



Neutral Citation Number: [2015] EWHC 135 (Comm)

Case No: 2014 FOLIO 538

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 29/01/2015

Before :

MR. JUSTICE TEARE

Between :

**MARK ROBERT ALEXANDER (as representative
of the "Property 118 Action Group")**

Claimant

- and -

**WEST BROMWICH MORTGAGE COMPANY
LTD**

Defendant

**Mark Smith (instructed by the Claimant and the members of the Property 118 Action
Group by direct access) for the Claimant**

**Raymond Cox QC and Chloe Carpenter (instructed by Addleshaw Goddard) for the
Defendant**

Hearing date. 21 January 2015

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.

.....
MR. JUSTICE TEARE

Mr. Justice Teare:

1. This is a dispute as to the extent of a lender's contractual right to vary the interest rate payable by the borrower and to terminate the mortgage on notice. It arises in the context of a "buy to let" mortgage granted by the West Bromwich Mortgage Company Limited to Mark Alexander. Mr. Alexander represents other borrowers as well. The dispute concerns a question of construction of the contractual documents.

The contractual documents

2. The offer letter dated 6 June 2008 provided as follows:

"We are please 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 note that except during the period of any specified 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."

3. Box 3 of the Offer stated that the loan was to be of £90,299 for 25 years. Box 4 contained a product description: "Buy To Let 6.29% fixed until 30.06.2010 (115% cover)". The repayment method was described as "interest-only" and the interest rate payable was said to be 6.29%. It then added:

"After 30 June 2010 your loan reverts to a variable rate which is the same as the Bank of England Base Rate, currently 5%, with a premium of 1.99%, until the term end, giving a current rate payable of 6.99%. Any applicable change in the Bank of England Base Rate will be applied to your account on the first day of the month following the change, unless the change is made after the 13th. of the month in which case it will be applied on the 1st. day of the second month following the change."

4. Box 6, entitled "What you need to pay each month", provided that the mortgage would start on 1 July 2008 and that there would be 22 payments at a Fixed Rate, currently 6.29%, of £480.68. It then continued:

"After 22 payments, your fixed rate ends and assuming that interest rates do not change your new payment on your loan will be £534.17."

"This new payment will continue for 277 payments at a variable rate which is the same as the Bank of England Base

Rate, currently 5%, with a premium of 1.99% until the term end, giving a current rate payable of 6.99%. Any applicable change in the Bank of England Base Rate will be applied to your account on the first day of the month following the change, unless the change is made after the 13th of the month in which case it will be applied on the 1st day of the second month following the change. ”

5. Box 7 was entitled “Are you comfortable with the risks ?” and provided:

“What if interest rates go up ?

The Monthly payments shown in this illustration for your loan could be considerably different if interest rates change. After the fixed rate ends on 30 June 2010 then for one per cent increase in the initial variable rate, your Monthly payment would increase by around £76.42.

**RATES MAY INCREASE BY MUCH MORE THAN THIS
SO MAKE SURE YOU CAN AFFORD THE MONTHLY
PAYMENTS.”**

6. The document entitled “Information you need to know about your mortgage” to which reference was made in the Offer of Loan (and accompanied it) contained General Information, Standard Conditions of Offer and Mortgage Conditions 2006 (daily interest). The last mentioned conditions stated in clause 1 as follows:

“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. ”

7. Clause 5 dealt with interest and provided as follows:

“Interest is payable by youat 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 Company 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 intended 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.”

8. Also included with the Offer were “Special Conditions” concerning such matters as insurance on the mortgaged premises and adequate life cover.
9. On 6 June 2008 Mr. Alexander accepted the Offer. He stated that he acknowledged the lender’s right to “vary the rates of interest and monthly payments”.
10. In due course, on 15th July 2008 Mr. Alexander signed the mortgage deed. He again accepted the standard conditions of offer (those set out in the booklet which accompanied the Offer), the mortgage conditions (those set out in the booklet) and the special conditions of offer (those which accompanied the Offer).

Variations to the interest rate

11. In September 2013 the lender informed Mr. Alexander (and other customers who had three or more by-to-let properties and so were not regarded as “consumers”) that it had decided to increase the margin over base rate applicable to their mortgage by 2%, so that, in Mr Alexander’s case, the margin was to increase from 1.99% to 3.99%. The lender’s decision was made in the light of market conditions and in order to carry out its business prudently, efficiently and competitively. The margin has since been reduced in the light of improving market conditions. These changes have given rise to the present dispute.

The dispute as to interest rates

12. In essence the submission made by Mr. Smith on behalf of Mr. Alexander is that the Offer, which was accepted by Mr. Alexander, provided for rates to vary (after the initial fixed period) in accordance with the Bank of England Base Rate but not otherwise. Clause 5 of the Mortgage Conditions purported to enable the lender to vary the interest rate in other circumstances but that was inconsistent with the Offer and in the event of inconsistency the Mortgage Conditions provided that the terms of the

Offer prevailed. The lender was therefore not entitled to increase the margin of 1.99% over Base Rate.

13. In essence the submission made by Mr. Cox QC on behalf of the lender is that there is no inconsistency between the Offer and the Mortgage Conditions. The Offer provided that after the initial fixed period the rate of interest would be a variable rate as therein defined but clause 5 of the Mortgage Conditions qualified that by stating the circumstances in which that rate could be varied. The Offer did not state that the margin of 1.99% over the Base Rate could not be varied if the circumstances stated in clause 5 of the Mortgage Conditions applied. There is therefore no inconsistency between the Offer and clause 5 of the Mortgage Conditions. The two can and should be read together.
14. At the heart of this dispute is the question whether there is any inconsistency between the Offer and the Mortgage Conditions. It is therefore essential to have a proper understanding of the circumstances in which different terms of an agreement may be held to be inconsistent with each other. As with many areas of the law the terrain has been covered by Bingham LJ, as he then was. In *Pagnan SpA v Tradax Ocean Transportation* [1987] 2 Lloyd's Rep. 342 Bingham LJ reviewed the authorities and concluded as follows, at p.350 col.2:

“These cases are only of significance as helping to define inconsistency and illustrating how Courts have approached that question in the past. It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses.”
15. In the same case Dillon LJ said, at p.353 col.2, that there is inconsistency where two clauses cannot sensibly be read together.
16. Further guidance has been given by Akenhead J. in *RWE Npower Renewables Limited v JN Bentley Limited* [2013] EWHC (TCC) at paragraph 24:

“What one can not and should not do is to carry out an initial contractual construction exercise on each of the material contract documents on any given topic and then, so to speak, compare the results of that exercise to see if there is an ambiguity. If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one.....
17. The decision of Akenhead J. was upheld in the Court of Appeal; see [2014] EWCA Civ 150. At paragraph 15 Moore-Bick LJ said that where the contract provides that one contractual document is to take precedence over another it was “only in the case of a clear and irreconcilable discrepancy” that it would be necessary to resort to the agreed order of precedence.
18. It is therefore necessary to consider all of the contractual terms as a whole. In particular it is necessary to consider whether the provisions in the Offer dealing with

- interest and the provisions in clause 5 of the Mortgage Conditions dealing with interest can sensibly be read together.
19. Box 4 of the Offer document provides for an initial period when the rate of interest is fixed. It also provides that thereafter the rate of interest would revert to being a variable rate. That variable rate was said to be (“is the same as”) the Bank of England Base Rate with a premium of 1.99%. It was to last “until the term end” (which was 25 years). It envisaged a change in that rate when there was a change in the Base Rate. Clause 5 of the Mortgage Conditions provides that interest is payable at the rate or rates specified in the Offer “which, except during any period in which interest is expressed to be at a fixed rate, may be varied by the Company at any time” for any one of several reasons which include not only a change in the Bank of England Base Rate but other circumstances as well, for example, changes in the law or the need to ensure that the business of the lender is carried out prudently, efficiently and competitively.
 20. Box 4 of the Offer specifies the rate or rates at which interest is payable by the borrower. Clause 5 expressly recognises that the Offer does so but goes on to say that the rates there specified (except during any period when the rate is expressed to be fixed) may be varied in the circumstances then listed. The question for the court is whether clause 5 contradicts box 4 of the Offer or is in conflict with it such that effect cannot fairly be given to both terms. Is there a clear and irreconcilable discrepancy between them ?
 21. Clause 5 would certainly contradict or conflict with Box 4 of the Offer if Box 4 provided that the *only* circumstances in which the rate could be varied were those set out in Box 4, namely, where there has been a change in the Bank of England Base Rate. Box 4 does not so provide in terms but Mr. Smith submitted that that is nevertheless the effect of Box 4.
 22. Mr. Smith submitted that there was no indication in Box 4 that the rate of interest could be varied in circumstances other than those set out in Box 4. Its meaning was clear: the circumstances in which it envisaged a variation were a change in the Base Rate. He pointed out, as accepted by Mr. Westhoff, the Chief Executive of the West Bromwich Building Society, the sole shareholder of the lender, that mortgages of the type entered into by Mr. Alexander are commonly known as tracker mortgages because they track a reference rate. Mr. Smith said that customers like Mr. Alexander choose tracker mortgages because they limit the risk to which the borrower is exposed with regard to the rate of interest. The interest rate varies with Base Rate and is not dependent upon the financial needs of the lender. Mr. Smith said that if clause 5 were operative there would be no difference between a tracker mortgage and a standard variable rate mortgage. There would be no point in the lender promoting tracker mortgages.
 23. In considering whether there is a contradiction between Box 4 and clause 5 one must, as advised by Bingham LJ, approach the question in a “cool and objective spirit” without any predisposition to find inconsistency and without any assumption that there is no inconsistency.
 24. Box 4 specifies the rate of interest payable (base rate plus 1.99%) after the initial period of a fixed interest rate. It is implicit that the rate may vary in line with changes

in the base rate, but Box 4 does not say in terms that the rate may not be varied in any other way or for any of the reasons set out in clause 5 of the Mortgage Conditions.

25. It is well recognised that one term may qualify another without contradicting it or being in conflict with it. Thus in *Pagnan v Tradax Ocean* Bingham LJ said at p. 350 that it is not enough if one term qualifies or modifies the effect of another and in *Cobelfret Bulk Carriers v Swissmarine Services* [2009] EWHC 2883 (Comm) Beatson J. (as he then was) said, at paragraph 26 that “the distinction between a conflicting provision and a qualifying one is generally accepted”.
26. In my judgment, effect can sensibly be given to both clauses if clause 5 is regarded as qualifying Box 4. Thus Box 4 specifies the rate of interest to be paid after the initial period of a fixed rate of interest but clause 5 modifies or qualifies Box 4 by providing that in certain circumstances the rate specified in Box 4 may be varied. I therefore do not consider that there is a contradiction between Box 4 and clause 5. There is no clear and irreconcilable discrepancy. When the lender seeks to vary the rate pursuant to clause 5 it is accepted that the lender must exercise its power honestly and in good faith, and not arbitrarily, capriciously or unreasonably.
27. I accept, as submitted by Mr. Smith, that there is no indication in Box 4 that the rate of interest could be varied in circumstances other than those set out in Box 4. To that extent Box 4 is different from clause 5. However, as explained by Akenhead J. in *RWE Npower Renewables Limited v JN Bentley Limited* [2013] EWHC (TCC) at paragraph 24 the court’s task is not simply to examine one contractual provision and compare it with another. The court’s task is to read the provisions together and, if possible, give sensible effect to each of them. That can be done by regarding one as modifying or qualifying the other.
28. Mr. Smith emphasised the words “until the term end” in Box 4. He said that they indicated that from 30 June 2010 until the end of the 25 year term there could be no variable rate other than that described in Box 4. I do not so read the agreement when regard is had to both Box 4 and clause 5. Box 4 specifies a rate for the rest of the term. Clause 5 recognises that but states that such rate may be varied in the circumstances described in clause 5.
29. I accept, as submitted by Mr. Smith, that “tracker” mortgages are attractive to customers because they seek to identify and limit the circumstances in which the rate of interest may change. However, the process of construction is dependent upon the words to which the parties have agreed. The process of construction is not dependent on a label which may be attached to a certain type of mortgage but which is not to be found in the words used by the parties. Customers may be attracted by the words in Box 4 but they have also agreed to the words in clause 5. The court’s task, when the parties choose to agree two different sets of terms dealing with the same subject-matter, is to see whether, notwithstanding the difference, they can be read together.
30. Mr. Smith submitted that there would be no commercial purpose in the lender promoting a tracker mortgage if, by reason of clause 5, it operated as a standard variable rate mortgage. But clause 5 cannot, it seems to me, be ignored simply because it dilutes the extent to which the mortgage may be described as a tracker mortgage. In any event, there is a difference between the mortgage to which Mr. Alexander agreed and a standard variable rate mortgage. Mr. Alexander has referred

to a definition of a standard variable rate mortgage as one where the rate varies with the lender's mortgage rate. The mortgage to which Mr. Alexander agreed was not of that nature. The variable rate for the period after the initial period when the rate was fixed was based on base rate plus 1.99%. Clause 5 permitted that rate to be varied only in the events listed in clause 5 and only if the lender acted honestly and in good faith, and not arbitrarily, capriciously or unreasonably. Since those events include such matters as a change in market conditions or a change in the law or decisions by government bodies or regulators there can be seen to be a commercial purpose in the clause notwithstanding that clause 5, if carefully considered by a prospective customer, may dissuade him from accepting the lender's offer.

31. I have therefore concluded that Box 4 does not conflict with clause 5. Although Box 4 specifies the rate of interest payable it is modified or qualified by clause 5 which permits the lender to vary the specified rate in certain circumstances. There being no inconsistency between Box 4 and clause 5 the agreement that the Offer takes precedence over the Mortgage Conditions does not come into play.
32. Whether it is fair for the lender to rely upon clause 5 of the standard terms in circumstances where boxes 4, 5 and 6, which deal with interest, do not draw the attention of the customer to clause 5, which also deals with interest, is not a matter before the court. I merely mention the point in order to emphasise that the question before the court is one of construction of the parties' agreement rather than of fairness.
33. Mr. Smith relied upon a "screen shot" taken from the web-site of the West Bromwich Building Society. It is dated 1 July 2007 and relates to "Tracker Mortgages". It states that tracker mortgages "give you the certainty of knowing that the rate you pay will move in line with the Bank Base Rates. We offer a choice of variable trackers, including flexible mortgages." The screen shot then refers to two such mortgages where the period of loan appears to be 2 years. Although it is not suggested that Mr. Alexander saw this screen shot when he accepted the lender's offer it was reasonably available to him and therefore Mr. Smith submitted that it was part of the factual matrix or background which would be admissible when construing the parties' agreement. In that regard Mr. Smith relied upon the phrase "certainty of knowing" as showing that it was envisaged that the interest rate would only change in line with the Base Rate.
34. Mr. Cox submitted that the screen shot was inadmissible because it was not issued by the lender but by its sole shareholder, the West Bromwich Building Society. Mr. Westhoff gave evidence that the lender operated its own website, access to which was restricted to registered intermediaries. I was not told what that website said about tracker mortgages but in any event it was not accessible by Mr. Alexander. In circumstances where Mr. Westhoff, as CEO of the Society, gave evidence on behalf of the lender I was not particularly impressed with the point that the court should ignore the screen shot because it was on the website of the Society rather than that of the lender. However, the screen shot referred to 2 year tracker mortgages rather than to mortgages for 25 years and it is not obvious that the terms of tracker mortgages for 2 and 25 years will be the same. Moreover, the screen shot itself says that a choice of variable trackers is offered. In those circumstances I do not consider that the screen shot can fairly or safely be regarded as part of the factual matrix which is admissible when construing the parties' agreement to a 25 year mortgage. The screen shot may

well have been referring to a mortgage with different terms from those agreed by Mr. Alexander.

The dispute as to termination of the mortgage

35. Clause 14 of the Mortgage Conditions provides that the borrower may be obliged to repay the loan in full 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 you 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.”
36. Mr. Smith submitted that the right to give one month’s notice requiring payment of the loan was inconsistent with the provisions in the Offer which stated in Box 3 that the term of the mortgage was 25 years, in Box 5 that the total amount to be paid back will vary if the borrower does not keep the mortgage for 25 years and in Box 6 that the borrower agreed to make a total of 299 monthly payments. Mr. Smith submitted that these Boxes made clear that the mortgage was to last for 25 years which was inconsistent with the lender having the right to terminate the mortgage on one month’s notice.
37. However, Mr. Smith accepted that the Offer was not inconsistent with the obligation to repay the loan if any of the other events in clause 14 occurred.

38. Mr. Cox submitted that none of the Boxes relied upon by the borrower referred to the possibility of early termination either by the lender or by the borrower. Clause 14 of the Mortgage Conditions provided for early termination by the lender and clause 19 provided for early termination by the borrower. Those clauses were not inconsistent with the Boxes relied upon because the Boxes said nothing about early termination. Mr. Cox further submitted that there was no rational distinction between the events listed in clause 14. Thus Mr. Smith's acceptance that the other events in clause 14 were effective was inconsistent with his primary submission.
39. Although Box 3 states that the period of the mortgage is 25 years other boxes contemplate that it may not last 25 years. Thus Box 5 refers to the event that the borrower does not keep the mortgage for 25 years and Box 10 refers to "Early Repayment Charges". Thus the Offer, read as a whole, envisaged early termination and made provision for the charges payable in that event, though Box 10 probably contemplates early termination by the borrower, not by the lender. The Offer did not, however, say anything about the circumstances in which there might be early termination. The Mortgage Conditions did so in clauses 14 and 19. There is therefore a cogent argument that those clauses are not inconsistent with the Offer but complement it. When they are read together with the Offer they set out the circumstances in which there may be early termination of the loan, either by the lender or by the borrower.
40. I have asked myself whether the provisions of the Offer can be said to contradict the right of the lender to require repayment of the loan on one month's notice. It is arguable that they do on the basis that, to the extent that the Offer makes provision for early repayment, it contemplates early termination by the borrower rather than by the lender. However, a term of 25 years is a long time and it is unrealistic to suppose that during that period the lender had no right to terminate the mortgage. It is accepted that all the events listed in clause 14 save for the giving of one month's notice apply and are not inconsistent with the Offer. That emphasises the unrealism in the suggestion that the lender has no rights to terminate the mortgage for 25 years. I have therefore concluded that a reasonable man would not have understood the Offer to contradict the provision in clause 14 that the lender may, in the events there specified, require repayment of the mortgage before the expiry of 25 years. Rather, he would have understood that clause 14, like clause 19, complemented the Offer and did not contradict it.
41. Mr. Smith also submitted that because the court would not order possession unless there was a default event the parties cannot have intended that the lender would have power to terminate the loan in the absence of a default. I did not follow this point. Section 8 of the Administration of Justice Act (on which Mr. Smith relied) applies "in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise." Thus the section contemplates that a mortgage may be repayable in the absence of a default.

Conclusion

42. Mr. Alexander is not entitled to the declarations which he seeks.