

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

Claim No. 2014 Folio 538

B E T W E E N:

MARK ROBERT ALEXANDER

Claimant

(as a representative of the "Property 118 Action Group")

and

WEST BROMWICH MORTGAGE COMPANY LTD

Defendant

WITNESS STATEMENT OF JONATHAN WESTHOFF

I, JONATHAN WESTHOFF of 374 High Street, West Bromwich, West Midlands B70 8LR will say as follows:

Introduction

1. I am the Chief Executive Officer of the West Bromwich Building Society ("**Society**"). The Society is the sole shareholder of West Bromwich Mortgage Company Limited, the Defendant in this action, and I have been authorised by the Society and the Defendant to provide this statement on behalf of the Defendant in:-
 - 1.1. defence of the Part 8 claim brought by Mark Robert Alexander ("**Mr Alexander**"), which I understand that he brings as a representative action on behalf of himself plus the 230 other individuals (including all borrowers where an account is in joint names) holding 408 accounts who are listed as members of the "**Property 118 Action Group**" as listed in the amended exhibit MRA/8 to the Witness Statement of Mr Alexander;
 - 1.2. response to the witness statement of Mr Alexander dated 29 April 2014 in support of the claim, which I have read;
 - 1.3. support of the different remedy sought by the Defendant in section A of the Defendant's Acknowledgement of Service, namely:-
 - 1.3.1. A declaration that the true contractual position is that:-

(a) the Offer of Loan is not inconsistent with clause 5 or clause 14 of the Mortgage Conditions;
and

(b) the Offer of Loan and clauses 5 and 14 of the Mortgage Conditions are to be read consistently, so that, in Mr Alexander's case:

(i) after 30 June 2010 the Defendant has been entitled to vary the "Margin" (as defined at paragraph 8 below) subject to the provisions of Clause 5 of the Mortgage Conditions; and

(ii) since 15 July 2008, the Defendant has been entitled to accelerate the loan pursuant to clause 14 of the Mortgage Conditions, including, but not limited to, in the event it provides Mr Alexander one month's notice; and

1.3.2. an order that Mr Alexander and the represented persons (i.e. the members of the Property 118 Action Group) pay the Defendant's costs.

2. I confirm that, to the extent the facts and matters to which I refer in this witness statement are within my personal knowledge, they are true, and insofar as they are not within my personal knowledge, they are true to the best of my knowledge, information and belief. Where a matter is not within my personal knowledge I indicate the source.
3. In this statement I shall refer to a paginated bundle marked "JW1" containing copies of documents to which I refer in the course of this statement.

Background

4. The Defendant is a retail lender, established in the mid-1990s as a wholly owned subsidiary of the Society. From October 2004, the Defendant was authorised and regulated by the Financial Services Authority. From 1 April 2013, the Defendant has been authorised and regulated by the Financial Conduct Authority ("**FCA**"). Although the Defendant is a statutory company, it does not operate independently of the Society and is entirely reliant on the Society for its funding.
5. The Defendant was originally established as a vehicle to acquire mortgage books from other lenders. By using a subsidiary, the Society was able to maintain a clear separation between mortgage business not originated through the Society and its member based activities.
6. Subsequently, in 2006, the Society and its group companies ("**the Group**") expanded its lending activities to buy-to-let lending through intermediaries (trading as West Brom for Intermediaries) and the resulting mortgages were advanced by the Defendant.

7. Between 1 January 2006 and 31 December 2008 the Defendant entered into 20,257 mortgages with buy-to-let borrowers, all of which were entered into via mortgage intermediaries.

7.1. All of these 20,257 mortgages were entered into on the Defendant's 2004 or 2006 Mortgage Conditions (Daily Interest) (the "**2004 Conditions**" and the "**2006 Conditions**" respectively and together referred to as the "**Mortgage Conditions**"). I attach at pages 15-30 of JW1 a copy of the 2004 Conditions and at pages 1-14 of JW1 a copy of the 2006 Conditions.

7.2. The 2004 Conditions were the Defendant's standard terms and conditions for Scottish properties. The 2006 Conditions were the Defendant's standard terms and conditions for English properties. In 2011 both the 2004 and 2006 Conditions were superseded, in respect of new lending, by a new set of standard terms and conditions with multi-jurisdictional application (the "**2011 Conditions**"). The 2004 and 2006 Conditions remain, however, the relevant terms and conditions for all mortgage contracts entered into during the period between 1 January 2006 and 31 December 2008 and, therefore, for all of the accounts listed in MRA/8. Twenty three of the properties secured under accounts listed in MRA/8 are located in Scotland and subject to the 2004 Conditions. I include at page 31 of JW1 a list of the 23 Property 118 Action Group accounts where the mortgage contract is subject to the 2004 Conditions. The remainder of the properties secured under the accounts listed in MRA/8 (including Mr Alexander's account) are subject to the 2006 Conditions.

7.3. Both the 2004 Conditions and the 2006 Conditions were subject to identical clauses 1, 5 and 14 as are in issue in Mr Alexander's claim.

7.4. All of the 20,257 mortgages were entered into by Deed and were preceded by:-

7.4.1. an Offer of Loan letter enclosing an offer document and a copy of the Defendant's Mortgage Booklet which included the Standard Conditions of Offer and the Mortgage Conditions; and

7.4.2. an Acceptance of Offer letter.

The wording of the Mortgage Booklet, including the Standard Conditions of Offer and the Mortgage Conditions, was in standard form. The wording of the Offer of Loan letter, offer document and Acceptance of Offer letter were in standard form subject to variations to reflect differences in the specific product being offered. The Offer of Loan letter and Acceptance of Offer letter, in the case of Mr Alexander, are at pages 61-71 of JW1. The offer document in the case of Mr Alexander is at MRA/1. The Defendant's Mortgage Booklet, which included the Standard Conditions of Offer and the Mortgage Conditions, in the case of Mr Alexander, are at MRA/2. However, I attach further copies of

the latter two documents at JW1 pages 65-71 & 73-86 so that the suite of documents in respect of Mr Alexander's loan can be viewed together.

8. Most of the 20,257 mortgages which the Defendant entered into with buy-to-let borrowers between the period 1 January 2006 and 31 December 2008 provided for interest to be payable at a margin (the "**Margin**") over a reference rate (the "**Reference Rate**") (e.g. 1.9% over Bank of England Base rate), described as a variable rate. Such mortgages are commonly known as tracker mortgages, because they track a reference rate, and I shall refer to them as such in this witness statement. The mortgages were either tracker mortgages from the outset, or converted to a tracker after an initial period at a fixed rate (see paragraphs 48 to 51 below for further details).

Summary of the Defendant's action which is the subject of the claim

9. In September 2013, the Defendant wrote to those of its buy-to-let borrowers with tracker mortgages who it understood to own 3 or more buy-to-let properties (whether mortgaged or not, and whether any other mortgages were held with the Defendant, or with other lenders) notifying them that it had decided, pursuant to clause 5 of Mortgage Conditions, to increase the Margin by 2% in light of market conditions and in order to carry out its business prudently, efficiently and competitively. Such borrowers were, and are, believed by the Defendant not to be consumers. The increase was to come into effect on 1 December 2013. This was a standard form letter, although certain variables differed depending on the precise circumstances applicable to the particular borrower (namely whether the account was in arrears at the date of the letter). The letter to Mr Alexander which he has exhibited at MRA/5 is an example of the standard form of letter sent by the Defendant.
10. In November 2013, those borrowers were notified in writing that the increase in Margin was to be reduced to 1.9% in light of slightly improved market conditions. Again, this was a standard form letter, although certain variables differed depending on the circumstances applicable to the particular borrower (namely whether the account was in arrears at the date of the letter). The letter to Mr Alexander which he has exhibited at MRA/7 is an example of the standard form of letter sent by the Defendant.
11. The increase in Margin of 1.9% came into effect on 1 December 2013.
12. Initially the increase in Margin on 1 December 2013 affected 6,547 accounts. As stated above, all of these accounts: (i) were held by borrowers who were understood by the Defendant (from Experian data as at the end of July 2013) to own 3 or more buy-to-let properties; and (ii) have standard terms and conditions which contain the same clause 1, 5 and clause 14 wording as is in issue in Mr Alexander's case. Certain borrowers complained to the Defendant on the grounds that they did not, in fact, own 3 or more buy-to-let properties, and the Defendant subsequently reversed rate increases for 100 accounts following investigations into the number of buy-to-let properties held by those borrowers. As at 16 June

2014, the number of accounts subject to the increase in Margin is 6,250 (the reduction in the total number is due both to the reversal of the rate increase for the 100 accounts and the subsequent redemption of a number of previously active accounts).

13. Of these 6,250 affected accounts, 231 borrowers (including Mr Alexander) with a total of 409 accounts have formed the Property 118 Action Group. The Defendant's solicitors have been told by Mr Smith of Cotswold Barristers (who is acting for Mr Alexander and the represented persons via direct access), that the represented persons together with Mr Alexander are funding Mr Alexander's Part 8 representative proceedings (see the letters from Mr Smith dated 28 March and 3 and 22 April 2014 at page 89-93, 138-139 & 146-148 of JW1). The Claimant stated that the members of the Property 118 Action Group were listed in exhibit MRA/8. The originally served MRA/8 appeared to contain a significant number of errors, and so the Defendant's solicitors wrote to the Claimant and represented persons' barrister, Mr Smith, on 16 May 2014 and again on 4 and 10 June 2014 regarding this (see pages 153-156, 161 & 162-163 of JW1). The responses received from Mr Smith on 10 and 13 June 2014 are at pages 164-169 of JW1. In these responses Mr Smith confirmed that the Defendant's solicitors' comments regarding MRA/8 were correct and were agreed and provided information about three additional pairs of joint borrowers, with a total of 6 further accounts, whom he stated were also represented persons. In their letter dated 13 June 2014 (at page 170-171 of JW1) the Defendant's solicitors asked that Mr Smith arrange for the Claimant to file and serve a corrected MRA/8 as a matter of urgency verified by a statement of truth. Mr Smith provided a revised version of MRA/8 under cover of a letter of 16 June 2014 (a copy of that letter is at page 172 of JW1 and a copy of the revised version of MRA/8 is at pages 173-194 of JW1) and promised to provide a copy containing a statement of truth as soon as he was able to do so. The version of MRA/8 containing a statement of truth is still awaited as at the date of this Witness Statement.
14. Mr Alexander is the author of the "Property 118" blog and on 28 May 2014 it was announced on Cotswold Barristers' Twitter account and on Mr Alexander's Linked In profile that Mr Alexander had been appointed a non-executive director and the Chairman of Cotswold Barristers. Mr Smith, the barrister representing Mr Alexander and the represented persons in this action, is the Head of Chambers at Cotswold Barristers. Cotswold Barristers have recently, with the assistance of Mr Alexander, launched a "Litigation Warranty" product (see screenshots of the relevant pages of the Property 118, Litigation Warranty (accessed via the Cotswold Barristers website) and Linked In websites at pages 195-209 of JW1).
15. As at 18 June 2014, the Defendant understands that 355 complaints have been referred to the Financial Ombudsman Service ("FOS") regarding the Defendant's action in increasing the Margin, including 107 brought by members of the Property 118 Action Group listed in exhibit MRA/8. I attach, at pages 32-35 of exhibit JW1, a list of those members of the Property 118 Action Group who the Defendant understands to have made a complaint to FOS.

16. The Defendant has been cooperating with FOS in responding to complaints. In light of this, and the fact that, unlike court proceedings, FOS is a free process for claimants, it is not clear to the Defendant why the Property 118 Action Group has commenced these proceedings, at least prior to the conclusion of the FOS process. The solicitor previously acting for the Property 118 Action Group, by letter dated 5 February 2014, asked the Defendant to agree to arbitration to save costs (page 87 of JW1). The Defendant's solicitors replied on 20 February 2014 (page 88 of JW1) explaining that the Defendant was already the subject of, and cooperating with, the FOS complaints process (including in respect of complaints by members of the Property 118 Action Group), which was already providing a dispute resolution process that was arbitral in nature, but was both quicker and less expensive than arbitration (or court proceedings). Despite the fact that members of the Property 118 Action Group initiated FOS complaints and asked for arbitration, the barrister now acting for the Property 118 Action Group stated in correspondence (a letter dated 22 April 2014 at pages 146-148 of JW1), that "*many members of the group have now had responses from the FoS, which, as they predicted, reject their complaints*". This is understood to be a reference to a decision of a FOS adjudicator(s) ("**Adjudicators**") rejecting the complaints. His letter then goes on to state "*Some have responded asking that the Ombudsman now consider the substance of the complaint as well as the method of decision-making. They have no faith in the FoS to act fairly, competently and independently.*" FOS states, on its website, that, when considering customer complaints about financial institutions: "*we'll listen to both sides of the story. And we'll be honest. We give advice or make decisions based on the facts that we see*". The website goes on to state FOS's promise: "*we won't take sides - and we'll look at every problem with an open mind. But we can't make any promises about the outcome, because it all depends on the individual circumstances*". I refer to a screenshot of the relevant page of FOS's website at page 210 of JW1.
17. As at 18 June 2014, the Defendant has received notification from FOS of the uncontested rejection of 82 complaints by borrowers. I understand from the Society's Complaints Teams that 13 of these uncontested rejected complaints were by members of the Property 118 Action Group. When I say uncontested I mean that I understand, from the Society's Complaints Team, that as regards each of those 82 decisions the borrower has not sought to exercise their right to challenge the decision before the Ombudsman. I attach to this witness statement, by way of example, at pages 211-214 of JW1 the decision of an Adjudicator rejecting the complaint made by Mr R C V and Mrs M A Stimson, members of the Property 118 Action Group.
18. The Defendant respectfully agrees with the approach of the Adjudicator. In light of the comments of the barrister for the Property 118 Action Group in his letter dated 22 April 2014 (at pages 146-148 of JW1), the Defendant understood that at least some borrowers in the Property 118 Action Group had, as at 22 April 2014, responded to FOS asking that the Ombudsman now consider the substance of the complaint as well as the method of decision-making i.e. that at least some members of the Property 118 Action

Group had as at 22 April 2014 sought to challenge the decision of the Adjudicator before the Ombudsman, as they are entitled to do. Further, Mr Smith stated in a letter dated 16 May 2014 (at pages 151-152 of JW1) that he had written to FOS saying that he had asked FOS to recall the decisions made in relation to complaints by Property 118 Action Group members and ensure uniformity of approach. Mr Smith has refused to provide the Defendant with a copy of the letter he refers (see his letter dated 16 June 2014 at page 172 of JW1) despite the Defendant's solicitors requests in their letters of 10 and 13 June 2014 (at pages 162-163 & 170-171 of JW1). However, up until 6 June 2014, there were only 5 cases of which the Defendant is aware in which a borrower sought to take the rejection of their complaint by the adjudicator to the Ombudsman, and none of those complainants are members of the Property 118 Action Group according to MRA/8. In light of this, the Defendant does not understand the comment in Mr Smith's letter dated 22 April 2014 (at pages 146-148 of JW1), nor his comment that FOS has required 9 pages of questionnaire to be completed in order for the complaint to be reviewed by the Ombudsman. My understanding is that a complainant can ask for his case to be reviewed by the Ombudsman simply by telephoning FOS. Further, if members of the Property 118 Action Group were intending to challenge the Adjudicator's decision before the Ombudsman, it is not clear why these Part 8 proceedings were commenced on 6 May 2014 pending the completion of the FOS process.

19. Indeed, I understand that the commencement of these proceedings has had the effect of FOS Adjudicators arranging to close their file as regards the members of the Property 118 Action Group; I understand, from my colleague, Helen Barnes' conversations with Mr Simon Ruffle of FOS, that, following the commencement of these proceedings, FOS Adjudicators wrote to those members of the Property 118 Action Group who have outstanding FOS complaints to inform them that FOS was arranging to close their file regarding their complaints. As I understand it this is standard practice by FOS when a complainant commences legal proceedings, and is specifically referred to in DISP rule 3.3.4(9). I understand that, as at the 18 June 2014, two individual borrowers have since written to FOS seeking to challenge FOS's decision to close their file, with each letter containing the same wording, and requesting that the Ombudsman review the decision to close the file.
20. On 14 and 15 May 2014, the Defendant notified borrowers affected by the Margin increase in writing that, in light of improving market conditions, the Defendant had decided to reduce the Margin increase by a further 0.2% to 1.7%. I attach at pages 215-216 of JW1 an example of the standard form letter used to send letters to those borrowers. This change came into effect on 1 June 2014.

Mr Alexander's Part 8 Claim

21. Mr Alexander entered into a Mortgage Deed ("**the Alexander Mortgage Contract**") with the Defendant on 15 July 2008 (see MRA/2 and page 72 of JW1). This stated:

"Mortgage Conditions: West Bromwich Mortgage Company Limited Mortgage Conditions 2006 (Daily Interest).

...

2. This Mortgage incorporates the Mortgage Conditions and the offer of Mortgage both of which the Borrower acknowledges having received.

...

By signing this Mortgage you accept the Standard Conditions of Offer, the Special Conditions of Offer and the Mortgage Conditions."

22. Mr Alexander's mortgage was therefore governed by the 2006 Conditions. The 2006 Conditions were contained in Part C of the Mortgage Booklet (see MRA/2 and pages 79-86 of JW1) and stated at clauses 1, 5 and 14 as follows:

5.1 Interest is payable by you...at the rate or rates specified in your Offer of Loan Letter which, except during any period in which interest is expressed to be at a fixed rate, may be varied by the [Defendant] at any time for any of the following reasons:

- if there has been, or we reasonably expect there to be in the near future, a change in the Bank of England Base Rate or in interest levels generally;*
- if investment interest rates have increased or decreased;*
- to reflect market conditions generally;*
- to take account of changes in the law, or any decisions, determinations, precedent, compelling guidance, regulations or instructions issued by a relevant governmental body, ombudsman, regulator or similar person or any code of practice with which we intend to comply;*
- at the end of any period during which any fixed rate or concession or alternative rate (such as the Bank of England Base Rate) is in force;*
- to reflect a change in the way the Property is used or occupied;*
- to make sure our business is carried out prudently, efficiently and competitively;*
- to make sure we can meet our obligations to third parties.*

If any of the above reasons is found to be invalid, we may still vary the interest rate for any of the remaining valid reasons.

5.2 We can also vary the interest rate specified in your Offer of Loan Letter, except during any period in which interest is expressed to be at a fixed rate, for any valid reason other than those set out in condition 5.1 if:

- we give you at least two months' notice in writing of the variation in interest rate and allow you, should you wish, during the 3 months following such notification of the variation in interest rate, to repay the Loan in full without paying any Early Repayment Charge (other than all interest accruing in respect of the Loan up to the date of repayment of the Loan and any reasonable costs reasonably incurred by us in connection with such repayment).

"Offer of Loan Letter" is defined in clause 1 (at page 79 of JW1) to mean "the letter sent to you in which we offer to make the Loan and which contains an offer document setting out the costs, features, terms and conditions of the Loan"

14 You may be obliged by us to repay the Loan in full together with any accrued interest and unpaid Charges and we will become entitled to exercise all the powers conferred on us under Condition 15 of these Mortgage Conditions immediately if any of the following events occur:

- we give you one month's notice requiring such repayment;
- any Payment remains unpaid for longer than one calendar month;
- you are in breach of any of the other obligations or conditions contained in these Mortgage Conditions;
- the Property becomes subject to a Compulsory Purchase Order;
- you are made bankrupt;
- you enter into an arrangement with or for the benefit of your creditors or propose to do so;
- you die or become incapable of managing your affairs;
- you do anything which may damage or reduce the value of the Property or you fail to perform any obligation (whether to pay money or otherwise) imposed upon you as the owner of the Property;
- the Guarantor terminates or purports to terminate its obligations under the Mortgage Conditions or becomes insolvent or dies or becomes incapable of managing his affairs.

23. The Mortgage Conditions also stated at clause 1:

"These Mortgage Conditions incorporate any terms contained in the Offer of Loan. If there are any inconsistencies between the terms in the Mortgage Conditions and those contained in the Offer of Loan then the terms contained in the Offer of Loan will prevail..."

Offer of Loan is defined in clause 1 to mean:

"the offer of Loan made by us to you consisting of the Offer of Loan Letter, the Special Conditions of Offer and our Standard Conditions of Offer and including any matters that may have been specifically altered by us in writing to you."

24. Mr Alexander's claim is that clauses 5 and 14 of the Mortgage Conditions are inconsistent with the offer document sent to him dated 6 June 2008 (see MRA/1 and pages 65-71 of JW1) which formed part of the Offer of Loan such that clauses 5 and 14 are overridden pursuant to clause 1 of the Mortgage Conditions. He therefore contends that:-

24.1. The Defendant is not entitled to increase the Margin; and

24.2. The Defendant would not be entitled to call in the mortgage on one month's notice.

25. The Defendant does not agree with Mr Alexander's suggestion that that clauses 5 and/or 14 of the Mortgage Conditions are inconsistent with the offer document sent to him dated 6 June 2008. The Defendant's position is that the Mortgage Conditions and the offer document are entirely consistent and fall to be read together as a suite of documents without contradiction or ambiguity. Mr Alexander wrongly focuses only on the offer document in isolation, instead of considering all of the documents comprising the Offer of Loan (namely the Offer of Loan Letter, including the offer document, the Special Conditions of Offer and the Defendant's Standard Conditions of Offer). I understand (without waiving privilege) from the Defendant's solicitors that detailed submissions as to the construction of the contract between the parties will be made by way of skeleton argument and oral submission by counsel and should not be made by me in this witness statement. Therefore I simply set out below a summary of the Defendant's reasons for believing that clauses 5 and/or 14 of the Mortgage Conditions are not inconsistent with the Offer of Loan. In short, the Defendant considers that it has acted lawfully, and that Mr Alexander's Part 8 claim is misconceived, for the reasons summarised below.

26. It is common ground between the parties (see paragraph 3 of the Defendant's solicitors' letter dated 16 April 2014 and the response from the barrister for the Claimant and the Property118 Action Group dated 22 April 2014 at paragraph 3, at pages 140 and 146-148 of JW1 respectively) that if Mr Alexander's claim of inconsistency fails, then:-

26.1. The Defendant's action in increasing the Margin was lawful, i.e. clause 5 permitted the increase in Margin and the factual requirements for the invocation of clauses 5.1 and/or 5.2 were met; and

26.2. The Defendant is entitled to call in the Mortgage on one month's notice.

27. In light of this common ground, I do not explain why the bullet points of clause 5.1 and/or the requirement of "valid reason" in clause 5.2 were engaged, although the Court will get a flavour of the Defendant's explanation regarding these issues from the Adjudicator's decision referred to at paragraph 17 above.

Clause 5 of Mortgage Conditions

28. Mr Alexander states, at paragraphs 3 and 9 of his Witness Statement, that clause 5 of the Mortgage Conditions is inconsistent with the third, fourth and fifth boxes of paragraph 4 of the offer document sent to him dated 6 June 2008. The Defendant considers this to be incorrect.
29. The 3rd, 4th and 5th boxes of paragraph 4 of Mr Alexander's offer document (see MRA/1) include the following:
- 29.1. the loan rate until 30 June 2010 was a fixed rate, at 6.29%;
- 29.2. after 30 June 2010 the loan rate reverted to a variable rate.
30. As stated at paragraph 22 above, clauses 5.1 and 5.2 state that they apply "*except during any period in which interest is expressed to be at a fixed rate*". Mr Alexander acknowledges, at paragraph 4 of his Witness Statement, that he was to pay "*an initial fixed rate of interest reverting thereafter to a variable rate interest only mortgage*" So:-
- 30.1. on its own terms, clause 5 was inapplicable during the initial period of Mr Alexander's mortgage to 30 June 2010, being a period in which interest was expressed in his offer document to be payable at a fixed rate; and
- 30.2. after 30 June 2010, Mr Alexander's interest payments then reverted to a tracker, which is specifically expressed in his offer document to be a "variable rate" (see the fifth box of paragraph 4 "*After 30 June 2010 your loan reverts to a variable rate...*" and the third box of paragraph 6 "*This new payment will continue for 277 payments at a variable rate...*"). Once the interest payments had moved to a variable rate then, on the clear wording of clause 5, that clause was applicable.
31. Other provisions of the offer document (not referred to by Mr Alexander) are also consistent with the fact that the Defendant had the ability to vary the interest rate under clause 5. For example:
- 31.1. the third box of paragraph 5 stated "*The figures in this section will vary following interest rate changes...*",
- 31.2. the third box of paragraph 6 stated "*assuming that interest rates do not change your new payment on your loan will be...*"
- 31.3. the first box of paragraph 7 stated "*The Monthly payments shown in this illustration for your loan could be considerably different if interest rates change.*"
32. In addition, in situations where the Defendant had agreed to vary the terms of its standard Mortgage Conditions (which was not the case for Mr Alexander's mortgage), then its practice was specifically to

state this in the offer document. For example, where, on a remortgage, the Defendant agreed that the borrower could utilise a free legal service, the offer document would so state. So, in the case of Mr MJ Roberts and Mrs D Turner (who are members of the Property 118 Action Group) their offer document dated 13 March 2008 stated (see pages 226 of JW1): "...For the avoidance of doubt, the Standard Conditions of Offer and Acceptance of Offer shall be amended to give effect to the following terms- (a) all references in the Standard Conditions of Offer to "the Company's solicitor" or "our Solicitor" shall be amended to read "our solicitor or licensed conveyancer" (b) the following text will be deleted from the Acceptance of Offer "will be responsible for their costs whether or not the transaction proceeds." The text will be replaced with the following sentence "will be responsible for their non standard costs in accordance with Special Condition 8945 whether or not the transaction proceeds".

33. In any event, Mr Alexander wrongly focuses only on the offer document. Clause 1 of the Mortgage Conditions refers to the "Offer of Loan" which, as stated above, is defined as including the Offer of Loan Letter (including the offer document), the Special Conditions of Offer and the Standard Conditions of Offer. Therefore, Mr Alexander would need to show that the Offer of Loan Letter (including the offer document), the Special Conditions of Offer and the Standard Conditions of Offer read together (and not just the offer document itself) are inconsistent with clause 5. They are not. The Offer of Loan Letter (including the offer document), the Special Conditions of Offer and the Standard Conditions of Offer are consistent with clause 5. In particular:-

33.1. The Offer of Loan Letter dated 6 June 2008 (at page 61 of JW1) under cover of which the offer document was sent to Mr Alexander specifically summarised the effect of clause 5, stating:

"We are pleased to make the attached Offer of Loan, to be secured on the Property to be mortgaged, on the terms set out in this letter. Attached to this letter you will find some important information about your loan. A copy of our booklet "Information you need to know about your Mortgage" is enclosed. It contains important information about your loan, including the Standard Conditions of Offer and the Mortgage Conditions 2006 (Daily Interest) applicable to your loan. Please read all of this documentation carefully...

Please note that except during the period of any specific fixed rate of interest all rates of interest are liable to change both before and after completion and that monthly payments will vary with the interest rate";

33.2. As to the offer document, I repeat paragraphs 29 to 31 above.

33.3. The Standard Conditions of Offer (contained in Part B of the Mortgage Booklet from the fifth page of MRA/2 and at pages 76-78 of JW1) stated at clause 11:

"All payments which comprise or include interest are subject to variation in accordance with the terms of the Mortgage Conditions (except during periods where Loans are expressed to be at a fixed rate of interest). We may vary our method of calculating interest and monthly payments"

34. The interplay and consistency between the Offer of Loan and clause 5 of the Mortgage Conditions is further demonstrated by:

34.1. the Application Form signed by Mr Alexander on 1 May 2008 (at pages 51-60 of JW1) which stated:

"IMPORTANT NOTICES

Your contract with the [Defendant] will be based solely on the terms of this mortgage application form and any mortgage offer or other literature provided by the [Defendant].By signing the mortgage deed, you accept all the terms of the mortgage included in the standard conditions of the offer, any special conditions of offer applicable to the mortgage offer and the relevant mortgage conditions...

INTEREST

I understand that:

... (c) the [Defendant] has the right to vary the rates of interest and monthly payments in accordance with the terms of the Mortgage Conditions.";

34.2. part A of the Mortgage Booklet (from the second page of MRA/2 and pages 74-75 of JW1) which stated:

"the rate of interest charged may be varied by us from time to time, except during periods when the Loan is expressed to be at a fixed rate of interest"; and,

34.3. the Acceptance of Offer letter dated 6 June 2008 (at page 64 of JW1), signed by Mr Alexander, which stated:

"I accept the Offer of the Loan specified above and have read and understand the Special and Standard Conditions of Offer. I acknowledge:-

1. your right to...vary the rates of interest and monthly payments..."

35. The Defendant's case is that the documents summarised above are a contractual package designed to be read and understood in reference to, and consistently with, each other. The variability of interest rates, and thus, the Defendant's rights of variation pursuant to clause 5, are a material and central feature of Mr

Alexander's loan, referred to in each of the relevant documents provided to Mr Alexander, including the Offer of Loan Letter and its enclosed offer document.

36. Mr Alexander appears to state at paragraphs 4 and 11 of his Witness Statement that he intended paragraph 4 of the offer document to have a different contractual effect. I do not know what Mr Alexander's subjective intentions were when he entered into the Alexander Mortgage Contract, and the Defendant does not accept without challenge his evidence as to what his subjective intentions were at that time. However, without waiving privilege, I understand from the Defendant's solicitors that Mr Alexander's subjective intentions are irrelevant to the objective question of whether, as a matter of construction, there is an inconsistency between the Offer of Loan and clause 5.
37. Mr Alexander suggests, at paragraph 5 of his Witness Statement, that he would have opted for a standard variable rate ("SVR") product either with the Defendant or elsewhere, had he been content to concede the power for the Defendant unilaterally to vary the interest rate. Mr Alexander has adduced no evidence to demonstrate that this was, in fact, his intention prior to entering into the Alexander Mortgage Contract and the Defendant does not accept without challenge his evidence at paragraph 5. Further, as I explain at paragraph 36 above, I understand that any such subjective intention as he may have had at the time is irrelevant to the objective questions of construction in issue in this claim. In any event, the Defendant did not offer any SVR buy-to-let products at the time of Mr Alexander's loan, or at any time prior to December 2008. I refer, at page 36 of JW1, to a list of loans that were available from the Defendant to buy-to-let borrowers at the date that Mr Alexander entered into the Alexander Mortgage Contract (15 July 2008). Further, I refer at pages 37-40 of JW1 to a table setting out all the mortgages that were available at the Defendant for buy-to-let customers between 1 January 2006 and 31 December 2008.
38. Further, even if an SVR loan had been available to Mr Alexander from the Defendant at the time of Mr Alexander's loan, it would have charged a higher initial rate of interest than the mortgage product Mr Alexander selected. The initial rate of interest charged on Mr Alexander's mortgage product was 6.29% (fixed). The Defendant's SVR at the date of Mr Alexander's mortgage (15 July 2008) was 7.35%. The Defendant has calculated the total interest payments which Mr Alexander would have made, had he taken out an SVR loan with the Defendant with the same principal balance and term (had such loan been available to him). It has then compared this to Mr Alexander's actual interest payments made under his mortgage. See the calculation at page 41 of JW1. As can be seen, as at 19 June 2014 Mr Alexander has paid £14,175.04 less in interest payments than he would have under an SVR loan with the Defendant (had such a loan been available from the Defendant at the time).
39. Further, as can be seen from JW1 pages 41, if an SVR mortgage had been available to Mr Alexander at the relevant time, his mortgage payments would have been subjected to earlier interest rate variations

than was the case under the mortgage he in fact took out. The Defendant's SVR decreased from 7.35% to 6.24% in December 2008 and then increased from 6.24% to 6.74% in July 2010. In contrast, the interest rate on Mr Alexander's mortgage was not varied (from 2.49% to 4.39%) from the expiry of his fixed interest rate period in July 2010 until 1 December 2013, a period of 40 months.

40. As regards the screenshot Mr Alexander refers to at paragraph 10 of his Witness Statement and exhibits at MRA/3, I understand that Mr Alexander contends that this screenshot is relevant "factual matrix" material to construing the Alexander Mortgage Contract. The Defendant disagrees for, in summary, the following reasons:

40.1. It is not understood on what grounds Mr Alexander contends that this screenshot supports his case on construction of the Alexander Mortgage Contract. The screenshot says that a tracker mortgage gives certainty that the amount you pay will move in line with bank base rates, and goes on to refer to there being a choice of "variable trackers". This is consistent with the Defendant's position that a tracker mortgage is a variable rate, and that, with such a mortgage, the interest payable will move in line with the Reference Rate but may also increase if the Defendant increases the Margin over the Reference Rate.

40.2. In any event, the screenshot is an extract from the Society's website (www.westbrom.co.uk) and not the Defendant's website and refers to a "2 Year Tracker Bank Base Rate + 0.99%" which was a product offered by the Society (not by the Defendant) and was offered by the Society to residential borrowers only. At all material times, the Defendant operated its own website, West Brom for Intermediaries, which was separate from the Society's website. Whilst the Defendant's West Brom for Intermediaries website was accessible from the Society's website, any access to the West Brom for Intermediaries website was restricted to registered brokers only. Individual borrowers would not have been able to access the West Brom for Intermediaries website and would not have been able to do so personally, even if they had borrowed through, or were considering borrowing through, a broker. Only the Defendant's mortgage products were referred to on the West Brom for Intermediaries website. Likewise, the Society's website only referred to products offered by the Society itself. The screenshot on the Society's website is therefore irrelevant to the construction of the contract between Mr Alexander and the Defendant.

40.3. In any event, the screenshot is not relevant factual matrix material to the construction of the Alexander Mortgage Contract for the following reasons:-

40.3.1. The Alexander Mortgage Contract in this case is the Defendant's standard form contract and there is therefore a need to construe it in the same way in all cases, irrespective of background

material which, at most, only some mortgagors will have seen and which may have varied from time to time; and/or

40.3.2. There is no evidence that I am aware of that Mr Alexander was aware of the screenshot at or prior to the entry into his contract, and he does not claim that he was so aware. Prior to the commencement of the proceedings he initially produced a screenshot that post-dated his contract (see the letter from his/the Property118 Action Group's barrister, Mr Smith, dated 28 March 2014 which attached a draft claim form and draft witness statement which referred to and attached a screenshot which post-dated his contract, at JW1 page 125). This would tend to suggest that he was not aware of the screenshot exhibited at MRA/3 at the relevant time but has, instead, been looking for material since deciding to bring this case. This is supported by the Property 118 discussion thread which suggests that Mr Alexander only discovered a version of the screenshot in November 2013 through the use of an internet archive website called Wayback Machine (see pages 228-233 of JW1). In any event, a reasonable observer would not have expected Mr Alexander to have known of the screenshot at the date of the contract given that it refers to a different product, offered to a different category of borrower by a different mortgage provider and is on a different entity's website. Further, even if Mr Alexander did know of the screenshot at the relevant time, a reasonable observer would not have expected Mr Alexander to rely on the screenshot (rather than reading the applicable contractual terms) given that Mr Alexander is, by his own admission (see paragraph 11 of his Witness Statement) "*experienced in property investment and finance*"; and/or

40.3.3. In any event, the Alexander Mortgage Contract was, by clause 15.7 of the Mortgage Conditions, assignable by the Defendant. The screenshot was not reasonably available to an assignee. These matters render the contract one where the need for certainty is paramount.

40.3.4. It would seem that Mr Alexander is seeking to use the screenshot to contradict the contract rather than to elucidate it.

41. Mr Alexander refers at paragraph 11 of his witness statement to extracts from the websites of the Council of Mortgage Lenders, the Money Advice Service and the FCA. These appear to be extracts from the current wording of the above websites. The Defendant does not understand how these assist the construction issue in this case. Whether the Defendant has the power to vary the Margin on its tracker mortgages depends on the terms and conditions of its mortgages and, in particular, whether the Claimant's case that the Offer of Loan is inconsistent with the Mortgage Conditions is correct or incorrect. Mr Alexander may be seeking to suggest that there is a technical or customary meaning of tracker mortgage and that the Defendant's case contradicts that meaning. If that is his

suggestion, then my understanding is that he is incorrect, and that tracker mortgages are of various different types depending on their terms and conditions.

Clause 14 of the Mortgage Conditions

42. At paragraphs 14 and 15 of his Witness Statement, Mr Alexander claims that clause 14 of the Mortgage Conditions is inconsistent with paragraph 6 of Mr Alexander's offer document (see MRA/1 and the 13th page of MRA/2 and the same provisions at pages 84 and 67 of JW1). The Defendant's case is that this is incorrect. Clause 14 sets out the circumstances in which the Defendant may accelerate the loan. Paragraph 6 of the offer document simply states the monthly payments that Mr Alexander would be obliged to make on certain assumptions, including that there is no capital repayment prior to loan maturity (whether by acceleration or voluntary prepayment). There is no inconsistency between these provisions.
43. Accordingly, the Defendant's case is that it is, and has been since execution of the loan, entitled to accelerate the loan on provision of one month's notice to Mr Alexander. In making reference to this right in the letter of 7 October 2013 (see MRA/6), in response to Mr Alexander's letter of complaint received on 1 October 2013 (to which I refer at pages 234-235 of JW1), the Defendant was simply explaining that it considered that an increased rate was preferable to the alternative course of giving one month's notice to demand full repayment. In no way did this constitute a threat, veiled or otherwise, as Mr Alexander suggests at paragraphs 13 and 14 of his Witness Statement.

Mr Alexander's complaint to the Defendant

44. The Defendant gave careful consideration to the complaint Mr Alexander raised, as can be seen by its letter of 7 October 2013 (see MRA/6). It has been constructively engaged in dealing with a number of FOS complaints, including those raised by some borrowers represented by Mr Alexander in this action, as set out at paragraphs 15 to 19 above. It has also engaged constructively, via its solicitors, in correspondence with Mr Alexander's legal representatives.

Conclusion as regards Mr Alexander's claim

45. The Defendant therefore asks the Court to answer the questions posed by Mr Alexander in his claim form as follows:
- 45.1. Whether the Defendant is entitled to require the Claimant to pay an increased rate of interest on the mortgage loan in circumstances where the Bank of England base rate does not change: yes.
- 45.2. Whether the Defendant is entitled to require the Claimant to pay interest on the mortgage loan at a rate exceeding a rate calculated as the prevailing Bank of England base rate plus a premium of 1.99%: yes

- 45.3. Whether the Defendant is entitled to require the Claimant to repay the loan on one month's notice pursuant to paragraph 14 of the Defendant's Mortgage Conditions 2006 (Daily Interest): yes
46. Further, the Defendant asks the Court to declare the true contractual position to be that:-
- 46.1. the Offer of Loan is not inconsistent with clause 5 or clause 14 of the Mortgage Conditions;
- 46.2. the Offer of Loan and clauses 5 and 14 of the Mortgage Conditions are to be read consistently, so that, in Mr Alexander's case:
- 46.2.1. after 30 June 2010 the Defendant has been entitled to vary the Margin subject to the provisions of Clause 5 of the Mortgage Conditions; and
- 46.2.2. since 15 July 2008, the Defendant has been entitled to accelerate the loan pursuant to clause 14 of the Mortgage Conditions, including, but not limited to, in the event it provides Mr Alexander one month's notice.
47. Finally, the Defendant asks the Court to dismiss Mr Alexander's claim for an order for repayment and for costs, and instead to make an order that Mr Alexander and all of the represented persons (comprising the Property 118 Action Group) pay the Defendant's costs.

Mr Alexander as a representative claimant of all members of the Action Group as listed at MRA/8

Fixed/variable and variable throughout cases

48. The tracker mortgages the subject of the Margin increase had Offers of Loan that fall into two broad categories, namely:
- 48.1. Fixed/variable (i.e. an initial period at a fixed interest rate, followed by a reversion to a tracker rate). Mr Alexander's Offer of Loan falls into this category; and
- 48.2. Variable throughout (a tracker rate is payable throughout).
49. The Defendant has undertaken an analysis of the list of represented persons listed at the amended MRA/8 and understands that 17.6% of the represented persons fall within the fixed/variable category and 82.4% fall within the variable throughout category. I refer at pages 42-50 of JW1 to a list of represented persons who the Defendant understands fall within each category.
50. It is common ground between the parties that there are no material differences between the Offers of Loan issued in variable throughout cases and the Offers of Loan issued in Fixed/variable cases (see

paragraphs 27 and 28 of the letter from the Defendant's solicitors dated 16 April 2014, and the response from the barrister for the Claimant/Property 118 Action Group dated 22 April 2014 at paragraphs 27 and 28, at pages 144 and 148 of JW1 respectively). I.e. it is common ground that the answer to the question:

"is the Offer of Loan inconsistent with clause 5 and/or 14 of the Mortgage Conditions?"

would be the same in a fixed/variable case and a variable throughout case. The parties have agreed (in the correspondence cited earlier in this paragraph) that a sample file of a variable throughout case of a member of the Property 118 Action Group should be attached to the witness statement served by the Defendant so that the Court has before it an example of such a case and is aware of the whole position. I therefore attach, by way of example, the file of Mr and Mrs Grunberg (pages 236-253 of JW1).

51. In light of this common ground, the Defendant has no objection to Mr Alexander acting as a representative claimant of those Property 118 Action Group members who had a variable throughout Offer of Loan.

Costs

52. The costs for the Defendant of dealing with a representative claim are considerably greater than the costs of dealing with a claim simply brought by Mr Alexander. For example:

52.1. The Defendant, assisted by its solicitors and counsel, has to consider whether all the proposed represented persons have the "same interest" as Mr Alexander. This has included, for example, dealing with the points at paragraphs 48 to 51 above;

52.2. The Defendant, assisted by its solicitors and counsel, has had to consider documentation relating to the proposed represented persons and to deal with the fact that the claim has been brought as a representative action on behalf of 231 borrowers, rather than on behalf of a single claimant, in its review of documentation and submission of evidence in response to the claim;

52.3. The Defendant, assisted by its solicitors and counsel, has to consider the various procedural issues arising from representative proceedings, including dealing with the lack of clarity in as to who the represented persons are (see paragraph 13 above).

53. The Defendant understands from the Property 118 Action Group's barrister that:

53.1. This action is funded by the members of the Property 118 Action Group and brought by Mr Alexander not only on behalf of the members of the Property 118 Action Group but at their specific request and agreement;

53.2. The Property 118 Action Group has set up an escrow account with BARCO to which they have all contributed; and

53.3. This account is intended to provide security for the Defendant's costs.

54. However, to date the Property 118 Action Group have declined, despite written requests from the Defendant's solicitors, to:

54.1. Confirm whether Mr Alexander has the benefit of an indemnity as to costs from the other members of the Property 118 Action Group;

54.2. Inform the Defendant how much money is held in the BARCO account, although the barrister for the Action Group did inform the Defendant's Solicitor, in his letter of 29 May 2014 (at pages 159-160 of JW1) that the sum held "is over £200,000". This contrasts with:-

52.2.1. the figure of £450,000 which had been suggested on the Property 118 blog (I refer to a screenshot of the same at page 262 of JW1); and

52.2.2. the sums of £458,744 and £450,000 referred to in the newspaper articles appearing in Your Mortgage on 1 April 2014 and The Sunday Times (Money) on 13 April 2014 and which I exhibit at pages 254-257 of JW1. These articles refer to Mr Alexander and/or Mr Smith and it is to be inferred that they were the source of the information stated in the articles. The Defendant's solicitors wrote to Mr Smith regarding this apparent discrepancy on 13 June 2014 (see page 170-171 of JW1). Mr Smith's response, contained in his letter of 16 June 2014 (at page 172 of JW1) was that *"the funds held in BARCO are earmarked for a number of purposes through the life of this matter, so there is no discrepancy that needs explaining"*.

54.3. Provide documentary evidence of the amount of funds held in the BARCO account;

54.4. Confirm that it is agreed that all members of the Property 118 Action Group will be jointly and severally liable for costs in the event that an order for costs is made in the Defendant's favour;

54.5. Provide an undertaking that the funds held in the BARCO account will be: (i) used solely for the purpose of discharging any costs order(s) made in favour of the Defendant in these proceedings (including any appeals); and (ii) will not be withdrawn or otherwise dissipated or used as security in any manner whatsoever prior to the final conclusion of these proceedings (including the exhaustion of any and all available avenues of appeal).

54.6. Provide a copy of the escrow agreement(s).

(see the correspondence dated 2 April 2014, 3 April 2014, 16 April 2014, 22 April 2014, 28 April 2014 , 16 May 2014, 23 May 2014, 29 May 2014, 13 June 2014 and 16 June 2014 at pages 134-194 of JW1).

55. The Property 118 Action Group contend (see numbered point 30-32 in the letter from their barrister to the Defendant's solicitors dated 22 April 2014 at page of 148 of JW1) that they have irrevocably agreed amongst themselves that their contributions to the escrow will remain on deposit until such time as their action succeeds or an adverse costs order needs to be met in the representative action, and that this provides sufficient protection for the Defendant. The Defendant believes this is unsatisfactory in that:-

55.1. The Defendant has not seen a copy of the alleged irrevocable agreement and in any event is not a party to it and hence would not be able to take action if the alleged irrevocable agreement was breached by one or more Property 118 Action Group members seeking to withdraw funds;

55.2. The Property 118 Action Group has chosen to commence these proceedings even though some of them have initiated FOS complaints which have not yet been finally resolved, and which FOS complaints they could have pursued at no costs risks to themselves. Having chosen to pursue the legal route, they should provide security for the Defendant's costs;

55.3. As stated above, the Property 118 Action Group's barrister has stated in more recent correspondence dated 16 June 2014 (at page 172 of JW1) that not all of the funds in the BARCO escrow account are to satisfy any adverse costs order that may be made, but that "*the funds held in BARCO are earmarked for a number of purposes through the life of this matter...*". The Defendant does not know for what other purposes the money is held, or why this was not referred to in the earlier correspondence referred to above.


56. However, Mr Smith indicated in his letter dated 29 May 2014 (at pages 159-160 of JW1) and subsequently confirmed in his second letter dated 10 June 2014 (at pages 166-167 of JW1) that he will be making a payment into court for security for costs. Mr Smith has also stated, in his letter dated 29 May 2014, that, if the funds held prove to be inadequate for the Defendant's permitted budget, he shall be using them to pay an ATE insurance premium (pages 159-160 of JW1). From this it seemed that Mr Smith was assuming that costs budgeting would apply, but he subsequently confirmed (in his second letter dated 10 June 2014) that he would not be pursuing an order for costs budgeting. If the Claimant provides security for costs through a payment into court covering the full amount of the Defendant's anticipated costs then the Defendant accepts this would adequately safeguard its position. The Defendant will provide a copy of its estimated costs to the Claimant in advance of the first case management conference following service of any reply evidence by the Claimant.

57. However, unless the Claimant has by the time of the CMC either: (i) provided security for costs through a payment into Court of an amount equal to or exceeding the Defendant's estimate of costs; or (ii) provided the undertaking set out at paragraph 54.5 above and dealt with the other issues at paragraph 54 above; the Defendant intends to apply for an order at the CMC under CPR 19.6(2) and (3) that, unless and until the Claimant and the represented persons:

- (i) provide an undertaking as set out in paragraph 54.5 above and confirm the position at paragraph 54.4 above; or
- (ii) provide security for costs

within 7 days of the Court's order, the action not be permitted to continue as a representative action.

58. I believe that the facts stated in this witness statement are true.



Signed

20/6/14

Dated