Appeal Reference: CA-2026-000054

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)

B E T W E E N:

(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/Respondent

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

Introduction

1. The appeal before the Court concerns two matters: (a) whether a borrower can prevent the ongoing accrual of interest on an outstanding loan by making a conditional proposal for future repayment; and (b) the application of the (undisputed) law on penalties in the context of a contractual default interest rate.

2. In his judgment of 23 October 2025 ("the Judgment") [**CB/8/82**], Mr Richard Farnhill ("the Judge"), sitting as a Deputy Judge of the Chancery Division, held that the Appellants' repayment proposals were settlement proposals rather than tenders of repayment and therefore did not stop interest from running. He also held that the default interest rate was not a penalty.

3. The dispute between the parties arises from a 12-month loan advanced by the First Respondent ("LCL") to the Third Appellant ("A3") on 7 August 2020 ("the Loan") on the terms set out in a Facility Letter dated 20 July 2020 ("the Facility Letter") (and amended on 31 July 2020 to increase the amount lent) [**SB/139/422**]. In September 2020, LCL gave A3 notice of an event of default and started to charge interest at the contractual default rate ("the Default Rate"). The Appellants ("As") disputed that a default had occurred in September 2020. The dispute between the parties remained unresolved until As' position was upheld by the judgment handed down on 12 June 2023 following the first trial of these proceedings. In that judgment, the Judge ruled that no default had occurred in September 2020, although a separate default had subsequently occurred on 7 August 2021 when As failed to repay the Loan when it fell due for repayment. (It is the application of the Default Rate following the still unremedied default on 7 August 2021 with which this appeal is concerned.)

4. Between March 2021 and October 2023 (i.e. from before the issue of these proceedings continuing until after the Judge's first judgment), As had made a series of offers in an attempt to settle the dispute that had arisen between the parties. Although on three occasions, LCL indicated that it would accept a sum that As had said they were prepared to offer by way of settlement, on each occasion the attempts at settlement collapsed as a result of the conduct of As, who, the Judge found, had "*throughout this process… cavilled, prevaricated, temporised and delayed often with a view to improving their outcome*": Judgment, ¶69(viii) [**CB/8/102**].

5. In response to LCL's counterclaim seeking payment of the outstanding sum due on the Loan, As sought to rely on various offers that they had made to LCL as the basis for preventing LCL from claiming the interest to which it is contractually entitled. The Judge rightly rejected that aspect of As' case. LCL invites the Court to uphold the Judge's decision for the reasons that he gave.

6. The Judge also rejected As' case that the Default Rate was unenforceable as a penalty (his earlier decision to the contrary having been overturned by the Court of Appeal in the first appeal in these proceedings). As do not challenge the Judge's decision as wrong in law but instead contend that he misapplied the law to the facts of this case. Again, LCL invites the Court to uphold the Judge's decision for the reasons he gave.

7. In the alternative to LCL's claim to contractual interest, LCL claimed statutory interest under the Senior Courts Act 1981. As the Judge found in LCL's favour on its claim for contractual interest, he did not address the alternative claim to statutory interest. In the event (contrary to LCL's case) that the Court overturns the Judge's decision on contractual interest, by a Respondent's Notice LCL contends that the Judge ought also to have found in its favour on its claim to statutory interest.

8. The As advance three grounds of appeal. These are addressed in turn below, followed by the issue raised by way of LCL's Respondent's Notice.

Grounds 1 and 2: Was the Judge in error in rejecting As' case that their offers of repayment justified As being relieved of ongoing liability for contractual interest?

9. The As' first two grounds of appeal are closely inter-related as they both arise from the series of "*offers*" made by As to LCL from March 2021 onwards. As' pleaded case relied on eight such "*offers*" in increasingly lower sums to be paid on successively later dates (Defence to Counterclaim, ¶16 [**CB/15/394**]) but in their Skeleton Argument in support of their appeal, they appear now to emphasise the earliest three of those offers: A Skeleton, ¶18.

10. The As relied on those "*offers*" by way of a defence to LCL's counterclaim in debt to recover the outstanding sum due to it under the Loan. Although it was not disputed at trial that the capital element of the debt was due and unpaid, in defence of LCL's claim, As' pleaded defence was that (a) LCL was under an express or implied contractual obligation to accept As' offers to repay the Loan, and if such an offer were refused, As were not in breach of their repayment obligation if they failed to repay the Loan; and (b) LCL was under an equivalent equitable obligation to permit A3 to repay the Loan and not to fetter the equity of redemption. In the course of closing, the reliance on the equitable right to redeem developed into an argument that the Court had an equitable discretion arising from the Privy Council's decision in Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd [2016] AC 923 ("Cukurova") which permitted the Court to grant equitable relief from liability for mortgage interest in "*exceptional circumstances*".

11. As' argument based on a contractual obligation was (rightly) rejected by the Court and no appeal is advanced against that. As now rely solely on equitable grounds, contending

that they should benefit from a general equitable jurisdiction (said to be established in Cukurova) to relieve contractual liability for interest where a borrower has made an offer of payment that a lender "*should*" accept as a matter of equity. Secondly, in a further development of the way the case was put at trial, As rely on a principle 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*" (A Skeleton ¶52.8).

12. The As arguments invite the Court to override LCL's contractual rights notwithstanding that As continue to remain in clear breach of their own obligations (despite the capital element of the debt being determined in the Court's order of 25 September 2023 and subsequently remaining unchallenged). There is no principled legal basis for As' position and As do little to identify a valid legal basis for their argument. As' position suffers several fundamental flaws:

    (1) When regard is had to the established requirements of tender and the nature of the "*offers*" relied on by As, the Judge rightly concluded that As have never made a tender of the full outstanding debt due to LCL.

    (2) As' "*offers*" were instead properly characterised by the Judge as proposals to make payment on the terms contained within the proposals, rather than tenders in accordance with the terms of the Facility Letter of sums admitted to be due.

    (3) When As have neither performed nor tendered performance of their contractual obligations, there is no basis for them to be relieved (whether in equity or otherwise) from performance of their obligations. An unsuccessful attempt at compromise provides no basis for being relieved from the obligation of ongoing contractual performance.

    (4) The Cukurova principle is an exceptional one; in that case, the Privy Council was considering only situations in which outstanding contractual obligations had already been discharged. The Judge rightly concluded that Cukurova does not assist As in extending the applicable principles to the facts of this case, where it is not disputed that there are contractual obligations which remain unperformed by As.

(5) In any event, the Judge was clear that LCL did not act unreasonably in responding to As' proposals. Instead of As being thwarted in their repayment attempts by an obdurate and opportunistic lender, the Judge found that "*the opposite is the case*". He criticised the behaviour of the As "*through this process*" on the ground that they had "*cavilled, prevaricated, temporised and delayed often with a view to improving their outcome*": Judgment, ¶69(viii) [**CB/8/102**]. That finding is not challenged and As own conduct provides no basis for the grant of exceptional equitable relief.

13. As the decision in Cukurova is best understood against the background of the established law on tender, the requirements for a valid tender are addressed first below before turning to the effect of the decision in Cukurova.

The requirements for a valid tender

14. Both the parties at trial and the Judge in his Judgment (at ¶26-29 [**CB/8/88**]) referred to the decision of Daniel Alexander QC in Shearer v Spring Capital [2013] EWHC 3148 as providing a helpful summary of the requirements for a valid tender. As suggest that there is no authoritative determination of the requirements for a valid tender because Shearer was a first instance decision on a summary judgment application: A Skeleton, ¶51. While that was the nature of the decision in Shearer, it does not follow that the principles underpinning the law on tender are unclear. On the contrary, the relevant principles are well-established by many authorities going back many years. Shearer merely serves as a helpful summary of the effect those authorities. Shearer also demonstrates (at ¶232) that the application of what were described as the "*second order points*" (as distinct from the fundamental principles) may in certain respects be subject to ongoing debate as to their application in a modern context; but the uncertainties on the nuances of the "*second order points*" do not arise on the facts of this case.

15. The defence of tender can (insofar as relevant) arise in two different but related ways. First, it can be raised as a defence to a claim in debt. Secondly, it can be raised in the context of an action to redeem a mortgage.

16. In both scenarios, the core requirements for a valid tender are well-established as being:

(1) The debtor must offer to pay no less than the sum in fact outstanding as at the date of the tender: Shearer, ¶131.

(2) Actual production of money is required to constitute a tender: Shearer, ¶139. The older cases involve the actual production of money in a literal sense (for example, Rourke v Robinson [1911] 1 Ch 480, where the tender involved quite literally placing money on the table). In a modern context, the physical production of cash cannot be expected in that literal sense but the requirement for funds to be actually and immediately available must remain as the essence of a tender. Shearer demonstrates (at ¶228-9) that it is at least arguable that money is sufficiently available if finance is available from a new lender at the time of a tender. Even in that situation, although the debtor may not itself necessarily possess the required funds, it has them immediately available to be deployed in repayment of the debt. There is no suggestion that anything less will suffice.

(3) The tender must be unconditional (Shearer, ¶170), although it is legitimate to impose a condition that the tender is subject to the simultaneous release of security: Shearer, ¶219. (There are nuances surrounding the requirement for unconditionality relating to the provision of release documentation but those are not relevant on the facts of this case.)

17. All of those requirements reflect the essence of what constitutes a tender, as set out in Dixon v Clarke 5 CB 365, as cited at ¶146 of Shearer, that "*the principle of the plea of tender… is that the defendant has been always ready… to perform entirely the contract on which the debt is founded; and that he did perform it, as far as he was able, by tendering the requisite money… and as in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready…, but must be accompanied by profert in curiam [i.e. payment in] of the money tendered*". In short, the debtor is saying that it was and remains ready, willing and able to perform its contractual obligation. The converse of that proposition is that an offer of compromise which proposes performance of some varied or alternative obligation cannot constitute a tender.

18. Consistently with the principle outlined in Dixon v Clark, for the defence of tender to be available to a claim in debt, it remains a requirement that the sum tendered is paid into

Court: CPR r.37.2. A mere tender does not discharge the debt and the debtor must demonstrate that it remains ready, willing and able to pay what is due by way of the actual production of money in the form of a payment into Court.

19. Where a mortgage redemption action is brought and a tender is relied on to avoid liability for interest after the tender was made, similar principles apply. However, a tender to stop mortgage interest continuing to accrue does not need to satisfy all of the requirements for a tender to afford a defence to a claim in debt: Webb v Crosse [1912] 1 Ch 323. There is no requirement to pay the tendered sum into Court. However, the tendered sums must be set aside and must remain available for the repayment of the debt, as made clear by the authorities referred to by Lord Neuberger in Cukurova at ¶130-136.

20. In Shearer, the Court addressed difficulties regarding the requirement for the tendered sum to be set aside and remain available which arise when the payment is to be raised through refinancing. However, the judgment leaves no doubt that the funds must remain available for the purpose of discharging the debt (¶152-155) such that they could be "*paid over at any time*" (¶143).

21. The standard order in a redemption action is for the taking of an account of the sums due to the mortgagee, with a direction that the mortgage be released upon payment of that sum within a stated period of time: Halsbury's Laws of England, volume 77, ¶670. Where payment is not made as directed, the claim for redemption is dismissed: Halsbury, vol 77, ¶673. Where a prior tender has been made, the standard order may be varied by directing that the account is taken from the date of the tender: Halsbury, vol 77, ¶671; Greenwood v Sutcliffe [1892] 1 Ch 1. Such an order has the effect of preventing recovery of interest subsequent to the date of the tender.

22. Where the right to redeem is asserted in response to a claim in debt, the approach is similar to that adopted in a redemption action. This is illustrated by Kinnaird v Trollope (1889) 12 Ch 610, where in response to a claim for repayment brought by the mortgagee, the mortgagor issued a summons by which an order for redemption upon payment of the sum due was sought.

23. By their defence to LCL's claim, As were seeking to obtain the benefit of what is effectively a special order on a redemption action directing that an account be taken of the sum due to LCL at the date of their "*offers*" of payment. However, they seek that

benefit without seeking an order for redemption and without accepting the obligation inherent in a redemption action that they make payment of the outstanding sum due to LCL. On As' case, LCL would instead be left with a judgment in debt, reduced in amount by the effect of what As say was a tender, but without As having made any payment into Court and with the debt remaining unpaid (wholly contrary to the essence of the defence of tender).

24. To be able to rely on a defence of tender to LCL's claim in debt for the sum contractually due to it, As would have had to:

    (1) establish that they had advanced an unconditional tender of the whole of the sum due to LCL; and

    (2) establish that the funds required to discharge the debt due to LCL had been set aside and remained available to discharge the outstanding debt; and

    (3) make payment of the tendered sum (or such lesser sum as was in fact due) within the time directed by the Court (thereby redeeming the mortgage) as a condition of obtaining the benefit of interest ceasing to run as at the date of the prior tender.

25. None of those conditions have been met. As addressed below, there was no unconditional tender of the whole sum due to LCL (as the Judge rightly found). There has been no suggestion that funds have been set aside and remain available to discharge the outstanding debt and the Judge's finding to that effect is not challenged: Judgment, ¶69(i) [**CB/8/101**]. Moreover, the form of order required by point (3) above was not sought by As, no payment was offered as part of As' pleaded case (which, when As commenced these proceedings, disputed their liability to pay any interest on the Loan at all rather than acknowledging a liability to pay the tendered sum: Particulars of Claim, ¶93 [**CB/11/310**]), and it is far from clear that As could now pay the previously offered sums.

<u>To what extent does the Cukurova discretion extend the law?</u>

26. The Privy Council's decision in <u>Cukurova</u> concerned a claim for relief from forfeiture. The Privy Council gave two judgments: the first concerned whether relief from forfeiture should be granted to CF Ltd and concluded that it should; the second concerned the terms on which relief from forfeiture ought to be granted.

27. CF Ltd had borrowed from AT Ltd and provided an equitable mortgage of shares held by CH Ltd as security for the loan. The loan fell into default and AT Ltd appropriated the mortgaged shares in discharge of the loan. Subsequently, CF Ltd tendered the full debt due under the loan but the tender was rejected on the ground that it was too late. CF Ltd then set aside the tendered funds for a period of 3 years. AT Ltd contended that relief from forfeiture ought only to be granted on the basis that the loan had remained outstanding with interest accruing at the default rate throughout. The Privy Council rejected that approach and gave relief from forfeiture on the basis that interest should be paid on the loan at the standard contractual rate (not the default rate) but that no interest at all should be paid for the period of 3-years for which the tendered funds had been set aside by CF Ltd.

28. All five members of the Board of the Privy Council reached the same conclusion as to the terms on which relief ought to be granted but the majority (Lords Mance, Kerr and Clarke) differed from the minority (Lords Neuberger and Sumption) in the reasoning by which they reached that conclusion.

29. The reasoning of the majority started from the proposition that, in the ordinary course, "*relief in equity will only be granted on the basis of conditions requiring performance, albeit late, of the contract in accordance with its terms as to principal, interest and costs*": ¶13 per Lord Mance. Lord Mance distinguished two situations: one in which a loan remains outstanding and one in which it has been discharged by appropriation. He accepted that in the former situation, "*the role of equity is likely to be circumscribed by the consideration that obligations will have continued to fall due for performance and actually remained unperformed*" (at ¶16). However, his analysis (and that of the majority) was focused on the latter situation, in which no contractual obligations could have fallen due for performance and remained unperformed, and whether "*exceptional circumstances may make it inequitable or unconscionable to apply the general rule*" (at ¶17).

30. Against that context, the majority concluded at ¶42 that, in the circumstances that they were considering (i.e. where the loan had been discharged and no contractual obligations remained unperformed), "*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 moneys actually paid into court or an account". However, Lord Mance emphasised that there was not a general or open-ended discretion but that the decision in the case was "*based on and confined to what [the Board] sees as an exceptional situation… probably unlikely to be repeated*" (at ¶44).

31. In reaching that conclusion, Lord Mance referred (at ¶30 to ¶40) to several cases demonstrating "*equity's response to tenders or offers of repayment which are refused or do not, for other reasons involving the lender's fault, lead to actual repayment*". Those cases involved either actual repayment, tenders which were refused, or decisions as to costs. Several of those authorities were cited uncritically by Lord Mance as supporting the proposition that a proper tender stops the running of interest only if the mortgagor keeps the money ready to pay over the mortgagee (see the references to Gyles v Hall, Bank of New South Wales v O'Connor, Kinnaird v Trollope and Edmondson v Copland). The decision of the Privy Council to grant relief from forfeiture on terms which did not require payment of interest only while the sum tendered by CF Ltd remained set aside is consistent with the approach seen in those mortgage cases.

32. The difference of principle between the majority and minority views was summarised by Lord Sumption at ¶178-179. The majority regarded the terms for relief as being at large and subject to a discretion, with the contractual terms being merely one factor. By contrast, the minority regarded the terms of the contract as central to what the debtor must do if relief from forfeiture is to be granted.

33. However, the minority recognised that "*if the mortgagee refuses a valid tender of all that is owing, the principal remains outstanding and interest continues to accrue under the mortgage, unless, after the tender the mortgagor sets what is due aside for the mortgagee*" (¶130 per Lord Neuberger). Since CF Ltd had made a tender of the sum due and kept the money set aside for a period of 3 years, the minority agreed with the majority's conclusion that relief from forfeiture could be granted on terms which did not require the payment of any interest by CF Ltd over that period.

34. The decision in Cukurova is therefore of very limited application and cannot apply on the facts of this case:

(1) The decision concerned only the terms on which relief from forfeiture could be granted by the Court (an issue which does not arise at all in this case).

(2) Although the majority found that a general equitable discretion could exist as to the terms of relief, that discretion could overlook contractual terms only in the circumstances in which the relevant contractual obligations had already been discharged. Even then, the circumstances in which the discretion might be exercised were highly exceptional.

(3) Both the majority and minority recognised an established equitable jurisdiction that a valid tender of all of the money due under a mortgage will stop interest running on the mortgage only if the mortgagor sets aside the money and keeps it ready to pay over to the mortgagee.

(4) No member of the Board found that there was any general equitable discretion to permit the Court to disregard the relevant contractual terms where they remained unperformed and where performance had not been tendered.

Was the Judge right to conclude that the Appellants did not tender repayment?

35. The As now focus on three of the eight "*offers*" which were relied on at trial by way of defence to LCL's counterclaim. The As refer to these "*offers*" variously as offers "*to repay the loan*" (A skeleton, ¶18), as offers that were "*compliant with the terms of the Facility Letter and/or amounted to valid tenders*" (A skeleton, ¶51), and "*valid contractual offers/tenders*" (A skeleton, ¶53.2). The ambiguous and varying terminology disguises the central weakness in As' case which is that (as the Judge rightly found) none of the "*offers*" constituted tenders of the performance contractually due from As: Judgment, ¶68-69 [**CB/8/100**]. In the absence of a tender of contractual performance, the law is clear that there is no basis for denying LCL its contractual right to interest.

36. The first of the offers, the 16 March Offer, was an offer by As to pay a total of £1.85m to LCL by "*the middle of April 2021*", upon which they required LCL to release all of the security that it held: Judgment, ¶70 [**CB/8/103; SB/32/226**]. As also offered to pay a further sum in respect of default interest on the basis of a concessionary rate to be

agreed between the parties. This further payment would necessarily be unsecured and no timescale was given for the making of the payment.

37. At the time that this offer was made, As did not have the immediate ability to pay £1.85m by "*the middle of April 2021*". Instead:

    (1) They had offers from Kent Reliance to lend £412,090 on the security of each of the three Downhills Way properties which were in A1's sole name [**SB/21/205, 207, 210**].

    (2) The As had obtained an offer in principle of a bridging loan from Overture Capital Ltd which would provide a further £650,000 towards the repayment of the Loan, to be secured on 71 Hamilton Road [**SB/42/239**]. The bridging loan was subject to various conditions which, as the As made clear in their solicitor's letter of 26 March 2021, they had yet to satisfy and did not intend to attempt to satisfy unless and until they could reach agreement with LCL: Judgment, ¶79-80 [**CB/8/105**].

38. The Judge rightly found that this offer was not a tender of payment both because the funds were not immediately available, and the offer was conditional on settlement of the dispute over default interest (which was to be paid on an unsecured basis): Judgment, ¶71 [**CB/8/103**]. As with all the offers, the absence of immediately available funds and the fact that there was no actual production of money inevitably meant that nothing was set aside to discharge the As' liabilities to LCL: Judgment, ¶69(i) [**CB/8/101**]. As suggest that the Judge's reasoning is flawed because it meant that As' position would have been stronger had they not offered an unspecified sum in respect of default interest: A Skeleton, ¶46.1. While As must succeed (if at all) on the basis of the offers actually made not alternative offers that could have been made instead, the criticism of the Judge's reasoning is unjustified: even without the element of the offer relating to default interest, the 16 March Offer would not have constituted a tender.

39. The second offer, the 23 March Offer, was a revised version of the 16 March Offer. The 23 March Offer proposed that the dispute over default interest be addressed in litigation (with the As setting out various conditions as to how such litigation would proceed) after £1.85m had been paid as previously offered: Judgment, ¶74 [**CB/8/104; SB/38/233**]. The offer was no longer that all of the security should be released upon payment of the

£1.85m, but only the charges over the three Downhills Way properties (released on payment of £1.2m) and 71 Hamilton Road (released on payment of £650,000), which would be required as security for the borrowing needed to finance the payment of the £1.85m.

40. Again, the Judge rightly found that the 23 March Offer was not a tender: Judgment, ¶82 [**CB/8/106**]. There was no actual production of money but rather an offer to make part payment in tranches as finance became available, conditional on the release of security not upon payment of the whole debt but upon each part payment (something to which As had no contractual entitlement). The offer was also conditional on several terms relating to the resolution of the dispute over default interest.

41. Rather than simply rejecting that offer, LCL made a counteroffer on 30 March 2021 [**SB/47/248**]. By this counteroffer, the suggestion that £1.85m be paid by 14 April 2021 in return for the release of security over the three Downhills Way properties and 71 Hamilton Road was effectively accepted. However, rather than leaving the question of default interest to be resolved, LCL suggested that it be settled by payment of a capped amount of £350,000 by no later than 9 August 2021 (mistakenly described in the counteroffer as the contractual Repayment Date although that date was in fact 7 August 2021): Judgment, ¶84 [**CB/8/106**].

42. The As' solicitors responded to that offer by suggesting that the £350,000 for interest could be reduced to £150,000 payable immediately (without any funding for that payment being identified): Judgment, ¶83 [**CB/8/106**]. LCL was unwilling to accept that proposal.

43. The As' formal response to LCL's counteroffer of 30 March 2021 came in the form of the third offer on which the Appellants rely, the 7 April Offer: Judgment, ¶86 [**CB/8/107; SB/49/253**]. The conditional payment of the £1.85m was by this stage effectively agreed in principle, albeit that the date for payment had slipped to 21 April 2021 (to which LCL raised no objection: see the email from LCL's solicitors of 7 April 2021). Payment of the sum of £350,000 in respect of default interest was also agreed by As in principle. However, their offer made that payment subject to conditions, including the uncertain conditions that "*the lenders of the 2 buy to let properties [agree] to extend their mortgage offers*" and that A1's compliance with the obligation was "*conditional upon Mrs*

Houssein receiving independent financial advice from an adviser who can communicate in the Turkish language, which is proving to be difficult due to the pandemic and her vulnerability" [**SB/49/254 at ¶4.4**].

44. The Judge described the whole proposal as "*contingent and uncertain*": Judgment, ¶95 [**CB/8/109**]. The offer plainly did not constitute a tender, not merely because it was subject to conditions, but also because it did not involve the actual production of money and because no money was set aside.

45. It is hardly surprising that the conditions which As sought to impose were unacceptable to LCL: LCL wanted a deadline for the final payment and could not accept conditions on it, as made clear in their solicitors' email of 7 April 2021: Judgment, ¶87 [**CB/8/107; SB/50/255**]. (The Judge found LCL's approach to be "*entirely reasonable*": Judgment, ¶95 [**CB/8/109**].)

46. As emphasise their case that none of the Offers were accepted by LCL. However, the position is not as straightforward as that. The correspondence from 16 March to 7 April 2021 constituted an ongoing exchange of correspondence in which LCL sought clarification of As' position in certain respects and the parties exchanged offer and counter-offer. By the 7 April Offer, the parties had effectively reached agreement on a settlement figure of £2.2m; the difficulty arose from As' new and uncertain conditions to which they made the 7 April Offer subject.

47. LCL kept its original offer of 30 March 2021 open, while continuing to press for a substantive response from As and offering a series of variations on the offer (on 13 April 2021 [**SB/52/257**], 15 April 2021 [**SB/58/263**], and 21 April 2021 [**SB/60/265**]). All of these offers were for the total sum of £2.2m which As had indicated on 7 April 2021 was an acceptable settlement sum. As' solicitors responded with a series of excuses for delays in reverting with a response: "*translation issues*" on 8 April 2021 [**SB/51/256**], a need for translation and to consult with a financial adviser on 14 April 2021 [**SB/53/258**], and the inability of the firm to communicate with A1 in Turkish on 15 April 2021 [**SB/57/262**]. In their solicitors' letter of 28 April 2021, As threatened LCL with proceedings and asserted that they had made "*every possible effort to achieve a settlement with your client… without any success*" [**SB/62/269**]. Despite As' approach, LCL reiterated its settlement offer yet again on 29 April 2021 [**SB/63/272**]. As' final

answer to LCL's repeated offers came on 5 May 2021 when they blamed LCL for having no desire to settle [**SB/66/277**]. As' attempt to blame LCL for not wanting to settle was (and is) wholly unwarranted.

48. The As made a further (lower) settlement offer on 11 May 2021 (by implication withdrawing the 7 April Offer) [**SB/70/282**]. That "*offer to settle*" was itself expressly withdrawn on 12 May 2021 with the Appellants saying that they would "*take their chances with the litigation*" [**SB/72/284**]. This sequence of correspondence wholly justifies the Judge's conclusion that As were throughout seeking a settlement rather than tendering payment of a sum admitted to be contractually due: Judgment, ¶100 [**CB/8/110**].

49. The As also rely in passing on an offer made in October 2023 to pay the "*Outstanding Balance*": A Skeleton, ¶42. That was a conditional offer of a partial repayment which the Judge rightly characterised as a settlement offer rather than a tender: Judgment, ¶107-108 [**CB/8/112; SB/116/347**].

50. The As advance two criticisms of the Judge's approach, namely that:

    (1) The Judge wrongly rejected the case that the Offers were tenders on the basis that they were "*not capable of acceptance and/or were invitations to treat, alternatively they were non-contractual offers, and in any event R1* [LCL] *was entitled to reject the offers*": A Skeleton, ¶52.2.

    (2) In the case of a refinance, the Judge wrongly emphasised the need for "*immediately available funds*" because a period between the offer of refinance and the availability of funds is inevitable such that offers of future payment can constitute a tender: A Skeleton, ¶52.4-52.7.

51. The first of these criticisms (A Skeleton, ¶52.2) wrongly identifies the reasons for the Judge's finding that the Offers were not tenders of payment. As set out above, the Judge did not find that the Offers were not tenders in the light of an analysis of the Offers from a contractual perspective. The Offers were not tenders because they did not meet the well-established requirements of a tender.

52. As to the second criticism, the Judge noted that the funds offered did not involve immediately available funds (which were required by the Facility Letter to discharge the

debt) and were not an offer of payment under the terms of the Facility Letter: Judgment, ¶69(i) and (ii) [**CB/8/101**]. The point is simply that the sending of the correspondence by which the Offers were made could not and did not of itself constitute repayment; even if LCL had replied with an immediate and unequivocal acceptance of one of the Offers, the debt would not thereby have been paid. The essence of a tender is that acceptance of the tendered payment does thereby immediately discharge the contractual obligation. A tender which has been accepted will have discharged the debt forthwith (by definition). If any of the Offers had been accepted, the debt would not thereby have been discharged: the parties would merely have agreed terms for future (and in some respects conditional) payment of a fixed and agreed sum in substitution for whatever might otherwise have been payable under the Facility Letter.

53. The As try to get around this difficulty by contending that the Offers could constitute a valid tender on the basis of offering (a) payment within 4 to 5 weeks; (b) backed by an offer of refinancing of existing security for £1.2m and an "*offer in principle*" for the further £650,000: A Skeleton, ¶52.6. That argument disregards the requirement of a tender that money be actually produced (rather than merely promised for the future). Even if funds being drawn from a new lender can suffice for a tender, the need for the actual production of money means that those funds must be actually and immediately available from that source. A tender cannot be based on funds that are not actually available at the time of the tender at all, particularly where (as the Judge found in relation to the £650,000 "*offer in principle*") there remained considerable uncertainty over whether it would ever lead to a firm and binding offer of funds: Judgment, ¶80 [**CB/8/105**]. (Nor can the requirement that the funds remain available be satisfied if their availability was never more than contingent and uncertain when the offer was made.)

54. Finally, As refer to the partial repayment made on 28 May 2021 to suggest that there is uncertainty over when a tender should be treated as made: A Skeleton, ¶52.9. The partial repayment does not assist As:

    (1) The payment on 28 May 2021 was a partial repayment of the outstanding debt. Although funds were tendered, the payment did not constitute a tender of the kind required to provide a defence to ongoing interest liability (for which the full sum due must be paid).

(2) LCL agreed to release its security over three properties to permit the repayment to be made. As the debt was not being discharged in full, the Appellants had no right to the release of the security. LCL had a discretion under clause 10.2(i) of the Facility Letter as to whether to allow the release of the security to be used instead as security for a partial refinancing [**SB/139/432**]. In the exercise of its discretion, LCL agreed to that release (but it would have been fully entitled to refuse the release provided it did not act arbitrarily or capriciously in doing so).

(3) It is wrong to suggest that nothing changed between when the £1.2m was first offered (on 3 not 8 March 2021) and 28 May 2021. On 3 March 2021, the Appellants merely highlighted their intent to make a repayment when the refinancing was completed [**SB/22/214**]. Subsequently, the proposed £1.2m formed part of the conditional settlement offers made by As. Only in mid-May 2021 did As propose making a repayment of £1.2m [**SB/74/286**]. LCL accepted the proposal and the funds were subsequently paid (with the partial repayment being tendered on 28 May 2021 when As' solicitors were in receipt of the funds and offered them to LCL [**SB/91/305**]).

Was the Judge right to conclude that Cukurova had no application on the facts?

55. Once it is clear that the "*offers*" on which As rely were not tenders but merely offers of future payment on terms, intended as offers to settle the dispute between the parties, it must follow that Cukurova can have no application. Nothing in Cukurova (or any other authority) supports the proposition that a mere proposal by a borrower to offer a future payment subject to conditions can prevent contractual interest from continuing to run on the debt which in fact remains unpaid. A tender of contractual performance is not something to be negotiated or which requires acceptance of a settlement proposal: it is an acknowledgement of a liability and an attempt to discharge it in full by the actual and unconditional production of the money needed to do so. The parties did not reach a settlement; that was largely because As prevaricated and changed their position constantly and refused to conclude an agreement even when LCL had indicated a willingness to accept settlement sums which As had previously indicated they would be willing to pay: Judgment, 69(viii) [**CB/8/102**]. However, As did no more than attempt to negotiate a settlement: they never tendered performance by attempting to make actual payment of the full outstanding debt due from them.

56. The As suggest that the facts of this case are so exceptional that the Court should exercise an equitable jurisdiction to intervene to excuse performance of a contractual obligation which As have not performed and where performance has not been tendered. Even if (contrary to the submissions above) the discretion relied on by As is as wide as they suggest, the circumstances of this case are not exceptional and do not justify the grant of the relief sought by As.

57. The As are wrong to suggest, as they do at ¶46.2 of their Skeleton, that LCL knew that it had no claim for default interest and knew that there was no breach of the terms of the Facility Letter in September 2020:

    (1) The Judge found at the first trial that Mr Stylianides of LCL (and Mr Houssein Houssein and As' agent, Mr Andreas Liondaris) were each aware that the 29 July 2020 inspection of 71 Hamilton Road was a sham "*concocted to create the impression that renovation works were ongoing when in fact the Housseins still resided there*": Judgment, ¶10 [**CB/8/85**]. That knowledge of Mr Stylianides was attributed to LCL.

    (2) As a consequence of that knowledge, and a concession made at the first trial on behalf of LCL, the Judge concluded that LCL had waived its right to enforce the contractual requirement that the Housseins should not live at 71 Hamilton Road. As a consequence, LCL had no entitlement to claim interest at the Default Rate from September 2020 to 7 August 2021; LCL remained fully entitled to interest at the Default Rate when A3 defaulted on its obligation to repay the Loan on 7 August 2021.

    (3) However, there was no finding nor even any pleaded allegation that LCL knew that it had waived its right to enforce the non-residency requirement. At most the underlying facts were known to LCL, but not the legal consequence of those facts as found by the Court at the first trial.

    (4) As such, LCL was advancing a *bona fide* claim for default interest which ultimately proved to be unsuccessful. The mere fact that As made some attempt at settling the claim cannot justify the conclusion that they should be relieved from the contractual liability to pay interest on the Loan. That is all the more so

in the light of the Judge's findings that LCL responded reasonably to As' offers, whereas As' conduct was worthy of criticism: Judgment, ¶69(viii) [**CB/8/102**].

Ground 3: Was the Judge wrong to hold that the Default Rate was not a penalty?

58. The As' challenge to the Judge's ruling that the Default Rate was not a penalty acknowledges that the Judge correctly identified the law to be applied. Instead, As challenge the Judge's assessment of the evidence.

59. It is well-established that a challenge on appeal to a trial judge's assessment of the evidence and decisions on the evaluation of that evidence will succeed only if "*the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'*" Re Sprintroom Ltd [2019] BCC 1031 at ¶76, citing (at ¶77 and 78) Biogen v Medeva [1997] RPC 1 and Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5. The concluding sentence in the passage cited from Lord Hoffmann's judgment in Biogen is particularly relevant: "*Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation*".

60. Such caution is fully justified in this case given the nature of the evidence which the Judge was called on to address in this case:

    (1) The application of a presumption that the contractual terms were not penal: Judgment, ¶268 [**SB/8/146**]. The Judge's finding that such a presumption applied is unchallenged by the Appellants.

    (2) The As invited the Judge to consider the test for a penalty against each of LCL's legitimate interests in the performance of the contractual terms: Judgment, ¶132-134 [**CB/8/116**]. The Judge did so, but, as the Judge noted, the evidence before the Court did not approach the issue in that manner: Judgment, ¶270-271 [**CB/8/148**]. Nor did As identify what the relevant legitimate interests were, or why the Default Rate was extortionate having regard to any or each of those legitimate interests. The case was put on a broader footing which had the

inevitable consequence of leaving the Judge to identify himself the specific legitimate interests and how the test for a penalty applied to each.

61. The As advance only a limited basis for their criticism of the Judge's evaluation of the evidence and they do not address how those criticisms meet the limited grounds on which the Judge's evaluation of the evidence could legitimately be overturned.

62. First, As criticise the Judge's review of the nature of risk and his consideration of academic articles that had not been raised with the parties. There is no substance to that criticism:

    (1) The Judge's identification of the legitimate interests of LCL is not the subject of any substantive criticism. That is unsurprising: As had invited the Judge to consider not merely LCL's legitimate interest in the repayment of the Loan but also the other legitimate interests of LCL which were protected by the Default Rate.

    (2) Beyond contending that LCL had a legitimate interest in the performance of all of the contractual terms in the Facility Letter, As did not advance their own characterisation of the legitimate interests that they were inviting the Judge to consider.

    (3) The criticism of the Judge's review of the nature of risk leads nowhere and the academic articles he mentions form an insignificant part of his reasoning. The Judge was merely distinguishing two potential meanings of "*credit risk*": one which is predictive and focused on the likelihood of future default, and another which is descriptive and refers to the effect of a past default on the likelihood of repayment: Judgment, ¶171-172 [**CB/8/125**]. The Judge correctly noted that the references to "*credit risk*" in Cargill, Ahuja and Lordsvale were focused on credit risk in the descriptive sense: Judgment, ¶174 [**CB/8/126**]. By contrast, the Judge was concerned with credit risk in the predictive sense: Judgment, ¶171 [**CB/8/125**]. The Judge was concerned to distinguish the two risks because he had identified the "*Default Risk Interest*" as a separate aspect of the LCL's legitimate interest in performance of the terms of the Facility Letter: Judgment, ¶177 and ¶195 [**CB/8/126 and 130**]. The As do not challenge that substantive conclusion.

63. Second, As criticise the Judge's approach to the evidence of Mr Griffiths. These criticisms fall into the category of challenge which the decisions in Sprintroom, Biogen and Fage UK warn against: they engage in an island-hopping exercise over parts of the evidence in an attempt to challenge the weight that the Judge attached to different aspects of the evidence. That approach is wrong in principle. In any event, there is no force to As' criticisms:

(1) The As say that the Judge should have understood Mr Griffiths' comment that a rate of 4% per cent per month was a "*huge, huge penalty*" as reflecting Mr Griffiths' own application of the correct legal test for a penalty: A Skeleton, ¶56.3.1. Yet that aspect of Mr Griffiths' evidence was addressed specifically in the course of closing submissions, and As' counsel did not disagree with the Judge's understanding that Mr Griffiths was "*not using penalty in the technical sense*" (day 3, page 334, lines 21-25). That understanding is unsurprising against the context of Mr Griffiths' report which did not address whether the Default Rate was extortionate, extravagant or unconscionable but rather whether it was a commercially acceptable rate or an appropriate and reasonable default rate: Griffiths ws, ¶3.89-90 [**SB/4/101**]. The Judge also referred to and relied on the answer which Mr Griffiths gave when the legal test for a penalty was put to him: Mr Griffiths did not respond to say that a 4% default rate met the test but focused instead on a 5% default rate: Judgment, ¶288-289 [**CB/8/151**].

(2) The As suggest that the Judge was wrong to place weight on Mr Griffiths' evidence in his consideration of the Credit Risk Interest when that evidence had not been dealt with in cross examination or raised with the parties. However, the Judge was relying on Mr Griffiths' evidence rather than rejecting it. The Judge rightly concluded from Mr Griffiths' evidence that a refinancing of the Loan had initially appeared viable, albeit on a "*best-case scenario*" of the figures presented by Mr Griffiths: Judgment, ¶324 [**CB/8/160**]. However, the Judge was right also to conclude on the evidence that even a small adverse move in interest rates could make it difficult for the Appellants to refinance the Loan: Judgment, ¶337 [**CB/8/163**]. Insofar as the Judge supported that conclusion by reference to events post-dating the Facility Letter, he did so only as illustrative of matters that would have been apparent at the time of the Facility Letter (such as the scope

for interest rates to move unfavourably to As). In that context, the finding that the Default Rate was not extortionate having regard to the Credit Rate Risk was an assessment that was fully open to the Judge (and was correct).

64. Third, As contend that the Judge merely considered "*snippets of the experts' evidence without seemingly addressing or appreciating it in its entirety*": A Skeleton, ¶56.4. The only specific criticism advanced on this point concerns Mr Griffiths' apparent view that the Default Rate was a penalty, yet this was addressed at length by the Judge: Judgment, ¶279-290 [**CB/8/150**]. The Court ought to assume that the Judge has taken all of the evidence into consideration unless there is compelling reason to the contrary: Volpi v Volpi [2022] 4 WLR 48 at ¶2. There is no such compelling reason here.

65. None of the arguments advanced by As demonstrate that the high hurdle for overturning the Judge's evaluative decision has been met. The conclusion that the Default Rate did not constitute a penalty was fully open to him on the evidence and ought to be upheld.

Respondent's Notice: The alternative claim to statutory interest

Does the court have a power to award statutory interest?

66. If, contrary to the submissions above, the Court holds the Default Rate to be a penalty and hence unenforceable, LCL seeks to recover statutory interest on the Loan under s.35A of the Senior Courts Act 1981 for the period that it has remained unpaid after the contractual Repayment Date.

67. This alternative basis for awarding interest was argued before the Judge but he did not address it in the Judgment because the point did not arise: Judgment, ¶352 [**CB/8/166**]. If result of As' appeal means that the point does now arise, it can be addressed either by remitting the question to the Judge for a further decision, or by the Court of Appeal deciding the point itself. The second approach is likely to be more cost-effective, particularly as the issue raises a question of law that could potentially be the subject of a further appeal, whatever decision was reached by the Judge.

68. In the absence of contractual interest, it would ordinarily be routine for the Court to order that simple interest is paid on a debt in respect of which judgment is given. However, As resisted any such order being made in this case. They relied on s.35A(4) of the Senior Courts Act 1981, which provides that interest shall not be awarded by the Court under

the Act "*for a period during which, for whatever reason, interest on the debt already runs*". The As rely on the existence of the Default Rate, even if it were held to be an unenforceable penalty, to contend that interest on the debt is already running.

69. The As' position is internally inconsistent: they contend that the Default Rate is ineffective for the purpose of LCL's entitlement to contractual interest, but they rely on it being effective for the purpose of preventing statutory interest from being recovered if the Default Rate is found to be penal. The effect of that position would be that As could retain the original 1-year Loan (and earn ongoing rental income on the properties securing the Loan) for as long as they wish beyond the end of the term without having to pay any additional interest at all. That result cannot be and is not right: it would wrongly treat a clause found to be a penalty as having some legal effect where it ought to have none.

70. If a contractual remedy is found to be penal in effect, it is "*by its nature contrary to the policy of the law*" and, as such, "*wholly unenforceable*": Cavendish at ¶9. However, although deprived of the benefit of the penalty provision to provide a remedy for a default by the other party, the "*innocent party is left to his remedy in damages under the general law*": Cavendish at ¶9.

71. As Sir Michael Burton put it in De Havilland v Spicejet [2021] EWHC 362 at ¶35, "*The remedy of depriving the innocent party of the right to receive the penalty provided for in a contract is founded in equity, and equity will not… deprive the innocent victim of recovery of his loss simply because he claimed what the court has concluded was an excessive pre-estimate of his loss*". The right to common law damages therefore remained, notwithstanding a contractual provision which provided that the remedy which was alleged to be a penalty was "*exclusive of and in substitution for any and all other rights and remedies provided by law…*".

72. While these decisions do not focus on the question of interest or the application of s.35A of the Senior Courts Act, they are inconsistent with As' position that the effect of a clause being found to be penal should be both to deprive LCL of the benefit of the clause and also to deprive LCL of an alternative remedy.

73. The effect of s.35A(4) is consistent with statutory interest remaining available as an alternative remedy to a penal provision for contractual interest. Its purpose is to prevent

a party who has an entitlement to contractual interest on a debt from seeking more advantageous rates or other terms under section 35A: Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2025] Bus LR 231 at ¶73. The sub-section stops interest being recovered twice on the same debt: Rolls-Royce Holdings v Goodrich Corp [2023] 2 CLC 289 at ¶9. While the discretionary power under the statute will normally be displaced by the effect of terms agreed between the parties, such displacement necessarily cannot occur where the terms agreed between the parties are held by the Court to be unenforceable as contrary to the policy of the law. Interest cannot be treated as "*running*" for the purpose of s.35A(4) where a party has no entitlement to contractual interest because the contractual term that would have given a right to contractual interest is unenforceable.

How should the discretion be exercised?

74. The principles governing the Court's exercise of its discretion to fix an interest rate under s.35A were summarised by the Court of Appeal in Carrasco v Johnson [2018] EWCA Civ 87 at ¶17 as including the following propositions:

> *"1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.*
>
> *(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.*
>
> *(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers."*

75. In addition, where the parties have entered into a contract which addresses the payment of interest, the parties' agreement will be a "*powerful factor*" in determining how the Court should exercise its discretion under s.35A: Rolls-Royce Holdings v Goodrich Corp [2023] 2 CLC 289 at ¶12.

76. In light of those principles, in the event that the Court allows As appeal and holds the Default Rate to be irrecoverable, the Court will be invited to order that As pay interest on the outstanding capital payable on the Loan from the contractual repayment date onwards at:

    (1) 12% per annum, being the standard contractual rate agreed between the parties and also reflecting the average rate that LCL could have earned on the capital had it been repaid as it ought to have been (Theophanous ws2, 16 [**SB/138/412**]); or

    (2) 3.25% over base rate, roughly reflecting the borrowing costs that LCL would have incurred to replace the unpaid capital through borrowing: Theophanous ws2, 20 [**SB/138/413**].

Conclusion

77. For the reasons set out above, the Court should dismiss all three grounds of appeal.

78. However, if the appeal is allowed and LCL found not to be entitled to enforce its contractual right to default interest, it ought to be awarded statutory interest instead.

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7 May 2026