IN THE COURT OF APPEAL **CASE NUMBER A3/2015/0561**

CIVIL DIVISION

ON APPEAL FROM

THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

IN THE COMMERCIAL COURT

BEFORE MR JUSTICE TEARE

BETWEEN

MARK ROBERT ALEXANDER

(as representative of the "Property118 Action group")

Appellant

and

WEST BROMWICH MORTGAGE COMPANY LIMITED

Respondent

SKELETON ARGUMENT FOR THE RESPONDENT

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

- The Judgment of Teare J dated 29 January 2015;
- The Order of Teare J dated 29 January 2015;
- The Appellant's Notice and the Appellant's appeal skeleton argument;
- The Respondent's Notice and this skeleton argument on behalf of the Respondent;
- Claim Form dated 6 May 2014;

- Acknowledgement of Service dated 23 May 2014;
- The witness statement of Mark Alexander dated 29 April 2014 ("**Alexander ws**") served on behalf of the Claimant;
- The witness statement of Jonathan Westhoff dated 20 June 2014 ("**Westhoff ws**") served on behalf of the Defendant;
- Mortgage Deed entered into by the Appellant with the Respondent dated 15 July 2008;
- "Mortgage Conditions 2006", in particular clauses 1, 5 and 14;
- Offer of Loan Letter from Respondent to Appellant dated 6 June 2008 enclosing:
    - (i) offer document; and
    - (ii) Booklet "Information you need to know about your Mortgage", see especially Section C "Mortgage Conditions 2006"; and
    - (iii) Acceptance of Offer letter; and
- Acceptance of Offer letter dated 6 June 2008 signed by the Appellant.

SUMMARY

1. The Appellant contends that 2 clauses of a buy-to-let mortgage contract should be rejected as inconsistent with parts of the offer document. The Respondent contends that the clauses are not inconsistent and should be given effect along with the rest of the contract, as was held by Teare J in his judgment of 29 January 2015. The judgment should be upheld for reasons given by the Judge, and/or for the additional reasons set out in the Respondent's Notice.

2. This appeal is concerned with the terms of the buy-to-let mortgage contract between the Appellant, Mr Alexander, and the Respondent. As well as acting for himself, the Appellant also acts as a representative claimant for 359 other represented persons who have or had buy-to-let mortgage contracts with the Respondent, and who, at the relevant time, each held at least 3 buy-to-let mortgages, whether with the Respondent or otherwise. The mortgagors with 3 or more buy to let mortgages had been identified by the Respondent as non-consumers. It is common ground that the terms of the mortgage contracts for all represented persons are not materially different.

3. The Appellant's case before the judge, which the judge rejected, was that although the terms of clause 5 of the Mortgage Conditions permitted the Respondent to increase the margin over base rate interest (as the Respondent has done), that that clause was inconsistent with the parts of the offer document sent to the Appellant and was therefore overridden pursuant to clause 1 of the Mortgage Conditions. The Appellant maintains this case before the Court of Appeal.

4. In addition, the Appellant's case before the judge, which he also rejected, was that although the terms of clause 14, first bullet, of the Mortgage Conditions permitted the Respondent to terminate the mortgage in the absence of default on one month's notice, it was inconsistent with parts of the offer document, and was therefore overridden. The Appellant maintains this case before the Court of Appeal. But in addition, he seeks at Appeal skeleton [25] to raise[1] a new case before the Court of Appeal that the clause does not in fact on its true construction permit termination on one month's notice in the absence of default or some other reason that entitles the Respondent to early repayment of the loan.

5. The Respondent submits that (as the Judge rightly accepted) there is no inconsistency between the offer document and either clause 5 or the first bullet point of clause 14 of the Mortgage Conditions. On the contrary, the offer document and the conditions fall to be read consistently as a suite of documents. The offer of a mortgage was simply subject to the right to vary under clause 5 and to terminate under clause 14 among other terms. Therefore, the Respondent was entitled to increase the margin as it did, and would be entitled to call in the mortgage on one month's notice. As to the Appellant's new case, clause 14 first bullet point permits termination on one month's notice.

6. It is common ground between the parties that if the Respondent is correct, the Respondent's action in increasing the margin fell within the grounds identified in clause 5 and was permissible in light of market conditions or the need to carry out its business prudently efficiently and competitively, and the Respondent would be entitled to call in the mortgage on one month's notice.

[1] This new point was not included in his Grounds of Appeal, or in his skeleton argument seeking permission to appeal.

THE DOCUMENTS

7. There were a series of relevant documents. The Appellant signed an Application Form on 1 May 2008 for a buy-to-let mortgage from the Respondent.

8. The Respondent then sent the Appellant an Offer of Loan Letter dated 6 June 2008. With the letter was an offer document[2] which included Special Conditions at pages 6 and 7, and the Respondent's Mortgage Booklet which included at Section B its Standard Conditions of Offer and at Section C its Mortgage Conditions[3]. In addition there was an Acceptance of Offer letter which the Appellant signed.

9. The Appellant later entered into his mortgage contract with the Respondent ("**the Alexander Mortgage Contract**") by deed on 15 July 2008. The Deed specifically incorporated the terms of the offer of mortgage, including those contained in the Special Conditions, the Standard Conditions and the Mortgage Conditions.

10. Clauses 5 and 14 were in the Mortgage Conditions. Those conditions were part of the Offer of Loan, and contained in Section C of the Mortgage Booklet which had been sent to the Appellant with the Offer of Loan Letter and thus formed part of the Alexander Mortgage Contract.

11. Clause 5 provided that:

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[2] The Appellant relies, as he did below, on boxes of the offer document in support of his case of inconsistency. It is submitted that the Appellant's case on inconsistency was correctly rejected by the Judge. In this appeal, the Appellant seeks to characterise (for the first time), the boxes of the offer document as "Special Conditions" of the mortgage (see, for example, Appeal skeleton at [2], [4], [8], 13(b)(iv), [14] and [15]). It is thought that nothing turns on this, but this nomenclature is incorrect. The special conditions are at pages 6 and 7 of the offer document under the section headed "11. Special Mortgage Conditions". They are also listed in the Summary of Advance. The boxes referred to by the Appellant are not special conditions, they are simply boxes of the offer document.

[3] In this appeal, the Appellant seeks to characterise (for the first time), the Mortgage Conditions at Section C as "Standard" Conditions of the mortgage (see, for example, Appeal skeleton at [2]). It is thought that nothing turns on this, but this nomenclature is incorrect. The Standard Conditions are at Section B of the Mortgage Booklet.

"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 [Respondent] 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)."*

12. "Offer of Loan Letter" was defined in clause 1 of the Mortgage 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*".

13. Clause 14 provided that:

> *"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."*

14. Only the first bullet in clause 14 is said by the Appellant to be inconsistent with parts of the offer document and to be overridden.

15. The clause relating to inconsistencies is Clause 1 of the Mortgage Conditions which stated:

> "*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…*"

It should be noted that the "Offer of Loan" there referred to 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*."

THE RESPONDENT'S SUBMISSIONS AS TO WHY THE JUDGE'S ORDER SHOULD BE UPHELD

16. It is submitted that the Judge correctly held that clauses 5 and 14 of the Mortgage Conditions are not inconsistent with the Offer of Loan.

The applicable principles on inconsistency

17. The Judge was referred to the relevant authorities on construing contracts (*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]).

18. The Judge was also taken (by the Respondent) to the relevant authorities on inconsistency (namely *Pagnan SpA v Tradax* [1987] 2 Lloyds Rep 342, CA, at 350 and 353; *Cobelfret Bulk Carriers v Swissmarine* [2009] EWHC 2883 (Comm) at [24] to [29] and [35] to [36]; *RWE Npower Renewables v Bentley* [2014] EWCA Civ 150 at [15] and [2013] EWHC 978 (TCC)) at [24]). These may be summarised as follows.

19. The court must 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 of the 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).

20. The court should 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).

21. 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].

22. 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]).

> "*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).

At first instance Akenhead J gave as an example of an irreconcilable difference where one part of the contract required a building to be painted black and another part stated it should be painted white. The judge also emphasised that the contract should be read first as a whole to see if it can be read sensibly ([2013] EWHC 978 (TCC)) at [24] as follows:

> "*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*."

23. The Judge correctly directed himself in accordance with the above principles at [14] to [18] of the Judgment.

24. Originally, the Appellant accepted, before the Judge, that the applicable principles on inconsistency were as summarised in paragraphs 18 to 22 above, as he did in his skeleton argument on application for permission to appeal at [25]. However, in his Appeal skeleton at [9] the Appellant now appears to contend, for the first time, that the cases above were not cases with a paramountcy clause, whereas in this case there is a paramountcy clause, namely clause 1 of the Mortgage Conditions, and so the Court should be more willing to find an inconsistency. The Appellant cites in support in his Appeal skeleton at [9] 4 authorities on inconsistency not cited to the Judge, namely *The Starsin* [2004] 1 AC 715, *Yien Yeih Commercial bank v Kwai Chung* [1989] 2 HKLR 639, *Kuoni Travel Limited v Boyle* [2013] EWHC 877 and *The Northern Progress* [1996] 2 Lloyds Rep 319. The Appellant also appears to contend that it would be appropriate to reject clauses 5 and 14 first bullet if there was "room for doubt" that they were inconsistent with parts of the offer (even if the court concluded they were not in fact inconsistent) because clear words are required before a court should conclude that a contract confers a unilateral power on one party to vary a contract to the detriment of another (Appeal skeleton at [9(i)], [16] and [24]).[4] Both points are incorrect.

25. As regards the first point, two of the three cases cited to the Judge on inconsistency concerned a contract which had a specific paramountcy clause or order of precedence and the very issue which the court was determining was whether the paramountcy clause/order of precedence needed to be invoked - see *Pagnan SpA v Tradax* at 344 at col 2 and *RWE Npower Renewables v Bentley* [2014] EWCA Civ 150 at [15] and [2013] EWHC 978 (TCC)) at [4]. None of the 4 new authorities cited by the Appellant support his contention that the Judge's summary of the applicable principles was incorrect.[5] Contrary to what the Appellant suggests at Appeal skeleton [9(b)]), *The Starsin* is not authority for a general proposition that greater weight should be given to special conditions than to general

[4] The reference to Lewison, The Interpretation of Contracts (5th edition) para 17-08 at Appeal skeleton [9(i)] appears to be incorrect. It is assumed that paragraph 7-18 was intended to be referred to. The relevance of this paragraph is not understood. Clauses 5 and 14 do not lead to unfairness and therefore the principle of clear words being needed is inapplicable. In any event, clauses 5 and 14 do contain clear words.

[5] Further, the reasoning in *Kuoni Travel Limited v Boyle* at [41] is incorrect.

conditions. In *The Starsin* it was held that if there was an inconsistency, and no paramountcy clause, it was common sense to give effect to specially chosen clauses that had been typed/ signed over pre-printed clauses on the back of the bill of lading. That case does not help with the essential prior question as to whether there is any inconsistency in this case between the Offer of Loan and clause 5 and/or 14.

26. As to the second point, there is no authority for the proposition that a clause will not be incorporated into a contract if there is "room for doubt" as to whether there is inconsistency between the clause any another provision of the contract. Either a clause is inconsistent (in which case it is inapplicable) or is consistent (in which case it is applicable).

Clause 5

27. The Judge's decision that clause 5 is not inconsistent with the Offer of Loan was correct.

28. First, the Appellant accepts that the meaning of clause 5 is that it allows the margin to be varied after the initial period when the mortgage was expressed to be a fixed rate (Appeal skeleton at [13]). He contends that clause 5 was inconsistent with the Offer of Loan and must therefore be rejected, relying on paramountcy clause 1. The way that Clause 5 operated in this case varied over time. Clause 5 specifically states that it applies "*except during any period in which interest is expressed to be at a fixed rate*". Clause 5 was therefore inapplicable during the initial period of the Appellant'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. After 30 June 2010, the Appellant's interest payments then reverted to "*a variable rate which is the same as Bank of England Base rate, currently 5%, with a premium of 1.99%*", which is specifically expressed in the offer document to be a "*variable rate*"[6]. As such, once the interest payments had moved to a rate expressed to be variable then, on the clear wording of Clause 5, that clause was applicable.

29. Second, the Appellant 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). It is said that box 4 defined the variable rate as the BoE rate plus a margin of 1.99%. The correct question in

[6] See box 4 "*After 30 June 2010 your loan reverts to a variable rate…*" and box 6 "*This new payment will continue for 277 payments at a variable rate…*"

principle is whether clause 5 can be sensibly read with box 4 and the rest of the terms of the Offer of Loan. The Judge rightly held that it could be. The rate in box 4 could be varied in any of the circumstances in clause 5. Box 4 does not state that the margin could not thereafter be varied in accordance with the contractual mechanism, or otherwise seek to refer to or exclude clause 5; it simply did not say anything about the mechanism for variation in clause 5. There is 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.

30. Third, the Appellant overlooks the terms of clause 1. Clause 1 only applies if the "Offer of Loan" is inconsistent with the Mortgage Conditions, and the Offer of Loan was defined to include the Special and Standard Conditions. The Standard Conditions of Offer (contained in Part B of the Mortgage Booklet) specifically referred to the right under clause 5 of the Mortgage Conditions to vary the rate except during any period when it was expressed to be fixed :

    "*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*" (clause 11 of the Standard Conditions of Offer).

    The Offer of Loan Letter also specifically referred to the right to vary the rate except during any period when the rate was expressed to be fixed. So it cannot be said that the terms of the Offer of Loan were inconsistent with clause 5 of the Mortgage Conditions within the meaning of the paramountcy clause.

31. 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 black and white paint 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 group represented by the Appellant) their offer document dated 13 March 2008 stated: "…*For the avoidance of doubt, the Standard Conditions of Offer and Acceptance of Offer shall be amended to give effect to the following terms"* which are then set out.

32. Fourth, the Appellant's assertion that it makes no commercial sense if the Respondent was able to vary the margin is incorrect, as the Judge rightly held at [30]. The mortgage was not for a fixed period after the initial period. The mortgage could be terminated early by either of the Appellant or the Respondent. If the Appellant did not like the margin as varied, the Appellant was entitled to terminate the loan and remortgage. So from a commercial point of view, the pressure was on the Respondent to keep the rate competitive or lose the business. Further, if the Respondent is correct, the Respondent was entitled under clause 14 first bullet to accelerate repayment of the loan on one month's notice. However, rather than accelerate the loan under clause 14, the Respondent had the right under clause 5 to vary the margin, if that would be better from a commercial point of view, as it did, and provided always that one of the criteria in clause 5 was satisfied (which is not in dispute in this case). In such a case the mortgagor might prefer to accept the varied margin rather than remortgage. This structure made commercial sense. Further, as the Judge rightly noted, the Appellant is and was protected by the implied obligation on the lender to exercise its discretion to vary the margin honestly, and in good faith and not arbitrarily, capriciously or unreasonably (see Judgment at [30]).

33. Fifth, the Respondent's right to vary the interest rate was repeatedly made clear in the documents sent to the Appellant and acknowledged:

33.1. The Appellant's Application Form stated:

"INTEREST

I understand that:

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

33.2. Section A of the Mortgage Booklet 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…*";

33.3. The Appellant's signed Acceptance of Offer letter dated 6 June 2008 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..."

34. Sixth, if, as the Appellant contends, clause 5 of the Mortgage Conditions is inconsistent with the Offer of Loan issued to the Appellant, 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 Respondent in respect of the Appellant's mortgage or the many thousands who have mortgages with the same material terms. The Respondent would have no power to vary the interest rate for a borrower on such a 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 Appellant's case, not be permitted even if required by law, regulation or code of practice. That is an extreme construction which cannot be correct.

Tracker

35. The Appellant contends that his mortgage is to be defined as a "tracker" mortgage and that clause 5 of the Mortgage Conditions is inconsistent with the Offer of Loan because an ability to vary the margin under clause 5 is inconsistent with a "tracker" mortgage.

36. The Judge correctly rejected this argument. The Respondent supports the Judge's reasons for rejecting the Appellant's argument at [29] of the Judgment, that is, no part of the contractual documentation uses the term "tracker", and whilst these sorts of mortgages may be referred to as trackers,[7] the Court must construe the contractual wording used.

[7] The Appellant wrongly states at footnote 3 of his Appeal skeleton that the Respondent agreed with the contention that the mortgage under consideration is a tracker mortgage and gave evidence as such. In fact, Mr Westhoff's evidence at [8] was that such mortgages "*are commonly known as tracker mortgages, because they track a reference rate*".

37. However, in addition to the reasons given by the Judge at [29] of his Judgment for rejecting this argument, this argument should also have been rejected for the following additional, or alternative, reasons.

38. First, "tracker" is not a term of art and does not have a universal meaning – see *Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System* [2007] 2 Lloyd's Rep 612, CA, at [17] to [18] and the unchallenged evidence at Westhoff ws [41]. The citation from Retail Mortgages: Law, Regulation and Procedure (at Appeal skeleton [11(c)], and not cited below) does not suggest otherwise. For example, some "trackers" may have a cap, a floor or a collar, some may not. Some may permit variation of the margin, some may not. It all depends on the contractual terms applicable to the particular product. Therefore, an ability to vary the margin is not inconsistent with a "tracker" mortgage.[8]

39. As regards the material extracted from the websites of the Council of Mortgage Lenders, the Money Advice Service and the FCA at Alexander ws [11], the Appellant has never explained on what grounds he contends these to be relevant to the construction of the Alexander Mortgage Contract. It was thought that reliance by the Appellant on this material had been abandoned by the time of trial, as it was not referred to at all in his skeleton argument for trial. In this appeal the Appellant seeks to resurrect reliance on this material (Appeal skeleton at [11(d)]). It is submitted that this material is plainly irrelevant for the reasons set out in the Judgment at [29]. Further, the Appellant adduced no evidence that he was aware of this material at the relevant time. In fact it is to be clearly inferred from his statement that "*I have researched official information concerning tracker mortgages*"[9] that this is merely information he has gathered in preparation for these proceedings. There is indeed no evidence that the extracts were even contemporaneous with the mortgage. The extracts upon which the Appellant seeks to rely appear on their face to be as at the date of Alexander ws. As set out above, 'Tracker mortgage' is not a term of

[8] It should also be noted that the argument at footnote 4 of the Appellant's Appeal skeleton is factually incorrect. Due to market conditions, the securitisation by the Respondent was never sold down to the market, and so it remains on the balance sheet of the Respondent's corporate group. In any event, the securitisation is not of any relevance, given the Appellant's concession that, if, contrary to his case, clause 5 was applicable, then it has been validly invoked by the Respondent.

[9] Alexander ws [11].

art (Westhoff ws [41]), and no assistance is to be gained from admitting evidence from industry and regulatory sources of what the term is thought to mean (*Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System* [2007] 2 Lloyd's Rep 612, CA, at [17] to [18]). Mortgage terms differ from product to product and lender to lender, and whether the Respondent has the power to vary the margin on the Appellant's mortgage depends not on extraneous material but on the terms and conditions of the mortgage as contained in the Offer of Loan and the Mortgage Conditions. In any event, the material, even if relevant and admissible, does not support the Appellant's case on inconsistency.

Screenshot

40. The Judge was referred (by the Respondent) to the relevant authorities on factual matrix material (namely *BCCI v Ali* [2002] 1 AC 251 at [39]; *Chartbrook v Persimmon* [2009] 1 AC 1101 at [40]; *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Rep 423, Comm. Ct. at 429, col. 2; *Challinor v Juliet Bellis* [2013] EWHC 347 at [279](5)[10]). In summary, whilst material can potentially be considered as part of the factual matrix if it is relevant material which would have affected the way in which the document would have been understood by a reasonable person, the use of background is subject to the following limits[11]: 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; the facts must be objective and not introduce, in effect, the subjective intention of the parties; the material must serve to elucidate the contract and not contradict it; and 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 contract is an archetypal example (*AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94 at [7]).

41. The Judge correctly held that the screenshot was not admissible factual matrix material. The Respondent supports the reasons given by the Judge for that conclusion at [34] of his

[10] Overturned in part by the Court of Appeal ([2015] EWCA Civ 59) but not on this point.

[11] 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.

Judgment. In addition to the reasons given by the Judge at [34] of his Judgment the Respondent relies on the following additional, or alternative, reasons.

42. First, the screenshot was an extract from the West Bromwich Building Society's website, and not from the Respondent's website. It was for a product offered by the West Bromwich Building Society and not offered by the Respondent. Moreover, the product was offered to residential borrowers only whereas the Appellant was a buy-to-let borrower. For all these reasons it was therefore incapable of being factual matrix material for the contract between the Appellant and the Respondent. The Judge stated at [34] of his Judgment that "*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*". This was a non sequitur. Mr Westhoff gave evidence on behalf of the Respondent because he was authorised to do so by the Respondent (see Westhoff ws [1]). The fact that the Respondent authorised the CEO of its sole shareholder to give evidence on the Respondent's behalf in 2014 does not suggest that entries on the website of the sole shareholder in 2007 and 2008 are relevant to construing contracts the Respondent entered into (with the represented persons) between 2006 and 2008.

43. Second, the Appellant had not seen the screenshot at any time prior to entry into the contract – he found it when preparing for these proceedings using a method for recovering historic internet pages (see Judgment at [33] and Westhoff ws [40.3.2]). Since the Appellant was unaware of the screenshot at the time of entry into the Alexander Mortgage Contract, it is incapable of being admissible factual matrix material (*Challinor v Juliet Bellis* [2013] EWHC 347 at [279] (5)). Further, the screenshot relied on by the Appellant in his evidence was dated 31 May 2008. The screenshot relied on by the Appellant at trial was dated 1 July 2007. Many of the Respondent's borrowers (including members of the Property 118 Action Group, whom the Appellant represents in this case) entered into their mortgage deeds prior to either date. Indeed, of the 411 represented accounts (held by 360 persons), 184 of the accounts completed[12] prior to 1 July 2007. Therefore there will be many borrowers for

[12] The date of completion is usually no more than one day following the date of execution of the Mortgage Deed by the relevant borrower, but may be the same day.

whom the "screenshot" is incapable of being factual matrix material. Even as regards borrowers who entered into their mortgage deed after 1 July 2007, there will be at least some (the Respondent 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.

44. Third, these are standard form contracts (see Westhoff ws [7.4] and [40.3.1]) and in such cases material which would only have been seen by some borrowers but not others is not admissible 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]).

45. Fourth, the contract permits assignment by the Respondent (clause 15.7 of the Mortgage Conditions). This means that the contract was not simply addressed to the particular borrower, the Appellant, but also to a potential future assignee of the Respondent. The screenshot would not be reasonably available to an assignee and therefore 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]).[13]

46. Even if, contrary to the above, the screenshot is admissible factual matrix material, the screenshot does not support the Appellant's case. The screenshot states that a tracker mortgage "*gives certainty that the amount you will pay will move in line with bank base rates*", and goes on to refer to there being a choice of "*variable trackers*". It does not state that the interest rate will *only* move in line with bank base rates. Its wording is consistent with the Respondent's case that the interest rate on the Appellant's mortgage is a variable rate which moves in line with a reference rate (Bank of England Base Rate) but may also increase if the Respondent increases the margin over the reference rate.

[13] 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 *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.

THE JUDGE'S DECISION ON CLAUSE 14

47. The Appellant claims that the first bullet point only of clause 14 of the Mortgage Conditions is inconsistent with boxes of the Appellant's offer document 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 Appellant relies, as he did below, on the reference in box 3 of the offer document to the term being 25 years, on the reference to 25 years in box 5 and to 277 monthly payments over the mortgage term in box 7.

48. The Judge rightly rejected the Appellant's case.

49. First, none of these boxes refer to the possibility of early termination of the mortgage either by the Respondent or the Appellant, yet that was obviously permitted (as the Appellant accepts in the case of all the bullets under clause 14 other than the first). The boxes are not inconsistent with early termination because they say nothing about it. The Appellant himself was entitled to repay the loan early at any time under clause 19 although nothing is said about that in the boxes. There were no charges except during the period that the rate was fixed. The Respondent was also 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 Appellant originally contended (in Alexander ws at [15], in the Agreed Case Memorandum at [8] and the Agreed list of issues at [4]) that <u>all</u> the bullets points in clause 14 were inconsistent with the offer document which would have meant that the Respondent could not accelerate repayment if the Appellant were in default. That position was belatedly abandoned in his skeleton argument for trial in which the Appellant contended 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.

50. Second, the Appellant again 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 the Offer of Loan Letter 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. The Standard Conditions of Offer (which comprise part of the Offer of Loan) also states at clause 11 "*If you do not maintain the regular payments required under the Loan, then you run the risk of losing your home*". This is also a reference to parts of clauses 14 and 15.

51. In this appeal, the Appellant now seeks also to rely, for the first time, on box 8 of the offer document (Appeal skeleton at [6(c)], [23(b) and (e)] and [24]) in support of his case on inconsistency. The Appellant points to the fees charged to him for his mortgage and contends that such fees are inconsistent with a mortgage repayable on 1 month's demand in the absence of any default. This argument is surprising given the Appellant, prior to trial, in a letter dated 16 May 2014[14] expressly conceded that the arrangement fee was of no relevance and as a result adduced no evidence as to the arrangement fees or other fees paid by the represented persons. The argument is in any event wrong – there is nothing inconsistent between the Appellant paying fees and a term that provides the mortgage is repayable to the Respondent on 1 month's notice. Indeed, the mortgage was also repayable early by the Appellant *at his option* under clause 19 of the Mortgage Conditions, notwithstanding that the Respondent had incurred costs in providing the mortgage (e.g. the payment of fees by the Respondent to the Appellant's mortgage broker – see box 13 of the offer document.)

52. The Appellant's case in his Appeal skeleton appears to be in essence that (i) the commercial purpose of the mortgage would be defeated if it was terminable by the lender on one month's notice, and (ii) therefore it must follow that clause 14 bullet point 1 is inconsistent with the Offer of Loan. This argument is misconceived. This was a buy-to-let mortgage that was terminable early by either party (see paragraphs 32 and 49 above). This makes commercial sense. In any event, general assertions of commercial purpose (which are not supported by the contractual documents) are not sufficient to establish an inconsistency.

[14] In response to a letter dated 28 April 2014.

The Appellant must be able to point to a term or box in the Offer of Loan which is inconsistent with clause 14 bullet point 1. He cannot do so.

53. As to the Appellant's new alternative argument that clause 14 first bullet point does not on its true construction permit termination simply on 1 months' notice, but only permits termination where there has been "*some default or other reason that entitles the lender to early repayment of the loan*" (Appeal skeleton at [25]) that is inconsistent with the language and structure of clause 14.

54. First, bullet point 1 refers to termination on 1 month's notice, with no default or other reason being required. What the Appellant means by "*some ... other reason that entitles the lender to early repayment of the loan*" is unclear, but in any event, one month's notice is a reason that, under the contract, entitles the lender to early repayment of the loan.

55. Second, the 2nd and 3rd bullet points of clause 14 provide for termination on default. The first bullet point cannot also require, as a matter of construction, a default – otherwise the first bullet point is otiose.

56. Third, the 4th to 9th bullet points provide for other criteria for termination in the absence of default by the Appellant. Given there are 2 bullet points which provide for termination on default and 6 bullet points which allow for termination in the absence of default, it is not understood why the Appellant contends default or other reason that entitles the lender to early repayment of the loan is a pre-requisite of the first bullet point.

57. Fourth, the case of *Digital Integration v Software* [1998] ECC 289 cited at Appeal skeleton [25] (not cited below) does not assist the Appellant. *Digital Integration* was concerned with the identification of the period during which a clause permitting termination on notice applied. Nothing in *Digital Integration* supports the Appellant's contention that a provision allowing termination on notice should only apply on default or other reason that entitles the lender to early repayment of the loan.

CONCLUSION

58. For the reasons set out above, the Court is asked to dismiss the Appellant's appeal, and order the Appellant to bear the costs of the appeal.

RAYMOND COX QC

CHLOE CARPENTER

Fountain Court Chambers

17 JULY 2015