Claim No: D10CL488

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 26 October 2018

Before :

HIS HONOUR JUDGE MONTY QC

- -

Between :

GOLDHILL FINANCE LIMITED

Claimant

- and -
CYNTHIA BERRY

Defendant

- -

Mr Anthony Pavlovich (instructed by **Sydney Mitchell LLP**) for the **Claimant**
Mr Stephen Boyd (instructed on direct access) for the **Defendant**

Hearing date: 6, 7, 8 August 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Monty QC

HHJ Monty QC:

Introduction

1. The Claimant seeks repayment of moneys due from the Defendant under a loan facility which completed in May 2015. The Defendant alleges that there was an unfair relationship between the parties (within the meaning of the Consumer Credit Act 1974) arising out of the way in which the Claimant enforced its security.

Brief background

A. The first loan

2. On 23 February 2015, the Claimant offered to lend the Defendant £130,000 together with a further sum of £16,379.88 (comprising interest and fees), which was to be repaid within 3 months. In default, interest was payable on the outstanding amount at 5% per month compounded. The Defendant executed a legal charge over Flat 8, 10 The Grange, London SE1 ("the Flat") as security for the loan.

B. The second loan

3. At the Defendant's request, on 19 May 2015, the Claimant offered the Defendant a second loan of £170,827.03 to repay the first loan in full. The second loan contains similar provisions to the first in relation to interest. The second loan was repayable in full by 25 September 2015. The Flat remained as security for the second loan.

C. Default

4. The second loan was not repaid. The Claimant imposed the default rate of interest from 25 September 2015.

5. By the time the Claimant sent a letter before action to the Defendant, on 23 October 2015, the debt stood at £179,368.43.

D. The possession proceedings

6. The Claimant issued proceedings for possession of the Flat and repayment of the total outstanding amount on 10 November 2015. On 3 February 2016, the Claimant obtained an order for possession of the Flat on or before 3 March 2016, with the money claim being adjourned.

7. A Notice of Appointment (with Bailiff) dated 13 April 2016 shows that the warrant of possession was due to be executed on 11 May 2016.

8. An application was made on 6 May 2016 by a Mr Fayinka, who claimed to be a tenant of the Flat under a lease from January 2016, seeking time to find alternative accommodation. I shall return to consider Mr Fayinka's position in more detail below. That application was dismissed on 10 May 2016, but the Claimant agreed to allow Mr Fayinka two months to find new accommodation.

9. As shown by the further Notice of Appointment (with Bailiff) dated 25 July 2016, the warrant of possession was now due to be executed by the court bailiff on 23 August 2016 at 09:20.

10. On 19 August 2016, the Defendant applied for a stay of the warrant of possession,

> "on the basis that contracts have been exchanged for the sale of the subject Property and completion of the sale to take place 4 weeks from the date of exchange."

The Application Notice went on to say this:

> "I respectfully request the court and inform the Honourable District Judge that the order for possession be suspended on the basis that we have today (Friday, August 19, 2016) accepted an offer for £520,000 for the sale of [the Flat]. The lawyers acting for me on this sale are Messrs TDK Solicitors and the lawyers acting for the Buyers are LB Property Lawyers. Both parties (Seller and Buyer) have today (Friday, August 19, 2016) exchanged on the sale of [the Flat]."

11. On 22 August 2016, Deputy District Judge Sofaer made an order staying the warrant of possession until 19 September 2016.

12. A tenancy had been granted to two women, Ms Ganieva and Ms Papamichali on 21 July 2015 (which pre-dated the tenancy to Mr Fayinka) and following the hearing before Deputy District Judge Sofaer, the Claimant had ascertained that they were leaving the property on 22 August. Despite the order suspending the warrant of possession, on the following day, 23 August 2016, through their agents AMG Maintenance, the Claimant took possession of the Flat, which by that time was unoccupied.

13. On 9 September 2016, the Claimant sought permission to appeal the order of the Deputy District Judge made on 22 August 2016. That appeal was in the event not pursued.

14. On 26 August 2016, the Defendant applied to the court to re-enter the Flat, on the grounds that the Claimant had taken possession despite the order of 22 August 2016, but that application was dismissed on 13 September 2016.

E. Sale of the Flat

15. The Flat was marketed by the Claimant through Foxtons estate agents, initially at a sale price of £595,000, which was reduced on 19 October 2016 to £550,000. On 30 November 2016 the Claimant accepted an offer at £525,000, and a sale completed on 19 January 2017. The Claimant applied the net proceeds of sale to the loan.

F. The money claim

16. On the Claimant's application, the court reinstated the Claimant's money claim on 16 February 2017. The Claimant applied for summary judgment and an interim payment, and the Defendant applied for permission to amend her defence and to add a counterclaim pleading an unfair relationship based on the level of the default rate of interest, and the circumstances in which the Claimant took possession. By an order dated 18 July 2017, District Judge Zimmels dismissed the Claimant's application, and gave permission to the Defendant to amend her defence and add a counterclaim. The recitals to the order included the following:

> "And upon the court finding that the Defendant should not be permitted to revisit the question of the Claimant's right to take peaceable possession of the subject property (but only to rely on the taking of possession on or about 23 August 2016 in support of a claim in respect of an alleged unfair relationship)".

17. In July 2018, the Defendant notified the Claimant's solicitors that she would no longer be arguing that the relationship was unfair because of the level of interest.

G. The sums claimed

18. The Claimant has produced a redemption statement showing that the amount due from the Defendant is £340,192.63.

19. This comprises default interest at 5% together with costs and expenses in relation to the sale.

The issues

20. The two issues which I have to decide are:

    (1) First, was there an unfair relationship between the parties arising from the way in which the Claimant took possession of the Flat?

    (2) Secondly, if there was an unfair relationship, what is the appropriate order which should be made?

The law on unfair relationships

21. Section 140A of the Consumer Credit Act 1974 provides (omitting sub-section (5) which is not relevant):

> **Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

22. Section 140B of the Act sets out the powers of the court in relation to unfair relationships. These are very wide; they include varying the agreement, discharging any obligation under it, ordering the repayment of money to the debtor, cancelling or reducing interest, and requiring the creditor to do anything else that the court considers necessary. I shall return to this section towards the end of this judgment.

23. As Lord Sumption said in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222 at [10]:

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone."

The evidence

24. For the Claimant, the only witness was Mr Ian Miller, who is employed by the Claimant as a consultant. He gave evidence as to the background to the Claimant's lending and the initial checks which the Claimant carried out, as well as in relation to the possession proceedings, the taking of possession, and the sale of the Flat. Although Mr Miller was a little vague on the dates and timing of some of the conversations he had, hampered no doubt by the passage of time and the fact that he had no notes of his conversations, I accept his evidence.

25. The Defendant's evidence was a bit of a mixed bag.

26. On the one hand, she gave evidence in a measured and sensible manner. A major theme of her evidence was to question why she would – as the Claimant alleged – have been so keen to delay the sale of the property, since every month which passed meant that the default interest was racking up and the amount owed to the Claimant was substantially increasing. There was no real answer to this from the Claimant, and in my view her evidence about needing to delay matters only until her sister came into funds to purchase the Flat made more sense than the Claimant's case about delay. I accept what Mr Boyd says about this; delay was positively adverse to the Defendant's interests.

27. On the other hand, there were a number of areas in which her evidence was unsatisfactory. I shall give three examples here.

28. First, it is plain that she did not tell the Deputy District Judge on 22 August 2016 the true position in relation to the sale; she told him that the sale was to the tenant, Mr Fayinka, whereas in fact it was a sale to her sister, Catherine (who was then Mr

Fayinka's estranged wife). The Deputy District Judge warned the Defendant that there would be serious consequences if anything she told him was not true, but she did not correct the position. The Defendant says that she was extremely flustered and her mind was focused on money coming from "Fayinka" rather than whether it was Mr Fayinka (it was not) or Catherine (her sister, with whom she says she had exchanged contracts). This part of the Defendant's evidence gave me great cause for concern. I have already mentioned the careful way in which the defendant gave her evidence in this case. I find it hard to accept that she would have been so flustered before the Deputy District Judge that she not only got the details of the sale so wrong, but also failed to correct it when given the opportunity. None the less, the fact is that there is evidence of an exchange of contracts between the Defendant and Catherine. So either the Defendant did indeed make an error because she was flustered, or the sale to Catherine – and the associated documentation (to which I shall turn below) – was a sham.

29. Secondly, the evidence which she gave in relation to Mr Fayinka's tenancy was particularly bizarre. I have already said that the Defendant had let the Flat to Ms Ganieva and Ms Papamichali on 21 July 2015. According to the Defendant, Mr Fayinka (who, it will be recalled, was the Defendant's brother-in-law) had formed a relationship with Ms Papamichali and by December 2015 was living at the Flat. In what she described as an attempt to scare him off, the Defendant offered Mr Fayinka a tenancy of the Flat for 12 months, and to her surprise he accepted. The Defendant had not told the Claimant about the July 2015 tenancy granted to Ms Ganieva and Ms Papamichali or the tenancy in January 2016 granted to Mr Fayinka. How the Defendant could have thought it appropriate or right to grant a tenancy to her sister's husband, enabling him to live at the Flat with his girlfriend, in circumstances in which she had already let the Flat to the two women, is a complete mystery.

30. Thirdly, it is plain from the documentation that the Defendant did not tell her conveyancing solicitors about the second charge to the Claimant (there was a first charge to Santander, which she did tell her solicitors about) nor did she mention the existence of tenants in the property.

31. For the reasons I will set out below, on balance I accept the Defendant's evidence in relation to the sale to Catherine and the tenancy to Mr Fayinka.

32. I also heard evidence from Catherine. I was not impressed with her evidence about Mr Fayinka's occupancy of the Flat, as it struck me as wholly incredible that she was not at all put out by her sister not only tolerating but indeed granting a tenancy to Mr Fayinka, but overall I accept her evidence.

Findings of fact

33. In early 2015, the Defendant contacted the Claimant to seek a bridging loan. The intention was to raise money to put towards a property development with two of her sisters. The proposal was to secure the loan against the Flat. Mr Miller of the Claimant spoke to the Defendant, who told him that the loan was in respect of a "very lucrative property transaction", and although she was guarded about the details, she was sure that the property deal easily justified the loan in terms of time and cost.

34. Prior to approaching the Claimant, in January 2015 the Defendant had put the Flat on the market with Acorn estate agents and it was marketed at £595,000, reduced shortly thereafter to £585,000. However there was a lack of interest, and that prompted the Defendant to look for bridging finance. She approached a number of lenders, including the Claimant.

35. The application form was signed by the Defendant in the presence of a representative from the Claimant, Philip Bayman, on 17 February 2015. The Defendant says, and I accept, that save for writing on the first page of the application form her name, address, date of birth, mobile telephone number, occupation and that the loan was to be used for business purposes, the remainder of the form (and not much else is written down on the form) was completed by Mr Bayman. In particular, under applicant financial details, the Defendant's assets are listed as "property 650k" and "mortgages 250k". The Defendant says that the figure of 650k could not have come from her and was not written on the form in her presence. I accept that evidence. In my view, that figure is likely to have come from the desktop valuation undertaken by the Claimant (see the paragraph below). Since the Flat was being marketed by Acorn at £585,000, and since I also accept that in her conversation with Mr Miller the Defendant told him about that marketing, and that it would have been possible to discover very easily the price at which the Flat was being marketed, I do not accept that the Defendant gave the Claimant the figure of 650k.

36. The Claimant undertook a number of searches in respect of both the Defendant and the Flat. It obtained office copy entries which confirm that the Defendant was the owner of the Flat and that there was one charge on the register in favour of Santander dated 1 September 2006. I accept Mr Miller's evidence (although there are no notes or records in the Claimant's file to this effect) that the Claimant carried out a desktop valuation. The Defendant obtained an Equifax Explorer report on the Defendant, which shows that her credit score was +471. There were a number of large credit card balances, and some indication that other credit application searches had been made against the Defendant in late 2014. The Claimant obtained a redemption statement from Santander. The Defendant provided identification documents.

37. The inquiries undertaken by the Claimant were clearly short of what one might describe as a lender's standard fact find exercise, but as Mr Miller explained, and as I accept, the Claimant's business model was to lend against the value of its security rather than the strength of the borrower's covenant, and so the personal position of the Defendant was of little importance to the Claimant. The Claimant was satisfied that the Flat was good security for the first loan.

38. The drawdown of the first loan took place on 25 February 2015. In accordance with the Claimant's policy, it wrote to the Defendant about one month prior to the expiry of the loan to remind her of the repayment date which was 25 May 2015.

39. On or around 19 May 2015, the Defendant contacted Mr Miller by telephone. She was unable to repay the loan on the repayment date and said that was because one of her properties had not yet been sold. The Claimant agreed to lend the Defendant further monies and issued a further offer letter in substantially the same form as the earlier offer letter. On the same date, the Defendant wrote to the Claimant stating that "the bridging loan is for business and property investments only. I will repay the loan from the sale proceeds of my properties."

40. The second loan facility completed on or about 25 May 2015 and was again secured against the Flat.

41. The Defendant says, and I accept, that since the Flat had still not sold and the Defendant needed further income, she let the Flat to Ms Ganieva and Ms Papamichali on 21 July 2015 for a term of 18 months up to and including 19 March 2017, via Foxtons as managing agents.

42. On 2 September 2015 the Claimant wrote to the Defendant informing her that the second loan was due for repayment on 25 September 2015. It was not repaid and the Defendant had not contacted the Claimant. On 28 September 2015, the Claimant wrote to the Defendant, informing her that repossession proceedings would be commenced in October. The Defendant did not contact the Claimant, and the Claimant instructed its solicitors to commence possession proceedings on 21 October 2015.

43. A letter before action was sent to the Defendant by the Claimant solicitors on 23 October 2015 requesting repayment. By that time the amount due was £179,368.43. No response was received from the Defendant.

44. In the meantime, the Defendant discovered in about December 2015 that Mr Fayinka, Catherine's estranged husband, was living at the Flat, apparently having formed a relationship with one of the tenants. In what she described as an attempt to scare him off, and get him to leave the property, she offered him a tenancy at a very high rent and demanded payment in advance, which she says to her surprise he accepted. On 10 January 2016, the Defendant granted a 12-month lease to Mr Fayinka at a rent of £2600 per month. The Defendant ought not to have done so. The Flat was already let with exclusive possession under the lease of July 2015. I found the evidence of the Defendant and her sister Catherine to be deeply unsatisfactory about Mr Fayinka and the granting of this tenancy. The Defendant says that she was unaware that Mr Fayinka had made an application (to which I refer below) to postpone the possession proceedings. In my view, the lease to Mr Fayinka was indeed an attempt to prevent the Claimant from obtaining possession and to delay repayment. In my judgment the reason for this was that the Defendant and Catherine had a discussion in early 2016 (they said it was in February, but I think it might have been earlier, which would explain the lease to Mr Fayinka) in which the Defendant asked Catherine if she would buy the property, Catherine said that she would but not until she received her share of the proceeds of the former matrimonial home. Catherine was not in a position to proceed at that time. The Defendant therefore needed to buy time, and the lease to Mr Fayinka and his successful attempt to delay possession were in my view all orchestrated by the Defendant. The purchase of the Flat had been a decent investment for the Defendant, and she was not prepared to contemplate losing it. Either it had to sell on the open market (but it did not) or she had to sell it to a connected party, her sister Catherine. Until Catherine was in a financial position to buy it, the Defendant had to stall for time.

45. Possession proceedings were commenced in the County Court at Lambeth on 10 November 2015. A possession order was obtained at the hearing on 3 February 2016. The Defendant was ordered to give up possession on or by 3 March 2016. She did not do so. On 10 March 2016, the Claimant solicitors filed a request for a warrant of possession with the court. A bailiff's appointment was scheduled for 11 May 2016 at 10:30.

46. On 6 May 2016, the Claimant's solicitors discovered from the court that an application to stay the eviction had been lodged by a Mr Fayinka who stated that he was a tenant in the property. His application notice stated that he had an assured shorthold tenancy which commenced on 10 January 2016 and the 12 months' rent had been paid in advance. His application asked for some more time to find alternative accommodation.

47. For the reasons I have already set out, I do not accept the Defendant's evidence that she was unaware of Mr Fayinka's application.

48. The Claimant's solicitors wrote to Mr Fayinka, having spoken to him on 10 May 2016, giving him two months to vacate the property on condition that he handed over the keys to Foxtons, allowed Foxtons to show prospective buyers around the Flat, and to vacate by 10 July 2016. I accept Mr Miller's evidence that Mr Fayinka handed over some keys, but they were not the keys to the Flat.

49. The Claimant then requested a further warrant and the bailiff's appointment was scheduled for 23 August 2016.

50. On 15 August 2016, one of the tenants at the Flat, Ms Ganieva, called the Claimant's solicitors and spoke to a Ms Lockley. Her attendance note shows that the tenant had received a notice of eviction advising of the eviction date and asked what she could do. Ms Lockley suggested that the tenant take legal advice as the eviction was due to proceed on 23 August 2016. The tenant asked if the Claimant had spoken recently with the Defendant and when this all started. Ms Lockley confirmed that it started in October 2015 and that legal proceedings were issued in November 2015, with the first notice to occupy being sent in December 2015. The tenant said she would take legal advice.

51. On 19 August 2016, the Defendant applied to suspend the possession order on the basis that she had that same day accepted an offer of £520,000 for the sale of the property, the contracts had been exchanged and the sale would complete in four weeks' time.

52. There was a hearing on 22 August 2016. The Claimant was represented by Mr Pavlovich, and the Defendant appeared in person. The Defendant says that she handed a number of documents to the Claimant's solicitor, but she is wrong about that. I accept what Mr Pavlovich told me, that he alone attended the hearing, and in cross examination the Defendant seemed to accept that Mr Pavlovich was right. The Defendant accepted as the transcript shows that only one document was handed to the Deputy District Judge at the hearing, namely a letter from TKD solicitors dated 19 August 2016, which stated,

> "I am pleased to confirm that exchange of contracts regarding your sale of the above property took place today with completion to take place on 16 September 2016. A deposit of £26,000 was paid by the buyer, to be held by us as stakeholders for both parties until completion."

53. The transcript also shows that the Defendant said:

> "…it is the tenant buying the property because they were not aware of the proceedings when it was supposed today to get repossessed to ask for more time. That was when they found out what was going on and that is when they decided to… It was after they attended the court hearing [when they decided that they were going to purchase the property] because the property was placed on the market by Goldhill. … That is when the tenant called me and said that he would like to purchase the property if it is going up the sale."

54. It was completely wrong for the Defendant to have informed the court, and the Claimant, that Mr Fayinka was buying the property. He was not. The "buyer" referred to in the letter shown to the court was Catherine. This is clear from the contract which was dated 19 August 2016. Contracts were indeed exchanged on that date with completion set for 16 September 2016, and the contract noted that a deposit of £26,000 had been paid. Why the Defendant did not simply show the Claimant, and the court, the contract is a complete mystery. There is also a letter from LB Property Lawyers (Catherine's solicitors) confirming exchange of contracts. Again this ought to have

been shown to the court. The Defendant's excuse for not having done so, and for referring as she did quite clearly to Mr Fayinka as the buyer rather than her sister Catherine, was that this was the first time she had ever appeared in court, she was representing herself, she was against counsel, and was so flustered by the experience that she made a mistake.

55. I have thought very carefully about whether this could have been a genuine mistake, or whether it was a deliberate attempt to mislead the court. On the one hand, I do not see how, given a moment's thought, the Defendant could have made such a simple error. On the other hand, the documents show that Catherine and not Mr Fayinka was the buyer. I am not prepared to accept that the documents, in particular the contract which bears the name of the solicitor acting for the Defendant, were anything other than genuine. In addition, the Defendant completed a client questionnaire for TKD solicitors, and a Law Society property information form. TKD solicitors provided a statement of account in respect of what became the aborted sale and an invoice for the work it carried out. It is true that in the client questionnaire the Defendant failed to tell TKD solicitors about the Claimant. I reject her evidence that she thought it was to complex a matter to put on the form. It would have been an easy thing simply to state "Goldhill" in answer to the question "please let us have the name of any other lenders who have a charge on the property other than your current mortgage lenders". In my view, the matter had become so urgent (the proposed sale to Catherine) in the face of the possession proceedings that a decision was taken by the Defendant not to inform her solicitors about the charge to the Claimant as this would have delayed matters further. That does not mean that the proposed sale was not genuine. In my view it was.

56. A further matter in relation to the genuineness of the sale was whether Catherine had the funds, or would have the funds, to complete. I accept Catherine's evidence that she was not in a position to buy the Flat until she was certain that she would be receiving her half share in the equity of her formal matrimonial home. I accept her evidence that she had to instruct solicitors, Edwin Coe, to act for her in that dispute because the property was in the sole name of Mr Fayinka. I also accept her evidence that it was not until August 2016 that she could be certain she would be receiving those funds. Whilst her bank statement shows that it was not until 26 August she received £157,000 odd from Edwin Coe, I accept her evidence that by 19 August the date of exchange of contracts that she had been informed by those solicitors that they had received or would shortly be receiving that money. Catherine also said that she would have completed the purchase of the Flat by obtaining a bridging loan, having used those types of loans several times in the past. She would then have remortgaged with a regular mortgage lender on a buy to let basis. In a witness statement for which I gave permission to the Defendant to rely on at the start of the trial, Catherine gave some evidence of previous transactions in which she had bought properties at short notice without a mortgage in place and had funded those purchases by bridging loans. These transactions were challenged as being of any assistance on the basis that with one exception they preceded the financial crash, following which lenders were less willing to make bridging loans, but in my view I see no reason why a lender taking the same approach as the Claimant in this case would not have granted a bridging loan to Catherine to complete the purchase of the Flat based on security of the Flat itself. For all of these reasons, in my view the purchase by Catherine of the Flat was a genuine one.

57. The position at the hearing on 22 August, therefore, was that the Claimant believed that Mr Fayinka was supposedly the purchaser of the Flat, but for the reasons given by Mr Pavlovich in his submissions to the Deputy District Judge, the Claimant had its

suspicions about Mr Fayinka. It would seem also that the Claimant believed that a sale at £520,000 would be a sale at an undervalue. It will be recalled that the Claimant was initially of the view that the property was worth £650,000 (the figure which it, and not the Defendant, had placed on it) and that it was aware that the property had been marketed for some time at £585,000. The Claimant's motivating factor appears to have been a desire for a sale at a proper market value. It did not believe that £520,000 was a proper market value. It was concerned that at that price there would be a shortfall and it was not keen to have to proceed against the Defendant personally for that shortfall, which was around £33,000.

58. The Claimant therefore opposed any suspension of the warrant of possession, but the Deputy District Judge was determined, as appears clearly from the transcript, to give the Defendant time to complete the sale. He therefore ordered that the warrant of possession be suspended for 28 days, to enable the sale to complete. This decision was strongly criticised by Mr Pavlovich, because he says that there was no evidence, in the words of section 36 of the 1970 Act, that in the event of the court exercising its power to suspend, "it appears to the court that … the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage". This was the basis of the Claimant's appeal from the Deputy District Judge's decision, which appeal was lodged on 9 September 2016. In my judgment, whether the Deputy District Judge was right or not is immaterial. The fact is that the Defendant obtained a suspension of the warrant of possession at that hearing.

59. After the hearing, it appears that Mr Miller spoke again to one of the tenants, and was told that they would be leaving that day. Mr Miller could not be sure when that conversation took place, but accepted in cross examination that it was probably after the hearing. He also accepted that he did not notify the tenant that the warrant had been suspended. That same afternoon, Mr Miller sought advice from the Claimant's solicitors. He says that the taking of possession the following day was in accordance with the advice he received although the decision to take possession was not his alone; he would have taken that decision in conjunction with Mr Hodgkinson who is the director of the Claimant company. What appears to have happened was that instead of the court bailiffs attending at 09:20 the day following the hearing, AMG Maintenance was instructed to take possession of the property on a voluntary repossession basis. AMG's report appears to indicate that Ms Lockley instructed AMG to take possession at the same time and date on which possession would have taken place had the warrant not been suspended; that keys were not handed over to or obtained by AMG; and that AMG obtained access to the communal door and the main gate having been let in by a cleaner. It is not clear from the AMG report whether AMG broke the locks to the Flat, but in my view they did, as they did not have a key. There was no one at the property. The locks were changed and the front door was shuttered.

60. There was no evidence from Mr Miller or indeed from anyone else on behalf of the Claimant as to the instructions which were given to AMG to justify the taking of possession in the face of an order suspending the warrant. Mr Boyd suggested that had AMG been shown the eviction notice and the possession order, and been told that the order had been suspended, the bailiffs would not have been comfortable in executing their instructions. He says that the only reasonable inference is that AMG were misled into thinking they were entitled to retake possession acting with the benefit of a court order. I am not prepared to draw that inference. It seems to me more likely that AMG were told, as the report suggests that they were to execute a voluntary repossession. If as I accept the Claimant was acting at all times on advice received from solicitors, that

it was lawful to take possession despite the court order, I would also accept that there was no need for the Claimant to have told AMG that a warrant for possession had been suspended. Clearly the question of whether steps taken by the Claimant were indeed lawful, or if lawful nevertheless created an unfair relationship, is a separate one, central to this claim, and I will turn to it later in this judgment.

61. On 26 August 2016 the Defendant applied to be put back into possession on the grounds that the Claimant had failed to comply with the order of 22 August. That application was heard on 13 August 2016 but was dismissed by District Judge Zimmels.

62. The Claimant marketed the Flat with Foxtons. The Claimant relied on Foxtons' advice and initially marketed the Flat for £595,000, but this was swiftly reduced to £550,000 by 19 October 2016. An offer at £500,000 was rejected, but the Claimant then accepted an offer at £525,000 on 30 November 2016, and completion took place in January 2017. From this I conclude that it is most unlikely that the Claimant would have accepted an offer from Catherine at £520,000 in August, September or even October 2016.

63. The proposed sale by the Defendant to Catherine was aborted, and Catherine's deposit of £26,000 was paid over to the Defendant, who later paid it back to Catherine. This was criticised by Mr Pavlovich as another example of the cosy relationship between the Defendant and Catherine which he said was an indication that this was not a genuine sale, or at least a sale which would have completed. It is indeed odd that the parties seem to have accepted that it was Catherine in breach of contract, whereas I accept her evidence that it was the Defendant who told her that the sale could no longer proceed and it appears to have been the Defendant who was no longer able to complete the sale, and that if any deposit was to be forfeit, it would have been the whole 10%, pursuant to the provisions of the contract, and not just the 5%. However, this was indeed not an arm's length transaction but a contract between siblings, and I am not at all surprised having found that the contract was a genuine one that the parties made the arrangements that they did once the sale fell through. I do not think for one moment that this is evidence that it was not a genuine contract.

Did the Claimant's taking of possession create an unfair relationship?

64. Mr Pavlovich says that the taking of possession in the exercise of the Claimant's common-law right to do so was lawful. As was said in *Four-Maids v Dudley Marshall* [1957] Ch 317 at 320, "The mortgagee may go into possession before the ink is dry on the mortgage". Mr Pavlovich relies principally on the decision of the Court of Appeal in *Ropaigealach v Barclays Bank PLC* [2000] 1 QB 263. The question in that case was whether section 36 of the 1970 Act had any application where a mortgagee has taken possession of the mortgaged property by peaceable re-entry and without first obtaining an order of the court. Chadwick LJ held that it did not, and that where a mortgagee exercising its common-law right to take possession, without the assistance of the court, the mortgagor could not avail himself of the protection of section 36, which only applied where the mortgagee sought possession through the courts: see 282F-283B. Mr Pavlovich says that in accordance with that decision, what the court order of 22 August 2016 did was simply to suspend the curial process and the assistance of the court and the court bailiffs in obtaining possession, but that the Claimant's common-law right to take possession peaceably without a court order was unaffected. Therefore the Claimant was entitled to retake possession as it did, despite the court order. Mr Pavlovich describes Mr Boyd's case as having a misunderstanding at its heart, namely

that the order of the court limited the claimant's right to possession. The court process exists to provide assistance in taking possession lawfully where a property is occupied. If the property is unoccupied, such assistance is unnecessary and the mortgagee can, as the claimant did here, take possession lawfully by itself. The fact that the claimant issued possession proceedings did not mean that the claimant was required to take possession only through those proceedings, and that to do otherwise would be unfair. Possession proceedings exist to help a mortgagee enforce its legal rights, not to limit its rights.

65. Mr Boyd says that *Ropaigealach* has no application to the present case. He says that once a mortgagee has decided to seek possession in the courts, and once section 36 is not only engaged on the application by the mortgagor but also an order pursuant to section 36 has been made, it is not open to the mortgagee to proceed along the "self-help" route and to take possession (and certainly not to take possession by breaking the locks, which is not peaceable re-entry in any event). He says that the curial route and the self-help route are two separate tracks, and once the curial route is fully engaged, the mortgagee cannot pick and choose just because it does not like the court order, and instead pursue what would otherwise be the common law right to take peaceable possession without a court order.

66. Mr Boyd suggests that the position can be tested in this way. Imagine what the Deputy District Judge would have said had he been told at the hearing on 22 August that despite his order suspending the possession, the Claimant was nevertheless going to take possession the next day under its common-law right. Mr Boyd says that the Deputy District Judge would have been astounded and would have prevented in some way that from happening, because the taking of possession in those circumstances in the face of a court order suspending the warrant would be tantamount to a contempt of court, or at least a flouting of a clear order of the court that possession should be suspended to enable the sale to complete.

67. I am told by both counsel that there is no reported decision on this point namely whether a mortgagee is put to its election as to whether it must follow the curial or the self-help route, and having so elected is prevented from following the other route. Mr Boyd drew my attention to a number of text-books but in none of those does it seem to me that the learned authors clearly state that there must be an election or that the self-help route is closed to a mortgagee once it starts down the route of court proceedings.

68. Clearly if a mortgagee decides to attempt possession without a court order, but discovers that it cannot do so (for example, because there are tenants at the property), it cannot be prevented from proceeding through the courts. That would be absurd. There is no question of any election in such circumstances.

69. However, it does seem to me that the position is different if a mortgagee decides to seek possession via the courts and an order pursuant to section 36 is made. It cannot be right in such circumstances, in my view, for a mortgagee to be able to say, "whatever the court order says, I do not agree with it, and therefore I'm going to exercise my common-law right, ignoring the effect of the order, and take possession in any event". I agree with Mr Boyd that had he known that was the intention of the Claimant, the Deputy District Judge would have been alarmed to say the least.

70. I find some support for this view in *Ropaigealach*. At 273H, Chadwick LJ cited the Law Commission's working paper on "Transfer of Land – Land Mortgages" (1991) (Law Com. No, 204) at para 6.16:

> "If the mortgagee prefers to obtain a court order for possession rather than obtain possession extra-judicially the court has power, if the property is a dwellinghouse, to withhold or delay the order on condition that the mortgagor remedies any default. Otherwise, the court has no power to regulate the exercise of the right: it is a rough matter in which equity has consistently refused to intervene."

It seems to me that this is an indication that once a mortgagee has started court proceedings, the court may regulate the existence of the right to possession (under section 36), and whilst the common law right is not extinguished, it cannot be enforced.

71. Whether the Deputy District Judge was right or not to have suspended the warrant of possession is, as I have indicated, immaterial. The order suspending the warrant was made. In my judgment, it was not in those circumstances open to the Claimant to take possession the following day purportedly under its common-law right to do so. *Ropaigealach* is clearly distinguishable. I do not accept Mr Pavlovich's argument that the decision in *Ropaigealach* would also have applied if the mortgagee in that case had obtained a court order. In my view, once court proceedings have started and once an order under section 36 has been made suspending the warrant, it is no longer open to the mortgagee to exercise its common law right to possession. That cannot have been the intention of Parliament, to give the mortgagor the protections afforded by section 36 in the face of court proceedings for possession, but nonetheless to allow the mortgagee to take possession irrespective of any order under section 36.

72. In *Ropaigealach* Chadwick LJ also cited an article by Alison Clarke in The Conveyancer & Property Lawyer (1983) 293, at 295 – 296, in which it was said:

> "It is anomalous and undesirable to protect mortgagors against eviction by court process yet leave them open to eviction by self-help, particularly if – as apparently would be the case – the mortgagee's right to use self-help continued notwithstanding that he had applied to the court for immediate possession and been refused."

This article, in my view, correctly summarises the position.

73. I also do not see how it makes any difference that a property is unoccupied, because all that means is that potentially a mortgagee can take peaceable repossession under its common law right. The question is whether, once an order suspending possession has been made, the mortgagee can nonetheless exercise a common law right – and this as a matter of principle is in my view unaffected by whether the property is occupied or not.

74. I do not think that my conclusion affects the decision in *Ropaigealach*. I am aware that the decision has been the subject of some academic criticism, which doubts whether it is still good law, but I am bound by it. The position is that the present case is distinguishable on its facts, and my conclusion is consistent with *Ropaigealach* in that the anomaly identified particularly by Clarke LJ at 287G remains, namely that section 36 has no application where a mortgagee takes possession under its common law rights having chosen not to pursue possession in the courts.

75. Mr Pavlovich also relies on *Groves v Capital Home Loans Ltd* [2014] EWCA Civ 1297 in which Patten LJ said at [31],

> "It would, I think, have to be an exceptional case for the court to conclude that a mortgagee whose power of sale had become exercisable due to the non-

> payment of the mortgage instalments was to be treated as having acted unfairly in deciding to realise its security."

Further, he relies on a comment in Goode at 47.171:

> "If the agreement itself … [is] fair for the purposes of … s140A(1)(a), in general exercising or enforcing any rights under the agreement must surely be fair also."

However, I agree with Mr Boyd that this is not a general or usual case, because the claimant chose to take possession not in the normal way, but in the face of a court order suspending the warrant of possession. Any comments in the authorities or in textbooks about what is "usual" or "general" practice are of no assistance, in my view, in this unusual case.

76. I have considered in particular what is said in *Plevin* as well as the wide discretion afforded to the court under section 140A when deciding whether the taking of possession by the Claimant in this case created an unfair relationship. I have no doubt that it did. The intention of the court order of 22 August was to give the Defendant the opportunity to complete the sale. The taking of possession deprived the Defendant of that opportunity, since it was clear that the Claimant viewed a sale at £520,000 as being at an undervalue, and it was determined to sell the property for more than that. It would not have entertained an offer at that amount from Catherine.

77. Even if I am wrong in my conclusion about whether the Claimant was entitled to exercise its common law right to possession, it seems to me that for the Claimant to have taken possession in the face of the court order suspending the warrant created an unfair relationship, for the same reasons.

78. Thus, in my judgment, the first issue is to be answered in favour of the Defendant. The taking of possession by the Claimant on 23 August 2016, in the face of the court order of 22 August 2016 suspending the warrant of possession, created an unfair relationship.

79. In reaching these conclusions, I have taken into account that the legal burden of proof is on the claimant, but there is an evidential burden on the defendant: see Goode: Consumer Credit Law and Practice, 47.46, 47.47.

What is the appropriate order?

80. I have referred to the very wide discretion given to the court in these circumstances. Mr Boyd urges me not only to cancel any interest accruing to the Claimant after 23 August 2016, the date of possession, or alternatively 16 September 2016 when the sale should have completed, but also to cancel any further sum owing to the Claimant. I am not prepared to do that.

81. Under section 140A(2), I must take into account all relevant matters, and in my view these are

    (1) The Defendant's failure to engage with the Claimant in relation to repayment.

    (2) The Defendant's failure to respond to the court proceedings until very late in the day.

    (3) The Defendant's (successful) attempts to delay matters by the introduction of the lease to Mr Fayinka and Mr Fayinka's application.

    (4) The fact that the Claimant, as I have found, acted in defiance of a court order.

(5) The Claimant was acting on advice (in my view, with respect, wrong advice) but was not deliberately acting improperly.

(6) The Claimant did not tell the tenants that the warrant had been suspended.

(7) The Defendant was deprived of the opportunity to complete the sale.

82. In my view, the correct order should be based on the assumption that, as I have found as a fact, the sale would have completed on 16 September, and to award the Claimant the amount which would have been due on 16 September 2016, less the sale proceeds and less the amount of £9000 which at some point, the precise date is unclear, was paid by the Defendant to the Claimant. I do not accept Mr Boyd's contention that the Claimant should not be entitled to default interest having wrongly taken possession on 23 August, because even had they not done so, default interest would still have been running until payment. I see no reason to impose an order depriving the Claimant of interest to which it was entitled simply because it acted, in my view wrongly, on advice in circumstances in which on any footing it remained out of pocket and had remained out of pocket for some considerable time. On the other hand, I do not see why the Claimant should be entitled to interest until January 2017, when the sale completed, having acted as it did in August 2016 and deprived the Defendant of the chance to complete a sale which I have found would have completed on 16 September 2016.

83. The result is that there will be judgment for the Claimant in the sum of £40,100.52 (representing the shortfall, payable by the Defendant to the Claimant, as at 16 September 2016, and having given credit for the £9,000 paid with a further credit of 1 month's interest for that payment at 5%).

Post-script

84. After I had circulated my judgment in draft to the parties, Mr Pavlovich asked that I clarify one point which he said I had omitted to deal with, namely interest from 16 September 2016. Mr Boyd characterised that request as indulging in the practice of making post-judgment submissions of the sort deprecated by the courts but I do not agree. It was indeed a point which I should have dealt with in the judgment, and I do so now. I am grateful for the opportunity to clarify this point.

85. The parties' submissions, which I set out below, are taken from the exchange of submissions after the draft judgment was circulated.

86. Mr Pavlovich says this:

(1) The decision at paragraph 82 of the judgment is that the Claimant was out of pocket and default interest should keep running until payment (a similar point is made in paragraph 80). The net sale proceeds would have been paid on 16 September 2016 and so there is no reason for interest to continue to accrue on that sum until January 2017 (as it does in the Claimant's redemption statement). But, he says, it also follows that default interest on the shortfall continues to accrue until trial. The Defendant chose not to pay, arguing at trial that the entire debt should be absolved, and as a result the Claimant has remained out of pocket.

(2) At trial, Mr Pavlovich submitted that the order should put the Defendant in the position she would have been in had the sale to Catherine completed, and my judgment appears to follow this approach. There was one correction to the figures he provided in closing to take account of the £9,000 payment made by the Claimant.

(3) The figures he gave in closing were as follows:

a) £40,100.52 for the shortfall on 16 September 2016 (which takes into account the £9,000 paid, less one month's interest on that sum at 5% - my judgment at paragraph 83 failed to take into account that deduction of interest); and

b) £123,169.71 for the total debt including interest to trial (which corresponds to the figure in the Claimant's skeleton argument but with a 19.1% reduction reflecting the reduction in the figure for the shortfall).

(4) Accordingly, Mr Pavlovich suggests that, following the reasoning in the judgment, the judgment sum should be £123,169.71.

87. Mr Boyd says this.

(1) Based on my finding that the Flat would have been sold on 16 September 2016, and that most of the debt would have been discharged from the proceeds of sale, all that was left was the shortfall, which has now been quantified at £40,550.52.

In fact, Mr Boyd has made here the same error as I had done in my draft judgment – the correct figure for the shortfall is £40,100.52, as Mr Pavlovich submits, having given credit for interest on the £9,000 payment.

(2) The rationale for my conclusion in paragraph 82 is clear: it was based on the assumption that, as I found as a fact, the sale would have completed on 16 September 2016 and the Claimant was entitled to the amount which would have been due at that date, less the sale proceeds and less the £9,000 paid by the Defendant.

(3) I rejected Mr Boyd's submission that no default interest should be awarded from 23 August 2016 because, even had the Claimant not taken possession on that day, default interest would still have been running until payment, i.e. until 16 September 2016.

(4) However, I went on to say that I did not see why the Claimant should be entitled to interest until January 2017, when the sale completed, having acted as it did in August 2016 and having deprived the Defendant of the chance to complete a sale. If the Claimant had allowed the sale to complete, the Defendant would have had the opportunity to pay a clearly defined and agreed shortfall at that time. She was deprived of that opportunity of achieving closure. Once a relationship has been found to be unfair, particularly following what was a manifestly wrongful failure to act in accordance with a court order (even if pursuant to legal advice), an act "in defiance of a court order", it is within the court's discretion to deprive the Claimant of the default interest to which it was contractually entitled. To allow it such interest would be to lend the Claimant's conduct an unwarranted normality.

88. The starting point here is I recognise that my draft judgment omitted to deal with interest. Having found that the shortfall due to the Claimant as at 16 September 2016 was £40,100.52 (and I now take the opportunity to use the correct figure provided by Mr Pavlovich), I find that the Claimant is entitled to contractual interest (in other words, interest at the default rate) on that sum until trial, as Mr Pavlovich has submitted.

89. When I said at paragraph 82 that the Claimant should not be entitled to interest until January 2017, that was intended as a reference to interest on the entire debt which was

not substantially reduced by receipt of the proceeds of sale until January 2017, and I regret that I did not make this clear.

90. As a result of my factual findings, what crystallised on 16 September 2016 was the shortfall. That remains unpaid. The Defendant could have paid it, or a large part of it, but she did not. It seems to me in those circumstances that the Claimant is entitled to contractual interest until trial.

91. I do not accept Mr Boyd's argument that the Claimant should be deprived of contractual interest on the shortfall. That is not "normalising" the Claimant's conduct; it is reflecting the fact that because the relationship had been made unfair by the taking of possession, the Defendant had a shortfall to pay as at the notional sale date and failed to pay anything to the Claimant (save for £9,000) at any time. On any footing, there was a shortfall, as the Defendant was well aware prior to the taking of possession, and nothing save £9,000 was paid. The Defendant instead asked the court to write off that shortfall, and to cancel any interest post-September 2016. Mr Boyd also submitted that it was understandable why only £9,000 was paid as the precise sum due was entirely unclear. I did not and do not accept those submissions. I have no doubt that Mr Pavlovich is correct when he submits that contractual interest should run on the shortfall until trial.

92. Mr Boyd's further submissions relate to deductions he says should be made from the crystallised figure. He made similar submissions in closing. The suggestion that there should be any deductions is irrelevant to my findings, because Mr Pavlovich's figures are in relation to the crystallised amount plus interest, and do not take into account sale costs or post-possession costs. Thus, there is nothing further to be deducted nor is there any need for allowances to be made for sale costs, estate agents' commission, or other post-possession expenses.

93. Finally, Mr Boyd says that there should be a further reduction of interest because the trial was delayed to suit Mr Pavlovich's availability. Now, this is precisely the sort of point which, if there was anything in it, should have been made at trial, and not in the post-draft judgment phase. I take no notice of it.

94. For all these reasons, the Claimant is entitled to judgment for £40,100.52 plus contractual interest, which is a total of £123,169.71 inclusive of that interest. That is the decision I have reached in the exercise of my discretion, pursuant to section 140B, having taken into account all relevant matters.

(End of judgment)