Neutral Citation Number: [2020] EWHC 1441 (QB)

Case No: QA-2019-000014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2020

Before :

MR JUSTICE FREEDMAN

- -

Between :

Ms Rosemary Diane Copeland — **Appellant**

- and -

Bank of Scotland PLC — **Respondent**

- -
- -

The Appellant appeared in person
Benjamin Wood (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Hearing dates: 26th and 27th February 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 4th June 2020 at 2.00pm.

Mr Justice Freedman:

I Contents

II Introductory Matters

1. This is an application out of time for permission to appeal against an order of Master Davison on 1st November 2018, and, if permission is given, with the appeal to follow. The case concerns a complex and convoluted history which goes back to a mortgage dated 8th February 2002. It is challenged by the appellant whether there was a mortgage. A possession action was brought on 11th September 2013. A possession order was made by Master Davison on 6th August 2018 at a trial at which the appellant did not attend. The decision on 1st November 2018, against which the appellant appeals, was a refusal to accede to an application to set aside the possession order being made at the hearing of 6th August 2018.

2. There have been permissible attempts on the part of the respondent, which has been seeking to obtain and enforce a possession order since 2013, to confine the issues. By way of example, it encouraged the Court to rule against the appellant on the basis of failure to file the notice of appeal by the time allowed. Then it sought that the case be decided on the basis of a permission application with no particularly detailed examination of the case. It counselled against allowing too much leeway for the appellant on the basis that (a) she should be limited to an appeal by way of review rather than rehearing, (b) any of her submissions which amounted to evidence not before Master Davison should be rejected, absent an application to admit the same, and having regards to the rule in *Ladd v Marshall*, and (c) to the extent that she failed to deal adequately with fundamental matters such as any good reason why she was absent at the hearing on 6th August 2018, the Court should not make allowances. It will be apparent that I have been mindful of the difficulties of the appellant as a litigant in person. I have also not wished this matter with its long and tortuous history to be decided purely on such points. I shall return to these points in the Conclusions.

3. At the appeal there appeared Mr Benjamin Wood of counsel for the respondent and the appellant in person. The hearing lasted most of 2 days. The first half day was taken up by the sudden and unexpected intervention of the sister of the appellant, namely Ms Elizabeth Watson. She had earlier in February 2020 sought to make an application to intervene and Mr Justice Andrew Baker, sitting in Court 37, adjourned that application

to be heard on 26th February 2020. The reason why it was unexpected was because Mr Justice Andrew Baker required Ms Watson to issue her application by 20th February 2020 and to serve it on the parties. For reasons which appear in a judgment that I gave on 26th February 2020, I dismissed the attempt of Ms Watson to intervene and I reserved the question as to whether this was an application which was totally without merit.

4. The appeal was heard on 26th and 27th February 2020, and judgment was reserved in order to prepare and hand down a written judgment, which in the usual way would be preceded by a confidential draft having been supplied to the parties. After that had been sent in draft to the parties, the respondent raised with the Court on 4th and 5th May 2020 whether Practice Direction 51Z, "Stay of Possession Proceedings – Coronavirus ("PD 51Z") applied. PD 51Z was made on 26th March 2020 in response to the Covid-19 pandemic which came into force on the following day, and the amended version which came into force on 20th April 2020. On 4th May 2020, the respondent's Counsel stated that *"It would be the respondent's position that the Practice Direction does not prevent the handing down of judgment or the making of a consequential order, provided that – as is proposed in the draft order – no steps are taken by either party during the stay period."* By a further email from the solicitors for the respondent to the Court on 5th May 2020, it was stated that this remained the respondent's position, but reference was made to the case of *Arkin v Marshall* in which the Court of Appeal had reserved consideration of PD 51Z. One suggestion was that the Court might wish to consider the impact of the reserved judgment in *Arkin v Marshall* on the instant appeal. That was a helpful suggestion in that it allowed this Court to consider its impact as well as the impact of another case which followed.

5. On 11th May 2020, the Court of Appeal handed down judgment in *Arkin v Marshall* [2020] EWCA Civ 620. It rejected a contention that PD 51Z was ultra vires. It said that it provided a blanket stay on possession proceedings. It "*imposes a temporary stay to protect and manage County Court capacity, and to ensure the effective administration of justice without endangering public health during a peak phase of the pandemic*" (paragraph 28). There is a power under CPR 3.1 to stay proceedings where it thinks it fit to do so, and *"the power to impose a stay necessarily includes the power to lift it"* (paragraph 39). The Court of Appeal stated that PD 51Z did not formally exclude the operation of CPR part 3.1 (paragraph 42). As a matter of strict jurisdiction,

a judge retains the power to lift the stay which PD 51Z imposes. However, the proper exercise of that power is informed by the nature of the stay and the purposes for which it was evidently imposed. The purpose identified was that during the 90-day period the burden on judges and staff in the County Court of having to deal with possession proceedings would be lifted, and also that the risk to public health of proceeding with evictions would be avoided. Since the purpose is of its nature blanket in character, it would be undermined if it could be avoided in the particular circumstances of particular cases. Thus, the Court of Appeal had great difficulty in envisaging a case where it could be lifted.

6. The question has arisen as to whether PD 51Z applied to appeals in respect of decisions in respect of possession matters. In a different case, 27th May 2020, the Court of Appeal gave judgment in the case of *London Borough of Hackney v Okoro* [2020] EWCA Civ 681. It stated that PD 51Z applied to appeals in possession proceedings up to the Court of Appeal. It would follow that had this appeal been due to be heard after PD 51Z came into being, this appeal would be stayed. However, all that remains is for the reserved judgment to be handed down. In my judgment, it is undesirable in this case, when following a heavily contested appeal, where there is a reserved judgment ready to be handed down following extensive preparation, to postpone hand-down of the judgment until such time as PD 51Z ceases to have effect. That may be towards the end of June, or it may be much later if PD 51Z is extended thereafter. This is not intended to inform any other Court about what to do in connection with a reserved judgment in another case: it is a course of action taken by reference only to the circumstances of this case.

7. It is important that the hand-down of the judgment does not have an effect inimical with PD 51Z. In the event of the appeal being dismissed, there should be the following provisos, namely (a) that any possession order must be stayed under PD 51Z for however long PD 51Z applies, and (b) an extension of time to apply for permission to bring a second appeal until after PD 51Z has ceased to apply would preserve the purpose of PD 51Z.. In my judgment, the stay should be lifted pursuant to CPR 3.1 for the very narrow purpose of issuing the reserved judgment and making a consequential order, but subject to these provisos.

III Does CPR 39.3 apply?

8. It was not clear whether CPR 39.3, which enables the court to proceed with 'a trial' in the absence of a party, applied. Like the Master, I have come to the view that it does apply either directly or by way of analogy. The Master did not explain why it did apply, notwithstanding that he had said in his direction of May 2018 that the next hearing would be a disposal hearing rather than allocating the case to a particular track for trial. He may have had in mind that as a result of failing to serve a defence, the scope for the appellant to take issue with the account of the respondent was so limited that it could not be described as a trial.

9. The rule CPR 39.3, which enables the party who does not attend the trial to apply for the judgment or order to be set aside, includes the following:

> *"….(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.*
>
> *(4) An application under paragraph…(3) must be supported by evidence.*
>
> *(5) Where an application is made under paragraph ….(3) by a party who failed to attend the trial, the court may grant the application only if the applicant –*
>
> > *(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or to make an order against him;*
> >
> > *(b) had a good reason for not attending the trial; and*
> >
> > *(c) has a reasonable prospect of success at the trial."*

10. The Master's judgment on 1st November 2018 was expressly on the premise that CPR 39.3 did apply. This is not surprising in that this was the basis of the application as set out in the third paragraph of the reasons for the application. In his written submission to the Court, Mr Wood said that the Court should at least have regard to the criteria under CPR 39.3 in deciding whether to permit the appellant a rehearing. He said that the hearing had been a "disposal hearing" rather than a "trial", with the implication that CPR 39.3 might not apply directly. Indeed, that emerges from the order of Master Davison of 14th May 2018 who characterised it as a disposal hearing, whilst giving directions for further evidence and attendance for cross-examination, and allocating half a day for the hearing. No track was allocated.

11. I have come to the following conclusions as regards the application of CPR 39.3, namely

(1) There is a compelling argument that although it was labelled a disposal hearing, this was in reality a trial rather than a disposal hearing. A disposal hearing is usually one of no more than 30 minutes and one where oral evidence is not to be called: see CPR 26PD.12.4. In *Forcelux Limited v Binnie* [2009] EWCA Civ 854, the Court of Appeal distinguished between the first hearing of possession proceedings where a summary process of 5-10 minutes was the norm, and a hearing directed thereafter for a fuller contested hearing. In this case, even labelled as a disposal hearing, the directed hearing has more in common with a trial than disposal hearing. In those circumstances, CPR 39.3 would apply.

(2) If 6th August 2018 were nonetheless to be treated as a disposal hearing, CPR 39.3 would apply by way of analogy unless there were special reasons to disapply it: see *Hackney LBC v Findlay* [2011] EWCA Civ. 8. At paragraph 24 of her judgment, Arden LJ said that "…*in the absence of some unusual and highly compelling factor as in Forcelux, a court that is asked to set aside a possession order under CPR 3.1 should in general apply the requirements of CPR 39.3(5) by analogy. This is in addition to, and not in derogation of, applying CPR 3.9 by analogy, as this court did in Forcelux, as that provision requires the court to have regard to all the circumstances in any event. However, in my judgment, for the reasons given above, in the absence of the unusual and compelling circumstances of a case such as Forcelux, this court should give precedence to the provisions of CPR 39.3(5) above those enumerated in CPR 3.9."*

(3) The application was also brought under CPR 23. CPR 23.11 gives the court power to re-list any application which has proceeded in the absence of a party. On such an application, the position is more flexible than under CPR 39.3, but in *Riverpath Properties v Bramall* [2000] WL 463, Neuberger J said: *'It would be a very rare case where the court exercised this jurisdiction to set aside an order that had been made, where it was satisfied that there was no real prospect of any new order being different from that which it originally made.'*

12. In the light of the foregoing, the Court was right to regard the CPR 39.3 factors as determinative, whether because they were directly in point or by way of analogy. Although the arguments before this court on the appeal have been wide-ranging, they have concentrated on whether the appellant had a good reason for not attending on 6th August 2018, and whether she has a reasonable prospect of success at a trial. This is not an unusual case where, if there was not a trial, it was appropriate to abandon the application of CPR 39.3 by analogy. Even if the case could be treated as a case under CPR 23.11, this is not a case where the court could set aside an order without at least being satisfied that there was a real prospect of success.

13. In order for the appellant to succeed on this appeal, this Court must be satisfied that *"the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings before the lower court"*: see CPR 52.21(3). The appeal will be limited to a review of the decision of the lower court unless there is a relevant practice direction to contrary effect for the particular appeal (there is none) or *"the court considers in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing"*: see CPR 52.21(1). There is no such relevant practice direction nor are there circumstances which require the Court to consider that it would be in the interests of justice to hold a re-hearing. The respondent cited authorities applying this rule. It is right that the Court should hear this appeal by way of review rather than re-hearing, and there is no reason why it would be in the interests of justice to order a re-hearing. However, I have considered some arguments which do not appear to have been put before the Master where I considered that it was in the interests of justice that I should do so, but I have not heard the matter as a rehearing.

IV The history of the case

14. Before dealing with the issues in this case, it is necessary to summarise the extensive history of the case including the procedural matters since the inception of the claim in 2013. This can be gleaned in part from judgments in the case. I refer first to the beginning of the judgment of Mr Justice Mitting given on 17th November 2016 ([2016] EWHC 3567 (QB)). The background was summarised by Mr Justice Mitting as follows:

> *"1. In 2001 Mrs Copeland was a 46-year old single mother, a painter and part-time teacher earning a modest income. She lived in a mortgage-free house: Lavender Cottage, 2 The Street, Bury St Edmunds. She wanted to sell that house and buy another in Bury St Edmunds: 59 Southgate Street. She approached a mortgage broker, Mr Holmes, with a view to obtaining a bridging load to permit her to do so. He made a proposal to the Bank of Scotland which on 19 November 2001 made an offer to lend her £97,500.*
>
> *2. She completed the purchase of 59 Southgate Street on 7 February 2002 with the aid of that advance secured by a first charge on that property. She paid the sums due under the mortgage until July 2007 when she stopped. On 8 August 2013 the Bank of Scotland brought possession proceedings against her in the Bury St Edmunds County Court, the outcome of which is now pending.*
>
> *3. Also in 2001, Mrs Copeland's sister, Elizabeth Watson, met a plausible but dishonest accountant, Mr Ganger. He invited her to invest in what turned out to be a Ponzi scheme. He persuaded her that it would be a good idea for her and her husband to raise £345,000 on the security of their home in Bournemouth which they did by an advance by the Bank of Scotland. They invested the proceeds and other free cash in the Ponzi scheme. Mrs Watson then persuaded other members of the family to invest their money in the same scheme: her parents; her aunt; and her sister, Mrs Copeland.*

4. Mrs Copeland had no free money of her own and so could only raise money to invest if she borrowed it from a bank on the security of her only asset, Lavender Cottage. Her sister, as is her case, Mr Ganger and Mr Holmes persuaded her to borrow money thus secured from the Bank of Scotland. On 20 November 2001 the Bank of Scotland advanced her £134,985 secured by a first charge on Lavender Cottage. Though she may now dispute it on the basis of entries in her then solicitor's ledger, £135,000 (sic)[1] *of that sum was then immediately paid to Butterfield Bank in the Channel Islands, possibly via a transfer effected through the Bank of Scotland. It, like the rest of the money invested by her sister, aunt and parents, has now been lost.*

5. According to Mrs Copeland who derives her information wholly or mainly through her sister, Mrs Watson, the US Securities and Exchange Commission froze the assets of the operators of the Ponzi scheme on the same day as the Bank of Scotland made an offer to lend her £97,500 on 19 November 2001. Mrs Copeland contends that the Bank of Scotland were negligent and, personally by a director of their private banking arm in Manchester, knowingly complicit in securing the investment of £125,000 by her in the Ponzi scheme.

6. In June 2002, Mrs Watson sought the return of her and her families' investments from the fraudsters. Remarkably, they paid US$545,000 into a joint account opened on 5 July 2002 by her and her husband at the Bank of Scotland. The money paid in was paid in in separate tranches: one of them was just over US$ 190,000 on 10 July 2002. She was then apparently persuaded to reinvest all of the money in the Ponzi scheme and instructed HBOS to transfer US$545,000 to a complicit conduit on 19 July

[1] The sum of £135,000 appears to be a typographical error in that it is larger than the sum of the advance of £134,985. Further, the true sum appears to be £125,000 by reference of the judgment of Mr Justice Mitting at paragraph 5. This then allowed to the appellant the sum of £10,000 which she used as part of the purchase price of 59 Southgate Street.

> *2002. It is not clear whether at the time Mrs Copeland knew anything of this beyond the fact which she asserts that her sister told her of her intention to demand repayment in June 2002.*
>
> *7. Mrs Watson apparently maintains that she was persuaded to reinvest US$545,000 by Mr Ganger and by a bank official, Mr Wells. She has also apparently told her sister, Mrs Copeland, that one of the sums paid, the US$197,000 paid on 10 July 2002 was a repayment of her investment. Mrs Copeland also says that she first became aware of these transactions in 2014 and first saw the bank of Scotland documents which evidenced them as well."*

15. In the judgment of Master Davison of 6th August 2018, he referred to a second witness statement of Trudie Flynn dated 12th October 2017 and the first witness statement of Patricia D'Souza dated 31st July 2018. Unfortunately, those were not included in the appeal bundles but they were provided upon being requested by the Court. They contain some of the documents in the case. In particular, Ms Flynn referred to an application made in June 2001 by the appellant via her broker Salisbury House to the respondent for a mortgage in relation to Lavender Cottage the purpose of which was to be initially stated to be the purchase of an investment property, later the application was changed to a buy to let mortgage. The advance moneys were paid to the appellant's then solicitors' Rudlings and Wakelam on 20th November 2001: the mortgage was said to be redeemed in July 2003, but this may have been in error for July 2002 when Lavender Cottage was sold. In October 2001, the appellant applied via her broker to the respondent for a home purchase mortgage to buy the property at 59 Southgate Street, Bury St Edmunds. The application form was exhibited to Ms Flynn's statement. The purchase price was stated to be £115,000 and the amount required to lend was £97,750.

16. On 19th November 2001 the respondent made a mortgage offer to the appellant in respect of 59 Southgate Street. A copy of that offer is exhibited to Ms Flynn's statement. The mortgage offer sets out what was being borrowed and what the repayments were and the terms and conditions of the respondent. The mortgage offer was signed by the appellant as acceptance of the mortgage loan in the presence of a witness on 22nd

November 2001. Ms Flynn states the circumstances in which she is reliant on copy documents rather than originals.

17. The advance moneys were released and paid by the respondent into the client account of Rudlings and Wakelam solicitors on 7th February 2002. A copy of the payment advice to Rudlings and Wakelam was exhibited to Ms Flynn's statement showing the receipt of a sum of £97,735. This was secured by a first legal charge over 59 Southgate Street. The land registry entries and the plan were exhibited to Ms Flynn's statement. Further, photocopy of the legal charge which was signed as a deed on behalf of the appellant and on behalf of the respondent is exhibited. The date was 8th February 2002: the witness to the signature of Mrs Copeland was Ms Barbara Barrington of Rudlings and Wakelam. The same legal deed was signed on behalf of the bank by Mr Navaid Hussein. The legal charge refers to various mortgage security terms which are referred to as the conditions. The respondent does not hold the original legal charge but believes the document exhibited to Ms Flynn's statement is a true copy of the legal charge.

18. As regards the state of the account, Ms Flynn stated that no payments had been made since September 2007. Two credits of £914.25 and £405.75 were made on 22nd February 2010 relating to costs refunded in resolution of a complaint. There is a statement of account that was exhibited to Ms Flynn's statement.

19. There is an update in Ms D'Souza's statement where she states that no further payments had been made to the relevant loan accounts. She also stated that the outstanding balance inclusive of arrears and costs was by that stage £249,989.65. A significant part of that has been the costs in relation to the mortgage possession. Based upon this evidence the judgment of Master Davison of 6th August 2018 starts with the following in paragraph 1:

> *"The claim is based on mortgage arrears which are presently £23,646.23. no payments have been made against the mortgage for more than 10 years."*

20. In his judgment of 6th August 2018, Master Davison made the following findings:

(1) The appellant signed and delivered the mortgage deed dated 8th February 2002 and her signature was duly witnessed. She did not deny in her defence which she originally

filed at the Bury St Edmunds County Court that she had signed the deed. Her defence was then that she was tricked into signing it.

(2) The sum of £97,750 was transferred to solicitors acting for the appellant on 7th February 2002, and that money was used to purchase the premises at 59 Southgate Street.

(3) The mortgage was duly registered at the Land Registry on 21st February 2002.

(4) The appellant was and remains in default. She had ceased to make payments since August or September 2007 and was in breach of the terms of the mortgage.

(5) The appellant was in arrears amounting to £23,646.23 and the total debt in favour of the respondent including the initial advance now stood at a figure of £249,989.

(6) The powers of the respondent under the terms and conditions included to ask the court for an order for possession of the property following an event of default.

(7) On the face of it there was no reason not to make an outright order for possession.

21. Thereafter Master Davison went on to consider various points taken by the appellant to which I shall return below.

V The procedural history

22. As indicated above the claim was issued in the Bury St Edmunds County Court on 8th August 2013. A defence and counterclaim was filed alleging fraud. The essence of the case was summarised in a judgment of HH Judge Moloney QC in the Bury St Edmunds County Court on 2nd May 2014:

> *"The essence of the case sought to be raised by the Defence and Counterclaim may be summarised as this. The loan transaction giving rise to the mortgage, considered in its context, was not a conventional house purchase mortgage or buy-to-let mortgage; rather, says the defendant, what was going on was that an officer of the Bank of Scotland, a Mr Mackay had, through*

> *intermediaries, encouraged and advised her, the defendant, to borrow monies from the bank for the purpose of investing them in a fraudulent investment scheme with which he, Mr Mackay, was connected, and that, as a result of investing those monies in the scheme, she lost them and the loan which the Bank now seeks to enforce essentially represents the money that she invested in that fraudulent scheme and lost."*

23. On that date, 2nd May 2014, HH Judge Moloney QC considered an application of the respondent to strike out the defence and counterclaim which rested predominantly on limitation grounds. He struck out the defence and counterclaim for reasons of limitation and also because the pleading was otherwise an abuse of process. However, he gave to the appellant the opportunity to replead her case. Paragraph 3 of the order was in these terms:

> *"Unless not later than 4pm on Monday 16 June 2014 the defendant issues an application for permission to serve an amended defence accompanied by a draft amended Defence, and any evidence to be relied upon in support of the application, the defendant will be debarred from making any such application and the claimant may proceed to apply for judgment."*

24. The judge gave the appellant that opportunity because he thought there was a prospect of her being able to rely on an equitable set-off, basing that defence on the facts which have been quoted from paragraph 4 of the judgment.

25. The respondent did not issue an application for permission to amend. Instead, she appealed the whole order of HH Judge Moloney QC, including the striking out of the existing defence and counterclaim. That application for permission to appeal was refused on paper by Mr Justice Jay on 26th September 2014. The application was orally renewed to Mr Justice Knowles on 31st March 2015 and he gave permission. The judgment which I referred above of Mr Justice Mitting was on the hearing of that appeal. The order which Mr Justice Mitting made was that the appeal be dismissed, and that the matter be transferred from the Bury St Edmunds County Court to the Queen's

Bench Division of the Royal Courts of Justice. He then ordered at paragraph 3 the following:

> *"The defendant shall by 4pm on 24 January 2017 –*
>
> *(a) serve a draft amended defence;*
>
> *(b) apply for permission to amend the defence in the form of the said draft."*

He also prohibited Mrs Elizabeth Watson from representing the appellant in these proceedings and further stated that she is not permitted to draft any statement of case in this claim. He required that the appellant should certify the statement of truth in any draft amended defence that Mrs Watson has not drafted any part of it.

26. At the hearing before Mr Justice Mitting, the appellant was represented by Mr Mukhtiar Singh of counsel acting on a direct access basis. The judge referred to the fact that Mr Singh accepted that the original counterclaim and statutory set-off was barred on limitation grounds. Reference was made to an earlier claim brought by Mrs Watson, her parents and her aunt as well as the appellant in which allegations were made against the respondent in the nature of dishonest assistance, breach of statutory duty under Financial Services Act 1986 and or Financial Services and Markets Act 2000 and negligence. Reference was made to pleadings. The claim form in that action was dated 9th December 2008 and the pleadings were signed by the appellant on 8th June 2009.

27. Mr Justice Mitting then said the following:

> *"11…..Mr Mukhtiar Singh seeks to adduce new evidence of the repayment of US$ 545,000 to the account of Mrs Watson and her husband, and the payment out of approximately the same sum of 19 July 2002 as set out above. This claim is now categorised as knowing assistance by the Bank of Scotland, essentially it seems by Mr Wells, of the breach of trust committed by (Mrs Watson) in respect of the US$195,000.*
>
> *12. There is no evidence whatsoever that Mr Wells knew that the US$ 195,000 was held on trust by Mrs Watson for Mrs Copeland*

> *or knowingly assisted the breach of trust by her in respect of it. It is just possible that the facts which I have briefly outlined would give rise to a claim of negligence if Mr Wells or another Bank of Scotland official with contemporaneous knowledge of the transactions knew of Mrs Copeland's beneficial interest in the funds, if indeed she had any, but such a claim or counterclaim would be subject to a limitation defence unless pleaded by way of equitable set-off and at present I am not satisfied that there are reasonable prospects that that defence could be overcome. Accordingly, and for those reasons, I refuse to admit the new evidence and so refuse any consequent permission to amend the counterclaim, if revived, to add that claim to it."*

28. Mr Justice Mitting then went on to analyse the nature of the equitable defence of set-off and found that the facts led by Mrs Copeland would, if she could prove them, at least arguably fall within that principal. He said this:

> *"this case has had a chequered history. It raises complex factual questions and a difficult question of law, whether or not an equitable set-off can be relied on free of limitation hurdles."*

29. It was against that background that the order was made giving permission to apply to amend the defence and for the application to be determined at a case management conference to be listed in the week commencing 6th March 2017. Mr Mukhtiar Singh said that provided he was instructed by the appellant, he would prepare the pleadings himself.

30. In fact, paragraph 3 of the order of Mr Justice Mitting was not complied with in that neither was a draft amended defence served nor was there an application to amend. All of this is now three years ago. This was despite (a) the opportunity afforded by HH Judge Moloney QC, (b) the opportunity afforded by Mr Justice Mitting, and (c) the willingness of Counsel to prepare pleadings. It was obvious that this step was critical if a positive case was to be advanced.

31. The result was then summarised by Master Davison in giving reasons for the order which he made on 11th October 2017. He said the following at paragraph 2 of his reasons:

> *"Due to Miss Copeland's failure to comply with paragraph 3 of the order of Mitting J referred to above she is permitted to put the bank to prove of their right to possession but that is the limit of her entitlement. She will not be entitled to raise any of the matters in the defence and counterclaim that were struck out, and she will not be entitled to raise a defence of equitable set-off because she did not plead that defence as directed by His Honour Judge Moloney QC and Mitting J."*

32. At paragraph 9 of his judgment of 6th August 2018 Master Davison stated that:

> *"the court had received many communications from Miss Copeland and from her sister seeking to raise other matters. Not all of those communications, particularly from Mrs Watson, have been phrased in polite or temperate terms."*

33. Master Davison then referred to an attempt by Dr Oraki to act as an advocate on behalf of the respondent which he refused for the reasons which he set out in his judgment at paragraphs 10 - 14.

34. Master Davison then dealt with points taken by the respondent in documents. Those documents included a letter of 5th August 2018 of 4 pages. Master Davison said that so far as open to Miss Copeland those points really came to the following:

(1) The claim was not validly issued in the Bury St Edmunds County Court. That was because an unsealed copy of the claim form had been provided for the bundle. In fact, there was before the Master the correct claim form which was supplied by the respondent in a clip of documents.

(2) The High Court lacked jurisdiction to deal with the claim. The Master dealt with this point by transferring the case to the County Court under section 40 of the County Courts Act 1984 and making the necessary orders sitting as a Recorder.

(3) There were defects of the mortgage deed. In this regard, the Master found that the appellant signed the mortgage deed which sufficed. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 is concerned with contracts for the creation of or sale of legal estates or interest in land and not with documents which actually create or transfer such estates or interest in land.

35. There were then some procedural matters that were dealt with at paragraphs 9 to 29 of Master Davison's judgment.

VI The hearing of 1st November 2018

36. It is to be noted that the application for permission to appeal in this case is not against the order of 6th August 2018: it is against the order of 1st November 2018. The appellant applied under CPR 39.3(3) to set aside the order of 6th August 2018. It was therefore incumbent on her to show that she had a good reason not to attend the hearing in August and that there were reasonable prospects of a different result if the matter were reheard.

37. On the basis of an application to set aside the order made on 6th August 2018, applying CPR 39.3 directly or by way of analogy, this involves the appellant having to prove that:

(a) the application was made promptly;

(b) the appellant had a good reason for failing to attend the trial;

(c) the appellant has a reasonable prospect of success at trial.

38. The promptness of the appellant's application was not an issue. Master Davison was satisfied that the appellant had made her application promptly. Master Davison found that the appellant was not unable to attend (paragraph 7), rather that she had made a conscious decision not to attend (paragraph 13). He therefore found that he was not satisfied that the appellant established a good reason for not attending the trial. He set out that in some detail at paragraphs 3-12. He added the following at paragraph 13:

"That would render the final limb of the test redundant and I do not propose to go through the various grounds upon which Miss Copeland maintains that she has a reasonable prospect of success at trial. Suffice it to say that none of the grounds put

forward disclose a defence with such prospects. In effect what Miss Copeland submitted to me today was a repeat of the argument advanced in writing at the hearing on 6 August and which were rejected for the reasons that I then gave."

39. It follows that although most of the reasoning of the decision was by reference to the absence of a good reason for the absence of the appellant at the hearing on 6th August 2018, Master Davison did reach the conclusion that nothing raised by the appellant disclosed a defence with reasonable prospects. The appellant has majored in her grounds of appeal on the merits of her defence. She did not deal specifically with the good reason for her non-attendance. However, she asserted that she has satisfied the three requirements of CPR 39.3 which include that she had a good reason not to attend the trial. The respondent says that since the grounds of appeal do not provide details of why the Master was wrong in making the finding of absence of good reason to attend, this Court should simply dismiss the appeal. In my judgment, issue was taken about the Master's finding that the appellant had not established a good reason not to attend the trial. The Court will consider that aspect of the case, albeit that it is noted that the appeal has majored on reasonable prospect of success in achieving a different result on a retrial.

40. There is therefore a mismatch between the Master's reasons and the basis of the intended appeal. The Master majored on lack of good reason for absence at trial, and dealt quite shortly with absence of reasonable prospect of success. By contrast, the appellant majored on reasonable prospect of success, and dealt quite shortly with lack of good reason for absence at trial. The mismatch is not a criticism of the Master's approach which he was entitled to take, having regard to the nature of the application before him of 1st November 2018.

41. The Court will consider the appeal that the Master should have found a reasonable prospect of success, and then move on to the case that there was a good reason for non-attendance at trial.

42. I should also make the following points before embarking on this exercise, namely:

(1) Although the Master said that everything was covered in his judgment, it was not covered in that more extensive arguments were advanced since the hearing, in

particular in the application dated 24th August 2018. I have considered arguments whether they were before the Master or not.

(2) The Respondent by its counsel has stated understandably that the evidence should be confined to that which was before the Court at the hearing of 1st November 2018. I recognise the difficulty of distinguishing between submissions and new evidence, particularly for a litigant in person, but I have not been over-rigorous in making that distinction.

VII Reasonable prospect of success?

43. The reasons for setting out the long history of this matter above are as follows:

(1) It is to show that by not complying with paragraph 3 of the order of Mr Justice Mitting, which was a life-line following earlier opportunities given to the appellant by HH Judge Moloney QC, the appellant has disabled herself from being able to put forward to the court a defence of set-off by reason of fraud or other wrongs on the part of the bank. She has confined herself, as Master Davison said in the above judgment of October 2017, to putting the respondent to proof of the state of the account.

(2) By the time the matter was before Master Davison on 6th August 2018, this action had been in progress for a very long time. Before that, the appellant had been a party to an action in 2008 against the respondent, and so for many years, she had the opportunity to seek to pursue a case against the respondent. Whatever allegations she had wished to make about the conduct of the respondent in 2001-2002, that inaction cannot be visited on the respondent.

(3) The documents that have been produced by the respondent prove the making of the relevant advances and the arrears.

44. The appellant contends that the moneys which she borrowed against Lavender Cottage were a bridging loan to be repaid upon the sale of Lavender Cottage in order to enable her to purchase 59 Southgate Street. That contention is unsustainable. As a matter of fact, she entered into two loans, one in respect of Lavender Cottage and one in respect of 59 Southgate Street. The mortgages were for the sums of £134,895 in respect of Lavender Cottage on or about 9th November 2001 and one for the sum of £97,500 in

respect of 59 Southgate Street in February 2002. It is inconsistent with a case of a bridging loan in the following respects, namely

(1) there would have been one bridging loan, and not two loans;

(2) the amount of the bridging loan would not have exceeded the cost of the acquisition of 59 Southgate Street which was £115,000, but the loan in respect of Lavender Cottage was in the region of £135,000, and hence there was about £ 30,000 in her account after the sale of Lavender Cottage); and

(3) the lending would have come to an end upon the sale of Lavender Cottage.

45. The appellant complains she only received a sum of £30,000 from the sale of Lavender Cottage. Her account at Alliance Leicester shows a deposit of £30,009.49 on 24th July 2002. She complains that at the time of the sale of Lavender Cottage, the respondent should have credited her account with the whole of the proceeds of sale, whereas the sum of about £135,000 was utilised to discharge the mortgage in respect of Lavender Cottage.

46. On this account, the dispute would have crystallised upon the sale of Lavender Cottage. First, she would have been complained about this very large sum of money having been withheld. She would have required the sum of £135,000 paid to the respondent to be handed over in addition to the sum of about £30,000 which she did receive. Secondly, she would have ceased to make any further mortgage payments. Yet as is not disputed, she continued to make payments in respect of the mortgage of 59 Southgate Street until about July 2007. This conduct is totally inconsistent with her present case, and it shows that she recognised that she had an indebtedness in respect of a separate mortgage in respect of 59 Southgate Street. All of this shows that the appellant's account that the moneys lent against Lavender Cottage was simply a bridging loan is incorrect.

47. The appellant is then driven to say that the respondent received her moneys in respect of the Lavender Cottage mortgage and did not pass it on to her. This comes from paragraph 12 of the Defence and Counterclaim (now struck out), that the moneys borrowed in respect of Lavender Cottage were not paid into the Ponzi Scheme, but were retained by the respondent, which said as follows:

"…on 20 November 2001 the Solicitors [Rudlings and Wakelam] received a loan advance from the Claimant in the sum of £134,985. On the same day the Solicitors transferred back to the Claimant a sum of £125,000 and in the clients ledger of the Solicitors this transfer is described as being "investment monies to Bank of Scotland Butterfield". As a result the Claimant had in its possession £125,000 of the Defendant's money which has never been accounted for again and the Claimant is put to strict proof of what has happened to that money. Specifically, the American Authorities had frozen worldwide the bank accounts of the Scheme, including that in Butterfield Bank in Guernsey, on 19 November 2001, and so payments into and out of that account would not have been possible."

48. This was all before Mr Justice Mitting in the above judgment who found as quoted above that *"Though she may now dispute it on the basis of entries in her then solicitor's ledger, [£125,000] of that sum was then immediately paid to Butterfield Bank in the Channel Islands, possibly via a transfer effected through the Bank of Scotland. It, like the rest of the money invested by her sister, aunt and parents, has now been lost."*

49. That was a part of the finding of Mr Justice Mitting. In his judgment, the moneys had gone to Butterfield Bank. The reference in the ledger of the moneys going to the respondent had added the words "Butterfield". There was evidence before the Master on 6th August 2018 of a statement of Trudie Flynn filed in relation to the application dated 17th December 2013. This confirmed that the moneys paid out to Rudlings and Wakelam on 20th November 2001 in respect of the advance against Lavender Cottage were not paid back to the respondent, but were paid to 'the Bank of Butterworth' (sic).[2] This was apparently confirmed in a statement of Penelope Brice a partner of Rudlings and Wakelam. It follows that the handwritten entry in the solicitors' ledger was to correct "Bank of Scotland" to "Bank of Butterfield". This was the bank used by Dobb White in furtherance of their fraud.

50. Even the appellant following the defence concentrated her fire on another suggestion, namely that the moneys had been returned to the respondent and then paid out again in July 2002. There was a sum of c.$190,000-$197,000 which might have been referable

[2] In error, Ms Flynn referred to that bank as the Bank of Butterworth, but she must have meant the Bank of Butterfield. The Bank of Butterfield is evidently more technically correct, reflecting the corporate name. Generally in this statement, the term Butterfield Bank has been used.

to the original investment in the scheme, referred to in the judgment of Mr Justice Mitting at paragraphs 6, 7 and 12 of the judgment. By reference to this possibility, Mr Justice Mitting did not accept that there was a possible case which had been shown of dishonest assistance against the respondent: rather the possibility of a case of negligence if Mr Wells and another respondent official with contemporaneous knowledge of the transactions knew of the appellant's interest in the moneys. Mr Justice Mitting said that this might be pleaded by equitable set off, albeit that it raised difficult legal and factual questions and the question as to whether it could be relied on free of limitation hurdles.

51. The possibility of the money having been in the account and then paid out dovetails with the unsuccessful appeal of Mrs Watson in her case against the respondent, *Bank of Scotland v Watson* [2013] EWCA Civ 6. In the judgment of Lloyd LJ, he referred to instructions being given by Mrs Watson for herself and her husband and other members of her family coming to a total investment of over $1 million, albeit that it is noted that the appellant was not a party to that action. At paragraphs 25 - 27, he said this:

"25. …On 5 July 2002 Mrs Watson wrote to Mr Wells at the bank telling him that she had instructed Dobb White to pay the full amount of over $1 million to the bank, so that the amount required for the £70,000 pledge could be set aside directly by the bank, and the balance could then be paid out as Mrs Watson would later direct. On 13 July 2002 Mrs Watson wrote again to Mr Wells in terms which indicate that Dobb White had transferred the $1 million or so to the bank. However, instead of instructing the bank to transfer the balance of the funds to a different overseas institution on a private arrangement, as had been forecast in the letter of 5 July, by this second letter she instructed the bank to return most of the money to Dobb White, with Dobb White's letter of undertaking still in place as security for the bank.

26. Not long after this, it seems, the Dobb White scheme was revealed as the fraudulent Ponzi scheme that it really was. In December 2003 Mr Gangar and Mr White were made bankrupt….

27. Mr Gangar and Mr White were tried for conspiracy to defraud in 2007 and were found guilty in February 2008…."

52. I am satisfied on the basis of the findings of Mr Justice Mitting and independently on the basis of my review of the papers before me that there is no reasonable prospect of success in the suggestion that the respondent never parted with the sum of £125,000 and/or retained the same for itself. It is to be noted that after detailed investigation in the case of *Bank of Scotland plc v Watson* supra, it was found that the existing defence and counterclaim did not make out a viable claim against the respondent in dishonest assistance. Further, before Mr Justice Mitting, his decision at paragraph 12 was that *"There is no evidence whatsoever that Mr Wells knew that the US $195,000 was held on trust by Mrs Watson for Mrs Copeland or knowingly assisted the breach of trust by her in respect of it."* I mention this because the allegations of fraud against the respondent at least as then formulated did not bear any fruit.

53. In any event, the time for seeking to make a case in fraud or even a claim in negligence or by way of equitable set off against the bank has long since passed. The appellant had that opportunity for years, and the detailed history set out above is one of a whole series of missed chances. It is simply not possible at this stage, and it was not possible in August 2018 when the matter was before Master Davison, to reinstate that argument. The final opportunity was to apply to plead a claim in equitable set off by reference to alleged negligence on the part of the respondent. That was lost when no amended defence or application was served by 24th January 2017, despite the order of Mr Justice Mitting of 17th November 2016. It was the latest of a series of opportunities. It follows that any part of the submissions made to the Court to seek to revive the allegations of fraud do not assist the appellant. Her position by October 2017 was accurately described by Master Davison in paragraph 2 of his reasons for his order of 11th October 2017: the appellant was able to put the respondent to proof of its claim and their entitlement to possession, but not to put forward a positive case of the kind for which permission was given more than three years ago, but not taken up by the appellant.

54. The appellant relies heavily on four documents, but none of them provide a reasonable basis to support the case that the moneys were not owed by her on the mortgage secured over 59 Southgate Street. Exhibit A is the entry in the register for Lavender Cottage showing a mortgage dated 20th November 2001, and simply confirms the date of that mortgage. Exhibit B is a letter from her solicitors confirming that as at 3rd September

2001 the moneys to be secured upon Lavender Cottage were to be used in the purchase of 59 Southgate Street. Evidently, that changed: hence the mortgage in respect of 59 Southgate Street. Exhibit C is an undertaking to the respondent by the solicitor having conduct of the sale of Lavender Cottage to pay funds to redeem the charge. This is a standard document in a conveyancing transaction without which the sale could not be sanctioned by the mortgagee. It does not inform as to how much was owed in respect of the Lavender Cottage mortgage, and therefore it does not prove a breach of the undertaking. Indeed, the undertaking was not from the respondent, but to the respondent. Exhibit D is the Alliance and Leicester statement which shows the crediting of the sum of £30,009.49 on 24th July 2002 following the sale of Lavender Cottage, and to which reference has been made above.

55. In making her submissions in a restrained way to the court, the appellant was critical of the conduct of Mrs Watson and also about her lawyers. Repeatedly in the past, the Court had warned the appellant against using the help of Mrs Watson.[3] She may have grievances about her sister, but this is not an answer to the case of the respondent against her. She says that she lost faith in her legal advisers. The Court cannot decide what grievances, if any, she may have against her lawyers, and they have not been identified. Neither grievances against her sister or her lawyers go to the state of her account with the respondent. The central point is that the respondent did not receive the monthly payments due under the 59 Southgate Street mortgage. The mortgage has not been paid for the last 12½ years. There is an unassailable claim to a possession order. None of the other matters which the appellant has sought to pray in aid affect this conclusion. I shall now refer to them.

56. First, the appellant says that the mortgage deed required the signature of an independent witness under section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. The witness was a legal executive at the solicitors whom the appellant says worked for the respondent. It is a misconception that this affords a defence for two reasons. The first reason is that there is a requirement that a deed is witnessed. The witness does not have to be independent under statute: it is simply that if the witness is not independent,

[3] An example was on 27th March 2015, when Mr Justice Mitting expressed his concern having regard to a possible conflict of interest which Mrs Watson may have had as the introducer of the appellant to the fraudulent scheme and being satisfied that the conduct of Mrs Watson in the litigation had not advanced her sister's interests. He therefore ordered that Mrs Watson would not be allowed to speak on behalf of the respondent. He reaffirmed that prohibition in his order of 17th November 2016

then there might be problems thereafter in proving that she did in fact sign the document. The second reason is that this witness was independent. The notion that the solicitors were not her solicitors is based on a fallacy. It is a part of a conveyancing transaction that the purchaser's solicitors have limited capacities for the bank e.g. as regards the giving of the undertaking to the mortgagee (exhibit C). That does not give rise to a conflict of interest since it is known to both parties that a solicitor has that dual role in respect of the proceeds of sale and it is in the interests of both parties that it is honoured. That dual role does not alter the fact that for the conveyancing transaction as a whole and in respect of the mortgage deed, the solicitor was acting for the appellant and their duties were owed entirely to her and not to the respondent as regards advising as to its terms and exercising care so that the appellant as their client understood that which she was signing.

57. Secondly, the appellant says that she executed the mortgage deed three months before she had a proprietary right to grant a legal or equitable interest over 59 Southgate Street. This is a bare assertion which does not have a reasonable prospect of success. In fact, she signed the mortgage offer in November 2001 in front of an independent witness as noted in paragraph 16 above. In that month, she also signed the legal charge in respect of Lavender Cottage. However, the legal charge in respect of 59 Southgate Street is dated 8th February 2002 and was signed by the appellant and witnessed by Ms Barrington of her solicitors Rudlings and Wakelam. There is no reason to believe that the signature page and the other relevant pages did not form part of a complete physical document signed on that date. If that were not the case, then as Mr Wood submitted, the deed would only have been completed by delivery of the deed which occurred on the acquisition of the property when the appellant did have a right to grant the mortgage.

58. The arguments about the ineffectiveness of the mortgage have only recently surfaced. As noted above, the appellant did not deny in her original defence that she had signed the document, but she contended that she was tricked into signing it. There is no reason to believe that the appellant has any reasonable prospect of proving that she did not enter into a valid mortgage on or taking effect on 8th February 2002. There is no basis to challenge the finding of Master Davison that the appellant signed and delivered a mortgage deed dated 8th February 2002.

59. That is dispositive of this point, and therefore it is not necessary to comment on the case raised in a written submission raised by the appellant subsequent to the hearing, namely *R (HMRC) v Mercury Tax Group* [2008] EWHC 2721 (Admin), which mentions that the statute about the formality of a deed requires the signature and attestation having to form part of the same physical document. There is no reason to believe that this was not done in this case. Further, the appellant's reliance on S*outh Pacific Mortgages v Scott* [2014] UKSC 52 does not take further her case: that was a tripartite case where there was an issue as to whether a mortgagee was bound by an arrangement between a vendor and a purchaser of which it had no notice. In this case, the vendor went out of the picture on sale, and there are no competing interests, and the relevant rights and obligations are simply between the appellant and the respondent.

60. Thirdly, the appellant submitted that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 prescribed that no mortgage or charge would arise in the absence of a single document incorporating all of the terms and conditions and signed by both the mortgagor and the mortgagee. She said that there was no such document. Master Davison dealt with that submission correctly on 6th August 2018 when he said *"Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 is concerned with contracts for the creation or sale of legal estates or interests in land and not with documents which actually create or transfer such estates or interests. It therefore sufficed if Ms Copeland signed the mortgage deed. That together with the required of writing is the less onerous requirement contained in section 53 of the Law of Property Act 1925 and, as I have already found, Ms Copeland did sign the mortgage deed itself."*

61. In so saying, he applied the law as set out by Lord Neuberger MR in *Helden v Strathmore Limited* [2011] EWCA Civ 542:

> *"27. Mr Helden's case on section 2 is hopeless. It proceeds on a fundamental misunderstanding of the reach and purpose of that section, a misunderstanding, it is fair to say, which appears to be not uncommon. Section 2 is concerned with contracts for the creation or sale of legal estates or interests in land, not with documents which actually create or transfer such estates or interests. So a contract to transfer a freehold or a lease in the future, a contract to grant a lease in the future, or a contract for a mortgage in the future, are all within the reach of the section, provided of course the*

ultimate subject matter is land. However, an actual transfer, conveyance or assignment, an actual lease, or an actual mortgage are not within the scope of section 2 at all.

28. As is spelt out in its opening words, section 2 is concerned with "a contract for the sale or other disposition of an interest in land". Its purpose is also clear from the fact that it replaced section 40 of the Law of Property Act 1925, and from the contents (and indeed the title) of the interesting and full Law Commission report which initiated it – Transfer of Land: Formalities for Contracts For Sale etc. of Land (Law Com. No. 364). The section was directed to tightening up the formalities required for contracts for the creation or transfer of interests or estates in land, and it was not concerned with documents which actually create or transfer legal estates or interests in land. This conclusion is consistent with the view expressed by the Chancellor of the High Court in McLaughlin v Duffill [2008] EWCA Civ 1627, [2010] Ch 1, paras 20-21, approving the reasoning of HH Judge Hicks QC in Target Holdings Ltd v Priestly 79 P & CR 305, para 51.

29. Mr Helden's case on section 53 is only marginally less weak. The section does indeed apply to mortgages, as, unlike section 2, it is concerned with the "creat[ion] or disposi[tion]" of any "interest in land". However, it is far less prescriptive than section 2, which requires every term of the arrangement to be included in a document or identical documents signed by both parties. Section 53 merely requires the arrangement to be in a document signed by the person creating or disposing of the interest. Section 2 therefore may give rise to problems when it comes to estoppel or rectification (as discussed in the thoughtful judgment of Morgan J in Oun v Ahmed [2008] EWHC 545 (Ch), paras 41-55), but no such problems arise in connection with section 53."

62. Fourthly, the appellant submits that the contract is legally unenforceable due to the Unfair Terms in Consumer Contracts Regulations 1999. The argument is predicated upon no money having been advanced in respect of 59 Southgate Street. However, the documents show that a sum of £97,500 was advanced. This harks back to the case that the only money that was lent was the sum in respect of Lavender Cottage intended as a bridging loan. I have found that that case is not sustainable. It therefore follows that the premise of the claim in respect of the 1999 Regulations must fail.

63. Fifthly, the appellant submits that the claim is based on fraud because it is predicated upon an untrue statement that moneys were lent in respect of 59 Southgate Street. In fact, for the reasons above stated, the moneys were lent in respect of 59 Southgate Street.

64. I now deal with other points raised by the appellant. She says that she has not signed the mortgage and draws attention to the fact that the respondent has failed to provide an original. Master Davison found that she did sign and deliver a mortgage deed dated 8th February 2002. Her signature appears on the document and was duly witnessed by Ms Barrington of Rudlings and Wakelam. She did not deny this in her original defence that she had signed the document, but she contended that she was tricked into signing it. The evidence in the second statement of Ms Flynn dated 12th October 2017 (paragraph 17) is that the respondent does not hold the original legal charge but believes that the document at pages 33-37 of her exhibit TF2 is a copy of the legal charge. The appellant has wrongly characterised this in her application dated 23rd August 2018 as an acceptance that there is no mortgage contract. I am satisfied on the basis of that explanation that only secondary evidence of a copy is available. Based on the copy provided, the explanation and all of the other evidence, I am satisfied that the evidence of the copy is sufficient to prove the existence of the mortgage deed. Thus, Master Davison was right to find that the mortgage deed dated 8th February 2002 in respect of 59 Southgate Street has been proven.

65. The appellant says that the order of 6th August 2018 does not say "in private". The Order did fail to do this, and this has been corrected by the Court. This does not invalidate the Court order of Master Davison.

66. There was transposition of two digits of the claim number in the note of counsel for the respondent for the hearing of 6th August 2018. This caused no confusion at all, as evidenced by the fact that the appellant sought to strike out the claim, showing that she knew that the respondent was seeking possession of 59 Southgate Street, and that the Court intended to determine the same on 6th August 2018.

67. It was said that the order of 6th August 2018 should be set aside to permit the appellant to serve a copy of the Consumer Credit Agreement on the appellant pursuant to section 78 of the Consumer Credit Act 1974. The real point of the appellant is that she is saying

indirectly that there was no such agreement in the first place, and that she does not accept that the documents provided are sufficient evidence of the mortgage and her indebtedness. This point has been rejected above. Further, reference is made to paragraphs 10-12 of the witness statement of Dorian Alexander Lloyd-Morris dated 22nd October 2018. He explained how copies of the agreement had been supplied to the appellant. In any event, the respondent did not seek possession on any of the grounds of default under the regulated element of the loan. The regulated facility was a small overdraft facility as an adjunct to the main mortgage debt which was withdrawn in 2007 and was never used by the appellant. According to section 78(3)(a), the duty to provide information contained in section 78(1) does not apply in these circumstances.

68. As noted at the outset, there are criticisms made by the respondent how these submissions go beyond review of the decision of the Master of 1st November 2018 or even of the decision of 6th August 2018 (which is not the subject of an appeal). Further, the respondent also criticises the absence of evidence not available before the Master, saying that matters put forward by way of submission are not a substitute for evidence. There was also a failure to heed the rule in *Ladd v Marshall*. I have not made rulings on each of these matters, and the objections are not without substance.

69. However, even without applying the rigour sought by the respondent, and making allowances for the appellant, I conclude that she has failed to show that she had a reasonable prospect of success at a rehearing of the possession hearing of achieving a different outcome from that ordered by the Master on 6th August 2018. On the contrary, there is and was no real prospect of her being able to resist the order for possession. For this reason, the appeal must fail. That is irrespective of whether CPR 39.3 applied directly or by way of analogy or even if the application were to be treated as brought under CPR 23.11. The absence of a defence with a real or a reasonable prospect of success is fatal to the appeal on any basis that it is put. It would also have been a complete answer to an appeal, if one had been brought, against the order of 6th August 2018 itself.

70. There is a further point to note. At the conclusion of oral submissions which ended with the reply of the appellant, Mr Wood sought to refer to a witness statement of the appellant of 30th January 2014 which he indicated cut across the appellant's case. This statement formed a part of the bundle prepared for the hearing of 6th August 2018. Mr

Wood was only permitted to do so on the basis that following the hearing the appellant would be able to respond in writing. At paragraph 17 of the statement, the appellant confirmed that the money advanced against Lavender Cottage had been used to go into the fraudulent scheme, and that notwithstanding a freezing order in America two days earlier, *"the fraudsters were desperate to get as much money into the Scheme before the real position was known."* In response, the appellant has sought to withdraw her statement on the basis, she asserted, that this was prepared by the undue influence of her sister.

71. The attempt to retract her statement is not something which would be lightly countenanced (particularly in the context of the hearing of this appeal), and not based solely on a statement of the appellant that it was all down to her sister. The statement of 30th January 2014 has formed a part of the material before the court in the numerous applications where she has been able to avoid a possession order over the last many years since the inception of this action. She has thereby benefited from this statement (together with the numerous like documents under the appellant's authorship), and an attempt to distance herself from the entirety of that statement six years later cannot be lightly permitted. In any event, even if the Court were to disregard the statement of 30th January 2014 including the statement at paragraph 17, the conclusion would be the same. It makes no conceivable difference because it does not change the conclusion. The evidence shows that the moneys advanced against Lavender Cottage went as to £125,000 to the fraudulent scheme. It follows that the arguments advanced by the appellant to contend that she has a reasonable prospect of avoiding a possession order must fail. There is no reasonable prospect that if the order of 6th August 2018 were set aside that a subsequent hearing would make a different order from the order of possession made by Master Davison on 6th August 2018. I therefore find that the Master was not wrong on this issue nor did he reach a decision which was unjust due to a procedural or other irregularity, and so the appeal must fail on this issue.

VIII Good reason for absence at trial?

72. It is then unnecessary strictly to analyse whether there was a good reason for absence at the hearing of 6th August 2018. However, I shall reach a conclusion in respect of that element since it formed the primary basis of the reasoning of the Master. The Master

found that the appellant was able to attend the hearing but made a conscious decision not to attend. His reasoning was as follows.

(1) The appellant had attended other hearings including the hearing of 1st November 2018.

(2) The appellant prepared for the hearing of 6th August 2018 by submitting a lengthy letter in conjunction with her sister Mrs Watson.

(3) The appellant provided a letter from her GP Dr Fran Booker dated 24th August 2018. Like Master Davison, I shall not quote the entirety of that letter in this judgment because of the privacy of its contents. In paragraph 3, Dr Booker stated *"Mrs Copeland has been under particular stress for the last few months and was indeed unfit to attend the court date on 6 August due to this."* In the judgment of the Master, the fact that she was under stress would be common to all litigants and especially litigants in person, but would not prevent attendance. A mere bald statement to that effect, even from a GP, could not be accepted at face value.

(4) Dr Oraki who sought to act for Mrs Watson told the Court:

"Master Davison: She has not written into the court to ask for this hearing to be adjourned on account of ill-health on her part.

Dr Oraki: "Not on account of ill-health, because she felt that other points of law are more important and in the letter to the manager of this court, and I have given a copy to the lady, to the clerk to give it to you, she explained everything why."

….

Master Davison: "…What you have just told me is that although Miss Copeland is unwell, the real reason is that she thinks that there are points of law which are of more importance than her attendance. Did I understand you correctly?

Dr Oraki: That's right, yes."

73. The Master found that the letter of Dr Booker did not come close to complying with the guidance given by Norris J in the case of *Levy v Ellis-Carr [2012] EWHC 63 (CH)*. He referred to a summary of the case at page 1236 of the White Book 2018 as follows:

> *"The Judge set out more stringent requirements as to the type of medical evidence required to demonstrate that a party was unable to attend and participate in a hearing, such that it justified an adjournment. Such evidence should identify the medical attendant and give details of his or her familiarity with the party's medical condition detailing all recent consultations, identify with particularity the patient's condition and the features of that condition preventing participation in the trial process, provide a reasoned prognosis and give the court confidence that the evidence expressed was an independent opinion following proper examination."*

74. In the skeleton argument of Mr Wood, he set out at paragraph 41 the submission which he made before the Master. It is apparent from that extract that there was cited to the Master the identical passage from the White Book 2018 at paragraph 39.3.7.2 (p.1253). It referred to the case of *Levy v Ellis-Carr*, and then quoted word for word the same passage as had been quoted by Counsel for the Appellant ending with the words *"an independent opinion following proper examination."* The Master then went on to say that *"the commentary goes on to say that judgment of the Court of Appeal was expressly approved in a subsequent case."* That is true to the extent that the next sentence in the commentary was as follows: *"This judgment was expressly approved by the Court of Appeal in Forrester Ketley & Co v Brent [2012] EWCA Civ 324, 21 February 2012, CA, unrep."*

75. However, there was omitted from that which was referred to the Master and from the judgment the next section in the commentary, which I quoted in my judgment of 31st October 2019, and which reads as follows:

> *"In Emojevbe v SoS Transport [2017] EWCA Civ 934, the Court of Appeal noted that the stringent test set out in Levy should not be applied under CPR 39.3, rather, the less rigorous Pereira test (see note 39.3.9) should be applied. The Pereira test still required the court to scrutinise any medical evidence relied on in support of an adjournment and whilst a simple "fit-note" may be insufficient to justify an adjournment (or the granting of an application under CPR 39.3) the court should bear in mind the pressure GPs work under and the difficulties faced by a litigant in person who may find it difficult to obtain*

a detailed report of her condition but at the same time ensure that the same test was applied to an application made by a litigant in person as is to an application made by a represented party (see para.31). relevant factors to take into account in an application under CPR 39.3 included: (a) any history (or absence of it) on the part of the applicant of failure to attend court or apply for adjournments (b) the genuineness of the illness (c) if the applicant's ability to present his case (in the event that he was capable of being physically present) would be hampered by his illness (d) the absence of any possibility (if the applicant was the Claimant) of having the claim determined on its merits."

76. It is not certain from the material which I have as to how this failure to refer to the next section occurred. It is striking that both the skeleton argument and the judgment quote the same passage, and do not quote the next part of the White Book which contained the important qualification and the less stringent approach of *Pereira*, which represents the correct test. Pereira is a reference to the case of *Bank of Scotland plc v Pereira* [2011] EWCA Civ 241; [2011] 1 WLR 2391. The skeleton argument for the respondent did not refer to the second part of the passage in the White Book or to the *Pereira* test. Mr Wood submitted that the Court should infer that the Master must have had the second part of the passage in mind. However, if the Master had had that in mind, it would be expected that there would have been at least a fleeting reference to the less stringent test in *Pereira*, whereas the Court referred only to and applied the more stringent test in *Levy*.

77. Mr Wood submitted that the court should in any event dismiss the application under CPR 39.3 because there was no ground in the Grounds of Appeal that the Master erred, if at all, as regards his finding that there was no good reason for the non-attendance of the appellant. He submitted that the court would descend into the arena if it considered a ground relating to good reason, and that accordingly the appeal should be rejected.

78. I do not regard it as descending into the arena to deal with this aspect in the course of the application for permission to appeal. The application did refer to the fact that the correct analysis was that she had satisfied all three limbs of CPR 39.3. It is right that the appellant did not finesse the submission and provide reasons why the Court erred in this respect. The Court here is entitled, consistent with the overriding objective, to make allowance for the fact that the appellant as a litigant in person may not have

appreciated the fact that she ought to have given separate attention to this. I am particularly satisfied that this is the correct approach because of the omission to refer to and adopt the less rigorous *Pereira* test.

79. In my judgment, it is proper to follow the less rigorous guidance found in *Pereira* rather than that found in *Levy*. That appears from *TBO Investments Limited v Mohun Smith and another [2016] EWCA Civ 403*. Here Lord Dyson MR at paragraphs 24-26 said that whilst the more rigorous approach of *Levy* might apply to some adjournment applications, the less rigorous approach of *Pereira* should be applied to an application under CPR 39.3. This was followed by Lloyd-Jones LJ in *Menojeveb v Secretary of State for Transport [2017] EWCA Civ 934* at para 21.

80. Mr Wood on the second day of the hearing referred to a number of authorities with a view to suggesting that the approach of the Judge should be upheld. Reference was made to *Pereira*. However, in *Pereira*, Lord Neuberger MR said that the rigour of CPR 39.3 was mitigated in particular by the fact that *"what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should at least, in many cases, not be very rigorous when considering the applicant's conduct"* (paragraph 26). It is also mitigated by the overriding objective. However, attention was drawn rightly to paragraph 27 to the effect that whilst the decision does not normally involve a challenging a discretion, an appellate court should be slow to overturn a decision of this kind unless the judge went wrong in principle. The primary court on fact is the court of first instance and the function of the appellate court is usually one of review and not rehearing.

81. Mr Wood also relied on reasoning in *Solanki v Intercity Telecom Ltd* [2018] 1 Costs LR 103 at paras 44-48 about a decision to refuse an adjournment being wrong because not to adjourn involved a denial of justice. Whilst that was the test which was applied in allowing the appeal and finding that there was a denial of justice by refusing the adjournment, the grounds for interfering with a judge's decision in respect of no good reason to attend are not limited to a denial of justice.

82. Mr Wood referred the Court to the case cited in the White Book as applying the *Levy* test, namely *Forrester Ketley & Co v Brent* above. At paragraph 25, Lewison LJ stated that something more than the stress occasioned by litigation was required, and if a

litigant suffers from stress, an adjournment is unlikely to serve any useful purpose because the stress will simply recur at the adjourned hearing. That does not necessarily strengthen the Master's reasoning because at paragraph 27 of the judgment of Lewison LJ, it is apparent from the respective medical reports that the doctors on both sides had stated that Mr Brent was not organically or chemically ill but was simply suffering from the stress of the litigation: see the summary of the medical evidence at paragraph 9. This did not replicate the instant case where there was no such concession by the doctor. In any event, it was a case about an adjournment and not absence at trial, where the criteria were different, as is noted in the previous paragraph above.

83. Insofar as the respondent submits that there is no real difference between the *Levy* and the *Pereira* tests, I disagree. In my judgment, the position is well summed up in the White Book as a whole, and an analysis of the cases simply confirms that the appropriate test to apply was the less stringent *Pereira* test.

84. Despite applying too rigorous a test, I am satisfied that the Master came to the right conclusion to the extent that the appellant did not prove that she had a good reason for not attending the hearing. The Master found that the appellant was able to attend and that she made a conscious decision to absent herself. If I had been the primary fact finder, I may have found that the case of having a good reason to attend was not proven rather than the positive case that she was able to attend. However, there is no practical difference in outcome because the burden was on the appellant to establish a good reason for her non-attendance. Further, I am reluctant to substitute my view for that of the Master because he saw Dr Oraki and he heard from the appellant on 1st November 2018.

85. In supporting the conclusion of Master Davison, I find the following:

(1) Although the Master applied too stringent a test, the evidence of the appellant, even making allowance for a litigant in person, did not satisfy the lesser *Pereira* test. In particular, there was no medical report provided at the time of the hearing itself on 6th August 2018 and no reason given why one was not provided. The medical report does not identify when the appellant was seen, if at all. There are no details provided as to why on 6th August 2018 the condition was so acute that

the appellant was unable to attend court. The medical evidence was not supplemented by a statement from the appellant seeking to fill any of these gaps. That was not done either before the hearing of 6th August 2018 or the hearing of 1st November 2018, nor (but it may have been too late in view of *Ladd v Marshall* criteria) before the appeal. The appellant has sought to supplement it orally in the course of the appeal without formal evidence being adduced and without an application being made to adduce it. This indicated that there was some doubt as to her ability to attend, but it fell far short of providing a good reason. The matters which troubled the Master remain in the air and unresolved including why there was no communication with the Court before the hearing of 6th August 2018 and the missing matters not contained in the medical report. The Master did not receive an explanation as to how the appellant was able to attend other hearings, in particular the hearing of 1st November 2018. That did not necessarily indicate that she was fit to attend on 6th August 2018, but it did require explanation as to how and when she recovered. In all the circumstances, unfitness to attend was not proven even on a less stringent test and even after making allowances for the difficulty of a litigant in person.

(2) The Master had the opportunity of hearing Dr Oraki speak. I was concerned about a possible inconsistency. On the one hand, he was very critical of her (she was *"argumentative and confrontational"* and *"persistently refused to accept that ruling, such that I had to rise and wait for her to compose herself and to leave the courtroom"*). The Master was unpersuaded about her authority to represent the appellant. On the other hand, the Master took from her the fact that the appellant may have made a conscious decision not to attend. In my judgment, there may not have been an inconsistency once the appellant confirmed the authority which Dr Oraki had had to speak on her behalf. This then led the Master to form the view that this was a deliberate decision not to attend. The Master was in a better position than this Court to form that view, and he was entitled to be critical about the way she behaved

in court, whilst at the same time accepting her statement about the appellant's decision not to attend.

(3) The Master relied on the document of 5th August 2018 which he found had been composed by the appellant and her sister Mrs Watson. This was another indicator to the Master as to the appellant's fitness to attend. Here too, the Master may have been in a better position to form a view. In one respect, this Court may have had an advantage consequent upon seeing the attempted intervention of Mrs Watson, which indicated that it may have been that most of the letter of 5th August 2018 was composed by Mrs Watson: it is consistent with the matters which she sought to place before the Court to justify her unsuccessful intervention. The appellant has sought to distance herself from her sister in this hearing and has suggested that it was a part of her being unwell that led her to signing the letter. In my judgment, the Master was entitled on the information before him to come to the view that the signature of this document indicated that she took an active part in the preparations for that hearing in conjunction with her sister and therefore made a conscious decision not to attend. In my judgment, this was at lowest another unexplained feature standing in the way of the appellant establishing a good reason for her non-attendance.

86. Whilst a report of a doctor and a statement of unfitness to attend carry significant weight, particularly on the *Pereira* test, the Master was entitled to reflect on the fact that stress would be common to all litigants and especially litigants in person and would not normally prevent attendance. In all the circumstances, the statement of inability to attend even from a GP without addressing the matters set out above was insufficient to prove a good reason not to attend. In my judgment, even applying the less stringent test of Pereira, the appellant failed to establish on 1st November 2018 a good reason for failing to attend the hearing of 6th August 2018.

87. In the course of submissions, particularly in reply to those of Mr Wood on behalf of the respondent, the appellant went further than she had gone in her written submissions or in the evidence before the Court. She said the following. In her opening submissions, she said that she was in an unstable state and had had a breakdown. Without being

unsympathetic, that is imprecise: on one analysis, it went no further than the doctor stated; on another analysis, it did, but there was no evidence as to how far it went or why it was not supported by the medical evidence at the time or at all. She said that she could provide further information from Dr Booker, but this was at the hearing of the appeal, and it was far too late.

88. In reply and on the second day of the hearing, she referred to the domineering nature of her sister which was a contributory factor to her stress, and that she took over completely and wrote the letter of 5th August 2018. She referred to her bullying nature over a long time even to the extent of physical abuse at home. None of this was set out in evidence on 1st November 2018 or in evidence since then or even in submissions in opening the appeal.

89. This was too little and too late. First, it was not set out in evidence despite opportunities to put in such evidence before the 6th August 2018, at the time of the application on 24th August 2018, in advance of the hearing of 1st November 2018 or at that hearing. Secondly, it was not supported by further medical evidence, and indeed was either more of the same with the medical evidence (and therefore took the position no further) or was at variance with the medical evidence. If the latter, there was no explanation for the variance: the possibility of seeking further evidence from the doctor expressed in the hearing of the appeal was far too late in time. Thirdly, the matters were simply put forward in submissions without any opportunity to test it.

90. Even taking into account the above as if it had been evidence, it does not in my judgment prove a good reason for the absence of the appellant at the hearing alongside all of the points made above. In my judgment, such evidence would not provide a basis for proving a good reason to attend in that this material is not of sufficient detail or cogency such as to prove a good reason not to attend or to have had a real prospect of doing so.

91. As regards the information about the bullying nature of Mrs Watson, the appellant did not explain how she was apparently able to represent herself on 1st November 2018 and how apparently unintimidated by her sister when she appeared in person before me, unequivocally distancing herself and being so critical of her sister. It is apparent to the Court, as it was to a substantial extent to Master Davison, that Mrs Watson was behind

the letter of 5th August 2018. It is cogent that Mrs Watson was adding to the stress levels on the appellant. However, this does not invalidate the reasoning of the Master or the reasons set out above for the judgment that the appellant failed to prove a good reason for her absence on 6th August 2018.

92. Given the appellant's inability to establish a good reason not to attend on 6th August 2018, the appeal must fail for this reason too. I find that it has not been shown that the Master was wrong on this issue nor that he reached a decision which was unjust due to a procedural or other irregularity.

93. For the purpose of completeness, I should add that it was submitted for the respondent that it was incumbent on the appellant to seek relief from sanctions under CPR 3.9 in addition to satisfying the three requirements of CPR 39.3. In view of the above conclusions, it is unnecessary to form a view about this. However, the requirements of CPR 39.3 are sufficiently stringent in most cases that it will be a very exceptional case where the court did not set aside an order on this basis alone: see *Bank of Scotland plc v Pereira* supra at paragraph 25 per Lord Neuberger MR. It is suggested that it would make a difference because relief from sanctions would normally require evidence in support, and there is no evidence. On 1st November 2018, Master Davison did not require an application for relief from sanctions to have been made, and there is no Respondent's Notice to this effect. I do not accept in the circumstances of this case that it is appropriate for the respondent to rely on this highly technical ground, when it has not complied with the technical pre-requisite of having issued a Respondent's Notice. In any event, in my judgment, the requirements of CPR 39.3 whether applied directly or by way of analogy are sufficiently rigorous to meet the justice of the instant case without requiring a formal application under CPR 3.9.

IX Conclusions

94. I have considered the question of an extension of time for permission to appeal out of time. Time was extended by Master Davison to permit an application for permission to appeal to be lodged by 29th November 2018. It was suggested that the Court ought to be especially rigorous because the Court has allowed an additional week to the appellant to bring her application for permission to appeal, that is 28 days instead of 21 days. It was also submitted that the application had been issued in the wrong court and that it

was not issued in the correct appeal office until some time in January 2019. It was said by reference to *Barton v Wright Hassall LLP* [2018] UKSC 12 that no lesser standard is expected of a litigant in person generally in respect of the observance of court orders, particularly where it was something that took no specialist knowledge such as observing a requirement about issuing a notice of appeal on time.

95. Although the application seems to have been prepared by 29th November 2018, the appeal notice was only issued on 3rd December 2018. There was an intervening weekend, so that the delay was of two court days. It appears that the appeal was issued in the wrong court, but this may be rather more technical for a litigant in person. There is no prejudice identified from this delay. I am satisfied that the period of delay is short. I do not regard it as serious or significant, even taking into account the extra week allowed for issuing the application. I therefore give relief from sanctions and extend time for permission to appeal. It would have been more satisfactory to have had evidence in respect of this aspect, but in view of the complexities of the case and the short period of delay prior to issue (albeit in the wrong court), this can be overlooked in the exercise of the discretion of the Court. In the absence of serious or significant breach, it is not necessary to go on to the other factors in *Denton v T.H.White Ltd* [2014] EWCA Civ 906. Accordingly, time is extended for permission to appeal.

96. In my judgment, permission to appeal should be granted. In one sense, this is artificial at this stage when I have in effect heard the appeal. However, the decision to look at all the issues in this rolled up hearing was because of the long and tortuous history of this case. It was necessary to consider much of this in order to decide whether the appeal had merit. It was also important, in my judgment, after everything that had gone before it to consider it on the merits. This is not to be read as a precedent capable of more general application, but a response to the particular circumstances of this case. This has led the Court to consider that there were compelling circumstances to hear the appeal.

97. In so doing, I have given a wide berth to the appellant as is evident from not following the narrower approaches of the respondent to (a) the case about good reason for absence not being developed in the grounds and submissions of the appellant, (b) the possibility of simply shutting the case down on a more cursory approach to the merits before the Master and confining the case to those points which were before him in particular absent

amended grounds of appeal, and (c) excluding any submissions which might traverse the boundary between submission and evidence to the extent of in effect putting in evidence which was not before the Court below. Generally, the Court has made appropriate allowances for the appellant appearing in person.

X Disposal

98. I conclude this judgment by saying that the appellant before this Court at the two-day hearing conducted herself throughout with dignity and made her submissions in a courteous manner. However, having considered all the arguments raised by the appellant in this way, the conclusion is that, in my judgment, the decision of the Master was not wrong nor was there a serious procedural or other irregularity in the proceedings before him giving rise to any injustice. Accordingly, the appeal must be dismissed, but subject to the provisos referred to at paragraph 7 above.