

IN THE COURT OF APPEAL

CASE NUMBER

CIVIL DIVISION

On an application for permission to appeal from

THE HIGH COURT OF JUSTICE

Claim No 2014 Folio 538

QUEEN'S BENCH DIVISION

IN THE COMMERCIAL COURT

BETWEEN

MARK ROBERT ALEXANDER
(as representative of the "Property118 Action Group")

APPLICANT

-V-

WEST BROMWICH MORTGAGE COMPANY LTD

RESPONDENT

APPLICANT'S SKELETON ARGUMENT ON APPLICATION FOR
PERMISSION TO APPEAL

1. The applicant submits that his appeal has a real prospect of success.
2. The applicant also submits that there are other compelling reasons for the appeal to be heard, namely the potential consequences of the ruling at trial. If the ruling is upheld, and if the lender is given licence to remove the margin over reference rate previously treated by both parties as binding, then many thousands of financial products could be interpreted in a way not previously followed in the financial services

sector, with serious consequences for borrowers. There would also be adverse consequences for professional advisers who would face claims in professional negligence if they failed similarly to anticipate the ruling of the Court in advising their borrower clients.

3. The appeal concerns contractual interpretation, and it turns on whether two standard clauses in the Respondent's Mortgage Conditions are incorporated into the contract, or are excluded from it as being inconsistent with the terms of the special conditions in the Respondent's Offer of Loan.

The documents

4. The mortgage contract is spread over two documents, the first being an 'Offer of Loan' specifically written to the Applicant, made up of an offer document and covering letter (Tab 1, pages 1-8), and the second being a printed booklet of standard Mortgage Conditions (Tab 2, pages 9-22) which is generic to the Respondent's entire mortgage product range.
5. The relationship between the two parts is governed by a paramountcy clause (at Tab 2, page 16, final 'bullet' point in left-hand column), which reads 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”.

The Applicant's case; introduction

6. It is the Applicant's case that there is inconsistency between the material terms of the Mortgage Conditions, and the material terms of the Offer of Loan, and that therefore the latter should prevail.
7. The material terms of the Offer of Loan can be found in Box 4 (Tab 1, top of page 2)

"i) 'Buy to Let 6.29% fixed until 30.6.2010 (115% cover)- a fixed rate. 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 day of the month in which case it will be applied on the 1st day of the second month following the change.

ii) Rate payable 6.29%.

iii) After 30th 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 day of the month in which case it will be applied on the 1st day of the second month following the change'".

(Referred to hereafter as SpC4) and the "Term of Mortgage" being 25 years (SpC3) (Tab 1 page 1)

The material terms in the Standard Conditions are to be found at paragraphs 5 and 14 of the Standard Conditions (Referred to hereafter as SC5 and SC14) (Tab 2, pages 16 and 20)

The Applicant's case; part 1, Interest rates

8. The Applicant's case is that this type of mortgage is universally known as and treated as a 'tracker mortgage' and the parties contracted for the same. The Respondent agrees with the contention that the mortgage under consideration is a tracker mortgage, and gave evidence as such¹. The Applicant submits that this evidence should be treated as part of the matrix of fact.
9. The Applicant gave unchallenged evidence in his witness statement² of various definitions of tracker mortgages given by various financial services bodies as follows;

"11....

The Council of Mortgage Lenders website says:

"What types of interest rates deals are there?

Fixed-rate - your interest payments are fixed for a set period of time after which you will be moved on to another rate, such as the standard variable rate or tracker rate.

Standard variable rate - your interest will vary with your lender's mortgage rate.

Tracker rate - your interest rate will move up or down by tracking an external rate such as the Bank of England rate or London interbank rate".

¹ Statement of the Respondent's Chief Executive Jonathan Westhoff (Tab 3 page 23)

² Tab 4 pages 24-25

The Money Advice Service, set up by the Government, says:

“Tracker mortgages

Tracker mortgages move directly in line with another interest rate, normally the Bank of England’s base rate. So if the base rate goes up by 0.5%, your mortgage rate will go up by 0.5%.

The advantages of tracker mortgages

If the rate is linked to the Bank of England base rate and it falls, you’ll know for sure that your mortgage payments will fall.

The disadvantages of tracker mortgages

If the rate being tracked goes up too much, you may struggle to meet your repayments.

You may have to pay an early repayment charge if you want to switch.

Suitable if you’re looking for...

The opportunity to pay less when interest rates are low and don’t mind the risk that rates might rise”.

The Financial Conduct Authority website says:

“Tracker- where the interest rate is guaranteed to move in line with either the Bank of England Base (or repo) Rate (BBR) or another index such as LIBOR (London InterBank Offered Rate).

Capped (and collared) rate mortgage where the interest rate is guaranteed not to exceed a stated maximum rate (the ‘capped’ rate) for specific period of time, but where the standard variable interest rate applies when the rate is lower than the capped rate. Also includes products where the interest rate is subject to a minimum rate (the ‘collared’ rate)””.

The Applicant submits that this evidence should be treated as part of

the matrix of fact.

10. The Respondent reported the contested loans to credit rating agencies as 'tracker mortgages' (Tab 5, page 26-27). The Respondent's owning company, WBBS, advertised tracker mortgages with the following advertising message "Tracker mortgages give you the certainty of knowing that the rate you pay will move in line with bank base rates". (Tab 6, page 28). The Applicant submits that this evidence should be treated as part of the matrix of fact.
11. It is submitted that the clear and only interpretation of SpC4. '*..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%*' is that this is the only method that will be used to calculate the rate payable by the Applicant. The use of the phrase '*until the term end*' refers to the 'Term of Mortgage' on box 3 of the Offer of Loan, (Tab 1, page 1) being 25 years. The overall conclusion submitted by the Applicant is that in every moment that the loan is extant (after the fixed rate period) the interest on it is calculated in accordance with this formula, which is applicable at every point in the life of the mortgage '*until the term end*'. There is no indication that any other method of varying the rate is contractually possible in the body of SpC4.
12. The Applicant submits that the reasonable borrower, in possession of the Offer of Loan, cognisant of the 'paramountcy' clause and of the advertising of the 'tracker' product by the Respondent, would conclude that the contract meant what Box 4 said it meant-that the interest rate would be calculated in this way, and no other, '*until the term end*'.

13. In respect of the Applicant, and some 6700 other broker-introduced loans, the Respondent, citing its powers under SC5, increased the *'premium'* over the Base Rate, initially by 2% in September 2013, which was subsequently reduced to 1.7%, and then 1.5%. It is the Applicant's case that no such increases were and are contractually permitted. (No such increases were made in respect of directly-sold loans, or those where the borrower owned fewer than 3 buy-to-let properties as of September 2013).

The Applicant's case; part 2, Accelerated repayment

14. In the ordinary course of events, barring any 'default event' on the part of the borrower, a reasonable man would expect to have 25 years to repay the sum advanced if the mortgage term granted was 25 years. The Mortgage term is specified as 25 years (Tab 1, page 1), and the Applicant submits that, because borrowers regulate their affairs in the legitimate expectation of having 25 years to repay, this is the commercial purpose of the contract. There would be little appetite amongst borrowers for a type of loan that was liable regularly to be 'called-in' part way through, even where their adherence to the terms had been faultless.

15. In advising the Applicant of the initial increase in the premium over base rate, the Respondent claimed to have a power to require accelerated repayment of the loans on 30 days' notice, pursuant to SC14, despite the absence of a default event.

16. The Applicant submits that the terms of the Offer of Loan prevail in the

case where there is no default event, as being inconsistent with the stated Term of 25 years and the commercial purpose of the Loan.

Commercial purpose of a tracker mortgage

17. The key distinguishing feature of this and all other 'tracker mortgage' products is that the lender's power to vary the rate payable is ceded. Variations of the rate are only permitted when the reference rate varies, and only then in accordance with the formula set out above in paragraph 11.
18. Put another way, this means that borrowers are protected from having to accept interest increases made necessary by the individual needs of the lender. In this case, this is what has brought about the increase in margin by the Respondent. (This is evident from the rating agency report (Tab 5, page 26-27). The Respondent entered into a security arrangement which was evidently drafted in such a way as to fail to prevent the Respondent finding itself in the situation which it now is, of receiving less from the Applicant and fellow borrowers than it is obliged to pay on to the security owner. It is to avoid having to bear the consequences of such imprudence by a lender that makes a tracker mortgage product is appealing to a borrower.
19. This type of product differs from a standard variable rate mortgage product, which can be varied in accordance with the criteria set out in SC5.

20. The Applicant submits that if a 'tracker mortgage' was susceptible to changes in the interest rate pursuant to SC5 there is no point in marketing a tracker mortgage, as the feature that distinguishes that product, set out in paragraph 11 above, from a lender's standard variable rate is removed. The Applicant submits there can be no purpose in having these two types of product if the conclusion on this point drawn by Teare J is correct, and as such the only reasonable objective reading of the contract as a whole, given all the background knowledge and the position of the parties, is the one contended for by the Applicant.

The approach of Teare J

21. His Lordship read and considered what the Applicant submits to be the material documents referred to in this skeleton. His Lordship summarised the respective arguments accurately at paragraphs 12 and 13 of his judgment. The issue being whether SC5 merely qualified SpC 4 or was inconsistent with it.

22. His Lordship then went on to formulate the test he would apply in determining that first question, at paragraphs 14 and 15

"It is not enough that 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". In the same case Dillon LJ said .. , there is "inconsistency when two clauses cannot sensibly be read together".

23. His Lordship reviewed some of the general authorities on reviewing the contract as a whole and not clause by clause, in order to discern a clear and sensible commercial interpretation, free from ambiguity. His Lordship did not find it necessary to include references to the seminal authorities of ICS and Rainy Sky in that part of the judgment, but the Applicant would not seek to argue against the proposition that the whole of the contract should be considered in discerning the parties' respective obligations, and the court should seek to give effect of the entirety of the contractual terms where possible.
24. Finally, His Lordship set out part of the judgment of Moore-Bick LJ in RWE³- it would only be necessary to have regard to a paramountcy clause in the event of 'clear and irreconcilable discrepancy'.

The Applicant's submissions on this approach

25. The Applicant does not seek to dissent from the principles enumerated by His Lordship governing the approach. What he submits is that the application of these principles by His Lordship was flawed.
26. The Applicant submits that the meaning of the whole of the contract is that the Applicant and Respondent agreed that the mortgage would be a 'tracker mortgage' as universally known in the sector. Neither party seeks to deny that the product was a 'tracker mortgage', a word used as a shorthand description in the sector to describe the interest

³ RWE Npower Renewables Ltd v J N Bentley Ltd [2014] EWCA Civ 150 (19 February 2014)

arrangement set out in detail at SpC 4.

27. The Applicant submits that clauses are irreconcilable. The Applicant submitted at trial, as summarised in paragraph 21 of the judgment of Teare J, that the effect of SpC 4 was that the only circumstance (applicable over the entire term of the mortgage), where the interest rate could change is when the reference rate changed, and only then with the premium remaining constant at 1.99%. That is the only interpretation of SpC4, as accepted by Teare J in paragraphs 19 and 20 of the judgment.
28. The Applicant submits that to allow SC5 to 'qualify or modify' SpC 4 would prevent SpC4 of having effect. This effect which is removed from the clause, submits the Applicant, is the protection of the borrower from being subjected to unilateral interest rate rises from the lender. This is the primary effect, and the only difference between a tracker mortgage and a standard variable rate mortgage.
29. The Applicant submits that his approach brings about an interpretation that gives an unambiguous reading of the contract by giving proper effect to its commercial purpose, and consistency with the factual matrix set out in paragraphs 8-10 above.
30. An example of the correct approach, in the Applicant's submission, is in CLP Holding v Singh [2014] EWCA Civ 1103 . In that case, to which His Lordship was not taken, a general condition that a buyer would be liable to pay the VAT on sale of commercial property was held to be irreconcilable with a special condition that the purchase price payable

was “£130,000”, which was in the event not inclusive of VAT. It would have been possible to read the two clauses together, but the inconsistency in requiring payment of VAT on top of the expressed purchase price was held to be irreconcilable, by Kitchin LJ and therefore the special condition prevailed over the general by the paramountcy clause.

31. The Applicant respectfully submits that His Lordship has gone too far in seeking to preserve and give effect to every clause in the contract. It is not possible, submits the Applicant, to give effect to SpC4 as it was objectively intended to have effect, whilst giving effect to SC5 as it was objectively intended to have effect. One must yield to the other. In that case, the order of priority clause must come in to play, and give SpC4 paramountcy.
32. The Applicant makes the same submissions in principle on SC14. The special conditions show that the Term of the Mortgage is 25 years. The Applicant may redeem it sooner, but cannot be required to do so, absent a default event. It cannot be consistent with the commercial purpose of the loan, advanced as it is to property investors and not residential consumers, to require redemption of it on one month’s notice. The Applicant submits that a reasonable person armed with the facts reasonably available to him at the time of entering into a 25 year mortgage was entered into would reasonably expect that he would have 25 years to repay it (absent a default event). For the same reasons as advanced above, the Applicant submits that SC14 is inconsistent with SpC3.

33. In paragraph 40 of his Judgment, Teare J said *“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”*. It was not submitted that the Defendant had no rights to terminate the mortgage, rather that only the default events listed would lead, on a proper construction and a interpretation of any reasonable man of the intent of the contract, to the establishment of a right to do so. It was further submitted that for the Defendant to have a right to require accelerated repayment of the whole balance outstanding on 30 days’ notice (SC14) was inconsistent with both the Special Condition as to term (25 years) and the overall commercial purpose of the transaction.

34. It is a commonplace of construction that the presumption is that the bespoke term will override the standard. In The Starsin [2003] UKHL 12 Lord Bingham said

11..It is common sense that greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the particular contracting parties have never addressed their minds. It is unnecessary to quote the classical

statement of this rule by Lord Ellenborough in Robertson v French (1803) 4 East 130 at 136; 102 ER 779 at 782, cited with approval by Lord Halsbury in Glynn v Margetson [1893] AC 351 at 358 and by Scrutton LJ in In re an Arbitration between L Sutro & Co and Heilbut, Symons & Co [1917] 2 KB 348 at 361-2.

12. ..The court must of course construe the whole instrument before it in its factual context, and cannot ignore the terms of the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen. If an obviously inappropriate form is used, its language must be adapted to apply to the particular case; The Okehampton [1913] P 173 at 180, per Hamilton LJ.

35. In The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. (The Antaios) [1985] 1 A.C. 191, 201, Lord Diplock stated “*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.*” It is the Applicant's case that if the generic standard terms override the bespoke specific terms on interest rate and term of loan then there is no commercial purpose in having a range of interest rates and terms on offer in special conditions, as they will always be capable of being overridden by the general.

Mark Smith
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____/2/2015

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Dated ____ 2/2015