter at 3% per month compounded;

(b) Given Mr Pomfret's concession (see paragraph 82 (b) above) no additional debts incurred by ACL/ADL to LSC after the date upon which demand was issued to the guarantors shall be added to those guarantee debts; and

(c) £13,500 is to be deducted from Mr Kumar's Pattingham Loan, as at 15 August 2018, in calculating the amount owing by Mr Kumar under his Pattingham Loan.

ISSUE 15 – Are Mr Kumar, Mrs Kumari and Mr Verma entitled to any relief by reason of their allegation that LSC sold the mortgaged property (Emerald Close) at an undervalue?

292. Only Mr Kumar and Mr Verma are guarantors of ACL's debt to LSC and only they therefore can have suffered loss if Emerald Close was sold at an undervalue.

293. LSC sold Emerald Close for £60,000 as mortgagee on 25 March 2019. Unlike the sale of the Pattingham Land, which was a sale by Receivers acting as agents of Mr Kumar/Mrs Kumari/Mr Verma, LSC is responsible for the sale of Emerald Close.

294. Mr Pomfret says that LSC's responsibility as mortgagee was to take reasonable steps to obtain proper market value for Emerald Close, but Mr Kumar has simply pleaded that Emerald Close was sold at an undervalue, with no particulars and therefore no proper basis upon which the court could find that LSC did fail to take reasonable steps to obtain proper market value.

295. Mr Say accepts that the right of action against LSC, selling as mortgagee, is that it failed to take reasonable steps to obtain proper market value for Emerald Close, but he says that the price obtained by LSC for Emerald Close was so much less than its true market value as at 25 March 2019, that I should infer that LSC did fail to take reasonable steps to obtain proper market value for it.

296. Mr Morison (joint valuation expert) reported, on 2 March 2023, that, in his opinion the value of Emerald Close as at 25 March 2019 was £70,000 if the roof was not complete

at the time of sale, as asserted by LSC and £82,000 if the roof was complete at the time of sale, as asserted by Mr Kumar. I have been referred to no evidence on the issue of whether the roof was complete at the time of the sale or not, the burden is on Mr Kumar to prove that it was complete, he has not discharged that burden.

297. The difference between the market value attributed to Emerald Close by Mr Morison, as at 25 March 2019 and the price at which it was sold by LSC, as mortgagee, is therefore £10,000. Absent any particulars of how it is said that LSC failed in its duty to take reasonable steps to obtain proper market value for Emerald Close, I find myself unable to infer from the difference of £10,000 between the price that LSC obtained and Mr Morison's opinion as to its market value, that LSC failed to take reasonable steps to obtain proper market value for Emerald Close when selling it as mortgagee, on 25 March 2019.

ISSUE 16 - In the event that Mr Verma's mortgage in respect of Plot 2 of the Pattingham Land is held to be an RMC and/or Issues (2) and (3) above are established in relation to the Mr Verma's Pattingham Loan, what relief is Mr Verma entitled to?

298. The claims under Issues 2 and 3 have been withdrawn by Mr Say and I have found that none of the Pattingham Loans are RMCs. Issue 16 does not therefore arise for determination.