Neutral Citation Number: [2018] EWHC 3472 (Ch)

Case No: 0128 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN MANCHESTER

Manchester Civil and Family Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 22/06/2018
Start Time: **17.03** Finish Time: **19.02**

Before:

THE HONOURABLE MR. JUSTICE BARLING

- -

Between:

KEVIN PHILBIN **Applicant**

- and –

STEWART DAVIES **Respondent**

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Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

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MR. MARK HARPER QC appeared for the **Applicant**
MR. DAVID MOHYUDDIN QC appeared for the **Respondent**

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JUDGMENT APPROVED

MR. JUSTICE BARLING:

Introduction

1. This is an application by Kevin Philbin, represented by Mr. Harper QC, to set aside a statutory demand issued by Stuart Davis, the respondent to the application, represented by Mr. Mohyuddin QC.

2. I have received very well written and helpful skeleton arguments from both sides and I have also had the benefit of very full and cogent submissions from leading counsel on both sides, for which I am extremely grateful. Given the lateness of the hour on a Friday afternoon, I will endeavour to state my decision and reasons as briefly as possible, but I am afraid inevitably I must go into a little of the detail.

3. The application is dated 16 February 2018 and it seeks to set aside a statutory demand which was issued on 30 January 2018 and to do so effectively on the basis that the debt of some £3.9 million is genuinely disputed on substantial grounds. Both sides accept that whether the application is also made on the ground that there is a cross claim which equals or exceeds that amount really does not matter, as in essence the issues between the parties are the same. Therefore, I will refer simply to rule 6.4(b) of the Insolvency Rules.

4. The application was originally made in the Peterborough County Court and for reasons which need not detain us, it has now been transferred to Manchester and is being heard by me. In addition to the skeleton arguments, I have read a number of witness statements on both sides, in particular two very long statements, one from the applicant and one from the respondent. In addition, there are two witness statements from Mr. Michael Kennedy, the applicant's solicitor, and there are statements from Mr. Michael Longworth, on behalf of the respondent, and from Mr. William Ward, of Savills, the well-known estate agents. Mr Ward has provided valuation evidence to which I will refer.

Background

5. The demand is based on two loan agreements and the securities attaching to them. The first agreement was dated 30 July 2015 and the respondent agreed to lend and did lend the applicant the sum of £180,000. That has been called the 'July 2015 agreement', so I will adopt that expression. For that agreement, interest was charged at the rate of 10% per annum and there were also exit and arrangement fees, each of 1% of the principal. The principal was to be repaid no later than 13 August 2016, which was 364 days after drawdown.

6. The second of the loans was in respect of an agreement dated 2 November 2015 and the respondent agreed to lend and did lend the applicant the sum of £3 million. This is the November 2015 agreement. For that loan, basic interest was charged at 1.18% per month which, not counting compounding, would be 14.16% per annum, I am told. The principal, together with an exit fee of some £30,000, was repayable no later than 21 December 2016. There may have been some small variations to those periods, but I do not think anything turns on them.

7. As far as security was concerned, the applicant provided security by legal charges. First, a legal charge of the same date as the July 15 agreement, charging the property known as 1 Hay Carr Cottages, Hay Carr Estate, Lancaster ("the Cottage"). In respect of the November 2015 agreement, there was a legal charge of 21 December 2015, charging the remainder of the Hay Carr Estate.

8. I should say, by way of short explanation, that the Hay Carr Estate consists of a very substantial main house, sitting in its own grounds, which extend to approximately 55 acres in North Lancashire. It comprises two flats in the body of the main building and in addition a lodge which I understand is two-bedroomed. Then there are two cottages: one to which I have referred, and the other being 2 Hay Carr Cottages.

9. Both the properties in question were apparently purchased with the aid respectively of the two loans. The properties which were charged in respect of those loans were purchased by the applicant. It appears that the Hay Carr Estate, (not counting what the Cottage, which was purchased separately), was bought for £3,750,000, on or about 21 December 2015. The Cottage was purchased for £550,000 in July 2015.

10. When the Cottage was purchased by the applicant, the parents of an associate of the applicant, Matthew Longworth, moved into it and, as far as I am aware, are still living there. They are called Mr. and Mrs. Watson. In his long witness statement, the applicant states that he was persuaded, against his better judgment, to obtain the loans for, and purchase, these properties in his own name. But, it appears that some of the purchase price of £550,000 for the Cottage was paid using funds resulting from the sale of Mr. and Mrs. Watson's previous abode, to the tune perhaps of £405,000.

11. Some payments in respect of interest were made by the applicant to the respondent: in March 2016 of about £112,000 and in June the same amount. Those, as I understand it, are possibly the only payments of interest that have been made, although they do not quite add up to the figure of £232,885.86, which Mr. Harper indicated had been paid. So, it may be that there was a further payment.

12. It appears that there was a failure to repay either of the principal sums of £180,000 or £3 million. It is not in dispute that the respondent re-entered and sold both properties as mortgagee on 22 December 2016 for £2,050,000. The sale was made to a company apparently incorporated by the respondent for that purpose, called Hay Carr Limited. It is not in dispute that the company is owned and controlled by the respondent.

13. That, as it were, sets the scene.

The statutory demand

14. No further sums having been paid by the applicant following the sale of the properties, in January 2018 the respondent, issued the statutory demand for £3,950,596.04. That figure took into account the proceeds of sale to the company which, it is accepted, was a connected sale.

15. The applicant disputes the right of the respondent to issue a statutory demand for that sum or indeed for any sum, on the basis that this was a connected sale, in other words a sale that was not at arm's length, and which appears to have been carried out towards the end of the end of 2016 without the knowledge of the applicant or, indeed,

of the estate agent Savills instructed to sell the property on the applicant's behalf. Although the sale took place on 22 December 2016, one sees Savills, in the person of Mr. Mark Holden, e-mailing the applicant on 15 February 2017, to update him on the fact that they have a client:

> "who I am expecting to make an offer, albeit under £4.5 million, following a recent e-mail exchange with him. We have a viewing on Saturday with Beverly Holden and Stephen Roeby, and Graham Blackledge has expressed an interest, although at a very early stage. I have some properties at half this price generating less interest."

16. This email appears to have been prompted by an indication from the applicant that someone was coming to see the property that Saturday, and enquiring whether Savills considered that the asking price should be reduced at that stage. The asking price was, on the advice of Savills, in the order of £5.5 million for both the main estate and the Cottage.

17. In the light of this, it appears that the applicant was not aware that his mortgagee had in fact already sold the whole property to a company which he controlled and owned.

18. Before the sale to the connected company in the present case, the respondent took advice as to valuation, and in doing so specified certain restrictions as to the basis on which that advice should be given. In particular, he indicated that the valuers should value the property on the basis that it was to be sold within 90 days. The applicant takes very significant objections to that condition of valuation. Valuations were also to be made on the basis that vacant possession was to be granted, alternatively that vacant possession was not to be given.

19. The respondent took valuation advice under those terms from some eight different companies, all of them apparently respectable and competent. However, I believe it to be common ground that no marketing of the properties was carried out, and no advice was taken as to the best method by which the properties should be sold. There is certainly no evidence to the contrary.

The applicant's essential contention

20. The applicant makes the basic submission that the alleged debt was not suitable to be the subject of a statutory demand, the respondent having admittedly sold the properties to a connected party. Mr. Harper submits that the effect of what happened is that, if the mortgagor does not accept that the best price reasonably obtainable was in fact obtained, then the mortgagee has a heavy burden in establishing the contrary, and that in the present case, in the light of all the evidence, the applicant has satisfied the overall burden of showing there is a real as opposed to a fanciful prospect, that he will succeed in establishing that there is no debt, if the matter is dealt with in another jurisdiction.

The relevant case law

21. Both sides have drawn a number of authorities to my attention. I will try to deal with those as briefly as possible, given there is, if not complete agreement, at least general

consensus as to the principles that need to be applied when considering whether it is appropriate to set aside a statutory demand. It is not necessary to go rehearse at length those principles. There is the well-known test of whether there is a real prospect of satisfying a court that the debt is below the bankruptcy level of £5000. The concept of a real prospect of success is, in effect, the same test as is applied in a summary judgment case. That principle can be seen clearly from many cases, including, for example, *Portsmouth v Alldays Franchising Ltd* [2005] EWHC 1006 (Ch), a decision Mr. Justice Patten (as he then was). See for example paragraphs 10 and 11 of the judgment.

22. In relation to a connected sale, my attention was drawn to the well-known case of *Lam* [1983] 1WLR 1349, where Lord Templeman, in the Privy Council, said:

> "In the result, their Lordships consider that in the present case the company was not debarred from purchasing the mortgaged property, but in view to the close relationship between the company and mortgagee and in view in particular of the conflict of duty and interest to which the mortgagee was subject, the sale to the company for $1.2 million can only be supported if the mortgagee proves that he took reasonable precautions to be obtain the best price reasonably obtainable at the time of sale. On behalf of the mortgagee it is submitted that all reasonable steps were taken when the mortgagee, with adequate advertisement, sold the property at a properly conducted auction to the highest bidder. The submission assumes that such an auction must produce the best price reasonably obtainable, or as Lord Justice Salmon expressed the test, 'the true market value'. But the price obtained at any particular auction may be less than the price obtainable by private treaty and may depend on the steps taken to encourage bidders to attend. An auction which only produces one bid is not necessarily an indication that the true market value has been achieved."

23. Later in his speech, Lord Templeman said:

> "A mortgagee who wishes to secure the mortgage property for a company in which he is interested ought to show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps which ought reasonably to be taken to make the sale a success and as to the amount of the reserve…
>
> Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived."

24. There was an obvious conflict of interest in the present case between the obligation on the mortgagee to obtain the best price reasonably obtainable, and the fact that the

mortgagee was proposing to sell the property to his company. The authorities in relation to that situation include *Saltri v Mezzanine* [2013] 1 AER (Comm) at page 661, a decision of Eder J. That was a case in which the court had to consider the burden of proof in a case where there was a conflict of interest. In the course of his judgment, Eder J set out, at paragraph 107, the position in the general law of the scope and effect of a mortgagee's powers and duties. At paragraph 135, referring to passages from Lord Templeman's speech in *Lam*, which I have mentioned, he said:

> "As I had stated, it was common ground that JPMEL was (at least) under a duty (a) to take reasonable care to obtain the true market value of and/or the best price reasonably obtainable for the transaction security at the time of sale or disposal and (b) to exercise the power of sale bona fide and for its proper purpose."

25. With regard to an argument by counsel that Lord Templeman's speech indicated that there was an absolute obligation to take certain advice and act upon it, the learned judge said this at paragraph 136:

> "On the basis of this passage, I understand Mr. Smouha's submission to be that in a situation where a mortgagee sells property to a connected or affiliated person, there was in effect an absolute obligation on the mortgagee both, one, to take and, two, to act upon independent expert advice and in particular, so far as the present case is concerned, as to (a) the method of sale and (b) the steps which ought reasonably to be taken into make the sale a success. I agree that the first part of this passage does indeed appear to support what I shall refer to as an absolute obligation. However, the second part of this passage, in particular the reference to "no good reason", is in my view to the contrary and points rather to a much broader approach. There are other passages in Lord Templeman's speech which also suggest that there is no inflexible absolute obligation of the kind urged by Mr. Smouha."

26. He continued:

> "Given these other passages I strongly doubt that Lord Templeman was seeking to prescribe an inflexible absolute obligation in the passage relied upon by Mr. Smouha. Further, whatever the scope of the duty of a mortgagee may be in an ordinary property case, the circumstances of the present case would seem to me to be very different. In particular it is, in my view, important to bear in mind the underlying subject matter ... as well as the particular nature of the relationships between the parties in the present case ... It is also necessary to consider, as a matter of principle, the basis upon which the suggested absolute obligation might be said to arise."

27. Having concluded that it was not an absolute obligation, and having considered further authorities, he said:

> "The authorities do not prescribe, indeed expressly resist prescribing, any particular procedure which a mortgagee should adopt in deciding the manner in which the charged asset should be sold, whether as to marketing or advertising or otherwise.…All [the cases considered] show that the courts have been careful to resist laying down any prescribed procedures or processes which a mortgagee must follow. All that can be said is that the mortgagee must take reasonable steps in the circumstances….
>
> I proceed on the basis, in this case, that the burden of proof is on JPMEL and that such burden is a heavy one. In deciding whether he has fallen short of his duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line. Thus if two or more alternative courses of action are available there is no negligence if the course taken might have commended itself to a competent mortgagee, even though subsequent events show that it was in fact the wrong course…
>
> …In particular, a party alleging breach of duty by a mortgagee to take reasonable precautions to obtain a proper price must also prove that they have suffered some damage as a result of the impugned transaction and the court will not order an inquiry unless that is shown…
>
> …In my judgment, the obligation on JPML was; (a) to take reasonable care to obtain the true market value of and/or the best price reasonably obtainable for the transactions security at the time of sale or disposal and; (b) to exercise the power of sale bona fide and for its proper purpose."

28. It is clear that in the case of a connected sale there is a heavy burden on a mortgagee to show that it has taken reasonable steps to obtain a proper price, but, in the light of the interpretation by Eder J of Lord Templeman's speech, with which I am in complete agreement, there is no absolute obligation to follow any particular procedure or to obtain any particular advice in deciding the manner in which the charged asset should be sold, whether as to marketing or advertising or otherwise. In considering whether that burden has been discharged, all the facts and circumstances of the particular case must be considered. Once the basic principles are established, too close an analysis of specific cases can be dangerous, as issues of this kind are extremely fact dependent.

29. Before leaving the applicable principles, I should refer to a further case called *Alpstream AG v PK Airfinance* [2013] EWHC 2370 (Comm), a decision of Burton J. This also involved a connected sale, in which the learned judge considered the authorities discussed by Mr. Justice Eder. None of these cases, I emphasise, concerned an application to set aside a statutory demand: in all of them the court was required to make a determination whether the mortgagee in a connected sale had in fact broken his obligation to take reasonable steps to obtain the best price. However,

they are, as both parties accept, indicative of what would have to be established and of the burden of proof.

30. In *Alpstream* Burton J stated, at paragraphs 71-2:

> "All this analysis has been on the basis of the usual case of a claimant mortgagor needing to prove that it has suffered as a result of a breach of duty by the defendant mortgagee. I have been referred to the authorities, particularly in relation to the 'duty of a mortgagee ... to behave ... as a reasonable man would behave in the realisation of his own property', spelt out in *McHugh v Union Bank of Canada* ... and the duty to take reasonable care to obtain the true market value of the mortgaged property derived from *Cuckmere Brick Company Limited v Mutual Finance* ... however, this is a case where the onus of proof is reversed. I do not consider ... that this transaction in which PK caused the borrowers to transfer the aircraft via the United States Trust to PK and then on to GECAS can be a sale simply on the basis that it is a sale to self. However, it is quite plainly a sale to a connected party and is thus governed by the guiding authorities in the *Bangadilly* case and the *Lam* case.
>
> …Accordingly, there is ... a heavy onus on PK to show that it used its best endeavours to obtain the best price reasonably obtainable for its mortgaged property. This must be approached on the basis of the reality of what occurred."

31. Then the learned judge went through the facts of that case, indicating why he considered that the defendants had merely gone through the motions of obtaining the best price and had done so in a way calculated not to obtain the best price. There are passages upon which Mr. Harper relied, in particular at paragraphs 79 to 81. In the latter paragraph the judge, having looked at the authorities, said that they:

> "... made it clear that in the ordinary case purity of purpose is not necessary for a mortgagee satisfactorily to perform his duty where he has mixed motives or purposes, one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage. In a connected sale case, the desire to obtain the best price must be given absolute preference over any desire that an associate should obtain a good bargain."

32. The case went to the Court of Appeal where the decision was upheld. The Court of Appeal made passing references to connected sales at paragraph 82, where referring to the facts, it said:

> "The arrangement was not a sale by the mortgagee to himself but it did give rise to a conflict of interests and duty. That conflict is addressed by the imposition of a reverse burden of proof which, as the judge found, was sufficient protection for the claimants."

33. At paragraph 173 of that decision, the Court of Appeal indicated that the remedy for breach of the equitable duty of a mortgagee is not common law damages, but an order that the mortgagee account to the mortgagor, and all others interested in the equity of redemption, for what should have been received.

The approach to be taken in the present case

34. The way in which I consider the matter before me (which concerns an application to set aside a statutory demand) should be approached is that the overall burden of showing that there is a real prospect of success in defending the alleged debt remains throughout on the applicant. However, where the applicant is able to point to some *prima facie* reasons for considering that the respondent mortgagee did not take reasonable steps to obtain the best price, the court should have regard to the fact that, in those circumstances, if it comes to a trial, the mortgagee will have a heavy burden of satisfying the court that it did take such reasonable steps. I believe that this approach was eventually endorsed by both counsel.

The valuation issue

35. The way the sale price was arrived at by Mr. Davis, the respondent and mortgagee of the properties, was to have the property valued by eight valuers and then, in so far as a valuation gave a range of values, to take the top of each valuer's range, and arrive at a simple average of those individual top values. For example, the top of the range given by Savills was either £2.5 million or £3.5 million, depending on whether a sale within 90 days was with or without vacant possession. The same approach was taken for each of the ranges of the other valuers, and the resultant averages were, in the case of a 90 day sale without vacant possession, £2,017,500 and with vacant possession £3,010,625. The respondent then chose the without vacant possession, for reasons which I will come to, and rounded it up from £2,017,500 to £2,050,000. That, as I understand it, is how the sale price was arrived at.

36. Mr. Harper submits that this methodology results in an obvious breach of the mortgagee's duty. This is because, even on the basis of valuations produced (to which the applicant takes considerable objection in any event) the respondent should have taken, not an average, but the highest valuation produced by the valuers. In any event, the applicant challenges the valuations.

37. The applicant's starting point is the November 2015 valuation by Savills. This may have been carried out for the purposes of the sale to the applicant. In any event, at that time Savills produced a valuation of £5.5 million if the Cottage was included, and £4.95 million without the Cottage. In both cases it was on the basis of vacant possession. As I have already said, by December 2015 the whole estate had been bought by the applicant, with vacant possession, for a total of about £4.8 million. Savills' valuations were certainly available to the respondent at the time, and he agreed to make the loans in question on the basis of them.

38. Mr. Harper points to evidence that property prices in both the UK generally and in Lancashire have in general increased over the last five years. This evidence is admittedly not directly from a valuer, but is reported by the applicant's solicitor, Mr. Kennedy, who has made detailed searches. Mr Harper submits that on any view there is no evidence of any reason why the value of this property should have gone down in

the year from December 2015 to December 2016, when the connected sale took place. He also points out that, of the eight valuations obtained by the respondent, only two of the valuers actually inspected the property.

39. As noted already, the property was sold very quickly and without the knowledge of the applicant, at a time (end of 2016, beginning of 2017) when he was still marketing it through Savills at a very much higher price than it was sold by Mr. Davis to his company. The main property was being marketed with vacant possession, although, as I have said, Mr. Longworth was living with his family in the main house at that time. There is evidence that Mr. Longworth had had a fixed term tenancy which by then had expired, so that he was holding over as a monthly tenant, having in fact paid no rent whatsoever under that tenancy. Further, there is evidence that Mr. Longworth was co-operating in the marketing by Savills, to the extent of being willing to show people around the property when Savills arranged it.

40. Having taken possession as mortgagee on 21 December 2016, Mr. Davis sold the property effectively to himself, the next day. The applicant's evidence is that he and Savills were proceeding on the basis that there should be no problem obtaining vacant possession. The respondent, on the other hand, states that he had taken advice from solicitors and had been told that it could take up to 12 months to obtain vacant possession. There has been no waiver of legal professional privilege in relation to that advice, but that is the respondent's evidence.

41. It is clear on the evidence that there were a number of people living in the main house in addition to Mr. Longworth's family. At least one of the two flats and possibly both of them were occupied, in one case by a gardener and in the other case by a housekeeper who had been employed to work at the property. In addition, the lodge cottage was apparently occupied by someone who may have been employed and was involved in falconry. The evidence is that there were no formal tenancies for any of those occupants, as distinct from the situation of Mr. Longworth. In the case of at least one, and possibly two, of those occupants, their occupancy was related to their service contracts. As I have already explained, Mr. and Mrs. Watson were occupying the Cottage.

42. What is entirely absent is evidence of any enquiries made by Mr. Davis as to the wish or willingness of any of those other occupants to vacate the premises. Nor is there any evidence that they were even written to. There is simply no evidence of any steps taken by Mr. Davis to discover how difficult or easy it would be to give vacant possession to a potential purchaser within a reasonable time. Nor is it suggested that he offered any financial inducement to anybody to encourage them to leave. Instead, Mr. Davis proceeded on the basis of advice that he apparently received that it could take a long time if people were unwilling to leave and it was necessary to take court proceedings in order to obtain possession.

43. The other factor in the evidence which has been drawn to my attention in relation to the valuations which have been obtained, is the reaction of Mr. Ward of Savills to the request to provide to the respondent a valuation of this property on the basis of a 90 day sale. On 9 April 2018 the applicant's solicitor, Mr. Kennedy, spoke to Mr. Ward by telephone, and asked him about the basis of valuation. Mr. Kennedy has described this conversation in his witness statement of 1 May 2018, at paragraph 11 onwards. The matter is summarised in a file note that he made on the same day. In his

statement he says that Mr. Ward was open in this conversation, while acknowledging the awkwardness from Savills' point of view because of the huge reduction in the valuation. In the file note Mr. Kennedy has recorded that he had made Mr. Ward aware of the dispute between the parties and of the fact that he acted for the applicant; he informed Mr Ward that he had concerns about two valuations by Savills, first the £5.5 million and second the valuation of somewhere between £2 million and £3.5 million, depending on vacant possession. I quote from the file note:

> "Mr. Ward said to me that Savills' position was a bit awkward and he said that in actual fact the second valuation that he was asked to prepare was on highly unusual terms that were being imposed upon him by Mr. Davis. He said that basically they were told to provide a valuation on the basis of the property being physically completed upon within 90 days and furthermore on the basis that there would not be vacant possession. He said that would make a sale almost impossible and it was under that criteria that there was such a marked difference between the two valuations."

44. Mr. Kennedy records that in the course of the conversation, in response to his question whether Mr Ward would value the property at £5.5 million if it had been marketed in the normal way as at September 2016 or even at the date of the conversation i.e. on the basis of vacant possession and without it having to be sold within 90 days, Mr. Ward stated without hesitation that he would value the property at £5.5 million, as per his previous valuation.

45. According to the interpretation placed upon the various valuations by Mr. Kennedy (and I have not been shown all of them), each indicated that it would be unusual for a property of this nature to sell within such a short timescale as 90 days. So, according to the evidence, the property was never exposed to the market by Mr. Davis, nor did he take any advice as to the best method of selling the property, nor did he take any steps to discover how difficult in fact it might be to obtain vacant possession.

46. In those circumstances, the applicant submits that there is a clear issue for the respondent to answer viz whether he obtained the best price reasonably obtainable, which he should answer on an account. Mr. Harper submits that it is not a fanciful argument and that it cannot be resolved in this jurisdiction, as there would need to be a trial which involved expert valuation evidence and disclosure. That was Mr. Harper's main argument.

Other allegations of the applicant

47. However, he also showed me draft Particulars of Claim which have now been extant for some considerable period. The issue concerning the purchase price in the connected sale is, of course, pleaded. In addition, the applicant intimates claims relating to the terms of the loan agreements. I will outline those allegations, without going into too much detail.

48. In relation to the July 2015 agreement and its related charge, reliance is placed on the Unfair Terms in Consumer Contract Regulations 1999. This allegation is on the basis that the respondent is a supplier under those Regulations and that the applicant is a

consumer. The concept of fairness and how it should be assessed are set out in the Regulations.

49. As far as the November 2015 agreement and the November charge are concerned, reliance is placed on the unfair contract terms provisions laid down in Part 2 of the Consumer Rights Act 2015. It is contended that the respondent is a trader and the applicant is a consumer for the purposes of that Act and the concept of unfairness set out in the Regulations. In addition, it is contended that the July 2015 agreement and the November 2015 agreement are credit agreements within section 140C of the Consumer Credit Act 1974, and that both July and November charges are related agreements within that section.

50. These allegations are pleaded out in some detail in the draft Particulars of Claim. In very brief terms, the contention is that the respondent is not entitled to enforce the acceleration and termination clauses and the default interest clauses under the two agreements because they are unfair; they are not entitled to demand or recover the principal sums prior to the expiry of the 364 day terms under those agreements; the default interest provisions are penalties, and the interest provisions are unfair terms. Finally, it is contended that the relationship between the applicant and the respondent was an unfair relationship, the burden being on the respondent to prove the contrary under the legislation. I refer, in these regards, to the fleshed out allegations that are contained in paragraphs 19 to 23 of the draft Particulars of Claim.

51. The allegations relating to penalties and unfair terms in the agreements are that contrary to the requirement of good faith in the Consumer Rights Act and/or in the Regulations which the Consumer Rights Act supplants, the terms of clause 5.2 of the first loan and clause 11.1 of the second loan are not binding because they cause a significant imbalance in the parties' rights and obligations under those loans, to the detriment of the applicant. They purportedly oblige the applicant to repay all outstanding sums before the end of the 364 day terms, on grounds which are insufficiently serious and may even be trivial; they contain no threshold for the amount of money which must be owing to trigger an obligation to repay the entire outstanding balance; there is no requirement that the applicant be given advance notice of the consequences of non-payment of sums due, and no requirement that the applicant should be informed that he has an opportunity to remedy the breach before an obligation to repay the entire outstanding balance is triggered.

52. It is also contended that clause 7.3 of the second loan is not binding because it is unfair within the meaning of the Act as providing an unfettered power for the respondent to determine the manner of payment of interest and charges following a default, and indeed to alter the terms of the loan without a valid reason.

53. Further, the clauses in question are challenged as being penalties, in that, *inter alia*, they provide for payment by the applicant upon breach of sums which are out of all proportion to the increased credit risk presented by a defaulting borrower.

54. In relation to sections 140A to C of the 1974 Act, it is said that the relationship arising between the parties out of the loans and their respective charges are unfair. It is for the respondent to prove to the contrary because the respondent had adequate security and was exposed to limited credit risk. The terms of the loans and the charges over the properties in question imposed a high level of interest for a secured loan, together

with other harsh and arbitrary provisions governing default and an exorbitant level of default interest and charges.

55. Finally, complaint is made about the manner in which the respondent had administered the accounts in respect of these loans. It is alleged that sums were debited which were not due, harsh default terms were implemented, false claims that a receiver could be or was to be appointed were made, and oppressive demands for payment were made.

56. That is no more than a summary of the ancillary claims that are in the draft pleading, and which touch on the enforceability of, in particular, the default interest elements of the debt.

The respondent's submissions

57. In response to the applicant's reliance on this draft pleading, the respondent has made the point that the applicant has been blowing hot and cold about starting proceedings for a long time. Mr. Mohyuddin submitted that that was an indication that the applicant had no faith in the arguments raised in the draft Particulars of Claim.

58. In opposition to this application, Mr. Mohyuddin has submitted that it does not matter whether the ground for setting aside the statutory demand is the cross claim or a substantial dispute about the debt, because in either case there must be some substance to such a ground. By reference to the well-known authorities which set out the test to be applied, he argued that one is not bound to set aside a statutory demand simply because there is a witness statement or other evidence which put purports to indicate some defence to a debt. He submitted that one can reject such evidence because of its inherent implausibility, and that one should look critically at what is being said in this case by the applicant and test it against what else is in the evidence; that ultimately one needs to consider whether the issues that are raised would provide the applicant with a real prospect of success; and that I should approach the evidence, and in particular the contentions made by the applicant, with a considerable degree of scepticism.

59. On the possibility of the property being sold with vacant possession, Mr. Mohyuddin submitted there is no case with any real prospect of success that vacant possession could have been obtained. He also contended that one should not lose sight of the fact that, on any view, a principal sum of £3.18 million was owing at the time of the sale of the property to his company. It was not, he pointed out, disputed, that the applicant had borrowed that sum and that it had not been repaid, although the original terms of the loans have now long expired, the last one in December 2016.

60. He also submitted (and I do not understand Mr. Harper to have disagreed for present purposes) that there would be a likelihood of some interest being due to the respondent in respect of the loans. Mr. Mohyuddin pointed out that the arrangement and exit fees were not seriously challenged. It was, he submitted, going to be nigh impossible for the applicant to establish a real prospect of the debt being below the bankruptcy level of £5000.

61. I have already referred to the decision of Eder J in the *Saltri* case, where the principles governing a mortgagee's responsibilities are helpfully set out. Mr. Mohyuddin relied,

in particular, on the statements at paragraphs 148 to 149 of that judgment, in submitting that here, on the evidence before the court, the respondent has discharged the burden of showing that he took reasonable steps to obtain the best price for these properties. He also submits that the applicant needs to show what the impact is, in money terms, of the case that he is putting forward, in order to be able to bring the undisputed debt below the bankruptcy limit. In that respect it was not sufficient, as submitted by Mr. Harper, for the applicant simply to show that there was an unliquidated and unquantified sum to be deducted from the amount of the statutory demand. It was necessary to show that it would reduce that amount to below the £5000 level.

62. Mr. Mohyuddin also relied on *AIB Finance Limited v Alsop* [1998] BCC 780, a Court of Appeal decision, in which the debtors had run a Post Office business with the aid of finance from a bank, which took a mortgage over the premises and the goodwill of the business. There was a default and the bank obtained possession and sold the property. A statutory demand was issued by the bank for the balance. The debtor argued that the sale was at an undervalue because the bank should have sold the property as a going concern. The District Judge set aside the statutory demand. On appeal, Carnwath J, as he then was, allowed further evidence of valuation to be admitted, but reinstated the statutory demand. His decision was upheld by the Court of Appeal. Mr. Mohyuddin refers to the finding by Carnwath J that, even accepting the new evidence, at its highest the debtor's case to justify setting aside the statutory demand on the figures was marginal, and there needed to be a realistic prospect that the new evidence would emerge from a trial unscathed. That, the judge found, was not credible, and so the requirements of the Insolvency Rule were not met.

63. In my view that was a decision which, as is so often the case, depended on the specific facts. The statement by Carnwath J is no more than an application of the accepted principle that if the proposed defence has no real prospect of successfully reducing the undisputed debt to below the level of the bankruptcy limit, the statutory demand should not be set aside.

64. Mr. Mohyuddin also submitted, in that regard, that it made no difference that the sale was to a connected party. That, in principle, appears to be correct, in the sense that the existence of a connected sale does not alter the nature of the test. On the other hand, the court might well scrutinise more closely the evidential material before it when faced, as I am in this case, with a connected sale.

65. Essentially Mr. Mohyuddin's submissions amounted to a contention that in the present case I could not be satisfied that there was a real, as opposed to a fanciful, prospect of Mr. Harper's client establishing that he has a defence which goes to virtually the whole of the debt. He submits that the evidence required to establish that is simply missing. As far as the 90 day sale condition was concerned, there was nothing in the evidence to show that that was an unreasonable valuation condition to impose, and it was fanciful to suggest that vacant possession of the property as a whole could have been obtained as a matter of formality. The Cottage, in his submission, represented one obvious difficulty in regard to vacant possession. The Watsons admittedly contributed to the purchase price by using the proceeds of sale of their house. On any view, he submits, it might well be difficult to establish that they were required to give up possession; even if they did, it could be a tricky business if £405,000 of their funds had gone into the purchase of the Cottage. Therefore, the

valuations were perfectly reasonable, and it was reasonable for Mr. Davis to act upon them in the way that he did.

Discussion and conclusions

66. That is the landscape of the issue before me. I may not, in view of the lateness of the hour, have provided a comprehensive summary of the skilful arguments I have heard. However, the test to be applied is clear, and in my view the result in the present case is also clear.

67. I regard the respondent's actions in relation to the question of vacant possession to be deficient in discharging the responsibilities of a mortgagee who wishes to sell the property. Given the substantial difference, even within the challenged valuations that the respondent obtained between granting vacant possession to a purchaser and not granting vacant possession (a difference in the order of £1 million), the omissions to which I referred earlier at paragraph 42 of this judgment, were significant. They would certainly cause me concern if I were in the shoes of a mortgagor. There should be a firmer basis for valuation than simply speculation by a lawyer that it could take up to 12 months to obtain vacant possession. There should at least have been enquiries made of those who were apparently occupying any of the premises as to whether they were willing to leave, and if so when, and possibly in consideration for what kind of inducement. There appears to have been no contact with any of the occupants, apart from perhaps Mr. Longworth. The Longworth tenancy was for a fixed term which had come to an end, and the tenants were holding over on a monthly tenancy. Notice to quit had apparently been served. Significantly, Mr. Longworth was co-operating with the vendor's agents.

68. Those omissions of the respondent are in my view, somewhat extraordinary, and I have little doubt that matters would have been dealt with differently if one had been genuinely trying to achieve the best price reasonably obtainable.

69. I also accept the applicant's submission that there is nothing in the evidence whereby the valuation condition of a sale within a 90 day period is sought to be justified by the respondent. That appears to be a condition which virtually all the valuers, including those instructed by the respondent, found unusual. Mr. Ward, as reported by Mr. Kennedy in his witness statement, found that condition extraordinary and one which, as he said, would render it virtually impossible to sell a property of this kind. It is clear that it was a strong factor in arriving at the valuations relied upon by the respondent.

70. One notes, in relation to those valuations, that on the basis of one of them the sale price represented about a 57% reduction in (less than half) the price for which the property had been valued and sold only a year earlier. Given that this was a connected and not at arms' length sale, that causes considerable concern, and requires a close examination of all the circumstances.

71. There is no evidence as to the best way of realising this property. As we have seen, the valuations was produced by reference to artificial criteria, and there was no attempt to find out whether there was a particular way in which the property should be marketed in order to obtain the best price reasonably obtainable.

72. There is some force in Mr. Mohyuddin's submissions about potential problems with the Cottage, and the possibility of equitable interests accruing to Mr. and Mrs. Watson through payment of part of the purchase price. That, as submitted by Mr. Harper, does not mean that they have rights of occupation. But it is a complicating factor, and it may therefore be that vacant possession of the Cottage would have to be looked at more carefully.

73. The figures also need to be carefully considered, in view of Mr. Mohyuddin's submission that on any view the applicant cannot realistically reduce the debt below £5000. In that regard one needs to take note of the allegations in the draft pleading in respect of default interest. The argument is that the default mechanism and the resultant rates of rest are unfair terms under the consumer legislation, and therefore unenforceable. Similarly, the alleged unfair relationship under the Consumer Credit Act 1974, would if established enable the court to vary rates of interest, impose penalties and deprive the lender of all or some of the interest claimed. Whether those allegations are established or not is another matter, but there is evidence from the applicant in support of the draft Particulars of Claim. Although I have not been shown the specific terms of the clauses in question in any detail, the effect of them, as expressed by the applicant and not specifically contradicted by the respondent, is in many respects draconian. That applies to the rates of default interest, to the manner in which the agreements can be enforced, and to the nature of what would constitute a default – apparently trivial defaults would have dire effects on the borrower's rights under the agreement.

74. In the context, these arguments, in particular those based on the manner in which the respondent has sought to enforce his rights (exemplified by the extraordinarily swift and un-notified sale of the property to his own company at a price, on one view, less than half the price at which the property had been sold a year before) in my view cannot be rejected as unrealistic or fanciful.

75. I come then, finally, to the figures. The bare figures as placed before me by Mr. Harper, are as follows. There are the principal sums of £180,000 and £3 million; there is basic interest, on the first loan of £25,596.72; there is also a £1800 arrangement fee for that loan and a £1800 exit fee for that loan. None of that is contested. In relation to the November loan, there is the principal of £3 million, plus interest calculated, at the ordinary (not default) rate, compounded on some basis, from drawdown on 21 December 2015 until 22 December 2016, when the property was sold. Mr. Harper and his solicitors calculate such interest in the sum of £471,487.22. That calculation of ordinary interest is not able to be confirmed by Mr. Mohyuddin or his clients, but it in the absence of my being told that it is wrong, and given the length of time that this matter has been proceeding during which the arguments have been known, I do not feel that I could properly reject it present purposes.

76. There is, it is true, a dispute between the parties as to whether interest runs from drawdown or from the date of the agreement. I am told that if the respondent is correct, that would add £56,000 or thereabouts. That point will turn on arguments as to the true construction of the November 2015 agreement, and also, (even if the respondent's construction is correct) as to whether that feature is consistent with the allegation of unfair terms. In view of that dispute I propose to employ the figure of c.£471,000 for ordinary interest on the November 2015 loan. If the default interest claimed is not payable because of the unfair term allegations, then the applicant's

liability for interest as at 22 December 2016, the date of the sale, would be that amount. In addition, the applicant accepts for this purpose that there would be an exit fee of £30,000. However, he challenges the administration fee on the basis that it is an unfair term. Further, costs of £66,526.36 are accepted by the applicat, again, for present purposes. That, on the applicant's case, results in a grand total owing to the respondent of £3,781,210.30 as at 22 December 2016.

77. In my view, for the reasons that I have given, the basis for this calculation cannot be rejected as fanciful or as unrealistic. Credit must be given against that sum of the interest payments actually made, which I am told amount to £232,885.86, a figure which has not been disputed by the respondent in the course of today's argument. This means that, if the applicant were to succeed in the arguments it has sought to raise in relation to the unfairness aspect of the case, the net debt would be £3,548,324.44. To that figure might be added some £50,000, depending on the outcome of the arguments as to the interpretation and fairness of the contract, and the drawdown versus date of agreement. However, I propose to operate on the basis that £3,548,324.44 is for present purposes in in the right ballpark.

78. Mr. Harper submits, and it is in my view indisputable, that if the property had been sold for anything over that figure, that is £3.54 million minus £5000 for the bankruptcy limit, then the debt would be wiped out. He refers, in that regard, to a number of factors. I recite them briefly. First, this property, including the Cottage, was being marketed by Savills at an asking price of £5.5 million at the time that the sale went through. There is evidence, which I have identified, that according to Savills a potential offer was on the cards in February of 2017, for the main house and the estate, minus the Cottage, for a figure said to be under £4.5 million. However, the tenor of the Savills e-mail indicates that it was in the general area of that sum. Then, there was a valuation by Savills in September 2015 at £5.5 million for the estate and the Cottage, and in 2015 the Cottage and the estate were sold to Mr. Philbin for £550,000 and £3.75 million respectively. Furthermore, on 22 September 2016, Savills valued the property, on the basis of its market value, at £4 - £5 million, or alternatively, £3.5 - £4 million if the property is to be sold within 90 days. There is evidence that Mr. Ward of Savills told Mr. Kennedy that his valuation with vacant possession, and absent the 90 day criterion, was still £5.5 million. Finally, the valuation at open market value on 16 November 2016 by one of the valuers, namely, Sanderson Weatherall, was £4.3 million, to which that valuer applied a reduction of 30% for the 90 day criterion.

79. In those circumstances, it cannot be fanciful or unrealistic for the applicant to argue that a debt of £3.54 million would be wholly removed on the basis of an argument that the mortgagee has not taken reasonable steps to obtain the best price. There is, in my view, a real prospect that the arguments discussed in this judgment would succeed; the possibility of success is not fanciful in the circumstances. I therefore consider that the statutory demand should be set aside, and I so order.

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This Judgment has been approved by the Judge.