[2021] EWHC 798 (Ch)

CR-2019-MAN-001065

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

INSOLVENCY AND COMPANIES LIST (ChD)

Date: 31 March 2021

Before:

HIS HONOUR JUDGE PEARCE

- -

Between:

(1) EDWARD MICHAEL AVERY-GEE

(2) DANIEL MARK RICHARDSON

(3) JONATHAN ELMAN AVERY-GEE **Applicants**

(as joint administrators of FUNDINGSECURE LTD

(in Administration))

- and -

(1) MAREK ZWIEFKA SIBLEY

(2) PAUL MUNDY

(3) ROBERT DANIEL LEVIN

(4) RAJINDER KUMAR

Respondents

- -

- -

DAVID MOHYUDDIN QC (instructed by **OCCASIO LEGAL LTD**) for the **Applicants**

MUHAMMED HAQUE QC and **SAM CHEESEBROUGH** (instructed by **CANDEY LTD**) for the **First, Second and Third Respondents**

ANDREW SHAW (instructed by **UNDERWOOD SOLICITORS LLP**) for the **Fourth Respondent**

Hearing date: 19 January 2021

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JUDGMENT

This judgment was handed down at 10am on 31 March 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Pearce:

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Introduction

1. This is my judgment on the application of the Joint Administrators of FundingSecure Ltd ("the Company") made by Application Notice dated 20 August 2020 ("the Application"), pursuant to which they sought the Court's directions on the true construction of terms and conditions regulating the relationship between the Company and third parties, some of whom claim to be its creditors.

2. The application was heard on 19 January 2021. At the conclusion of the hearing, I reserved judgment.

The Background

3. The Company, which was authorised and regulated by the Financial Conduct Authority ("FCA"), promoted and managed short term so-called peer-to-peer loans funded by a large number of lenders. (Such lenders are called "Investors" within the various documents to which the Application relates. I shall adopt that terminology, but should make clear that the name is not intended to indicate that the Investors were investing in the Company itself. The vast majority were not.) Prospective borrowers (called, understandably, "Borrowers" in the contractual documentation) would apply to be promoted on the Company's website, stating the amount that they were seeking to borrow and proposing security for the facility. The Company would undertake due diligence investigations and value the proposed security for the loan. If approved by the Company, the loan opportunity would be advertised on the Company's website, applying a loan to value ratio of no more than 75%. Prospective Investors could then agree to lend money for a period of six months. It would typically be the case that several Investors would be anonymously brought together to fund a particular borrowing request.

4. Such lending was anticipated to involve a relatively high risk of default by Borrowers. Pursuant to the Terms and Conditions, part of the Company's service was to undertake to enforce the security in the event of default, in which event it became entitled to certain payments. The quid pro quo for the risk was the high rate of interest and other fees payable by the Borrowers, as considered below

5. The Company fell into financial difficulty. It entered administration on 23 October 2019. During the Administration, several issues have arisen. Initially, there was a question as to whether the Administrators held any money recovered from Borrowers on trust for the relevant Investors, or whether alternatively they held such money in the Administration, the rights of the Investors being limited to those of creditors of the Company for the amount of the lending. That issue was resolved by the Administrators agreeing, with the consent of the Company's secured charge holders, to distribute funds as if they were held on trust for the relevant Investors.

6. A second area of dispute has been as to the quantification of the Company's entitlement to fees in circumstances where Borrowers have defaulted, as well as the order of priority between such fees and the Investors' right to recoup the loan. It is this area that is the subject of the Application.

The relevant contracts

7. The scheme of lending established by the Company involved each Borrower and the Company, acting as agent for the Investors as unnamed principals and called the "Lender" in this agreement, entering into a Master Facility Agreement relating to the loan, which created a series of individual loan agreements in identical terms with each Investor as an unnamed principal in each loan agreement. At the end of the loan period (stated to be 182 days), the Master Facility Agreement provided that the loan would be repaid.

8. Section 1 of the Master Facility Agreement provided for the payment of an Arrangement Fee by the Borrower and went on to provide for the payment by the Borrower of a further sum referred to as an Administration Fee in these terms:

> *"The Borrower shall pay to the Lender an administration fee of 0.50% per month on the Loan (Administration Fee) which is to be calculated on a pro rata basis by reference to the amount of the Loan outstanding from time to time and the number of days that the loan is outstanding. The Administration Fee shall be repaid in full on the Repayment Date.*
>
> *If the Borrower fails to repay the Loan on the Repayment Date, the Administration Fee will continue to be charged at the rate specified until*

the Loan (and all other sums outstanding under this Agreement) are repaid in full."

9. Clause 8 of the terms and conditions of the Master Facility Agreement, is headed "Default Fee" and provides:

> "*If the borrower fails to pay any amount payable by it under a Finance Document on its due date, a default fee shall accrue on the overdue amount from the due date up to the date of actual payment (both before and after judgment) at a rate which is 0.5% per calendar month higher than the Administration Fee which would have been payable pursuant to section 1 (key terms) if the overdue amount had, during the period of non-payment, constituted the Loan. Any default fee accruing under this clause 8 shall be immediately payable by the Borrower on demand by the Lender."*

10. The relationship between the Company and individual Investors was governed by contractual terms ("the Terms and Conditions"). It is common ground that Version 2.4, which appears in the bundle, governed the relationships which are relevant to the Application.

11. Clause 6 of the Terms and Conditions deals with "Repayments, Defaults and Renewals."

    (a) Clause 6.1 deals with early repayment of loans. It is not relevant to this dispute.

    (b) Clause 6.2 provides:

    > "*If the Loan Term has elapsed and the balance outstanding under the Loan Agreement has not been repaid, FundingSecure, acting on behalf of the Investors, undertakes to enforce the default procedures set out in the Loan Agreement including those set out in clauses 6.2.1 to 6.2.7."*

    (c) Clauses 6.2.1 and 6.2.2 set out how the Company was to go about enforcing the default procedures. In essence, the Company would send a letter to the Borrower explaining the process by which it proposed to sell the "Assets" (defined by clause 14.1 as "*those assets which are secured by*

a pledge as security for a Loan") by way of auction. Clause 6.2.2 gives an alternative power to the Company to sell the Assets by private sale instead of sending to auction, provided that the price achieved by such a sale exceeded fair market value.

(d) Clause 6.2.4 provides:

> *"An additional administration fee of 5% of the Loan value will be deducted from the net proceeds of sale of the Asset and paid to FundingSecure (after deduction of all selling expenses such as commission)."*

(e) Clause 6.2.5 provides:

> *"Net proceeds of sale of Assets shall be used to settle amounts due in the following order:*
>
> *i. Principal amount of Loan which was funded by, and is repayable to, the Investors (allocated pro rata in accordance with the proportion of the Loan amount which each Investor invested);*
>
> *ii. Direct costs incurred by FundingSecure through the setting up and the administration of the Loan including, but not limited to, storage costs, referral fees and valuation fees up to the date of sale;*
>
> *iii. Interest due to the Investors up to the date of sale (allocated pro rata in accordance with the proportion of the Loan amount which each Investor invested);*
>
> *iv. Administration fees due to FundingSecure not recovered through clause 6.2.5(ii) above;*
>
> *v. The balance (if any) will be returned to the Borrower."*

12. Clause 8 of the Terms and Conditions provides:

> "*8.1 FundingSecure charges Borrowers an administration fee on every Loan depending on the Loan amount. The rates charged are per month on a daily basis for the duration of the Loan.*

> *8.2 The administration fees may vary from time to time and are listed on our website.*
>
> *8.3 FundingSecure does not charge Investors any fees or commissions."*

13. The phrases "administration fee" and "administration fees" are not defined in the Terms and Conditions. It will be noted that Clause 8.1 of that document states that the "administration fee" there referred to is a rate charged per month. This appears to be a reference to the Administration Fee as set out in section 1 of the Master Facility Agreement rather than the "*additional administration fee of 5%"* set out in clause 6.2.4 of the Terms and Conditions (which is a one-off fee). To avoid confusion, I shall adopt the terminology used during the hearing of describing the fee in clause 6.2.4 of the Terms and Conditions as "*the 5% Fee*".

14. Clause 14.15 defines "Loans" as "*the loan made to a Borrower on these Terms and Conditions and a Loan Agreement"* (sic – this may be intended to mean "*the loan made to a Borrower on these Terms and Conditions and* <u>*pursuant to*</u> *a Loan Agreement.")*

The Application

15. The dispute before the Court turns on whether the 5% fee is payable before or after repayment of the Investors. Clearly if the realised value of the relevant Assets as achieved by auction or private sale exceeds the total of the amounts due to the Investors and to the Company, it makes no difference at what point the 5% Fee is deducted. However, if there is a shortfall in the realised value, the order of deduction determines who loses out through that shortfall, the Company or the Investors.

16. The Administrators are of course officeholders. They owe duties to the Court in that role, but their primary duty is to maximise the return to the Company and its creditors. The fact that they are officeholders may lead to the conclusion that their position is more disinterested (in the older sense of "neutral", rather than the more recent usage of "uninterested"), but the other parties to the Application should be reassured that this does not give them some privileged position with the Court in terms of the submissions that they advance.

17. The First, Second and Third Respondents are Investors who are otherwise unconnected with the Company and in particular are not members of it. They were joined in the action at the proposal of the Applicants as "*representative respondents on behalf of all of the Investors*" (paragraph 38 of the First Applicant's first witness statement). Their interest lies in maximising the amount of money paid out to themselves and other Investors. Counsel representing these Respondents have, within their skeleton argument, called them the "Opposing Respondents." That is a convenient term to adopt, subject to making it clear that to describe them thus is not to suggest anything about where the burden of proof lies.

18. The Fourth Respondent's initial involvement with the Company was as an Investor in the sense described above. He came to know the then executive directors and controlling shareholders of the Company, Richard Luxmore and Nigel Hackett, in or around 2018. In Autumn 2018, he became aware that the Company was subject to an investigation by the FCA that arose when it came to light that the Company had been rolling over loans using funding from the Company's client account.

19. The Fourth Respondent agreed to lend £1.5 million to the Company (secured by a debenture) in order to regularise the position and he thereafter became both a director and the controlling shareholder of the Company. It appears that the Fourth Respondent had no involvement in the management of the Company leading to its financial difficulties. Since he has been involved, it would seem that the Company has been run in a more regular fashion, albeit that the incidence of bad debts amongst Borrowers, caused according to the Fourth Respondent by fraudulent behaviour on the part of some of them, has led to his deciding to put the Company into Administration.

20. The Fourth Respondent tells us at paragraph 16 of his first witness statement that he has continued to be an Investor, to the tune of about £750,000 in total, of which about £250,000 has been repaid. It follows that, as a creditor of the Company through the loan of £1.5 million referred to above, the Fourth Respondent has an interest in maximising the return to the Company, but that as an Investor who has not been fully repaid, he has an opposing interest in maximising the funds be paid to Investors. As counsel on his behalf conceded, his

financial interest overall probably lies in maximising the return to the Company and doubtless this explains the stance that he takes within this litigation.

21. I have referred to the interests of the parties because a certain amount has been said both in witness evidence and in submissions about where their respective interests lie. In truth, where litigation involves money, it is rare to find that those contesting it do not have conflicting financial interests. It is easy to see why the parties in this case have advanced the particular positions that they have adopted. However to understand where their interests lie does not assist in resolving the issues as set out below.

22. The Application came before HHJ Halliwell for directions on 16 October 2020. His order conveniently sets out the issues as follows:

    (a) "*whether the 5% Fee falls to be deducted from the proceeds of sale of the Asset before repayment of Investors, or only out of any surplus thereafter*" ("Issue 1");

    (b) *"whether the 5% Fee is to be calculated by reference to the amount realised on sale of the Asset, or to the "Loan Value", i.e. the amount of the initial advance"* ("Issue 2");

    (c) "*whether the 5% Fee applies to all loans that have exceeded term, or just those that have been marked as "defaulted", i.e. loans closed without realising the full amount of the capital*" ("Issue 3");

    (d) "*whether the way in which the Administrators ought to approach the deduction of the 5% fee on behalf of the Company is affected in any way by any course of conduct on the part of the Company prior to our Administration, and if so, how and to what extent*" ("Issue 4").

23. Issue 4 is dealt with in slightly further detail by the third preamble to the Order which provides that the parties agree that the Opposing Respondents are entitled to argue that the doctrines of promissory estoppel and estoppel by convention apply in this case. In the event, the Opposing Respondents have, in addition to arguing promissory estoppel and estoppel by convention, contended that the doctrine of contractual estoppel applies. This introduction of a further argument has been the subject of mild criticism by the Applicants and the Fourth Respondent. However, as counsel for the Opposing Respondents made clear, this

is simply an issue of classification or nomenclature, rather than the advancement of a new unheralded argument. In fact, he conceded that he was unlikely to succeed on the basis of contractual estoppel if he failed on his other estoppel arguments; and if he succeeded on one or other of those, he did not need to rely on contractual estoppel. This may well be correct. In any event, it seems to me artificial for the Court to fail to consider a legal argument which is closely allied to those anticipated in the order of HHJ Halliwell, in circumstances where there is no apparent prejudice to the other parties through the failure to flag up the specific argument earlier.

24. It should immediately be noted that there is no dispute between the parties as to Issue 3. As the Applicants point out, clause 6.2 makes it a trigger for the payment of the 5% Fee that the term of the relevant loan has elapsed and that the balance outstanding under the loan agreement has not been repaid. The 5% Fee is, however, only repayable from the sum received on realisation of the asset, which must presuppose that a sale of the asset has occurred.

25. For the hearing of the Application, the following witness statements were served:

    (a) On behalf of the Applicants, statements of the First Applicant dated 20 August 2020, 5 October 2020 and 17 December 2020; and of Mr Nigel Hackett, a director of the Company, dated 16 December 2020.

    (b) On behalf of the Opposing Respondents, from the Second Respondent dated 20 November 2020 and 18 December 2020;

    (c) On behalf of the Fourth Respondent his own statements dated 18 November 2020 and 18 December 2020.

26. I did not hear oral evidence from witnesses. It follows that, where there are factual disputes, these are untested by cross-examination.

The Law – Construction of the Contracts

27. The principles of contractual construction are well-established. In brief:

    (a) The aim of interpretation is to determine what the parties meant by the language that they used in the contract. The Supreme Court put it thus in Rainy Sky SA v Kookmin v Bank [2011] 1 WLR 2900 at paragraph [14]:

> *"the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant"*

(b) In determining the intention of the parties, the Court may have regard to the relevant factual context in which the contract was agreed, as described by Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912:

> *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

(c) While the circumstances in which the contract was agreed may be considered by the Court in determining the objective intention of the parties to that contract, the Court will not have regard to pre-contractual negotiations (Chartbrook Ltd v Persimmon Homes [2009] 1 AC 1101).

(d) The usual rule is that, where parties to an agreement reduced that agreement to writing and agreed or intended that the writing should be their agreement then external evidence of earlier oral discussions or written communications is excluded: see Chitty on Contracts[1], 13-109.

(e) The usual rule may be excluded if the Court concludes that the parties agreed and intended that there should be terms additional to those contained in the written agreement but, absent this, where an agreement has been reduced to writing then the rule will apply. But, in practice, where there is a complete written contract, it is likely to be difficult to conclude that the parties also intended that there be some further or different unwritten terms applicable: see Chitty on Contracts, 13-111.

[1] A reference to the 33rd Edition, here and in all other references.

(f) Only those facts or circumstances that existed at the time the contract was made and were known, or reasonably available to, both parties may be taken into consideration for the purposes of interpreting a contractual provision (Arnold v Britton [2015] AC 1619 at [21]).

(g) In the case of commercial agreements, a relevant consideration is whether the construction is consistent with a commercially sensible outcome. In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 771, Lord Steyn held:

> *"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties."*

(h) Construction is an iterative process, that involves checking the rival meanings against other provisions of the document and investigating the commercial consequences (Re Sigma Finance Ltd [2010] 1 All ER 571, per Lord Mance at [12]).

(i) It is important that due weight is given to the context in which words appear. In Wood v Capita Insurance Services Ltd [2017] AC 1173, Lord Hodge held (at [10]):

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."*

(j) The objective view taken of the intention of the parties means that a contract cannot be avoided simply because the subjective belief of one of the parties as to the effect of the agreement made differs from the view

that a reasonable person would take: see Chitty on Contracts, 13-058 and Smith v Hughes (1871) LR 6 QB 597.

28. In support of its proposed construction, the Opposing Respondents invoke the *contra proferentem* doctrine. In Tam Wing Cheun v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 BCLC 69 at 77, Lord Mustill put it thus:

> "*… The basis of the contra proferentem principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.*"

29. A similar principle arises pursuant to Section 69(1) of the Consumer Rights Act 2015 (at least in the usual situation in which a consumer contracts upon a trader's standard terms), which provides:

> "*if a term in a consumer contract, or any consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.*"

The Law – Estoppel

30. The conditions of a promissory estoppel are stated in Chitty on Contracts 4-087, (citing Robert Goff J in BP Exploration (Libya) v Hunt (No 2) [1979] 1 WLR 783 at 812ff) to be:

    (a) the parties must be in a pre-existing legal relationship;

    (b) one party must make an unequivocal representation to the other that it does not intend to rely on its strict legal rights;

    (c) the party making the representation must intend that the other party will rely on it and the other party must so rely upon it; and

    (d) it must be inequitable for the party making the representation to go back on its promise.

31. The only material distinction to be drawn between promissory estoppel and estoppel by contract is that in the latter the estoppel is a term (express or implied) of the agreement between the parties rather than acting as an independent

promise. The result of this is that the consideration for the promise is the contract itself and hence the representee does not need to show reliance on the promise. But it is of course essential to this type of estoppel that it arise as a term of the contract.

32. Where a promissory estoppel arises, its usual effect is that the promisor's ability to insist upon its strict legal rights is suspended; it does not ordinarily extinguish the promisor's legal rights unless the promisee's ability to perform its obligations has become impossible (Chitty on Contracts, 4-097 – 4-098). A promissory estoppel is defensive in nature and does not create new causes of action (Combe v Combe [1951] 2 KB 215).

33. In Blindley Heath Investments Ltd v Bass [2017] Ch 389 at [73], the Court of Appeal described the circumstances in which an estoppel by convention might arise and the effect of such an estoppel:

> *"Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see Snell's Equity, 33rd ed (2015), para 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so*."

The Applicants' stance

34. The Applicants describe their position as "*essentially neutral*", though the interpretations that they consider to be more likely are:

    (a) On Issue 1, that the 5% Fee is to be deducted before payment to the Investors. In this regard the Applicants point to the conflict between the interpretation put on clause 6.2.4 by the Second Respondent on behalf of

the Opposing Respondents and that given by Mr Hackett on behalf of the Applicant. They suggest that the interpretation of Mr Hackett is more probably correct, given that it avoids rendering clause 8.3 nugatory, as a clause simply stating that which is already established by the preceding terms.

(b) On Issue 2, that the more obvious interpretation is that "Loan Value" means the amount of the loan made under clause 14.15 of the Terms and Conditions.

(c) On Issue 3, the Applicants assert that there are two triggers for payment of the 5% Fee, namely that the loan term has elapsed and that the balance outstanding under the loan agreement has not been repaid, but also the right to enforce the security must have accrued in order for the asset to be realised.

(d) On Issue 4, the Applicants doubt that the requirements for an estoppel are made out but made no detailed submission on the point.

35. The Applicants are keen to defend themselves against the criticism that they have behaved inappropriately, in particular as to the manner in which they have treated Issue 2. As the First Applicant sets out at paragraph 32 of his first statement, the Applicants, until 28 July 2020, followed the practice that they understood the Company had followed previously of taking the 5% Fee calculated as a percentage of the amount realised from the Assets. However since then, and in order to protect their position, they have taken 5% of the higher of the amount realised or the original loan. They accept that the correct calculation can only be one or other of these amounts not the higher of the two.

36. The First Applicant describes this approach as being "*to protect our position as Joint Administrators…*" In contrast, the Opposing Respondents describe the actions of the Applicants at paragraph 24 of their skeleton argument as having caused the Company to move "*from being an agent acting in the best interests of the principal, to taking monies for the benefit of the Company's own Investors. This motive is quite frankly outrageous.*"

37. It forms no part of the matters that I have to determine on this Application to state whether the Applicants were in fact entitled to protect their position in this

respect. If that issue needs to be addressed to resolve other issues in due course, it will have to be considered then.

The Opposing Respondents' stance

38. The main issues taken by the Opposing Respondents relate to Issues 1, 2 and 4.

(a) On Issue 1, they contend that the 5% Fee is payable from the net proceeds of realisation of the security asset, in strict conformity with the "waterfall" created by clause 6.2.5, that is to say after repayment of the principal amount of the loan to the Investors, the direct costs of the Company in the setting up and administration of the loan and interest due to the Investors, in that order. The Opposing Respondents contend that this interpretation is consistent with how the Company stated that the proceeds of the realisation of assets would be dealt with, prior to the Administration.

(b) On Issue 2, they are happy to agree that the Administrators' original approach of calculating the 5% Fee as 5% of the amount realised from the security asset is correct. They criticise the Applicants for changing the approach, in particular taking the greater of 5% of the amount realised or the original loan amount, in circumstances where the Applicants accept that this is not the correct approach.

(c) On Issue 4, they assert that there were clearly assumed facts and/or representations made, upon which Investors relied in lending money to Borrowers via the Company's platform, to the effect that the 5% Fee would not be deducted until after capital and interest have been returned to the Investors, giving rise to an enforceable estoppel.

39. In terms of the sequence of deduction of sums from realised assets, the Opposing Respondents say that a distinction needs to be drawn between clause 6.2.4, which establishes that the 5% Fee is payable, and clause 6.2.5, which establishes the sequence of payment from the net proceeds of sale. This is apparent from:

(a) The use of the phrase "*net proceeds of sale*" in both clauses. It would be strange for that phrase to have different meanings in consecutive clauses, yet that would be the inevitable consequence if the Fourth Respondent's interpretation were to be preferred and the Court should prefer an interpretation that avoids such inconsistency.

(b) The use of the phrase "*administration fee*" in both clauses. Again, the Court should seek to avoid an interpretation that involves the same phrase being used inconsistently.

40. A further point might be taken in favour of the Opposing Respondents' preferred interpretation of clause 6.2.5(iv) as including within its ambit the 5% Fee. If in fact the 5% Fee were deducted prior to the 'waterfall' at clause 6.2.5, the result would be that the Company recovered the "direct costs" of enforcing the security after it had recovered a fee for doing so. Thus, if the shortfall on the security was so substantial that an insufficient sum was realised to pay the costs, the Company might be in the position of recovering a fee for enforcing the security, but not recovering its outgoings. Whilst it would have course be possible for the parties to have intended that result, it would be strange outcome for a party who has incurred both obligations to pay third parties and (at least potentially) internal costs, to recover the latter in preference to the former. It is far more usual for recovery of the sums paid to third parties to take preference for the simple reason that it may be possible to avoid or at least minimise an internal cost, whereas it is usually not possible to avoid a liability to a third party.

41. The Opposing Respondents place reliance upon various material produced by the Company as to how it dealt with defaulting borrowers:

(a) A document headed "Frequently Asked Questions" states, "*In the event of non-repayment (default) by the borrower, FundingSecure will auction the asset at the earliest opportunity. Proceeds from the sale will be used to settle Investors' capital, Investors' interest and then FundingSecure's fees (in that order). Any surplus is returned to the borrower. Interest and fees continue to accrue up until the asset is sold. In the event that the proceeds from the sale of the assets are insufficient to repay capital, then your capital will be lost.*"

(b) A newsletter from the Company dated October 2015 talks on its third page of "*New Terms and Conditions*". The document goes on to state:

"*Previously, the order of payout was as follows:*

1. Investors' capital

2. FundingSecure admin fees,

3. Investors' interest,

4. Any balance is returned to the borrower.

Now, the order of payout is

1. Investors' capital,

2. FundingSecure direct costs (direct costs include storage, valuation and referral fees)

3. Investors' interest,

4. FundingSecure admin fees not recovered in (2)

5. Any balance is returned to borrower."

(c) In an online forum for peer-to-peer lending, the Company on 21 September 2016 posted a message in response to a query from someone apparently called Mike:

"*Mikes* (sic) *- just to be clear on the order of payment in the event of a default – not specifically for this loan, but for all loans.*

In both the FAQ and the T&C it states:

Proceeds from the sale will be used to settle Investors capital, Investors interest and FundingSecure's fees (in that order). Any surplus is returned to the borrower. Interest and fees continue to accrue up until the asset is sold."

(d) In an email to Mr Hackett dated 5 December 2017, one Davide Bacci, a potential Investor, asked, amongst other things:

"*Do FS take their fees at the beginning and renewal points of a loan? We'd like to know a bit more about the fee structure (we don't need to know amounts) so we can understand their priority in repayment and whether they would be paid before or after capital and interest being due to lenders."*

Mr Hackett responded;

"*We take the legal fees and administration fees (form* (sic) *broker and others) at the start of the loan to cover basic costs. Unless there are*

changes to the contract we do not take additional fees aon (sic) *renewals. Our interest (along with Investors* (sic) *interest) is only paid at loan completion. In the event of the default funds recovered our client as follows:*

1. *Receiver's costs (No choice!)*
2. *Investors' Capital*
3. *Direct costs incurred by FundingSecure relating to the default process (rent, insurance etc)*
4. *Investors' Interest*
5. *FundingSecure Interest*
6. *FundingSecure Penalty interest*
7. *Any balance return to borrower."*

42. Throughout this material, the Company either made no reference at all to the 5% Fee or (depending on upon how one interprets the various references to "*admin fees*" or "*fees*") asserted that they were payable after repayment of both capital and interest to Investors. Thus the Opposing Respondents contend that the Company made clear representations as to the true interpretation of the contractual arrangements which is relevant background material to the interpretation of the contract as well as being capable of supporting an estoppel.

43. In respect of the evidence that the Company on occasions charged the 5% Fee in preference to distributing the funds realised on the enforcement of the security to Investors, the Opposing Respondents assert that:

(a) This happened only on a small number of occasions, as apparently demonstrated by a table created by Mr Martin Hounsell, an Investor, which purports to show that the 5% Fee was not charged in 379 cases of loans which went into default and in respect of which the Company undertook recovery steps;

(b) In so far as the figures produced by Mr Hackett show that there was sufficient buffer to allow full recovery both by the Investors and by the

Company itself, the figures do not show any preference because it made no difference in what order the monies were deducted; and

(c) On the very small number of occasions where the 5% Fee was fully recovered but the Investors were not fully reimbursed, the actions of the Company were unjustified.

44. Further, in so far as Mr Hackett says that the 5% Fee was waived so as to engender goodwill amongst Investors, since none of the Investors from whom the witness statements have been taken were informed of the supposed waiver, the Opposing Respondents contend that it is difficult to see how it can have engendered goodwill.

45. The Opposing Respondents argue that their proposed construction of the contract is the one more consistent with the intended structure of the enterprise. The Company, in a document headed 'Risk Warnings – Our Approach" (which appears to form part of the FAQs referred to above), stated:

"*Capital returns are not guaranteed, neither of forecast interest returns, which may also be lower than expected.*

FSL primarily manages this capital risk by ensuring all assets are professionally valued and restricting the amount lent to a typical maximum range of 70% to 75% of the value (LTV). This means that if a loan does default, FSL have provisioned in the loan arrangement a minimum of 25% buffer between what has been lent on the market value of the security…"

However, if the Fourth Respondent's construction is to be preferred, the Company would be rewarded ahead of the Investors in circumstances where the valuation of the security provided an insufficient buffer. The Opposing Respondents contend that it makes more commercial sense that the Company bear the risk of the security buffer being inadequate, since it was being rewarded for checking that the offer was adequate. If that is the correct construction, the Company would not be undertaking its stated role of managing the capital risk.

46. Indeed, Mr Mundy, in his first statement, gives hearsay evidence that other Investors were told by Mr Hackett that the Company recorded the 5% Fee as *"effectively a penalty against defaulting Borrowers…"* It appears that no

suggestion was made that the 5% Fee in fact potentially worked to the disadvantage of the Investors.

47. The Opposing Respondents invoke the *contra proferentem* principle. The Terms and Conditions was a document drawn up by the Company. It should be taken to have protected its own position through those terms and accordingly any ambiguity should be resolved in favour of the Investors. This would also accord with the position under the Consumer Rights Act 2015 (if it had applied to this situation) and would be consistent with a fiduciary duty on the part of the Company not to place itself in a position where its duty to maximise the recovery for the Investors was in conflict with its own interest to maximise the amount recovered by the 5% Fee.

48. The Opposing Respondents develop this argument by pointing to the Company's obligation under the Conduct of Business Sourcebook ("COBS") of the FCA Handbook which states at paragraph 2.1.1(d) that "*a firm must provide appropriate information in a comprehensible form to a client about … costs and associated charges.*" Accordingly, if the true interpretation of the contract is that the 5% Fee is paid first, this would mean that the Company was in effect charging a fee to Investors, though the back door of having a preference over Investors when there was a shortfall on realisation of the security. Such a fee could only be charged in accordance with COBS if its terms had been comprehensibly communicated to the Investors. Thus, any ambiguity about the interpretation should be resolved in favour of the Investors so as to give effect to the protection contained in COBS.

49. The Opposing Respondents also point to the Company's duty, as agent for the Investors, not to "*place himself in a position where his duty and his interest may conflict"* per Millett LJ in Bristol and West Building Society v Mothew [1998] Ch 1 at page 18B). The court should prefer an interpretation that does not put the Company in a position of conflict where its interest in maximising the recovery of sums pursuant to the 5% Fee runs directly contrary to its duty to maximise the return for Investors.

50. On the issue of estoppel, the Opposing Respondents point to the various material described at paragraph 41 above and assert that this contains clear representations,

either express or implied, that the 5% Fee would be charged only after the Investors were repaid. They assert that, once the representations are made out, the Court can readily conclude reliance was placed on them by Investors, having regard to the express terms of the Second Respondent's evidence, especially paragraph 54 of his first statement, and the inference to be drawn that, when a company inviting investment makes representations about how that investment is to operate, and in particular how charges are to be applied, Investors will rely on such statements in deciding whether to enter into the investment.

The Fourth Respondent's stance

51. Like the Applicants, the Fourth Respondent contends on Issue 1 that the 5% Fee falls to be deducted from the net proceeds of sale of a security asset before any other distribution is made. On Issue 2, he contends that the amount of the fee should be calculated by reference to the original amount of the loan rather than to the sum realised on the sale of the asset. On Issue 3, he contends that the 5% Fee applies to any loan for which the term has elapsed without the loan being repaid, albeit that the fee can only be deducted where there has been a sale of the asset. Finally, on Issue 4, he denies that an estoppel arises.

52. In support of his preferred interpretation on Issue 1, the Fourth Respondent draws attention to the sequence of events set out in clause 6.2 of the Terms and Conditions. The early paragraphs of the clause provide for the realisation of the asset, then clause 6.2.4 provides for the deduction of the 5% Fee. Only after that does the 'waterfall' of clause 6.2.5 apply.

53. Whilst it is acknowledged that clause 6.2.4 describes the 5% Fee as an 'administration fee', the same phrase as is used in clause 6.2.5(iv), the Fourth Respondent contends that, on its true interpretation, the contract is using that phrase differently in the two clauses. This is consistent both with the sequence of events set out in clause 6.2, as identified above, and the various uses of the phrase 'administration fee' in the contract. As is identified in paragraph 22 of Mr Shaw's skeleton argument, uses of the phrase within the Terms and Condition include:

(a) At clause 4.3, to describe a discretionary fee charged to Investors who require a paper copy of their annual tax statement;

(b) At clause 6.2.4, to describe the fee payable to the Company on realisation of an asset;

(c) At clause 6.2.5(iv), to describe fees payable to the Company that are not direct costs within clause 6.2.5(ii), the implication being that some of the direct costs are themselves administration fees, a different meaning to that in the previous subparagraph; and

(d) At clause 8.1, to describe a monthly fee charged by the Company to borrowers. (As noted above, the phrase seems to be used in this same sense within the Master Facility Agreement.)

54. Thus, the Fourth Respondent argues that the use of the phrase "administration fee" in clause 6.2.5(iv) cannot be taken as an indication that it is intended to include the fee payable under clause 6.2.4.

55. As to the suggestion that his preferred construction would render the use of the phrase "net proceeds of sale" in clause 6.2.4 inconsistent with its use in clause 6.2.5 (because, in the first case, the "net proceeds of sale" would be calculated before deduction of the 5% Fee, whereas, in the second, it would be calculated after deduction of that fee), the Fourth Respondent states that the reference to deducting the 5% Fee under clause 6.2.4 would be superfluous if the phrase "net proceeds of sale" has the same meaning in both clauses, since it would in any event fall to be deducted under clause 6.2.5(iv). The apparent inconsistency is to be preferred to an interpretation that renders the clause superfluous.

56. As to the suggestion that his interpretation is inconsistent with clause 8.3 of the Terms and Conditions (which asserts that the Company does not charge any fee or commission to the Investors), the Fourth Respondent says that, on the true interpretation that he proposes, the 5% Fee is being charged to the Borrower not the Investor. He draws attention to the terms of clause 6.3 which deals with the situation where the asset does not sell at auction. In those circumstances, the Borrower's debt is cancelled as if the asset had been sold at the reserve price and legal title passes to the Company which may sell the asset privately or at subsequent auction and must apply the net proceeds of sale in a specified "waterfall." There is however no reference in this procedure to the payment of a 5% Fee which, the Fourth Respondent says, shows that the fee is being charged

not to the Investors but to the Borrower. The Fourth Respondent says that this is also consistent with clause 12.3 of the Master Facility Agreement, which provides for the Borrower to pay the costs and expenses of the Company in enforcing its rights.

57. The Fourth Respondent contends that this interpretation is also consistent with commercial common sense. If it were otherwise, the obvious risk of a shortfall on the forced sale of a security asset would lead to a position where the Company only recovered its direct costs for enforcement, meaning that its provision of services for enforcing security went unrecompensed.

58. Within his first witness statement, the Fourth Respondent acknowledges that the 5% Fee was not always charged.

    (a) At paragraph 24 he states, "*The 5% fee was waived particularly when, although technically in default, in that a loan had not been repaid on the due date, the Company had yet to start to enforce its security*."

    (b) At paragraph 25 he states, "*Further, the Company was well aware that repeat business depended on the goodwill of Investors and, to a lesser extent Borrowers. For this reason, although quite entitled to stand on its legal rights, it was not necessarily sensible for the Company always to do so. The right to the 5% fee was therefore frequently waived, whether in whole or part. But, equally, it was also enforced when this was thought appropriate, particularly during my involvement with the business as we needed the 5% to fund recoveries...*"

59. However, the Fourth Respondent relies upon paragraph 12 of Mr Hackett's statement in support of the contention that the 5% Fee was sometimes charged. The bundle contains a table setting out nine loans where it is said that the 5% Fee was charged, this being 20% of the loans which defaulted in this period. Of these however there was no shortfall on the realisation of the asset in four cases and only in three of the remaining six loans do the figures suggest that the 5% Fee was recovered in preference to interest due to Investors. On their face, these figures suggest that in fact it was rare for the 5% Fee to be charged.

60. Turning to the issue of estoppel, in his skeleton argument, the Fourth Respondent asserts that the Opposing Respondents have not identified any clear representation

that the additional administration fee would not be applied by the Company in priority to sums due to Investors, nor do they identify any reliance on such a statement. In oral submissions, the following additional points were made:

(a) The Opposing Respondents have failed to identify any evidence of an unequivocal representation or any reliance upon it. In particular:

i. None of the FAQs, the newsletter of October 2015 or the Company's posting of 21 September 2016 make any representation that no enforcement costs are payable.

ii. In any event, there is no evidence that Mr Mundy or any other identified Investor relied upon any of these alleged representations in entering into loan agreements.

iii. There is no evidence that the email exchange between Mr Hackett and Mr Bacci of 5 December 2017 was relied on by Mr Bacci in entering into a loan or that the contents were known to and relied on by any other Investor.

(b) In so far as the claim is based on promissory estoppel, the Opposing Respondents needs to show that the parties were in a pre-existing relationship. However, there was no such relationship prior to the entering into of the Loan Agreements.

(c) In so far as the claims is put as an estoppel by contract, the Opposing Respondents have failed to show how the alleged representations are terms of any relevant contract.

(d) In so far as the claim is put on the basis of an estoppel by convention, the evidence before the court from Mr Hackett is he believed the 5% Fee was deductible, the failure consistently to enforce it being a waiver of its rights by the Company. Unless the court concluded (without the benefit of cross examination) that Mr Hackett was not telling the truth, there is no basis for a finding of a common understanding as to how the Loan Agreements were to operate.

Discussion

Issue 1

61. The question as to the order of payment out of the net proceeds of sale is the central issue in this application. The parties' respective arguments as to the wording of the Terms and Conditions provide limited assistance in determining this issue.

    (a) On the one hand, the fact that the deduction of the 5% Fee is dealt with at clause 6.2.4, before the "waterfall" of clause 6.2.5, might be taken to suggest an intention that the 5% Fee be paid before the distribution under clause 6.2.5, so that the Fourth Respondent's interpretation is to be preferred.

    (b) On the other hand, that outcome would be inconsistent with:

        i. The use of the phrase "net proceeds of sale" in two consecutive clauses, 6.2.4 and 6.2.5, because if the 5% fee is deducted first under clause 6.2.4, the meaning of "proceeds of sale" in clause 6.2.5 has to differ from that in clause 6.2.5;

        ii. The reference in clause 6.2.5 to the deduction of administration fees (which on the more natural natural reading means more than one fee including the 5% Fee, itself having been described as an "administration fee") after repayment of the Investors; and

        iii. The later statement in clause 8.3 that the Investors are not charging fees or commissions, which in effect would be incorrect if the payment of the 5% Fee took effect before repayment of Investors, at least in those cases where the amount realised from the security was inadequate to meet the total of the 5% Fee, the capital investment and any interest due to the Investors.

62. In my judgment, the fact that the reference to the 5% Fee comes before the application of the "waterfall" is not of significant assistance in the true construction of this contract. Whilst it might have been clearer to establish the circumstances in which the 5% Fee is payable within the terms of Clause 6.2.5, the fact that it is set out other than in that clause is not an unusual style of

contractual drafting. Further, I see nothing particular to be drawn from the fact that it is referred to before rather than after the "waterfall".

63. The most significant part of the contractual language used is the reference to "net proceeds of sale" within both clauses 6.2.4 and 6.2.5. Whilst this could in theory mean something different in the two clauses, one would have expected anyone who intended the meaning to be different to have sought to change the wording in the clauses. This is most particularly so where the party who seeks to argue that the phrase has two different meaning is the party who proposed the terms on which the parties contracted. This interpretation is supported by the other two points made at paragraph 61(b) above. Subject to looking at other material, this leads me to incline in favour of the Opposing Respondent's interpretation.

64. There are three other aspects of the material before the court that are relied on.

(a) First, the Opposing Respondents' seek to invoke the material provided by the Company in clarification of the scheme, as referred to at paragraphs 41 and 42 above which they say is consistent with their argument that the 5% Fee is payable only after Investors have been recompensed. However in my judgment, these arguments simply amount to a rerun of the argument about the terms of the contract itself. If the Fourth Respondents' proposed interpretation of the natural meaning of the words of the contract were correct, there would be nothing within this material to point to some different meaning. But what was said once the scheme was up and running and loans had been entered into cannot amount to background material as to what the contract meant at the time that the parties entered the loans unless one is concerned with a loan entered into after the scheme has been operated in this manner. That however creates the further difficulty that the "background material" that may legitimately be relied on is liable to vary depending upon when any particular loan was taken out (which may have been before any of the statements referred to at paragraphs 41 and 422 were made, and hence the further implication that the true construction of the same clause used in a series of contracts might be found to have varied with the passage of time). In my judgment, this material does not assist in the interpretation of the contract. Obviously this

material has some relevance to the issue of estoppel issue, but that is a separate matter dealt with below.

(b) Second, both parties draw attention to how the scheme was in fact operated. The evidence in this regard is relatively thin. It would appear that, on at least some occasions, the Company operated the scheme in the manner contended for by the Fourth Respondent, but on other occasions it did not. I do not see that this adds anything to the argument and it raises the same problem as that relating to background material referred to in the previous sub-paragraph, namely that it might lead to a conclusion that the true meaning of the contract varied from time to time.

(c) Third, both parties rely on the commercial sense of the situation. As is commonly the case where the parties appeal to commercial common sense, their competing arguments each have an attraction from their own point of view. Of course the Fourth Respondent, as a major Investor in the Company, would wish to be paid for enforcing the security and therefore would want the 5% Fee to be paid before repayment of the Investors, so as to avoid the risk of any shortfall harming the Company's interests. Equally, the Opposing Respondents would wish to be paid first (again to avoid any shortfall biting on them). To this extent, it does not seem to me that commercial common sense points one way or the other.

65. However, the fact that the Company was responsible for valuing the security does provide some support for the Opposing Respondents' proposed construction, since that construction creates an incentive in the Company to value the security accurately, so as to minimise the risk of shortfall. The Fourth Respondent's preferred construction would reduce the Company's incentive to exercise care in the valuation, since it would virtually guarantee payment of the 5% Fee, even where the valuation was woefully inadequate.

66. Indeed, the Opposing Respondents' interpretation leads to a scheme for remuneration which sensibly addresses the risks to both Company and Investors by prioritising the Investors' return of capital over all recovery by the Company, but the Company's recovery of direct expenses over the Investors' recovery of

interest. This avoids the odd (and commercially unattractive) consequence that the Company recovers the 5% Fee in preference to its direct costs.

67. Of course, the Company had other incentives to value the security properly, most obviously the need to ensure that it had a reputation for offering lending that was as attractive as possible to Investors. Thus, it seems to me that it cannot be said that the Fourth Respondent's proposed construction was so contrary to commercial common sense as to be rejected as inconceivable, but overall the Opposing Respondents' construction fits better with the commercial reality of the situation, as reflected by the parties' respective abilities to assess the risks involved in their dealings.

68. I conclude that both the natural meaning of the words used in the context in which they appear and the commercial common sense of the situation favour the Opposing Respondents' interpretation that what the parties meant by the words used in the contract is that the 5% Fee should be payable from the proceeds of realisation of an asset only after deduction of the sums due to the Investors.

69. In coming to this conclusion, I have not had to invoke the principle of construction *contra proferentem*, save to the limited extent that it is relevant to the point at paragraph 62 above, though if anything that principle would more generally favour the conclusion reached above, since it is in effect the Company which proposed the terms of the contract and whose creditors' interests would be better favoured by the Fourth Respondent's argument. I am not convinced that the Consumer Rights Act 2005 applies to this dealing, but in any event that would add nothing further to the *contra proferentem* argument.

70. Equally, I am not persuaded that an analysis of the relationship based upon fiduciary duties would assist. The existence and nature of such duties would be established by the contract. If on its true construction, the contract creates a situation in which the Company was paid the 5% Fee in preference to the Investors where there was a shortfall on realisation of the security, it does not seem to me that Court should contemplate invoking a fiduciary duty which would be inconsistent with that construction.

Issue 2

71. Once Issue 1 has been determined, Issue 2 loses significance at least for some of the parties before the Court. Since, on my findings, the Opposing Respondents are entitled to recover both the capital sum and any outstanding interest in preference to the 5% Fee, it becomes of no relevance to them which figure it is applied to, be it the original amount of the loan or the amount realised on enforcing the security. Indeed, the Opposing Respondents' complaint about Issue 2 was less about which of the two alternative interpretations be preferred and more that whichever was preferred should be applied consistently.

72. The clue to the correct interpretation of the phrase "loan value" in clause 6.2.4 lies in the use of the word "loan". The value is not stated to be a reference to the amount realised on the security but rather the loan. In my judgment, that only makes sense as a reference to the amount of the loan. Since it is inherent in this scheme that the loan is not repaid by instalments but simply as a single sum at the end of the term, no issue arises as to whether that is reference to the amount outstanding at any particular time, rather than the original advance.

Issue 3

73. As I have indicated above, there is in the event no dispute between the parties before the court on this issue. The 5% Fee is only repayable from the sum received on realisation of the asset, once the Borrower has defaulted and the assets has been sold.

Issue 4

74. The remaining issue between the parties is that as to the alleged estoppel. In light of my finding on issue 1, this becomes academic, since the Opposing Respondents do not need to rely on any estoppel to establish their case. However, had they needed to do so, I would not have found an estoppel to be made out, whether contractual, promissory or by convention.

75. In so far as the alleged estoppel relies upon the material referred to at paragraph 41, some of the material, specifically items (a), (b) and (d), do amount to representations as to how the fee structure is to work. However, the Opposing Respondents fail to show what, if any, of this material was relied upon by particular Investors, whether the Opposing Respondents or others who have not

been made parties to the action. Whilst in some circumstances it may be possible to draw inferences as to reliance on material such as this, in my judgment the Opposing Respondents fail to make out such a case here. In particular, in so far as Mr Mundy himself is concerned, whilst there is a statement of reliance at paragraphs 53 and 54 of his first statement, this is said to be reliance in large part on the contractual documentation itself, not on other representations. In so far as there is reliance on either how the Company operated the scheme or the representations that the Company is said to have made, Mr Mundy fails to identify how he was aware of how the Company operated the scheme, or which representations he (rather than other Investors) saw. Indeed, the reliance is said to be that of he and other Investors generally, without distinguishing what he relied on and what others relied on. The lack of detail on what material Mr Mundy himself saw and relied on renders his evidence unreliable on the issue.

76. In any event, there has been no clear analysis as to how the alleged estoppel(s) are said to have arisen and operated. Had the Opposing Respondents been able to show unequivocal representations and unequivocal reliance, this might have resolved the problem. But absent evidence of those, it is simply not possible to form a coherent view on their operation.

Conclusion

77. For the reasons identified above, I conclude that, on their true construction, the Loan Agreements operate so that payment of the 5% Fee arises where a Borrower has defaulted and the security asset has been sold; that it is payable after repayment of the Investors; and that the fee is to be calculated as 5% of the original amount of the relevant loan.