-IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Richard Farnhill (sitting as a Deputy Judge of the Chancery Division)

Appeal Court Reference: CA-2026-000054
Lower Case Reference: PT-2021-000393

BETWEEN:

(1) MRS NURAY HOUSSEIN
(2) HOUSSEIN ALI HOUSSEIN
(as executor of the estate of Ali Houssein deceased)
(3) CEK INVESTMENTS LIMITED

Claimants/ Appellants

– and –

(1) LONDON CREDIT LIMITED
(2) VICTORIA LIDDELL AND ANNIKA KISBY
(as joint Fixed Charge Receivers)

Defendants/ Respondents

APPELLANTS' SKELETON ARGUMENT

References to pages in the Core Bundle are in the form **[CB/TAB/PAGE]**
References to pages in the Supplementary Bundle are in the form **[SB/TAB/PAGE]**

1. The Appellants ("**As**" or respectively "**A1**", "**A2**" and "**A3**") appeal against an Order ("**the Order**") of Richard Farnhill (sitting as a Deputy Judge of the Chancery Division) ("**the Judge**") following a three-day remitted hearing between 3 and 5 September 2025. The Judge handed down his judgment ("**the Remitted Judgment**") on 23 October 2025. CB/7/79-81 CB/8/82-168

2. This appeal concerns the circumstances in which interest will cease to run against a mortgagor where:

   2.1. the mortgagor offers a greater sum than that which is due to the mortgagee, but the mortgagee refuses to accept that offer; and

   2.2. the mortgagor seeks to redeem the loan but relies upon refinancing to exit the existing security.

3. In the Remitted Judgment, the Judge determined, among other things, that:

3.1. As a matter of construction of the facility letter entered into by A3, none of the offers made by A3 to redeem the mortgage was sufficient to have that effect and to stop interest running on the sums outstanding;

3.2. The equitable jurisdiction to make an order preventing interest from running against a mortgagor as described at [42] in Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 4) [2013] UKPC 2 was not engaged where the offer of payment relied upon was not made in accordance with the terms of the facility letter entered into between mortgagor and mortgagee and was therefore not engaged on the facts of the present case; and

3.3. The default interest rate of 4% per calendar month compounded monthly was not a penalty at common law.

4. The Judge refused permission to appeal on those issues, however on 10 February 2026 Lady Justice Asplin granted permission to appeal on all grounds as well as a stay of enforcement pending the determination of the appeal. CB/6/77-78

SUMMARY OF THE DISPUTE

5. The Judge set out the background to the dispute in detail in his trial Judgment dated 12 June 2023 ("**the Trial Judgment**") and the Remitted Judgment. What follows is a summary of the key issues relevant to the points raised on appeal.

The Facility

6. By a facility letter dated 20 July 2020 ("**the Facility Letter**"), R1 agreed to loan £1,845,000 to A3 on the terms contained therein. By a Deed of Variation dated 31 July 2020 that sum was increased to £1,881,000, however the substantive terms remained the same. SB/139/422-443

7. By Clauses 5.1 and 5.3 of the Facility Letter, it was provided as follows: SB/139/428

"*5.1 Interest due on the Loan shall be paid, together with the Loan amount and all other sums due to the Lender under the Finance Documents, in full by no later than 12 noon on the Repayment Date. The Facility shall be cancelled in full on the Repayment Date.* …

5.3 Subject to Clause 7.3, the Borrower shall be entitled to repay (or prepay) either the whole or part only of the Loan in tranches of £50,000.00 (Fifty Thousand Pounds Sterling) or such lesser tranches as the Lender shall agree".

8. Clause 9 of the Facility Letter is also relevant. It provides: SB/139/431

"*All payments of principal and interest and any other amounts due from the Borrower to the Lender under this Facility Letter shall be made in Sterling and in immediately available funds to such account as the Lender specifies to the Borrower. Whenever any such payment would (but for this Clause 9) fall due on a day which is not a Business Day then the due date for payment thereof shall be postponed to the next succeeding day which is a Business Day unless such day falls in the next calendar month (in which event such payment shall be made on the immediately preceding Business Day). All such payments shall be made free and clear of any restrictions or conditions and free and clear of, and (subject as provided in the next sentence) without deduction for any taxes. If any such deduction is required by law to be made from any such payment, the Borrower shall pay in the same manner and at the same time such additional amounts as will result in receipt by the Lender of such amount as would have been received by the Lender had no such deduction been required to be made".*

9. The facility was for 12 months from the date of advance with interest on the net advance accruing daily at the rate of 1% per month. The gross sum included rolled-up interest of £225,720, retained out of the loan, and fees of £75,473. It was secured by:

   9.1. A debenture over the assets of A3 (a dormant company);

   9.2. Personal guarantees from A3's directors Ali Houssein ("**AH**") (who sadly passed away on 31 December 2020) and his wife, A1;

   9.3. Third-party mortgages over 5 buy-to-let houses owned by AH and A1; and

   9.4. A third-party mortgage over AH and A1's home at 71 Hamilton Road, Cockfosters, Barnet EN4 9HD.

10. The net advance (in the sum of £1,579,807) was drawn down on 7 August 2020, however before that took place there was an inspection of 71 Hamilton Road on 29 July 2020 by R1's business development manager, Mr Chris Stylianides, and the broker who arranged the finance, Mr Andreas Liondaris, to 'verify' that it was not occupied, non-occupation being a condition in the Facility Letter (albeit that applied to A3, a company, as the defined 'Borrower') ("**the July Inspection**"). SB/141/450

11. A1 and A2 maintained that they (and AH) were in occupation of 71 Hamilton Road at the time of the July Inspection, it being the family home, and that they intended to remain in occupation. They said, however, that Mr Stylianides and Mr Liondaris took staged photographs of 71 Hamilton Road during the July Inspection to make it look like the property was vacant. R1 and Mr Liondaris disputed that version of events and maintained that the property was in fact vacant.

12. In any event, Mr Stylianides reported back to R1 that that was the case, and the facility moneys were released.

13. On 8 September 2020, R1 alleged A3 was in default by reason of the continued residential occupation of 71 Hamilton Road by AH and A1, together with their son, A2. R1 claimed to be entitled to default interest at the rate of 3% per month above the normal interest rate retrospectively from 7 September 2020. It purported to charge interest at 4% per month compounded monthly in arrears on the whole sum due (notwithstanding it already held the benefit of the retained interest of 1%). The effective rate of interest, therefore, was 5% monthly, and after compounding monthly, was the equivalent of over 60% per annum.

14. A3 did not pay the additional sums demanded. On 3 November 2020, R1 claimed to be entitled to immediate repayment of the amount advanced pursuant to the Facility Letter together with all interest, fees and any commission, and it demanded immediate payment of £1,818,518.27 (together with further default interest until payment).

15. On 27 November 2020, R2 advised they had been appointed as receivers and managers in the exercise of R1's powers under the legal charge over 71 Hamilton Road and thereafter R2 threatened to sell the property.

16. On 11 March 2021, R1 appointed R2 as joint receivers in respect of the 5 buy-to-let houses. They were due to be auctioned on 13 May 2021.

17. As, through their solicitors, denied there had been a default. They also alleged that the default interest constituted a penalty and was therefore unenforceable. On 3 March 2021, they wrote to R1's solicitors providing copies of loan offers that A1 had obtained from Kent Reliance. SB/22/214 SB/20-21/201-213

18. In addition, As made the following offers (together "**the Offers**") to R1 to repay the loan and release its security:

18.1. On 16 March 2021, an offer of £1.85m comprising £1.2m and £650,000 from alternate bridging finance to be paid by mid-April 2021, plus As would pay a concessionary default rate to be agreed between the parties ("**the 16 March offer**"); SB/32/226

18.2. On 23 March 2021, a similar offer was made whereby £1.85m would be paid by mid-April 2021 with R1 retaining security over two of the Downhills Way properties to cover potential liability pending a determination of the default interest issue to follow ("**the 23 March offer**"). SB/38/233-234

18.3. On 7 April 2021, an offer was made to pay £1.85m by 21 April 2021 and a further £350,000 to be paid following the grant of probate of AH's estate and the refinancing of the two Downhills Way properties over which R1 was to retain security ("**the 7 April offer**"). That retained security had a value in excess of £1.1 million, providing more than adequate security for the disputed sums of default interest and costs then being claimed by R1. SB/49/253-254

19. None of the Offers was accepted by R1 as it insisted on payment of (at least some of) the default interest as well.

20. Both at 15 April 2021 and 21 April 2021, the sum actually due to R1 (because, as the Judge determined, there was no default and, therefore, no right to default interest from September 2020 as claimed by R1) was less than £1.85m.

21. On 29 April 2021, As issued the present claim for declaratory and consequential relief, which put in issue: CB/10/280-283 CB/11/284-328

21.1. Whether the Facility Letter had been breached at all, R1 being aware that 71 Hamilton Road was occupied, and was always going to be occupied, by AH, A1 and their family.

21.2. Whether the default rate of interest was enforceable as a common law penalty.

21.3. Whether R1's appointment of R2 was unlawful.

21.4. Whether the Facility Letter was unenforceable as against A1 by reason of undue influence.

21.5. Whether the Facility Letter was unenforceable against As by reason of it being a sham and/or s.26(1) of the Financial Services and Markets Act 2000 ("**FSMA**") and/or

ss.140A & 140B of the Consumer Credit Act 1974 and/or s.62 of the Consumer Rights Act 2015 (the last two being referred to collectively as the "**Consumer Claims**").

22. On 5 May 2021, to prevent the properties being sold at auction, As applied for an interim injunction, which was granted on 12 May 2021 by Falk J, thereby restraining R1 and R2 from dealing with the properties until trial or further order.

23. In May 2021, As refinanced three of the Downhills Way properties and repaid the sum of £1.2m to R1.

The 2023 Trial

24. The matter was heard by the Judge over 6 days on 29-31 March, 3-4 April and 10 May 2023.

25. The Trial Judgment (at [2023] EWHC 1428 (Ch)) rehearsed the evidence in detail and then addressed the main legal points in issue (some falling away due to findings elsewhere). Of importance for the purposes of this appeal:

    25.1. Mr Stylianides – the business development manager and only sales contact at R1 – gave honest evidence in some respects, but gave dishonest evidence in respect of the July Inspection. He took misleading and staged photographs on that occasion, lied to R1 when reporting to them, and lied during in evidence at trial; almost no weight was attached to his version of events. See the Trial Judgment at [34-37].

    25.2. As' version of the July Inspection was preferred, and the evidence of Mr Liondaris and Mr Stylianides was not just mistaken but dishonest. See the Trial Judgment at [133-147].

    25.3. There was no breach of the terms of the Facility Letter by reason of AH, A1 and A2's occupation of 71 Hamilton Road. R1 had been aware of their occupation as it was fixed with Mr Stylianides' knowledge, such that the non-occupation condition had been waived. There was therefore also no right to charge default interest or appoint R2. See the Trial Judgment at [189-191].

    25.4. The default interest was, in any event, an unenforceable penalty. See the Trial Judgment at [195-209].

The Consequentials Hearing

26. On 19 September 2023, a consequentials hearing took place at which the Judge determined, amongst other matters, that R1 was entitled to interest at the rate of 1% per calendar month after the term of the Facility Letter had expired.

The First Appeal and Cross-appeal

27. As and R1 each appealed aspects of the Judge's order following the Trial Judgment. The Court of Appeal reversed the Judge's decision in certain key respects (at [2024] EWCA Civ 721). As successfully persuaded the Court of Appeal to reverse the Judge's decision that R1 was entitled to interest at the rate of 1% per calendar months after the term and to reverse the Judge's issue-based costs order. R1 successfully appealed the trial determination that the default interest rate was a penalty at common law.

28. The Court of Appeal did not remake the costs decision nor did it decide that the default rate was not in fact a penalty; instead, those issues were remitted to the Judge. R1 was also permitted to raise a Counterclaim seeking judgment for the sums which have not been paid, which As resisted on various bases including: CB/14/ 387-389 CB/15/ 391-398

    28.1. That interest stopped running against A3 as a result of R1's failure to accept each of the offers when made; and

    28.2. That A3 was entitled to set off losses it suffered as a result of not being able to refinance the loans at more favourable interest rates than were subsequently available to it.

The Remitted Trial

29. The matter was remitted back to the Judge for further determination. The remitted trial took place over three days from 3 to 5 September 2025 ("**the Remitted Trial**"). The issues before the court on the Remitted Trial were:

    29.1. Whether the default rate of interest contained within the Facility amounted to a penalty at common law.

    29.2. Whether, if the default rate of interest is a penalty, R1 was nonetheless entitled to statutory interest.

29.3. If either of the above issues was determined in favour of R1, whether R1's conduct had otherwise disentitled it from claiming any interest.

29.4. Whether As had a set-off against any sums due to R1 (either of the capital loan or any interest) as a result of R1's conduct.

30. The Remitted Judgment was handed down on 23 October 2025, and the Order of the same date gave effect to the Remitted Judgment. The Order:

30.1. Stayed the enforcement of the interest element of the judgment debt entered against the Claimants, but not the 'Outstanding Balance' (as defined in the Order) of £629,991.79; and

30.2. Left questions of permission to appeal and costs to be determined at a consequentials hearing.

31. The consequentials hearing ("**the Remitted Consequentials Hearing**") took place on 15 December 2025. The Judge refused permission to appeal, retained (a more limited) partial stay on enforcement and dealt with the costs of the Remitted Trial and the original trial. CB/9.1/ 169-187

32. As now appeal on the three grounds set out in As' Notice of Appeal.

OUTLINE SUBMISSIONS ON APPEAL

33. As submit that the Judge was wrong to reach the conclusions he did for the reasons set out below.

Ground 1 – The Judge erred in his application of the equitable 'Çukurova jurisdiction'

34. At the Remitted Trial, As' case was that notwithstanding that interest may otherwise contractually have been due to R1, the Court should nonetheless disallow that interest as a matter of equity. The ability of the Court to do so was confirmed in Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 4) [2013] UKPC 20; [2016] AC 923, and was recognised by the Judge at [3(iii)] and [30] of the Remitted Judgment.

35. At [42] of Cukurova, Lord Mance (with whom Lords Kerr and Clarke agreed) said:

"The conclusion which the Board would reach in relation to its seventh and eighth points above is that equity can and should respond by a special order as to interest or costs in exceptional situations where the mortgagee has by words or conduct rejected, made impossible or delayed repayment of the mortgage debt, and that such a situation may exist where there is a tender or offer of repayment, particularly one backed by monies actually paid into court or an account. With reference to the Privy Council decision in Bank of New South Wales v O'Connor (1889) 14 App Cas 273 (para 37 above), the Board would also question whether in modern conditions the wrongful rejection by a lender of properly offered repayment during the currency of a loan should not be viewed as constituting a positive breach of a loan agreement such as the present Facility Agreement which expressly provides for repayment and, in an event of default, acceleration.

36. However, the Judge went on to say at [67] of the Remitted Judgment that: CB/8/100

"I will address the knowledge point below, but simply as regards the scope of the jurisdiction I agree with Mr Wheeler that Çukurova does not mean that LCL was obliged to accept an offer of payment that was not compliant with the contractual scheme of the Facility Letter. Specifically, LCL was entitled to refuse any offer that did not involve payment of the sum due in immediately available funds. None of the communications relied on by the Claimants did involve immediate payment, such that in my view the jurisdiction contemplated by Çukurova has no factual basis here."

37. The Judge therefore considered that although the Çukurova jurisdiction applied as a matter of principle, it had no role to play on the facts of the case.

38. This was in error in that:

    38.1. The Judge misunderstood the scope of the Çukurova jurisdiction and unduly restricted/ fettered the equitable principles it embodies; and

    38.2. The Judge did not disallow the interest to which R1 would otherwise be entitled.

39. As to the former point, the Judge correctly referred to [42] of the judgment in Çukurova. But the Judge then elided the equitable jurisdiction with the terms of the Facility Letter, stating that it had no role to play because R1 could reject any offers that did not comply with *"the contractual scheme of the Facility Letter"*. The Judge did so notwithstanding the clear indication to the contrary at [13] of Çukurova. In doing so, the Judge neutered the Çukurova jurisdiction – it would have absolutely no role to play, because if an offer compliant with the contractual scheme was made,

then R1 would have to accept it as a matter of contract (and this would likely amount to a formal tender in any event), and equity adds nothing at all.

40. Properly understood, the Çukurova jurisdiction is not limited to offers/tenders that a lender is obliged to accept as a matter of contract, but extends to offers of payment that a lender should accept as a matter of equity.

41. And as was the position at the Remitted Trial:

    41.1. The Offers were for more than R1 was entitled to because at the date at which the money would have been handed over, no default interest was actually due because there had been no default;

    41.2. R1 conceded that the 16 March offer was capable of acceptance (and although the Judge queried this concession in the Remitted Judgment at [68], it is not for him to go behind such a concession) and did not challenge the position that the remaining offers were equally capable of acceptance; and CB/8/100

    41.3. The Offers were rejected because R1 incorrectly thought it was entitled to more money, even though R1 had corporate knowledge (through the imputed knowledge and dishonesty of Mr Stylianides) that that was not the case.

42. This is also true in relation to the other offers made by As and listed at paragraph 16 of As' Defence to Counterclaim including the offer in October 2023 to pay the undisputed 'Outstanding Balance' of £629,991.79 in full, with As' solicitors confirming by email that they were holding the funds in their client account ready for completion. CB/15/394

43. The equitable jurisdiction applies only in exceptional circumstances. But the circumstances in this case were exceptional. R1 claimed default interest for a period when it had corporate knowledge which would inevitably lead to the conclusion that there had been no default. As do not contend that R1 acted dishonestly. But equity will intervene in many situations where there is unconscionability which falls short of dishonesty, for instance where a promisor seeks to change his mind and deny the benefit of his promise to the promisee upon which the promisee has relied.

44. The offers should, as it turns out, have been accepted, and R1's refusal to do so should disentitle it from claiming interest for the period following the date when the loan would have

been redeemed if the offer had been accepted. It would be unconscionable for R1 to be able to insist on its legal rights.

45. All the more so where it is recognised that, in a manner similar to the right to forfeit a lease, a mortgagee's security is designed merely to serve as security for the outstanding debt and not to enable the mortgagee to take advantage of any collateral advantage: see [19] of Çukurova. By the offers, As offered R1 what was properly due to R1 (indeed, more than was due). R1 refused the offers notwithstanding the knowledge attributed to it.

46. Two further points are made about the Remitted Judgment:

    46.1. As a general point of principle, the Judge criticised the offers made by As on the basis that parts of the offers were still to be agreed (such as the 'concessionary' default interest rate), such that they had limited contractual effect. It is implicit in this reasoning that had those additional items not been offered, As' position would have been stronger. But it is deeply problematic to penalise As for offering even more than R1 could legitimately claim.

    46.2. The Judge considered, at [69(v)], that R1 could reject the offers made because even a very weak claim (i.e. R1's claim to default interest prior to the expiry of the Facility) has value. That is true insofar as it goes. But it is not the case here – R1 did not have a very weak claim; R1 had no claim because there was no breach of the facility in September 2020, as it well knew. Offers to settle that type of claim would fail for a want of consideration (see *Chitty on Contracts*, 35th ed. at 6-050 – 6-052), which reinforces the preceding point that As were offering R1 something more than they could ever hope to achieve. Nor is this a case of an invalid claim (i.e. a settlement offer) made in good faith; whilst the 'claim'/ counter-offer was not made dishonestly, it was made with knowledge of the true facts. CB/8/102

47. At the Remitted Consequentials Hearing, the Judge refused permission to appeal on this Ground on the basis that:

    47.1. As had accepted at the Remitted Trial that the extent of contractual and equitable relief were in line with one another (see [42-47]); CB/9.3/268

    47.2. It was impossible to say that the reference to an "offer" in Çukurova went beyond a contractual offer and covered offers including the negotiation of other issues (see [52]); CB/9.3/269

47.3. Equity should not intervene as As' case robbed the phrase *"immediately available funds"* in the Facility Letter of meaning (see [55]); and CB/9.3/270

47.4. R1 was not at fault in refusing the offers, but As were at fault in making the offers on the terms that they did (see [53] and [56-59]). CB/9.3/270

48. That reasoning is deeply flawed and problematic, which reinforces the basis for allowing the appeal on this ground:

48.1. As had not accepted at the Remitted Trial, whether in their written or oral submissions, that the extent of contractual and equitable relief were in line with one another. What As had accepted was that the contractual right to redeem (which exists during the term of the mortgage) and the equitable right to redeem (which exists once the mortgage term has expired) were largely equivalent[1]. But that is an entirely separate point to the Çukurova jurisdiction, which addresses completely different equitable considerations. It is therefore wrong to say, as the Judge did at [47], that *"the argument has expanded, in my view very significantly"*; there were two separate points being made that invoked equitable considerations, a point that the Judge appears to have not appreciated, and As were rehearsing the same arguments as had been made at trial. The fact that the Judge misunderstood this point demonstrates that he did not understand or grapple with As' arguments on the correct basis, and reached his decision in the Remitted Judgment and on permission to appeal erroneously.

48.2. The Judge gave no reason for limiting the language in Çukurova in the way that he did. The suggestion that *"Çukurova allows the Court to intervene in exceptional circumstances where the borrower has sought to comply with the contract, done what is in its power to do so, and has been thwarted by the lender."* (see [54] of the consequentials judgment) is an unduly narrow reading of Çukurova. That limitation was not employed by the Privy Council, and for the reasons already given such a limitation would make no sense for it would rob equity of adding anything to the contractual protections that already exist.

[1] Mr Cowen KC stated *"We say that it was open to the third claimant to redeem the loan at any time. We say, firstly, as a matter of law, it had a legal right to redeem up to 7th August of 2021, and thereafter it had an equitable right to redeem."* The Judge asked *"Do you say there is, you may come to this, but I would be grateful for your assistance on the point at some stage, any difference between the right at law prior to the 7th August and the right in equity thereafter? …"* to which Mr Cowen KC responded *"No, in terms of the standards which are required, I would say they are the same."* See the Transcript for Day 1 at page 35, line 13 onwards.

48.3. As' case was not robbing the phrase *"immediately available funds"* of meaning; it was construing it as part of the Facility Letter, which one is obliged to do as with any contractual document (and see further paragraphs 52 and 54.3 below). But in any event, it is inherent in equitable relief that it can go beyond the terms of the contract, hence the need for it and hence the error of the Judge in eliding contractual with equitable relief.

48.4. The Judge seems to have been concerned by two points in particular when ascribing blame to As over R1 –

48.4.1. Firstly, the Judge was concerned by allegations of dishonesty (see, for example, [65-66]). It is not clear why this troubled him, nor why the point proved so controversial during the Remitted Trial. As were clear that they were not alleging that R1 had been dishonest, but that it was fixed with the knowledge of Mr Stylianides, its agent, who had been dishonest. This formed a fundamental part of the Trial Judgment and is unavoidable, explaining as it did why R1 could not claim default interest during the term of the Facility Letter. It was not a question, as the Judge suggested at [65] of the consequentials judgment, of R1 having *"at the corporate level … the knowledge of the facts to see, if properly advised, that its claim should fail"*; it is a straight-forward question of R1 having knowledge of a state of affairs and then proceeding on a course of conduct alleging facts contrary to that known state of affairs. Its behaviour is therefore blameworthy even if not dishonest. As did not need to allege or establish dishonesty of R1 itself where it was relying on the factual findings already made by the Judge. Instead, however, R1 and the Judge seemed to treat the matter as though without a separate specific finding of dishonesty on R1's part, then R1 was blame-free and the earlier findings of corporate knowledge had no relevance to the matters in issue. That is wrong and amounts to a misunderstanding of As' position. CB/9.3/ 271-272

48.4.2. Tied into the foregoing, the Judge considered that R1 was entitled to put forward counter-offers demanding more money than it was entitled to, and that As were to blame for putting forward 'conditional offers'. This characterisation, again, does not withstand scrutiny. Whilst R1 may not have been precluded from demanding more money than it was entitled to, such behaviour does not reflect well on it. Conversely, As were offering more than was due to R1 but the terms of those offers necessarily reflected the refinancing CB/9.3/ 271

that was part of the exit strategy for the Facility Letter. As cannot be criticised for doing so.

48.5. From its response to As' application for permission to appeal, it appears that R1 may submit that this ground of appeal (and Ground 2 below) cannot succeed because As are not challenging the Judge's findings of fact about the offers or his characterisation of the conduct of As and R1. That is not the case – the appeal clearly challenges both (see e.g. paragraphs 46 and 48.4.2 above, as well as the whole of Ground 2), as was recognised by Asplin LJ when granting permission to appeal on Ground 2. CB/6/77

49. Accordingly, not only was the Judge wrong to refuse Permission to Appeal, but his reasons for refusing to do so underline the errors made in the Remitted Judgment itself. The appeal should accordingly be allowed on this ground.

Ground 2 – The Judge erred in his understanding/ application of the law of tender as it applies to refinancing cases

50. Without prejudice to the foregoing, As maintain that the offers were compliant with the terms of the Facility Letter and/or amounted to valid tenders. More specifically, As maintain that that is the case bearing in mind the context of this particular case i.e. that the repayment of the facility was always going to be by way of a refinance.

51. In this respect, the primary case relied on by the parties at the Remitted Trial was Shearer v Spring Capital [2013] EWHC 3148 (Ch); however that case was (1) a first instance decision, and (2) a decision on a summary judgment application. The Remitted Judgment therefore represents the most authoritative decision on the point, albeit it too is a first instance decision. The point is, therefore, an important one – when refinancing is becoming more and more commonplace, the boundaries of the law of tender as they apply to situations such as these are of wider importance.

52. In any event, As submit that the Judge was wrong in his treatment of this point in the Remitted Judgment, and the appeal should therefore be allowed:

52.1. As made the offers which, as above, were for more than was, at the proposed dates of repayment, due under the terms of the facility. In principle, therefore, they were sufficient to discharge the entirety of the moneys lent by R1.

52.2. The Judge rejected As' case that these were valid contractual offers/ tenders, however, on the basis that either they were not capable of acceptance and/or were invitations to treat, alternatively they were non-contractual offers, and in any event R1 was entitled to reject the offers and put forward its own proposals requiring payment of the disputed default interest (which it was not entitled to claim or receive by reason of its imputed knowledge).

52.3. As to the offers being incapable of acceptance/ being invitations to treat, this was contrary to the case conceded by R1: see [68] of the Remitted Judgment. In so far as he sought to do so, the Judge should not have gone behind that concession. CB/8/100

52.4. As to the offers being non-contractual offers, the Judge relied heavily on Clause 9 of the Facility Letter, which required payments to be made in *"immediately available funds"*. SB/139/431

52.5. However, in the context of refinancing, funds can never be *"immediately available"* as their release depends on a third party. Moreover, that third party, the proposed new provider of finance, will not release those funds until completion. Set against the factual matrix of a transaction where the known proposed exit strategy was always a refinancing, Clause 9 cannot, therefore, mean that money must (for example) be in As' bank account. Instead, the meaning of *"immediately available"* must be more flexible bearing in mind the context and the common understanding of the parties.

52.6. Each of the Offers proposed payment of £1.85m either by mid-April or by 21 April 2021. This was within approximately 4 to 5 weeks of the Offers having been made. The Offers were backed by an offer of refinancing over three of the Downhills Way properties in respect of £1.2m and an offer in principle from Overture Capital for the refinance of 71 Hamilton Road which would have provided the further £650,000. Whilst it is true that certain matters remained to be completed such as translations and draw-down of funds, none of the remaining steps rendered As' offers insufficient as contractual offers or tenders for they were a fundamental and inherent part of any lending/ refinancing process; they were procedural steps rather than substantive ones. Indeed, R1 did not enquire how much time As needed to deal with translations or otherwise challenge the need for such steps, which were steps that R1 itself accepted would have to be completed as part of any refinancing. In addition, there was evidence from Rose Huseyin at the Remitted Trial that it would have been possible to complete on the Offers. That amounts to a valid tender. SB/20-21/201-213 SB/42/239-243 SB/136/397-404

52.7. In the case of a refinance, there will inevitably be a period between the offer of refinance and the monies being available to be drawn down. It is submitted that in the present case, in the context of the wider construction of "*immediate payment'* advocated for by As, that period was not so long as to disqualify the Offers from being tenders for the purposes of Clause 9 of the Facility Letter.

52.8. The Judge considered that this had the potential to lead R1 into a trap; (see the Remitted Judgment at [44(ii)]) that an offer several weeks before completion would, on As' case, have the effect of stopping interest running on the debt yet if completion was then delayed by, say, a year, R1 could find itself in a position whereby, through no fault of its own, it was deprived of *any* interest for that period of a year. This is not a valid answer to As' construction arguments, for it addresses a different hypothetical scenario from that raised by As. The principle is that where a valid offer to redeem is made, and completion is then delayed solely due to the unreasonable conduct of the mortgagee in refusing that offer, the mortgagee cannot profit from its own wrong by claiming interest for the period of its own delay. Interest will cease to run from the date the loan would have been redeemed but for the mortgagee's conduct. CB/8/92

52.9. The Judge concluded that the offer and acceptance of £1.2m on 28 May 2021 was a tender [3(iv)]. But the offer to make that payment was first made on 8 March 2021 and nothing in that offer changed between that date and 28 May 2021 when R1 agreed to accept it. The payment was then made within days. Can it be the case that there was no tender – with the legal consequence that it was open to R1 legally to refuse to accept it – until the date of completion itself when the funds were released by the refinancer? That would make any refinance difficult where a mortgagee was determined not to accept a redemption; a mortgagor could never guarantee to its new financier that the existing security over the property would be released until after funds had been drawn down. So, when does the tender occur on these facts? Is it on 8 March 2021 when the offer is made or 28 May 2021 when the offer is accepted or a few days later when payment is made? The difficulty in pinpointing the moment at which tender is made for these purposes illustrates the issue raised by As. If the offer made in May 2021 was a tender, then why was the offer to pay the undisputed Outstanding Balance in June 2023 (where the funds were actually held by As' solicitors) not a tender? It is an issue of commercial significance. CB/8/83 SB/25/ 219

52.10. The precise limits of that flexibility are inherently arguable, and hence there is a real prospect of the As successfully arguing that their offers were sufficient offers/ tenders

for the purposes of the Facility Letter and that the Judge construed the Offers too narrowly.

52.11. The Judge was wrong to say that R1 was entitled to reject the offers that were made prior to May 2021. It was obliged to accept them, with the consequence that interest stopped running from the date of proposed redemption

53. In refusing permission to appeal, the Judge considered that:

53.1. There was no point of general importance as the issues formed part of standard lending law (see [73] of the consequentials judgment); CB/9.3/272

53.2. As' case was that a contractual offer could become binding in the absence of acceptance by R1 (see [78]); and CB/9.3/273

53.3. There was no real prospect of success because 'immediately available funds' could not be robbed of its meaning (see [80]). CB/9.3/273

54. That reasoning betrays a failure to grapple with the issues involved in this case and sheds further light on where the Judge went wrong in the Remitted Judgment:

54.1. Whilst a number of cases of course exist in the field of lending law, it was not in dispute that Shearer was the only case to deal with the points in issue and then only did so on a summary judgment application. As was said in Shearer itself at [222] *"This issue* [i.e. the effect of a tender where the availability of the money to pay the debt is conditional upon simultaneous release of the security] *might be thought to be a narrow point of law, albeit one without direct precedent, which could (and the first defendant says, should) be decided now against the claimants to bring an end to this part of the claim. However, I think it raises a triable issue for two reasons."* The Judge in that case went on to say at [232] that *"there is a serious question mark as to whether (and the extent to which) the cases referred to in the application above lay down strict rules on tender which must be complied with before the court has any jurisdiction even to consider reducing interest or whether they are rather instances of the exercise of a general equitable discretion to do so when it is clear that a borrower is ready willing and able to pay off the full debt and has offered the money to do so in exchange for return of security, keeping the money aside. So rules – such as the fact that full sum must be tendered are and have remained strict (see Devon Nominees). When one gets to second order points such as the precise terms of a valid tender and the requirements of provision of draft documents in advance, the cases do not express themselves as laying down any general principles or hard and fast*

conditions." And lastly, in Shearer, the Judge began the summary of his conclusions by stating at [250] that *"I would tentatively suggest that if (and it is a big if) a high-level principle of this sub-branch of equity can or should be formulated which is more or less consistent with the authorities and which would be in tune with the requirements of the modern world, it is, perhaps, this."*. That can hardly be considered an unequivocal statement of established and settled principles. References to other case law such as Çukurova (which dealt with separate issues in any event, again showing a failure by the Judge to distinguish between the points being raised by As) and Swallowfalls Ltd v Monaco Yachting & Technologies SAM [2014] EWCA Civ 186 therefore does not assist. The Judge suggested that it was asserted *"without evidence"* that refinancing was more common, but that criticism was unwarranted as the Judge can and should have taken judicial notice of what is a widely known fact.

54.2. It is inherent in the nature of a sufficient tender that complies with the scheme of the Facility Letter that it would prevent interest from running even if not accepted by R1. It is not a question of whether the offer is accepted and therefore binding; it is a question of whether the consequences of making the tender result in interest ceasing to run. The question of whether a contractual offer must be accepted is not relevant to the issues raised in this appeal.

54.3. As do not propose, by this Ground of Appeal, to 'rob' Clause 9 of the facility of meaning. As is expressly stated above, As simply contend for the (uncontroversial) proposition that that Clause must be interpreted in is broader contractual and factual context. As a matter of contractual interpretation, that is inherently arguable, not least because the Judge's interpretation would render compliance with the terms of the Facility unrealistically complicated/ difficult.

Ground 3 – The Judge erred in determining that the default rate under the facility was not a penalty

55. The Judge correctly identified the law to be applied in this case. However, with respect, the Judge erroneously applied that law to the facts of the case. Had he done so correctly, the result would have been a finding that the default rate was a penalty.

56. In particular, whilst As do not take issue with the Judge's approach to separate out the various 'legitimate interests' of R1 that were to be protected by the default rate, he did so in a manner which was not legitimate. In particular, the Judge:

56.1. Embarked on a highly academic review of the nature of risk, including considering a number of articles that were never raised with or discussed with the parties;

56.2. Focussed on particular parts of the evidence of Mr Griffiths which were never raised with Mr Griffiths himself at the Original Trial nor raised/ discussed in submissions at the Original Trial or the Remitted Trial. Had they been raised in the course of the Remitted Trial, As would have made an application to re-call Mr Griffiths to deal with the issues raised. Instead, these issues were raised for the first time in the Judge's judgment;

56.3. By way of examples only –

56.3.1. The Judge quotes Mr Griffiths' evidence at [285] where he stated that *"4% a month is all well and good but if you compound that it becomes 60% per annum. It's a huge, huge penalty."* The Judge then states at [286] that *"The test for penalty had not been put to Mr Griffiths at that stage and I did not and do not take him to be saying that the legal standard was met"*. In the context of a claim where one of the key issues was whether 4% per month compounded monthly was a penalty, it is unrealistic to suppose that an expert is not considering that very issue when he gives evidence which includes the word 'penalty'. Indeed, what else could he have meant in that context? At the very least, the Judge came to that conclusion without allowing Mr Griffiths to comment upon his evidence. CB/8/151

56.3.2. In particular in his assessment of the Credit Risk Interest, the Judge placed considerable significance on Mr Griffiths' sensitivity analysis of interest cover ratios at [319] concluding that if circumstances changed, it was likely that no lender would agree to refinance the Downhills Way properties. This conclusion, reached without hearing argument upon it, is expressly contrary to the evidence of Mr Griffiths at paragraphs 3.55 to 3.69 of his expert report where he concluded that: CB/8/159 SB/4/95-98

56.3.2.1. R1's underwriting assumed interest cover of 145% of interest costs which was said to be "very conservative … and arguably over-cautious".

56.3.2.2. It also assumed a rental value (of £33,600) for 71 Hamilton Road.

56.3.2.3. Based on the rental income of all of the properties, the maximum loan available would comfortably repay the loan from R1 based on interest cover at every level from 125% to 140%.

56.3.2.4. If the rental income from *only* the Downhills Way properties was taken into account (which, on the facts, it was not), then the rental income of £111,400 "easily" could fund a new loan at an interest rate of 0.67% per month for a 9 month term (which was a realistic prospect in the market at the relevant time).

56.3.2.5. Even on that alternative hypothesis, As would have been able to borrow up to £1.62m so that the net figure of £1,618,380 required by As was achievable.

The Judge preferred the expert evidence of Mr Griffiths at the 2023 Trial but appears to have reached his conclusion at the Remitted Trial based on analysis which was contrary to Mr Griffiths' evidence and without giving As the opportunity to make submissions concerning that analysis or to re-call Mr Griffiths to put the analysis to him.

56.3.3. Moreover, at [316], the Judge acknowledged that in assessing the viability of the exit strategy, the lender would consider both the interest cover ratio and LTV. He quotes Mr Griffiths as referring to both as "critical". But at no stage in his analysis does the Judge attempt to assess the correlation between the two and nor was an opportunity given to As to recall Mr Griffiths to seek his views concerning this issue. Whilst it is accepted that the interest cover ratios suggested that a change in circumstances might make a difference to a lender's preparedness to refinance, it stands to reason that preparedness might vary depending, in part, on LVT. If the loan is well secured (with a low LTV), logically, a lender might be prepared to take on a greater risk. By introducing this analysis for the first time in his judgment without raising it with the parties, the Judge prevented As from seeking to recall Mr Griffiths to provide evidence on this crucial question. CB/8/158

56.3.4. Based on Mr Griffiths' evidence, the Credit Risk Interest was adequately protected without the deterrent of a default interest rate of 4% per month

compounded monthly. That default interest rate was therefore a penalty in relation to that interest and, accordingly, it was a penalty at common law.

56.4. Considered a selection of snippets of the experts' evidence without seemingly addressing or appreciating it in its entirety. The Judge nowhere recognises or takes into account that it was Mr Griffiths' view that the 4% per month compounded interest rate was a penalty notwithstanding that the Judge preferred Mr Griffiths' evidence to that of R1's expert;

56.5. Considered matters that happened after the facility had been entered into, and therefore matters that were outside the contemplation of the parties (such as the use of a property as an HMO);

and as a result the Judge erred in the conclusion that he reached.

57. The default rate was extortionate/ unconscionable etc, and that is true both in respect of the 'Credit Risk Interest', the 'Repayment Interest' as well as the other interests such as the 'Non-Residence Interest'. As Mr Griffiths said in the evidence given at trial, the default rate is *"a huge, huge penalty"*. That was the correct conclusion on the evidence.

58. The Judge, at [89] of the consequentials judgment, considered that As' pursual of Ground 3 was a consequence of As' *"disagree[ing] with where I came out"*. As' criticism of the Judge's findings on this point are less simplistic. As submit that the Judge reached a conclusion which was contrary to the evidence, took into account elements of the evidence without considering the evidence as a whole and arrived at conclusions which had not been addressed in evidence or argument. CB/9.3/ 274

59. Further, the Judge, unfortunately, appeared to take this Ground of Appeal as a personal attack on his background, stating at [91] of the consequentials judgment that he cannot be criticised for having academic interests and at [93] that, as an academic, it would be wrong not adopt an idea without attribution and that he was already aware of the concepts referred to before the Remitted Trial. Absolutely no criticism is made of academics at the bench, nor is any criticism made of the Judge for having an academic background. The criticism is that in the Remitted Judgment the Judge (1) conducted such an in-depth academic review of matters that he lost sight of the real issues, and (2) referred to evidence and academic articles in an unfair way, with the consequence that he also reached the wrong result. CB/9.3/ 274-275

60. The Judge also laid blame at the door of the parties, suggesting at [99] of the consequentials judgment that there was limited evidence at the first trial and that he was bound by the parties' decision not to call experts at the Remitted Trial. That, however, does not justify the approach taken by the Judge in the Remitted Judgment nor does it right the wrongs reached in his conclusions. CB/9.3/276

61. With all due respect to the Judge, his Judgment in refusing permission to appeal at the Remitted Consequentials Hearing appeared as an after-the-event defence of the Remitted Judgment, rather than engaging with the points raised by As. And for the reasons already given, the appeal should be allowed on this ground.

62. It is open to the Court to substitute its own view on the question of whether the default interest rate was a penalty, and As invite the Court to do so. In light of the foregoing submissions and those made by As at the Remitted Trial, and in light the evidence of Mr Griffiths (which the Judge has already endorsed over that of Mr Kyriacou), the only available conclusion is that the default rate was indeed unenforceable as a penalty. The Court could remit the matter again to the Judge, but As consider that it should not do so as the time and expense of a third trial would be disproportionate bearing in mind the evidence already adduced to date.

CONCLUSION

63. The Court is asked to allow the appeal on each of the three grounds for the reasons set out above. As a consequence, the costs order made by the Judge also falls to be revisited.

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