Neutral Citation Number: [2024] EWCA Civ 254

Case No: CA-2023-001285

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST
HH Judge Rawlings sitting as a Judge of the High Court
Claim No BL-2019-BHM-000122

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ANDREWS

- -

Between :

(1) RAJINDER KUMAR **(2) MANJIT KUMARI** **(3) LALIT RAM VERMA**	**Appellants/ Claimant, 3rd and 4th Parties**
- and –	
LSC FINANCE LIMITED	**Respondent /Defendant**

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- -

Julian Gun Cuninghame (instructed **on direct access**) for the **Appellants (**on the appeal)
Mr Rajinder Kumar (in person) for the **Appellants (**on the application to adduce fresh evidence and introduce a further ground of appeal)
Brad Pomfret (instructed by **Freeths LLP**) for the **Respondent**

Hearing date: 5 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. LSC Finance Ltd ("LSC"), the Respondent to this appeal, is an unregulated lender, that is, it is not authorised to make loans which are regulated under the Financial Services and Markets Act 2000 ("the 2000 Act") or the Consumer Credit Act 1974. LSC provides short-term finance, particularly for the purchase and development of real property. Mr Shaun Morley is LSC's managing director and Mr Adam Turner is its finance director.

2. The First Appellant, Mr Kumar, is the former husband of the Second Appellant, Mrs Kumari, but they have continued to cohabit since their divorce. The Third Appellant, Mr Verma, is their son. Mr Kumar and Mrs Kumari are the directors of Aureation Developments Ltd ("ADL"). Mr Kumar and Mr Verma are the directors of Aureation Construction Ltd ("ACL"). ADL and ACL were at all material times the latest in a series of property development businesses operated by Mr Kumar on his own or with other family members.

3. Between 6 April 2017 and 25 May 2018, LSC entered into a series of loan agreements with ACL, ADL and with each of the Appellants personally, to facilitate the purchase and development of various plots of land. This appeal chiefly concerns three of those loan agreements ("the Pattingham loan agreements"), which were entered into with Mr Kumar, Mrs Kumari and Mr Verma respectively on 17 January 2018, and related to three adjoining plots of land at Redhill Poultry Farm, Spoonly Gate, Pattingham, Wolverhampton ("the Pattingham land"). The loans, which were secured by mortgages over the Pattingham land, were for 12 months. After the Appellants defaulted, a dispute arose as to whether LSC was entitled to enforce the Pattingham loan agreements, and if so, whether it had agreed to an extension of time for repayment. The Appellants also contended that the Pattingham Loan Agreements gave rise to an unfair relationship under sections 140A-B of the Consumer Credit Act 1974.

4. In the course of his lengthy (298 paragraph) judgment, HH Judge Rawlings ("the Judge") identified 16 issues for determination (though, as he recorded at [102], issues 2-4 and 11-14 were abandoned in closing) and made extensive fact findings on those which survived. Only 2 issues arise on this appeal, both of which are of relatively narrow compass. The main issue is whether the Pattingham Loan Agreements were regulated mortgage contracts under the 2000 Act or whether, as the Judge held, they were investment property loans within the meaning of Article 61A(6) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the Regulations"). If they are regulated mortgage contracts, on the face of it they would be unenforceable by virtue of s.26 of the 2000 Act, because LSC is not authorised to conduct regulated business.

5. The second issue is whether on its correct interpretation, clause 4.3 of the standard form Deeds of Guarantee and Indemnity executed by the directors of ACL and ADL in respect of the liabilities of those companies to LSC, means that the guarantor is not liable to pay interest on the principal sums owed by those companies to LSC.

6. For the reasons set out in this judgment, I agree with the Judge's conclusion that the Pattingham Loan Agreements were investment property loans, and therefore enforceable. I also agree with him that on its proper interpretation Clause 4.3 of the Guarantees operates so as to preclude double recovery by the lender, LSC, and not to relieve the guarantor from all liability to pay interest. I would therefore dismiss this appeal on both grounds.

7. Shortly before the hearing, Mr Kumar made an application to adduce fresh evidence and to amend the grounds of appeal for which permission had previously been granted, to add a further ground, namely that:

> "material discrepancies in the evidence given by two key witnesses in their testimonies concerning the working practices of [LSC] given in the original trial and in an unrelated later criminal trial undermines their credibility and renders the decision of the Learned Judge unsafe".

The witnesses in question are Mr Morley and Mr Turner.

8. After hearing submissions on those applications from Mr Kumar, in person, and from Mr Pomfret, counsel for LSC, and having considered the proposed "fresh evidence" for what it was worth, and without prejudice to its admissibility, the Court informed the parties at the hearing that the applications were refused, and that our reasons would be provided in our judgments on the appeal. I will address that matter in the final section of this judgment.

Issue 1 – Were the Pattingham Loan Agreements Investment Property Loans?

9. Section 26 of the 2000 Act provides, so far as is material, that:

> 26 **Agreements made with unauthorised persons**.
>
> (1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover –
>
> (a) any money or other property paid or transferred by him under the agreement, and
>
> (b) compensation for any loss sustained by him as a result of having parted with it."

10. "Regulated mortgage contracts" are defined by article 61(3) of the Regulations, which provides, so far as is relevant, that:

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

> (i) the contract is one under which a person ("the lender") provides credit to an individual or to trustees ("the borrower");
>
> (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA;
>
> (iii) at least 40% of that land is used, or intended to be used
>
> (aa) in the case of credit provided to an individual, as or in connection with a dwelling …
>
> but such a contract is not a regulated mortgage contract if it falls within article 61A(1)..."

It was common ground that the Pattingham Loan Agreements met all three of those conditions, and that they were regulated mortgage contracts unless one of the exceptions in article 61A(1) applied.

11. Article 61A(1) sets out seven categories of contracts which are not to be treated as regulated mortgage contracts, the fourth of which is an "investment property loan". That term is defined by article 61A(6) as follows:

> "investment property loan" is a contract that, at the time it is entered into, meets the conditions in paragraphs (i) to (iii) of article 61(3)(a) and the following conditions-
>
> (a) less than 40% of the land subject to the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower … and
>
> (b) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."

12. Article 61A (3) provides that:

> "For the purposes of this article, if an agreement includes a declaration which –
>
> (a) is made by the borrower, and
>
> (b) includes –
>
> (i) a statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower, and

> (ii) a statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that would be available to the borrower under the [2000] Act if the agreement were a regulated mortgage contract under the [2000] Act, and
>
> (iii) a statement that the borrower is aware that if the borrower is in any doubt as to the consequences of the agreement not being regulated by the [2000] Act, then the borrower should seek independent legal advice,
>
> the agreement is to be presumed to have been entered into by the borrower wholly or predominantly for the purposes specified in sub-paragraph (b)(i) unless paragraph (4) applies."

13. Paragraph (4) provides, so far as is material:

> "(4) This paragraph applies if, when the agreement is entered into –
>
> (a) the lender…
>
> knows or has reasonable cause to suspect that the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."

14. It is evident from these provisions that the answer to the question whether an agreement which would otherwise be a regulated mortgage contract meets the two criteria for exemption as an investment property loan depends on a fact-sensitive enquiry into (i) the borrower's intended use for the land, and (ii) whether the loan is made wholly or predominantly for business purposes. Both those inquiries relate solely to the time at which the loan agreement is made, and so if the intended use or purpose changes thereafter, that change will be immaterial. For regulatory purposes, the character of the agreement is fixed at the time when it is made.

15. The unregulated lender seeking to establish the exemption will be assisted in demonstrating that the second of these criteria is met by the statutory presumption which arises if the agreement contains a declaration by the borrower which meets all three of the substantive requirements set out in article 61A(3) of the Regulations. If it does, then the evidential burden must fall on the borrower to show either that the lender knew at the relevant time that the first part of the declaration was untrue, or that he had reasonable cause to suspect it to be untrue.

16. The very fact that the proviso in paragraph (4) exists demonstrates that a statement in the loan agreement that the loan is solely or predominantly for business purposes cannot operate as an estoppel by representation (or by convention) precluding the borrower from adducing evidence to show that the statement was factually incorrect. However, if the declaration does give rise to the statutory presumption, the only circumstances in which the presumption will <u>not</u> be treated as conclusive as to the purpose of the loan is when the proviso in paragraph (4) applies. In other words, if the statement of purpose is the first limb of a declaration which meets the other two

requirements of article 61A(3), proof that the loan was not for business purposes would only avail the borrower if the true position was known to the lender, or they had reasonable cause to suspect it.

17. There is nothing in the 2000 Act or in the Regulations which mandates the inclusion of such a declaration. If there is no declaration, or the declaration fails to meet all the statutory requirements (as it did in the present case) then the lender will have to prove that the loan was wholly or mainly for business purposes, and the Court will be concerned with ascertaining the true purpose of the loan irrespective of the lender's state of knowledge about it.

18. Whether or not there is an operative declaration, the lender will still have to prove that the first of the two criteria for an investment property loan is met, namely, that the borrower does not intend to use more than 40% of the mortgaged land as a dwelling for himself or herself (or in connection with such a dwelling). That is a question of fact, which by its very nature is likely to be closely connected with the purpose for which the loan is taken out.

19. In the present case, Mr Kumar contended that he had told Mr Turner and Mr Morley on various occasions in late 2017 that his plan was to use each plot on the Pattingham Land to build three personal homes for himself, Mrs Kumari and Mr Verma, and that this was why the loans were being taken out by them individually instead of by ACL or ADL. The Judge rejected that evidence at [154] and following, for clear and cogent reasons, including (but not limited to) an acceptance of Mr Turner and Mr Morley's evidence that, since they knew that lending to individuals to purchase or develop houses for those individuals to live in was regulated lending, which LSC was not authorised to carry out, they would not have made the Pattingham Loans if they had been so informed by Mr Kumar.

20. LSC's case at trial, which the Judge accepted, was that the Pattingham Loans were originally intended to be made to a limited company. That only changed because the Pattingham Land had existing planning permission for four houses, subject to a restriction that the occupants must both live and work on the land. Mr Kumar had told Mr Turner and Mr Morley that he wanted to acquire the land in the personal names of himself, his wife and his son in order that they could make separate applications to remove that restriction from each of the plots, with Mr Kumar making the first application (presumably to see how the local planning authority would react). The terms of the loan offers from LSC were also inconsistent with an understanding that the borrowers were going to build dwellings for themselves on the land.

21. The Judge's fact-findings concerning the proposed use of the land cannot be impugned. More importantly (aside from the application to amend the grounds of appeal) there has been no attempt by the Appellants to do so. The first condition for the agreements to qualify as investment property loans was therefore satisfied. The second condition is that the loan was wholly or predominantly for the purposes of a business carried out by the borrower. Again, that is a question of fact, and not one of contractual interpretation, though the terms of the contract could provide evidence as to the purpose of the loan (and in certain circumstances, prescribed by the Regulations, could prove conclusive).

22. Each of the Pattingham Loan Agreements contained a declaration. Unfortunately, it was in the appropriate form for an agreement which would otherwise be a regulated credit agreement under article 60C or a regulated consumer hire agreement under article 60O of the Regulations. It stated that the borrower was entering into the agreement wholly or predominantly for the purposes of a business carried on by him/her or intended to be carried on by him/her. It also advised the borrower to take independent legal advice if they did not understand the consequences of the agreement not being regulated. But it did not contain a statement that the borrower understood that they would not have the benefit of the protection and remedies that would be available to the borrower under the 2000 Act if the agreement were a regulated mortgage contract under the 2000 Act. It made no mention of regulated mortgage contracts. Instead it stated:

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

23. The Judge held at [141] and [142] that although the expression "regulated agreement" was capable of referring to a regulated mortgage contract, the problem was that, when read together with the heading of the declaration, (which referred expressly to articles 60C and 60O but not article 61A) the objective reader would interpret the expression " regulated agreement" as referring only to consumer credit agreements and regulated consumer hire agreements.

24. On this appeal, Mr Pomfret pursued the argument (raised by way of respondent's notice) that this was an unduly restrictive interpretation, and that the declaration was sufficient to convey the information required by the 2000 Act. He submitted that although the heading might have been apt to confuse the reasonable reader as to the source of possible regulation, they would still understand the substance of what the borrower was declaring, including that the loan agreement was not regulated under the 2000 Act.

25. I am unable to accept those submissions. Without the heading, the declaration might well have sufficed, and it appears that the Judge thought so too. However, in the light of the express references in the heading to articles of the Regulation pertaining to two completely different types of regulated agreement, and the absence of any reference to article 61A, it is impossible to interpret the declaration as demonstrating an understanding by the borrower that they will not have the benefits of the specific statutory protection afforded to a regulated mortgage contract.

26. However, that does not mean that the declaration somehow ceases to be relevant, and should have been ignored, as Mr Gun Cuninghame contended. He submitted that if the Judge was right in his approach, it would be inevitable that in every case in which the agreement contained a declaration by the borrower that the loan was intended for business purposes, the agreement would be construed as an agreement wholly or predominantly for business purposes irrespective of whether the declaration conformed with the other two requirements set out in article 61A(3).

27. I accept that it would be wrong in principle to treat a defective declaration as having the same effect as a valid one. However, the Appellants' criticism is misplaced, because the Judge did not do that. Indeed, he rightly rejected a submission by Mr Pomfret that the statements in the defective declaration gave rise to an estoppel [167]. His conclusion that the Pattingham Loan Agreements were investment property loans is based on a plethora of fact-findings based on all the relevant evidence. Whilst he found that on its correct interpretation, the declaration objectively evinced an intention on the part of the contracting parties to enter into investment property loans, that was just one factor that led to the conclusion he reached that the loan agreements satisfied the criteria set out in the Regulations.

28. Mr Gun Cuninghame contended that a defective declaration should be disregarded for all purposes, but he cited no authority for that proposition. Nor was he able to make it good as a matter of principle. The representation that the loan was intended wholly or predominantly for business purposes remained a term of the contract. The purpose to which the borrower intends to put the money at the time that the agreement is made is just as much a matter of fact, based on the evidence, as the borrower's intended use of the land after it is acquired. A statement made by the borrower about that purpose at or before the time when the contract is entered into is *evidence* of that purpose irrespective of whether the statement is in a letter to the lender, or made at a pre-contractual meeting, or appears on the face of the loan agreement itself. That evidence of the borrower's intention falls to be weighed against any evidence suggesting that the loan is <u>not</u> intended to be used for business purposes.

29. It is quite clear from his judgment that the Judge did not consider the representation in the contract that the loan was for business purposes in isolation, nor did he regard it as conclusive. He looked at all the contemporaneous documentary evidence of what was to be built on the Pattingham Land and for what purpose, including the loan offers [150] and [151] and the professional valuation of the Pattingham Land [153]. He found as a fact at [154] that:

> "not only was LSC… never told, before the Pattingham Loan Agreements were completed on 19 January 2018, that it was intended that Mr Kumar, Mrs Kumari and Mr Verma would build house for themselves on their respective plots of the Pattingham Land but that, as at 19 January 2018 it was not the actual intention of Mr Kumar, Mrs Kumari or Mr Verma to do so. *Instead it was their intention to build: one house on Plot 1; two houses on Plot 2; and one house on Plot 3; to sell those houses to third parties and to use the proceeds to repay the Pattingham Loans advanced by LSC."*
>
> [Emphasis added].

He gave extensive reasons for those conclusions in paragraphs [155] to [163].

30. Those findings are fatal to the Appellants' case on Ground 1 of this appeal. Both the requirements for an investment property loan were satisfied. Accordingly, the Judge was right to hold that the Pattingham Loan Agreements were unregulated investment property loans and that they were enforceable.

Issue 2 – What is the meaning of Clause 4.3 of the Guarantees?

31. Clause 4 of the Guarantees is entitled "Interest". So far as is material it provides as follows:

> "4.1 The Guarantor shall pay interest to the Lender after as well as before judgment at the rate of 3% per month on all sums demanded under this guarantee from the date of demand by the Lender or, if earlier, the date on which the relevant damages, losses, costs or expenses arose in respect of which the demand has been made, until, but excluding, the date of actual payment.
>
> …..
>
> 4.3. The Lender shall not be entitled to recover any amount in respect of interest under both this guarantee and any arrangements entered into between the Borrower and the Lender in respect of any failure by the Borrower to make any payment in respect of the Guaranteed Obligations."

3% per month is the default rate of interest prescribed under the various Loan Agreements, discussed in the judgment at [196] to [200].

32. Mr Gun Cuninghame submitted that Clause 4.3 meant that if the borrower was liable to pay interest under the Facility Agreement, there was no liability on the part of the Guarantor to pay interest under the Guarantee. If this interpretation meant that there was a contradiction between Clause 4.3 and Clause 4.1, then by operation of the *contra proferentem* rule, because this document was drafted by the lender, Clause 4.3 must prevail. Mr Pomfret submitted that this interpretation of Clause 4.3 was wrong, and in any event contradicted the way in which the Appellants' case was run at trial (by different counsel) and that it would be unfair to the Respondents to allow this late change of case. I need not deal with that alternative submission.

33. On the application of ordinary principles of contractual interpretation the starting point must be that the parties intended both these provisions (which are part of the same Clause of the agreement, Clause 4) to serve some purpose. One should aim to interpret the agreement in a way which makes sense of both provisions, unless this proves impossible. Although the obligations of a guarantor are generally co-extensive with those of the principal debtor (here, the borrower), it is prudent for a contract of guarantee to contain an express provision for the guarantor to pay interest in order to protect the creditor in circumstances in which they are unable to recover interest from the principal debtor (insolvency being one example). That explains the existence of Clause 4.1, which makes express provision for the guarantor to pay interest on any sums demanded from them under the Guarantee.

34. However, the sums demanded under the Guarantee will be whatever is due from the principal debtor at the time of the demand. That figure may include an element of default interest, which starts to accrue from the date when there is a failure to pay back the loan in accordance with its terms. Clause 4.3 provides that the lender, LSC, cannot recover interest both under the Guarantee (i.e. under Clause 4.1) and under the loan agreement. As the Judge held at [285] this:

> "operates to prevent LSC from recovering interest for the same period from both ADL under the ADL Facility Agreements and the guarantors (Mr Kumar /Mrs Kumari) under the ADL Guarantees".

35. It seems to me to be obvious that this clause was put in for the avoidance of doubt to prevent double recovery of interest on the same principal sum for the same period, since without it, it was possible to interpret Clause 4.1 as giving rise to a free-standing obligation by the guarantor to pay interest on all sums due from the borrower, including accrued interest (and, moreover, to do so from a time pre-dating the demand). The description of the Guarantee as a Guarantee and Indemnity would have strengthened that interpretation. Clause 4.3 makes it plain that the lender only recovers one amount of interest from either the principal or the guarantor.

36. Although in theory the parties to a Guarantee could agree that the guarantor will never pay interest on any sums due from the borrower, (so that the guarantee is of the principal sum only) one would not expect a provision of that nature to appear in the same clause of the agreement as a provision expressly providing for the payment of such interest, and specifying the rate. Moreover, that interpretation of Clause 4.3 cannot be reconciled with Clause 2.3, which specifies the maximum exposure of the Guarantor in terms that expressly include interest. In the context of this particular Guarantee, the alternative construction put forward by Mr Gun Cuninghame made no commercial sense. The Judge interpreted Clause 4.3 correctly. I would therefore dismiss the appeal on Ground 2.

Issue 3 – Should the Appellants be allowed to adduce fresh evidence and raise a further ground of appeal?

37. Mr Kumar's application to adduce fresh evidence concerned the evidence given by Mr Turner and Mr Morley at a hearing which took place after the trial in the present case. The evidence was given in criminal proceedings in the Crown Court at Carlisle against a Mr Livesey with whom LSC had sub-contracted to carry out certain work for them: *R v Allan Livesey* T20217040. It was alleged that Mr Livesey had submitted fraudulent invoices to LSC when seeking drawdowns under a facility agreement granted to a development company of which he was a director. Mr Livesey pleaded guilty to two counts of fraud, but did so on a written basis of plea that LSC owed him substantial amounts of money for the other work he had done for it. This included monitoring or overseeing "distressed" sites where LSC had provided the necessary finance to enable the development project to be completed. The sites overseen by Mr Livesey happened to include the Pattingham land and some of the other sites being developed by ACL and ADL that were the subject of these proceedings.

38. The basis of plea was contested, and Mr Turner and Mr Morley were called by the prosecution to give evidence at what is known as a *Newton* hearing (that is, a hearing before the judge alone for the purpose of establishing the facts on the basis of which he or she will pass sentence on the defendant who has pleaded guilty). They were cross-examined by Mr Livesey's defence counsel. Among other matters they told the judge in that case that (apart from the facility agreement with his company) the contractual arrangements made with Mr Livesey were purely verbal, and that he would only be paid a fee for his services on completion and sale of the whole of the development site that he had assisted with (not just individual buildings on that site). They asserted that none of the sites was completed when Mr Livesey was working for

LSC (before they fell out with him in November 2019) and that only some of them were completed afterwards.

39. Mr Kumar contended that in the present proceedings Mr Morley and Mr Turner had suggested that LSC did not make verbal agreements, whereas in the Livesey proceedings they accepted that it did. He also contended that certain answers given by them in the Livesey proceedings regarding the completion of the sites were demonstrably untrue and amounted to "fraudulent representations," which cast doubt on their credibility and reliability as witnesses and could have materially affected the outcome in this case.

40. CPR 52.21(2) provides that unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court. The principles upon which the power to "order otherwise" may be exercised are not spelt out in any rule or practice direction. However, as this Court made clear in cases such as *Terluk v Berusovsky* [2011] EWCA Civ 1534, in determining whether the admission of the fresh evidence would serve the overriding objective, the Court will still be guided by the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489. It must therefore ask itself whether the evidence could have been obtained with reasonable diligence for use at trial; whether the evidence is apparently credible; and whether, if admitted, it would probably have an important influence on the result of the case.

41. The Court should always be cautious about admitting evidence given after the trial by which it is sought to persuade the Court of Appeal to reverse the trial judge's assessment of credibility or reliability, or to order a new trial: see *Riyad Bank v Ahli United Bank (UK) Plc* [2004] EWCA Civ 1419.

42. Mr Kumar submitted that the evidence of Mr Turner and Mr Morley could not have obtained with reasonable diligence before the trial because it was not given until afterwards. I am prepared to accept that there is no evidence that the Appellants were aware of the existence of the arrangements between Mr Livesey and LSC or, if they were aware of them, that they knew or suspected that they were not committed to writing. Therefore, their trial counsel could not have cross-examined Mr Turner and Mr Morley about those oral arrangements. However, the evidence that LSC's contractual arrangements with Mr Livesey were oral does not demonstrate that Mr Morley or Mr Turner told lies in their evidence about LSC's practices concerning loan agreements with borrowers such as Mr Kumar and his companies.

43. We do not have transcripts of that evidence in the court below, but the Judge summarises the relevant parts in the judgment at [112] to [116] (Mr Turner) and [117] to [121] (Mr Morley). The only relevant aspect of that evidence is Mr Turner's evidence, summarised at [112], that it was LSC's practice never to agree to extend the date for repayment of a loan before the loan was advanced, and never to agree to such an extension orally; and that any such agreement to extend time would be the subject of a side letter signed by both LSC and the borrower. That evidence was given by Mr Turner in response to allegations by Mr Kumar that he and Mr Morley and Mr Turner had verbally agreed (or that they had assured him) during telephone conversations *before* the Pattingham Loans were advanced, that the dates for repayment of those loans would be extended. I can find no evidence to support Mr Kumar's suggestion that either witness told the Judge that LSC never made oral agreements of any kind.

44. As it happens, despite finding Mr Turner to be an honest witness, the Judge did not take his evidence entirely at face value, because he noted that Mr Turner did not appear to have strictly followed what he said were LSC's lending procedures and practices [116]. So far as Mr Morley's denial that he agreed to the alleged extension of the repayment date (or represented that an extension would be granted) was concerned, the Judge also considered him to be an honest witness but, like Mr Turner, one whose evidence was broadly based upon what he said he would and would not have done, rather than on his actual recollection.

45. In rejecting Mr Kumar's evidence about the alleged agreements to extend time or oral representations that time would be extended, the Judge did not place much weight on what Mr Turner and Mr Morley said about LSC's practice of committing such arrangements to writing. Instead he gave a number of cogent reasons for finding Mr Kumar's evidence to be unreliable. He placed considerable weight on the contemporaneous documents, which he found to be inconsistent with Mr Kumar's case [102] and [103]. Even if he had completely disregarded what Mr Turner and Mr Morley had said about LSC's practice of not making such arrangements verbally, the Judge had more than enough material to justify the conclusion that he reached.

46. In any event, I do not accept that what Mr Turner or Mr Morley said in the criminal proceedings undermined their evidence about LSC's usual practices and procedures concerning loan agreements. There is no incompatibility between that evidence, and their subsequent evidence in the criminal proceedings. The agreements with Mr Livesey which were accepted to have been made informally and orally were not loan agreements (where LSC would be the creditor seeking repayment on a given date, and had little incentive to extend the term of the loan) but agreements for services to be provided to LSC, where fees would be paid *by* LSC in accordance with their terms. Nothing was said in the evidence in the criminal case to suggest that LSC ever did agree informally to extend the dates for repayment of loans.

47. Therefore, the evidence of Mr Turner and Mr Morley concerning LSC's oral agreements with Mr Livesey, if admitted, would not have had any influence on the result of the present case, let alone an important one. It would not even have had the potential to adversely impact on the credibility of Mr Turner or Mr Morley. Finally, as Mr Pomfret pointed out in his written submissions in response to the application, the Appellants' trial counsel conceded their claims based on alleged oral agreements in his closing submissions, as the Judge recorded at [102].

48. So far as the evidence given in the criminal trial about completion of the various sites is concerned, it is clear that Mr Turner's evidence about a site at Daley Road was materially incorrect in two respects, namely that it was build complete when it was sold in November 2019 (he said that it was not), and the proceeds of sale were not £623,000, as he alleged, but £1 million. It is odd that Mr Turner himself did not provide an explanation for giving this inaccurate evidence, and that instead, Ms Meadows, LSC's "in-house counsel" came up with an explanation which appears to me to be pure speculation. She does not say in her witness statement that she discussed this matter with Mr Turner and that her theory is the product of such discussions. Nor is there any explanation given by LSC for Mr Turner's failure to provide his own statement.

49. I am not particularly impressed by Mr Morley's explanation for giving evidence in the criminal proceedings that the Pattingham Land developments and Emerald Close development were not completed before November 2019, when (as he now accepts) they had been both completed and sold at a time when Mr Livesey was still working for LSC. The truthful answer, according to Mr Morley's witness statement in answer to the applications, would have been that they were completed, but that despite this, so far as LSC were concerned, no money was due to Mr Livesey because those developments were used as cross-collateral for other development loans. However, that explanation would have been at odds with Mr Morley's evidence in the criminal trial - which he did not qualify - that any payment to Mr Livesey would be made when a development was built out and sold, and that Mr Livesey would be paid "on completion of the sale" (see pages 10 and 11 of the transcript).

50. Taken at its highest, therefore, the evidence of what was said by Mr Morley and Mr Turner in the criminal proceedings, together with other reliable documentary evidence about the actual dates of completion and sale and the proceeds of sale of the development properties about which they were asked, could properly found a submission that they lied in the criminal proceedings about matters pertaining to LSC's liability to pay fees to Mr Livesey for the work he had done on those sites. However before making that submission, Mr Morley and Mr Turner would probably have to be recalled and cross-examined about their evidence in the criminal proceedings.

51. It appears that Mr Kumar wants to use that *prima facie* evidence of dishonesty (perjury) as a means of undermining their credibility in the present case. However that falls a long way short of establishing that the judgment was obtained by fraud. A useful summary of the appropriate approach to applications of this nature is found in *Dale v Banga and others* [2021] EWCA Civ 240. In that case, permission had already been granted to rely on the fresh evidence, which concerned dishonest (or allegedly dishonest) conduct of a witness and a party which was unrelated to the issues which were before the court in the original trial, but which was said to indicate that the judge may have been materially misled into making the fact-findings that he did.

52. Lady Justice Asplin (with whom Lord Justice Moylan and Mr Justice Hayden agreed) said this at [27]:

> "At this point, it is important to be clear about what it would be necessary to prove in order to be successful in setting aside the judgment. It goes without saying that judgments are not set aside lightly. It is not sufficient that the evidence given below can now be proved to have been mistaken. If judgments and orders could be set aside on that basis, there would be an end to finality in litigation. *Nor is it sufficient that a witness committed perjury. It is necessary that the judgment was obtained by fraud and that the fraud was that of a party to the action or was at least suborned by or knowingly relied upon by that party."* [Emphasis added].

53. My Lady went on to refer to the principles summarised by Aikens LJ in *Royal Bank of Scotland Plc v Highland Financial Partners [2013] 1 CLC 595* at [106] and approved by the Supreme Court in *Takhar v Gracefield Developments Ltd & Others [2020] AC 450* at [56] and [67]. It is necessary to establish conscious and deliberate dishonesty

which is material in the sense that it is causative of the impugned judgment being obtained in the terms it was. She then considered authorities, particularly *Noble v Owens* [2010] 1 WLR 2491, which specifically addressed the appropriate approach if the *Ladd v Marshall* conditions were satisfied and the new evidence suggested that deceit had been practised on the court below.

54. These authorities established that in essence, the fresh evidence must be sufficient to justify pleading a case of fraud; in other words, it must be capable of showing that there was conscious and deliberate dishonesty by one of the parties which was causative of the judgment being obtained in the terms that it was. If it met that threshold, and the allegation of fraud was contested, the court would then have to decide whether, on the facts and circumstances of the particular case, the fraud issue should be remitted or otherwise dealt with within the same proceedings.

55. On the facts of *Dale v Banga* the Court decided that the threshold test was not met. The evidence of dishonesty which emerged in criminal proceedings after the relevant civil trial was, at most, bad character evidence which did not go directly to the central issues of fact before the trial judge. The same is true of the evidence on which Mr Kumar seeks to rely. Even if it could be proved that Mr Turner and Mr Morley lied in the criminal proceedings about the completion of developments and the sums paid to LSC, in order to pretend that there was no obligation on LSC to pay any money to Mr Livesey as he alleged, that falls a long way short of establishing any conscious and deliberate dishonesty on their part concerning the issues that were decided by the Judge in the present case, let alone establishing the requisite causative link between the dishonesty and the Judge's findings.

56. The "fresh evidence" would not have had an important influence on the outcome of this case, and does not meet the test in *Ladd v Marshall* for that reason. Considered at its highest, the evidence raises a tangential issue going to the credibility of those witnesses, but that was of little importance in the Judge's overall assessment of the evidence leading to his key fact-findings. His judgment, including his rejection of Mr Kumar's evidence (and that of Mr Verma) as incredible, was firmly founded on the documentary evidence, and tested by reference to business common sense. It did not materially depend on his assessment of Mr Morley and Mr Turner as honest witnesses. Admitting evidence that Mr Turner and Mr Morley had lied about an unrelated matter in subsequent criminal proceedings (even if that could be established) would not form a justifiable basis for impugning the Judge's fact findings or setting aside the judgment for fraud.

57. Accordingly, the proposed new ground of appeal has no realistic prospect of success. For those reasons, I joined in the decision by my Lord and my Lady at the hearing to refuse the application to adduce it and to amend the Grounds of Appeal.

Conclusion

58. This appeal should therefore be dismissed.

Lord Justice Phillips:

59. I agree.

Lady Justice Asplin:

60. I also agree.