Neutral Citation Number: [2023] EWHC 306 (Ch)

Case No: F4PP0192

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 16 February 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

BANK OF SCOTLAND PLC	**Claimant**
- and -	
PETER LISNEY HOSKINS	**Defendant**
-and-	
JEMIMA JANE HOSKINS	**Proposed Second Defendant**

- -
- -

Tim Calland (instructed by **TLT LLP**) for the **Claimant**
Gerard McMeel KC (instructed by **Shakespeare Martineau LLP**) for the **Defendant**
Kate Harrington (instructed by **Direct Access**) for the **Proposed Second Defendant**

Hearing date: 9 February 2023

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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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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 16 February 2023

HHJ Paul Matthews :

Introduction

1. This is my judgment on four matters in this litigation. The first in time of listing is the hearing of the claimant mortgagee's claim to possession of residential property, which is in the sole name of the defendant. This claim was issued under CPR Part 55, as long ago as 14 May 2019, in the County Court at Plymouth. The second and third matters are an application by the defendant for relief from sanctions for the late filing of evidence and an application (in the same application notice) for permission to re-amend his defence.

2. The final matter is an application by the defendant's wife ("Mrs Hoskins") to be added as second defendant to the claim. As I understand the draft particulars of defence that have been provided, the purpose of this is so that she can, first of all, establish that she has an equitable interest in the property, and then, secondly, defend the possession claim, on the basis that her husband practised such undue influence on her (the claimant having constructive notice of it) that she was persuaded to agree to the security being granted over the property by virtue of which the claimant now seeks possession. All four matters were argued before me at an in-person hearing on 9 February 2023.

Background

3. The property was purchased by the defendant in his sole name in 2006. Most of the purchase price was provided by Halifax plc on the security of a mortgage dated 30 June 2006 upon it. There is a difference of opinion as to how much was actually advanced at this time, but, in my judgment, for present purposes nothing turns on this. The defendant, as sole legal owner, was the sole mortgagor of the property under the charge. Accordingly, he has been, for the entire time up to this hearing, the sole defendant to the claim. According to Mrs Hoskins' witness statement of 2 December 2022, she and her husband bought the property together in 2006, and she has continued to live there ever since as her home, with her husband and their three children, now aged 14, 12 and 4 years respectively, all being born since the purchase of the property. The defendant's elderly mother, Mrs Margaret Hoskins, also lived with them until December 2022.

4. There is in evidence a form of "Consent to Mortgage" dated 27 June 2006 and signed by the defendant's wife, by which on the face of it she agrees to postpone any interest she might have in the property to the claimant's rights under the mortgage. In her second witness statement (1 February 2023) Mrs Hoskins says that she has no recollection of signing this document, but accepts that the signature looks like hers, and in particular "the version I used when I was not happy about something". I accept that Mrs Hoskins has no recollection of signing it, but, on the material before me, and on the balance of probabilities, I find that she did sign it. However, in the circumstances set out below, in my judgment it makes no difference even if I am wrong about that, and in fact she did not sign it.

5. I have also seen a further form headed "Occupiers postponement form" dated 19 December 2007, also signed by Mrs Hoskins, and witnessed by a solicitor from William Sturges solicitors. On the face of it, this document further agrees to postpone Mrs Hoskins' rights as an occupier in respect of an undated charge made between the defendant and the claimant. The charge referred to appears to have been security for a £500,000 business overdraft taken out by the defendant for the purpose of investing in other companies. For the reasons given below, it is not necessary to go further into this second charge.

6. By virtue of the HBOS Group Reorganisation Act 2006, the claimant has succeeded to the rights and obligations of Halifax plc under the mortgage. The property is a large country property near Tavistock, Grade I listed, the origins of which feature in the Domesday Book, but which was extensively rebuilt in the fifteenth century for the Abbot of Tavistock. It is set in land amounting to more than 240 acres, and has been featured in (amongst other publications) *Country Life*. It was actively marketed in 2018 by Strutt & Parker for £4.5 million. According to the defendant, it was valued at £5 million in 2021, and offers have since been made of between £3.5 million and £4.25 million.

7. According to the defendant's evidence, he had realised in September 2018 that he could no longer afford to make the monthly interest payments of £13,018.42. He had agreed a three-month payment holiday (subsequently extended to six months) whilst he marketed the property, as mentioned above. However, the claimant refused to extend the payment holiday further, and the defendant withdrew the property from the market. He says that he was advised to do so following an interview with local planning officers about alleged unauthorised works having been carried out at the property in 2006-07. He further says that he did this in order to relieve any purchaser of the need to acquire the knowledge which he says he had of why the planning complaints were baseless. It is unnecessary for present purposes to resolve the question whether that is true or not.

Procedure

8. As I say, the claimant issued the claim on 14 May 2019, shortly after the six-month payment holiday ran out. It is common ground that the last monthly payment was made in January 2019, when the defendant was in arrears of nearly £100,000. According to the particulars of claim dated 10 May 2019, the total amount outstanding at that date by way of loan was £2,625,000. At that time the arrears on the loan were said to be £150,584.52, and the total amount required to repay the outstanding liability in full would be £2,911,392.11, including legal costs. As at 20 January 2023, the arrears were said to be £689,726.68, and the total amount required to pay in full was more than £3.4 million.

9. On 17 September 2019, DDJ Healey transferred the matter from Plymouth to Bristol. His manuscript order stated that the transfer was "for directions to be given as to the preliminary question whether or not the defendant may rely on the confidential terms of settlement of claim number TLQ13/0126." The preliminary question referred to the fact that earlier litigation between the same parties had been compromised by an agreement dated 24 December

2013 between them (also relating to possession proceedings of the same property, but also other matters) on terms which were to be confidential and not disclosed further. However, the defendant wished to be able to refer to the terms of that settlement in his defence (and possible counterclaim), on the basis that the compromise of the earlier proceedings "was not fairly procured". On 6 January 2020, I ordered that any further document filed might refer to but not (without consent or court order) set out or exhibit any part of the settlement agreement between the parties.

10. On 17 January 2020, the defendant filed a defence and counterclaim, alleging fraud and breaches of duty by the claimant, and claiming sums exceeding £35 million in compensation. On 3 March 2020 the claimant filed a reply and defence to counterclaim, joining issue on the defence and denying the counterclaim.

11. Subsequently, the claimant by notice dated 21 December 2020 applied for an order striking out the defence and counterclaim of the defendant, alternatively for summary judgment. Eventually, I heard that application on 1-2 July 2021. On 17 November 2021 I handed down judgment, explaining why I was striking out the whole counterclaim. My order of that date also directed a disposal hearing, for which evidence had to be filed 14 days in advance. After considering written submissions, on 26 November I refused permission to appeal. On 3 May 2022 the Court of Appeal also refused permission to appeal.

12. That left the defence of the defendant. As it currently stands, this essentially pleads two points:

    (1) reliance on section 36 of the Administration of Justice Act 1970 (para 68);

    (2) a complaint that the claimant irrationally refused in 2019 to allow him to sell part of the land to reduce the arrears (para 69).

    As I say below, however, the defendant recently applied for permission to amend his defence.

The disposal hearing

13. Under CPR Part 55, dealing with possession claims, a disposal hearing is normally set at the outset. In the present case that was not possible until the strike-out application had been dealt with. The claimant now seeks a possession order, on the basis that neither of the above points is any impediment. On 12 September 2022, the possession claim was listed to be heard before a district judge on 5 December 2022.

14. On 11 November 2022 the defendant's solicitors wrote to the claimant to state for the first time that Mrs Hoskins intended to make a claim, and also various other matters, and therefore an adjournment was requested. The claimant refused, citing the lack of supporting evidence. Notwithstanding my order of 17 November 2021, the defendant did not file any evidence at least 14 days before the hearing of 5 December 2022. Instead, on 2 December 2022 (which

was in fact the business day before the hearing), the defendant's solicitors served and filed a bundle of some 206 pages, consisting of an application notice, supporting evidence and a draft amended defence.

15. After 4 pm on the same day, Mrs Hoskins sent emails to the claimant's solicitors (from an email address containing her husband's name, but not hers, and previously used by him to communicate with the claimant's solicitors). These emails contained an application to be joined as a second defendant, together with a witness statement, and sought permission to file a defence. On the morning of 5 December 2022 itself, the defendant's counsel notified the claimant's counsel that the defendant's mother was in hospital and on life support. The defendant also wrote an email timed at 09:47 to the court (it is not clear whether it was also sent to the claimant) saying that, the previous day (Sunday 4 December), he had accepted advice from hospital doctors "to withdraw Life Support" from his mother. He further stated that he had chosen to be with the mother and not come to court, and apologised for his absence. In these circumstances the substantive hearing was adjourned. (In fact, I was told at the hearing that the defendant's mother was still alive, although now being cared for at a specialist care unit. Her prognosis is unfortunately bleak.)

16. The order of 5 December 2022 adjourning the substantive hearing was made by DJ Markland. She directed that the adjourned hearing be refixed before me, with a time estimate of three hours. She also ordered that the claimant be entitled to file any evidence in response to the two applications 14 days before, and that the defendant and/or Mrs Hoskins might file evidence in answer to that evidence not less than three days before, the relisted hearing. The adjourned hearing was then refixed for 9 February 2023, before me. Pursuant to that order, the claimant's solicitor Emma Davey made a fourth witness statement, dated 20 January 2023, and the defendant and Mrs Hoskins each made a further witness statement dated 1 February 2023 (his fifth witness statement and her second).

17. The defendant's application for permission to amend his defence and for relief from sanction was made by application notice dated 2 December 2022. It was supported by the fourth (though stated to be the third) witness statement of the defendant, dated the same day. As stated above, these were hand delivered to the claimant's solicitors also on 2 December 2022. The fourth witness statement of Emma Davey responded to this application. The claimant's position was that relief from sanction should not be given, but, if given, the application for permission to amend the defence should be refused.

18. The application by Mrs Hoskins to be added as second defendant to the claim was made by an undated notice, which was sealed by the court on 5 December 2022. As already mentioned, Mrs Hoskins made two witness statements in support of her application, one dated 2 December 2022, and a second dated 1 February 2023. She also lodged a draft defence and counterclaim, settled by counsel, dated 5 February 2023. The fourth witness statement of Emma Davey of 20 January 2023 responded to this application also. The claimant's position was that the application to be added as second defendant should be refused.

The defendant's application for relief from sanction

19. This application related only to the evidence intended to be adduced by the defendant in relation to the disposal hearing. The defendant did not need any permission in order to adduce evidence in support of his application to amend his defence. However, at the hearing, I dealt first of all with the application for relief from sanction. After hearing counsel, I dismissed that application, for reasons to be given subsequently in writing. Later in this judgment, I set out those reasons.

The defendant's application to amend

Proposed amendments

20. Next at the hearing, I dealt with the defendant's application of 2 December 2022 for permission to amend. After hearing counsel, I refused the application, and said that I would give my reasons in writing as soon as I could. These are those reasons. The draft amended defence seeks to add six new paragraphs following paragraph 69, as paragraphs 69K to 69F. These read as follows:

> "69A. The Bank by paragraph 28 of its Reply and Defence to Counterclain [sic] in these proceedings asserted that it was 'entitled to manage its security how it wishes and in its own interests'.
>
> 69B The Bank reiterated its refusal to provide prior consent permitting the marketing and sale of parts of the Property by an email from its Solicitors dated 29th of November 2022.
>
> 69C. In the circumstances Mr Hoskins as an individual borrower will rely on section 140A of the Consumer Credit Act 1974 and the relationship between the Bank and Mr Hoskins is an unfair one, by reason of, but not limited to:
>
> > (a) The Bank's original decision to refuse permission to sell part of the Property in or about September 2019, as evidence [sic] by its Solicitors' letter dated 12 September 2019.
> >
> > (b) as a result of that refusal Mr Hoskins was unable to pay off the arrears as at about September 2019, and to significantly reduce the capital sum.
> >
> > (c) The Bank's continuing refusal to permit Mr Hoskins to market and to sell part of the Property, as evidenced by its Solicitors' letter dated 29 November 2019.
>
> 69D. In the circumstances Mr Hoskins seeks relief under section 140B of the Consumer Credit Act 1974, including:
>
> > (a) an order that the Bank permit him to market and sell parts of the Property if so advised, without the need to seek further approval or consent of the Bank.

> (b) reduction of the interest payable on the account to reflect the position Mr Hoskins would have been in had he been permitted to proceed with the sale of part of the Property in September 2019.
>
> (c) Payment or repayment to Mr Hoskins of the costs of these proceedings incurred since September 2019.
>
> 69E. In the alternative, if contrary to Mr Hoskins primary case, the mortgage is a regulated mortgage contract, within the meaning of the Financial Services and Markets Act 2000 regime, Mr Hoskins will rely on the Bank's conduct, and in particular those matters at paragraph 69C hereof, as a breach of MCOB 2.5A.1 R, and actionable under section 138D(2) of the 2000 Act, in respect whereof he is entitled to damages.
>
> 69F. In the further alternative Mr Hoskins will rely on section 36 of the Administration of Justice Act 1970."

(The reference in paragraph 69E to 'MCOB' is a reference to the Mortgage Conduct of Business Sourcebook, issued in 2003 by the then Financial Services Authority, now the Financial Conduct Authority.)

21. In fact, as shown by the prayer for relief at the end of the draft amended statement of case, the defendant was actually seeking permission to make a fresh counterclaim. The prayer for relief, in the draft amended version, reads:

> "AND the Defendant counterclaims:
>
> (1) Relief under sections 140A and 140B of the Consumer Credit Act 1974
>
> (2) Damages pursuant to the Financial Services and Markets Act 2000
>
> (2A) Further or alternatively relief under section 36 of the Administration of Justice Act 1970
>
> (4) Interest pursuant to section 30 5A of the Senior Courts Act 1981."

The defendant's contentions

22. It will be seen that, in this draft amended statement of case, the defendant argued that the Consumer Credit Act 1974, as amended, applies to this case. The defendant relied in particular on a number of provisions in this Act. These relevantly provide as follows:

> "140A(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—
>
> […]

> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> […]
>
> (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)].
>
> […]
>
> 140B(1) An order under this section in connection with a credit agreement may do one or more of the following—
>
> […]
>
> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> […]
>
> (9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

23. The claimant denied that section 140B applies, because it said that the mortgage contract was a "regulated mortgage contract" within section 140A(5). This term is defined by article 61(3)(a) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as a contract under which

> "(a) … at the time it is entered into, the following conditions are met –
>
> (i) a person ('the lender') provides credit to an individual … ('the borrower'); and
>
> (ii) the obligation of the borrower to repay secured by a first legal mortgage on land … in the United Kingdom, at least 40% of which is used, or is intended to be used, as or in connection with the dwelling by the borrower … "

24. Paragraph 11 of the terms and conditions attached to the mortgage deed in the present case relevantly provided:

> "You must use the property as your only or main home unless we agree otherwise".

Moreover, the mortgage illustration provided to the borrower stated in part:

> "You must confirm that no restrictions under the Agricultural Holdings Act apply to the property. The borrower must confirm to us that the property will not be used for commercial purposes."

And the claimant's underwriting notes, which were in evidence, said that the defendant had confirmed that he would let 112 of the 243 acres for grazing in order to "maintain the land" and that they would not be farming the land.

25. The defendant went on to emphasise the effect of section 140B(9) in reversing the burden of proof as to whether a relationship was unfair. He referred to the decision of the Court of Appeal in *McMullon v Secure the Bridge Ltd* [2015] EWCA Civ 884, where Hildyard J said this about that provision:

> "13. I should also mention section 140B, which details the powers of the court in connection with a credit agreement, and prescribes one important evidential standard. Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied. As to the evidential standard, it is important to note (as, indeed, the Recorder did) that section 140B(9) provides that where the debtor (or surety) alleges that the relationship is unfair, it is for the creditor to prove that it is not: the burden is squarely on the creditor; and see *Bevin v Datum Finance Limited* [2011] EWHC 3542 (Ch) at [59]."

26. The defendant also said that if the court awarded the remedy under section 140B(1)(c) of reducing the interest, then the jurisdictional basis for the possession order would fall away. He also referred to evidence that he could have sold part of the land covered by the charge in 2019 for £1.25 million.

27. As for the claim under MCOB 2.5A, 1R, this reads:

> "a firm must act honestly, fairly and professionally in accordance with the best interests of its customer".

The defendant asserted in his amendment application that, if the mortgage were a regulated mortgage contract, the claimant's refusal to consent to a sale of part of the property in 2090 was a breach of this rule. The claimant denied any such breach but went on to say that even if there were one it would give rise to a claim for damages and would not interfere with the claimant's right to possession.

Principles for permission to amend

28. The need for permission to amend a defence in the present case is set out in CPR rule 17.1(2)(b), which reads as follows:

> "(2) If his statement of case has been served, a party may amend it only –
>
> (a) with the written consent of all the other parties; or
>
> (b) with the permission of the court."

In fact, the form of the amendments proposed is actually to insert a new counterclaim, so that it is rule 20.4(2)(b) that should be applicable:

> "(2) A defendant may make a counterclaim against a claimant –
>
> (a) without the court's permission if he files it with his defence; or
>
> (b) at any other time with the court's permission."

In either case, the permission of the court is required.

29. The principles on which this application should be decided are set out in the decisions of Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) and of Jacobs J in *PJSC Tatneft v Bogolyubov* [2020] EWHC 623 (Comm). In the former case, Carr J said:

> "36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
>
> 38. Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> > a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
> >
> > b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the

> application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

30. In the latter case, Jacobs J said:

> "15. I was referred to a number of authorities as to the general principles governing permission to amend, including the decisions in *Quah v Goldman Sachs* [2015] EWHC 759 (Comm) (Carr J) and *CIP Properties v Galliford* [2015] EWHC 1345 (TCC) (Coulson J). Both of these authorities were considered by Stuart-Smith J. in *Vilca v Xstrata* [2017] EWHC 2096 (QB) . It is important to note, and I agree with his approach, that if there is no good explanation as to why an amendment is being made at a late stage that is not fatal to an application to amend. It is simply one of the factors which needs to be brought into the balance in deciding where to strike a fair balance. The authorities show that the principal matters to be considered are the timing and lateness of the amendment, the reason that it has not been made earlier, the respective prejudice to the parties, and the clarity of the amendment made."

Discussion

31. **Regulated mortgage contract**: I begin with the question whether the mortgage contract in the present case is a regulated mortgage contract and so outside the scope of section 140B. I have already set out the definition of a regulated mortgage contract, contained in the 2001 Order. The defendant asserted that this case was not one of a regulated mortgage contract within section 140A(5), because the property was set in 243 acres of land. But all his skeleton argument said on this point was this:

> "The principal reason for this is that the dwelling element forms only a very small part of the areas of the estate".

32. The defendant did not further address the important parts of the statutory definition, namely (i) the opening words "at the time it is entered into" (not, as the defendant said, "forms ", *ie* now), and (ii) "used, or … intended to be used, … in connection with the dwelling" (not, as the defendant said "the dwelling element"). Moreover, the defendant's evidence did not deny the evidence on behalf of the claimant as to what the defendant had told the claimant at the time that the mortgage loan was negotiated and granted. I noted one or two stray references in the defendant's evidence to "farming" the land, but they were not particularised, and in any event referred only to events *after* the purchase had been completed. This was too late for the purposes of the definition, because the state of affairs is judged as at the time the contract is entered into.

33. The defendant told the claimant that he intended to let 112 acres for grazing, in order to "maintain the land". An area of 112 acres out of 243 would be about 46% of the whole. So even if that counted as commercial purposes there would be 54% that would not. If, on the other hand, the defendant was referring to the 112 acres of grazing as land being enjoyed in connection with the main house, because it was simply to "maintain the land", then the 40% minimum referred to in article article 61(3)(a)(ii) would also be met. On the material before me, and looking at the matter at the time the mortgage contract was entered into, I was satisfied that this was indeed a regulated mortgage contract. The claim under the Consumer Credit Act was therefore bound to fail in any event.

34. **Burden of proof**: However, in case I was wrong, and section 140B did apply, I went on to consider the question of the possible impact on this application of section 140B(9), reversing the burden of proof. This provision applies where "*in any such proceedings,* the debtor … *alleges* that the relationship between the creditor and the debtor is unfair to the debtor" (emphasis supplied). The question was what the word "alleges" meant in this context.

35. The defendant submitted that this word meant exactly what it said, and that it was sufficient for the debtor, at any time, anywhere, and in any form, to claim that the relationship is unfair. He accepted that this meant that, if at any time the debtor sent an email or had a telephone conversation with the creditor in which the debtor said that the relationship between them was unfair, the provision was engaged and the burden of proof reversed, so that from that point on it would be presumed that the relationship was unfair, unless and until the creditor proved to the contrary.

36. The claimant submitted that this would mean that, if the debtor was in the witness box giving evidence in proceedings brought by the creditor, and in a throwaway remark said for the first time that the relationship was unfair, then the provision would immediately be engaged, so that (for example) the parties would then have to replead their cases, the creditor to say why the relationship was not unfair, and the debtor to reply to that. The defendant did not shrink from this, saying that it was what Parliament had decided should be the law.

37. I do not accept the defendant's submission. First of all, the word used is "alleges", which is a word typically used in legal proceedings to say what is intended in those proceedings to be proved by the party who so "alleges". Secondly, the express wording of the provision limits the "alleging" to that taking place "in any such proceedings". Those "proceedings" are civil legal proceedings. In order for an allegation to be made *in* such proceedings, it must be put in a statement of case: see in particular CPR Part 16, and in particular rules 16.4, 16.5 and 16.7. If the allegation is not made *in* such proceedings, but for example in a letter or telephone conversation of complaint before any proceedings are instituted, in my judgment it is not within the provision, and the burden of proof remains unaltered.

38. In the present case the allegations in the draft amended defence were *ex hypothesi* not yet *in* the defence. They could not form any part of it unless and until (i) permission had been given, and (ii) the defence had been so amended. Neither of those things had happened here. Accordingly, at this stage at least, section 140B(9) did not apply. Therefore, to the extent that there was a burden on this application of showing that there was merit (or not) in the proposed defence, that burden lay still on the defendant, as the party making the application.

39. **Lateness**: Next, in my judgment, this application to amend was "very late" in the sense used by Carr J in *Quah*. It was served on the business day before the disposal hearing (equivalent to the trial for this purpose). I accept that the disposal hearing was then adjourned, but that does not take away from the fact that it was "very late" when served, and that is the time at which to judge the lateness, from the point of view of permission to amend.

40. **Good reason?** In this case, no good reason was given for not making the application earlier. In his witness statement of 2 December 2022 in support of his application, the defendant referred to (and exhibited) a letter from his solicitors to the claimant's solicitors of 11 November 2022, which sought an adjournment of the disposal hearing on 5 December. The only reference in the letter to the matters now put forward in the application for permission to amend was a short paragraph reading:

> "Your client's refusal to allow our clients to sell part of the property 3/4 years ago which would have cleared all the arrears and a substantial element of the mortgage capital has meant unnecessary interest has been added to the overall debt which would otherwise have been avoided".

41. In fact, the factual substance of these allegations appeared already in the defence, at paragraph 69, which read:

> "Mr Hoskins was pursuing a sale of part of the Property, being the land adjoining Morwell House, which was not affected by the potential listed building issues. By letter dated 12 September 2019 the Bank formally refused consent to sale of part on the basis that it would 'significantly impact the overall value of the security property'. The Bank is wrongfully refusing its consent and is further in breach of the Implied Duties of Good Faith, in particular by irrationally refusing to permit sale of part of the Property."

42. I did bear in mind that the defendant was not bound to plead law, only allegations of fact. The Court of Appeal made this clear in *Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, at 436 B-C:

> "In answer, it has been contended that some of these points are not open to M & R on their pleading, and, furthermore, have not been foreshadowed in the affidavit evidence sworn on their behalf. One of Mr. Waller's responses to this contention has been to refer us to the general observations made by Lord Denning MR in *In re Vandervell's Trusts (No 2)* [1974] Ch 269, 321, as to the modern practice concerning pleadings:
>
> > 'It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated.'
>
> We respectfully agree with this statement as a general proposition."

43. In factual terms, the draft amended pleading went further than the present version in certain respects. First, it pleaded a letter dated 29 November 2022 from the claimant's solicitors to those of the defendant. But so far as I could see that added nothing of substance to the letter originally referred to of 12 September 2019. Second, in paragraph 69B, it described the *relationship* between claimant and the defendant as *unfair*, rather than merely stigmatising the claimant's *action* (the refusal of consent to sale of part) as *irrational*. Third, in the same paragraph, it pleaded that, as a result of the refusal to consent to the sale of part of the land, Mr Hoskins was unable to eliminate the arrears and significantly to reduce the capital debt.

44. Nevertheless, all the evidence which the defendant then put forward to support his new claims was evidence which he had had since the events concerned in 2019 and following. Assuming that there was any real point in seeking to extend paragraph 69 at all, there was no good explanation for the delay in filing his application. Certainly, none was given in the evidence. Of course, as Jacobs J says in *Tatneft*, this is not fatal to an application for permission to amend. Instead, it is simply one of the factors which needs to be taken into account.

45. **Heavy burden on applicant**: However, as Carr J says in *Quah*, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case. There were a number of different aspects here. The first is that the lateness of the application to amend, nearly 4 years after the claim was issued, suggested to me that this new version of the claim was simply

something to be thrown into the mix at the last minute, in the hope of staving off a disposal hearing, and therefore a possible possession order. If it had any real force, it would have been deployed at an earlier stage.

46. The second point was that the defendant's proposed case on unfairness by the claimant suffered from a number of potential difficulties. Without of course deciding, I mention some here. One was that it was clear from the documents that, at the time of the possible sale by the defendant of part of the land, the bank had already issued these proceedings, and, as its solicitor said, in a letter of 12 September 2019, did not consent to "splitting the legal title at this stage". Moreover, the defendant had himself told the claimant's solicitor on 2 August 2019 that "splitting the title could substantively impact the overall value of the Property". (In his witness statement of 2 December 2022, the defendant commented that in saying this he "was speculating".) In September 2019 the defendant's counsel made clear that the defendant wanted to bring a counterclaim on the basis that the compromise of the earlier possession proceedings was not fairly procured. But that counterclaim was then struck out. This was a relevant consideration for any court considering whether the claimant's actions at that time were unfair. The defendant's then solicitors had also written to the claimant's solicitors on 30 May 2019 to say that the property was "effectively unmarketable" and that the claimant "risk[ed] criminal liability or remediation obligations by taking possession".

47. Thirdly, and I think more importantly, none of the claims now sought to be put forward (and this included that under MCOB in proposed paragraph 69E) was actually a defence to the possession claim. At their highest, they might result in an award of damages. Whether a possession order was made or not, those claims could (and can) still be pursued, should the defendant wish to do so. The financial claims sought relief from *some* of the interest charged since 2019. The MCOB claim, if successful, might have resulted in an award of damages.

48. But this is not normally a defence to a possession claim by a mortgagee. As Slade LJ said in *National Westminster Bank plc v Skelton* [1993] 1 WLR 72, at 78A-B,

> "the existence of a cross-claim, even if it exceeds the amount of a mortgage debt, will not by itself defeat a right to possession enjoyed by a legal charge … The principle in my view has much to commend it, since it could lead to abuse if a mortgagee were to be kept out of his undoubted prima facie right to D possession by allegations of some connected cross-claim which might prove wholly without foundation."

49. The defendant said however that a reduction of interest under section 140B(1)(c) would wipe out the jurisdictional basis for this claim to possession. But, by the time the claimant issued this claim in May 2019, no interest had been paid since January, which (as I show later) by itself would justify the claim to possession. Moreover, even in January, arrears had already accrued of nearly £100,000, which by themselves were sufficient to justify the claim. So, a complaint by the defendant of action taken by the claimant to refuse sale of part only in September 2019 could not affect this. Even if the complaint were

successful, and interest from September 2019 onwards were wiped out, the claimant would still have the right to possession under the mortgage, based on arrears already accrued.

50. I noted that the proposed paragraph 69D(a) sought an order that the claimant permit sales of parts of the property if so advised. If the defendant obtained this relief, he could proceed to sell parts of the land without the consent of the claimant, and accordingly could part redeem the mortgage. But, in itself, such a power would have nothing to do with the possession rights of the claimant. The defendant would not need to be in possession of the property in order to sell it, or any part of it.

51. **The interests of justice**: For the reasons given, there would therefore be no prejudice to the defendant if he were left to pursue these further claims in some other proceedings, which he was (and is) at liberty to start tomorrow. But the prejudice to the claimant if the amendments are allowed was obvious. It would be kept out of the realisation of its security for a large and ever-increasing debt for a further and indefinite period. In all the circumstances, and in the exercise of my discretion, I considered that it was not in the interests of justice to give permission to the defendant to amend his statement of case in the way proposed at this late stage. His application was therefore dismissed.

Mrs Hoskins' application to be joined

52. At the hearing, I then turned to the application by Mrs Hoskins to be added as second defendant to the claim, and consequential directions including for the filing of a defence and a directions hearing to be fixed. After hearing counsel, I dismissed this application also, with written reasons to be given later. These are those reasons.

Principles for joinder as a new party

53. The application for joinder was made under CPR rule 19.2(2)(b), which reads as follows:

> "(2) The court may order a person to be added as a new party if –
>
> […]
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

54. Once the test in this rule is satisfied, the court has a discretion to exercise on judicial principles: *Welsh Ministers v Price* [2018] 1 WLR 738, [47]. Sir Terence Etherton MR (with whom Longmore and Irwin LJJ agreed) went on in that case to say:

> "60. In considering whether or not it is desirable to add a new party pursuant to CPR 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the Overriding Objective in CPR Part 1. … "

The threshold: strike-out or summary judgment?

55. In applying CPR rule 19.2(2)(b) to the facts of this case, it was clear that Mrs Hoskins had to demonstrate that her case was at least good enough to pass the threshold for a strike-out under COR rule 3.4. In *PeCe Beheer BV v Alevere Ltd* [2016] EWHC 434 (IPEC), HHJ Hacon said:

> "36. I take the view that in the normal course the correct test to be applied in relation to CPR 19.2(2)(b) is that which would be applied in an application to strike out a claim against a defendant had the claim already been pleaded, i.e. in an application made pursuant to CPR 3.4(2)(a) or (b). Other things being equal, I think it would make little sense if the question whether a person should be a defendant in proceedings depends on whether that person were a defendant from the start of the action or is to be joined at a later stage. Sometimes the facts on which to base a claim against a party may not emerge until after the Particulars of Claim have been served."

56. The claimant argued that the test was actually higher than this, and corresponded to a claim that would resist an application for summary judgment under CPR Part 24. It relied on the decision of Geraint Webb QC, sitting as a deputy judge of the High Court, in *Credico Marketing Ltd v Lambert* [2021] EWHC 204 (QB), where he said:

> "32. The respondents submit that the proposed claims against the proposed additional defendants do not have reasonable prospects of success and that the application should be dismissed on this basis.
>
> 33. It was also contended by the respondents, at least initially, that the merits of the proposed new claims must be judged by reference to the draft pleading and that regard should not be had to the evidence contained in the witness statements. …
>
> 34. This submission was founded on paragraphs 36 and 37 of the judgment of HHJ Hacon in *PeCe Beheer BV v Alevere Ltd* where the Judge noted that the correct test to be applied in relation to CPR 19.2(2)(b) is that which would be applied in an application to strike out a claim pursuant to CPR 3.4(2)(a) or (b). On this basis, the focus will be on whether the statement of case discloses reasonable grounds for bringing the claim on the hypothesis that the claimant will be able to establish the facts pleaded. In contrast, in a summary judgment application, a defendant may seek to rely on additional factors in witness statements to demonstrate that the claimant has no real prospects of success.
>
> 35. Nevertheless, having set out 'the normal course', HHJ Hacon made clear, at paragraph 38, that he considered that it was appropriate, in that

> case, to have regard to the witness evidence served by both sides in respect of the merits of the claim, noting that no objection had been taken by the parties to that evidence.
>
> 36. Mr Baudet's evidence was adduced and relied upon by the proposed additional defendants for the purposes of contesting the application including, presumably, the challenge on the merits. In the circumstances, it is difficult to see on what basis the respondents can properly object to the claimants relying on, or the court having regard to, that evidence for the purpose of determining whether the proposed claims disclose a good arguable case. …
>
> 37. In my judgment, it would be wrong in principle, and artificial in practice, not to have regard to Mr Baudet's evidence, submitted for the application, when considering whether the claimants have satisfied the good arguable case threshold."

57. For my own part, as at present advised, I prefer the claimant's submission and the higher standard, that is, a claim which would resist an application for summary judgment. I say this on the basis that the lower standard would still leave the case open to a reverse summary judgment application, and it makes more sense not to allow the amendment to be made in the first place. However, in my judgment, it was not actually necessary for me to decide this, as in my view Mrs Hoskins failed on either test.

Mrs Hoskins' case

58. Mrs Hoskins' case was that she contributed to the purchase price of the property, and that in the circumstances she was entitled to an equitable interest, such that the defendant held the property on trust for them both as beneficial tenants in common in equal shares. She further said that her interest in the property had priority over the rights of the claimant under the mortgage, because the waiver of her occupation or matrimonial rights in relation to it (on which she said she had had no legal advice) was procured by actual or presumed undue influence, or duress, exercised over her by the defendant, or misrepresentations made to her by the defendant, of which the claimant had constructive notice.

The first problem

59. In my judgment, the first problem for Mrs Hoskins (explored in argument at the hearing) was this. Even if she had an equitable interest in the property, the mortgage loan was taken out for the express purpose of acquiring that property. It was an "acquisition mortgage". In the House of Lords decision in *Abbey National Building Society v Cann* [1991] 1 AC 56, Lord Oliver of Aylmerton, with whom the rest of their lordships agreed, said (at 93B):

> "The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it

> could never have been transferred at all and it was never intended that it should be otherwise. …"

60. Lord Oliver also agreed (*obiter*) with the statement made by the Court of Appeal in the same case. He said (at 94B-G):

> "The view that I have formed renders it strictly unnecessary to consider the ground upon which Mrs. Cann's claim failed in the Court of Appeal. What was said was that, despite her initial evidence (in her affidavit) that she did not know of her son's intention to raise any of the money required for the purchase on mortgage, nevertheless her oral evidence before the judge disclosed that she was well aware that there was a shortfall which would have to be met from somewhere. Her own account of the matter was that his reason for selling was that he was in financial difficulties, so that she must have known that he was not going to be able to meet it out of his own resources. Dillon L.J. (with whom, on this point, the other two members of the court agreed) inferred that ' she left it to George Cann to raise the balance' [1989] 2 F.L.R. 265, 276, from which he further inferred that George Cann had authority to raise that sum from the society. There was no finding to this effect by the judge, but I think, for my part, that it is a necessary conclusion once it is accepted, as it has to be, that she knew that there was a shortfall of some £4,000 apart from conveyancing costs, that George Cann was going to raise it, and that he was in financial difficulties. It is said that there was no evidence that he was going to raise it on the security of this property. There might, for instance, be other property available to him. He might obtain an unsecured loan. In the circumstances of his known lack of resources, however, this is fanciful and in my judgment the court was entitled to draw the inference that it did draw. If that is right, it follows that George Cann was permitted by her to raise money on the security of the property without any limitation on his authority being communicated to the society. She is not, therefore, in a position to complain, as against the lender, that too much was raised and even if, contrary to the view which I have formed, she had been able to establish an interest in the property which would otherwise prevail against the society, the circumstances to which I have alluded would preclude her from relying upon it as prevailing over the society's interest for the reasons given in the judgment of Dillon L.J. in the Court of Appeal."

61. Accordingly, on this view, the consent form was actually irrelevant. As a matter of law, whatever interest Mrs Hoskins might have was automatically subordinated to the mortgage interest of the claimant. But Mrs Hoskins argued that the claimant clearly had constructive notice of her claim to an interest in the property, and therefore was bound by it. The problem is that constructive notice is only relevant when there is a claim by two or more persons to an interest in the *same* property, and the question is which of them should have priority. But the operation of the *Cann* principle meant that if Mrs Hoskins had an interest at all, it was in the *equity of redemption* rather than in the *legal estate*, and therefore it was necessarily subordinate to the claimant's charge by way of legal mortgage, which was a legal interest carved out of that legal estate.

The second problem

62. So, the *Cann* case was really the beginning and the end of the matter, so far as Mrs Hoskins was concerned. But, even if that were not the law, it was clear on the evidence that Mrs Hoskins did in fact sign the postponement form in June 2006, at the time that the property was acquired. I appreciated that she now asserted that her consent was obtained by undue influence or duress. However, the property was acquired as a home for her and the defendant to live in, rather than, for example, as a security for a business loan for the defendant alone. Accordingly, in my judgment, from the claimant's point of view there was no transaction to call for any explanation, or to put the claimant on inquiry, and there was no evidence otherwise that the claimant should be fixed with notice of any undue influence or other wrongdoing: *cf Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, HL. Even the fact (if it be so) that Mrs Hoskins did not receive independent legal advice would be irrelevant. For this reason too, Mrs Hoskins' claim was bound to fail.

A third problem?

63. The claimant made a further point. It referred me to *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655, where a series of cases were examined, and a principle referred to as the *Brocklesby* principle (from *Brocklesby v Temperance Permanent BS* [1895] AC 17) applied. In that case Mr Wishart had trusted a business associate and friend ("Sami"), who owed him a share of the proceeds of a business venture, to acquire a property for him to live in free of mortgage. Unknown to Mr Wishart, Sami acquired the property in his own name, transferred it to a company he controlled, and then mortgaged it, dissipating the mortgage monies. It was held that Mr Wishart's abstinence from any involvement at all in the mechanics of the purchase meant that he had given Sami the means of representing himself as the beneficial owner of the property, with full authority to deal with third parties as such owner. It is a kind of estoppel. It was approved, *obiter*, by the House of Lords, in *Cann*.

64. I have no doubt about the principle, but at present I am not quite sure how it fits with the case where the beneficial owner signs a written consent to postpone her interest to that of the mortgage lender. The lender obviously knows of the existence of the person signing, and therefore that the legal owner may not be entire beneficial owner. However, given the first two points set out above, on which I found in favour of the claimant, it was not necessary for me to reach a concluded view on the applicability of the *Brocklesby* principle to this case. It was also not necessary for me to consider the impact of the significant delay on the part of Mrs Hoskins in putting forward her claim, nor to consider her explanation for this delay, and I did not do so. In my judgment, whether or not Mrs Hoskins had a beneficial interest in the property (which I did not need to decide, and have not decided), her application to be joined to this litigation fell to be dismissed.

The possession claim

Relief from sanction

65. As I have said, at the hearing I had to deal with the defendant's application under CPR rule 3.9 for relief from sanction for evidence served late. This rule relevantly reads as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

66. And, after hearing counsel, I refused the application. These are my reasons. As I have also said, my order of 17 November 2021 required the defendant to file any evidence to be relied on at the disposal hearing at least 14 days before the date for which that hearing was directed to be listed. In September 2022, it was listed for 5 December 2022. (So far as that evidence related to the application to amend the defence, it was not in breach of any order. I was not therefore concerned with that. My concern was with that part of the evidence relating to the disposal hearing itself.)

67. The defendant served his evidence only on 2 December 2022. Any exclusion of evidence for failure to comply with a court direction to file and serve by a particular date would be a procedural sanction, bringing CPR rules 3.8 and 3.9 and the case law surrounding those provisions into play. In particular I had to consider the so-called *Denton* criteria: see *Denton v TH White Ltd* [2014] 1 WLR 3926, CA. There are three stages to these. First of all, how serious and significant is the failure? Secondly, is there a good explanation for the failure? Thirdly, looking at the matter and the circumstances overall, is it in the interests of justice to allow the disputed evidence to be admitted?

68. **The first stage**: In my judgment, this was a serious failure, as the defendant accepted at the hearing. This was a claim which had been on foot since May 2019, and in which the defendant's counterclaim was struck out in November 2021. At the same time, I directed the disposal hearing. The defendant had 2½ years between issue and strike out to decide what his defence was and what evidence he would need. After the strike out, he knew that there would be a disposal hearing within a relatively short time, although in fact the date fixed turned out to be just over a year later. The defendant could have prepared his evidence then. Next, the defendant had 2½ months' notice of the date of the hearing. But he still left it to the business day before to put in evidence to defend the possession claim. I am afraid that this is all of a piece with the history of this litigation. The defendant was simply stringing out the proceedings for as long as possible, so as to be able to continue to live with his family in this very expensive Grade 1 listed country manor house without paying anything now for the privilege.

69. **The second stage**: Secondly, there was no good explanation for this failure. In his second witness statement, the defendant referred to the order of 17 November 2021, and then said simply:

> "5. It has not been possible to comply with that order as the issues that have needed to be addressed to respond in full have been substantial and have taken time to collate".

70. I have already referred to the letter from his solicitors to the claimant's solicitors of 11 November 2022, which sought an adjournment of the disposal hearing. This said that the solicitors did not believe that a one-hour hearing would be sufficient to deal with the submissions that the defendant intended to make. Apart from a reference to claims intended to be made by Mrs Hoskins against the property and her husband (which obviously did not fall to be made by the defendant, and of which at that stage the claimant had no idea), those matters referred to the defendant's elderly mother and three young children, resident at the property, as well as to ongoing interest from third parties and purchasing the property. So far, there was nothing of any substance that could not have been put in a short witness statement and filed and served well before the 14 days before the hearing.

71. I then referred to the short paragraph in the solicitors' letter, complaining of a refusal by the claimant to allow the defendant to sell part of the property some years earlier. Despite relating to matters which were alleged to have happened years ago, the defendant had waited until less than a month before the listed disposal hearing to raise them in correspondence for the first time.

72. The defendant put forward this explanation for the delay:

> "7. … The threat of losing my house and my young family, and elderly mother (who has had serious health issues in recent weeks and who is in hospital at the date of this statement), being without a property is a very serious issue which justifies me taking time over the response and collating the evidence I need to support my position. Those details are set out below and in the attached exhibit".

So far as concerned the defendant's mother, his evidence was that she had been taken ill on 22 November 2022. But the deadline for the evidence to be filed and served was 21 November 2022, and so had already passed. As to the remainder of the evidence which the defendant then put forward, it was evidence which he had had since the events concerned in 2019 and following. And he lived through it and must have known all about it at the time. None of this was a good explanation for the delay in filing his evidence in opposition to the possession claim.

73. **The third stage**: The final stage of the process was to consider whether, overall and taking everything into account, it was in the interests of justice to allow the late evidence to be admitted. I bore in mind the matters mentioned in CPR rule 3.9, namely the need for efficiently conducted litigation at proportionate cost, and enforcement of rules, practice directions and orders. The defendant was and had been throughout represented by experienced

solicitors and counsel (now leading counsel). He had had more than sufficient notice of the disposal hearing, being aware in November 2021 that it would be listed, and receiving the actual listing in September 2022 for December 2022. Yet he waited until the business day before the hearing before serving his evidence. No good reason had been given for this. Given the attempts made by the defendant in correspondence to obtain an adjournment of the disposal hearing, it was hard to escape the conclusion that it was tactical, so as to make it impossible for the claimant to deal with, and so force an adjournment, as indeed was achieved.

74. The defendant said that the order of District Judge Markland of 5 December 2022 had superseded my previous order regarding the service of evidence for the disposal hearing. I did not so read the order of 5 December 2022. It directed the filing and service of evidence in relation to the two applications, but said nothing about evidence in relation to the disposal of the possession claim.

75. The defendant further said that, whatever the position might have been at the time of the hearing of 5 December 2022, the claimant would not now be prejudiced by the admission of the late evidence. I disagreed. This latest episode showed exactly how the claimant was being prejudiced by the defendant's dragging out the proceedings, so that an order for possession (if otherwise appropriate) would never actually be made.

76. **Human rights**: Finally, the defendant invoked article 8 (the right to respect for the home) and article 1 of protocol 1 (the entitlement to the peaceful enjoyment of possessions) of the European Convention on Human Rights. These read as follows:

> "Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> […]
>
> Protocol 1, Article 1
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

77. But he cited no authority in support of the submission that these articles impeded the refusal of relief from sanction. I was and am not aware of any such authority. On the other hand, there are cases dealing with the right to a fair trial under article 6, which in my view are of some assistance.

78. In *Azeez v Momson* [2009] EWCA Civ 202, the appellant had failed to comply with an unless order, and consequently was debarred from defending the claim to a beneficial interest in properties which he owned. The question arose whether article 6 of the Convention (right to a fair trial) had been infringed. Rimer LJ (with whom Wall and Aikens LJJ agreed) said:

> "36. The second ground of appeal raised the question as to whether Briggs J was required by Article 6 of the Convention (or otherwise) to consider whether the debarring order was proportionate. Mr Flower accepted that if (contrary to his primary submission) Briggs J was right to conclude that, without the ordered disclosure, a fair trial for Ms Momson was not possible, his decision could not be challenged on the basis that it was not compliant with Article 6. He conceded that the refusal of a court to grant relief against a debarring sanction will not contravene Article 6 provided that such refusal is proportionate and is for a legitimate purpose."

79. In *Hayden v Charlton* [2010] EWHC 3144 (QB), Sharp J struck out the claimants' claims for libel for "deliberate and wholesale non compliance with the rules and orders of the court". She considered article 6 of the ECHR in these terms:

> "78. In considering whether it would be appropriate to strike these actions out, I have borne in mind that doing so will deprive the Claimants of access to the court, a matter which it might be argued by the Claimants, has implications for their rights pursuant to article 6(1) of the ECHR 'to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law.' However as Hale LJ (as she then was) said in *Khilili v Bennett and ors* EWCA [2000] EMLR 996 at [50] when considering whether a decision to strike out a claim for delay deprived a party of his article 6(1) rights:
>
> > 'National laws are entitled to regulate their domestic procedures, and this includes prescribing timetables and steps which have to be taken within a limited period. If a claimant has not complied with those rules, then normally he will not be able to complain under Article 6'."

80. Plainly, the rights sought to be brought into play in the present case were different rights, under article 8 and article 1 of protocol 1 respectively. But, if the use of procedural rules to debar parties from making or defending claims (the most serious sanction possible in purely procedural, as opposed to penal,

terms) did not contravene the right to a fair trial in article 6, it was hard to see why the refusal to relieve from sanction, properly applied, should do so. And, if that were so, given the exceptions for laws necessary to protect the rights and freedoms of others and to allow the government to control property in the general interest, it was just as hard to see why those rules should fall foul of article 8 or article 1 of protocol 1 either.

81. Nevertheless, looking first at the article 8 right, it was clear that it was not absolute. It is a right *to respect for* the home, and not *to* the home. More importantly for our purpose, it is a right which is concerned with *privacy* rather than with property or contractual rights in relation to the family home. As Lord Hope said in *Harrow London Borough Council v Qazi* [2004] 1 AC 983,

> "50. The right to respect referred to in this paragraph extends to the person's home. But the essence of this right lies in the concept of respect for the home as one among various things that affect a person's right to privacy. The context in which the reference to the person's 'home' must be understood is indicated by the references in the same paragraph to his private and family life and to his correspondence. The emphasis is on the person's home as a place where he is entitled to be free from arbitrary interference *by the public authorities*. Article 8(1) does not concern itself with the person's right to the peaceful enjoyment of his home as a possession or as a property right. Rights of that kind are protected by article 1 of the First Protocol" (emphasis supplied).

(See also at [8] (Lord Bingham, with whom Lord Steyn agreed), [89] (Lord Millett), and [121]-[122] (Lord Scott).) This (unanimous) view was not overruled in *Manchester City Council v Pinnock* [2011] 2 AC 104, which dealt with public sector social housing: see at [50].

82. Article 1 of protocol 1 concerns the deprivation of possessions (which is an autonomous term of art). I do not see the rules of relief from sanction for failure to keep to court timetables as involving any deprivation of possessions. If you do not defend a claim brought against you to claim an asset in your hands, of course you may lose it. So I see these rules much more as going to the notion of a fair trial, *ie* under article 6, already discussed above. Nor, in any event, is the right absolute. Paragraph 2 of article 1 of protocol 1 provides that it is subject to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". The rules of litigation relating to relief from sanction are in my judgment rules which are considered necessary in the general interest, and which in their ultimate effect may control the use of property. (In passing, I add only that I do not doubt that, in line with the applicable jurisprudence, the claimant's security interest under the mortgage was also a possession protected under the article.)

83. For these reasons, I considered that the defendant's appeal to human rights here was misplaced.

84. **Conclusion**: Overall, I was clear that it was not in the interests of justice to allow this evidence to be admitted. This kind of behaviour has no place in our system. Therefore, the evidence in the witness statements of 2 December 2022 and 1 February 2023 relating to the disposal of the possession claim (rather than the applications for relief against sanctions and the permission to amend) was and is strictly inadmissible. However, in case I should prove to have been wrong in my decision, I will look at the further evidence *de bene esse*, so that it may not be necessary in that case to remit the matter to this court.

The substance of the claim

85. I turn finally therefore to the substance of the possession claim and the defences put forward by the defendant in his defence. At the hearing I heard counsel on this aspect and then reserved my judgment. This is my decision. *Prima facie*, the claimant is entitled to possession of the property as mortgagee. Clauses 17 and 18 of the mortgage deed of 30 June 2006 relevantly provide as follows:

> "**17. When the debt has to be repaid immediately**
>
> If any of the things mentioned in this condition happen, you must pay us the debt immediately.
>
> 17.1 If you do not pay any two monthly payments (they do not have to be consecutive) except where the Flexible Options apply to your mortgage and gives you the right not to pay them.
>
> 17.2 If you do not pay any other money you owe under the mortgage within two months after you should have paid it.
>
> […]
>
> **18. Our right to take possession of the property**
>
> 18.1 If you must pay off the debt immediately under condition 17 … we may:
>
> > (a) make you leave the property (if you have not already done so) so that we can take possession of it;
> >
> > (b) sell the property … "

86. It is common ground between the parties that, at the date that this claim was issued, in May 2019, no instalments had been paid since January 2019, and by May there were arrears of some £151,000. No instalments have been paid since, and none of those arrears has been paid. In these circumstances, the right of the claimant to take possession is established, subject only to any defences which the defendant may be able to put forward.

87. **First defence – section 36**: The defendant has put forward two such defences. First, in paragraph 68 of his defence, he relies on section 36 of the Administration of Justice Act 1970. This relevantly provides as follows:

> "(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
>
> (2) The court—
>
> (a) may adjourn the proceedings, or
>
> (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—
>
> (i) stay or suspend execution of the judgment or order, or
>
> (ii) postpone the date for delivery of possession,
>
> for such period or periods as the court thinks reasonable."

88. The defendant seeks the adjournment of the proceedings until the end of August 2023 (to cover any conveyancing delays there may be), or alternatively at least to the end of June 2023 (the end of the mortgage term). However, the defendant has not offered to pay anything at all in the meantime towards the mortgage interest continuing to accrue. Nevertheless, he says he should be given "the benefit of the doubt".

89. So far as concerns the evidence available to the court, he refers to the decision of the Court of Appeal in *Cheltenham and Gloucester Building Society v Grant* (1994) 26 HLR 703, in which Nourse LJ (with whom Wall J agreed) said this of fact-finding under the 1970 Act (at 707):

> "It is not the function of this court to lay down rigid rules as to how busy district and county court judges should satisfy themselves of what they have to be satisfied for the purposes of sections 36 and 8. It must be possible for them to act without evidence, especially where, as here, the mortgagor is present in court and available to be questioned and no objection to the reception of informal material is made by the mortgagee. Clearly, it will sometimes be prudent for the mortgagor to put in an affidavit before the hearing. Moreover, if the mortgagee submits that the truth of what the court is told should not be accepted without evidence, then evidence will normally be necessary. In the absence of such a submission it must be for the judge to decide whether or not to act on the basis of informal material."

90. On the other side, the claimant asks for an order for possession within 28 days. As a fallback position, if the court is not willing to grant an order for

possession in 28 days, it asks for an order that the defendant give up possession on a certain date (which could then be subject to variation on an application for good reason).

91. In considering what amounts to a "reasonable period" within section 36(1), the starting point, in the absence of unusual circumstances, is the remaining term of the mortgage: *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 143, CA; *Bristol & West Building Society v Ellis* (1996) 73 P & CR 158. In the present case, the term of the mortgage ends in June 2023, approximately four months away. Although there may be cases where it would be appropriate for the "reasonable period" to last longer than the mortgage term, I see no reason, on the facts of this case, for it to be any longer. That was the term which was agreed to by the parties at the outset, and I see no justification here for keeping the claimant out of its money any longer than that. The defendant does not suggest that there is a means by which current instalments and the accrued arrears could be paid off in that period without a sale taking place. Indeed, he says that he can achieve a sale in that time.

92. In *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416, CA, Sir John Pennycuick, with whom Megaw and Browne LJJ agreed, said (at 1420):

> "The power of suspension exercisable by the court under section 36 is conditional on its appearing to the court that in the event of the exercise of the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage. 'Likelihood' is a question of fact, to be determined by the judge on evidence before him. In the present case there was simply no evidence whatever that the mortgagors were likely to be able within a reasonable period to pay the sums due under the mortgage. They did not themselves put any evidence at all before the court. All that the court had was knowledge derived from an affidavit on behalf of the Royal Trust Co. that the mortgagors were putting the property or had put the property on the market."

93. The defendant here contends that such a sale is likely. He refers to a letter from an Exeter estate agent, Jackson-Stops, to him dated 31 January 2023. This confirms that the property is currently receiving only "low-level marketing". There has been an offer of £3.95 million from potential purchasers described by the estate agent as "seasoned and hard negotiators", whom he is confident would take "a robust attitude to the listed building issues". There have also been several visits from other possible purchasers, but their interest "is contingent on their sale, which has not yet quite reached to point of certainty, but their agent assures me that it is only a matter of a few of months [sic] before it will have completed".

94. In *Target Home Loans Ltd v Clothier* [1994] 1 All ER 439, the Court of Appeal, in considering whether it was likely that the mortgagors would be able to pay the sums due under the mortgage, was faced with a similar situation to the present. Nolan LJ, with whom Hollis J agreed, said this (at 445):

> "What then of a possible sale? Mr. Clothier exhibits a letter from a firm of estate agents in Weybridge which says this:

> ‘We confirm that we are instructed by Mr. and Mrs. Clothier in connection with the sale of the above property. We were first instructed on January 22, 1992, and have been actively marketing the property since then. Mr. and Mrs. Clothier have been persistent in their inquiries and have kept us under considerable pressure to sell the property. Unfortunately a sale has not yet been agreed and recently the price of the property was, on our advice, reduced to £495,000.
>
> As a result, there have been several applicants interested in the property during the last few days, and this morning we received an initial offer of £450,000 from a Mr. & Mrs. T. Jones who will require a mortgage in the region of £50,000 and have no property to sell, and therefore sound to be very good applicants. Naturally we are attempting to increase this offer because it is substantially less than the asking price.
>
> We are quite satisfied that the property will be sold very shortly either to this applicant or to another. ‘Honeycroft' is one of the most desirable properties in the area and has been kept to a very high standard of decoration and repair by Mr. & Mrs. Clothier.’

I mean no disrespect to the estate agency profession when I offer the suggestion that they would win by a distance any competition between members of different professions for optimism. Any such letter must be viewed with reserve if it is to form the basis of a decision involving real money. It is also, as Miss Bell for the mortgagees points out, a little surprising that after all this time, with the lapse of regular payments over two years ago, we should on the day of this hearing be presented with evidence of very recent interest in the property and of the prospects of a sale at a price which, although no doubt disappointing in comparison with prices obtainable two or three years ago, is still a substantial offer and one which exceeds not only the amount owing to the plaintiffs but also the amount secured by way of a second charge on the property amounting to about £130,000 in favour of Mr. and Mrs. Clothier's bankers.”

95. I accept that Jackson-Stops is not an ordinary high street estate agent. But I am afraid that I do view the letter from Jackson-Stops “with reserve”. One set of potential purchasers said to be interested are also said to be “hard and seasoned negotiators”, who have made an offer which (I infer) the defendant is unwilling to accept. The other set have not made any offer, but in any event are said (by *another* agent, not Jackson-Stops) to be several months away from being in a position to purchase, even if an offer were actually made and terms could be agreed. There is no evidence before me that the listed building consent problems which led the defendant himself to say that the property was unsaleable, have now been resolved. Even if they were, the conveyancing process for a complex property like this cannot be predicted to be either smooth or short. Matters may arise which require to be solved, which will inevitably slow things down.

96. Moreover, I bear in mind the defendant's own evidence that he realised in 2018 that the property would have to be sold because he could not afford to service the mortgage, but that he has not paid anything since January 2019, and that his counterclaim was struck out more than a year ago. He has had considerable time to market, and indeed sell, the property, and yet it remains unsold. Offers have been made which well exceed the amount of his indebtedness to the claimant, but these have not been accepted. Of course, it is in his interest to hold out for the best possible price, which may take some time. Doing so would improve the possibility of a surplus with which he could accommodate his family elsewhere. On the material before me, even if it included the evidence which I have refused to admit on grounds of lateness, I am simply not satisfied that it is likely that the defendant will be able to pay the sums due within a reasonable time, and accordingly I cannot make any order under section 36 of the 1970 Act. I emphasise that, even out of possession, there is nothing to prevent the defendant from marketing and selling the property himself, if he wishes to do so.

97. **Second defence – Irrational refusal to consent**: The only other point is the complaint that the claimant irrationally refused in 2019 to allow him to sell part of the land to reduce the arrears, made in paragraph 69 of the defence. But the substance of this has already been dealt with above, in the context of the application to amend the claim, at [23] and [24]. And the allegation of an "irrational" refusal is not an allegation of an unfair relationship. Mortgagees are generally entitled, subject to legislation such as the Consumer Credit Act, to act in their own interests: *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997, [13]-[17]. Moreover, and as I have already explained, even if there were anything in the defence, it would not in fact impede the claimant's right to possession. For all these reasons, this complaint provides no defence to the claimant's possession claim.

Conclusion

98. There being no other basis for defending this claim, and in light of all the manifold delays and other circumstances of this case, I will make a possession order. The claimant asks for this to take effect in 28 days. In most cases of an ordinary house or flat, that would be appropriate. But this is a large and complicated property, and it will take longer than usual to pack up and move. So, I will order possession to be given up by noon on Tuesday 11 April 2023 (the Tuesday immediately following Easter Sunday). I will at the request of the claimant adjourn its money claim with liberty to restore, on the basis that, until the property is sold, it cannot be known whether there is a surplus or a deficit, and in what amount.