Neutral Citation Number: **[2023] EWHC 362 (KB)**

Appeal no.: QA-2021-000155
County Court case no. G10CL147

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2023

Before :

MR JUSTICE SOOLE

- -

Between :

GOLDHILL FINANCE LIMITED	**Respondent/ Claimant**
- and –	
TRACEY MARGARET SMYTH	**Appellant/ Defendant**

- -
- -

Mr George Woodhead (instructed by **Stephen Fidler & Co**) for the **Appellant**

Mr Anthony Pavlovich (instructed by **Freeths LLP**) for the **Respondent**

Hearing date: 15 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Mr Justice Soole :

1. This is an appeal from the decision of His Honour Judge Gerald dated 28 June 2021 whereby the Respondent mortgagee/lender (Goldhill) was granted possession of the Appellant borrower (Ms Smyth)'s leasehold property and home at 20B Harold Road, London N8 (the Property) by 23 August 2021.

2. The central issue in the appeal is whether, by reason of the events to be described, Ms Smyth was wrongly deprived of the opportunity to rely on the 'unfair relationship' provisions of sections 140A–D Consumer Credit Act 1974 as amended (CCA).

3. Ms Smyth was represented in this appeal by Mr George Woodhead and at the trial by Ms Ayesha Smart. Goldhill was represented here and below by Mr Anthony Pavlovich.

4. Sections 140A-B CCA provide as material:

> ***'140A Unfair relationships between creditors and debtors***
>
> *(1) 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 of 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).*
>
> *(2) 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).*
>
> *….(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*
>
> *(5) an order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (**regulated mortgage contracts and regulated home purchase plans**)…*[emphasis supplied]
>
> ***140B Powers of court in relation to unfair relationships***
>
> *(1) An order under this section in connection with a credit agreement may do one or more of the following –*
>
> *(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement*

or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

…(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

…(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, ***it is for the creditor to prove to the contrary****.*" [emphasis supplied].

Narrative

5. It is necessary to consider the narrative of events in some detail.

The underlying loan agreement

6. Ms Smyth has been since 2007 the leasehold owner of the Property, pursuant to a 999 year lease commencing 25 December 1979. The Property is a 2-storey, 3-bedroom maisonette and the home of Ms Smyth and her two children now aged 10 and 12. The first mortgage is in favour of Mortgage Express. Ms Smyth also ran the business of a beauty salon.

7. With the advice and assistance of brokers, Ms Smyth on 14 September 2018 entered a 6-month bridging loan agreement with Goldhill, secured by a second charge on the Property. The loan was in the total sum of £66,978 .69, comprising £50,000 principal and £16,978 for 6 months rolled up interest, a facility fee, a broker fee and the lender's legal and professional fees.

8. The rate of interest during the six-month term was 2% per month simple. In the event of default on repayment, the rate increased to 5% per month compounded.

9. The contractual documents completed by Ms Smyth included the statement that the purpose of the loan was 'business cash flow' and included declarations that she (i) was entering the agreement wholly or predominantly for the purpose of a business carried on by her; (ii) confirmed that less than 40% of the property to be mortgaged 'will be used by me/us and by my/our family residence'; (iii) understood that she would not have the benefits of the protection and remedies available to her under the Financial Services and Markets Act 2000 (FSMA) or CCA if this were a regulated agreement under those Acts; (iv) understood that this declaration did not affect the powers of the Court under s.140B CCA in relation to a credit agreement when it determines that the relationship between the lender and the borrower is unfair to the borrower; (v) acknowledged that this was an unregulated commercial non status loan.

10. These declarations reflected three aspects of consumer credit legislation under the CCA, FSMA and its subordinate instrument the FSMA (Regulated Activities) Order 2001 (RAO).

11. First, that a loan agreement is not a regulated mortgage contract (RMC) if it is a second charge business loan providing credit of more than £25,000 where the loan is wholly or predominantly for business purposes: RAO Article 61A(1)(c). Further, if the borrower makes a declaration that the loan was agreed for business purposes, then that is presumed to be the case unless the lender has reasonable cause to suspect otherwise: Art. 61A(3)-(4).

12. Secondly, that a loan agreement is not a regulated consumer credit agreement under s.8 CCA and RAO Part 2 if it (a) is a RMC or (b) involves credit of more than £25,000 and is wholly or predominantly for business purposes. Again, a declaration of business purposes made by the borrower creates a presumption of a business purpose unless the lender has reasonable cause to suspect otherwise: Art. 60C(5)–(6).

13. Thirdly, a credit agreement, whether regulated or unregulated, is subject to the "unfair relationship" provisions of ss.140A-D CCA, unless it is a RMC or a regulated home purchase plan: s.140A(5). In this case the only potential exception was if the loan agreement were a RMC.

14. Ms Smyth defaulted on the loan at the end of the six-month term. No sums have been repaid. Default interest has thus accrued at 5% p.m. compounded. I was told that by the date of the trial the debt had increased to about £250,000; and at the date of the appeal hearing to about £740,000.

15. By letter to Ms Smyth dated 18 March 2019 Goldhill noted that it had not received the redemption monies due on the account (then £70,327) and advised that it would be instructing solicitors to commence repossession proceedings on 8 April 2019.

The proceedings

16. On 8 May 2019 Goldhill issued the Claim Form, together with Particulars of Claim, in the County Court at Clerkenwell and Shoreditch, claiming possession of the Property and a money judgment.

17. Acting in person, Ms Smyth on 3 June 2019 completed and filed the Defence Form for mortgaged residential premises (N11M) and an attached witness statement of the same date.

18. Her statement included contentions that the bridging loan had been mis-sold to her as an intended precursor to the remortgage which she required; that the documents which she had signed had been pre-completed by Goldhill's representative who had visited her home; that she had made clear that the Property was 100% residential use; and that in consequence the loan was regulated. The statement concluded:

'15. I do not dispute that Goldhill finance made the loan, I do however dispute the way the loan was presented and sold to me and not fully explaining the high level of fees applied to the loan sum by the claimant.

16. I trusted the parties involved to show a level of due care and diligence when finding the best financing facility available. I feel they have not conducted themselves this way but have monopolised on my position to benefit themselves financially.

17. I would ask the court…

i. To examine if the terms of the loan were fair and if it was compliant to be an unregulated loan.

And/or ii. To grant an order to vary the terms of the agreement and the interest rate, allowing me an extended period to complete my re-mortgage.'

19. The Defence Form N11M included the following questions, preceded by the words *'(Only answer these questions if the loan secured by the mortgage (or part of it) is a regulated consumer credit agreement)'*:

'*5. Do you want the court to consider whether or not the terms of your original loan agreement are fair?*

6. Do you intend to apply to the court for an order changing the terms of your loan agreement (a time order)?'

Each question was followed by two boxes, respectively marked 'Yes' and 'No'. In each case Ms Smyth ticked the box marked 'Yes'.

20. On 21 June 2019 there was a hearing before Deputy District Judge Jordan at the County Court. Ms Smyth was in person *'with McKenzie Friend'* and Goldhill was represented by Counsel. Orders were made for service of Ms Smyth's Defence and witness statement and for Goldhill to file and serve, if so advised, a Reply. The hearing was adjourned to 7 August 2019.

21. Goldhill's Reply dated 22/25 July 2019 responded to the paragraphs of Ms Smyth's witness statement. It referred to the various statements and declarations in the loan documentation; and denied that the agreement was a RMC or a regulated consumer credit agreement. It recited the declaration that Ms Smyth would not have the benefit of the protection and remedies available under FSMA or CCA if it were a regulated agreement, but not the declaration relating to the unfair relationship provisions of ss. 140A–D.

22. As to the concluding paragraphs of Ms Smyth's witness statement (15–17), the Reply denied that the fees and other aspects of the loan had not been fully explained or that Goldhill was responsible for anything done by her broker; and stated that the claim of failure of due care and diligence and "monopolising on her position" was inadequately particularised. As to the remedies claimed in paragraph 17, it was denied that there was any such entitlement and: '*a. For the reasons provided in this Reply, it is clear that the loan was a second charge business loan and therefore exempt for the purposes of FCA regulation; and b. The Defendant has failed to particularise why she is entitled to have a variation of the agreement and interest rate.*'

23. Ms Smyth then served a 'Defendant's Response to Claimant's Reply' dated 31 July 2019. This took issue on various points and concluded: '*23. If the Claimant had undertaken due care and diligence towards the Defendant, they would have identified*

that the loan was outside of the scope of an unregulated loan and was moreover only suitable to be a regulated loan, that the Claimant is not licenced to facilitate. On this basis the Defendant has been mis sold.'

24. At the adjourned hearing on 7 August 2019, before District Judge Bell, Ms Smyth again attended in person, together with a McKenzie friend, and Goldhill appeared by Counsel. The resulting Order included a recital of the issues raised in the following terms:

'*And upon issues having been raised as to:*

1. *Whether the bridging loan was a regulated or un-regulated agreement;*

2. *The role of the broker in obtaining such loan;*

3. *What was the aim of the Defendant in raising money by way of the bridging loan;*

4. *There had been mis-selling;*

5. *The "fairness" of the agreement.*'

There followed orders that the claim was allocated to the multitrack and transferred to the County Court at Central London.

25. On 4 September 2020 there was a CCMC before District Judge Mauger at Central London. By this stage Ms Smyth had instructed solicitors and they had agreed a Case Summary prepared by Mr Pavlovich. Ms Smyth was duly represented by a solicitor at the hearing. Agreed case directions were given towards a 2-day trial. These included that "No expert evidence is necessary" and that the bundle should include the Case Summary.

26. The Case Summary included:

'*4. By a Defence dated 3 June 2019…D asked the Court to consider whether the loan is unregulated,* ***and if not****: (5) whether the terms are fair, and (6) whether the terms and interest rate should be varied to extend the period to repay the loan.*' [emphasis supplied].

Under the heading 'Main issues' the Summary continued:

'*7. The main issues for the Court to decide are:*

(1) Was the loan a regulated mortgage contract or a regulated consumer credit agreement?

(2) What role did the broker…play? What significance does the broker's conduct have?

(3) What was the purpose of the loan and how much of the Property did D occupy for residential purposes? What did D state about those matters, and what is the significance of those statements?

(4) Was the loan 'missold' on the basis that (a) it is obvious that the Property is a residential property not a business property and/or (b) C would have known that the loan was regulated if C had taken due care? If so, what are the legal consequences?

(5) ***If the loan is regulated,*** *then were the terms fair, or should the interest rate and time for repayment be changed because of the matters set out above?'* [emphasis supplied].

27. The two-day trial was listed to commence on Monday 28 June 2021 before HH Judge Gerald. Counsel for Ms Smyth, Ms Smart, was not instructed until a 'late return' on Thursday 24 June when a conference was arranged for 5 pm on Friday 25 June: see paragraph 1 of Ms Smart's 'Position Statement' for the trial.

28. Ms Smart served that document on 25 June, before her conference with the client had taken place. It recited the 'main issues for the Court' in the same terms as in paragraph 7 of the Case Summary. The next section, headed 'Is the loan regulated', focussed on the provisions of RAO Arts. 60C-H; and in particular relied on the exception where the lender or its agent knows or has reasonable cause to suspect that the agreement is not entered by the borrower wholly or predominantly for the purposes of the business carried on by the borrower. She submitted that it was a regulated mortgage and a regulated consumer credit agreement.

29. The final section of the Position Statement was headed 'If regulated, are the terms fair?' It placed particular emphasis on the default rate of 5% p.m. compounded and the consequence that Goldhill was now seeking 'over £250,000 for a £67,000 loan'. It concluded:

'*20. It is submitted that the 5% compound interest on the loan is an extortion and does not marry up with standard practice and grossly exceeds the principles of fair dealing.* ***It is for the Claimant, to prove the contrary****.*

21. Further, it is a requirement under the FCA rules that there must be provided an adequate explanation of the product's features. If the Defendant's evidence is accepted, then the Claimant merely prompted her to sign and did not provide any or any adequate explanation themselves. ***It is submitted that the unfair relationship provision apply.***' [emphasis supplied].

30. On reading this document, Mr Pavlovich noted these references to 'unfair relationship' and the reverse burden of proof. In consequence, by email to Ms Smart on 25 June at 16.16 he stated: '*…Paragraphs 20 and 21 refer to 'extortion' and 'unfair relationships'. Neither point has been pleaded and neither is included in the agreed list of issues. Does your client plan to amend? If not, I shall object to those points being taken. If so, I shall object on the basis that it is a 'very late amendment' ie one that would require the trial to be vacated*'.

31. Ms Smart replied at 16.22, i.e. before the planned conference with Ms Smyth**:** '*The Position Statement merely sets out the limited instructions I was provided with and asked to set out. In light of no conference I have not been able to advise or deal with anything – I am hoping to make some headway in conference*.'

32. In his skeleton argument for the trial, Mr Pavlovich set out the issues in the claim in the terms of paragraph 7 of the Case Summary. As to issue (5), he submitted that this would not arise because the loan was unregulated. Further, Ms Smyth had not brought a counterclaim for relief nor stated any clear grounds for relief, *'.. so it is not clear on what basis the Court is asked to change the interest rate and time for repayment (and no other terms of the loan are specifically challenged). All that Ms Smyth has done is ticked boxes 5 and 6 in the Defence form, asking the court to consider whether the terms are fair and stating that she will apply for a time order. But both those boxes are expressed to apply only where the loan is a regulated consumer credit agreement.'*

33. He then contended that the terms were 'fair and reasonable'. His reasons included that the interest rates were clearly disclosed to Ms Smyth; there was a prominent recommendation to take legal advice; and that the default rate was similar to that charged by other providers of bridging loans. The latter was supported by the witness statement of Goldhill's Mr Ian Miller which stated:

'*45. The terms of the Loan Agreement and, in particular, the costs and interest rate is, in my experience, in line with other bridging loan providers for an advance of this amount and term.*

46. The terms and cost of the bridging loan were clearly set out in the Loan Agreement and the Defendant raised no issue with these costs at the time of the Advance.'

34. Neither skeleton argument specifically identified the provisions on 'fairness' which might be applicable if the loan agreement were a RMC or regulated consumer credit agreement. Following my request in the course of the hearing, Counsel subsequently provided a joint note which identified the *'Provisions which apply for the benefit of the borrower in the event the agreement is a regulated mortgage contract, in the context of "fairness"'*.

35. This shows that RMCs are principally[1] regulated under FSMA which provides (i) The Financial Conduct Authority (FCA) may make rules governing the activities of 'authorised persons'; and (ii) contravention of those rules is actionable by private persons with the rules so provide: ss.137A, 138D. The FCA Rules are set out in the FCA Handbook.

36. The overarching Principles (PRIN) in the FCA Handbook include PRIN 2.2.1R with '*6 Customers' interests: A firm must pay due regard to the interests of its customers* ***and treat them fairly***' and '*7 Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear,* ***fair*** *and not misleading*'.[emphasis supplied].

37. The Rules relating to RMCs appear in a section of the FCA Handbook called the 'Mortgages and Home Finance: Conduct of Business sourcebook' (MCOB) These address 'fairness' in various ways: see in particular MCOB 2.5A; 3A.2.1R; 11.5.1G; 13.3.1R. Private persons have a right of action in respect of all rules in MCOB: Sch 5.2G.

[1] Not subject to CCA, save s.126

The trial

38. In the course of Mr Pavlovich's opening on the law, the Judge had the following exchange with Ms Smart:

'Judge: '*...Ms Smart, do you accept that the question here is whether or not it is a regulated mortgage contract rather than a regulated consumer credit agreement?*

Counsel: *Yes, I agree with that, your Honour*.

Judge: *OK. So, for my purposes, I can simply forget about all the regulated consumer credit business and simply focus on whether or not it is a regulated mortgage contract?*

Counsel: *yes, you can*.'

39. Ms Smart's cross-examination of Mr Ian Miller included this exchange:

'Q: '*So, specifically in respect of the 5 per cent compound interest per month, you didn't flag that up to the defendant did you?*

A: *I think that would have been flagged up, yes, because we always discuss the term and what will happen if it's not repaid within the term*.'

40. In the course of Mr Pavlovich's cross-examination of Ms Smyth, she was asked about the evidence of Mr Miller in paragraph 45 of his witness statement: Q: '*...So you are unable to contradict that statement, are you, because he's the one who has…?*

A: *Well, it's not really, I mean, I'm not, you know, I mean, definitely I can get people to challenge these charges*.'

In a previous answer she had stated about the charges and rates: *'This is definitely not ethical or lawful in our society today. I'm happy to pay a normal interest rate on this loan but not this*.'

41. In Ms Smart's closing submissions on issue (5), i.e. 'fairness' if it were a regulated agreement, she focused on the 5% p.m. compounded default rate of interest. Thus: '*And, finally, your Honour, it can be put briefly, of course, only if your Honour is satisfied in respect of issue 1 would issue 5 come into play. And that's in reality whether the terms of the contractual arrangement between the two parties were fair. And what is advanced by the defendant that is, of course, the – the initial terms of the contract so, for example, the loan and the six months' interest being rolled up into one is fair. What she objects to and is disputing is fair is the 5 per cent per month compound interest… I do appreciate, your Honour, that there is no evidence in the bundle with regards to alternative rates or any documentation or witness statements from a relevant expert or – or a relevant person from that field. What is asked of your Honour is to consider it on a common sense basis and whether or not 5 per cent per*

month on a compound basis which has aggravated a £67,000 loan to over £250,000 is fair in the circumstances. I think those are – those are really the submissions that I can make in the light of the defendant's evidence, your Honour'.

42. There followed this exchange between the Judge and Mr Pavlovich in his closing submissions:

Judge: '*...there's only really one issue, isn't there, which is whether or not you – you are on notice that the loan was not predominantly for business purposes*. Counsel: *Yes*.

Judge: *If the answer to that is no you were not on notice then that's the end of the whole thing*.

Counsel: *Well, your Honour, that – that is the point in dispute. Well, whether you – your Honour will want me to go through all the other things that I – I need to prove to make out my claim I – I don't know.*'

43. Shortly thereafter:

Judge: '*The only – and the second issue in reality is that if there was such notice whether or not the interest rate is too high, wasn't it?*

Counsel: *Yes.*'

The judgment

44. In his extempore judgment, the Judge first noted that Ms Smart had been '*... instructed very late in the day and has done the best she can on the basis of the evidence before the court and the pleadings, such as they are*.'

45. At [6] he stated '*So that is the factual background, it being common ground before me that were it not for the loan being for business purposes, that the loan would be a regulated mortgage contract within the meaning of the Regulated Activities Order. It is equally common ground that the declaration to which I have referred is compliant with the statutory provisions and by it being signed by the defendant that of itself raises a presumption that the loan was wholly or predominantly for business purposes, from which it follows that the agreement was not a regulated mortgage contract and therefore falls outwith the provisions of the Consumer Credit Act 1974 and can be enforced free of statutory restrictions. That presumption can be disengaged if the defendant establishes that the claimant lender knew, or had reasonable cause to suspect, that the loan was not being used wholly or predominantly for business purposes*.'

46. As to the issue of 'reasonable cause to suspect' the Judge preferred the evidence of Mr Miller to that of Ms Smyth, concluding that '*There is simply nothing at all which would put the claimant on any form of notice that the money was not being used or required wholly or predominantly for business purposes...*': [16].

47. As to the contention that Ms Smyth's intention had been to remortgage, the Judge stated at [18]: '*Whilst the defendant has said that, well, the deal was with Mr Kai, the agent,* [i.e. the broker] *and that she would take out a remortgage when the loan would*

be refinanced, that may or may not have been the intention – usually it is with a bridging loan because it is extremely unwise to take them out because they are known to get extremely expensive if not repaid within time and even if repaid within time they are quite expensive, but there is no suggestion and no pleaded basis for that in any way being material to the claimant's ability to enforce the loan directly against the defendant'.

48. The Judge concluded in the final two paragraphs [19-20]:

'*19.The conclusion I reached, therefore, is that this was not a regulated mortgage contract so that the 1974 Consumer Credit Act is simply immaterial to the enforcement of this loan.*

20. Having reached that conclusion, it is therefore not necessary to consider the fairness or otherwise of the terms. The only question in relation to the fairness or otherwise of this was the rate of interest. In that respect, the defendant's counsel very frankly and properly accepted there is simply no evidence before the court to the effect that five per cent compound monthly was something which was exorbitant or unreasonable': [19-20].

The appeal

49. There is no challenge to the Judge's conclusion that the loan agreement was unregulated. The challenge is based on ss.140A-B and the unfair relationship provisions.

50. Permission to appeal was granted on this basis by Ritchie J at the oral renewal hearing on 12 April 2022. He gave unqualified permission to revise the original grounds of appeal. The revised grounds are sufficiently summarised in Mr Woodhead's skeleton argument as the Judge:

(1) failing to consider the fairness of the terms of the loan because that is what ss.140A-B required of him;

(2) failing to consider/hold that the burden of proof as to the fairness of the terms of the loan was on Goldhill as creditor;

(3) failing to conclude that the terms of the loan were not fair and ought to be varied so as to be more favourable to Ms Smyth;

(4) acting improperly or irregularly or misapplying his discretion in making an outright possession order in 56 days; and

(5) failing to consider and then conclude that the default rate of interest was a penalty clause and to vary the terms of the loan accordingly.

Given the terms of Ritchie J's Order, I accept that his grant of permission was wide enough to include issue (5).

The Appellant's submissions

Grounds 1 and 2

51. The first stage of Mr Woodhead's argument is that the issue of unfair relationship was raised by Ms Smyth in her defence. In particular:

(i) whilst questions 5 and 6 in the Defence Form were stated only to apply if the loan was a regulated consumer credit agreement, that form expressly attached Ms Smyth's witness statement which asked the court 'to examine if the terms of the loan were fair and if it was compliant to be an unregulated loan'. This raised 'fairness' in terms which did not depend upon a finding that the agreement was regulated;

(ii) at the CCMC on 7 August 2019, with Ms Smyth again in person, the District Judge identified the issues as including 'The fairness of the agreement', This formulation did not depend upon a finding that the loan was regulated. That was the correct understanding of the issues and confirmed that the unfair relationship provisions were in play;

(iii) the Case Summary neither reflected nor replaced the pleaded and unqualified issue of fairness;

(iv) Ms Smart's Position Statement thus properly referred to the issue of unfair relationship.

52. However, in her exchanges with the Judge, Ms Smart erroneously (a) agreed with the Judge's identification of the critical issue as 'whether or not it is a regulated mortgage contract rather than a regulated consumer credit agreement' and (b) acknowledged that the fairness issue only arose if she succeeded on issue 1 in the agreed list.

53. In consequence the Judge was led to a misunderstanding of the law, namely that the bridging loan fell outside the protections of the CCA if it was not a RMC: see the judgment at [6], [19] and [20]. He therefore did not consider the question of fairness: [20, first sentence]; and, to the limited extent that he referred to the complaint about the 5% p.m. compounded default rate, wrongly placed the burden of proof on the borrower rather than the lender: s.140B(9).

54. Mr Woodhead then submits that Mr Pavlovich should have intervened to correct these apparent misunderstandings of the law: first, in the course of Ms Smart's exchanges with the Judge; secondly, on hearing the oral judgment. At the very least, he should have pointed out that (a) the unfair relationship provisions of the CCA applied if the loan agreement was an unregulated mortgage contract but that (b) (in his submission) that issue had not been raised in the pleaded case.

55. In consequence this was not a new point being raised on appeal. The unfair relationship issue was in fact raised on the pleaded case, albeit it could have been raised more clearly; and Mr Pavlovich should have corrected the Judge's misunderstanding of the law. In any event, the Judge made an error of law and in consequence failed to deal with the 'unfair relationship' issue.

56. Alternatively, if it is a new point, in all the circumstances Ms Smyth should be allowed to raise it on appeal. Citing Notting Hill Finance Ltd v. Sheikh [2019] EWCA Civ 1337 at [26] *'...there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether*

it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken'.

57. As to the nature of the proceedings, the claim was for possession of a residential property which is the family home for Ms Smyth and her young children; the sum involved is very large; it is a complicated area of law; the debtor represented herself until the CCMC; her Counsel was instructed at the last minute; it is an area where recent statute - i.e. the CCA 2006 which introduced the unfair relationship provisions, in replacement of the previous legislation concerning 'extortionate credit bargains' - intervened to protect the borrower from ruinous terms.

58. As to the nature of the new point, it required a further trial rather than a re-trial. Further evidence would be required. If the Judge had appreciated the correct position in law, the likelihood is that he would have ordered a further hearing on the issue of unfair relationship. There was prima facie evidence of such a relationship. As another example involving the same lender, he pointed to the decision of the County Court at Central London in Goldhill v Berry [2018] 10 WLUK 480 (HHJ Monty QC) which found that Goldhill had acted in ways that constituted an unfair relationship.

59. There was no real prejudice if the point were allowed. Whilst acknowledging the importance of finality in litigation, that was distinctly outweighed by the prejudice to Ms Smyth if she were not allowed to pursue the issue.

Ground 3

60. This Ground contends that, properly directed, the Judge would have made an order pursuant to his wide powers under s.140B. However, in the final paragraph of his skeleton argument and in his oral argument, Mr Woodhead focused on the alternative submission that the unfair relationship issue should be remitted to the County Court for directions towards a further trial.

61. As to the pleaded Ground, this was in particular supported by (i) the exorbitant and unconscionable default rate of interest, with the consequent exponential rise in the debt, and which served no legitimate business interest; and (ii) the failure of Goldhill to adduce evidence to discharge the burden of establishing the fairness of the relationship. Its evidence was confined to the two sentences in paragraph 45 of Mr Miller's witness statement. There was no evidence to support his generalised assertion as to the practice of other bridging loan providers.

62. By contrast, there was evidence from Ms Smyth in particular that it was a family home for her and her young children; that she was happy to pay back the money without the exorbitant interest charges and was making continued efforts to refinance so as to redeem the loan net of those charges; that Goldhill had made no attempt to comply with the Mortgage Arrears Pre-Action Protocol applicable to unregulated residential mortgages but had simply sent the brief letter before action; that Goldhill had refused an extension of the term which she had requested in March 2019 and thereby blocked her from refinancing; that her business had been closed for over 18 months during the Covid-19 pandemic; that in the latter part of the pandemic she would have been entitled to seek to enter a debt respite breathing space pursuant to

the Regulations[2] which came into force in May 2021; and that the Covid-related delays in the court system had added to the exponential growth of the debt. Mr Woodhead cited Greenlands Trading Ltd v. Pontearo [2019] EWHC 278 (Ch) as providing support for Ms Smyth's case.

Ground 4

63. Properly directed on the law and in the light of the evidence, the Judge would or should not have made an outright order for possession. Rather he should have ordered that possession of the Property be suspended on terms that Ms Smyth repay the amount of capital advance plus interest at the rate of 2% p.m. or such other order as did justice to the case and the unfairness of the parties' relationship.

Ground 5

64. Mr Woodhead acknowledged that the issue of penalty is a new point. He does not submit that Mr Pavlovich should have raised it, but contends that the Judge should have done so of his own motion and pursuant to the duty under the Overriding Objective to ensure that the parties are on an equal footing. Citing the Court of Appeal in Notting Hill v Sheikh, the default rate should have 'sounded alarm bells' to the Judge. In that case Snowden J (as he then was) referred to the *'remarkably high'* default rate and its consequences and continued: *'Those numbers are sufficiently striking that I would have expected them to have rung alarm-bells for the District Judge, even given his busy list. Whilst I do not express any view as to whether the District Judge was under any positive duty to do so, in my view he could not possibly have been criticised if he had raised the issue of whether such a term was penal or unfair to the defendant of his own motion"* [45]; see also Hussein v. London Credit Ltd [2021] EWHC 1417 (Ch) at [24-26].

The Respondent's submissions

Grounds 1 and 2

No case advanced

65. Mr Pavlovich submitted that there had been no pleaded case of unfair relationship. In the Defence Form, the questions (and therefore answers) in paragraphs 5 and 6 were expressly relevant only if the loan were a regulated consumer credit agreement. As to box 6, the question reflected s.129(2) CCA (time orders deferring payment of sums owed under a regulated agreement) and s.136 (the power to vary any agreement or security in consequence of such an order).

66. Ms Smyth's supporting witness statement was to the same effect. Its vagueness and lack of particularity had been pointed out in Goldhill's Reply but had not been clarified in the Response to that Reply.

67. The list of issues in the Order of District Judge Bell dated 7 August 2019 (and in particular number 5) could not expand the pleaded case so as to include 'unfair relationship', nor did it do so.

[2] Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020

68. The Case Summary had been drafted by Mr Pavlovich on the basis of the pleadings and then agreed by Ms Smyth's solicitors on her behalf. It made clear that the 'fairness' issue arose only if the loan was found to be regulated. This was further demonstrated by its reference to the fairness of the terms rather than the fairness of the relationship: cf. Plevin v. Paragon Personal Finance Ltd [2014] UKSC 61 per Lord Sumption at [9]: *'First, what must be unfair is the relationship between the debtor and creditor'*.

69. Ms Smart's Position Statement then duly identified the 'main issues' in the same terms as the agreed Case Summary. However, in conflict with issue (5), the Statement used the language of 'unfair relationship' and referred to a reverse burden of proof. His email of 25 June 2021 accordingly challenged this as a matter going outside the pleaded case and which would require a 'very late' amendment, which would be opposed. The only inference from Ms Smart's conduct at the trial was that at the intervening conference it had been decided not to make any such application and to proceed on the basis that 'fairness' only arose in the event that the agreement was regulated (and in particular a RMC). Consistently only with that inference, Ms Smart had made clear to the Judge that issue (5) only came into play if she succeeded on issue (1).

70. Mr Pavlovich accepted that, taken on its bare terms and without context, paragraph [6] of the Judgment was wrong in its statement that a regulated mortgage contract '*falls outwith the provisions of the CCA 1974 and can be enforced free of statutory restrictions*'. However that statement had to be read in the context of the pleaded case and agreed issues: see also the reference to the "pleaded basis" in paragraph [18]. The statements in [19] and [20] were likewise to be understood in that context. Thus correctly understood in that context the Judge made no error of law.

71. As to his own position, it was no part of the duty of Counsel - at least where the opposing party was represented – to suggest a case that had not been pleaded but might theoretically have been pursued.

72. The effect of the appeal was to try and pursue an argument which had not been pleaded and which, in any event and by inference from the Position Statement and subsequent events, had deliberately not been pursued.

Now too late

73. This was a new point and the strictly limited discretion to allow it to be taken should not be exercised. Notting Hill made clear :

(1) the discretion was to be exercised cautiously because each party should present its whole case at first instance: [11], [25], [26];

(2) an appellate court will not generally permit a new point be raised on appeal if that point is such that either (a) it will necessitate new evidence or (b) had it been run below it would have resulted in the trial being conducted differently with regards to the evidence at the trial [25]. Further, where a new point is taken following a full trial *'it is hard to see how it could be just to permit the new point to be taken on appeal'*[27];

(3) even a pure point of law may only be raised if the other party has had adequate time to deal with it; has not acted to its detriment in reliance on the omission to raise the point; and can be adequately protected in costs: [25], also [23] and [28].

74. As further observed in Crane v Sky In-Home Ltd [2008] EWCA Civ 978 per Arden LJ at [21]: '*If there is any area of doubt, the benefit must be given to the party against whom the amendment is sought. It is the party who should have raised the point at trial who should bear any risk of prejudice.*' To like effect were the authorities on attempts on appeal to withdraw concessions made in the lower court: see e.g. Ali v Khatib [2022] EWCA Civ 481.

75. Further the actual decision in Notting Hill was to be distinguished on its very different facts. In that case the Court of Appeal upheld the appellate decision of the Circuit Judge to allow the borrower to raise 'unfair relationship' where it had not been raised before the District Judge. However the hearing before the District Judge had been an initial 7-minute hearing under CPR 55.8 when no evidence was given; the debtor had been represented only by a duty solicitor on the day; no defence form N11M had been completed; and the default rate was 12% p.m. compounded.

Prejudice

76. The introduction of the new point would irremediably prejudice Goldhill because it required new evidence and would change the way the trial was conducted, including the reversal of the burden of proof. Goldhill would also be prejudiced by the continuing accrual of interest in circumstances where (as was accepted) the Property was in negative equity.

77. Further it had acted to its detriment in trying to enforce the possession order in reliance on the judgment obtained at trial. Following the refusal of permission to appeal on the papers, a warrant for possession had been obtained; but it could not be executed following a subsequent late application to renew Ms Smyth's application for permission to appeal at an oral hearing.

No prospect of success

78. In any event, the case of unfair relationship had no real prospect of success.

79. As to the burden of proof, there were competing first-instance authorities as to what is required for the debtor to put the point in issue. In Carey v. HSBC Bank plc [2009] EWHC 3417 (QB); [2010] Bus LR 1042 (HHJ Waksman QC, as he then was) it was held that an allegation of unfair relationship without any supporting facts was insufficient, without more, to found such a relationship: [193-194].

80. Conversely, in Bevin v. Datum Finance Ltd [2011] EWHC 3542 (Ch) Peter Smith J held that it was sufficient simply for the debtor to make an allegation of unfair relationship; with the consequence that s.140B(9) placed the reverse burden on the creditor: see at [53]-[63]. However Carey was not cited.

81. Other first instance decisions were inconsistent with Bevin. These are set out in Chitty on Contract (34th ed.) at 41-227 and its footnote 1477 which suggests that Bevin *'is of doubtful authority'*. Paragraph 41-227 concluded *'It is suggested that whilst in*

principle it is enough for the debtor merely to allege an "unfair relationship" for the issue to be raised, if the debtor is the claimant then in practice he will need to provide supporting evidence if a CPR Pt 18 request for "further information" is served by the creditor. Moreover, even if the debtor is the defendant, it is suggested that if the [debtor[3]]*'s evidence provides no suggestion that the relationship is unfair, the court is likely to regard the creditor as having discharged the burden and to dismiss the debtor's claim*'. That sentence was cited with approval in Credit Capital Corp Ltd v Watson [2021] EWHC 466 (QB) per Freedman J at [55].

82. In this case (i) the interest rate was clearly disclosed in the loan offer and there was a prominent recommendation to take legal advice; (ii) Ms Smyth was an experienced businesswoman who could understand what the offer said. Her difficulty was simply that she did not read the documents but relied instead on the broker's advice; (iii) her real complaint was that her broker had promised her a remortgage to repay the bridging loan, but later disappeared. If so that had nothing to do with Goldhill; (iv) Mr Miller's evidence on market practice was not challenged and no evidence was adduced to the contrary; (v) in any event, a short-term bridging loan would be expected to have a higher interest rate than a normal 'High Street loan'. This reflected the increased risk to the lender, in particular because upon default the lending becomes involuntary and the security may prove inadequate.

83. Authority supported Goldhill's position. In Greenlands the rate increased from pre-default 1.35% to 3% pm. The trial judge held it not to be penal or unfair because it followed the industry standard and was intended to be competitive. There were no documents nor expert evidence in support of the lender's evidence that it followed the industry standard. The appeal to Nugee J was dismissed. The decision thus followed the general approach described in Chitty at 41-223: *'The case-law under the "unfair relationship" provisions has so far generally follow the previous approach under the old 'extortionate credit bargain' provisions of judging interest rates against the market rate for that type of loan'*.

84. The County Court case of Goldhill v. Berry provided no assistance. The finding of unfair relationship was on a different basis. The default interest rate was the same as here, was withdrawn as a challenge before trial; and the defendant was ultimately ordered to pay interest at that rate.

85. No support for an 'unfair relationship' was provided by the various further matters raised on behalf of Ms Smyth for the first time on the appeal.

Ground 3

86. For the same reasons Ground 3 must fail; as must the alternative suggestion – raised for the first time in Mr Woodhead's skeleton argument – that the issue should be remitted to the County Court for directions towards a further trial.

Ground 4

87. In any event, there was no reason to set aside the possession order. The order proposed on behalf of Ms Smyth sought to reduce the default rate to the pre-default rate. The effect would be to grant a fee-free 3-year extension to a six-month bridging

[3] The text says 'creditor', but this is evidently a slip.

loan. This would conflict with the guidance from authority that an order under section 140B *'...should reflect and be proportionate to the nature and degree of unfairness which the court has found…It should not give the* [debtor] *a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place*': Carney v. N.M. Rothschild & Sons Ltd [2018] EWHC 958 (Comm) per HHJ Waksman at [101].

88. Above all, there was no evidence that Ms Smyth could repay the loan, even without interest. The Property would have to be sold. If the Court concluded that the argument on unfair relationship should be allowed to proceed, the only effect would be on the money judgment, not the order for possession.

Ground 5 : penalty

89. There was no basis for the proposition that the Court should have raised 'penalty' of its own motion. The citation from Notting Hill at [45] provided no such support. In Hussein the point was expressly taken. In any event there was no arguable case that the default rate constituted a penalty: cf. Cavendish Square Holdings BV v. Makdessi [2015] UKSC 67; also Cargill International Trading Pte Ltd v. Uttam Galva Steels Ltd [2019] EWHC 476 (Comm) at [50], [56] and [70].

Reply

90. Mr Woodhead's reply included that (i) Mr Miller's evidence of industry practice was no more than an assertion; (ii) the decision of Nugee J in Greenlands was not based on a principle that the market rate was always fair, but was on the basis that the decision involved an evaluative judgment with which it would be wrong for an appellate court to interfere; and (iii) Ms Smyth and Ms Smart did not speak before the trial, which was conducted remotely**.**

Discussion

The pleaded case/issues for trial

91. The first question is whether Ms Smyth ever pleaded a case of unfair relationship. In considering that question, I take due account of her position as a litigant in person at the time of her completion of the Defence Form and at the CCMC hearing on 7 August 2019 and of the complexities of consumer credit legislation.

92. I accept that the Defence Form has to be construed together with the 'attached statement' of the same date. I accept that the answers to Questions 5 and 6 in the Form are qualified by the preceding words in parenthesis; and thus raise no plea of unfair relationship. On the other hand, the attached statement raises a 'fairness' issue in more general terms. In particular, it takes issue with the way in which the loan had been presented and sold, e.g. including *'monopolised on my position'*; and requests the Court *'To examine if the terms of the loan were fair and it was compliant to be an unregulated loan'*.

93. However I do not accept that the combined document goes so far as to allege, whether expressly or by implication, an unfair relationship within the meaning of s.140A-D. Rather, the focus is on fairness of the agreement and its terms: cf. the distinction

emphasised by the Supreme Court in Plevin. True it is that one of the matters which s.140A directs the Court to consider is *'(c) any of the terms of the agreement'*. However it does not follow that a challenge to the fairness of the terms implicitly amounts to a challenge to the fairness of the relationship. This distinction is further emphasised by the reverse burden of proof which arises where an unfair relationship is alleged: s.140B(9).

94. This distinction is in turn reflected in the 'fairness' issue identified by District Judge Bell at the hearing on 7 August 2019, i.e. *'the "fairness" of the agreement'*. If the District Judge had understood the pleaded case to include an allegation of 'unfair relationship' (including its reverse burden of proof), the identified list of issues would have made that clear.

95. In any event, any doubt on the point was removed by the Case Summary. Mr Pavlovich prepared this (as I accept) on the basis of his reading of the pleaded case. Its terms were then approved by the solicitors who had now been retained by Ms Smyth. Issue (5) in that Summary made clear that fairness only arose in the event that the loan agreement was held to be regulated. Nor is the clarity of that limitation qualified by the reference to these as 'the main issues for the Court to decide'.

96. Further, even if (contrary to my view) the pleaded case included an allegation of 'unfair relationship', I do not accept Mr Woodhead's argument that the Case Summary could not revise it. The purpose of pleadings is to identify the issues for trial. The purpose of the Summary (and of the Order which required it to be placed within the trial bundle) was to provide clear and agreed identification of the issues to be determined at the trial. I add that the trial was not of preliminary issues but of the entire action.

97. As stated by May LJ in Jones v. MBNA International Bank Ltd [2000] EWCA Civ 514 at [52] (cited in Notting Hill at [11]) : *'Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised.'*

98. In my judgment, the effect of the agreed Case Summary was to put beyond doubt that the issue of fairness did not arise for consideration if the loan were held to be regulated. Thus the unfair relationship provisions of s.140A-D were not an issue for trial.

99. Ms Smart was then instructed at a very late stage. Her quickly prepared Position Statement did indeed refer to unfair relationship in terms which must have been intended to relate to the relevant statutory provisions. However Mr Pavlovich then took the point that (as was his view) no such claim was pleaded and that any late application to amend would be opposed. I do not know if the conference planned for 5 pm on Friday 25 June went ahead, but understood Mr Woodhead to be stating in his reply that there was no conference on the day of trial.

100. In any event (and whether or not there was a conference on the Friday), Ms Smart did not apply to amend the pleaded case nor otherwise to go outside the issues identified

in the Case Summary. She proceeded on the basis of the issues identified in that Summary; and thus in her submissions expressly reiterated that the issue of fairness arose only if the Judge found the loan agreement to be regulated.

Duty to raise the point?

101. In these circumstances, I do not consider that Mr Pavlovich was obliged to say anything different in the course of the submissions to the Judge. I do not accept that Ms Smart made errors of law in her submissions to the Judge. On the contrary, her submissions reflected the issues identified in the Case Summary.

102. Did any such duty arise from the language of the Judge's extempore judgment, now contained in paragraphs [6] and [18]-[20] of the transcript?

103. I accept that upon the bare language of those paragraphs (and in particular [6] and [19]) the statement, that the 'statutory restrictions' of the CCA had no application if the bridging loan agreement was an unregulated mortgage contract, was wrong in law. The unfair relationship provisions do apply to an unregulated mortgage contract: s.140A(5). I also accept, of course, that it is the duty of Counsel to intervene if it appears, at any stage, that the Judge has misunderstood the law.

104. However I consider that the Judge's statements in his judgment have to be understood in the context of the agreed issues before him. In that context, the CCA did have no application if the bridging loan was an unregulated mortgage contract. On the issues before him, there was no error of law.

105. Nor do I accept that Mr Pavlovich should have intervened at this stage. I accept that his understanding was that the Judge's statements were made in the context of a pleaded case where the issue of consumer credit protection arose only if the loan agreement were found to be regulated. I also accept that Mr Pavlovich had no reason to believe that Ms Smart was advancing a case of unfair relationship. By his e-mail to Ms Smart he had challenged that reference in the Position Statement and pointed out the need to amend and that this would be opposed. Ms Smart had not pursued the point and had advanced the unfairness case on the basis identified and agreed in the Case Summary.

106. It follows that I accept that the proposed case of unfair relationship is a 'new point' being taken on appeal.

New point

107. The next question is whether, having regard to the principles restated in Notting Hill, Ms Smyth should be allowed to take this new point.

108. For this purpose I think it relevant first to consider what would or might have happened if, at the outset of the trial or at some later point in its course, Ms Smart had sought to advance a case of unfair relationship.

109. In that event, I consider it inevitable that Ms Smart would have had to make an application to amend the defence (and/or add a counterclaim) accordingly. This is

because, given my conclusions on the procedural history, there was no such issue before the Court.

110. If such an application had been made it would have confronted the principles which apply to a 'very late' application to amend, namely an application which if granted would require the vacation of the trial: see the familiar authorities cited in the White Book at p. 637, para.17.3.8 and in particular the summary of principles identified by Carr J (as she then was) in Quah v. Goldman Sachs International [2015] EWHC 759 (Comm) at [38]. These principles include: *'(b)…a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission; (c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;…'*

111. In my judgment, vacation of the trial would have been a necessary consequence of a successful application to amend, in particular because of the reverse burden of proof imposed on the creditor by s.140B(9) and the consequence that Goldhill would have to both plead and prove its case that the relationship was not unfair.

112. In the circumstances I consider it almost inevitable that an application to add this new issue by amendment on the day of the trial would have been refused; and that any appeal against such a decision would have failed. In this respect I accept Mr Pavlovich's contention that the facts and circumstances are quite different from those which arose in Notting Hill.

113. The prospects of success of an application to amend would have been even weaker if the application had not been made until the delivery of the extempore judgment and following intervention by either Counsel.

114. It follows that the effect of allowing Ms Smyth to raise this new point would be to place her in a better position than she would have enjoyed if Ms Smart had sought to pursue the point at the trial (and *a fortiori* if she had not sought to do so). In my judgment it would require a very strong case indeed to justify that effect.

115. Returning to the principles and factors restated in Notting Hill, the Court of Appeal referred to *'…one end of the spectrum…in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual enquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight."*: [27].

116. At the other end of the spectrum *'... are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court…In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the*

new argument and has not suffered any irremediable prejudice in the meantime.': [28].

117. In my judgment, this case is at the first end of the spectrum. If the point on appeal had been taken and pursued below, the course of the trial and evidence would undoubtedly have changed. This follows again both from the reverse burden of proof and from the necessary focus on the overall fairness of the relationship rather than just the fairness of the terms. Indeed this is only confirmed by Mr Woodhead's understandable focus in oral submissions on the alternative remedy on a successful appeal, namely for the issue to be remitted to the County Court; and by the many new points which he advanced in argument as to the alleged unfairness of the relationship.

118. I reach this view whatever the precise position in law as to whether (or the extent to which) there is an evidential burden on the debtor. In any event, I am not persuaded that there is any truly significant difference between the observations in Bevin and in the other cases cited in Chitty. Furthermore the Court of Appeal in McMullon v. Secure the Bridge Ltd [2015] EWCA Civ 884 per Hildyard J at [13] referred without disapproval to Bevin, stating: *'As to the evidential standard, it is important to note… that section 140B(9) provides that where the debtor (or surety) alleges that the relationship is unfair, it is for the creditor to prove that it is not: the burden is squarely on the creditor; and see* [Bevin] at [59].'

119. From its place on the spectrum, it follows that in this case the policy argument on finality in litigation carries great weight. The imposition of a further trial, including the reverse burden of proof, would be a substantial prejudice to Goldhill. There is additional prejudice from the continuing rise in indebtedness (even without the default rate) against a property in negative equity. By contrast I do not accept that Goldhill's interim inability to enforce the warrant for possession of itself constitutes material detriment or prejudice; that was simply a consequence of the grant of permission to appeal at the renewal hearing.

120. On the other side of the scale, this case is about the home of Ms Smyth and her children and an indebtedness which, through the combination of the continuing default and the amount of the default rate of interest, has soared.

121. In reaching my decision, I also remind myself that the guidance in Notting Hill is as to how the discretion should 'generally' be exercised; and that it is not necessary to establish that it is an 'exceptional' case.

122. Having weighed all these matters in the balance, I am clear that the discretion should not be exercised in favour of allowing the issue of unfair relationship to be pursued. In particular:

(i) the judgment under appeal followed a full trial of the issues, as identified in the Case Summary which was agreed between legal representatives on each side;

(ii) if the point had been run below, it would have resulted in the trial being conducted differently with regards to the burden of proof and the evidence;

(iii) the policy argument in favour of finality in litigation deserves great weight;

(iv) Goldhill would be prejudiced both by the need to proceed to a further trial and by the continuing increase in indebtedness against the value of the Property in negative equity;

(v) any application to pursue the point at the trial would have required permission to amend which would almost certainly have been refused; and there is no good reason for Ms Smyth to be in a better position by way of appeal.

123. I consider that all these factors outweigh the prejudice to Ms Smyth from the inability to pursue this issue.

124. In reaching this conclusion I have given no weight to the rival contentions on the prospects of success on the issue of 'unfair relationship'. For the reasons already given, if the issue were to proceed it would require the parties to undertake afresh a review of the relevant law and the potentially relevant evidence. At this stage the Court is simply not in a position to make any useful assessment on the merits.

The remaining grounds of appeal

125. It also follows that Ground 3 of the appeal would have failed in any event. If I had thought that it was right to allow the unfair relationship issue to be advanced, the only remedy would have been to remit the issue to the County Court for further directions and fresh evidence towards a new trial.

126. As to Ground 4 this must fail in consequence of failure on grounds 1-3.

127. As to Ground 5, this can be taken shortly. I reject the argument that the Judge should of his own motion have raised the defence of penalty. I see no authority or principle to support that contention – not least in circumstances where each party had legal representation - nor any support from the Overriding Objective.

Conclusion

128. For all these reasons the appeal must be dismissed.