Neutral Citation Number: [2022] EWHC 848 (Ch)

Case No: D90LV070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
BUSINESS LIST (Ch D)

Liverpool District Registry
Liverpool Civil and Family Courts
35 Vernon Street
Liverpool L2 2BX

Date: Friday 8 April 2022

Before:

Ms Lesley Anderson QC sitting as a Deputy Judge of the High Court

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Between:

ARTHISTORY LTD

Claimant

and

(1) MR ALAN ERIC CAMPBELL
(2) MRS MAUREEN CAMPBELL

Defendants

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Nicholas Jackson (instructed by MSB Solicitors Ltd, for the Claimant)

The Defendants (were not represented and did not appear)

Hearing dates: 5, 6 and 8 April 2022

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JUDGMENT

Introduction

1. Mr and Mrs Campbell, the Defendants, are the registered owners of the freehold property situated at 98 New Cut Lane, Southport which is registered at HM Land Registry with title number LA580469 ("the Property"). By an agreement made by deed dated 9 September 2015, the Defendants granted an option to the Claimant to acquire the Property ("the Option Agreement"). By its Part 8 Claim Form dated 27 November 2017, the Claimants seek specific performance of the Option Agreement and/or for an order that the Defendants be compelled to execute a transfer in Land Registry Form TR1 ("the Transfer") to give effect to the option thereby granted.
2. The Claimant was represented by Nicholas Jackson of Counsel. The Defendants act as litigants in person. A pre-trial review was held on Monday 4 May 2020. HHJ Hodge QC recorded at Recital (4) that the case was presently ready for trial but that the case was unsuitable for trial remotely and that as the Defendants are elderly and vulnerable persons who could not reasonably be expected then to attend court in person each day of the three-day trial due to the coronavirus pandemic, the matter should be adjourned.
3. On Monday 4 April 2022, the day listed prior to commencement of the trial, I heard and dismissed an informal application by Mr Campbell (who attended Court in person to make oral submissions) to adjourn the trial. I dismissed the application for the reasons set out in my separate judgment. However, despite being contacted by Court staff in the morning of Tuesday 5 April 2022 and being given firm encouragement to attend, Mr and Mrs Campbell failed to attend the trial, as Mr Campbell had indicated would be his position following the rejection of his application to adjourn the trial. At the commencement of the trial, I therefore considered whether it was appropriate for me to continue with the trial in the absence of the Defendants. For the reasons given in the short judgment delivered by me at about 1100 that morning, I concluded that it was appropriate for me to continue with the trial.
4. I have been assisted by written skeleton arguments from both sides, although Mr Campbell was not able to complete his before the commencement of the trial, and by the careful oral submissions on behalf of the Claimant. At my request, Mr Jackson encapsulated in a short, written submission certain comparative calculations which he had referred to in oral closing.

The Suite of Agreements

5. The Option Agreement was part of a suite of written agreements all dated 9 September 2015 made between the Claimant and the Defendants. I am satisfied that the agreements are related to one another in that they are together intended to give effect to the arrangements between the parties.

6. First, a Facility Agreement was made between the Defendants (1) and the Claimant (2) ("the Facility Agreement"). By clause 2.1 and paragraph 1.3 of Schedule 4, the Claimant as Lender agreed to make a facility of £123,215.18 to the Defendants. Although clause 2.1 purports to refer to the purpose of the loan as being that set out in paragraph 1.4 of Schedule 4, no such purpose is stated (whether at that paragraph or elsewhere). Clause 2.2 provides for the loan to be repaid by the repayment date which is specified by paragraph 1.5 of Schedule 4 to mean the date which is 36 calendar months from the date of the Facility Agreement. If the loan was not repaid in full together with interest (at the Initial Interest Rate of 28% per annum from Drawdown Date until Repayment Date) and fees, clauses 2.2 and 6.3 provide for Default Interest (at an additional 2.5% per month or part thereof) to be paid. By clause 3.1 and Schedule 1, the Claimant was entitled to call for security over the Property in the form of a legal charge in terms satisfactory to it. Clause 6.4 and paragraph 1.1 of Schedule 4 also provides for an Arrangement Fee equivalent to 15% of the Facility and paragraph 1.2 of Schedule 4 provides for an Exit Fee equivalent to 3% of the Facility. Paragraph 1.9 of Schedule 4 provides that the Redemption Sum was the total of the Costs (as defined in clause 1.1), the Initial Interest, the Exit Fee, the Default Interest (if any) and the Facility. Clause 10 of the Facility Agreement specified various events of default including at clause 10.17 if the Borrower repudiated or evidenced any intention to repudiate a Finance Document (as defined in clause 1.1).

7. Secondly, a Legal Charge was duly executed over the Property ("the Legal Charge"). By clause 2.1, the Defendants covenanted in "all monies" form to pay on demand the Secured Liabilities.

8. Thirdly, the Option Agreement was entered into between the Defendants as Seller and the Claimant as Buyer. That provides at clause 3.1 for the grant of the option in consideration of payment of the Option Fee of £1.00 and at clause 3.2 for the Option to lapse if not validly exercised before the end of the Option Period (defined by clause 1 to mean the date which is 36 calendar months from the date of the Option Agreement). Clause 5.1 provides that the Option is to be exercised by the Buyer giving written

notice and clause 5.2 provides that if the Option is exercised, the Seller and the Buyer became bound to complete the sale and purchase of the Property on the Completion Date (being the date that is 28 Working Days after exercise of the Option or such other date agreed by the parties). Clause 5.3 provides that upon the exercise of the Option, the Defendants would forthwith instruct their solicitors to act on their behalves in the sale of the Property. Although it purports to be a definition of the Price, in clause 1 the Price is defined as "*the consideration for the price payable for the Property is the sum which represents the release of the Buyer of all monies due and outstanding under the terms of the Facility Agreement and Legal Charge of even date and in consideration of the terms of clause 16*". Under the general heading "Enhancement of the Property", by clause 16.1 the Buyer agrees and the Seller grants consent to the Buyer to take steps to enhance the value of the Property by seeking planning permission for the residential development of the land situated at the Property and/or to explore other possible options for the land at the Property. Clause 16.2 provides that in the event that any uplift in value of the Property is achieved by virtue of such enhancements made by the Buyer the uplift in value shall be shared equally by the Seller and the Buyer. Clause 16.2 then goes on to make specific provision if such uplift is calculated prior to the option having been exercised.

9. Schedule 1 to the Option Agreement provides that on valid exercise of the Option by the Buyer: "*The sale of the Property by the Seller shall be subject to the continued occupation of the Seller pursuant to an agreed shorthold tenancy agreement in similar terms to the assured shorthold agreement annexed to this Option Agreement and signed by the parties at a rental of 1% of principal monies loaned by the Buyer to the Seller and to include any further advances made by the Buyer to the Seller"*.

10. Fourthly, there is a Buy Back Option Agreement ("the Buy Back Option"). That largely mirrors the terms of the Option Agreement save that: (a) the Claimant is the Seller and the Buyer is the Defendant and (b) the Price is defined to mean an amount equal to the amounts outstanding under the terms of the Facility Agreement and Legal Charge together with any further advances and certain additions to the Price depending on when the Option is exercised. For example, if the Option is exercised in the first year of the Option Period, the Price was to be payable together with 20% of the Price. If the Option was exercised in the second year of the Option Period, the Price was payable together with an amount equal to a further 5% compounded sum of the Price and the additional 20% referred to above. If the Option was exercised in the third year

of the Option Period, the Price was payable together with an amount equal to a further 5% compounded sum of the Price and the additional 20% and 5% referred to above. The draft Transfer annexed at Schedule 1 contains a number of additional terms including at 11.2 provision for an overage to be paid by the Defendants (as Transferee) to the Claimant (as Transferor) in the event that the Property was disposed of with the benefit of planning permission. The Overage Payment was to be 50% of the difference in Market Value with or without the permission.

11. Finally, in anticipation of the exercise by the Claimant of the Option, on 9 September 2015, the Defendants executed two transfers in Land Registry Form TR1 in relation to the Property which were delivered to the Claimant's solicitor to be held in escrow pending the exercise of the Option ("the Transfer") and the Buy-Back Option ("the Buy-Back Transfer"). The draft Transfers contain a number of additional terms including at 11.2 provision for an overage to be paid by the Claimant (as Transferee) to the Defendants (as Transferor) in the event that the Property was disposed of with the benefit of planning permission. The Overage Payment was to be 50% of the difference in Market Value with or without the permission.
12. On 12 October 2015, the Claimant exercised the Option under the Option Agreement, which was within the first year of the Option Period.

The Issues

13. The Claimant's case is that, notwithstanding the exercise by it of the Option in the Option Agreement, the Defendants have failed to carry out the steps to enable the transfer of the Property to take place. It complains that the Defendants have failed, in breach of clause 5.3 and/or an implied term of the Option Agreement, to instruct a solicitor to act on their behalves or to enable their identities to be verified for the purpose of rule 17 of the Land Registration Rules 2003 and have therefore prevented the Transfer being registered. They seek specific performance of the Defendants' obligations to enable the completion of the disposition of the Property by registration of the Transfer.
14. The Defendants' pleaded position is set out in a document entitled "The Defendants Emergency Defence Needing to Act for Themselves" dated 16 February 2018 and verified by a statement of truth ("the Defence") and in a response dated 26 March 2018 by Mr Campbell to the Claimant's Request for Further Information.

15. The Defendants' position is that the various agreement and deeds are not enforceable. Although it is not in dispute that the Claimant made the loan contemplated by the Facility Agreement to them and that it has not been repaid, they say that there was no discussion about an option to purchase and that they signed the documents in blank and on trust and under pressure, in order to stop the Property being repossessed at 3pm that day by their existing mortgagee Redstone Mortgages Limited ("Redstone"). They contend that although they challenged some of the terms in the draft documents at the time of execution, Mr O'Hare or his solicitor told them that they would be adjusted in a side letter which has never been provided and that he set out to defraud them (and the prior charge holders) by taking the Property.
16. They rely amongst other things on the provisions of the Financial Services & Markets Act 2000 ("FSMA"), the Financial Services & Markets Act 2000 (Regulated Activities) Order (SI 2001/544) ("the RAO") and the Consumer Credit Act 1974, as amended ("CCA").
17. I will return to this when considering the relevant legal principles but one of the issues for me to determine is whether the Facility Agreement and Legal Charge constitute a regulated mortgage contract as defined by article 61 of RAO. The Claimant contends that it did not because the residential use comprised less than 40% of the Property. The Defendants' position is that 62% of the Property was occupied domestically.
18. If the Facility Agreement and Legal Charge do constitute a regulated mortgage contract, the issue then arises as to whether the Claimant entered those arrangements with the Defendants "*by way of business"* such that they offended the general prohibition under sections 19 and 22 of FSMA. The Claimant's case is that it was not in the business of entering into regulated contracts as a lender and that this was a "one-off" transaction at the request of the Defendants although it admits that it had previously carried on the business of entering into hire purchase agreements in connection with the sale of motor vehicles. It is common ground that a consumer credit licence to enter into hire purchase agreements would not permit the Claimant to enter into regulated mortgage transactions.
19. Finally, on the Defendants' case, an issue arises as to whether the arrangements constituted an unfair relationship under s.140A of the CCA. On that issue, Counsel for the Claimant properly accepts that the burden of proof is on the Claimant.
20. For the Claimant, it is then contended that even if the Defendants are right that the Facility Agreement and Legal Charge are unenforceable for some reason, the Option

Agreement and the execution of the Transfer are not tainted and that, in circumstances where it was paid off by the Claimant, the Claimant is entitled to be subrogated to the rights of Redstone, as prior mortgagee.

The Evidence

21. I heard oral evidence on behalf of the Claimant from Kevin O'Hare, its director and sole shareholder. His witness statements are dated 10 January 2020 and 13 February 2020 (although the latter is entitled "Rejoinder"). In the absence of any attendance by or on behalf of the Defendants, I asked him a series of questions to elicit his answers to questions which might have been put to him if they had been in Court and represented. I am satisfied overall that Mr O'Hare was seeking to assist the Court and was generally truthful although there were occasions on which I felt he was downplaying his commercial experience and acumen and his understanding of the meaning and effect of the suite of documents. Although he was initially somewhat reluctant to accept that the two transcripts to which I refer below accurately reflected what had been said in the call and meeting, I think that was probably because he was generally suspicious because they had been recorded secretly and because he had not looked at them again in the run up to the trial. I gave him the opportunity to look at them again overnight and he accepted that the transcript of the meeting at least was accurate. Save where otherwise indicated, I accept his evidence.
22. Notwithstanding their failure to attend the trial, I have read carefully and taken fully into account the written evidence from each Defendant in their witness statements dated 22 January 2020. Realistically, in view of the significance of the matters at issue in the trial for them, Mr Jackson did not contend otherwise. However, unless it is uncontroversial or reflected in documents, I have to be very cautious as to the weight I attach to their evidence in circumstances where it has not been tested in cross-examination. The short witness statement from Mandy Conway, which had been adduced on behalf of the Defendants, was agreed. She keeps her pony at the Livery Yard at the Property and has done so for 25 years and her evidence goes to the use to which the Property was being put in September 2015.
23. Part of the documentary evidence put before me by Mr and Mrs Campbell is a written transcript of a fairly short telephone call which took place between Mr O'Hare and Mr Campbell and a much longer transcript made of a crucial meeting which took place on 9 September 2015 between Neil Kelly, a solicitor at MSB Solicitors Ltd ("MSB) who

was by then acting on behalf of the Claimant, Mr Campbell, Mrs Campbell and Mr O'Hare. I had initially understood that the telephone call had taken place on Tuesday 8 September 2015, the night before the meeting, but I accept Mr Jackson's submission that it was most likely on Thursday 3 September 2015. The transcript of the telephone call and meeting were made by Cater Walsh Reporting from secret recordings on Mrs Campbell's mobile phone. The transcript of the meeting runs to 42 pages and it is not possible, without significantly lengthening this judgment, to do more than pick out some key aspects. However, I am satisfied that, aside from some missing words, each transcript is an accurate account of what was said in the call and meeting.

24. I have also received expert evidence in the form of a written report from Jonathan Kersh (BSc (Hons) MRICS and RICS Registered Valuer of Sutton Kersh Chartered Surveyors ("Mr Kersh"), who was appointed as the single joint expert by an order of District Judge Johnson made on 17 April 2018 and sealed on 30 April 2018. Mr Kersh has experience over 27 years in commercial and residential general practice surveying work including valuations and appraisals, acting as an expert witness, the buying and selling of property and residential and commercial property portfolio management including across Merseyside and Lancashire.

25. According to that Order, the question for Mr Kersh was:
"*whether, as at 9th September 2015, less than 40% of the registered land comprised in title number LA580469 either was used or was intended to be used for domestic purposes within the meaning of articles 60D(2) and/or 61(3)(iii) of the Regulated Activities Order (SI 2001/544)"*.

26. Mr Kersh's report is dated 15 September 2019 ("the Report"). District Judge Johnson's Order at paragraph 8 provided that the parties had the opportunity to address questions to the single joint expert in relation to his report and for them to be answered by a specified date. In the event, neither party took up that opportunity.

27. At Recital (5) of the Order made by HHJ Hodge QC at the pre-trial review on 4 May 2020, he noted that there was no direction for the single joint expert surveyor to attend the trial to give evidence and that the Court did not consider that his oral evidence was reasonably required to resolve the proceedings. In accordance with that Order, Mr Kersh has not attended the trial.

The Facts

28. The Property is situated in a semi-rural location approximately 3.5 miles south-east of Southport town centre and comprises a mixed use holding. There is housing on New Cut Lane immediately surrounding the Property but much of the surrounding area consists of fields and farmland which are within West Lancashire County Council's designated green belt.

29. Although it has suffered some settlement, according to the Defence at [17], the value of the Property with planning consent for 26/28 new homes is between £1,500,000 and £1,835,000 and the house alone is valued at £385,000. Mr and Mrs Campbell were keen to unlock the development potential of the Property. In Mr Campbell's words, they believed they were "sat on a fortune".

30. It is common ground that Mr O'Hare and Mr Campbell first met in or about 2011 when Mr O'Hare sold Mr Campbell a taxicab and Sefton Council licence plate for the sum of £7,800 which was paid in weekly instalments over 12 months by way of an informal credit arrangement. Over the following four years or so, a further six transactions were carried out between them (or with one of Mr O'Hare's companies) with a total value of £50,830 – five were in relation to the sale and purchase of taxis and a further one was in relation to a motor home for the Defendants' personal use. At this time, Mr O'Hare (but not the Claimant) was licensed to carry out consumer credit transactions under the CCA.

31. Although they disagree on what was the ultimate outcome, the evidence is that after the transactions in September 2015 which are the subject of the proceedings before me, they fell out and proceedings took place in the Liverpool County Court. Although Mr Campbell denies that he and Mr O'Hare became friendly and describes the relationship as being "strictly business", it seems to me that the relationship was an informal one with several meetings taking place in a local pub.

32. At that time, the Property was subject to a mortgage to Redstone Mortgages Limited ("Redstone") and to two further charges or charging orders. According to a redemption statement dated 7 September 2015, the amount required to redeem the Redstone account on 30 September 2015 was £123,395.96. According to the Office Copies for the Property, David Rawlinson and Lesley Heseltine c/o Cuff Roberts, were the proprietors of a registered charge dated 31 July 2004, and I have seen evidence that Cuff Roberts was prepared to accept £19,000 in settlement of the amounts due to it. A curious feature of this case is that the other encumbrance was a charging order in favour

of Nicholas David Kingsley Jackson (Counsel for the Claimant in this case) in respect of costs incurred by the Bar Mutual Indemnity Fund on his behalf in successfully defending an allegation of fraud made against him by Mr Campbell. An interim charging order had been made on 2 October 2013 in the Birmingham District Registry which was protected by a unilateral notice dated 8 October 2013 and a final charging order was made on 13 January 2014 which was protected by a unilateral notice dated 30 January 2014. The evidence suggests that this charge secured circa £20,000. It is readily apparent from his appearance before me when he made his application for an adjournment and in his witness evidence, that Mr Campbell bears a deep resentment about Mr Jackson and his role in this case which, in my view, has added a certain heat to this dispute.

33. Although they disagree as to who made the first contact, it is also common ground that in early 2015, Mr Campbell and Mr O'Hare began to discuss the need for Mr and Mrs Campbell to refinance the Redstone mortgage over the Property. They agree that it was coming up for renewal and that Redstone had no appetite to extend it (possibly because Mr and Mrs Campbell were by now in their 70s and 80s respectively). It is also common ground that they discussed the development potential of the Property if planning permission was granted for residential development. Mr O'Hare says that Mr Campbell first asked him for a loan of £100,000 to enable him to pay off his mortgage. In my view, that is improbable because as I have just set out, the amount needed for that purpose was significantly higher. Although Mr Campbell's evidence in his witness statement is that he and his wife had already been offered a "Lifetime Mortgage" and a regular mortgage, I treat that part of his evidence with caution because: (a) he has provided no documents which would support those offers being made; (b) his evidence appears to be contradicted by the transcripts of the meeting where was plainly anxious to stress the urgency in getting rid of Redstone and (c) his evidence has not been tested. It seems to me that Mr O'Hare is right to say that what he was shown by Mr Campbell (and which appear in the trial bundle) are standard non-committal responses to enquiries and that if Mr Campbell **had** a firm offer to re-mortgage, the ultimate transaction would either not have proceeded at all or not at such speed.

34. At some point after mid-2015, Mr O'Hare's evidence was that he, against his better judgment, agreed to get involved in some form of refinance of the Defendants' loan. When questioned by me on this, I had the feeling he was slightly overplaying his professed reluctance. I am satisfied that the true position is that he spotted an

opportunity to share in the potential upside of the development of the Property, as well as being willing to help them out. In particular, he told the Court that he borrowed money at a commercial rate from Lloyds Bank, in order to lend it to the Defendants. That seems more consistent with his ultimate motive being a commercial rather than purely benevolent one.

35. According to Mr O'Hare, his agreement to assist was always conditional on the Property being put into his name. In paragraph 11 of his witness statement, Mr Campbell accepts that the deal was to include the sale of the land but that it was conditional on the other terms of their verbal agreement being adhered to. Although Mr Campbell has not clearly articulated what those other terms were, there is common ground over the central concept of a transfer of ownership of the Property to the Claimant if it paid off the Redstone mortgage and other charges and the transcript of the meeting is replete with references to it. Mr O'Hare told me that the notion of an "option agreement" arose for the first time only close to the final execution meeting of 9 September 2015 and came from Mr Kelly. I accept this part of his evidence. It is highly improbable that either Mr O'Hare or Mr Campbell would have come up with the idea of an option agreement far less the buy-back. However, he said firmly that the idea of the buy-back was Mr Campbell's and it was this, not anything put forward by him, which caused the deal to become complicated. I have some difficulty with this. Although both transcripts are replete with references to buy-back (and indeed to the Facility Agreement; Legal Charge; Option Agreement and draft transfers) I take from them that Mr Campbell was at times struggling to understand the concepts and there is a sense in which he is simply going along with what he has been told. Of particular significance in my view, is that there does not appear to be a point when Mr O'Hare or Mr Kelly explains the way the whole deal was going to work, far less do they articulate how the documents relate to one another. In re-examination, Mr O'Hare himself struggled to answer the latter question. It seems to me that the natural chronological flow of the documents for the purpose of explanation and execution is to start with the Facility Agreement (because that is the source of the monies to pay off the prior charges) and Option Agreement (by which ownership of the land is to be transferred) but instead Mr Kelly dealt with the Option Agreement at the very end of the meeting.

36. Mr O'Hare also accepts that Mr Campbell is correct when he says that certain matters were to be reflected in a side letter which was simply never provided to the Defendants. As I have already noted, Schedule 1 of the Option Agreement contemplated that there

would be an assured shorthold tenancy annexed to the agreement. No such tenancy agreement is before me. Mr O'Hare said that although a copy exists and was provided to the Defendants, Mr Campbell took it away to be signed by Mrs Campbell but it was never properly executed or returned to the Claimant. I treat that evidence with some caution given that not even a draft of any tenancy agreement has been provided when one might be expected to have been retained by Mr Kelly. Even on the Claimant's own case, the suite of documents is incomplete.

37. There is a dispute as to the true underlying terms of the "tenancy" arrangement. The Claimant's position is that Schedule 1 of the Option Agreement is correct, but its Counsel concedes that, as drafted, it does not make clear whether the "1% of principal monies loaned by the Buyer to the Seller" is payable annually or monthly. Mr Campbell's case is that the rent was agreed at £280.00 per month which was the same monthly rate as he was paying to Redstone. There is little or no reference to the proposed tenancy in the transcript of the meeting on 9 September 2015 and nothing in it to suggest that any written agreement was produced at the meeting for execution. This may accord with Mr O'Hare's evidence that it might have been signed sometime later. I think it is more likely than not that Mr O'Hare is correct that the agreed figure was £1,250.00 because that it referred to by him in a letter dated 16 August 2016 to which I refer further below.

38. However, of some significance is that Mr O'Hare essentially agreed with me that the real purpose of the Option Agreement and Buy-Back Option was to provide security for the sums advanced by the Claimant to Redstone (and contemplated but not actually advanced to the other charge-holders) and costs. To this extent, whilst he did not accept the language of windfall, it seems to me he implicitly understands and accepts that the exercise of the Option Agreement has provided him with more than that because, provided the Claimant obtains the relief it seeks the Claimant will be entitled to be registered at the Land Registry as the proprietor of the Property with no obligation to account to Mr and Mrs Campbell for any surplus.

39. Returning to the factual narrative, Mr Campbell says that almost as soon as the ink was dry on the signed agreements, he and his wife read them fully and challenged them (in particular, at a meeting with Mr O'Hare the next day). I think that Mr Campbell is mistaken on this and that there was no such meeting the next day, 10 September 2015. In the trial bundle, there is an email from Mr Campbell (sent using his son Sean's email account) to John McGreaney, a legal executive at MSB at 1620 on 8 October 2015,

where he states: "My wife and I have now read for the first time, the several agreements we needed to sign to avoid Redstone repossessing our property that fateful hour". The letter goes on to complain that the agreements do not properly reflect the agreement between the parties. In particular, it states that they now understand that they are being asked to sell the property outright to Mr O'Hare for £162,000.00 when that was never their intention.

40. From that point on, it seems that the relationship between the parties deteriorated quickly (partly because as I have already explained they were by now also in dispute about the monies owed in relation to the taxi loans). Although it had agreed to do so, the Claimant did not pay off the two other charges (which remain on the title to the Property) and did not take any steps to enhance value of the Property by seeking planning permission for residential development. For their parts, the Defendants did not release the Transfer or provide information as to their identity to enable the Transfer of title to the Claimant to be perfected and despite remaining in possession of the Property they have not paid the agreed or any rental to the Claimant.

41. I have seen a letter from Mr O'Hare dated 17 August 2016 which is marked "without prejudice" in which he identifies the sums in which he considered himself to be out of pocket as being:

"1 125k which I transferred to your lender to stop the repossession.

2 about 5k to arrange my loan.

3 about 12k in repayments to service my loan.

4 legal fees I continue to incur as a direct result of your default.

5 the 5k I gave you in good faith to purchase the taxi plate.

6 the income I should have received from that taxi plate.

7 15k being the agreed rental of the property up to 9th August 2016 while waiting for planning permission (£1250 x 12)".

42. The letter goes on to record that Mr O'Hare's position following the immediate breakdown of the relationship had been that the matter would be at an end if Mr and Mrs Campbell refunded this outlay and costs and that any windfall from the planning permission on the Property would be theirs. The letter repeats that offer: "*If you can repay that money then that would be the end of it"* and, as an alternative, offered that Mr and Mrs Campbell should pay the agreed rent up to date and return the taxi plate (or agree a figure to purchase or rent) and he would then undertake to pursue the

application or planning permission. I have not been provided with any response to this letter and I infer there was none.

The Law

43. There is no real dispute as to the correct legal principles. I am especially grateful to Mr Jackson who, mindful of the status of the Defendants as litigants in person, properly undertook the task of setting out the relevant law in his Skeleton Argument and bundle of authorities. Moreover, once it was clear that the Defendants were not intending to attend the trial, he acknowledged and accepted his duty to the Court to be full and frank and, albeit consistent to his duties to his own client, to present the law as neutrally as possible.

44. Section 19 of FSMA contains the so-called general prohibition that no person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is (a) an authorised person; or (b) an exempt person.

45. Section 22 of FSMA sets out the meaning of "regulated activity" as being an activity of a specified kind which is carried on by way of business and (a) relates to an investment of a specified kind; or (b) in the case of an activity of a kind which is also specified for the purposes of that paragraph, is carried on in relation to property of any kind.

46. Article 60D(1) of the RAO provides that a credit agreement is an exempt agreement for the purposes of that Chapter if, at the time it is entered into, any sums due under it are secured by a legal or equitable mortgage on land and the condition in paragraph (2) is satisfied. Paragraph (2)(a) then provides that the condition is that less than 40% of the land is used, or is intended to be used, as or in connection with a dwelling by the borrower or a related person of the borrower.

47. Article 61(1) of the RAO provides that entering into a "regulated mortgage contract" as lender is a specified kind of activity. So far as material here, article 61(3)(a) provides that 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 ("the borrower"); (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA; (iii) at least 40% of that land is used, or is intended to be used (aa) in the case of credit provided to an individual, as or in connection with a dwelling. Article 61(3)(c) defines "credit" as including a cash loan and any other form of financial accommodation and article 61(4) states that "mortgage" includes a charge.

48. Counsel for the Claimant told me that there is no reported decision on the meaning of the expression "used, or is intended to be used … as or in connection with a dwelling".

49. According to the PERG 4.4.7 (the perimeter guidance of the Financial Conduct Authority on regulated activities connected with mortgages), loans to buy a small house with a large garden would in general be covered. However, if at the time of entering into the contract the intention was for the garden to be used for some other purpose – for example, if it was intended that a third party were to have use of the garden – the contract would not constitute a regulated mortgage contract. Furthermore, it says that the FCA would not regard a loan to purchase farmland and a farmhouse as constituting a regulated mortgage contract (where the farmhouse and garden amount to less than 40% of the land area) since it does not appear that the land could properly be said to be used "in connection with" the farmhouse. The presence of the farmhouse is unconnected with the use to which the farmland is put (in contrast to a residential property's garden, which would have no existence independent of the property). This led Mr Kersh to express the view at paragraph 1.4 of his report that loans secured on "mixed use" property may be covered, provided that the occupier uses at least 40% of the total of the land as or in connection with a dwelling.

50. Counsel for the Claimant also referred me to the recent decision of McBride J. sitting in the Chancery Division of the High Court in Northern Ireland in *Presbyterian Mutual Society Ltd v Walter Dodds* [2021] NI Ch 2 at [29]. That was a case which concerned a 53 acre farm with farmhouse (comprising a dwellinghouse and curtilage). The application by Mr Dodds was to set aside a possession order made on the application of the Claimant who had advanced a facility of £410,000 to him. There is little or no analysis of the relevant principles.

51. I was also referred, on the question of whether the general prohibition in section 22(1) FSMA is engaged here, to the decision of Mr Justice Popplewell in *Bassano v Toft* [2014] EWHC 377 (QB). In that case, Mr Toft was a dealer in musical instruments which did not ordinarily involve him making loans. His unchallenged evidence was that a loan he made to Mrs Bassano was the only occasion on which he had ever done so and was therefore a one-off.

52. The Judge analysed the matter as follows at [33] before concluding at [34] that the loan was a one-off transaction which was not made in the course of carrying on a consumer credit business, nor in the course of his business as dealer, or any business:

"*The same principle was applied to the Consumer Credit Act licensing provisions by the Court of Appeal in Hare v Schurek [1993] C.C.L.R. 47; (1993) G.C.C.R.1669. Section 40 in its then form rendered regulated agreements by unlicensed creditors unenforceable unless they were "non-commercial agreements" which bore the definition then, as now, in s.189(1) as meaning "a consumer credit agreement … not made by the creditor or owner in the course of a business carried on by him". The court held that if the transaction between the parties was "one-off" or "of a type only occasionally entered into by the applicant in the course of his motor trade business" or "unique or a manifestation of occasional transactions" it did not fall within the licensing requirements because it was not made in the course of a business. This conclusion was supported by s.189(2) which provides "A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type." Mann LJ observed that such a conclusion was consonant with the purpose of the Act which is to regulate those who carry on particular forms of business as a trade or profession. See also Goode: Consumer Credit Law & Practice Issue 41 para. 23.141 which in my view correctly summarises the position and how the judgment of Mann LJ in Hare v Schurek is to be interpreted. An occasional or one off consumer credit transaction does not require the creditor to be licensed because it is not carried out in the course of any business, whether consumer credit business or any business."*

53. Section 140A of the CCA deals with unfair relationships between creditors and debtors. Section 140A provides that the court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following: (a) any of the terms of the agreement or any related agreement; (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement; (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement). Subsection (2) goes on to say that in deciding whether to make a determination under this section, the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

54. Section 140B of the CCA deals with the powers of the court in relation to unfair relationships. Subsection (1) contains a list of the orders which the Court may make

including: at (b) a power to require a creditor to do or not do (or cease doing) anything specified in the order in connection with the agreement or any related agreement; at (c) to reduce or discharge any sum payable by a debtor by virtue of the agreement or any related agreement; at (e) to set aside (in whole or in part) any duty imposed on the debtor by virtue of the agreement or any related agreement; at (f) to alter the terms of the agreement or any related agreement and at (g) to direct accounts to be taken. Section 140B(2)(b) provides that an order may be made in connection with a credit agreement at the instance of a debtor in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement. Section 140B(3) confirms that an order may be made under the section notwithstanding that its effect is to place on the creditor a burden in respect of advantage enjoyed by another person.

55. Finally, I note that section 140B(9) provides that if, in any such proceedings, a debtor alleges that the relationship between the creditor and debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

56. There is a useful summary of the principal authorities and the criteria to be applied to unfair relationship cases in the decision of Hamblen J. (as he then was) in the Commercial Court in *Deutsche Bank (Suisse) SA v Gulzar Ahmed Khan & Others* [2013] EWHC 482 (Comm) at [344] to [346] which I set out here in full:

"*344. The consequences of a finding of unfairness are potentially draconian. The orders under section 140B may include discharging the debtor's indebtedness in whole or in part and/or requiring the creditor to repay some or all of the sums paid by the debtor under the Credit Agreement or any related agreement.*

345. In considering the test of unfairness guidance is provided by the following authorities in particular: Maple Leaf Macro Volatility Master Fund & Another v Rouvray & Or [2009] EWHC 257 (Comm) ("Maple Leaf"); Paragon Mortgages Ltd v McEwan-Peters [2011] EWHC 2491 (Comm) ("Paragon Mortgages") and Rahman & Ors v HSBC Bank Plc & Ors [2012] EWHC 11 (Ch) ("Rahman").

346. (1) In relation to the fairness of the terms themselves:

a. whether the term is commonplace and/or in the nature of the product in question (Rahman [277]);

b. whether there are sound commercial reasons for the term (Rahman [278]);

c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (Maple Leaf [278]);

d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (Maple Leaf [289]);

e. the scale of the lending and whether it was commercial or quasi-commercial in nature (Rahman [275]) (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and

f. the strength (or otherwise) of the debtors bargaining position (Rahman [275]);

g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (Rahman [275]).

(2) In relation to the creditor's conduct before and at the time of formation:

a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with any sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (Maple Leaf [274]);

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors (Maple Leaf [274]);

c. whether the creditor had any reason to think that the debtor had not read or understood the terms (Maple Leaf [274]);

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms) (Maple Leaf [274]; Rahman [276]);

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" (Paragon Mortgages [54(b)]);

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals) (Rahman [280-281]); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor (Rahman [280-281])."

57. Finally, I was referred on the law of subrogation to the decision of the Court of Appeal in *Cheltenham & Gloucester Plc v Appleyard* [2014] EWCA Civ 291 and to the

judgment of the Court as delivered by Lord Justice Neuberger (as he then was) at [30] to [44].

Exempt/Regulated Agreements

58. I have been assisted by the evidence of Mr Kersh on the central question he was asked (which was not challenged in any specific regard by Mr and Mrs Campbell) and especially by the photographs which I was taken through in some detail by Counsel for the Claimant. I am especially grateful to Mr Kersh for his diligence in seeking the directions of the Court and for resolving the difficulties he had without a reliable scale plan of the Property.
59. The whole site comprises approximately 0.9 hectares. Mr Kersh inspected it on 12 June 2018.
60. To the front of the site is situated a dormer bungalow with front garden and large rear gardens. These were marked in blue on an extract from the Ordnance Survey annexed to his report at Appendix K3 (page 215 of the main trial bundle) and shown on the photographs (pages 218 to 224 in the main bundle) and aerial mapping photo (page 255). This part of the site comprises 0.1 hectares (representing 11.11% of the total site area).
61. To the rear of the gardens there is a workshop and small outbuildings including a portacabin and land used for the storage of vehicles and taxis and there is a static caravan on this part of the site visible in the photographs. The area used as a garage and for the storage of vehicles and taxis comprises 0.1 hectares (representing 11.11% of the total site area). This area is shown on the photographs (pages 227 to 233 of the main trial bundle) and on the aerial mapping photo (page 256).
62. The area of the first field (also known as the paddock) including the garage and vehicle storage area is 0.4 hectares (or 44.44 % of the total site area). If the garage and vehicle storage area are excluded the remaining part of the paddock area is 0.3 hectares (or 33.33% of the total site area). This is also shown and can be deduced from the aerial mapping photograph which shows that the entire area apart from the house and gardens is 0.8 hectares (page 257 of the main trial bundle).
63. Beyond the back field there are timber stables that were once used as part of the livery business known as “The Alamo Stables” operating from 2-14 Headbolt Lane although that business closed over 7 years ago. The fields are no longer used in connection with the livery stables but the front or upper field is used to keep a couple of horses owned

by the Defendants. There are 22 stables on the Alamo part of the site. The Alamo Stables part of the site can be seen from the photographs (in the distance on the photograph at 235 of the main trial bundle and more clearly in those at pages 240 to 245) and in the aerial mapping photograph (as page 258). The area of the lower field and commercial stables comprises 0.4 hectares (representing 44.44% of the total site area).

64. The rear fields are divided in two by a fence which is just visible on the google maps extract (page 216 of the main trial bundle).

65. This appears to accord broadly with Mrs Campbell's evidence at paragraph 14 of her witness statement where she says that after buying the Property in 1988, 28 stables were erected for commercial purposes and about half of the field was allocated for riding lessons. She says that the dividing fence was erected to separate those commercial activities from her own side of the fence which was used for training her own horses. She had two sheds converted to stables in what they refer to as the small yard to the rear of the house which attaches to her section of the field which is accessed from her house and a two-horse gate was fitted to enable her to walk from the house to her personal stables and to walk her horses into her section of the field. I accept this evidence.

66. Mr Kersh goes on at paragraph 6.9 of his report to say that he is satisfied that the total percentage of the land being used for non-domestic use as at 9th September 2015 was a minimum of 55.55% being the sum of the lower field and stables at 44.44% together with the vehicle storage land at 11.11%.

67. Mr and Mrs Campbell have contended that 62% of the Property was used for domestic purposes. They maintained that position in their witness statements which were filed after Mr Kersh had provided his report. This, it is to be inferred, is based on the contention that each of: (a) the house and gardens; (b) the north or upper or first field and (c) the vehicle storage areas are being used in connection with one another as a dwelling.

68. On this point, I agree with Mr Kersh. The area occupied by the Alamo stables and the lower field (0.4 hectares or 44.44%) was demonstrably being used or was capable of being used as commercial stabling. Having considered all of the evidence, in my judgment the garage/storage areas (comprising 0.1 hectares or 11.11%) were also not being used in connection with the dwelling-house. That accounts for 0.5 hectares (or 55% being used or capable of being used for commercial use).

69. It is not suggested that the house and gardens is anything other than domestic use. As Mr Kersh acknowledges, the position regarding the upper or first field/paddock (0.3 hectares representing 33.3% of the total site) is more difficult. In principle, and having regard to the PERG 4 guidance, I can see that it might be said that the stabling and grazing of a couple of ponies on land which is close or adjacent to the dwelling-house might fall to be treated as a part of the overall domestic use. I was also assisted by the CLA Guidance Note Reference 25-15 on Planning law and horses. Although this issue does not arise in a planning context which is an entirely different legislative framework, I note that the keeping of a horse within the curtilage of a dwelling-house may be considered as incidental to the enjoyment of the dwelling-house and so permitted.
70. Mr Kersh also referred me to a full planning permission for the Property, pursuant to an application made by Mr and Mrs Campbell on 18 May 2018, for change of use of part of the Property from storage of vehicles to storage of vehicles and the siting of a residential caravan and storage container but as this post dates the dates of the relevant agreements and is a temporary permission, I am not assisted by it.
71. In my judgment, apart from that part which was devoted to garage/storage areas, the rest of the upper or first field or paddock was being used in connection with the dwelling-house. I accept the evidence of Mrs Campbell (supported by Ms Conway). The first field and the two private stables were adjacent to and used in conjunction with the dwelling-house and access to them were from the dwelling-house. I am satisfied that this is the type of situation described in the CLA guidance note as being a "residentially incidental horse".
72. Given my conclusions on the use of the Property, I am satisfied that this was a regulated mortgage contract for the purpose of FSMA and article 61 of the RAO and that it was not exempt because more than 40% of the Property was being used "as or in connection with a dwelling".

FCA Authorisation

73. I now have to consider whether the general prohibition bites because even if the Facility Agreement and Legal Charge constitute regulated activities (as I have found they do) the prohibition applies only if the Claimant entered into the transaction by way of business.
74. I am satisfied, based on the evidence that I have heard from Mr O'Hare, that the Claimant did not enter into the arrangements with the Defendants "by way of business"

for the purposes of the general prohibition. Mr Campbell had said in his witness statement that Mr O'Hare was a "prolific Money Lender and still is". However, his justification for this conclusion was that Mr O'Hare had been a second-hand car dealer for years before entering into property dealing and that he had boasted about selling cars via his own finance facilities. As I have already noted, this does not mean that Mr O'Hare or his companies were purportedly carrying out business in relation to mortgages. Mr O'Hare's position was that this was a one-off transaction which was not entered into for commercial purposes. Although I have expressed some caution about that being the sole motivation, there is simply no evidence to contradict his evidence. I asked Mr O'Hare about this and he firmly denied it and I accept his evidence.

75. I am also satisfied that, although that was a case under the CCA regime and not FSMA and the RAO, the legal analysis in *Bassano v Toft* applies equally here to the question whether the Claimant was carrying on business. Like Mr Toft, the Claimant (through Mr O'Hare) was in business (buying and selling property) but he was not in the business of providing secured lending.

76. Accordingly, although I have found this to be a regulated mortgage contract, it does not offend the general prohibition.

Unfair Relationships

77. The principal submission made on behalf of the Claimant is that this was not an unfair relationship. Counsel for the Claimant also addressed me on the alternative basis if I should find that the Option Agreement and Buy Back Option were tainted by some unfairness.

78. As the extract from the *Deutsche Bank* decision makes clear, the statutory regime requires me to address this in three stages: first, to consider whether any of the terms of the agreement or any related agreement are unfair; secondly, to consider whether the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement is unfair and thirdly, to ask whether any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) was unfair.

79. First, I consider the terms of the suite of agreements. In his oral closing, Mr Jackson spent some time going through the transcript of the meeting on 9 September 2015, in order to establish what were the real terms of the agreement between the parties. It seemed to me that this was only necessary because he was compelled by that evidence

to concede that they were not fully reflected in the written agreements. In particular, it is clear from the transcript that although, as I have already detailed, the Facility Letter provides for Initial Interest at a rate of 28% per annum and for an Exit Fee equivalent to 3% of the Facility, the Claimant (by Mr O'Hare) agreed not to charge them (see page 32 of the transcript at 324 of the main trial bundle).

80. It seems to me that there are two relevant aspects to this part of the evidence. First, if and insofar as Mr Jackson was seeking to persuade me to ignore these when considering the fairness or otherwise of the agreed terms, I am unable to do so. Unless and until they were either removed from the Facility Letter or the position confirmed in the promised side letter, they are terms of the agreements. In this regard, it seems to me that there is some force in Mr and Mrs Campbell's complaints that the agreements as drafted do not properly reflect the underlying agreement. In the context of this jurisdiction, it seems to me I am entitled to proceed on the basis that the Initial Interest rate was 28% and the exit fee was 3% of the Facility, both of which seem to me to be unfair. The second aspect of this part of Mr Jackson's submissions only arises if I conclude that the relationship was unfair and decide to exercise my discretion to re-write its terms. In effect, Mr Jackson urges me in that event, to have regard to the true underlying bargain as evidenced by the transcript of the 9 September 2015 meeting. So, for example, he invites me to conclude that an arrangement fee of 15% of the Facility (15% of £123k) was an immutable part of the bargain which should not be disturbed in any circumstances (see pages 6 of the transcript at page 298 of the main trial bundle). One difficulty for that submission is that later in the transcript (at page 20 and page 312 of the trial bundle) Mr O'Hare was (wrongly it seems) applying the 15% administration fee not only to the Facility but to the sums which the Claimant was going to pay to the other charge holders. At the same part of the extract, Mr Campbell is seen to challenge whether there was some sort of side deal in relation to that administration fee (as with the Initial Interest and Exit Fee).

81. The starting point for Mr Jackson's analysis of fairness was to take the figures from the transcript of the meeting on 9 September 2015 as best illustrating the bargain intended by the parties. First, he took the gross value of the Property at £375,000.00. Next, he took £186,000 as being the total initial outlay/indebtedness (comprising the Redstone redemption money; the Cuff Roberts charge; the Bar Mutual charging order; the 15% Administration Fee and the 3% Exit Fee). If the Option Agreement is not set aside and the Transfer is specifically performed as sought in these proceedings, he says that the

Claimant will have made a profit of £189,000 (ie £375k less £186k) representing a 102% return over three years (i.e. (189 ÷ 186) x 100) which equates to a simple annual rate of 34%. This, he submits, does not allow for capital appreciation in the value of the Property but conversely, he submits that bridging finance projections would invariably be based on compound interest rates. In short, he submitted that the Claimant's simple annual rate of 34% is not unfair.

82. In my judgment, the terms of the arrangements taken as a whole are unfair for the following reasons.

83. First, as the Claimant accepts, the Facility Agreement provides for Initial Interest at a rate of 28% when it was always intended that this would be waived by the promised side letter.

84. Secondly, as the Claimant also accepts, the Facility Agreement provides for an Exit Fee of 3% when again, it was always intended that this would be waived by the promised side letter.

85. Thirdly, and in my view most seriously, the Option Agreement operates unfairly because it goes well beyond what Mr O'Hare accepts was really intended to be security for the Facility. Mr Jackson's calculation is premised on the value of the Property being only £375,000 but the evidence suggests that the Property may be worth significantly more and that valuation does not reflect the hope value which might be unlocked by the grant of planning permission. The time for Mr and Mrs Campbell to exercise the buy-back has now lapsed but I am satisfied on the evidence, that there was never any real prospect of them being able to do so. They had been driven to seek the arrangement with the Claimant because of Redstone's insistence on re-finance and, as I have already found, there was no viable alternative on offer (against Mr Campbell's evidence). I am satisfied that the Option Agreement and Buy-Back Option were not commonplace or inherent in the arrangements. Although Mr Jackson sought to persuade me that these were in the nature of "bridging" finance, I disagree. Mr and Mrs Campbell were acting as consumers and the Redstone mortgage was an entirely more conventional product. I am not persuaded that there were sound commercial reasons for the Option Agreement or that it represents a legitimate and proportionate attempt by the Claimant to protect its position when what the Claimant was looking for was simply adequate security. There is no special risk which the Claimant faced as a result of the Facility provided that it was adequately secured. Indeed, it is difficult to see why the Claimant is not adequately protected by the Facility Letter and Legal

Charge. The fact that the Claimant agreed so readily to waive the Initial Interest rate and Exit Fee is an indication that these were not usual terms and it is not in issue that the entire deal was done at great speed. Although Mr Jackson is right to point to the fact that the urgency was not of the Claimant's making, the transcripts of the telephone call and the meeting on 9 September 2015 attest to desperation on the part of the Defendants such that they were not of equal bargaining strength. I accept that the Defendants were advised to seek independent legal advice but the speed with which matters progressed made that practically impossible (and I note that the terms of the deal were still being worked through as late as at that meeting). There was simply not the opportunity for Mr and Mrs Campbell properly to reflect on those terms and where they elicited concessions, the relevant side letter was never sent. Although at that meeting, Mr Kelly said he was acting only for the Claimant, MSB has previously acted for Mr Campbell and he said on more than one occasion that he trusted and was relying on Mr O'Hare and Mr Kelly to look after their interests.

86. So far as the Claimant's conduct before and at the time the suite of agreements was signed is concerned, I have already noted the urgency of the transaction and that matters were being negotiated right at the last minute, including at the signing meeting. Although I am satisfied the Claimant did not exert any pressure on Mr and Mrs Campbell for the Facility to be granted in the first place, there was in my judgment pressure to reflect the agreed terms in the specific written documents which were adopted, especially the inclusion of the Option Agreement and Buy-Back Option. This was an unusual and new part of the arrangements which merited proper and careful consideration by the Defendants. There was real urgency as I have already explained. In part, this appears to have been the result of delays on the part of Mr Kelly in drafting the documents. Mr O'Hare himself had no previous experience of making secured loans or option agreements and there is nothing to suggest that he believed that Mr and Mrs Campbell were better versed in them. The Claimant knew that Mr and Mrs Campbell had not taken legal advice in relation to the transaction. They were not provided with any documents in advance of the meeting at which they were signed and even if, as Mr O'Hare said in evidence, the meeting lasted some 3.5 hours (which I find is probably right) that was not sufficient time for them to read and digest them. No special adjustment was made for Mrs Campbell who, so far as I can see, had not been involved in any of the previous discussions. Although Mr Campbell objected to certain terms, the promised side letter was never provided.

87. I turn then to consider the Claimant's conduct following formation and leading to enforcement. In my judgment, there is here no "improper" motive or "arbitrary decision" on the part of the Claimant of the type envisaged in *Paragon Mortgages* and *Deutsche Bank* cases. The later correspondence to which I have already referred indicates that the Claimant displayed patience and made settlement proposals in order to resolve this matter (and the outstanding taxi claim). These were largely rebuffed by Mr and Mrs Campbell. There is no question in my mind that Mr Campbell has behaved wholly unreasonably in failing to negotiate and by raising and repeating unfounded allegations about Mr O'Hare (and as I have already mentioned Mr Jackson). Having witnessed his demeanour in Court on the hearing of his application to adjourn the trial, I am in no doubt whatsoever that Mr Campbell can be a very difficult person to deal with. However, it seems to me that none of these are factors which act to counter-balance the essential unfairness of the transaction overall, especially having regard to the vulnerable position in which Mr and Mrs Campbell found themselves in September 2015.

88. In my judgment, the relationship between the Claimant and the Defendants was unfair for the reasons I have identified, and I will go on to exercise the powers under s.140B CCA in order to remedy the unfairness.

The Altered Agreements

89. Dealing first with the Option Agreement, Buy-Back Option and the Transfers (still held in escrow) I have first considered whether it is possible for these to be amended in order to meet the unfairness I have identified. In my view, it is not possible to do so in circumstances where the unfairness goes to the core purpose of effecting a transfer of ownership from the Defendants to the Claimant (albeit in its inception subject to the Buy-Back Option). I will therefore order that the Option Agreement, Buy-Back Option and Transfers be set aside. If the Option Agreement is set aside the exercise of that Option by the Claimant will necessarily lapse.

90. However, it seems to me that justice requires that I leave in place the Facility Agreement and the Legal Charge. As I have indicated it is this which provides the secured lending which was, as I have found, the core bargain which was intended by the parties. I also accept the submission by Mr Jackson that some alteration of those agreements is required in order to achieve justice between the parties.

91. I will hear Counsel (and Mr and Mrs Campbell if they choose to attend) on the hand-down of this judgment on the precise terms of the order which is required to give effect to my judgment and any consequential matters, but my intention is to achieve the following.

92. First, it is proper to reflect that the Legal Charge will now secure the sums that the Claimant has paid off (the Redstone mortgage). The other charges which it was intended should be paid off by it (the Cuff Roberts charge and the sums secured by the Bar Mutual charging order) have not been paid. The total sum in this regard is c.£123,000.00. It is not possible to be precise as matters stand about the sums secured by the Bar Mutual charging order.

93. Secondly, in line with my findings that these were to be waived, the provision for Initial Interest at 28% and an Exit Fee of 3% of the Facility Agreement should be struck from it.

94. Thirdly, Mr Jackson urged upon me that the Arrangement Fee of 15% of the Facility should stand in the light of the fact that the Claimant was resolute in its insistence upon it albeit he acknowledged and accepted that this should be levied only in relation the monies paid to redeem the Redstone mortgage. In my judgment, he is right that the Arrangement Fee should remain payable in the re-written Facility Letter but I regard a rate of 15% to be excessive. I take into account here that the Facility was not a standard commercial mortgage but it seems to me most of this fee will have attached to the Option Agreement and Buy-Back Option which, as I have found, are at the heart of the unfairness. Put another way, if the transaction had proceeded by way of the Facility Agreement and Legal Charge, it is doubtful that an Arrangement Fee of 15% would have been contemplated. In my view, the acceptable figure is 10% which is £12,300.

95. Fourthly, Mr Jackson submits that although there was no provision for rent in the Facility Agreement, it is appropriate to import something into the Facility Agreement by substituting a figure of 12% for the figure of 28% Initial Interest. If expressed as 12% of the Redstone mortgage redemption sum of £123,215.18, at a simple annual rate, it equates to £14,760 annually and £44,280 after three years. I agree with this submission. As he points out, the mechanics of the Initial Interest rate can be left in the Facility Agreement because it falls to be calculated by reference to the Facility which is defined in Schedule 4 to mean the £123,215.18 which is the Redstone mortgage redemption. These sums will then be secured by the Legal Charge.

96. Finally, Mr Jackson addressed me on the question of Default Interest. He submits that the Defendants are to be treated as having been in default almost immediately by reason of their failure following exercise of the Option on 12 October 2015 to take steps to permit the registration of the Claimant's title. In particular, he says that their conduct constituted a repudiation and so an event of default within the meaning of clause 10.17 of the Finance Agreement. I will not disturb the provision for Default Interest which he has calculated as being £107,625. Although I received no evidence of rates in the market, I am satisfied that he is correct that the combination of the new substituted rent equivalent of 1% monthly with a default interest of 2.5% monthly, giving rise to a composite monthly default rate of 3.5% is justifiable.

97. It is important that Mr and Mrs Campbell appreciate, that the effect of my judgment is that the Facility Agreement, as altered, and the Legal Charge presently secures at least the indebtedness to the Claimant of £287,420.18 (the initial outlay of £123,215.18; the altered Arrangement Fee of £12,300.00; three years of Initial Interest at the altered rate of 12% per annum of £44,280.00 and Default Interest of £107,625.00).

98. As a result, the practical effect of my judgment may be to do no more than buy some additional time for them in circumstances where if the Claimant is resolute in seeking to enforce the revised terms of the Facility Agreement and Legal Charge their home remains at risk.

Subrogration

99. In view of my decision that the Legal Charge remains in place to secure the altered Facility Agreement, it is not necessary or appropriate for me to make an order that the Claimant be subrogated to the Redstone mortgage and I decline to do so.

Conclusion

100. For all these reasons, I decline to order specific performance of the Option Agreement and/or the Transfer. In exercise of my powers under s.140B CCA, I have set aside the Option Agreement, Buy-Back Option and Transfers but leave in place the Facility Agreement, as altered, and the Legal Charge.

Confirmation of identity

101. One consequential matter arises which it is appropriate for me to deal with now rather than at the hand down of my judgment. The Land Registry requires confirmation of the

identity of parties to transfers and other dispositions before it will proceed with application to register them. I was provided with an extract from Ruoff and Roper: Registered Conveyancing (2022) at [8.022]. Evidence of identity is defined in a direction under s.100(4) of the Land Registration Act 2002 to mean the relevant form set out in Practice Guide 67, being the form ID1 in the case of an individual, completed in accordance with that Guide. The form is not required where one of six exceptions apply. Exception C applies where it is not practicable to provide evidence of identity. The Practice Guide gives some examples, such as where a tenant has "walked away" from their lease and the application is being made to close the leasehold title following its surrender by operation of law. Inconvenience is not sufficient but if the Registrar is satisfied that it is just not possible to provide evidence of identity by way of form ID1 but some other evidence can be produced, the Registrar might exercise his discretion to dispense with the form if satisfied that the person's identity can be achieved by other means. Mr Jackson accepts that the exercise of the discretion is a matter for the Registrar but invites me to indicate if I am satisfied as to the identity of Mr and Mrs Campbell. Given that Mr Campbell attended before me on Monday in response to the notice of the trial date, and in light of the submissions he made and the evidence I have now heard, I am so satisfied as to their identity. Whether that will be sufficient for the Registrar's purpose is a different matter.