Neutral Citation Number: [2022] EWHC 423 (Ch)

Consumer Credit Act 1974, ss. 16B, 140A, 140B – Whether loan agreement regulated – Whether business exemption applies – Burden of proof – Effect of failures to give extended disclosure and serve witness evidence – Sufficiency of business purposes declaration – Omission of words "or predominantly" after "wholly" – Whether strict compliance with prescribed form of declaration required –Whether omission of words capable of being cured as a matter of construction – Whether reasonable cause to suspect agreement not entered into for business purposes – Whether relationship unfair

Case No: BL-2019-LIV-000026

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

Liverpool Civil & Family Courts
35 Vernon Street
Liverpool L2 2BX

Date: Tuesday, 8 March 2022

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

DANNIELLE VICTORIA CAMPBELL

Claimant

- and -
(1) JOSEPH TYRRELL
(2) GOLDCREST FINANCE LIMITED
(3) RAVINDER CHAWLA

Defendant

- -
- -

Mr Neil Berragan (instructed by **Gosschalks LLP**, Kingston-upon-Hull) for the **Claimant**
Mr Stephen Connolly (instructed by **Gotelee Solicitors LLP**, Ipswich) for the **Second Defendant**
The First and Third Defendants did not appear and were not represented

Hearing dates (by Teams): 16 and 17 February 2022

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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 HODGE QC

The following cases are referred to in the judgment:

Biles v Caesar [1957] 1 WLR 156
Carney v N M Rothschild & Sons Limited [2018] EWHC 958 (Comm)
The Chiltern Railway Company Limited v Patel [2008] EWCA Civ 178, [2008] 2 P&CR 12
Davis v Burton (1883) 11 QBD 537
Deutsche Bank (Suisse) SA v. Khan [2013] EWHC 482 (Comm)
East v Pantiles (Plant Hire) Limited [1982] 2 EGLR 111
Emmanuel v Avison [2020] EWHC 1696 (Ch)
Homburg Houtimport BV v Agrosin Private Limited (The Starsin) [2003] UKHL 12, [2004] 1 AC 715
Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm), [2020] CTLC 161
Pink Floyd Music Limited v EMI Records Limited [2010] EWCA Civ 1429
Plevin v. Paragon Personal Finance Ltd [2014] UKSC 61, [2014] 1 WLR 4222
Pollen Estate Trustee Co Limited v Revenue & Customs Commissioners [2013] EWCA Civ 753, [2013] 1 WLR 3785
TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Limited [2021] EWCA Civ 688, [2021] Bus LR 1407
Wisniewski v Central Manchester Health Authority [1998] PIQR 324
Wood v Capital Bridging Finance Limited [2015] EWCA Civ 451

His Honour Judge Hodge QC:

1. Introduction

1. By CPR 1.3, parties to civil litigation are required to help the court to further the overriding objective of dealing with the case justly and at proportionate cost. Apart from the detailed analysis and able submissions from both counsel instructed in this litigation, there has been precious little help afforded to the court in this case; instead, there has been a complete failure by both of the remaining parties to engage in the processes of extended disclosure and witness evidence. Indeed, this case might merit the title: The Curious Case of the Missing Evidence.

2. This is my judgment following the substantive trial of this Part 7 claim, which was issued in the Business & Property Courts in Liverpool on 7 November 2019. The claim concerns a loan agreement for £250,000 that was entered into by the claimant (**Ms Campbell**) and her then husband (**Mr Tyrrell**), in the form of a facility letter, with the second defendant, Goldcrest Finance Limited (**Goldcrest**), on 28 November 2013, although the advance was not made until 17 January 2014, when Ms Campbell and Mr Tyrrell granted a second legal charge over their matrimonial home, known as Tree Tops, in the pleasant Liverpool suburb of Woolton, by way of security. At the time of the facility letter, Ms Campbell and Mr Tyrrell were apparently living separately; and their marriage was dissolved on 29 August 2014. Goldcrest is a specialist property finance lender based in central Manchester. Its sole shareholder is the third defendant (**Mr Chawla**), who is also a director of Goldcrest. A related company, GC Capital Limited (**GC Capital**), is engaged in the business of buying and selling real estate.

3. On 17 August 2020 DDJ Watkin entered judgment in default for Ms Campbell against Mr Tyrrell for damages for an amount to be assessed by the trial judge; and Ms Campbell's application for declaratory relief against Mr Tyrrell was adjourned for determination by the trial judge. Neither of these heads of relief was pursued at trial; and I therefore assess damages against Mr Tyrrell as nil and I dismiss the claim for declaratory relief against him.

4. On 15 February 2021 DJ Lampkin made comprehensive case management directions, including directions for extended disclosure and witness statements, leading to a seven day trial which (on 6 April 2021) was listed to commence on 14 February 2022. As explained in an extemporary judgment which I delivered at the pre-trial review on 4 January 2022 (which should be read in full in order to explain how the substantive trial has proceeded without the benefit of either full and proper extended disclosure or any witness evidence), Ms Campbell and her then newly-appointed solicitors failed to engage at all with Goldcrest's solicitors in complying with any of the case management directions. However, in the face of such lamentable failure, there is no reason why Goldcrest and Mr Chawla could not have provided extended disclosure or produced any witness evidence upon which they might have wished to rely. Instead, they did nothing until shortly before the pre-trial review, when they first wrote to the court proposing that both the pre-trial review and the trial should be adjourned, and fresh case management directions issued. Then, in response to a communication from the court, Goldcrest and Mr Chawla issued an application for summary judgment and/or to strike out the claim. This at last spurred Ms Campbell's solicitors into

action, leading them to issue a cross-application for relief from sanctions, for permission to serve amended particulars of claim, and an order vacating the trial.

5. For the reasons I gave in my extemporary judgment, I: (1) dismissed Ms Campbell's application; (2) gave summary judgment for Mr Chawla on all claims against him; (3) gave summary judgment for the Goldcrest on all the claims against it, save for those set out in paragraphs 33 to 42 and 44 of the particulars of claim and paragraphs (3), (4), (6), (7) and (8) of the prayer for relief; and (4) directed that the trial should proceed, starting with a day for pre-reading on 15 February 2022, on the claims in relation to which summary judgment had not been given and the counterclaim, and (save and unless permission was later given) without oral evidence and on the basis of the documents already disclosed. No such permission has ever been sought.

6. The trial proceeded, remotely by teams, over two days, on Wednesday 16 and Thursday 17 February 2022 without any witness evidence and on the basis of the (limited) existing disclosure. Neither Mr Tyrrell nor Mr Chawla took any part in the trial. Ms Campbell was represented, as she had been at the pre-trial review, by Mr Neil Berragan (of counsel). Goldcrest was represented by Mr Stephen Connolly (also of counsel), who had represented both Goldcrest and Mr Chawla at the pre-trial review. Both counsel had produced detailed written skeleton arguments, which I had pre-read, together with the pages of the hearing bundle to which they had directed me. Mr Berragan addressed the court for about 3 ½ hours; Mr Connolly for about 5 hours; and Mr Berragan replied for a little over half an hour. The principal hearing bundle (with two additional pages) extended to 722 pages; and there was a correspondence bundle of 62 pages. A further bundle, comprising some 167 pages of "WhatsApp" messages, apparently provided by Mr Tyrrell to Ms Campbell, was produced shortly before the hearing, although there was a significant gap covering the period between 8 November 2013 and the late afternoon of 26 June 2014. At the beginning of the second day of the hearing, before Mr Connolly resumed addressing the court after the overnight adjournment, Mr Berragan produced an additional supplemental bundle of 108 pages.

7. As a result of my order of 4 January 2022, there are two live issues between the parties: (1) Was the loan agreement a regulated agreement for the purposes of the Consumer Credit Act 1974 (the **CCA**) or was it subject to the exemption relating to businesses in s. 16B? (In the course of this judgment, whenever I refer to a provision of the CCA, I will use the version that applied to this loan agreement.) It is common ground that if the loan agreement was a regulated agreement, then, since it was improperly executed, it is, and was, unenforceable unless and until an enforcement order has been obtained from the county court following the service of a default notice. (2) Irrespective of the status of the loan agreement, was the relationship between Ms Campbell and Goldcrest unfair within the meaning of ss. 140A and 140B of the CCA? The first issue, in particular, gives rise to a number of sub-issues. Although this was not the way in which those sub-issues were addressed by counsel, logically it seems to me that the appropriate way forward is to consider, first, whether, in fact, the loan agreement was entered into wholly or predominantly for the purposes of a business carried on by Mr Tyrrell and Ms Campbell; secondly, whether the loan agreement contained a valid declaration for the purposes of s. 16B (2), so as to give rise to the presumption that it was entered into wholly or predominantly for such purposes; and, finally, irrespective of any presumption, whether, when the loan

agreement was entered into, Goldcrest (acting by Mr Chawla, as its directing mind) knew, or had reasonable cause to suspect, that the agreement was not entered into by Mr Tyrrell and Ms Campbell wholly or predominantly for the purposes of a business carried on by them.

8. During the course of the hearing, Mr Connolly raised an issue as to the incidence of the burden of proof on the issue of whether the loan agreement was a regulated agreement; and he also advanced submissions as to the effect of Ms Campbell's wholesale failures to comply with her obligations to give extended disclosure and to serve any witness evidence. It is convenient for the court to address these as preliminary matters.

9. I therefore propose to deal with the issues in the case in this way (although I make it clear that this ordering is entirely for structural reasons and clarity of exposition and that each section of this judgment has informed the others). In section 2, I address the burden of proof and the court's approach to Ms Campbell's failures to comply with her obligations to give extended disclosure and to serve any witness evidence. In section 3, I set out my findings on the true purpose of the loan. In section 4, I deal with the business purposes declaration. In section 5, I consider whether Goldcrest knew, or had reasonable cause to suspect, that the loan agreement was not entered into by Mr Tyrrell and Ms Campbell wholly or predominantly for the purposes of a business carried on by them. In section 6, I consider whether there was an unfair relationship between Ms Campbell and Goldcrest. In section 7, I summarise my conclusions. I will not address all of the many arguments that were advanced before me but only those that are necessary to my decision; but that does not mean that those other arguments have been overlooked. However, it is first necessary for me to address two further preliminary matters.

10. During the course of Mr Connolly's submissions, the court's attention was directed to the fact that, by s. 140B (4), a debtor's application for an order under s. 140B may only be made to the county court. Both counsel invited me to transfer this claim to the county court (under s. 40 of the County Courts Act 1984) and then to order its re-transfer to the High Court (under s. 42 of that Act). I make those orders. It is appropriate that the issues raised in this litigation should be determined in the High Court (with any appeal lying to the Court of Appeal) rather than the county court (with the appeal route being to a single judge of the High Court).

11. By its counterclaim, Goldcrest seeks an order, so far as necessary, that the loan agreement should be regarded as enforceable. Mr Connolly accepts, however, that since Goldcrest has not served Ms Campbell with any default notice, on the present state of the authorities, its statutory entitlement to seek an enforcement order from the court has not yet arisen. It therefore seeks a stay of its counterclaim pending a decision as to whether it can, or should, serve a default notice as a precursor to seeking substantive relief by way of an enforcement order.

12. In support of that course of action, I was referred to the decision of the Court of Appeal in *Wood v Capital Bridging Finance Limited* [2015] EWCA Civ 451. There, having allowed an appeal against a money judgment founded upon a regulated loan agreement which could only be enforced by way of an application under s. 127, the Court of Appeal (at paragraph 41) declined to dismiss the proceedings brought by the lender in their entirety. It did so because the debtor acknowledged that it was virtually

inevitable that she would have to pay a substantial sum to the lender if it applied for an enforcement order and so no sensible purpose, consistent with the overriding objective, would be served by dismissing the proceedings and requiring the claimant to start again. Rather, the Court of Appeal gave liberty to the claimant to apply in the existing county court proceedings for an enforcement order, and for directions as to any necessary amendment and exchange of evidence sufficient to enable the county court to exercise its various powers under the CCA in relation to the enforcement of the loan facility. However, the unusual feature of that litigation was that, although the question whether the loan facility was a regulated agreement had formally been in issue on the pleadings, both the parties, and the judge sitting in the county court, appeared to have lost sight of that issue by the time the claim for a money judgment had first become the subject of submissions; and, as a result, the defendant had only taken that point of law for the first time in the Court of Appeal.

13. In the present case, the status of the loan under the CCA has been in issue throughout these proceedings, and it has been one of the only two remaining issues ever since 4 January 2022. Had Goldcrest wished to pursue an application for an enforcement order, it should have taken the necessary preliminary steps to do so before now. In the exercise of my discretionary powers of case management, I would therefore refuse Goldcrest a stay of its counterclaim, and leave it to serve a default notice, and bring fresh proceedings in the county court seeking an enforcement order if so advised.

2. Burden of proof and failures of disclosure and evidence

14. By s.140B (9) of the CCA, if a debtor alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary. However, except where the presumption under s. 16B (2) is available, the CCA does not expressly address the incidence of the burden of proving whether a loan is a regulated credit agreement or one to which the exemption relating to businesses applies. Mr Berragan submits that the burden of proving that the business exemption applies to a loan rests with the creditor. He relies upon observations of Briggs LJ (with the agreement of Patten and King LJJ) at paragraph 26 of *Wood v Capital Bridging Finance Limited* [2015] EWCA Civ 451:

> "It is in my view implicit in the structure of sections 8 and 16B of the CCA that the burden of proving that the business exception applies to a credit agreement, so as to make it unregulated, falls on the creditor. This is because, prima facie, all consumer credit agreements (as defined in section 8(1)) are regulated unless they are exempt agreements, and section 16B sets out one class of exemption. Nonetheless, Parliament has prescribed by section 16B(2) an easy method of discharging that burden by way of presumption, where the creditor obtains a declaration in the prescribed form. But where, on the facts, the presumption is inapplicable because sub-section (3) applies, then the burden falls back on the creditor: see *Chitty on Contracts* (31st Ed) Vol 2 at paragraph 38-044, with which I agree. Of course, if (within the meaning of sub-section (3)) the creditor knows that the agreement is not entered into by the debtor wholly or predominantly for the purposes of business carried on, or intended to be carried on, by him, then it is hard to see how the creditor could ever prove the contrary. But if the creditor merely has reasonable cause to suspect that this may be so, this by no means disables him from proving, if he can that, with the benefit of hindsight, such a suspicion was wrong."

15. Like all judicial utterances, those observations must be read in the context of the case in which they were made. The context in ***Wood*** was a claim by a lender, and mortgagee, for possession of the mortgaged property and a money judgment. That is made plain by the statement at paragraph 34 of Briggs LJ's judgment that "… the onus of demonstrating, as a necessary part of a claim for a contractual money judgment, that the Facility was not a regulated agreement, lay upon the claimant …". That was recognised in the particulars of claim, which included the plea that "The agreement for the loan secured by the mortgage is not … a regulated consumer credit agreement": see paragraph 12 of the judgment. In order to succeed in its claim, the claimant had to prove its case, including the allegation that the business exemption applied. It was common ground that if the facility was a regulated agreement, it was non-compliant in terms of form and/or content, such that it could only be enforced by an application for an enforcement order under s. 127: see paragraph 23.

16. This case is different. Here the claimant is the debtor, and not the lender; and she is seeking "a declaration that the mortgage between Ms Campbell and Goldcrest is /was unenforceable". In my judgment, Briggs LJ's observations have no direct application to such a claim. They were directed to a claim by a creditor and, as such, were entirely correct. But they are of no assistance where the claim is brought by the debtor.

17. Mr Connolly relies on the general statement at paragraph 6-04 of ***Phipson on Evidence***, 19th edn, that "the general rule is that the party who asserts must prove". Paragraph 6-06 states:

> "So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

Mr Connolly emphasises that it is crucial to Ms Campbell's case that the loan agreement is a regulated agreement that the business exemption does not apply, so the burden of proving this rests upon her. He submits that this makes good sense because whether or not she took the loan for the purposes of her business is matter within her own knowledge.

18. Mr Connolly also relies upon the decision of Birss J in ***Emmanuel v Avison*** [2020] EWHC 1696 (Ch). The claimant brought a claim for declarations that: (1) her signatures on a legal charge and a loan agreement were forgeries and not binding upon her, and (2) she was not indebted to the defendants for the sum purportedly loaned pursuant to the loan agreement. The issue of the burden of proof was addressed at paragraphs 44-57 of the judgment. It was common ground that the general rule is that the party who asserts must prove. The claimant submitted that the true meaning of this rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on them. Her case, at its core, was an assertion that she did not enter into the loan or charge. She submitted that had the defendants brought a claim to enforce the loan agreement, then they would have had to prove that the claimant had entered into the

loan contract. That showed that execution was an essential part of the defendants' case. Birss J rejected this submission (at paragraphs 54-57 of his judgment):

> "54 The legal rule is … that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on them. However in my judgment the proper application of that rule in this case does not help Ms Emmanuel. Putting it another way, there is nothing about the facts of the present case which means that the general principle that they who assert must prove does not apply in its simplest way. Ms Emmanuel has brought this claim. In it she is asserting that her signatures on the documents are forgeries, and that she was not indebted to Mr and Mrs Avison. Ms Emmanuel seeks declarations to that effect and an order to alter the register accordingly. Prima facie, the burden of proving those facts is on her.
>
> 55 I agree with counsel for Ms Emmanuel that if instead Mr and Mrs Avison had sued Ms Emmanuel to enforce the loan agreement then they would have to assert, as part of that claim, that it had been entered into by Ms Emmanuel and, assuming the assertion was denied or not admitted, the burden of proof would lie on them. However I do not agree that point provides the answer to the problem in this case. Part of the argument on Ms Emmanuel's behalf was that it cannot matter who is the claimant or the defendant. I do not accept that. The reason why not is that one function of the burden of proof is to operate as a rule of law which determines the outcome of a claim in certain circumstances. A claim is a claim for relief.
>
> 56 I recognise that in a case like this, one may end up with the unsatisfactory result that Ms Emmanuel cannot prove she did not enter into the loan, but neither could Mr and Mrs Avison prove that she did. Moreover it would mean that Mr and Mrs Avison have the benefit of a legal charge which, on this assumption, they cannot prove Ms Emmanuel accepted. However considerations of this kind are the reason why the courts strive to avoid deciding cases in this way; they are not a justification for a different approach to the onus of proof.
>
> 57 Therefore the judge was right to find that the burden of proof lay with Ms Emmanuel on conventional principles …"

19. I agree with these observations, which seem to me to be sound in principle. In this case, the persuasive burden of proving that the loan agreement was a regulated agreement rests with Ms Campbell, who seeks declaratory relief to that effect. That includes the persuasive burden of satisfying the court that the business exemption has no application to the loan agreement.

20. Mr Berragan submits that it is implicit in the structure of the CCA (and, in particular s. 8 (3), which provides that "a consumer credit agreement is a regulated agreement within the meaning of this Act if it is not an agreement (an 'exempt agreement') specified in or under section 16, 16A, 16B or 16C") that, absent a valid business purposes declaration falling within s. 16B (2), the burden of showing that a loan agreement is not a regulated agreement falls on the creditor. The CCA creates a statutory burden of proof which overrides common law principles; there is nothing to suggest that the incidence of the burden shifts according to the nature of the proceedings. I reject this submission. In my judgment, there is nothing in the CCA to

displace the general legal rule that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on them. Mr Berragan also pointed to the presumption created by s. 16B (2) as supporting his argument that the burden of proving that a consumer credit agreement is not a regulated agreement would otherwise fall on the creditor. However, the fact that the inclusion of a business purposes declaration that complies with s. 16B (2) may operate to reverse the burden of proof in the typical case where it is the creditor which is the claimant says nothing about the burden of proof in the less usual case where it is the debtor who is the claimant.

21. Mr Berragan also submits that if the incidence of the burden of proof depends upon the identity of the claimant, a lender will be in a better position if he takes steps to enforce a loan agreement otherwise than through the courts, which would be contrary to the policy of discouraging lenders from resorting to self-help remedies in consumer credit cases. He also suggests that it might discourage lenders from including a business purposes declaration if the debtor were ever to bear the burden of establishing that a loan agreement was a regulated agreement. I regard the latter suggestion as fanciful because a lender for business purposes will inevitably wish to be able to invoke the presumption should there ever be the need to bring enforcement proceedings. As for the former suggestion, Birss J recognised that anomalies might arise depending upon the identity of the claimant in the proceedings; but that could not be allowed to affect the burden of proof.

22. However, whilst I agree with Mr Connolly that the burden of proving that the business exemption does not apply rests on Ms Campbell, I agree with Mr Berragan that the outcome of this case will not turn on the burden of proof.

23. Mr Connolly submits that my decision on the burden of proof feeds through into the court's approach to Ms Campbell's abject failures to comply with her obligations to give extended disclosure and to serve any witness evidence. He invites the court to infer that Ms Campbell has not provided extended disclosure, has given no evidence herself, and has failed to call any of Mr Tyrrell, or his business partner, Mr Raymond Laitak, or his business associate, Mr Robert Taylor, to give any evidence on the centrally important issue of the business purpose of the loan because she knows that such disclosure and witness evidence would be consistent with her contemporaneous written declarations as to the business purpose of the loan and inconsistent with her bare assertion that the loan facility was not for an existing or proposed business purpose of her own.

24. Mr Connolly naturally relies upon the four principles that Brooke LJ identified, on the basis of the previous case law authorities, in the frequently cited case of ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 324 at 340. However, in the present case neither of the remaining parties to this litigation has elected to give any extended disclosure or to call any witness evidence. Although I accept that Ms Campbell must bear the primary responsibility for failing to engage with Goldcrest and Mr Chawla over the process of extended disclosure, there was nothing to prevent the latter from giving their own extended disclosure or from serving any witness evidence in support of their defence to the claim. As to the former, a good example is the gap in the WhatsApp messages during the crucial period when the loan and the legal charge were being negotiated. Faced with the partial disclosure by Ms Campbell of the messages supplied to her by Mr Tyrrell, Goldcrest has pointed to nothing that

might have prevented Mr Chawla and Goldcrest from disclosing the missing WhatsApp messages. Likewise, Mr Chawla and Goldcrest could have explained the nature of the business in which they had understood Ms Campbell to have been engaged in 2013-2014, and for the purposes of which the loan was made, instead of leaving it to the court to draw appropriate inferences from the statements of case and the limited disclosed documentation. If, as Ms Campbell says, she had no interest in the business in connection with which the loan was taken out from Goldcrest, it is difficult to see what disclosure she might have provided on that issue; whereas, if Mr Chawla had understood that Ms Campbell was involved in that business, Goldcrest should have been able to produce some documentation to evidence that understanding. As Mr Berragan put it in the course of his oral submissions, both the remaining parties are equally hampered, and both are equally exposed, by their mutual failures to give extended disclosure and to serve any witness evidence.

25. In my judgment, this is not a case in which it is appropriate to draw any adverse inferences from such reciprocal failures: both parties must live with the consequences; and the court is left to do the best it can. Neither of the remaining parties is deserving of any sympathy from this court since they have both deliberately failed to comply with their duty (under CPR 1.3) to help the court to further the overriding objective of enabling the court to deal with this case justly and at proportionate cost.

3. The true purpose of the loan

26. It is common ground that, since Ms Campbell and Mr Tyrrell were joint debtors, in order for the business purposes exemption to apply, the loan agreement must have been entered into wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by both of them. I have held that the burden of proving that the business exemption does not apply rests on Ms Campbell; but I find that the determination of this issue does not turn on the burden of proof because, on the evidence before the court, the objective purpose of the loan is clear. It is clear from the available documents that the £250,000 loan was taken out to repay existing borrowings from HSBC, which were secured on Tree Tops, and that those borrowings had been taken out for business purposes. I accept that a loan which is taken out in order to repay existing business borrowings is taken out wholly for business purposes so as to attract the business purposes exemption in s. 16B. The real question in the present case is: whose was the business?

27. On the available documents, I am satisfied that the business was the partnership between Mr Tyrrell and Mr Laitak. That is made clear in the first numbered paragraph of HSBC's letter of 9 January 2014, which was counter-signed by Mr Tyrrell and Ms Campbell on 14 January, and by Mr Laitak on 15 January 2014. This reads:

> "As at 9 January 2014 Mr Tyrrell and Mr Laitak trading in partnership ('Partnership') are jointly and severally indebted to the Bank in the sum of £1,209,924,57 … ('Liabilities'). For the avoidance of doubt, the Liabilities do not include the personal liabilities of Mr Laitak and/or Mr Tyrrell and/or Mrs Tyrrell to the Bank. The Bank represents and declares (in the knowledge that Mr Laitak and Mr Tyrrell are relying on such representation) that the Liabilities represent the full extent of the Partnership's liabilities to the Bank."

The proposals in this letter formed the basis of the discharge of the outstanding indebtedness of Mr Tyrrell and Mr Laitak to HSBC, which was achieved by the comprehensive settlement of 17 January 2014 under which (amongst other matters) Goldcrest lent £250,000 to Mr Tyrrell and Ms Campbell on the security of a second legal charge over Tree Tops and GC Capital purchased four of the partnership properties (for £437,241.51).

28. This is confirmed by numbered paragraph 6 of the letter dated 22 November 2018 sent by Goldcrest's former solicitors (Gordons LLP) in response to the original letter of claim, dated 25 October 2018, sent by the solicitors formerly acting for Ms Campbell (Hill Dickinson LLP). This reads:

> "Please bear in mind that your client had granted with her then husband an all monies legal charge over Treetops in favour of HSBC Bank plc ('HSBC') to secure the indebtedness of Mr Tyrrell and Mr Laitak."

Mr Connolly emphasises that this letter was written some five years after Ms Campbell and Mr Tyrrell had signed the facility letter, with its business purposes declaration. However, it is entirely consistent with all of the contemporaneous documentation available to the court; absent any direct evidence of Goldcrest's true understanding in November 2013 and January 2014, it affords evidence of that understanding upon which the court is entitled to rely.

29. During the course of Mr Connolly's submissions to the court, Mr Berragan produced an additional supplemental bundle, which included a previously missing letter from HSBC dated 5 December 2013. This refers to HSBC's concerns about "your business". It was addressed to Mr and Mrs Tyrrell at Tree Tops, and to Mr Laitak and Mr Tyrrell at an address at 379 Woolton Road, Liverpool. However, the end of the letter indicates that it was copied to Mr and Mrs Tyrrell at Tree Tops. I do not consider that Mr and Mrs Tyrrell need be regarded as addressees of this letter; nor can the 5 December 2013 letter be regarded as any evidence that HSBC regarded Ms Campbell (then Mrs Tyrrell) as having any relevant business interests. There is no direct evidence that this letter, or the later HSBC letter of 9 January 2014, were ever seen by Goldcrest or Mr Chawla at the time, although Goldcrest and GC Capital both feature in the heading to the later letter, and both entities participated in the settlement arrangements contemplated by these letters. Indeed, paragraph 26 of the Goldcrest defence pleads that the "global settlement to be made between Mr and Mrs Tyrrell, Mr Laitak, HSBC, GC Capital Limited, and Goldcrest … was later referred to in" the 9 January 2014 letter. There is no plea that Goldcrest did not know about the 9 January 2014 letter at the time it was written and despatched. I am satisfied that Mrs Tyrrell featured in these letters solely because she was a co-owner (and thus a co-mortgagor) of Tree Tops.

30. It is also instructive to consider the terms of the parties' statements of case. The material paragraphs of the particulars of claim are paragraphs 33-35, which read:

> "33. At all material times, Mr Chawla, acting on behalf of or in the alternative as agent of Goldcrest, knew that Ms Campbell was a housewife and had never been in business either by herself or with Mr Tyrrell throughout the period of Mr Tyrrell's friendship with Mr Chawla. Notwithstanding this knowledge, Mr Chawla requested that Ms Campbell sign a business purposes declaration

pursuant to sections 16B and 189 (1) and (2) of the Consumer Credit Act 1974. This presumption is rebutted if the lender knew or had cause to believe that the agreement was not entered into by the borrower wholly or predominantly for the purpose of a business carried on by him (s.16B (3) CCA 2006).

34. At the time of entering into the loan agreement, Mr Chawla acting on behalf of Goldcrest had reasonable cause to suspect that the loan agreement was not entered into by Ms Campbell for wholly or predominantly business purposes, but (on Ms Campbell's case) was at all material times a loan being used to re-pay a HSBC business loan previously obtained by Mr Tyrrell and Mr Ray Laitak secured on Ms Campbell's and Mr Tyrrell's personal property so as to avoid possession proceedings being taken by HSBC plc. Further, the text message referred to at Paragraph 24 of these Particulars of Claim and the discussions Mr Chawla held with Ms Campbell before the loan was entered into show that Mr Chawla knew that the purpose of the loan was to redeem the first charge held in HSBC's favour over Treetops.

35. Consequently, the said loan is a non-business loan and a regulated consumer credit agreement. In particular:

(i) When Ms Campbell was introduced to Mr Chawla in 2008, she was introduced in her capacity as a housewife;

(ii) The loan entered into was wholly unconnected to any business operated by Ms Campbell;

(iii) Mr Chawla was fully aware of his meeting throughout with Ms Campbell either alone or when she was accompanied by Mr Tyrrell, that she was a housewife and had not at any point been involved in any of Mr Tyrrell's business dealings.

(iv) The predominant purpose of the loan was to stave off possession proceedings threatened by HSBC by virtue of Goldcrest redeeming HSBC's charge."

Although not directly responsive to these paragraphs, the material part of the defence is paragraph 40, which reads:

"40. As to Paragraph 9 of the Particulars of Claim

(1) It is admitted that at and about the Marriott Meeting Mr Chawla knew that Mrs Tyrrell was a housewife.

(2) He also knew that the loan which she and her husband were seeking from Goldcrest was being sought for business purposes, that is, to repay other business borrowings.

(3) He knew that Mrs Tyrrell had given the Personal Guarantee following receipt of independent legal advice by which she guaranteed Mr Tyrrell's business borrowings from Goldcrest.

(4) He knew that on 3rd September 2013 Goldcrest had indicated to HSBC that it was prepared to lend £250,000 on the security of Tree Tops and that Mrs Tyrrell

had, together with Mr Tyrrell, signed an application form to jointly borrow £250,000 from Goldcrest over a period of 6 months for the purpose of raising capital to repay outstanding business debts.

(5) Mr Chawla had no other knowledge of whether or not she was also then operating, or had at any time operated, a business.

(6) Mr Chawla later knew that she had signed a business exemption declaration, and these Defendants were entitled to and did rely on it."

31. What is striking about this paragraph is that Goldcrest nowhere identifies the nature of any business carried on by Ms Campbell. When I inquired about Goldcrest's understanding as to the nature of this suggested business, Mr Connolly ventured two suggestions. One was that she and Mr Tyrrell had retained their previous matrimonial home, 47 Beaconsfield Road, Woolton, as an investment property when they had purchased Tree Tops on 22 December 2009. However, not only is there no satisfactory evidence that this was the case, but (in the absence of any relevant historic Land Registry entries), on the afternoon of the second day of the hearing Mr Berragan produced an apparently reliable Rightmove house price history showing that 47 Beaconsfield Road had been sold on 22 December 2009 for £1,000,000, simultaneously with the purchase of Tree Tops. Mr Connolly's second suggestion was that Ms Campbell might have had some interest in the partnership between Mr Tyrrell and Mr Laitak, either as a sub-partner with Mr Tyrrell or by way of a beneficial interest under some trust of his partnership share. I am afraid that this is pure speculation, without any shred of support in any of the available documents; and it is contradicted by such documentation as is available to the court.

32. It also relevant to consider other paragraphs of the defence. Paragraphs 3 and 4 address the positions of Ms Campbell and Mr Tyrrell. In neither paragraph is there any plea that Ms Campbell is engaged in any form of business activity. Paragraph 18 of the defence, referring to a partnership liability to HSBC of £1,475,000 as at 9 January 2012, pleads: "… this is understood to be a reference to a partnership between Mr Laitak and Mr Tyrrell, alternatively to a company or companies in which they were both concerned". In the light of that plea, Mr Berragan described the averment in paragraph 40 (5) of the defence that "Mr Chawla had no other knowledge of whether or not [Ms Campbell, who was described as "a housewife"] was also then operating, or had at any time operated, a business" as "disingenuous". Mr Berragan submits that it had been clear to Mr Chawla (and to Goldcrest) that the HSBC debt that was to be partly repaid from the Goldcrest loan facility represented a debt from the partnership identified in paragraph 18. In my judgment, Ms Campbell has established that proposition, on the basis of the material before the court. Mr Berragan also points to paragraph 70 (3) of the defence, which pleads that neither Goldcrest nor Mr Chawla "… knew or had reasonable cause to suspect that the agreement was not entered into by them wholly or predominantly for the purposes of a business carried on or intended to be carried on by them. In the premises, the agreement is not regulated by the Consumer Credit Act 1974". Mr Berragan points out that this plea is entirely negative in form, advancing no positive case that either of Goldcrest and Mr Chawla knew, or had reasonable cause to suspect, that Ms Campbell was entering into the loan agreement for the purposes of any business carried on, or intended to be carried on, by her.

33. Mr Connolly relies upon the statement in the application form for the £250,000 loan that Mr Tyrrell and Ms Campbell both signed on 16 October 2013 that the purpose of the loan was "Capital raising to pay outstanding business debts". However, as Mr Connolly was constrained to accept, this statement is of limited assistance because it fails to identify whose business debts were to be repaid. I also note that although Mr Tyrrell is described as "self-employed", Ms Campbell's employment details are left blank in the application form.

34. Mr Connolly also relies upon the signed statement in the business purposes declaration that:

> "I am/We are* entering this agreement wholly for the purposes of a business carried on by me/us* or intended to be carried by me/us*."

However, there is no plea that this declaration gave rise to any form of estoppel; and nor could there be as a matter of law, at least as long as the lender was aware that the declaration was false (as was the position in *Wood v Capital Bridging Finance Limited* [2015] EWCA Civ 451) because he knew that the loan was not entered into wholly or predominantly for the purposes of any business carried on by both of the joint debtors.

35. In his leading judgment in *Wood v Capital Bridging Finance Limited* [2015] EWCA Civ 451 (at paragraphs 30-33), Briggs LJ rejected a submission that the defendant was estopped by her business purposes declaration in the facility letter from denying that the loan agreement was unregulated. Three forms of estoppel were relied upon; all were rejected. Because it is of the essence of a contractual estoppel that it should enjoy contractual force, Briggs LJ considered that to give contractual effect to a declaration in what would otherwise be a regulated agreement that it was not such an agreement would fall foul of the prohibition on contracting-out of the CCA set out in s. 173. As for estoppel by representation, any suggestion that a debtor's written declaration constituted a representation that the loan was sought for the debtor's own business purposes, upon which the claimant then relied, could not assist any lender who knew the truth because there would be no relevant reliance. Turning to estoppel by convention, Briggs LJ could not envisage how this could assist the claimant when it had known, even before the defendant signed the declaration, that its contents were untrue. Thereafter, it was difficult to identify any relevant conduct between the parties which could properly form the basis of any conclusion that they had acted thereafter upon any mistaken assumption that it was true. Furthermore, any attempt to construct an estoppel by convention from a declaration designed to comply with s. 16B (2), in circumstances where it was disabled by section 16B (3), seemed to Briggs LJ to run counter to the requirements of the CCA.

36. Mr Connolly accepts that he cannot rely upon any form of estoppel argument; but he submits that the statements and declarations made both by Mr Tyrrell and by Ms Campbell afford contemporaneous evidence of the true purpose of the loan application. (In the case of Mr Tyrrell, his statement and declaration are said to be binding upon Ms Campbell, as his joint debtor, pursuant to s. 185 (1) of the CCA.) I accept Mr Berragan's counter-submission that the evidential value of such statements and declarations is nil unless there is evidence to suggest that their contents may have been true. I am satisfied that there is no such evidence in the present case.

37. Mr Connolly submits that Ms Campbell's declaration as to the purpose of the loan was either true or, alternatively, that she was guilty of knowingly making a false declaration, and therefore was guilty of fraud. Since the latter alternative is inherently unlikely, Mr Connolly invites me to find that Ms Campbell's declaration was true. However, as I observed to Mr Connolly during the course of his submissions, this is not a true binary choice between truth and fraud. There is a third explanation: Ms Campbell might well have signed the business purposes declaration knowing that without it, Goldcrest would not grant the loan, and also knowing, because of the close personal relationship between Mr Tyrrell and Mr Chawla (as evidenced by the disclosed WhatsApp messages), that Goldcrest appreciated that the real purpose of the loan was to repay business borrowings of Mr Tyrrell and Mr Laitak, and that the business purposes declaration was a pure matter of form. Mr Connolly acknowledged this as a possibility; but his answer was to point to the way in which Goldcrest had been hampered by Ms Campbell's lack of engagement over extended disclosure and witness evidence. I have previously dismissed this objection in section 2 of this judgment. Mr Connolly also points to the plea (at paragraph 7 of the particulars of claim) that at a meeting at the Marriott Hotel in south Manchester in November 2013, prior to signing the business purposes declaration, Ms Campbell had "communicated to Mr Chawla that she did not trust Mr Tyrrell". Mr Connolly suggests that it is therefore unlikely that Ms Campbell would have put her trust in a close confidant of her husband. However, this is precisely what Ms Campbell's statement of case says she did; and, in any event, any distrust she may have entertained towards Mr Tyrrell would not invalidate her understanding of his close personal business relationship with Mr Chawla. Mr Connolly also points to the fact that Ms Campbell's statement of case is silent as to her reasons for signing the business purposes declaration. However, this silence does not support one explanation to the exclusion of the others; and her silence is no more eloquent than Goldcrest's silence of its understanding as to the nature of Ms Campbell's business activities.

38. On the evidence, I find that the third explanation is the most likely scenario: that Ms Campbell signed the business declaration knowing: (1) that without it, Goldcrest would not grant the loan, and also (2) that because of the close personal relationship between Mr Tyrrell and Mr Chawla, Goldcrest appreciated that the real purpose of the loan was to repay business borrowings of Mr Tyrrell and Mr Laitak, and that the business purposes declaration was a pure matter of form. After all, Ms Campbell had previously (on 16 October 2009) signed a business purposes declaration (in proper form), and witnessed by a solicitor from a practice in Leeds who confirmed that Mr Tyrrell and Ms Campbell had "fully understood" the terms of the facility letter, declaring that "I am/We are* entering this agreement wholly or predominantly for the purposes of a business carried on by me/us* or intended to be carried by me/us*". It had been entirely unnecessary for Ms Campbell to have done this since she was acting as a guarantor of Mr Tyrrell's loan obligations, and not as a joint debtor. More importantly, this declaration was false because the stated purpose of the loan (according to that facility letter) was: "The term loan will be made available for drawdown in one amount of £100,000 and is only to be used as working capital to refurbish restaurant premises known as 601-603 Smithdown Road Liverpool." There is no evidence that Ms Campbell ever had any interest in that restaurant business, which formed part of Mr Tyrrell's partnership with Mr Laitak; yet Ms Campbell was quite prepared to sign a declaration in that form. I find that Goldcrest was aware of those matters. I find that Ms Campbell was not acting fraudulently in signing the

business purposes declarations in either October 2009 or November 2013; she was merely doing what she understood was expected and required of her in order to ensure that Goldcrest lent money to Mr Tyrrell.

39. I should add that, upon reflection, it seems to me that Mr Connolly may have been too quick to reject the potential availability, as a matter of law, of any estoppel by representation or convention in circumstances where he disputes that Goldcrest had known that the business purposes declaration was false, denying that Mr Chawla ever appreciated that the loan had not been entered into wholly for the purposes of a business carried on by Mr Tyrrell and Ms Campbell. However, I am satisfied that Mr Chawla not only had reasonable cause to suspect, but that he in fact knew, that the loan agreement had not been entered into by Mr Tyrrell and Ms Campbell wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by them. Thus, on the facts, no such estoppel would be available to Goldcrest. In any event, no such estoppel is pleaded; and the burden of establishing one would have rested upon Goldcrest.

40. In my judgment, and despite Mr Connolly's submissions to the contrary, Mr Berragan has established, by reference to the available documents, that the HSBC debt that was to be repaid in part from the Goldcrest loan facility represented a debt due to HSBC from the partnership between Mr Tyrrell and Mr Laitak. I find that the assertion (at paragraph 126 of Mr Berragan's skeleton argument) that the capital sum advanced by Goldcrest to Mr and Mrs Tyrrell was to be spent entirely upon her then husband's partnership business debts is well-founded. As will become apparent in section 6 below, I accept Mr Connolly's submission that Ms Campbell was active in the negotiations for the Goldcrest loan and was no mere "passenger". But that was because the matrimonial home was already subject to a second charge to HSBC to secure existing business borrowings, and Ms Campbell was being invited to grant alternative security over that matrimonial home; it was not because she was in any way involved in the business for which the loan was being taken out.

4. The business purposes declaration

41. By CCA, s 8 (1), a 'consumer credit agreement' is an agreement between an individual ('the debtor') and any other person ('the creditor') by which a creditor provides the debtor with credit of any amount. By s. 8 (3), a consumer credit agreement is a 'regulated agreement' within the meaning of the CCA if it is not an agreement (an 'exempt agreement') specified in or under s. 16, 16A, 16B or 16C. At the relevant time s. 16 B provided two exemptions relating to businesses. The first (in s. 16B (1)) applied where the credit exceeded £25,000 and the agreement was entered into by the debtor "wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him". (In the case of joint debtors, this means both of them.) It is this exemption which Goldcrest seeks to invoke in the present case. The second business exemption (introduced by later amendment) applied where the credit did not exceed £25,000 and the agreement was a 'green deal plan'. In such a case, the agreement must be entered into by the debtor "wholly for the purposes of a business carried on, or intended to be carried on, by him". S. 16B (2) creates a presumption: "If an agreement falling within subsection (1) includes a declaration made by the debtor…to the effect that the agreement is entered into by him wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him, the agreement shall be presumed to have been entered into by him wholly or

predominantly for such purposes." But s. 16B (3) creates an exception to the presumption: "But that presumption does not apply if, when the agreement is entered into – (a) the creditor…, or (b) any person who has acted on his behalf in connection with the entering into of the agreement, knows or has reasonable cause to suspect, that the agreement is not entered into by the debtor…wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him." It is common ground that Mr Chawla falls within the scope of subs. (3) (b). S. 16B (3A) adapts the original provisions to green deal plan loans: "Subsections (2) and (3) also apply in relation to an agreement falling within subsection (1A) but with the omission of the words 'or predominantly'." S. 16B (4) is a rule-making power: "The Secretary of State may by order make provisions about the form, content and signing of declarations for the purposes of subsection (2)." S. 16B (6) is a saving provision: "Nothing in this section affects the application of sections 140A to 140C."

42. Pursuant to section 16B (4), the Secretary of State made the *Consumer Credit (Exempt Agreements) Order 2007* (SI 2007/1168). At the relevant time, this provided that a declaration for the purposes of s. 16B (2) of the CCA "shall – (a) comply with Schedule 3 …". At the relevant time, article 6 of Schedule 3 to the 2007 Order 2007/1168 provided that: "A declaration for the purposes of article 6 must have the following form and content …"

43. It is common ground that the business purposes declaration in the relevant loan agreement signed by Mr Tyrrell and Ms Campbell on 28 November 2013 fails strictly to comply with the requirements of the 2007 Order. It reads:

> "I am/We are* entering this agreement wholly for the purposes of a business carried on by me/us* or intended to be carried by me/us*."

The non-compliance lies in the omission of the words "or predominantly" after the word "wholly". Mr Connolly suggests that if this case were a short story drawn from the annals of the fictional detective, Sherlock Holmes, it might be entitled 'The Conundrum of the Missing Words'.

44. Mr Berragan submits that this omission is fatal to the efficacy of the declaration so that the presumption under s. 16B (3) does not arise. Whilst s. 16B (2) uses the words "to the effect that…", the wording of the 2007 Order is mandatory: a declaration for the purposes of s. 16B (2) of the CCA "shall – (a) comply with Schedule 3 …"; and such a declaration "must have" the prescribed form and content. Mr Berragan also points to the relaxation of the need to include the words "or predominantly" in the case of green deal plan loans permitted by s. 16B (3A); and he submits that this emphasises the need for the inclusion of such words in a declaration made in support of a non-green deal plan loan. I reject this latter submission because the difference in wording is clearly due to the stricter substantive conditions that green deal plan loans must satisfy in order to qualify for the business purposes exemption. In my judgment, it does not assist Mr Berragan's case.

45. Mr Connolly submits that it would be a startling outcome if the absence of the words "or predominantly" within a declaration given for the purposes of a loan agreement under s. 16B (1) of the CCA had the effect of transforming that loan agreement from an exempt agreement into a regulated agreement. He does not plead, and he does not seek, relief by way of the equitable remedy of rectification; but he seeks to avoid that

outcome in two ways: First, he submits that by a process of construction, the words "or predominantly" should be read into the business purposes declaration. Secondly, he submits that substantial compliance with the prescribed form of words is sufficient to satisfy the requirements of s. 16B (2). Although Mr Connolly addressed matters in this order, I prefer to consider them in the reverse order; that is because if strict compliance with the prescribed form of declaration is not required, then it is neither necessary, nor appropriate, to consider whether the omission of the words "or predominantly" is capable of being cured as a matter of construction because there would be no clear mistake on the face of the declaration.

46. Mr Connolly submits that it was not permissible for the Secretary of State to introduce a requirement of strict and slavish compliance with the wording in Schedule 3 to the 2007 Order because this would contradict the permissive wording ("to the effect that …") of the statute from which his power to make the order came. However, the rule-conferring power in s. 16B (4) is widely expressed (… provisions about the form, content …); and it is not for this court, in private-law proceedings, to declare the exercise of the Secretary of State's rule-making powers to be ultra vires.

47. In my judgment, where a loan agreement is entered into wholly, rather than predominantly, for business purposes, then a declaration to that effect sufficiently satisfies the requirements of s. 16B (2), so as to give rise to the presumption arising under that sub-section, even though the words "or predominantly" have been omitted. That conclusion is supported by the authorities cited by Mr Connolly, even though none of them is directly in point.

48. In *The Chiltern Railway Company Limited v Patel* [2008] EWCA Civ 178, [2008] 2 P&CR 12 Lord Neuberger MR said (at paragraph 12):

> "Of course, the statutory requirements in relation to a notice or a declaration could be so clearly and unequivocally expressed that strict compliance would be required and that any deviation, however insignificant, from those requirements would render a purported notice or declaration invalid. Sometimes, indeed, although it conflicts with common and commercial common sense, this may be the result because it is correct as a matter of law. However, this is not such a case."

49. Even where, on the face of the statute, strict compliance might seem to be required, some slight degree of flexibility may be permissible. Mr Connolly cites, by way of example, the case of *Davis v Burton* (1883) 11 QBD 537, where the relevant statute provided that a bill of sale should be "in accordance with the form in the schedule." With his characteristic disdain for technicalities, Sir Baliol Brett MR said (at page 540):

> "That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it. "

Fry LJ said the same (at page 541):

> "The meaning of s. 9 is that every bill of sale which is not substantially 'in accordance with the form in the schedule', shall be void."

Admittedly those observations were obiter, because the actual decision was that the bill of sale was void, as it was not made in the form given in the schedule. But they show that statutory requirements in relation to the form of a document must be clearly and unequivocally expressed before strict compliance will be required and any deviation, however insignificant, operate to render the document invalid. As Mr Connolly points out, a document does not need to be "word perfect" in order to comply with the statutory requirements.

50. To determine whether or not the business purposes declaration in this case substantially complied with section 16B, it is necessary to consider the purpose of the declaration. This involves a question of statutory interpretation. In this regard, in *Pollen Estate Trustee Co Limited v Revenue & Customs Commissioners* [2013] EWCA Civ 753, [2013] 1 WLR 3785 Lewison LJ (with the agreement of Laws and McFarlane LJJ) said this (at paragraph 24):

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose … In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole … The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then decide whether the actual transaction … answered the statutory description."

51. Mr Connolly summarises the purpose of the declaration under section 16B as follows:

(1) To allow business loans of over £25,000 to be made outside the strictures of the regulated agreements regime under the CCA (as had historically always been the case).

(2) To give the borrower the protection of being told expressly that their loan would be unregulated and outside of the strictures of the CCA.

(3) To give the borrower the opportunity to seek legal advice before entering into the loan agreement.

(4) To give the lender the comfort that the borrower knew the consequences and/or had the means of finding out the consequences of entering into an exempt agreement.

(5) To create the statutory presumption in favour of a lender that they could rely upon the word of the borrower as to the loan being for business purposes, save and unless the lender knew otherwise.

52. Mr Connolly submits that all of those purposes are achieved irrespective of whether or not the wording is "wholly" or "wholly or predominantly". Given that, he says that substantial compliance has undoubtedly been achieved.

53. Mr Connolly submits that the landlord and tenant case of *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Limited* [2021] EWCA Civ 688, [2021] Bus LR 1407 provides a useful analogy. The case concerned the

question of whether agreements to exclude the security of tenure provisions in Part II of the Landlord and Tenant Act 1954 under s. 38A (1) were void because the tenants' declaration under sub-s. (3) failed to include the seemingly mandatory requirement of the term commencement date of the proposed tenancies. The Court of Appeal provided a negative answer. What mattered was whether the declaration fulfilled the statutory purposes. Mr Connolly draws four points out of the case:

(1) The purposive construction given to section 38A (at paragraphs 36 to 39).

(2) The observation that if the declaration as a whole fulfils all of the essential purposes of the prescribed form, then, despite the use of apparently mandatory language, Parliament is not to be taken to have insisted on an interpretation which is contrary to commercial sense (at paragraph 39).

(3) The essential purposes of the statutory declaration under subs. (3) were for the tenant (as the giver of the notice) to acknowledge that the proposed tenancy will be outside the security of tenure provisions of Part II of the 1954 Act, that the landlord had served a warning notice in proper form, and that the tenant had read the warning notice and accepted the consequences of entering into the lease (at paragraph 41).

(4) That the maker of the declaration was the tenant, and whilst the landlord might have produced a draft of the declaration for the tenant's signature, it was the tenant who was declaring the truth of it. It was an unattractive argument for the tenant to say either: (1) that what they had said was untrue, or (2) that they had filled in the declaration incorrectly and were now claiming the benefit of that which they had known and declared they were not entitled to (at paragraph 40).

54. Mr Connolly submits that all four points are analogous to the present case. In particular point (4) is said to be particularly relevant where Ms Campbell seeks to avoid not only the basis upon which she expressly entered into the loan agreement but also seeks to deny the truth of the declaration she had given to Goldcrest. Mr Connolly characterises that as a tremendously unattractive argument and one that very obviously falls foul of the principle that prevents a contracting party from relying upon their own wrongful act.

55. Mr Berragan submits that the ***TFS Stores*** case is not in point because a business purposes declaration for the purposes of s. 16B is of a different nature to the notice given by a business tenant acknowledging that the proposed tenancy will be outside the security of tenure provisions of Part II of the 1954 Act. This is because its effect is to give rise to a statutory presumption that the loan is being taken out for business purposes. However, the business declaration also contains various acknowledgments on the part of the debtor, including the debtor's understanding that they will not have the benefit of the protection and remedies that would be available under the CCA if the loan agreement were a regulated agreement under that Act. I can therefore see no material distinction in principle between the two forms of document.

56. In a case where a loan is taken out wholly, rather than predominantly, for the purposes of a business carried in by the debtor, I can identify no good reason why a business purposes declaration should be invalidated solely on the ground that it omits the redundant words "or predominantly". In such a case, there is substantial compliance with the requirements of s. 16B (2); and no good reason why the omission of these

two redundant words should invalidate the declaration. Mr Berragan acknowledged the force of this point when I put it to him during the course of his oral submissions. His answer was that the omission of the words "or predominantly" is not an option permitted by the wording prescribed by the 2007 Order. In a case where the loan is being entered into "wholly" for business purposes, however, I cannot accept that the omission of the redundant words "or predominantly" prevents compliance with the requirements of s. 16B (2).

57. Mr Connolly also submits that the use of the word "wholly" would encompass "predominantly" on the general principle that the greater includes the less. He cites observations in ***Biles v Caesar*** [1957] 1 WLR 156 by Hodson LJ (at page 160) and by Morris LJ (at page 161). That was a case where a landlord opposed the grant of a new business tenancy under ground (f) where the s. 25 notice had indicated an intention to demolish the whole of the demised premises whereas the true intention had been to demolish only part. Delivering the leading judgment, at page 158 Denning LJ said this:

> "It is a settled rule of pleading that if a pleader alleges more than is necessary, he is entitled to rely on any lesser facts covered by that allegation which are sufficient for the purpose he has in hand. So here, it seems to me, that as long as the landlords prove (as they did) that they intend to reconstruct a substantial part of the premises, that is sufficient. The greater allegation includes the less."

In other words, having declared that the whole of the loan was to be used for business purposes, Mr Connolly submits that there was no need for Mr Tyrrell and Ms Campbell to use the words "or predominantly" because this was subsumed in the expression "wholly".

58. I cannot accept this submission, which would seem to me to render the need for the words "or predominantly" redundant in all cases, even where the purpose of the loan is predominantly, and not wholly, for business purposes. It would amount to a comprehensive re-writing of the prescribed form of business purposes declaration. The context of the observations in ***Biles v Caesar*** is very different from the present case; and the wording of the declaration is being used for a very different purpose, not analogous to a pleading.

59. However, for the reasons I have already given, I accept Mr Connolly's submission that where a loan is taken out wholly, rather than predominantly, for the purposes of a business carried in by the debtor, a business purposes declaration is valid even though it omits the redundant words "or predominantly". For want of those two words, the presumption in s. 16B (2) is not lost.

60. Since, in the present case, strict compliance with the prescribed form of business purposes declaration was not required, and the omission of the two words "or predominantly" does not render the actual declaration ineffective, it is not strictly necessary for me to consider whether the omission of the words "or predominantly" is capable of being cured as a matter of construction because there is no clear mistake on the face of the declaration. However, I will proceed to consider this issue, albeit only briefly, in case I am wrong on the compliance issue.

61. It is common ground that, as part of the process of interpretation, the court has the power to correct obvious mistakes in the written expression of the intentions of the parties. Once corrected, the contract is interpreted in its corrected form. In order to correct such an obvious mistake, two conditions must be satisfied: (1) There must be a clear mistake on the face of the document; and (2) it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then correction of the mistake is a matter of construction: see *East v Pantiles (Plant Hire) Limited* [1982] 2 EGLR 111 at page 112A-C per Brightman LJ.

62. In *Pink Floyd Music Limited v EMI Records Limited* [2010] EWCA Civ 1429 Lord Neuberger MR summarised the approach to contractual construction (at paragraphs 16 to 20); he reiterated the test for correcting a mistake by way of construction (at paragraph 21); and, quoting earlier observations of Chadwick LJ, he said this (at paragraph 22):

> "… the court cannot 'introduce words that the parties have not used' into a contract unless 'satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence'."

63. As part of the process of correction by construction, the court can correct errors of omission: see the examples given at paragraphs 2-60 to 2-67 of *Hodge on Rectification*, 2nd edn.

64. Mr Connolly submits that it is objectively plain that the parties proceeded on the footing that the loan was to be an exempt business agreement under s. 16B (1) of the CCA. What, in fact, the parties got was a s. 16B (3A) declaration, i.e. a declaration limited to a green deal plan loan up to but not exceeding a value of £25,000. Objectively construed, says Mr Connolly, that cannot have been the intention of the parties. The use of the green deal plan declaration, instead of the s.16B (1) declaration, in the loan facility is therefore a plain and obvious mistake.

65. That the intention of the parties was to include a valid s. 16B (1) declaration is said to be apparent from the remaining terms of the business purposes declaration, where Mr Tyrrell and Ms Campbell both declare that they understand that they will not have the benefit of the protections and remedies that would be available to them under the CCA. If it had been the intention of the parties to use the form of declaration appliable to a green deal plan loan (limited to £25,000), and so bring the £250,000 loan facility within the provisions of the CCA applicable to regulated agreements, then the whole of the declaration would have been otiose and wholly unnecessary.

66. On this basis, and reverting to *East v Pantiles*, Mr Connolly says that there is a clear mistake on the face of the document (i.e. the missing words "or predominantly") and it is absolutely clear what correction ought to be made in order to cure the mistake (i.e. the insertion of the words "or predominantly"). Like *Homburg Houtimport BV v Agrosin Private Limited (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, where there were words obviously missing from a bill of lading, this is a case where it is clear both that words have been omitted and what those omitted words are: see per Lord Bingham at paragraph 23. In those circumstances, Mr Connolly submits that on

a true construction of the facility agreement, the words "or predominantly" should be interpolated into the business purposes declaration.

67. I reject these submissions. I accept Mr Berragan's submission that the application of the established principles of corrective construction involves a different exercise when the issue is one of compliance with a statutory form of words than when one is construing a normal commercial document. I am not aware of, and I have not been referred to, any authority in which the court has cured what (on this hypothesis) would be a failure to comply with the strict requirements as to the form of words required by statute to be included within a declaration, notice or other document by supplying the necessary missing words as a process of construction. I do not propose to use this case to supply such an authority.

68. In my judgment, the reason for the absence of any such authority is that, in such a case, it is unlikely ever to be clear that the parties have omitted the words as a result of any relevant mistake. In one sense, of course, there has been a mistake, in that the parties have mistakenly failed to comply with the relevant statutory requirements; but that is not a relevant mistake for present purposes. What is required is that it should be clear that something has gone wrong with the language the parties have used, in the sense (in the present context) that they have accidentally left out some words that they had intended to include. Here it is not clear whether the words "or predominantly" were omitted by mistake (in this sense) or deliberately, either in the mistaken belief that they were unnecessary (since the loan was wholly, and not predominantly, for business purposes) or because the parties were mistakenly using the wrong form of business declaration. There is nothing in the wording of the declaration itself, or the admissible background, that can, still less should, lead the court to conclude that something has gone wrong with the wording of the business purposes declaration. It may be plain from the face of the loan agreement that it was never intended to be a regulated agreement, as Mr Connolly submits; but it does not follow that the parties made a mistake as to the actual language they intended to use in the business purposes declaration as opposed to a mistake as to what form of declaration was (on this hypothesis) required to satisfy the requirements of s. 16B (2) and 2007 Order. If, as on this hypothesis one must assume, strict compliance is required in order to satisfy the statutory requirements, then, in my judgment, non-compliance cannot be cured by a process of corrective construction because to do so would drive a coach and horses through the strict statutory requirements.

69. For these brief reasons, had I held that strict compliance with the prescribed form of declaration was required, I would have held that the omission of the words "or predominantly" was not capable of being cured as a matter of construction.

5. Goldcrest's knowledge and reasonable suspicions

70. Since I have held that there was a valid declaration for the purposes of s. 16B (2) of the CCA, the loan agreement is presumed to have been entered into by Mr Tyrrell and Ms Campbell wholly (since the words "or predominantly" are missing) for the purposes of a business carried on by them unless, when it was entered into, Goldcrest (acting through Mr Chawla) knew, or had reasonable cause to suspect, that the agreement was not entered into for such a purpose. By virtue of the statutory presumption, the burden of proving this rests on Ms Campbell. Although I heard no submissions on this point, since the loan agreement was entered into on 28 November

2013, this would seem to me to be the relevant date for the purposes of rebutting the presumption, even though the loan was not drawn down until a little under two months later, on 17 January 2014. However, my attention has not been drawn to any relevant change of circumstances between these two dates. (As previously stated, there is no evidence that Goldcrest or Mr Chawla received copies of HSBC's letters of 5 December 2013 or 9 January 2014 at that time.)

71. Paragraph 34 of the particulars of claim alleges that "at the time of entering into the loan agreement, Mr Chawla acting on behalf of Goldcrest, had reasonable cause to suspect that the loan agreement was not entered into by Ms Campbell for wholly or predominantly business purposes". There is no allegation that Goldcrest actually knew that this was the case. As Mr Berragan pointed out, "reasonable cause to suspect" is a lower threshold than knowledge, or even belief.

72. I am satisfied that Ms Campbell has demonstrated that Mr Chawla had reasonable cause to suspect that the loan agreement had not been entered into by Mr Tyrrell and Ms Campbell wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by them. I have already set out my reasons for this in section 3 above. At the very least, Goldcrest, through Mr Chawla, had reasonable cause to suspect that the loan had nothing to do with any business being carried on, or intended to be carried on, by Ms Campbell. Goldcrest has never suggested what the nature of this business might be. At the very least, Goldcrest had reasonable cause to suspect that the loan was being taken out to replace existing business borrowings owing to HSBC from the business that was being, or had been, carried on in partnership between Mr Tyrrell and Mr Laitak.

73. Strictly, on the pleadings, I need go no further than this because Goldcrest has not pleaded any form of estoppel founded upon the business purposes declaration signed by Mr Tyrrell and Ms Campbell. Were it necessary to do so, however, I would be prepared to find – and I do find – that Ms Campbell has demonstrated that Goldcrest, through Mr Chawla, actually knew that the loan was being taken out to replace existing business borrowings owing to HSBC from the business that was being, or had been, carried on in partnership between Mr Tyrrell and Mr Laitak. Again, I do so for the reasons I have already set out in section 3 above. Such a finding is entirely consistent with the inherent probabilities: given the close personal business relationship between Mr Chawla and Mr Tyrrell (as evidenced by, amongst other documents, the incomplete stream of WhatsApp messages), and the involvement of GC Capital in the purchase of four of the partnership properties, it is inconceivable that Mr Chawla did not know both that the purpose of the Goldcrest loan was to repay part of the substantial sums that the partnership between Mr Tyrrell and Mr Laitak had borrowed from HSBC and also that Ms Campbell had nothing whatsoever to do with these business borrowings.

74. This finding is supported by an email from Mr Chawla to Mr Tyrrell, timed at 9.59 on 15 August 2012, in which Mr Chawla was suggesting the terms of an email that Mr Tyrrell might send to HSBC. Mr Berragan relied upon this email as evidence that Mr Chawla was directly involving himself in negotiations between Mr Tyrrell and HSBC over the repayment of the HSBC borrowings. On my reading of this email, it also evidences Mr Chawla's knowledge that these borrowings involved Mr Tyrrell's partner, Mr Laitak. The email reads:

> "Dear Stephen,
>
> Further to the offer that I have forwarded on the sale of my house, please note that I wish for you to accept this offer and allow me to sell this property which will allow me to move forward with my life. I feel that I have been hoodwinked into this agreement by the bank and I have taken legal advice and have been informed that I have a good case against HSBC. If you would allow me to sell the property for £700k I am happy for you to retain the difference from the 1st chargee monies and the balance up to £700K, in addition I am would waive [sic] all my rights for any claims against HSBC from my side, but whatever your position would be in pursuing my partner Mr.Laitak then feel free to do so."

75. For all these reasons, I find that the loan agreement was a regulated agreement. Since it is common ground that the loan agreement was not properly executed, it was not enforceable by Goldcrest without the service of a default notice and an order of the court under s. 127 of the CCA. Likewise, the legal charge was not enforceable without an order of the court under s.126 of the CCA. The result is that Ms Campbell is entitled to a declaration that the mortgage (and also the loan agreement) entered into between Ms Campbell and Goldcrest were unenforceable; but this must be subject to the qualification proposed by Mr Connolly "subject to the service of a default notice and any claim for enforcement orders under ss. 126 and 127 of the CCA".

76. In the particulars of claim, Ms Campbell does not in terms seek any financial relief in consequence of the unenforceability of the loan agreement and legal charge. In the usual way, however, she does seek: "Further or other remedy or relief". In his skeleton argument, Mr Berragan submits that if Goldcrest intends to serve a default notice in due course and apply for enforcement orders, then appropriate directions should be given for inquiries under both ss. 127 and 140B.

77. Mr Berragan submits that Ms Campbell is entitled to the return of the value of her beneficial interest in Tree Tops. During the course of oral submissions, Mr Berragan accepted that she would have been entitled to only half the equity in the property. Mr Berragan submits that the valuation will have to take account of the fact that the original loan agreement and legal charge were not properly executed in January/February 2014, at a time when the property was worth considerably more than its ultimate sale price. He submits that the sale price in July 2015 was evidently depressed by: (1) the incomplete works carried out in late 2014, making the property "unmortgageable", and (2) the restricted marketing period.

78. However, there is no evidence before the court that Tree Tops was sold at an undervalue or that any restricted marketing period affected the eventual sale price. Because of the lack of any supporting evidence, these allegations have not survived my order of 4 January 2022. The same applies to any claim that Goldcrest was in any way responsible for the depreciation in the value of the property attributable to the works of conversion to a children's nursery. In any event, the marketing and sale of Tree Tops were undertaken by the LPA receivers, and not by Goldcrest. The receivers marketed the property in accordance with recommendations from apparently competent and reputable valuers. The sale was completed a little under five months after the receivers were first appointed, and it followed an informal bidding war which resulted in a sale price of £950,000 (against a recommended asking price of offers in

excess of £800,000). This was exactly in line with Sutton Kersh's November 2014 valuation of £950,000 made for the purposes of the ancillary relief proceedings between Ms Campbell and Mr Tyrrell.

79. The statement of account between Mr and Mrs Tyrrell (which was inserted into the hearing bundle at pages 721-2) shows that even without the redemption fee or any default interest, some £340.000 (including a total of £90,000 for 18 months' interest) was due and owing to Goldcrest by the date the LPA receivers sold Tree Tops for £950,000 on 10 July 2015. The total received by Goldcrest (after the discharge of Bank of Scotland's first charge) was some £448,332, from which Goldcrest accounted for agents' fees of £17,100. On this basis, and ignoring the redemption fee, default interest, legal costs of sale, and the LPA receivers' fees, Goldcrest achieved a surplus of a little over £91,000.

80. However, by a personal guarantee dated 16 October 2009 Mrs Tyrrell had guaranteed to Goldcrest the payment of all monies then or at any time thereafter owed to Goldcrest by Mr Tyrrell, limited to the principal sum of £100,000, with interest thereon and all costs, charges and expenses referred to therein. By paragraph 85 of its defence, Goldcrest pleads that by s. 281 (7) of the Insolvency Act 1986, this personal guarantee was not discharged by Mr Tyrrell's bankruptcy, and Ms Campbell remains liable thereunder for Mr Tyrrell's several debts. Goldcrest also claims to set-off those debts against any liability to Ms Campbell. Paragraph 34 of the Reply is a bare denial of Goldcrest's entitlement to any such right of set-off.

81. On the basis of these figures, my provisional view is that Ms Campbell would have difficulty in demonstrating any actual financial loss from the enforcement of the legal charge over Tree Tops entitling her to any inquiry (which would, in any event, be limited to only one half of the equity in that property) or an account. However, if Ms Campbell wishes to pursue an application for such an inquiry, this can be the subject of further submissions following the formal hand-down of this judgment.

6. Unfair relationship

82. Finally, I turn to consider whether the relationship between Goldcrest and Ms Campbell was unfair within the meaning of ss. 140A and 140B of the CCA.

83. S. 140A of the CCA provides (so far as material) as follows:

> "(1) The Court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following –
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

> (2) In deciding whether to make a determination under this section, the Court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> …
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended ."

84. S. 140B provides the court with wide powers in relation to any unfair relationship which is found under s. 140A. S. 140B (9) states that:

> "(9) If, in any … proceedings, the debtor or surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

85. The leading authority on these provisions is the judgment of Lord Sumption (with whom the other members of the Supreme Court all agreed) in ***Plevin v. Paragon Personal Finance Ltd*** [2014] UKSC 61, [2014] 1 WLR 4222. At paragraph 10 Lord Sumption said the following:

> "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 paras (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."

86. Mr Berragan referred me to observations of Hamblen J in ***Deutsche Bank (Suisse) SA v. Khan*** [2013] EWHC 482 (Comm). Having referred to guidance as to the test of unfairness provided by previous authorities, at paragraphs 346 and following Hamblen J set out a non-exhaustive list of matters likely to be of relevance. A review of those factors led Hamblen J to conclude that there was no unfairness in the relationship between the bank and the defendants in that case.

87. Mr Berragan also took me to observations of HHJ Worster, sitting as a Judge of the High Court in the Circuit Commercial Court in Birmingham, in *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm), [2020] CTLC 161 (at paragraph 11) that:

> "… a failure by a creditor to undertake a proper creditworthiness assessment prior to entering into a regulated credit agreement would almost certainly affect the fairness of the relationship and so trigger the Court's powers to make appropriate orders under section 140B."

88. Ms Campbell sets out her unfair relationship case at paragraph 42 of the particular of claim as follows:

> "42. Ms Campbell seeks an order under S.140B of the Consumer Credit Act 2006 that the relationship between Goldcrest and Ms Campbell was unfair due to Mr Chawla asking Ms Campbell to sign a business declaration knowing that Ms Campbell was a housewife and for the reasons set out below, namely that:
>
> (i) Mr Chawla (acting on behalf of Goldcrest) knew that Ms Campbell was not experienced in the business of obtaining loans;
>
> (ii) Mr Chawla (acting on behalf of Goldcrest) failed to carry out any sufficient checks to ensure that she could re-pay the loan which Ms Campbell did not believe would be applicable in any event due to Goldcrest's representation that the loan would only be repayable after the sale of Tree Tops;
>
> (iii) Mr Chawla (acting on behalf of Goldcrest) knew that Ms Campbell was in a vulnerable position in that she was concerned that Tree Tops was going to be repossessed, was having marital difficulties and suffering from duress, and he acting on behalf of Goldcrest sought to take advantage of Ms Campbell's vulnerabilities;
>
> (iv) Mr Chawla (acting on behalf of Goldcrest) never advised Ms Campbell to obtain independent legal advice and instead advised her to obtain legal advice from a firm of solicitors that was also acting on behalf of Goldcrest and was therefore not independent;
>
> (v) Mr Chawla (acting on behalf of Goldcrest) (in joint collusion with Mr Tyrrell) planned to gain possession of Treetops, convert Treetops into a nursery and lease it out in order to receive the sum of £10,000 per month, £4,000 of which would be paid to Goldcrest each month. Due to above the renovation works being carried out, this caused the value of Treetops to decrease by approximately £649,995. Ms Campbell avers Mr Chawla (acting on behalf of Goldcrest) created an unfair relationship in that Goldcrest was complicit in this conspiracy to devalue Treetops.
>
> (vi) On 23 February 2015, Colin Jennings and Daniel Whittaker were appointed as Joint LPA Receivers over Tree Tops, a copy of their appointment is annexed hereto as DC/29. Entwistle Green were appointed to market the property. A restricted marketing campaign subsequently took place and on 10 July 2015, Treetops was sold for £950,000 despite an offer of £1.3m being made to purchase

> Tree Tops by Robert Taylor to the Joint LPA Receivers on or about January 2015, a copy of the statement of account is annexed DC/30. In March 2016, a subsequent payment of £325,979 was paid to Mr Tyrell by Goldcrest, a copy of the email requesting such is annexed hereto as DC/31. Ms Campbell understands that the payment represented Mr Tyrell's share of the profits relating to Tree Tops arising out of the planned intention referred to above to gain possession of Treetops from Ms Campbell.
>
> (vii) For the reasons set out in Paragraphs 30 to 42 of these Particulars of Claim Ms Campbell does not accept that the appointment of the Joint LPA Receivers was valid. Further, Ms Campbell avers that Goldcrest's actions in appointing the Joint LPA Receivers unlawfully has created an unfair relationship."

Ms Campbell seeks "such orders as the Court thinks fit under s.140B" of the CCA.

89. Goldcrest's response is at paragraph 79 of the defence, as follows:

> "79. As to Paragraph 42 of the Particulars of Claim, it is denied that s. 140B Consumer Credit Act 2006 has any application to the loan agreement and in any event that the relationship was unfair. As to the particulars set out in Paragraph 42, Goldcrest's case is as follows:
>
> (1) Goldcrest had no knowledge whether or not Mrs Tyrrell was experienced in the business of obtaining loans;
>
> (2) Goldcrest was not obliged to carry out any checks to ensure that she could repay the loan; and Goldcrest did not represent that the loan would only be repayable after the sale of Tree Tops (an allegation made nowhere else in the Particulars of Claim);
>
> (3) Goldcrest was entitled to rely on the information supplied by Mr and Mrs Tyrrell which indicated that the loan would be repayable when Tree Tops was sold if not before; the loan was taken on the basis that it would be repaid out of the proceeds of sale of Tree Tops if not otherwise repaid; no checks which might have been undertaken by Goldcrest could have revealed any other situation;
>
> (4) Goldcrest knew that Mrs Tyrrell was concerned that Tree Tops might be repossessed but not that she was having marital difficulties or suffering from duress; Goldcrest did not take any (unspecified) advantage of her (unspecified) vulnerabilities;
>
> (5) Goldcrest was under no positive obligation to advise Mrs Tyrrell to obtain independent legal advice; it was entitled to rely on the fact that she did receive independent legal advice from Mr Case at EAD Solicitors; which advice was independent from the advice offered by Mr Edwards of EAD to Goldcrest;
>
> (6) There was no such plan as is alleged on behalf of Goldcrest, let alone in collusion with Mr Tyrrell. No admission is made as to any diminution in value occasioned by renovation works, and any devaluation any reduction in the value of Tree Tops was disadvantageous to Goldcrest in that it reduced its security;

> (7) As already pleaded, it is admitted that on 23rd February 2015 LPA receivers were appointed over Tree Tops. It is further admitted that Entwistle Green were appointed to market the property. The LPA receivers acted as agents of Mr and Mrs Tyrrell, not of Goldcrest. The marketing campaign was not 'restricted', but was a proper marketing campaign in the circumstances. As already pleaded, it is admitted that on 10th July 2015 Tree Tops was sold for £950,000. It is denied that Robert Taylor made an offer to purchase Tree Tops for £1.3m, or that the same was a genuine or serious offer if it was made. It is admitted that in March 2016 Goldcrest paid Mr Tyrell £325,979, for works which he carried out on another property at the direction of Goldcrest. Goldcrest was not entitled to set off against that liability Mr Tyrrell's liability to Goldcrest under the loan agreement. It is denied that the said payment represented Mr Tyrrell's share of any profits relating to Tree Tops.
>
> (8) The appointment of the joint LPA receivers was valid and did not make the relationship with Goldcrest unfair."

90. Where a debtor alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary. However, in my judgment, both the requirements of the overriding objective (specifically ensuring that the parties are on an equal footing, saving expense, and ensuring that the case is dealt with fairly) and the provisions of CPR 16.4 (1) (a) (requiring particulars of claim to include a concise statement of the facts on which the claimant relies) operate so as to require a debtor who alleges that the relationship between the creditor and the debtor is unfair to the latter to identify those particular facts and matters which the creditor is required to address when establishing the fairness of their relationship.

91. In his skeleton argument, Mr Berragan advances the following points:

> (1) On its face this was a short-term bridging loan to repay the business debts of Ms Campbell's then husband and his business partner. There may have been a prospect of selling Tree Tops within the six month term, but there is no evidence that it was being actively marketed at that time. There is no evidence that Ms Campbell had any opportunity to consider other lenders or any other means of addressing her own liability to HSBC.
>
> (2) The interest rate of 2% per calendar month is a very high rate, but potentially justified by the circumstances. However, to this must be added the so-called "Redemption Fee" payable, together with rolled-up interest (as orally agreed), at the end of the six month term of £115,000. This represents an additional 46% of the capital sum charged for a term of six months, or an additional 7.67% pcm, making a true rate of almost 10% pcm (or 120% per year). The APR was not stated as would be required in a properly executed consumer credit agreement.
>
> (3) On top of this, if (as must have been contemplated) Tree Tops was not sold within six months, the default interest rate would apply, of 3.95% pcm.
>
> (4) There is no evidence that Goldcrest took any steps to establish whether or not Mr Tyrrell personally would have the resources to repay either the capital sum (which was to be spent entirely upon his partnership business debts) or the exorbitant interest/charges. Under s. 55B of the CCA, the lender was required to undertake an

assessment of the creditworthiness of the debtor, before making a regulated consumer credit agreement.

(5) Goldcrest, through its associates Mr Chawla and GC Capital, had entered into separate, informal (but ultimately completed) agreements for the purchase of the partnership's remaining properties. It is to be inferred that GC Capital anticipated that there would be profits to be earned from such purchases; and an immediate profit of £125,000 (some 50%) was apparently made from the onward sale of 601 Smithdown Road.

(6) Despite the apparently dire financial circumstances of Mr Tyrrell, Goldcrest (through Mr Chawla) continued their close and personal business relationship. Approximately four weeks after the settlement agreement, Goldcrest provided a further loan of £80,000 to Mr Tyrrell, on this occasion guaranteed by Mr Taylor, who was Mr Tyrrell's intended partner in the proposed children's day nursery to be established at Tree Tops.

(7) On the evidence, the loan agreement was entered into at a time when Mr Tyrrell and Ms Campbell had either separated or must have been on the verge of separation, given the evidence of divorce proceedings issued and completed in 2014. Ms Campbell had no knowledge of the continuing business arrangements between Mr Tyrrell and Mr Chawla; and she was not even living at Tree Tops when the default notices and the notice appointing the receivers were delivered there. She therefore had no opportunity herself to deal with the outstanding debts or threatened repossession, or to make any proposals to purchase the property herself.

(8) At paragraph 130 of his skeleton argument, Mr Berragan refers to a 167-page bundle of (incomplete) WhatsApp messages passing between Mr Chawla and Mr Tyrrell from September 2013 to July 2015. Mr Berragan took me to some of these exchanges during the course of his oral submissions. These are said to demonstrate the exceptionally close and personal business relationship between Mr Tyrrell and Mr Chawla; the fact that Mr Tyrrell kept Mr Chawla informed of his business dealings throughout this period and, despite several broken promises by Mr Tyrrell, Mr Chawla continued to support him and to extend credit through Goldcrest; and that even after the initial demands for repayment of the £250,000 loan, Mr Tyrrell and Mr Chawla remained in close contact and continued to discuss business propositions, including attempts by Mr Tyrrell himself to purchase Tree Tops from the receivers. There are also unpleaded, incomplete, and inconclusive, references (through October to December 2014) to £30,000 being received by Goldcrest in respect of a property at Carter Street which was possibly "to be allocated to" Tree Tops.

92. In those circumstances, Mr Berragan submits that the relationship between Ms Campbell and Goldcrest was unfair on each of the grounds set out under s. 140A (1). There should be an inquiry into the benefits received by Goldcrest, Mr Chawla and/or GC Capital as a result of Ms Campbell entering into the loan agreement and the losses she has suffered as a result of entering into an unfair relationship. In his oral submissions, Mr Berragan suggested that the object should be to reduce her debt to Goldcrest, formerly secured on Tree Tops, to £250,000, plus "reasonable" interest.

93. In his skeleton argument, Mr Connolly addresses each of the seven aspects of unfairness of which Ms Campbell complains in paragraph 42 of her particulars of claim as follows:

(1) Point (i) (Knowledge that Ms Campbell was not experienced in the business of obtaining loans) – Goldcrest had no such knowledge; and, in any event, it is not understood or explained how this point can be said to fall within the three categories of cause in s. 140A.

(2) Point (ii) (Failure to carry out any sufficient checks that she could repay the loan) – Goldcrest had no obligation to carry out any such (unparticularised) checks, and it was reliant upon the truth of the information provided to them by Ms Campbell. Ms Campbell's case as to alleged misrepresentations by Goldcrest has been summarily dismissed. In any event, on Ms Campbell's own case, the Goldcrest loan was to be repaid on the sale of Tree Tops.

(3) Point (iii) (Mr Chawla knew Ms Campbell was in a vulnerable position) – the extent of Goldcrest and Mr Chawla's knowledge was that Tree Tops was threatened with repossession. They knew nothing of any marital difficulties or duress. Ms Campbell's case as to unfair advantage (i.e. conspiracy or breach of fiduciary duty) has been summarily dismissed.

(4) Point (iv) (Independent legal advice) – there was no positive obligation on Goldcrest to advise Ms Campbell to obtain independent legal advice. Given the terms of the business purposes declaration, Ms Campbell was aware of the opportunity to seek such advice; and, in any event, she received such advice from Mr Case of EAD. Moreover, in circumstances where a debtor has the opportunity to and/or obtains legal advice, it is very difficult to envisage circumstances where the relationship could in those circumstances be found to be unfair.

(5) Point (v) (collusion) – this allegation was summarily dismissed by the Order of 4 January 2022.

(6) Point (vi) (Conduct of Receivers) – the receivers were the agents of Ms Campbell and Mr Tyrrell. The price obtained on sale mirrored the only independent valuation of Tree Tops that the court has before it. An extensive marketing campaign was run, with bidders being played off against one another to achieve £150,000 more than the recommended offer price. No offer was made by Mr Taylor, and there is no evidence from Mr Taylor to support such an offer being made. The allegation that the payment of £329,979 to Mr Tyrrell was payment of the "profits" arising from Tree Tops was abandoned by Ms Campbell on her unsuccessful application to amend her Particulars of Claim on 4 January 2022.

(7) Point (vii) (Appointment of Receivers) – the appointment was lawful. Moreover, without exceptional circumstances the lawful enforcement of security by a lender cannot give rise to an unfair relationship.

Given these matters, Mr Connolly submits that Ms Campbell's unfair relationship case against Goldcrest is without foundation and falls to be dismissed.

94. If the Court is against Goldcrest as to the dismissal of Ms Campbell's unfair relationship case, and the question of relief falls to be considered, Mr Connolly submits that the proper measure of relief is that summarised by HHJ Waksman QC in *Carney v N M Rothschild & Sons Limited* [2018] EWHC 958 (Comm) at paragraph 101:

> "101. Finally, and as noted above, the Court has a wide discretion as to any relief to be ordered once the unfair relationship has been found. In that regard I adopt paragraph 71 of the Bank's written closing submissions which I did not understand to be challenged. This is that if the court decides to make an order, then it 'should reflect and be proportionate to the nature and degree of unfairness which the court has found': *Patel v Patel* [2010] 1 All ER (Comm) 864 at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place: *Link Finance Limited v Wilson* [2014] CTLC. 145 at [77]; *Chubb & Bruce v Dean* [2013] EWHC 1282 (Ch) at [24]; *Nelmes v NRAM Plc* [2006] EWCA Civ 491 at [116]."

95. Mr Connolly submits that it is difficult to see how any of Ms Campbell's complaints can sound in money terms. As she implicitly recognises in her pleaded case, but for the Goldcrest loan, Tree Tops would have been repossessed by either Bank of Scotland or HSBC and she would have received no surplus on its sale. (In an email dated 22 February 2013 to Mr Tyrrell's trustee in bankruptcy Ms Campbell mentions "a shortfall of circa £1 million".) Even if her claim could sound in money terms, it would be extinguished by her liabilities under the loan agreement and the personal guarantee she had given for the £100,000 loan taken out by Mr Tyrrell in October 2009. Still further, even if it were the case that the Goldcrest loan was for any reason not enforceable, Goldcrest would nonetheless be entitled to be subrogated to the HSBC second charge over Tree Tops because otherwise Ms Campbell would receive an impermissible windfall. That too would extinguish any money claim that she might otherwise have had.

96. With the single exception of his submission that the appointment of the LPA receivers was lawful (because, as a regulated agreement, the loan agreement and consequent legal charge were unenforceable without an order of the county court), I accept Mr Connolly's submissions, and I reject the submissions of Mr Berragan.

97. Whilst Goldcrest knew that Ms Campbell was a "housewife", it also knew that she had previously guaranteed a business debt of Mr Tyrrell, having received legal advice from a solicitor in Leeds. In relation to the Goldcrest loan of £250,000, she received legal advice from Mr Case of EAD Solicitors LLP. Although the same firm was acting for Goldcrest, it was a different fee-earner (Mr Edwards) who represented Goldcrest. It is clear (from Mr Case's email to Mr Edwards, timed at 14.22 on 15 November 2013) both: (1) that Ms Campbell had "read through the latest offer in great detail and having read through the offer letter … required [Mr Case] to raise" certain points, including the fact that "interest was to be rolled up and paid at the end of the loan Term"; and (2) that Mr Case thought fit to raise a further point of his own initiative for the benefit of Ms Campbell:

> "Lastly, from my own point of view I see that event of default at clause 10 is very wide. I appreciate that this will be standard form of letter and does not take into

> account the special relationship that exists between Joe and your client. Some latitude may however act as a catalyst in getting Mrs Tyrrell to sign. The insertion of the word 'reasonable' before the word 'opinion' would I am sure be a welcome concession."

I accept Mr Connolly's submission that Ms Campbell was active in the negotiations with Goldcrest and was no mere "passenger".

98. In the course of his oral submissions, Mr Berragan accepted that he could not establish that Ms Campbell had been acting under duress; but he submitted that Mr Chawla had known of her marital difficulties. This is clearly evidenced by the WhatsApp messages on and around 15 October 2013; but I do not consider that this knowledge affected the fairness of the relationship between Goldcrest and Mr and Mrs Tyrrell. The reality was that the Goldcrest loan was their last opportunity of preserving their matrimonial home from re-possession and a forced sale. Historically, Tree Tops had already been encumbered by Mr Tyrrell's partnership borrowings to HSBC before Goldcrest arrived on the scene, and to a far greater extent than the eventual indebtedness to Goldcrest. In her email to Mr Tyrrell's trustee in bankruptcy, timed at 22.07 on 22 February 2013, Ms Campbell had referred to "a shortfall of circa £1m". This was almost certainly an exaggeration because, in December 2013, there was (only) some £1,686 million secured on Tree Tops (and other properties): some £476,479.05 (with arrears of £9,687.22) owing to Bank of Scotland and some £1,209,925 (subject to some minor adjustments) owing to HSBC; and, according to Sutton Kersh's November 2014 valuation (but adjusting for the later £50,000 depreciation in value), Tree Tops was worth in the order of £1 million. However, that property was probably in negative equity; and Mr and Mrs Tyrrell's credit rating was in tatters because: (1) Mr Tyrrell had only recently been automatically discharged from bankruptcy (on 11 October 2013), and (2) Tree Tops was the subject of four interim charging orders (including one on Ms Campbell's own beneficial interest in the property).

99. There is not a shred of evidence that any other lender would have been prepared to enter into a global settlement agreement with HSBC (under which it effectively wrote off a substantial part of the business borrowings of Mr Tyrrell and Mr Laitak that were secured on Tree Tops). This settlement gave Mr Tyrrell and Ms Campbell a six months' breathing space. According to her solicitor's email, it was Ms Campbell who had "said interest was to be rolled up and paid at the end of the loan Term", reflecting the lack of any immediate source for the payment of interest as it accrued on a monthly basis. The stated source of the repayment of the Goldcrest loan was to be the sale of Tree Tops; and the subsequent experience of the LPA receivers demonstrates that six months was a realistic timescale within which to effect a sale of that property. It was not the responsibility of Goldcrest that no such sale was undertaken by Mr Tyrrell and Ms Campbell during the six months' term of the Goldcrest loan.

100. I have found that the business purposes declaration was false; but it was false to the knowledge of Ms Campbell as well as Mr Chawla and Goldcrest. Nevertheless, Ms Campbell signed it, with the benefit of independent legal advice. I have no doubt that she did so because she knew that it represented her last hope of preserving Tree Tops from imminent re-possession by HSBC and a forced sale. The Goldcrest loan represented a more palatable alternative.

101. There is no evidence to support any allegations of collusion or that Mr Chawla or Goldcrest were complicit in any conspiracy to devalue Treetops; and in the course of his oral submissions, Mr Berragan accepted that he was in difficulty in pursuing this allegation of unfairness. I cannot regard the post-loan dealings between Mr Chawla and Mr Tyrrell as giving rise to an unfair relationship between Goldcrest and Ms Campbell. As a result of their close and continuing personal business relationship, Mr Chawla was prepared to show considerable latitude towards Mr Tyrrell over both the loan and Tree Tops; but I am satisfied that this did not disadvantage Ms Campbell in any way. She was not thereby inhibited in, still less prevented from, pursuing her own sale of Tree Tops, or taking any other steps to effect repayment of loan.

102. There is no evidence to support any criticism of the LPA's receivers' conduct of the sale of Tree Tops; and they were not acting as Goldcrest's agents. Although this matter was raised by Mr Berragan in his skeleton argument, the particulars of claim take no point about either the rate of default interest or the level of the redemption payment. Goldcrest has therefore had no proper opportunity to address any complaints in this regard. Mr Berragan recognises that, whilst he says it was "very high", the primary interest rate of 2% per calendar month is potentially justified by the circumstances. I find that there was nothing unfair about this rate of interest. The default rate is less than twice the primary rate, and it would not have been incurred had the loan been repaid after six months, following a sale of the property. I find nothing unfair in that in view of the increased risks that any default in repayment of a loan inevitably brings. The redemption fee had been negotiated down from the original figure of £215,000 to £115,000; and it was agreed after Mr and Mrs Tyrrell had received independent legal advice. I do not find that to be unfair either, even if it is open to Ms Campbell to raise this point without proper advance warning (which, in fairness to Goldcrest, I do not think it is).

103. Goldcrest has satisfied me that there was nothing unfair in the relationship between itself and Ms Campbell, apart from the fact that the loan agreement and legal charge were unenforceable without a court order. That is adequately addressed by the declaration I propose to make.

104. I also agree with Mr Connolly that, for the reasons I have set out towards the end of section 5 of this judgment, it is difficult to see how any of Ms Campbell's complaints can sound in money terms. For all of these reasons, I dismiss the unfair relationship claim.

7. Conclusions

105. For the reasons I have given, I find that the business purposes declaration was a valid declaration for the purposes of s. 16B (2) of the CCA. However, I also find that the presumption arising under that subsection has been rebutted because Goldcrest not only had reasonable cause to suspect, but actually knew, that the loan was not being taken out by Mr Tyrrell and Ms Campbell wholly, or even predominantly, for the purposes of their own business, but rather to repay existing business debts of the partnership between Mr Tyrrell and Mr Laitak. The loan agreement was therefore a regulated agreement for the purposes of the CCA; and, since no default notice had been served, and no enforcement order had been obtained from the court, the loan agreement and the legal charge were unenforceable by the appointment of the LPA

receivers and the sale of the property. However, as at present advised, I am not satisfied that this has resulted in any financial loss to Ms Campbell.

106. Goldcrest has also proved to my satisfaction that the relationship between Goldcrest and Ms Campbell was not unfair for the purposes of s. 140A and 140B of the CCA.

107. Unless the parties can agree the terms of an order to dispose of this claim, I will hear submissions as to the appropriate form of order at the formal hand-down of this judgment.