IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIS HONOUR JUDGE KAYE QC
(Sitting as a Judge of the High Court)

2007 EWHC 3523 (Ch) / 4LS90129

The Combined Court Centre
Oxford Row
Leeds

13th April 2007

BETWEEN:

ANDREW SIMON EVANS

Claimant

- and -

CHERRYTREE FINANCE LIMITED

Defendant

APPROVED JUDGMENT

APPEARANCES:

For the Claimant: MR J PUGH

For the Defendant: MR T PUTNAM

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13th April 2007

ANDREW SIMON EVANS -v- CHERRYTREE FINANCE LIMITED

JUDGMENT

JUDGE KAYE QC:

1. This is a trial of an action in which, in substance, the Claimant seeks the return of monies paid to the Defendant on redemption of a mortgage on his former property at Markington, North Yorkshire. The Defendant's charge on this property was redeemed - under protest - on 22 or 23 March 2003. The basis of the action is that the Claimant asserts that he paid too much on redemption and now, by this action, seeks the return of the amount or some part of the amount he claims to have overpaid.

2. The Defendant carries on the business of lending money by borrowing from banks, or other financial institutions, and lending to non-status, high risk borrowers on commercial, as opposed to domestic, premises. The company is now in fact in run off, having ceased to lend further money and is now simply surviving on the remaining outstanding loans that it has lent.

3. The main or central issue in this case turns on the meaning and application of Clause 1.8 of the Loan Agreement and Mortgage entered into by Mr Evans with the Defendant, which was in these terms.

> "If all sums due under this secured credit agreement are repaid early, the borrower will be entitled to a rebate calculated on the same basis as if this secured credit agreement was regulated by the Consumer Credit Act 1974, but with the settlement date deferred by six months."

There are subsidiary issues affecting the rate of interest applicable and the amount of an administration fee charged. There was little, if any, conflict of evidence. I heard evidence from Mr & Mrs Evans and from a Mr Cummings, a director of the Defendant company. All the witnesses, I accept, were being honest and trying to assist the court.

4. The relevant events leading to this action, as I find them, are as follows. In 1999 the Claimant and his then wife carried on an antiques business in partnership known as "Daleside Antiques" (or "Daleside") from their property of that name at Hinks Hall Lane, Markington, North Yorkshire ("the property"). The business consisted of antique furniture renovation.

5. The property consisted of a number of buildings and out-buildings linked together, incorporating loading bays, despatch bays, areas for stripping furniture, polishing areas, offices, toilets, canteen, storage and so on and so forth. The property was, in 1999, charged to the Norwich & Peterborough Building Society.

6. The couple lived on the first floor in a suite of rooms between 1993 and 1996. In 1996, the couple separated. Access to the living accommodation was obtained either through the business part of the premises, or via a separate entrance leading to a flight of stairs, itself leading to the living accommodation. The business property and the living accommodation were separately assessed and rated for council tax purposes. In order also to distinguish their person from their business lives, the addresses were separate; the business address being known as "Daleside" and the private address as Wilburne House.

7. In 1996, as I have said, the couple separated and eventually divorced. Following the separation, Mr Evans continued to live in the property. In 1999, Mrs Evans commenced divorce proceedings and at around about the same time, the partnership between them ceased; Mr Evans continuing what had been the partnership business in his sole name. Mrs Evans also commenced proceedings for ancillary relief.

8. In November 1999, as part of her claim to ancillary relief, Mrs Evans obtained an order that the property should be sold and the proceeds paid over to her, amongst other orders made in her favour. An appeal against this order was unsuccessful.

9. Mr Evans was anxious to keep "Daleside". On 28 June 2001 he managed to persuade the District Judge to give him four weeks to raise finance to buy out Mrs Evans. They agreed that the sum required was £150,000. On 6 August 2001 Mr Evans obtained an extension of time to 17 August of that year to complete the arrangements to buy out Mrs Evans. In the meantime he had set about trying to raise finance. He had sought assistance from a number of mortgage brokers. He completed an application form for what, in my judgment, he clearly thought was a commercial mortgage in the sense that it was to be a mortgage on his commercial premises at "Daleside", and sent it to his broker on 26 June 2001. His letter, addressed to his broker Mr T Hudson (at page 137 of the trial bundle) is headed "Reference Commercial Mortgage". "Dear Mr Hudson," he said, "Please find enclosed completed application form. I would, however, request if possible that the term of the loan could be extended to twenty years." The application form described the purpose of the loan as "To purchase equity from divorced spouse and to re-finance existing loan."

10. In order to speed matters up, Mr Evans also sought and obtained a written valuation of the property from Messrs Dacre Son & Hartley, Chartered Surveyors. They produced a descriptive report dated 5 July 2001 and a letter dated 9 July 2001 stating that they valued the property at £150,000. The descriptive report of 5 July 2001 described the property but did not refer to any living accommodation, and this omission was never expressly corrected by Mr Evans; a matter about which Mr Cummings, the director of the Defendant company who gave evidence, felt strongly. Despite this omission, the written report of 5 July found its way to the Defendant, along with the application form, either to the Defendant or to the Defendant's representatives in the form of their solicitors, or what Mr Cummings described as their "master brokers", a company called Solent Mortgages.

11. The Defendant was prepared to lend, in principle. They, or probably more accurately their representatives and agents, via the chain of connecting brokers, wanted to know, amongst other

things in July 2001, if the property was "owner occupied" and, by virtue of the forms that Mr Evans received, if anyone else apart from him was in occupation of the property. Mr Evans confirmed that was "owner occupied". Indeed, in a letter written to the Defendant's master broker dated 18 July 2001, Mr Cummings wrote as follows:

> "Dear Sir, I hereby declare that I am the sole occupier of the building situated at Hinks Hall Lane, Markington, HG3 3NU, North Yorkshire. Do not hesitate to contact me if you require further information. Yours faithfully ..."

I am satisfied that this answer reached the Defendant's agents and solicitors before the loan was concluded. It appears that no further information, or further explanation as to what was meant by the expressions "owner occupier" or "I am the sole occupier" was ever required.

12. Mr Evans, for his part, himself sought information about the proposed loan, including the cost of any redemption penalty. He was told three months, which he took to be three months' interest. Throughout, Mr Evans was assisted by his former solicitors. The upshot was that Mr Evans succeeded in obtaining a loan offer from the Defendant for £105,000 and the balance required to buy out his former wife - £45,000 - he obtained from his parents.

13. On 14 August 2001 Mr Evans executed the loan and charge agreement in favour of the Defendant. This was eventually completed and dated 23 August 2001, following a written report by the Defendant's solicitors to Mr Cummings, their director. Mr Cummings, once he had accepted the property as security in principle, left the details to be worked out and finalised by his solicitors and his master brokers. He says he did not realise Mr Evans was living in the property and thought that he was lending on the security of commercial property exclusively and not any domestic accommodation, but he accepted the application form and letter setting out that Mr Evans was the owner occupier and in occupation must have reached the Defendant company's agents. Hence, as I have said before, in this sense I find that the Defendant was made aware of Mr Evans' purpose for the loan and that he was in occupation in the sense that the property was

also his living accommodation. If the Defendant had enquired further, that is what they have would learned.

14. The terms of the loan were recorded in a composite document headed "Secured Credit Agreement for a Commercial Loan" which included a charge of the property in favour of the Defendant. The material terms reflected in that document were as follows:

15. First, the amount borrowed was expressed to be £105,000.

16. Secondly, the total amount payable, which could be worked out by reference to the fact that repayments of the loan and credit charges were spread over 240 consecutive monthly repayments of £1,566.25 per month, was £375,900. Thus, the total interest payable under this agreement was £270,900; that is to say, £375,900, less £105,000. As I have said, the term of the loan was recorded as twenty years or, to be more accurate, involving 240 consecutive monthly repayments of £1,566.25.

17. Clause 1.3 provided as follows: "The interest rate applicable to this loan is 12.9% flat". I pause to note in passing at this point that the official Bank of England rate on the date the loan was completed, that is to say 23 August 2001, was 6%; (see page 148 of the bundle) and thereafter it dropped to around 4% for some period of time.

18. Returning to the terms of the loan, there were provisions that if the borrower wished to redeem early, he could do so in accordance with the provisions of Clause 1.8, which I have previously quoted. In addition, there was provision for an administration fee provided for by the terms of Clause 1.4 which provided as follows:

> "If any instalment is not received by the lender within seven days of the date upon which it falls due, an administration fee of £250 per month will be paid by the borrower to the lender. Such administration fees shall continue to be paid by the borrower to the lender every month until the account is totally up to date. The arrears shall also bear interest at the rate specified in Clause 1.3 above, and subject to increase as specified in Clause 4.1 below."

Clause 4.1, in passing, provided for a variation in the interest rate. It has not been suggested that the interest rate in this case was ever varied.

19. At the end of the form, in bold type and involving, in places, the use of capital letters, appeared the following.

> "The lender strongly recommends that before entering into this secured credit agreement, the borrower (a) makes sure that he/she/they understand the provisions and implications of this secured credit agreement; (b) takes independent legal or other appropriate professional advice on whether he/she/they should enter into this secured credit agreement."

It then continued,

> "This is a secured credit agreement not regulated by the Consumer Credit Act 1974. As borrower, you should sign it only if you want to be bound by its terms, and signed as a deed by the borrower" etc.

There duly followed Mr Evans' signature witnessed by his solicitors.

20. That the question of occupation was of some concern to the Defendant is tangentially made plain by the terms of this document itself in that in Clause 5.4, the following provision also appears:

> "The borrower agrees that the legal charge created by this secured credit agreement shall rank in priority to any statutory rights of occupation of the property that the borrower may have, whether registered or not."

21. The Claimant unfortunately was unable to maintain the monthly payments and soon defaulted, largely due, he says, to customers defaulting on payments to him, but the result was that the Defendant commenced possession proceedings against him in the Harrogate County Court on 18 February 2002. During the course of the proceedings it seems to me to be clear that Mr Evans disputed the amount required to redeem. He also disputed the administration fee.

22. On 29 July 2002 the District Judge recorded an agreement reached between the parties in these possession proceedings, putting into effect, as it seems to me, an agreement that effectively the property would be sold. The order recorded the following.

> "By consent, it is ordered that:

(i) the claim is stayed to enable the agreed terms set out in the schedule to be put into effect."

The schedule, curiously, contained no actual provision that the property should be sold, but that seems to have been the effect of the agreement. The schedule, however, also contained the following in paragraph 3:

> "The Defendant" - that is to say Mr Evans - "concedes that an administration fee is payable in the sum of £125 per month until such time as the arrears and costs referred to in paragraphs 1 and 2 above have been discharged in entirety. The payment of £125 is to replace the £250 referred to in the credit agreement and legal charge. The Claimant, however, will capitalise the £125 each month, to be added to the redemption figure, and not to be deducted from the payment referred to in paragraph 4 below. In the event the arrear and costs are cleared, and the Defendant subsequently falls into arrears again, the administration fee will continue again at £125 per month until the account is again brought up to date."

It seems to me from that clear beyond peradventure that the parties agreed that the appropriate administration fee contemplated by Clause 1.4 of the secured credit agreement was to be, and was accepted by Mr Evans as £125, as opposed to £250.

23. In January 2003 the contracts for the sale of the property were exchanged with completion for 23 March of 2003. Mr Evans, no doubt then by his then solicitors, sought information as to the amount required to redeem. The Defendant's solicitors sent a schedule setting out a calculation as to the amount required to redeem. This referred to the agreement number, to the original advance of £105,000, to the date of the agreement, to the total number of instalments and then referred to "relevant date (i.e. 22.3.03 plus six months) 22.9.03". It then referred to the un-expired term as 240, less 24, equals 216 and set out a calculation of the total charge for credit; that is 240 at £1,566.25, less the original advance, equals £375,900 minus £105,000 equals £270,900, i.e. unsurprisingly, the amounts that I have mentioned before.

24. It then set out what is referred to as the Rule of 78 rebate. It set out the calculation in accordance with that Rule, as I shall explain in a moment, and it stated that the Rule of 78 rebate was £219,530.17. There then followed a section headed "Redemption" which referred to the total sum

payable as £375,900, less the rebate - the £219,530.17, I have already mentioned - plus the monies paid - which was noted as £17,012.50 - giving a total deduction of £236,542.67. The sub-total thus arrived at was £139,357.33. To that was added back certain items. First admin fees: 17 at £250 (as opposed to £125) totalled £4,250; costs paid to date with interest, £3,435.40; and what were called administration costs and disbursements, £7,672.59, making a total of £15,357.99. Below that was inserted payable to the Defendant - or "payable to Cherrytree £154,715.32". On top of that was the sums to be paid to the Defendant's solicitors as described as "Miscellaneous litigation and redemption costs" £3,595.51, and the total balance to redeem was noted at the foot as £158,310.83. The parties have tended to proceed on the footing that that was the amount paid on redemption.

25. However, in a subsequent letter dated 24 February 2003 the Defendant's solicitors referred to the previous position of their client as to the amount required for redemption and added the following.

> "Our client had proposed to charge for the administration fees, in accordance with Clause 1.4 of the agreement, from inception to the date of redemption. We have pointed out that in view of the settlement reached last year, our client is entitled to charge only £125 for each month since settlement, and we therefore confirm that our client agrees a reduction on the figure given in the sum of £875. In the (inaudible) our client requires the sum of £157,435.83 to redeem the charge as at today's date."

The thinking behind the calculations to which I have referred was based on Clause 1.8 of the loan agreement and what both sides in the present action agreed were the then relevant Consumer Credit Regulations, namely the Consumer Credit Rebate on Early Settlement Regulations 1983 (which I shall refer to as "the 1983 Regulations"). These regulations have subsequently been replaced by new regulations applicable, I think, from 2006.

26. The relevant Regulations applicable, contained in this instrument setting out the 1983 Regulations (that is SI 1983 No. 1562) are as follows. Regulation 2, headed "Entitlement to Rebate", provided in sub-regulation 1 that:

> "Subject to the following provisions of this Regulation, the creditor shall allow to the debtor under a regulated consumer credit agreement a rebate at least equal to that calculated in accordance with the following provisions of these Regulations whenever early settlement take place, that is to say whenever, under Section 94 of the Act, on refinancing, on breach of the agreement or for any other reason the indebtedness of the debtor is discharged or becomes payable before the time fixed by the agreement, or any sum becomes payable by him before the time so fixed."

27. Regulation 4 dealt with the formulae for calculating the rebate, and Regulation 4(2)(i), so far as relevant to the present case, provided as follows:

> "Subject as hereinafter mentioned in the case of agreements under which credit is repayable by instalments, the amount of the rebate shall be as follows:
>
> (i) Where credit is repayable in equal instalments at equal intervals, the amount of the rebate shall be given by the formula set out in Part 1 of Schedule 2 to these Regulations."

28. Regulation 6 defined the settlement date, and for the purposes of the 1983 Regulations, which was, so far as present purposes are concerned, the date on which payment was made: See Regulation 6(1)(c) and Regulation 6(4).

29. Regulation 5 permitted deferment of the settlement date and provided as follows:

> "The settlement date for calculation of the rebate in Schedules 1 to 4 to these Regulations may be deferred as follows:-
>
> (a) where the agreement provides for the credit to be repaid over or at the end of a period of five years or less by two months;
>
> (b) where the agreement provides for the credit to be repaid over; or
>
> (c) at the end of a period of more than five years by one month."

Pausing there, of course, although that clearly plainly contemplated the fact that the loan agreement might be extended over a period of more than five years, the whole concept of the

Consumer Credit Legislation in terms of calculating the amounts of interest and the provision of consumer credit and rebate on early settlement - the background scenario, if I may put it that way - contemplates relatively short-term loans, and not, as a rule, loans of twenty years or so.

30. Returning to those Regulations then, the provisions of Schedule 2, Part 1, referred to in Regulation 4(2) set out a complicated formula for calculating the amount due on redemption by reference to what is commonly known as the "Rule of 78" rather than that stated in the schedule I referred to earlier, the "Rule of 78". I do not suppose anything as such turns on that.

31. Daleside was sold and the Claimant redeemed the charge and paid the sum set out in the letter that is at least £157,435.83, if not the greater sum of £158,310.83. The evidence, surprisingly, was rather thin on the actual amount paid by Mr Evans, but a wholly sensible and helpful attitude (if I may say so, hopefully without sounding patronising) has been adopted by everybody who has done their best to agree the figures. The present proceedings were then instituted following that payment in order to determine, so far as relevant for present purposes, the amount properly payable and thereby recoverable from the Defendant, if anything.

32. This dispute has centred upon three issues: first, the amount paid by reference to the calculation under the 1983 Regulations in accordance with the Rule of 78; second, the amount of interest; and third, the amount of administrative fees. Should the latter be at the rate of £250 per month; £125 per month or nothing? The other deducted amounts for legal and administrative and miscellaneous fees are not disputed, and no claim to the return of them is made.

33. I can deal with the last two, that is to say the interest and administrative fees' issues quite shortly. First, as to the provision for interest. I have referred to the manner in which this was calculated. The £105,000 had a flat rate of 12.9% applied to it, which produces a figure of £13,545. If that figure is multiplied by the period of the loan in years, i.e. twenty, it produces £270,900. That then added to the amount of the loan - £105,000 - produces the total charge under the agreement,

which was, as I have previously set out, £375,900. The aim of the agreement was that the borrower would repay the whole of the total amount due by equal instalments over a twenty year period. The provisions, however, of Clause 1.3 of the agreement, which I have already referred to, stated simply "The interest rate applicable to this loan is 12.9% flat".

34. The issue was whether that was 12.9% per annum and whether that was 12.9% on the whole of the amount, or whether it should be on the reducing balance. The effect of course is by paying an amount each month attributable to capital and interest over the period of the first year, an amount of capital is repaid. The following year, a further amount of capital is repaid, but the amount of capital actually outstanding at the end of the year is less by the amounts that have been repaid of capital in each monthly instalment.

35. Given that the provisions of Clause 1.3 are somewhat ambiguous, and given that the provisions of 1.4, which I have also previously mentioned, refer to the fact that the arrears should bear interest at the rate specified in Clause 1.3 above, and reading the term of the agreement as a whole, in my judgment, the effect was that the lender was charging interest at 12.9% per annum on the outstanding loan. Thus, although the payments were - as I have said - the same each month, as time progressed, the capital element would reduce and the interest element, in the instalments that is, would increase, but the result over twenty years would - or ought to be - the same. Mr Evans would, by the end of twenty years, have repaid £105,000 capital and to have paid a further £270,900 interest - more than twice the amount, if not almost three times the amount by way of interest - over the full period of the loan.

36. As to the administration fee contemplated by Clause 1.4, Mr Putnam, for the Defendant, concedes immediately, as had been done in the letter of 24 February 2003 to which I have referred, that his clients were correct to give credit for the fee calculated on the basis of £125 per month, rather

than £250. He maintained, in effect, that the parties had already compromised that part of the dispute and that it was no longer open to the Claimant to challenge it.

37. Mr Pugh, on behalf of Mr Evans, contended that the fee was a penalty and should be disallowed in total. In my judgment, Mr Putnam was correct to make the concession that he did, even if the fee was a penalty. It was plainly put in dispute in the possession proceedings and was compromised.

38. I thus turn to the main issue over the Rule of 78 calculation, as it has been referred to by way of shorthand. This Rule has been the subject of much criticism in recent years and as I indicated earlier, I was told has now been abandoned altogether, at least so far as the relevant Consumer Credit Rebate Regulations are concerned. As I have said, those of 1983 having been recently replaced by new regulations having the effect, I was told, of permitting the lender to charge about the equivalent of an extra one month's interest only for early redemption.

39. Part of the criticism brought to the public attention about this Rule was contained in guidelines - and I emphasise they are only just that, guidelines - issued as paragraph 5 of those guidelines made clear in relation to secured loans for non-commercial purposes, issued by the Office of Fair Trading in November 1997, which included the following comment about the Rule of 78:

> "The July guidelines made clear the Office's view that use of the Rule of 78 in the non-status lending market can be unfair and oppressive as it tends to produce a settlement figure which is excessive relative to the amount borrowed and repayments made and relative to the costs incurred by the lender. Lenders should discontinue its use at the earliest opportunity and should not apply it rigidly to existing loan agreements without some form of cap to ensure that payments on early redemption are not excessive."

The same guidelines then referred to the unfair terms in Consumer Contracts Regulations, and pointed out that under those Regulations, the terms incorporating any provision for the application of Rule of 78 might be deemed unfair, and not binding on the consumer.

40. Mr Pugh, on behalf of Mr Evans, has mounted his attack on Clause 1.8 and the calculation of the redemption figure in this case, broadly speaking on three fronts: first, by reference to the unfair terms in Consumer Contracts Regulations 1999 (SI 1999 No. 2083 - which I shall refer to as "he 1999 Regulations"). These Regulations replaced the unfair terms in Consumer Contracts Regulations 1994, which were the obvious subject of the reference in the OFT guidelines to which I have just referred. However, the 1999 Regulations did not significantly contain any major difference from those issued in 1994.

41. Mr Pugh submitted that Mr Evans dealt with the Defendant as a consumer within the meaning of these Regulations and that they therefore applied to the loan agreement entered into between Mr Evans and the Defendant, and that the terms of Clause 1.8 are unfair within the meaning of those Regulations and are therefore not binding on Mr Evans.

42. His second platform of attack - if I may be forgiven for mixing my metaphors - was based on the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, a decision of the Court of Appeal reported, for present purposes, at [1988] 1 All E.R. 348. Basically, the basis of his submission on this head was that the provisions of Clause 1.8 ought to be ignored on this ground as having been incorporated into the contract in an unfair manner; in short, by the terms not having been properly or fully explained to Mr Evans prior to his signing the agreement.

43. His third attack on the provisions of Clause 1.8 was based on the decision of Browne-Wilkinson J, as he then was, in the case of *Multiservice Bookbinding Ltd and Others v Marden* [1978] 2 All E.R. 489. In short, his submission under this head was that Clause 1.8 should be ignored as an unfair term binding on the conscience of the Defendant and that being, in all the circumstances of the case, an unconscionable term was not binding on Mr Evans.

44. I turn therefore to the first of these grounds of attack, the 1999 Regulations. These Regulations fell for consideration before the House of Lords in a case called *Director General of Fair Trading*

v First National Bank plc [2002] 1 All E.R. 97. The Regulations which in fact fell for consideration by the House of Lords in that case were the earlier 1994 Regulations, but the House had in mind the latter 1999 Regulations, and for present purposes nothing turns on the distinction between the two.

45. The speech of Lord Bingham in the House pointed out that the 1994 Regulations derived from and were brought into effect pursuant to a European Directive, and he said this at paragraph 17 of his speech:

> "It is plain from the recitals to the directive that one of its objectives was partially to harmonise the law in this important field among all member states of the European Union. The member states have no common concept of fairness or good faith, and the directive does not purport to state the law of any single member state. It lays down a test to be applied, whatever their pre-existing law, by all member states. If the meaning of the test were doubtful, or vulnerable to the possibility of differing interpretations in differing member states, it might be desirable or necessary to seek a ruling from the European Court of Justice on its interpretation. But the language used in expressing the test, so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations.
>
> A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour."

He pointed out also that the 1974 Act (that is the Consumer Credit Act 1974) was passed to protect consumers and that the Directive and the 1994 Regulations were part of that process of increasing consumer protection brought about by the harmonisation affects of the European Directives.

46. The first issue, however, in relation to the 1999 Regulations is, do they apply at all? Regulation 4 of the 1999 Regulations provides

> "(1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer."

So the terms "consumer" and "seller or supplier" are terms of art for the purposes of those Regulations. Regulation 3 contains interpretation. Regulation 3(1) defines “consumer” as "Any natural person who in contracts covered by these Regulations is acting for purposes which are outside his trade, business or profession"; “seller or supplier” means "Any natural or legal person who in contracts covered by these Regulations is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned". So a “consumer” is someone who is acting for purposes outside his trade, business or profession, whereas the “seller or supplier” - for these purposes - is acting for purposes relating to his trade, business or profession.

47. I acknowledge that the words and the definition "... contracts covered by these Regulations ..." is somewhat circular in that the contracts governed by these Regulations are contracts concluded between a seller or a supplier and a consumer (see Regulation 4(1) to which I have referred) but the meaning is plain, as I have said. They are intended, and it is here that the purpose of the Regulations and the fact that they were made pursuant to a European Directive is important, it is plain that the purpose of these Regulations is for consumer protection, i.e. those persons who are dealing with a seller or supplier in a stronger position, but for purposes outside the consumer's trade, business or profession.

48. I remind myself that the purpose of the loan expressed to be by Mr Evans in his application form was to purchase equity from divorced spouse and to re-finance existing loan. Mr Putnam, on behalf of the Defendant, submits that in effect, this amounted to the purchase of the property and the wife's former share in the business carried on at the property and that the purchase was, therefore, for purposes connected with the business and Mr Evans' desire to preserve the business and hence, for these purposes, he was not acting outside his trade, profession or business but, on the other hand, was acting for purposes relating to his trade, profession or business. That,

coupled with the commercial nature of the loan, and the fact that he obtained some tax relief on the interest payments, or some of them, reinforced this.

49. I respectfully disagree. In my judgment, Mr Evans is to be viewed as a consumer for the purposes of the 1999 Regulations in respect of the loan made by the Defendant to him. He was not borrowing, in my judgment, for the purposes of his business, e.g. to raise working capital, but for purposes outside his trade, business or profession, i.e. to buy out his wife in divorce proceedings. The loan was essentially for personal purposes to enable him to have a place to live - a home - as well as to work. It may well be there may have been a mixed purpose, but the predominant purpose was not in my judgment for the purpose of his business, so much as for the purpose of paying off his wife in order to be able to establish himself separately outside the partnership formerly carried on with his wife and, as I say, to acquire the property both as a place to live as well as a place to work. In my judgment it is plain, therefore, that in this sense, Mr Evans was dealing in my judgment as a consumer with the Defendant who was a seller or supplier for the purposes of these Regulations.

50. Some support can be derived from the case, helpfully drawn to my attention, a decision of Longmore J in the case of *Standard Bank London Ltd v Demetrios and Stiliani Apostolakis [fill in reference]*. In that case, the defendants were a Greek husband and wife who worked as a civil engineer and a lawyer respectively and were invited to invest in foreign exchange transactions with the claimant English bank. They were wealthy professionals and they made substantial investments which, unfortunately for them, ended up in total loss. They sued the claimant in Greece arguing that the contracts were invalid under Greek law. The claimant issued proceedings in London for an injunction to restrain the Greek proceedings. It relied on an alleged exclusive jurisdiction agreement in the framework contracts governing the parties' relationship, confirming jurisdiction on the English courts. The existence of the exclusive jurisdiction agreement was

disputed because two separate provisions of the framework contracts dealt with jurisdiction each in rather different terms.

51. Longmore J accepted that on the construction of the documents, the interpretation in favour of the existence of an exclusive jurisdiction agreement should prevail, so he therefore had to turn to the question as to whether the contract should be defined as consumer contracts, and the issue which would influence the outcome of the case both as to jurisdiction and in substance, and concluded that the relevant test was whether the defendants were acting in the course of their trade or business. In spite of the large size of the investments made by the defendants, their professional activities, he held, could not be said to include the making of the investments in question. The contracts must, therefore, be defined as consumer ones.

52. One might say, in parenthesis in this case, that it is not part of Mr Evans' business activities to buy and sell property. It is part of his business activities to restore antique furniture, which was not what the purpose of the transaction was.

53. Longmore J, during the course of his judgment, referred to the European case of *Benincasa v Dentalkit Srl*, reported in 1997 ECR 1-3767, where the European Court held that in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned. As the Advocate General rightly observed in paragraph 38 of his opinion:

> "The self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Consequently, on contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character."

In my judgment, this was a case where the contract entered into by Mr Evans was for the purpose of satisfying his own needs in terms of private consumption and not, as I say, for the purposes of his business, trade or profession. Accordingly, I have to consider whether, within the meaning of the 1999 Regulations, the relevant term - Clause 1.8 - is unfair.

54. I therefore now turn to the 1999 Regulations. I previously referred to Regulation 4 and Regulation 3. Regulation 5 deals with unfair terms and the relevant parts of this Regulation are as follows:

> "(1). A contract which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.
>
> (2). A term shall always be regarded as not having been individually negotiated where it has been drafted in advance, and the consumer has therefore not been able to influence the substance of the term.
>
> (3). Notwithstanding that a specific term or certain aspects of it in a contract have been individually negotiated, these Regulations shall apply to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4). It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
>
> (5). Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair."

55. Pausing there, nobody in this case has suggested that the loan agreement entered into in this case was other than a pre-formulated standard contract and that Clause 1.8 was not individually negotiated.

56. So far as Schedule 2 is concerned, this sets out - as I have said - an indicative and non-exhaustive list of terms which may be regarded as unfair, and Mr Pugh relies - in particular - on (e) and (i) which are in the following terms:

> "Terms which have the object or effect of ...

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum of compensation; ...

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."

57. Regulation 6 provides:

"(1). Without prejudice to Regulation 12 (which I add - in parenthesis - does not apply in this case) the unfairness of a contractual term shall be assessed to take into account the nature of the goods or services for which the contract was concluded and by referring at the time of the inclusion of the contract, to all the circumstances attending the conclusion of the contract, and to all the other terms of the contract or of another contract on which it is dependent.

(2). Insofar as it is in plain, intelligible language, the assessment of fairness of a term shall not relate a) to the definition of the main subject matter in the contract; or b) to the adequacy of the price or remuneration as against the goods or services supplied in exchange."

Nobody in this case has suggested that 6.2 applies to the present contract.

58. Under Regulation 7, it is provided:

"A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language. If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail. But this Rule shall not apply in proceedings brought under Regulation 12."

59. So far as the effect of an unfair term, if the court does conclude that the term is unfair, this is governed by Regulation 8, which provides as follows:

"(1). An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2). The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."

60. I return to the case I cited earlier in consideration of these Regulations, namely *Director General of Fair Trading v First National Bank plc* and I remind myself of the passage that I quoted earlier from the speech of Lord Bingham. Later, in the same speech, Lord Bingham said this, at page 108, paragraph 17:

> "The imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

Later, he said, at paragraph 20,

> "In judging the fairness of the term it is necessary to consider the position of typical parties when the contract is made."

61. In my judgment, the term in this case - Clause 1.8 - is opaque and unclear. It is not explained; how it is to apply is not set out or explained. I do not overlook the fact that Mr Evans had a solicitor advising him and that he was anxious to obtain finance. In his pleadings, in the present action, Mr Evans maintained that had he known that the amount required on redemption was so high, he would have looked elsewhere, or told the court and sought a further extension of time to seek finance elsewhere. That may, or may not, be so, but in my judgment, the Clause fails to comply with the requirements that the terms should be in plain, intelligible language. I also have to take into account all the circumstances attending the conclusion of the contract; all the terms of the contract and indeed all the circumstances surrounding it.

62. The effect, in my judgment, is that the application of the Clause does indeed lead to a significant imbalance. This is apparent if one only looks at the statement supplied by the lender as to the redemption figure. They calculated that the interest over the entire term was almost three times the amount of the loan. It still left, after some two years into the term, a considerable sum repayable by way of redemption, the £158,000-odd. Even if one took the lower figure of

£157,00-odd, that was almost half as much again of the entire loan, an additional £50,000-odd over and above the £105,000, and even that is ignoring the fact that some of the repayments - in the monthly repayment instalments - some of those repayments must have led to a repayment of capital.

63. I do not overlook the fact that Mr Evans had a solicitor acting for him. Mr Cummings, in his own evidence, admitted he could not understand the Clause. Mr Evans thought, for what it is worth, that the effect of the Clause was that the lender would be entitled to six months' deferment of interest, and it may be - as I have indicated - that bearing in mind the need for the speed of the transaction, that Mr Evans would have gone ahead. I bear in mind also that the transaction was accompanied by some need for speed. I bear in mind that the security being offered was commercial premises, and that the Defendant was lending to what they regarded as a non-status market. I also do not overlook the fact that Mr Evans had been told, contrary to what the Clause said, that the proposed lender was looking for a three months' interest penalty.

64. In my judgment, given that the loan was £105,000 and interest at 12.9% was over the whole term, as against prevailing Bank of England rates at less than half that amount even at its highest, as I have mentioned previously, but calculated as if the capital was not reducing over the whole term, these factors, plus the attempted six month deferment, does show the disproportionate nature of the term.

65. I also bear in mind, though I am not bound by, the OFT guidelines. In effect, Mr Pugh adopted them as part of his submissions. He also adopted and relied on a case of His Honour Judge Morgan in the Macclesfield County Court delivered in 28 October 1998 in which the learned judge explained that the Rule of 78, based on the evidence that had been given to him in that case, was, to put it mildly,

> "... a not uncomplicated concept to non-mathematicians like myself. As I understand it …"

- the learned judge went on -

> "... it is based upon the total sum of digits from one to twelve and it divides the total interest charge under an agreement equally over the life of that agreement."

He went on that, in his view, it was a calculation that is grossly inaccurate in regard to loans of the type applicable in that case.

> "It has its advantages with regard to shorter term loans, but as far as a loan of this character is concerned, it can lead to severe injustices."

I do not think that Mr Pugh was relying on that case for much more than that statement, which is entirely consistent with the guidelines that have been delivered by the OFT. The facts of the case were somewhat different from present circumstances, and the terms of the loan were different and the circumstances were much stronger than the present case, as Mr Putnam urged upon me, so I do not derive much comfort or assistance from that case other than in the way that it supports the submissions made in the OFT guidelines.

66. Nevertheless, having regard to the 1999 Regulations, in my judgment, this case - the case under the 1999 Regulations - is made out. They do require Mr Evans to pay a disproportionately high sum in compensation, and whilst I accept Mr Evans, as I have previously indicated, had a solicitor acting for him, he had no real opportunity of becoming acquainted with the terms before the conclusion of the contract. I appreciate the sentiments at the end of the agreement, cautioning him and drawing his attention to the terms of the mortgage and to satisfy himself as to them, but nobody ventured an explanation as to what Clause 1.8 meant, and to some extent it just gave the appearance that the Consumer Credit Act Regulations applied, and that was it. As I say, I conclude, having regard to the circumstances as a whole and the matters I am required to consider under the 1999 Regulations, the case that the term was unfair is made out.

67. Can the loan agreement survive if Clause 1.8 is ignored? In my judgment it can. The effect, in my judgment, is that Mr Evans can redeem on payment of the arrears and the outstanding principal. Does this include an extra six months' interest? In my view it does not. It is not possible to sever one part of 1.8 from another. The Clause has to be read as a whole and in my judgment this does not entitle the Defendant to an extra six months' interest. It entitles them, as I have said, to payment of the arrears outstanding at the date of redemption, and the outstanding principal.

68. It follows from the fact that Mr Pugh has succeeded on this first platform of his attack that it is not strictly necessary for me to consider his other submissions. But since I have received submissions on them carefully from both sides, and in fairness to them, I will briefly consider them.

69. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* a question arose as to whether certain standard terms and conditions of the Advertising Agency were included in the contract or not. There was a condition requiring the return of transparencies within 14 days if they were not used in respect of photographs, with an exorbitant holding fee charge if the transparencies were not returned within an agreed period. The question arose as to whether the term was incorporated into the contract between the parties. Dillon LJ, after review of the authorities, said this at page 352,

> "In the ticket cases the courts held that the common law required that reasonable steps to be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v Shoe Lane Parking Ltd*, that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party. In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note.

> Consequently condition 2 never, in my judgment, became part of the contract between the parties."

I pause to emphasise the sentence "if one condition in a set of printed conditions is particularly onerous or unusual". The words "particularly onerous or unusual" appear to me, at first sight, to be disjunctive rather than conjunctive.

70. Bingham LJ, as he then was in the same case, after a very careful review of all the authorities, reached this conclusion at page 357:

> "The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned."

That statement, of course, and his review in that case of the civil law of good faith, preceded the *Director General of Fair Trading v First National Bank plc* case that I have mentioned by some considerable number of years.

71. This case was subsequently considered by the Court of Appeal and at least one first instance decision. I was referred to three authorities in this context, which I will try and take in chronological order.

72. The first was *HIH Casualty & General Insurance Ltd v. New Hampshire Insurance Company*, a decision of the Court of Appeal, [2001] EWCA (Civ) 735 of 21 May 2001. The question in that case was whether certain terms were, or were not, included in an insurance contract. Part of the argument that was raised was by reference to the decision in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.* Rix LJ, giving the principal judgment of the Court of Appeal, with which Mummery LJ and Peter Gibson LJ agreed, concluded that the *Interfoto* test, if applicable at all, was a matter he preferred to leave open and regarded it as outside the scope of the issues raised in that case, hence his remarks about *Interfoto* have to be regarded as obiter. But

he plainly was not overly struck - as it seems to me - by the *Interfoto* test. He said this at paragraph 209:

> "For all that neither party in terms rejected what I might call the *Interfoto* test, I am nevertheless doubtful of the application of this principle as a means of solving the present problem, especially at this stage of the proceedings. In the first place, *Interfoto v Stiletto* was not concerned with the effectiveness of an incorporation clause in a signed contract, which is essentially a question of construction, but rather with a question of notice: the question of whether sufficient notice has been given to a person by means of a document which has not been signed so as to render that person contractually bound by the term or terms set out in that document. Secondly, that question of notice is closely akin to a question of awareness: the party affected by sufficient notice, even if not actually aware of the term in question, is regarded as having constructive knowledge of it, i.e. as being constructively aware of it."

In addition, he said this at paragraph 211 of the judgment:

> "Seventhly, I am not persuaded that the *Interfoto* test applies to a term that is merely unusual, at any rate in the context of a binding incorporation clause. I acknowledge that some of the dicta in previous cases referred to in *Interfoto v Stiletto* mention the case of a term that is 'usual': but *Interfoto v Stiletto* itself was concerned with a term which was not merely unusual, but very onerous, unreasonable and extortionate. No one has suggested that those descriptions apply to clause 8, however much it might increase the risk undertaken by an insurer."

73. The next case was the case of *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70, decision of Christopher Clarke J in the Technology & Construction Court delivered on 26 January 2007. Thereto he appears to have referred to the *Interfoto v Stiletto* test in the context of whether or not certain terms were to be regarded as applicable in that case.

74. He referred to the passages from the judgments that I have already referred to of Dillon LJ and Bingham LJ. He also had the *HIH v New Hampshire* case referred to him and while the passage he referred to was the passage at paragraph 211 - that I have mentioned - from the judgment of Rix LJ. In paragraph 68, Christopher Clarke J said this:

> "If, therefore, it had been necessary to establish that the clause was 'particularly onerous or unusual' I would not have been persuaded that the present clause falls within that category. Some piling contractors' standard terms include such a

> provision; some do not. I doubt however whether in a case such as this the application of the clause is wholly determined by this categorisation. The principle is that the person relying on the clause must have done what was reasonable fairly to bring the clause to the notice of his customer when the contract was made. As Bingham LJ put it ' the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given'."

75. Finally, the third case was a decision also of the Court of Appeal in *Sumukan Ltd v Commonwealth Secretariat* given on 21 March 2007, also unreported, but the neutral citation number is [2007] EWCA (Civ) 243. This was a question whether a term of an arbitration contract was to be enforced, or not. Again, the *Interfoto* principle was relied upon; again, the passage that I have referred to from the judgments of Dillon LJ and Bingham LJ were referred to.

76. In paragraph 47, Waller LJ, giving the judgment of the court said this:

> "There cannot be any doubt that under normal rules of domestic contract law, (i.e. without application of what we shall call for convenience the *Interfoto* principle) the exclusion agreement would be incorporated into the contract. This is not a case of incorporation by conduct. In this case an admitted contractual term expressly incorporated the statute and the terms of the statute."

That is the Arbitration Act.

> "The question is whether the *Interfoto* principle applies. To answer that question it is necessary to consider whether and if so the extent to which the clause is onerous or unusual or takes away statutory rights Y"

At paragraph 50, he said,

> "Accordingly, in our view, as a matter of domestic law without regard at this stage to Article 6 Y"

that is Article 6 of the European Convention on Human Rights and Fundamental Freedoms

> "... the reasoning of Leggatt J and Staughton J demonstrates that the court would not see an exclusion agreement as some form of unusual or onerous clause to which the *Interfoto* principle should be applied in considering whether it has been incorporated."

His conclusion, and the conclusion of the Court of Appeal in that case, was that the *Interfoto* principle had no application.

77. In none of the cases, therefore - except *Interfoto* itself - has what has been called the *Interfoto* test seemingly succeeded on the authorities to which I have been referred. Moreover, although there has been excessive citation of the statement of principle outlined by Bingham LJ, where he put the test much more broadly than that applied by Dillon LJ, in the few cases to which I have been referred, the *Interfoto* test seems to have become a test of whether or not the clause in question has been (a) sufficiently, in all the circumstances, drawn to the attention of the person concerned, and whether it is particularly onerous or unusual.

78. As I have previously indicated, the onerous or unusual test comes from the judgment of Dillon LJ; the wider test is that of Bingham LJ, but as Mr Pugh accepts, the principle was applied in those cases or at worst, not completely rejected, but not applied to the facts of the individual cases. Mr Putnam accepts the principle, but submits that this clause is not - that is Clause 1.8 in this case - is not unusual. Plainly, as to that, it was not, otherwise there would have been no need for the OFT to draw attention to it.

79. For my part, whether one relies on the question purely of notice or purely of whether the clause was onerous or unusual, in both instances, I would have thought Mr Evans would not have succeeded, having regard to the fact that he was legally represented and having regard to the fact that the clause in this case is not so unusual as to fall within what appears to be at least the narrower of the *Interfoto* test. In any event, I prefer to rest my decision upon the application of the 1999 Regulations, rather than this test.

80. I therefore turn to the third of Mr Pugh's attacks and that is based on the decision of Browne-Wilkinson J, as he then was, in *Multiservice Bookbinding Ltd and Others v Marden*, to which I have already referred. The passage Mr Pugh relies upon and which encapsulates the principle upon which he relies, is set out at page 502 in the judgment of Browne-Wilkinson J. He said:

> "Y in order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable. It is not enough to show that in the eyes of the court, it was unreasonable. In my judgment, a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner; that is to say, in a way which affects his conscience. The classic example of an unconscionable bargain is where advantage has been taken of a young inexperienced or ignorant person to introduce a term which no sensible, well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited. The court can and should intervene where a bargain has been procured by unfair means."

81. Mr Pugh, armed with the opaque and obscure nature of Clause 1.8 attempted throughout to urge upon me that somehow or other the Defendant was guilty of morally reprehensible behaviour in trying to foist the clause on the Defendant*(sic)* without explanation. I, for my part, am not prepared to go so far as that. Whilst I have already said that the clause is, in my judgment, opaque and unclear for the purposes of the 1999 Regulations such that it amounts to an unfair term, I do not go so far as to castigate the Defendant for acting in a morally reprehensible manner. Nor do I think in the context of the passage quoted in the *Multiservice* case has the bargain been procured by unfair means. Mr Evans was represented.

82. So that the result of that is that this is a case where I regard the matter as falling within the Consumer Protection situation governed by the 1999 Regulations, and on that ground and on that ground alone in my judgment Mr Evans is entitled to succeed. There will be judgment for him, therefore, in sums - the precise figure of which I will propose to discuss with counsel in a moment - but in my judgment the Defendant is entitled to keep the outstanding balance due, whatever that was, having regard to what I said about the interest rate; it is entitled to keep the fees and expenses and so forth, and the administration fee on the footing of £125 per month, plus the outstanding arrears at the date of redemption. If there is any surplus over and above that falling within what has been called Rule of 78, it must, in my judgment, be returned.
