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

SKELETON ARGUMENT ON BEHALF OF THE DEFENDANT FOR TRIAL ON 21 JANUARY 2015

The Court has before it 4 trial bundles. References to the trial bundles in this skeleton argument are in the form **[file/tab/page number]**

If time allows, the Court is asked to pre-read the following (time estimate: half a day):

- Claim Form dated 6 May 2014 **[A/1/1-2]**;
- Acknowledgement of Service dated 23 May 2014 **[A/2/3-4]**;
- The witness statement of Mark Alexander dated 29 April 2014 ("Alexander ws") **[B/7/15-22]**;
- The witness statement of Jonathan Westhoff dated 20 June 2014 ("Westhoff ws") **[B/8/23-44]**;
- Offer of Loan letter from Defendant to Claimant dated 6 June 2008 **[C/13/97 and C/15/105-6]** enclosing:
    - (i) offer document **[C/14/98-104]**; and
    - (ii) Booklet "Information you need to know about your Mortgage" **[C/10/61-75]**, see especially Section C "Mortgage Conditions 2006" clauses 1, 5 and 14 **[C/10/67-9 and 72]**; and
    - (iii) Acceptance of Offer letter **[C/16/107]**;

- Acceptance of Offer letter dated 6 June 2008 signed by the Claimant **[C/16/107]**;
- Mortgage Deed entered into by the Claimant with the Defendant dated 15 July 2008 **[C/17/108]**; and
- The parties' skeleton arguments and the documents referred to therein

SUMMARY

1. This is the Defendant's skeleton argument in relation to the Part 8 claim for declaratory relief brought by Mark Robert Alexander ("**Mr Alexander**") as a representative claimant under CPR 19.6 regarding the true construction of a mortgage contract, on behalf of himself plus the 359 other represented persons (including all borrowers where an account is in joint names) holding 410 accounts who are listed as members of the "**Property 118 Action Group**" in the amended exhibit MRA/8 to Alexander ws **[C/63/365-388]**.

2. The Defendant has also sought a declaration, pursuant to CPR r.8.3(2)(b), as to the true contractual position **[A/2/3]**.

3. The Claimant contends in essence that although clause 5 and clause 14 first bullet of the Defendant's Mortgage Conditions have the meaning for which the Defendant contends, they are inconsistent with the offer document and overridden pursuant to clause 1 of the Mortgage Conditions.

4. The Defendant submits that there is no inconsistency between the Offer of Loan and either clause 5 or the first bullet point of clause 14. On the contrary, the Offer of Loan and the Mortgage Conditions fall to be read consistently as a suite of documents. Therefore the Defendant was entitled to increase the margin and would be entitled to call in the mortgage on one month's notice.

5. It is common ground that if the Claimant's claim of inconsistency fails then the Defendant's action in increasing the margin fell within clause 5 and was permissible, and the Defendant would be entitled to call in the mortgage on one month's notice.

BACKGROUND

The Mortgages

6. The Defendant is a retail lender, established in the mid-1990s as a wholly owned subsidiary of West Bromwich Building Society ("**the Society**"). The Defendant was regulated at all material times by either the Financial Services Authority ("**FSA**") or the Financial Conduct Authority ("**FCA**"). The Defendant was originally established as a vehicle to acquire mortgage books from other lenders. 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 (Westhoff ws at [4] and [6]).

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. In summary:

   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**");

   7.2. The 2004 Conditions were the Defendant's standard terms and conditions for Scottish properties and apply in respect of 23 of the 411 Property 118 Action Group accounts. The 2006 Conditions were the Defendant's standard terms and conditions for English properties and apply in respect of 388 of the 411 Property 118 Action Group accounts (including Mr Alexander's mortgage account);

   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 (including Mr Alexander's mortgage) 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;

7.5. Most of the 20,257 mortgages which were 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, and have been referred to as such in the witness evidence. The mortgages were either tracker mortgages from the outset ("**variable throughout**" cases), or converted to a tracker after an initial period at a fixed rate ("**fixed/variable**" cases).

(Westhoff ws at [7] and [8]).

Mr Alexander's Mortgage

8. Mr Alexander signed an Application Form on 1 May 2008 for a buy-to-let mortgage from the Defendant [**C/12/87-96**].

9. The Defendant sent Mr Alexander an Offer of Loan Letter dated 6 June 2008 [**C/13/97 and C/15/105-6**] under cover of which the following was also sent:-

9.1. an offer document [**C/14/98-104**]; and

9.2. the Defendant's Mortgage Booklet (including its Standard Conditions of Offer and 2006 Conditions) [**C/10/61-75**]; and

9.3. An Acceptance of Offer letter **[C/16/107]**.

10. Mr Alexander signed the Acceptance of Offer Letter dated 6 June 2008 **[C/16/107]**.

11. Mr Alexander entered into a Mortgage Deed ("**the Alexander Mortgage Contract**") with the Defendant on 15 July 2008 **[C/17/108]**. 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."

12. Mr Alexander's mortgage was therefore governed by the 2006 Conditions. The 2006 Conditions were contained in Section C of the Mortgage Booklet **[C/10/67-75]** and stated at clauses 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" was defined in clause 1 of the 2006 Conditions 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.*

13. The 2006 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" was 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.*"

14. Under the Alexander Mortgage Contract, interest was payable at a fixed rate of 6.29% for an initial period (until 30 June 2010) and, thereafter, at a variable rate of Bank of England Base Rate + 1.99%. The Alexander Mortgage Contract was therefore a fixed/variable case.

The margin variations

15. In September 2013, the Defendant wrote, by standard form letter [**C/19/127-8**], to those of its buy-to-let borrowers with tracker mortgages subject to the 2004 or 2006 Conditions 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), including Mr Alexander, notifying them that it had decided, pursuant to clause 5 of Mortgage Conditions, to increase the margin by 2%, with effect from 1 December 2013, in light of market conditions and in order to carry out its business prudently, efficiently and competitively (Westhoff ws at [9]). Such mortgagors were not consumers.

16. In November 2013, those borrowers, including Mr Alexander, were notified in writing, by standard form letter [**C/24/141**], that the increase in margin was to be reduced to 1.9% in light of slightly improved market conditions (Westhoff ws at [10]).

17. The increase in margin of 1.9% came into effect on 1 December 2013. Initially the increase in margin on 1 December 2013 affected 6,547 accounts. All of these accounts (i) were held by borrowers who were understood by the Defendant 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, as at 20 June 2014, the Defendant had reversed rate increases for 100 accounts following investigations into the number of buy-to-let properties held by those borrowers[1] (Westhoff ws at [11-12]).

18. As at 16 June 2014, the number of accounts subject to the increase in margin was 6250 (the reduction in the total number being due both to the reversal of the rate increase for the 100 accounts and the subsequent redemption of a number of previously active accounts). Of these 6250 affected accounts, 356 borrowers (including Mr Alexander) with a total of 409 accounts formed the Property 118 Action Group and on 6 May 2014 commenced these proceedings

[1] As at 1 January 2015 the number of accounts removed from the rate increase on the grounds that they did not own 3 or more buy-to-let properties was 102.

against the Defendant. In December 2014 a further 4 borrowers (Mr and Mrs Gujral and Mr and Mrs Taylor[2]) with 2 accounts joined the proceedings brought by Mr Alexander. The Claimant's counsel has stated that the claim has been brought by Mr Alexander on behalf of the other borrowers, not only with their knowledge, but with their specific consent and authority and that all borrowers together with Mr Alexander are funding the action via the payment of monies into a BARCO escrow account (Westhoff ws at [12]- [13]).

19. The margin increase has subsequently been reduced in light of improving market conditions:-

19.1. On 14 and 15 May 2014, the Defendant notified borrowers affected by the margin increase in writing, by standard form letter [**C/59/301**], that in light of improving market conditions, the Defendant had decided to reduce the margin increase by a further 0.2% to 1.7%. This reduction came into effect on 1 June 2014 (Westhoff ws at [20]).

19.2. On 20 November 2014, the Defendant notified borrowers affected by the margin increase in writing, by standard form letter, that in light of improving market conditions, the Defendant had decided to reduce the margin increase by a further 0.2% to 1.5%. This reduction came into effect on 1 December 2014.

The Financial Ombudsman Service

20. In summary, a number of the members of the Action Group have submitted complaints to the Financial Ombudsman Service ("**FOS**") in respect of the increase in interest rates, all of which have been rejected by FOS.

21. FOS provides an adjudication service free for complainants. The final decision of the Ombudsman is binding on the Defendant[3] but not binding on the complainant.

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[2] Mrs Taylor was not listed on the amended MRA/8, but the barrister for the Claimant has confirmed in an email dated 11 January 2015 that she is a represented person.

[3] Unless grounds for judicial review can be established.

21.1. As at the date of the Defendant's witness evidence (20 June 2014), 355 complaints about the Defendant's action in increasing the margin had been made by borrowers to FOS (Westhoff ws at [15]).

21.2. Of the 355 complaints to FOS as at 20 June 2014, 107 complaints were made by represented persons (Westhoff ws at paras 15 to 19 at **B/8/27-29**).[4]

21.3. As at the date of the commencement of these proceedings (6 May 2014) FOS Adjudicators had notified the Defendant that they had reached a decision on the merits in the case of 10 of the 107 complaints by represented persons, in each case issuing a view in the Defendant's favour.[5] The complainants had the right to challenge this view before the Ombudsman. It is not understood why these expensive proceedings were commenced in May 2014, prior to the exhaustion of the FOS complaints that many of the represented persons themselves initiated.

22. As at 1 January 2015:-

22.1. 368 complaints about the Defendant's action in increasing the margin had been made by borrowers to FOS.

22.2. Of these 368 complaints, 110 complaints were by represented persons[6].

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[4] See the list of complaints by represented persons in the exhibit to Mr Westhoff's witness statement at **[C/52/280-283]**. As can be seen from the list, some complaints are brought by joint borrowers and/or in respect of more than one account number. The 107 complaints were made by a total of 172 of the 355 represented persons and in respect of 211 of the 409 represented account numbers.

[5] The 10 complaints were: Jackson, Thornton, Henderson, Thomas, Newell, Stimson, Johnson, Finch, Bourne and Holmes.

[6] The 110 complaints to FOS by represented persons were brought by 177 of the 359 represented persons and in respect of 213 of the 410 represented account numbers.

22.3. 252 of these complaints have been considered on the merits by FOS. In 250 cases an Adjudicator has issued a view that the complaint should be rejected.[7]

22.4. Of the 252 complaints that have been considered on the merits by FOS, 18 are complaints by represented persons, all of which have been rejected.[8]

22.5. 77 of the 250 unsuccessful complainants have challenged the adjudicators' views on the merits to the Ombudsman. The Ombudsman has, to date, issued 2 decisions on the merits. These were both in the Defendant's favour, i.e. that the rejection of the complaint should be upheld **[C/64/389-389B and C/65/390-390B]**.

22.6. Further, and as a result of the commencement of these proceedings, FOS Adjudicators and/or the Ombudsman, notified the Defendant that they have dismissed all 110 complaints brought by represented persons, under DISP rule 3.3.4(9). 68 of the 110 complainants challenged this dismissal to the Ombudsman, who upheld the dismissal. This appears to have come as some surprise to the Action Group and their legal representative. If so, it is not understood why that should be so, as DISP 3.3.4(9) specifically states:

"*The Ombudsman may dismiss a complaint without considering its merits if he considers that ... the subject matter of the complaint is the subject of current court proceedings...*"

ISSUES

23. The Issues are:

23.1. Is clause 5 of the Mortgage Conditions inconsistent with Offer of Loan such that clause 5 is overridden pursuant to clause 1 of the Mortgage Conditions?

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[7] As regards the other two cases, in one case a borrower had been mistakenly classified by the Defendant as a borrower with 3 or more buy-to-let properties, and in the other case the properties were occupied by a disabled family members/close friend and were not income generating.

[8] The 18 complaints by represented persons which have been rejected by FOS on the merits are Jackson, Thornton, Iqbal, Henderson, Thomas, Newell, Stimson, Johnson, Finch, Bourne, Holme, Ivie, Foster, Cole, Callaghan, Hughes, Page and Clark/Philpot.

23.2. Is the first bullet of clause 14 of the Mortgage Conditions inconsistent with the Offer of Loan and so overridden pursuant to clause 1 of the Mortgage Conditions?

24. If, contrary to the Claimant's case, the Defendant is entitled to rely on clause 5 to vary the margin, it is not in dispute that the Defendant was in fact entitled to vary the margin under clause 5 in light of market conditions or the need to carry out its business prudently efficiently and competitively.

THE DEFENDANT'S SUBMISSIONS

25. In summary, the Defendant submits that

25.1. Clause 5 is not inconsistent with the Offer of Loan. The consequence, which is not in dispute, is that since 30 June 2010 the Defendant was entitled as it did under clause 5 to vary the margin.

25.2. Clause 14, first bullet is not inconsistent with the Offer of Loan, and the Defendant would have been entitled to accelerate the loan under clause 14 on giving one month's notice after 15 July 2008.

26. We deal first with the relevant principles and then their application to this case.

Relevant principles

27. The principles applicable to construing commercial contracts are well known, and are summarised in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [14], [21] and [30] and *BMA Special Opportunity Hub Fund v African Minerals* [2013] EWCA Civ 416 at [24]:-

27.1. The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, and that involves ascertaining what the reasonable person with access to all of the background knowledge reasonably available to the parties in the situation they were in at the time the contract was made (i.e. relevant and admissible factual matrix material) would understand the parties to have meant.

27.2. Evidence of pre-contractual negotiations and declarations of subjective intent are inadmissible.

27.3. If the terms of a contract have two or more possible interpretations, the court can, and generally should, prefer the interpretation most in accordance with business common sense, if that can be ascertained.

28. The principles to be applied in determining whether, on their true construction, contractual provisions are *inconsistent* are well settled. The task before the Court is to:

28.1. Ascertain the meaning which the relevant provisions (i.e. the Offer of Loan Letter, the offer document, the Standard Conditions of Offer and clauses 5 and 14 of the Mortgage Conditions), read together with the rest Alexander Mortgage Contract as a whole, would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (*ICS v West Bromwich Building Society* [1998] 1 WLR 896, HL at 912H).

28.2. Determine whether on their true construction those provisions can sensibly be read together. Provisions are inconsistent if they cannot sensibly be read together (*Pagnan SpA v Tradax* [1987] 2 Lloyds Rep 342, CA at 353, Col. 2).

28.3. As regards any assertion of inconsistency between the terms of a contract, the first task of the Court (prior to the application of any paramountcy clause such as that in clause 1 of the Mortgage Conditions) is to ascertain whether there is a conflict or inconsistency to resolve. Bingham LJ, in *Pagnan SA v Tradax* [1987] 2 Lloyd Rep 342, CA, at 350, Col.1-2, summarised the proper approach in the following terms:

"*One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not.....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.*"

See also *Cobelfret Bulk Carriers v Swissmarine* [2009] EWHC 2883 (Comm) at [24] to [29] and [35] to [36].

28.4. It is to be expected that provisions in different contractual documents complement each other and it is only in the case of a clear and irreconcilable discrepancy that it is necessary to resort to a contractual order of precedence (such as the paramountcy clause in clause 1 of the Mortgage Conditions) to resolve construction (*RWE Npower Renewables v Bentley* [2014] EWCA Civ 150 at [15]).

> *"I start, as did the judge, from the position that the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. I also note, as he did, that Option X5 is worded in more general terms than clause 6.2, which identifies in rather greater detail the work comprised in each section.... Despite differences in detail, however, one would expect the two provisions to complement each other and that only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.*" (Moore-Bick LJ).

Akenhead J had considered the same point in more detail at first instance ([2013] EWHC 978 (TCC)) at [24] as follows:

> *"In this case, the parties did make some provision in Clause 2 of the signed contract and provided for an "order of precedence" in the various documents with Contract Data Part 1 being the first and the Works Information and Contract Data Part 2 being well down the order. But the order of precedence is effectively prefaced by the words that all the documents are "deemed to form and be read and construed as part of this Agreement". Accordingly, this is a contract which is to be construed in the usual way by reference to all the documents forming part of the Contract. It is only if there is an ambiguity or discrepancy between two or more contract documents that one then needs to have regard to the order of precedence. I did not understand from Counsel that there was any material disagreement with this conclusion. It is obviously right. One can take an example where the Contract Data Part 1 document required the powerhouse to be painted white but the Works Information required it to be painted black. That is on its face an irreconcilable ambiguity and the contract would be construed as requiring white paint. What one cannot 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; in those circumstances, one does not need the "order of precedence" to resolve an ambiguity which does not actually on a proper construction arise at all."

29. Where a contract confers a discretion on one party, and the exercise of that discretion may adversely affect the interests of the other party, it is implicit that the discretion must be exercised honestly and rationally and for the purposes intended. The exercise of the discretion in accordance with uninhibited whim is not permitted. In *The Product Star (No 2)* [1993] 1 Lloyd's Rep 397, Leggatt LJ said at p.404:

> "***Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.***"

30. The purpose of this well-known principle was explained by Rix LJ in *Socimer v Standard Bank* [2008] 1 Lloyd's Rep 558, at [66]:

> "*It is plain from these authorities that a decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a*

reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria."

See generally Lewison, *The Interpretation of Contracts*, 5th edition, at para 14.11.

31. The principle was indeed applied in the case of a clause which gave a mortgagee a discretion to vary an interest rate in *Paragon v Nash* [2002] 1 WLR 685, at [41 to 42]. That was a case of a variable rate mortgage but the principle would equally apply to the variation of margin under a tracker.

32. As to what background material can be taken into account, there is no conceptual limit to admissible background material (*BCCI v Ali* [2002] 1 AC 251 at [39]). It can include anything relevant which would have affected the way in which the document would have been understood by a reasonable person. However, the use of background is nonetheless subject to natural limits. The established[9] limitations are:

    32.1. relevance;

    32.2. the facts must have been known to/ reasonably available to the parties and to anyone else to whom the contract is treated as having been addressed;

    32.3. the facts must be objective and not introduce, in effect, the subjective intention of the parties; and

    32.4. the material must serve to elucidate the contract and not contradict it.

33. Further, there are certain types of contracts where, although certain factual matrix material is admissible (i.e. that which relates to the industry or material that can be derived from the wording of the contract itself such as deductions as to commercial purpose), background material simply known to both contracting parties is unlikely to be admitted. A standard form

[9] See, for example, *BCCI v Ali* at [39], *Chartbrook v Persimmon* [2009] 1 AC 1101 at [40] and *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Rep 423, Comm. Ct. at 429, col. 2.

contract is an archetypal example. In *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94 at [7] Lord Millet said:

> *"A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited. The danger, of course, is that a standard form may be employed in circumstances for which it was not designed. Unless the context in a particular case shows that this has happened, however, the interpretation of the form ought not to be affected by the factual background."*

34. This is not a case where the standard form was used in circumstances for which it was not designed. Accordingly, given the need to construe standard form documentation in the same way in all cases, the only material which can safely be said to be relevant to the objective presumed intention of the parties in this case is the contractual documentation itself, and any factual matrix material known to or reasonably available to all borrowers across all time periods.

Application of principles to clause 5

35. It is submitted first, that the natural meaning of clause 5 was that it allowed the margin to be varied after the initial period when the mortgage was expressed to be a fixed rate. The Claimant accepts that this was its meaning. But he contends that clause 5 was inconsistent with the Offer of Loan and must therefore be rejected, relying on paramountcy clause 1. Clauses 5 specifically states that it applies "*except during any period in which interest is expressed to be at a fixed rate*". As Mr Alexander acknowledges, at Alexander ws [4], he was to pay "an initial fixed rate of interest reverting thereafter to a variable rate interest only mortgage". Therefore:

35.1. 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;[10] and

[10] Mr Alexander therefore mischaracterises the Defendant's case at paragraph 18 of his skeleton argument. The Defendant has never contended that clause 5 applies regardless of how the rate is stated as being calculated in the Offer of Loan. On the contrary, the Defendant's case is that clause 5 does not apply during any period in which

35.2. 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"[11]. As such, once the interest payments had moved to a variable rate then, on the clear wording of Clause 5, that clause was applicable.

36. Second, the Claimant contends that the right to vary the margin is inconsistent with the 4th box of the offer document (the same points are made on the 6th box): skeleton para 2. It is said that box 4 "defined" the variable rate as the BoE rate plus a margin of 1.99%. The correct question in principle is whether clause 5 can be sensibly read with box 4. It is submitted that it can. Box 4 stated the rate including the margin of 1.99% but box 4 did not state that the margin so stated could not thereafter be varied in accordance with the contractual mechanism, or otherwise seek to refer to or exclude clause 5. Box 4 simply did not say anything about the mechanism for variation in clause 5. Box 4 can and should sensibly be read subject to all the other terms in the contract relating to interest which are not referred to in box 4, including clause 5. There is nothing in box 4 which is inconsistent with the application of clause 5 to the stated margin, and no necessary reason to read box 4 as inconsistent with clause 5. Box 6 is in the same terms as box 4 and the same points apply.

37. The Claimant therefore fails to demonstrate any inconsistency between the Offer of Loan and clause 5, or indeed to engage at all with the case-law summarised above. Indeed, the Claimant's approach, which is to seek to read and construe the offer document in isolation, and then seek to construe clause 5 in isolation, and to contend that they are inconsistent, is not only factually incorrect. It is also misguided in law because it is contrary to the approach set out in the authorities at paragraph 28 above, which is to construe the provisions as a whole and see whether they can be construed consistently. Plainly in this case they can be.

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interest is expressed in the Offer of Loan to be at a fixed rate. However, clause 5 applies to all other periods, including periods where interest is expressed in the Offer of Loan to be at a variable rate.

[11] See the fifth box of paragraph 4 "*After 30 June 2010 your loan reverts to a variable rate…*" **[C/14/99]** and the third box of paragraph 6 **[C/14/100]** "*This new payment will continue for 277 payments at a variable rate…*"

38. Third, the Claimant asserts that it makes no commercial sense if the Defendant was able to vary the margin. This is not correct. The mortgage was not for a fixed period after the initial period. The loan could be repaid at any time by the Claimant. If the Claimant did not like the margin as varied the Claimant could terminate the loan and remortgage. From a commercial point of view, the pressure was on the Defendant to keep the rate competitive or lose the business.

39. Further, if the Defendant is correct, the Defendant was entitled under clause 14 1st bullet to accelerate repayment of the loan on one month's notice. The mortgage could be terminated early by either of the Claimant or the Defendant. Rather than accelerate the loan under clause 14, the Defendant had the right under clause 5 to vary the margin, if that would be better from a commercial point of view, as it did. The Claimant might prefer to accept the varied margin than remortgage. This structure made commercial sense.

40. The Claimant argues that the liability should not be governed by the "whims" of the lender (skeleton 17), without reference to the implied obligation on the lender not to exercise its discretion to vary the margin honestly, and in good faith and not arbitrarily.

41. Fourth, the Defendant's right to vary the interest rate was repeatedly made clear in the documents sent to Mr Alexander and acknowledged:

41.1. Mr Alexander's Application Form **[C/12/87-96 at 93]** stated:

"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.";

41.2. Section A of the Mortgage Booklet **[C/10/62]** 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...*";

41.3. Mr Alexander's signed Acceptance of Offer letter dated 6 June 2008 **[C/16/107]** stated:

"I accept the Offer of the Loan specified above and have read and understand the Special and Standard Conditions of Offer. I acknowledge:-
your right to...vary the rates of interest and monthly payments..."

42. Fifth, the Claimant cannot rely on the patamountcy clause in clause 1 of the Mortgage Conditions to override clause 5. Clause 1 refers to the "Offer of Loan" which means "*the offer of Loan made by us and 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.*" It is only if the terms of the Offer of Loan as defined is inconsistent with the terms in the Mortgage Conditions that the terms of the Offer of Loan prevail. The Claimant relies only on the terms of the offer document in support of the argument and wrongly ignores the other documents which comprise the defined Offer of Loan.

43. Mr Alexander's Offer of Loan Letter dated 6 June 2008 **[C/13/97]** specifically incorporated the Mortgage Conditions (including clause 5). It also and 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*";

The Standard Conditions of Offer (contained in Part B of the Mortgage Booklet at **C/10/65**) also 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*"

44. The mortgage conditions and specifically clause 5 can be read together with all the other documents which comprise the Offer of Loan. It is submitted that the paramountcy clause 1 was aimed at a case where, for example, the Offer of Loan letter states that the interest is payable annually and the Mortgage Conditions provide that is payable monthly (like the example of an irreconcilable difference referred to by Akenhead J in *Npower*). Another example would be a specific reference in the offer document to alterations to standard terms. 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 **[C/11/76-86 at 78 and 85]**: "*...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*".

45. Sixth, if, as the Claimant contends, clause 5 of the Mortgage Conditions is inconsistent with the Offer of Loan issued to borrowers with tracker mortgages, such that the terms in the Offer of Loan prevail pursuant to the paramountcy clause 1, then it would appear to follow that clause 5 can never be invoked by the Defendant in respect of a tracker mortgage. The Defendant would have no power to vary the interest rate for a borrower on a tracker mortgage, save where such variation is specifically provided for in the Offer of Loan. The only variation specifically provided for in the Offer of Loan is where Bank of England Base Rate changes, the offer document stating "*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.*" So, a variation in the interest rate would, on the Claimant's case, not be permitted even if required by law, regulation or code of practice. That is an extreme construction which cannot be correct.

Application of principles to the first bullet point of Clause 14 of the Mortgage Conditions

46. Mr Alexander claims that the first bullet point only of clause 14 of the Mortgage Conditions is inconsistent with paragraphs of Mr Alexander's offer document **[C/14/100]** which formed part of the Offer of Loan such that the first bullet point of clause 14 is overridden pursuant to clause 1 of the Mortgage Conditions. The Claimant relies on the reference in box 3 of the offer document to the term being 25 years. He also relies on the reference to 25 years in box 5 and to 277 monthly payments over the mortgage term in box 7. The Claimant's claim is incorrect.

47. First, none of these boxes refer to the possibility of early termination of the mortgage either by the Defendant or the Claimant, yet that was obviously permitted. The boxes are not inconsistent with early termination because they say nothing about it. Further:-

    47.1. The Claimant was entitled to repay the loan early at any time under clause 19. There were no charges unless the rate was fixed.

    47.2. The Defendant was entitled to accelerate repayment of the loan early on any of the grounds in clause 14, including for example, non-payment and breach of conditions. Remarkably, the Claimant originally contended that all of these provisos were inconsistent with the offer document which would have meant that the Defendant could not accelerate repayment if the Claimant were in default. That position has been belatedly abandoned in the skeleton and the Claimant now contends that only the first bullet of clause 14 is inconsistent with the offer document. But the offer document provides no basis whatever for distinguishing between the first bullet and the other bullets in clause 14. The Claimant in effect now concedes that the offer document is not inconsistent with early termination on the ground of the other bullets in clause 14. That must equally apply as a matter of construction to the first bullet.

48. Second, the Claimant wrongly focuses on the offer document, whereas in fact he must establish inconsistency between (i) the documents comprising the Offer of Loan read as a whole and (ii)

clause 14. There is no inconsistency between the documents comprising the Offer of Loan and clause 14. On the contrary:-

48.1. Mr Alexander's Offer of Loan Letter dated 6 June 2008 specifically incorporated the Mortgage Conditions (including clause 14) **[C/13/97]**.

48.2. The Offer of Loan Letter **[C/13/97]** states "YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR MORTGAGE". This is a reference to parts of clauses 14 and 15 **[C/10/72]**.

48.3. The Standard Conditions of Offer (which comprise part of the Offer of Loan) state at clause 11 **[C/10/65]** "*If you do not maintain the regular payments required under the loan, then you run the risk of losing your home*". This is a reference to parts of clauses 14 and 15.

49. Third, as to the new argument made at paragraph 25 of the Claimant's skeleton argument, the relevance of these statutory provisions to the contractual construction issue before the Court is not understood. Section 8 of the Administration of Justice Act 1973 would have been entirely unnecessary if mortgage contracts could not and did not provide, as a matter of contractual construction, that a mortgage was repayable on demand. This section simply means that a court *may* offer relief from an application for possession where a mortgagee has invoked a contractual right for repayment on demand. The existence of this statutory provision in fact shows, contrary to the Claimant's submissions, that it is perfectly possible and normal for a mortgage to be repayable on demand as a matter of contractual construction.

Application of the principles to the mortgages of the represented persons

50. As stated above, the tracker mortgages granted by the Defendant to buy-to-let borrowers fall into two broad categories, namely fixed/variable cases (Mr Alexander's case is such a case) and variable throughout cases. Approximately 17.5% of the 411 Property 118 Action group accounts are fixed/variable cases and approximately 82.5% are variable throughout cases (Westhoff ws at [49] and **C/56/290-298**). Each type of mortgage was subject to Mortgage

Conditions which contained the same clauses 1, 5 and 14. Further, 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. It is therefore common ground that the contractual construction answer is the same for a fixed/variable and variable throughout case[12] and that Mr Alexander is therefore capable of representing both categories of case under CPR 19.6. However, so that the Court is aware of the full position, the parties agreed that the Defendant would exhibit to its evidence an example file of a Property 118 Action Group member with a variable throughout case. Therefore, the file of Mr and Mrs Grunberg is exhibited to Westhoff ws at exhibit pages 236-253 **[C/18/109-126]**.

51. It is submitted that the analysis set out at paragraphs 35 to 49 above applies in exactly the same way to a variable throughout case. In a variable throughout case the Company has the ability under clause 5 to vary the margin, subject to the provisions of clause 5, from the date the mortgage contract is entered into.

The evidence contained within Alexander ws that is irrelevant and/or inadmissible and/or of no assistance to the Court

52. Finally, we turn to aspects of the evidence within Mr Alexander's witness statement which have not been considered above because they are irrelevant and/or inadmissible and/or of no assistance to the Court in determining the contractual construction issue the Court is to decide.

53. Mr Alexander seeks to rely[13] on a screenshot taken from the Society's website www.westbrom.co.uk containing a statement that as regards the mortgage product referred to therein (a 2 year Tracker Bank Base Rate + 0.99% with the Society)[14] "*Tracker mortgages give*

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[12] I.e. 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 for a fixed/variable and a variable throughout case.

[13] Alexander ws at [10] and **C/12A/96A**.

[14] In the Claimant's skeleton argument he refers at paragraph 7 to the version at **C/23/140**, rather than the version he attached to his witness statement at **C/12A/96A**. However, there is no material difference between the two versions. That at **C/23/140** is also taken from the Society's website www.westbrom.co.uk and contains the same statement as

you the certainty that the amount you pay will move in line with Bank Base Rates. We offer a choice of variable trackers, including flexible mortgages...". It is submitted that this statement is obviously irrelevant for myriad reasons with which the Claimant makes no attempt to grapple.

54. First, 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%"[15] which was a product offered by the Society (not by the Defendant) and was offered by the Society to residential borrowers only. The Defendant operated its own website, West Brom for Intermediaries, separate from the Society's website, and only accessible by registered brokers. 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. The Society's website only referred to products offered by the Society itself, and not those offered by the Defendant (Westhoff ws at [40.2]).

55. Second, in any event, it is in any event not admissible factual matrix material. Mr Alexander has adduced no evidence that he was aware of the screenshot at the time he entered into the Alexander Mortgage Contract. Prior to the commencement of the proceedings he initially produced, attached to a draft witness statement, a screenshot dated 25 September 2013 i.e. that post-dated his contract [**C/27/185**]. From this it is clearly to be inferred that he was not aware of the screenshot exhibited at MRA/3 at the time of entry into the contract 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

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regards the mortgage products referred to therein with the Society ((i) a 2 year Tracker Bank Base Rate -0.05% and (ii) a 2 year Tracker Bank Base Rate + 0.10%).

[15] Or (i) 2 year Tracker Bank Base Rate -0.05% and (ii) a 2 year Tracker Bank Base Rate + 0.10% in the case of the document at **C/23/140**.

machine [**C/23/135 and 140**].[16] (Westhoff ws at [40.3.2]). Given that it can be shown that Mr Alexander was unaware of the screenshot at the time of entry into the Alexander Mortgage Contract, it is not capable of being admissible factual matrix material (*Challinor v Juliet Bellis* [2013] EWHC 347 at [279] (5)).

56. Thirdly, the screenshot is dated 31 May 2008 but many of the Company's borrowers (including members of the Property 118 Action Group whom Mr Alexander claims to represent) entered into their mortgages prior to 31 May 2008. Therefore there will be many borrowers for whom the Society screenshot is incapable of being factual matrix material. Even as regards borrowers who entered into their contracts after 31 May 2008, there will be at least some (the Defendant would submit the vast majority) who would have been entirely unaware of the Society screenshot and for whom the Society screenshot would be incapable of being factual matrix material.

57. Fourth, these are standard form contracts (see Westhoff ws at [7.4] and [40.3.1]). It is clear that in such cases, material which would only have been seen by some borrowers but not others is not admitted as factual matrix material, given the need to construe standard form contracts consistently for all borrowers (see, for example, *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94 at [7] at paragraph 33 above).

58. Fifth, the Alexander Mortgage Contract permits assignment by the Defendant (clause 15.7 of the Mortgage Conditions) [**C/10/72**]. This means that the contract was not simply addressed to the particular borrower, Mr Alexander, but also to a potential future assignee of the Defendant. The Society screenshot would not be reasonably available to an assignee and therefore it is inadmissible in construing the contract (see *Phoenix Commercial Enterprises v City of Canada* [2010] NSWCA 64 at [151] and [154] and *Cherry Tree Investments Ltd v Landmain* [2012] EWCA Civ 736 at [149]).[17]

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[16] As stated above, in the Claimant's skeleton argument he refers to the version at **C/23/140**, rather than the version he attached to his witness statement at **C/12A/96A**. However, there is no material difference between the two versions.

[17] Cf Lord Hoffmann's judgment in *Chartbrook v Persimmon* at [40]. The author of Lewison, Interpretation of Contracts, 5th edition, at paragraph 3.18 prefers the view in *Phoenix Commercial Enterprises v City of Canada*. In

59. As regards the material extracted from the websites of the Council of Mortgage Lenders, the Money Advice Service and the FCA, Mr Alexander does not state on what grounds he contends these to be relevant to the construction of the Alexander Mortgage Contract. It is submitted they are plainly irrelevant, as the Claimant appears now to accept as this material is not referred to in his skeleton argument.

60. Mr Alexander states at Alexander ws [4] and [11] that he subjectively intended paragraph 4 of the offer document to have a different contractual effect. Mr Alexander's subjective intentions are irrelevant to the objective question of whether, as a matter of construction, there is an inconsistency between (i) the Offer of Loan and (ii) clause 5 and/or 14 such that clauses 5 and 14 cannot be relied upon.[18]

CONCLUSION

61. For the reasons set out above, the Court is asked to:

61.1. Answer the questions set out in Mr Alexander's claim as follows;

61.1.1. 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.

61.1.2. 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

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Cherry Tree Investments Ltd v Landmain [2012] EWCA Civ 736 at [149], Longmore LJ preferred the view of Lewison and stated that the difference between his view and that of Lord Hoffmann was perhaps more apparent than real.

[18] See, for example, *The Proctor & Gamble Company v Svenska* [2012] EWCA 1413 (cited by the Claimant) at [38]. It is not understood why the Claimant submits that this case assists him.

61.1.3. 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

61.2. Dismiss the claim for repayment and for costs brought by Mr Alexander;

61.3. Grant the declaration sought by the Defendant; and

61.4. Order Mr Alexander and the represented persons to pay the Defendant's costs. To the extent that it is necessary to do so, the Claimant is content to apply to join the represented persons as parties to the claim, for the purposes of obtaining non-party costs orders.

Raymond Cox QC
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Fountain Court Chambers
Temple
EC4Y 9DH
15 January 2015