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Neutral Citation Number: [2021] EWHC 5 (Ch)

Case No: PT-2019-001005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 06/01/2021

Before :

MASTER KAYE

- -

Between :

SLF ASSOCIATES INC **(a company registered in the Seychelles)**	**Claimant**
- and -	
(1) HSBC (UK) BANK PLC **(2) MRS KATHRYN ANN DURNFORD** **(a bankrupt)** **(3) THE OFFICIAL RECEIVER** **(as trustee in bankruptcy of Mrs Durnford)**	**Defendants**

- -
- -

Anthony Katz (instructed by **Malcolm & Co LLP**) for the **Claimant**
Benjamin Wood (instructed by **Shoosmiths LLP**) for the **First Defendant**
Mrs Durnford in person
Claire Thompson (instructed by **TLT LLP**) for the **Third Defendant**

Hearing dates: 27 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

FRK

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MASTER KAYE

Master Kaye :

1. This dispute concerns The Vineyard and South Wing, Lullingstone Castle, Eynsford, DA4 0JA (together, "**the Property**"). The First Defendant ("**the Bank**") holds a first registered legal charge over the Property dated 24 November 2006 ("**the mortgage**"). The Claimant, SLF Associates Inc ("**SLF**") subsequently registered a restriction against the title in 2013 as the holder of an option over the Property dated 30 August 2011 ("**the Option Agreement**")("**the Restriction**").

2. The Second Defendant ("**Mrs Durnford"**) was the registered leasehold proprietor of the Property, which is now the subject to a possession order in favour of the Bank made on 15 January 2019 ("**the Possession Order**"). The Bank wants to enforce the Possession Order.

3. SLF issued this Part 8 claim ("**the Redemption Claim**") on 4 December 2019. SLF's Redemption Claim was supported by a witness statement from Mrs Sally Goldman of Malcolm & Co dated 3 December 2019 ("**Mrs Goldman**"). SLF relies in addition on a further statement from Mrs Goldman dated 28 February 2020. There was no direct evidence from SLF or Mr Giles, a director of SLF or Mrs Giles.

4. This hearing concerned the Bank's application dated 12 December 2019 to set aside the order obtained by SLF without notice on 5 December 2019 and to strike out the Redemption Claim ("**the Bank's application**"). In the event that it was not successful the Bank sought security for costs. The Bank's application was supported by the witness statements of Johanne Butler dated 19 December 2019 and 18 March 2020 and a witness statement of David Prideaux dated 20 July 2020 both of Shoosmiths LLP. Mr Prideaux's witness statement provided up to date details of the outstanding balance of the mortgage and the Bank's costs. As at 16 July 2020 there was an outstanding mortgage balance of £569,687.07. The last mortgage payment received by the Bank was on 18 June 2018.

5. In addition to the Bank's application there were two further applications issued by SLF: an application issued on 12 February 2020 to join Mrs Durnford's trustee in bankruptcy ("**the Trustee**") and an application issued on 13 March 2020 seeking, amongst other remedies, an order to stay enforcement of the Possession Order until the determination of the Redemption Claim and/or the Specific Performance Claim (see below).

6. I have had the benefit of detailed written submissions from both Mr Wood and Mr Katz as well as short notes from Mrs Durnford and Ms Thompson. Both Mr Wood and Mr Katz supplemented their written submissions with extensive oral submissions during the course of the hearing and provided short additional written notes after the hearing. I read with care the written submissions, evidence and authorities relied on by the Bank and SLF and have considered their oral submissions. Although this judgment does not rehearse the full extent of the submissions and evidence, I have taken them into account in reaching this decision.

7. This hearing took place remotely via Skype for Business both audio and video at a time when Covid-19 restrictions would have prevented the enforcement of the Possession Order. The Bank confirmed both at the hearing and subsequently that it

did not intend to take any action to enforce the Possession Order before 31 October 2020.

8. The Bank's application initially came before the court on 17 January 2020 when the court substantially discharged an order obtained by SLF without notice on 5 December 2019 ("**the 5 December Order**"). The Bank's application to strike out was relisted for a 1-day hearing on 27 March 2020 but adjourned in light of the then recent lockdown and relisted on 27 July 2020.

9. I pause there as in this case unfortunately there is a history between Mrs Durnford and Mr and Mrs Giles which has perhaps led Mrs Durnford and her supporters to lose sight of the conduct expected of them in relation to court hearings. The hearing was conducted remotely. Mrs Durnford joined the hearing remotely as did someone who signed into the hearing as "Mrs Durnford's Legal Friend". After the hearing, a screen shot image from the hearing appears to have been circulated by a Mr Keith Gannon who described himself as a "witness" to the hearing. The screen shot appears to have been taken by "Mrs Durnford's Legal Friend". As the other attendees were all identifiably either the parties or their legal representatives it seems likely that Mr Gannon was "Mrs Durnford's Legal Friend" alternatively he has by some means been provided with the screen shot image by "Mrs Durnford's Legal Friend".

10. I draw the parties' attention to s.85C of the Courts Act 2003 (as inserted by the Coronovirus Act 2020) which provides that it is an offence for a person to make or attempt to make an unauthorised recording or transmission of court proceedings, which includes images. The screen shot circulated by Mr Gannon is an unauthorised recording or transmission of an image for the purposes of s.85C.

11. The screen shot and/or any other recordings or screen shots taken of the hearing on 27 July 2020 are unauthorised recordings of court proceedings in breach of s.85C. Any person in possession of any unauthorised recording or image of the 27 July hearing should immediately delete it and ask anyone to whom they have sent it to do the same.

12. When this judgment is handed down, I will direct that Mr Gannon and "Mrs Durnford's Legal Friend" are provided with a copy of the relevant paragraphs of this judgment. The parties and their legal advisers should provide a copy of the relevant paragraphs to anyone else who has, to their knowledge, come into possession of or circulated any unauthorised recording or image from the hearing.

13. It is important that during this public health crisis court business can continue, and so far as possible, where appropriate, be conducted remotely in accordance with the overriding objective and in a transparent, open, and public way. To do so requires all those who wish to participate in a remote hearing to observe the requirements set out in s.85C.

The Bank's application

14. An application to strike out is made pursuant to CPR 3.4(2) which provides so far as relevant:

> **3.4**

> …
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.
>
> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.
>
> …
>
> (5) Paragraph (2) does not limit any other power of the court to strike out a statement of case.

15. The Bank seeks to strike out the Redemption Claim on the basis that it says the claim is:

    i) inchoate/incoherent/insufficient (CPR3.4(2)(a);

    ii) an abuse of process as primarily a collateral attack on the judgment of District Judge Wilkinson or an abuse by reference to the *Aldi Guidelines* (CPR3.4(2)(b); and

    iii) there was procedural non-compliance (CPR 3.4(2)(c).

16. The court uses its power to strike out sparingly and only in a clear and obvious case, but it will use it where a party is pursuing a claim which has no reasonable basis. If for example, as alleged here, it is inchoate or does not make sense, or where it identifies an unwinnable case where allowing it to continue is without any possible benefit and would be a waste of resources to all parties. The court's focus is on the claim itself and it should not be considering contested factual disputes or conducting a mini trial.

17. Claims may also be struck out as an abuse of process on the basis that they are a collateral attack on a previous decision even if that decision is in a different tribunal/court. Equally, claims can be struck out where they represent in substance an attempt to re-litigate issues that have already been decided in other proceedings. They may also be struck out where there is a failure to follow the *Aldi guidelines.* Finally, a failure to comply with rules and orders is also a basis for striking out in its own right in some circumstances or can be an additional factor in considering an application under CPR3.4(2)(a) and (b).

18. The court has to keep in mind the overriding objective which includes considering the overall effect of an order on the parties.

19. The Redemption Claim is part of a wider dispute between SLF, Mr and Mrs Giles and Mrs Durnford.

20. It is necessary on an application to strike out that relies on issues of abuse of process by reference to collateral attack and the *Aldi guidelines* to review the background and chronology in some detail. This is necessary in particular to enable the court to consider the extent to which the issues raised in the Redemption Claim could or should have been or were raised in previous proceedings.

Background

21. Pursuant to the terms of the Option Agreement in 2011 and 2012 SLF paid a sum of just over £600,000 to Mrs Durnford in two tranches. In addition, between 2011 and mid-2018 SLF paid a sum said to be the equivalent of the monthly mortgage payments to the Bank on behalf of Mrs Durnford until she withdrew her consent. Mr and Mrs Simon Giles had an exclusive right to occupy the Property, as SLF's nominees, pursuant to clause 15 of the Option Agreement.

22. The Option Agreement was an option to purchase the Property and set out the mechanism by which notice was to be given to exercise it and when and how it could be extended. There is a dispute between Mrs Durnford and SLF about whether the Option Agreement continued after 2012 and/or whether a valid notice to exercise it was given in November 2018.

23. It is common ground that the Bank was not notified of nor did it give written consent to the Option Agreement. The granting of the Option Agreement was, and continues to be, a breach of the mortgage conditions between Mrs Durnford and the Bank as was the granting of any license or tenancy to occupy. SLF was advised by its solicitors in advance of completion of the Option Agreement of the risks and consequences of entering into it without the Bank's knowledge or consent. Although the Option Agreement was entered into in 2011, SLF did not register the Restriction against the title of the Property until 15 February 2013. SLF did not notify the Bank of the Option Agreement or the Restriction. The Land Registry has confirmed that they would not have sought the Bank's consent to register the Restriction.

24. There can be no doubt that SLF and Mr Giles were made aware of the Bank's prior charge, which was a defined term in the Option Agreement, and of the potential consequences for SLF.

25. Mr Wood had extracted what he said were the relevant parts of the Report on Title to SLF and the relevant parts of the mortgage conditions setting them out in his skeleton as follows:

> "SLF received a Report on Title dated 26 August 2011, prepared for it by Miramar Legal, its conveyancing solicitors (and who appear to have drafted the Option Agreement), which included the following points:

4.9 We have not reviewed [Mrs Durnford's] *current mortgage conditions but it is probable that, unless* [she] *gets their mortgagee's consent before entering into the Option Agreement they will be breaching its terms and conditions. In that case, the mortgage company may be able to claim an event of default and repossess the Property. If they do, they will be able to overreach the Agreement and sell the Property free of your interest. Please note, for the avoidance of doubt, in such circumstances you will not be able to recover the Option Sum from the mortgagee, i.e., you will lose the Option Sum.*

…

17. Breach of [Mrs Durnford's] *existing mortgage condition. We have not seen* [Mrs Durnford's] *mortgage conditions. However, generally mortgage conditions will prohibit any dealing with the property, i.e., entering into this Agreement. It is therefore likely that the* [Mrs Durnford] *will be in breach of the mortgage conditions. In the event that the* [Bank] *were to exercise its powers of sale, the Property and the Vineyard could be sold free of your interest to a third party even though the Agreement has been registered at the Land Registry. Of course you would have a claim against* [Mrs Durnford] *for breach of contract but as* [Mrs Durnford] *is in financial difficulties your chances of financial redress would be slim.*

Even though the author of the Report on Title did not have the mortgage conditions in front of him or her, the report correctly assumed that the Bank's mortgage conditions contained what are (it is submitted) standard terms. In particular, Mrs Durnford was subject to the following obligations and restrictions:

5(b) You must not neglect the Property or do anything else to reduce its value…

9(a) You must not, without the Bank's written consent: (i) agree to, or give, any licence or tenancy affecting the Property;… (iii) in any other way, either create, or dispose of, (or agree to) any legal estate or legal or equitable interest in the Property;…

9(b) You must do everything in your power to prevent: (i) any other person from being registered under the Land Registration Acts and Rules from time to time in force as proprietor of the Property… and (ii) any person from becoming entitled to claim any right over the Property.

9(c) You must do everything necessary to help the Bank to: (i) confirm or protect its interest in the Property; and (ii) exercise any of its rights under the Mortgage.

9(d) You must not, without the Bank's written consent, at any time create or allow any other mortgage, charge or burden in relation to the Assets.

> The Report on Title was also correct about the implications of breaching the mortgage conditions, which included:
>
> *11 The Mortgage shall become enforceable if: (a) the Debt, or any part of it, is not paid or discharged when due; (b) you are in breach of any of your obligations under the Mortgage; … (d) anyone seeks to, or takes possession of, or seeks to enforce, or enforces, any security affecting the Assets or if anything else happens which might adversely affect the security given by the Mortgage;…*
>
> *and when any of the above has occurred (whether or not it is continuing) and at any time afterwards, the powers of sale and of appointing a receiver conferred by section 101 of the Law of Property Act 1925 shall immediately arise and become exercisable by the Bank in respect of the Assets free from the restrictions contained in sections 103 and 109 of that Act…*"

26. SLF was plainly on notice of the risk it was taking in entering into the Option Agreement as against the Bank and, indeed, Mrs Durnford. It was warned that any interest it claimed could be overreached by the Bank and it could lose the Option sums. Precisely the position it now finds itself in. It has been seeking the assistance of the court through, initially, its intervention in the possession proceedings, then the Specific Performance Claim and now the Redemption Claim to ameliorate the consequences of the risk it took.

27. In support of the Redemption Claim Mr Katz relies on SLF's payments pursuant to the Option Agreement of approximately £600,000 to Mrs Durnford and mortgage payments totalling £475,922.86 over 7-years directly to the Bank. The Bank does not dispute that it received the mortgage payments. However, it does not accept that they can be characterised as payments from SLF as against the Bank.

28. A dispute arose between SLF/Mr and Mrs Giles and Mrs Durnford. In about 2014/2015 Mrs Durnford became concerned about the source of the monies being used to make the mortgage payments. She has produced a number of documents and made written submissions in which she makes serious allegations against Mr Giles and in respect of his wider business dealings not limited to SLF. She sought to bring the Option Agreement and/or SLF/Mr and Mrs Giles' involvement with the Property to an end.

29. Mrs Durnford filed a witness statement dated 19 February 2020 relating to both the Specific Performance Claim and the Redemption Claim. In addition, she provided written submissions in which she repeated a number of her allegations and concerns. Although Mrs Durnford clearly feels very strongly about the allegations she makes and the matters she raised, it appeared to me that save in limited respects it was not relevant to the Bank's application. Both the Bank's and Mrs Durnford's evidence was that SLF was subject to a Seychelles Freezing Order made in 2014. A copy of the Supreme Court of the Seychelles order dated 15 May 2014 extending a freezing order made in January 2014 was in the court bundle. It appears to be a freezing order made in support of an investigation by the Financial Intelligence Unit in the Seychelles under anti-money laundering legislation. Ms Butler fairly says that it is unclear whether the order remains in force. SLF did not address this in evidence or submissions.

30. Further, I note that Mrs Durnford says that Mr Giles was disqualified from acting as a director for 9 years with effect from October 2019. SLF is a Seychelles registered company. However, it did not address what effect the disqualification of its director, as a matter of English law, had, if any, on the Redemption Claim, in evidence or submissions.

31. In 2015 Mrs Durnford sought to evict SLF and Mr and Mrs Giles from the Property. She relied amongst other things upon what she said was an implied term in the Option Agreement entitling her to enter the Property. She was not successful. Following a trial at Central London County Court SLF obtained a final injunction against Mrs Durnford.

32. In 2016, Mrs Durnford instigated further proceedings. Unknown to SLF, she obtained a possession order in respect of the Property. The order was subsequently set aside, and the proceedings discontinued with Mrs Durnford agreeing to pay costs, which I understand remain outstanding.

33. A further consequence of the dispute between Mrs Durnford and SLF was that in 2018 unknown to SLF, she withdrew her consent to SLF making the mortgage payments on her behalf and she did not otherwise arrange to pay the mortgage. From about mid-2018 mortgage payments made by SLF were returned by the Bank. The Bank says that the last payment was in June 2018 whilst SLF suggests it was August 2018. In either case SLF was aware from the summer of 2018 that mortgage payments were being returned. The evidence in the Redemption Claim does not suggest SLF immediately took action either to enforce the Option Agreement or to remedy the shortfall in the mortgage payments. The mortgage fell into arrears and the Bank eventually sought to enforce its security by way of possession proceedings.

34. On 22 November 2018 SLF gave notice to exercise the Option Agreement. Under the terms of the Option Agreement, if validly exercised, completion would have taken place by 21 December 2018. Mrs Durnford does not accept that the notice was valid and/or that the Option Agreement continued to be enforceable at that time. Completion did not take place.

35. On 30 November 2018, the Bank issued its claim for possession based on arrears, resulting in the Possession Order. A Notice of Eviction was issued on 21 February 2019 with the warrant due to be executed on 29 March 2019.

36. SLF says that it did not become aware of the Possession Order until it received the Notice of Eviction in February 2019. It had still, by then, not taken any action to enforce the Option Agreement after the expiry of the notice in December 2018. In August 2019 District Judge Wilkinson was satisfied that notices in respect of the possession proceedings had been sent to the tenants/occupiers at the Property in the correct manner.

37. Mrs Goldman, initially on behalf of Mr Giles as occupier, and then on behalf of both Mr Giles and SLF contacted the Bank to seek to agree a resolution which would involve the Possession Order being set aside and Mr Giles and SLF becoming parties to the possession proceedings. The Bank was told that SLF had access to the funds required to clear the outstanding mortgage and that Mr Giles had a power of attorney pursuant to Clause 20 of the Option Agreement.

38. Clause 20 of the Option Agreement was intended to take effect on payment of the second option payment in 2012 and required Mrs Durnford to sign and deliver a power of attorney in the form set out in annex to the Option Agreement. The terms of the power of attorney provided authority for the holder to liaise with the Bank about the security. The draft in the annex to the Option Agreement is in the name of a Mr Murray. No executed power of attorney has been produced, by any party, in the name of Mr Murray or Mr Giles either in these proceedings or in the possession proceedings.

39. SLF sought to intervene in the possession proceedings. By an application dated 25 March 2019 it sought a stay of execution of the warrant and to be joined as a party to the possession proceedings.

40. At a hearing on 28 March 2019 SLF argued that a stay was necessary to enable it to make an application for an injunction against Mrs Durnford and to issue of proceedings in the High Court. Deputy District Judge Rahman acceded to that request. SLF was joined as a Second Defendant and execution of the warrant was stayed.

41. In the meantime, on 18 March 2019, SLF sent a letter of claim to Mrs Durnford in relation to the enforcement of the Option Agreement. No injunction was ever sought against Mrs Durnford.

42. On 9 April 2019 SLF issued a further application seeking to set aside the Possession Order and for permission to file a defence and counterclaim.

43. SLF's applications came before District Judge Wilkinson on 21 August 2019. SLF sought to argue that it could rely on s.36 (2) Administration of Justice Act 1970 ("**AJA**") arguing that the Option Agreement was signed as a deed and the power of attorney included within it took effect such that s.36 AJA did apply.

44. The Bank's position was that it had a valid Possession Order, it had not consented to the Option Agreement nor the tenancy of Mr Giles (both of which were therefore continuing breaches of the mortgage conditions). Neither the Option Agreement, the Restriction nor the tenancy were binding on the Bank. SLF had no authority to make the mortgage payments to the Bank and did so only with the consent of and on behalf of Mrs Durnford. Any dispute about the Option Agreement was a dispute between Mrs Durnford and SLF/Mr Giles. Consequently, the Bank argued that s.36 AJA was not engaged and SLF had no right of possession as against the Bank.

45. District Judge Wilkinson's judgment was dated 22 October 2019 ("**the Possession Judgment**") and the consequent order was dated 19 November 2019. In summary, she found that there was no reasonable prospect of SLF successfully defending the Bank's claim to possession because they could not bring themselves within s.36/39 AJA and had no standing within the possession proceedings.

46. It is necessary, however, to consider the Possession Judgment in some detail as Mr Wood argues that as a consequence SLF's Redemption Claim is an abuse of process as a collateral attack on the Possession Judgment and/or for a failure to follow the *Aldi guidelines*. Mr Katz argues that the Possession Judgment does not and could not preclude the Redemption Claim not least because the District Judge had no jurisdiction in respect of the Redemption Claim.

47. SLF finally issued a claim against Mrs Durnford for specific performance of the Option Agreement in the Chancery Division on 19 July 2019 ("**the Specific Performance Claim**"). This was 7 months after Mrs Durnford had failed to complete the sale in December 2018. Mrs Durnford filed defences in September and October 2019. She alleges that the Option Agreement lapsed on 30 August 2012 and the payments made by Mr Giles/SLF thereafter were rental payments. SLF does not accept that the Option Agreement had terminated or lapsed when it served notice to exercise the Option Agreement in November 2018. It says that Mrs Durnford's position is contrary to the position that she had adopted in, for example, the 2015 unlawful eviction proceedings.

48. There is no explanation of the delay in issuing or progressing the Specific Performance Claim. Indeed, Mrs Durnford's evidence suggests that SLF may have known considerably earlier that Mrs Durnford considered the Option Agreement to have lapsed.

49. The Possession Judgment refers to witness statements of Mrs Goldman as setting out both the factual background and SLF's argument that it had an interest in the Property which it was said would be a defence to the possession proceedings. No draft defence had been filed in advance of the hearing and there was no direct evidence from SLF or Mr Giles. Mrs Durnford supported the Bank's entitlement to the Possession Order.

50. The Possession Judgment records a brief background including that there was a dispute between Mrs Durnford and SLF.

51. The District Judge summarised the submissions of SLF at [12] as follows:

> "the creation of the Option confirms an equitable interest in land which, having served the option notice upon [Mrs Durnford] in November 2018 means that in equity the option has been performed by [Mrs Durnford]. Thus redeeming the mortgage and transferring title to [SLF] prior to the Possession Order being made. [SLF] asserts that this brings it within S39 [AJA] and that [SLF] can rely on S36 AJA to defeat the [Bank's] claim."

52. The District Judge summarised the Bank's submissions at [13] to [16] which I summarise as follows:

i) any interest SLF may have had in the property did not affect the Bank's right to possession as its charge ranked in priority to SLF's interest;

ii) the Option Agreement and any power of attorney were breaches of the mortgage conditions and a further ground for possession;

iii) the power of attorney did not confer on SLF any right to demand that the Bank dealt with SLF let alone accept money from it and in any event, Mrs Durnford, its principal, was present at the possession hearing when the Possession Order was made.

53. District Judge Wilkinson addressed the power of attorney issue at [23] – [24] and concluded as follows:

> "In my judgement the submission made by [the Bank] is correct; there is no basis in this case for asserting that a power of attorney entitles someone to pay money on behalf of the principal (as opposed to entering into an obligation to pay money) and the power of attorney itself does not purport to confer such are right. Furthermore, the power of attorney is said to be given by way of security, which renders it in breach of [the Bank's] mortgage which gives rise to a further right of possession on the part of [the Bank]. Lastly, [the Bank] itself has a power of attorney in respect of the property (by virtue of clause 16 of the mortgage conditions) which ranks in priority to any similar power held by [SLF]. **"**

54. The balance of the Possession Judgment was focussed on whether SLF had standing pursuant to s.39 and s.36 AJA and could redeem the mortgage or whether the Option Agreement gave rise to a proprietary interest.

55. District Judge Wilkinson noted the following at [26]:

i) There was no assertion or evidence that the Bank had waived Mrs Durnford's breach of the mortgage conditions;

ii) There was no assertion that the Bank was estopped from relying on the mortgage conditions;

iii) SLF's case as advanced at the hearing exceeded the scope of the application; and

iv) No part of SLF's application included a claim under the equity of redemption doctrine.

56. The Bank's consistent position has been that SLF cannot defeat the Bank's right to possession on the basis of the Option Agreement entered into (to the knowledge of SLF) in breach of the mortgage conditions. The Bank's position was that the court did not have jurisdiction to consider an application pursuant to s.36 AJA as the breach of the mortgage conditions, which was not limited to the arrears but was the Option Agreement itself, could not be remedied within a reasonable period of time.

57. The Bank relied on *Britannia Building Society v Earl* [1990] 1WLR 422 ("*Britannia*") in support of its position. SLF sought to distinguish it on the basis that the asserted estate or interest in land was said to arise under the Option Agreement and was protected by the Restriction. The District Judge summarised Mr Katz's arguments at [29] as follows:

> "the Option is specifically enforceable, the option notice was served before the [possession] claim was issued, the mortgage would be redeemed by [SLF] (whereas in Earl the tenants are not seeking to redeem the mortgage) and that in equity the

> option has been performed by [Mrs Durnford] in accordance with the option notice. As a result this title has been transferred and the mortgage is redeemed prior to the date of the Possession Order."

58. The District Judge concluded at [35] that there was no reasonable prospect of SLF successfully defending the Bank's claim for possession as it could not defeat the Bank's priority right to possession and did not fall within consideration of s.36 AJA.

59. She set out her reasoning at [30]-[37]:

    i) the Bank's charge ranked in priority to any other interest that may affect the Property and could not be defeated by a subsequent interest.

    ii) SLF could not force the Bank to allow it to exercise the Option Agreement and complete the purchase of the Property. SLF's interest could not defeat the Bank's claim and entitlement to possession in the circumstances.

    iii) The position between SLF and the Bank was analogous to the position in *Britannia* and SLF's application was without merit.

    iv) Contrary to Mr Katz's interpretation of the mortgage conditions the Option Agreement was a clear breach of the mortgage conditions (Clause 9(a)(iii)) that entitled the Bank to seek possession of and sell the Property.

    v) SLF had been given clear advice by its conveyancing solicitor that in the absence of the Bank's consent the Bank would be able to overreach the Option Agreement and sell free of its interest.

    vi) Consequently, whilst SLF had or claimed to have rights under, the Option Agreement the court did not have jurisdiction on an application under s.36 AJA. The very existence of the Option Agreement was a breach of the mortgage terms and a ground for possession.

    vii) The only way the breach of the mortgage conditions could be remedied would be for the Option Agreement to be declared void or terminated in which case SLF would no longer have any standing to defend the possession proceedings in reliance on it.

60. The District Judge noted the basis of SLF's application in March 2019. In her view, the application was granted to allow SLF to apply for an injunction against Mrs Durnford to enforce SLF's rights under the Option Agreement. She noted that by 21 August 2019 no proceedings for an injunction had been commenced and that it was only at the hearing that the court and the Bank were provided with a copy of the Specific Performance Claim issued in July.

61. The District Judge concluded at [37]

> "In my judgement though, those proceedings are for [Mrs Durnford] and [SLF] to pursue separately and distinct to the [Bank's] right to enforce its priority rights. **It should not**

> **prevent or delay the execution of the correctly obtained Possession Order."** (my emphasis)

62. Following the 19 November 2019 Order, giving effect to the Possession Judgment, the Bank applied to enforce its Possession Order. A warrant of possession was due to be executed against the Property on 19 December 2019. SLF applied for permission to appeal on 25 November 2019 and sought a stay of execution.

63. The application for permission to appeal was eventually dismissed by HHJ Venn on 3 March 2020. The Possession Order at the time of this hearing is now final and conclusive and therefore capable of enforcement subject to the lifting of the restrictions arising from Covid-19.

64. Mrs Durnford was declared bankrupt in the High Court on 26 November 2019. The bankruptcy was based on a petition presented on 8 January 2019. Her application to annul in January 2020 was unsuccessful and at the time of this hearing she remained an undischarged bankrupt. Her beneficial interest in the Property, if any, therefore, vested in her bankrupt estate on 26 November 2019.

65. On behalf of Mrs Durnford's creditors the Trustee has an interest in the Redemption Claim and the Specific Performance Claim. An application to join the Trustee was eventually issued by SLF on 12 February 2020.

66. The Trustee's position was that she was neutral in relation to the Redemption Claim and was prepared to agree to being joined as a party and to agree to be bound by any order the court might make. This was subject to one concern in relation to costs orders that might adversely affect creditors of Mrs Durnford. Their position in relation to the Specific Performance Claim was still under review.

67. The Redemption Claim is based on SLF's claim to have an interest in the equity of redemption. It is a statutory claim pursuant to s.91(2) of the Law of Property Act 1925 (LPA) and/or s.50 LPA for redemption of the mortgage and the transfer of the Property to SLF. Mr Katz argues it was properly brought as a Part 8 claim in the High Court. It is not a claim over which the county court would have had jurisdiction.

68. S.91 provides:

> 91.— Sale of mortgaged property in action for redemption or foreclosure.
>
> (1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.
>
> (2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that—

> (a) any other person dissents; or
>
> (b) the mortgagee or any person so interested does not appear in the action;
>
> and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.
>
> (3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
>
> (4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.
>
> (5) This section applies to actions brought either before or after the commencement of this Act.
>
> (6) In this section *"mortgaged property"* includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.
>
> (7) For the purposes of this section the court may, in favour of a purchaser, make a vesting order conveying the mortgaged property, or appoint a person to do so, subject or not to any incumbrance, as the court may think fit; or, in the case of an equitable mortgage, may create and vest a mortgage term in the mortgagee to enable him to carry out the sale as if the mortgage had been made by deed by way of legal mortgage.
>
> (8) The county court has jurisdiction under this section where the amount owing in respect of the mortgage or charge at the commencement of the proceedings does not exceed [£30,000] .

69. Mr Katz says that SLF as a person with a beneficial interest in the property, however small that interest may be, even if not a party to the mortgage, would have an interest in the right of redemption (S91(3)) and has a right to redeem the mortgage. The Trustee in whom Mrs Durnford's estate vested was also a person who might have a beneficial interest and yet despite that SLF's application to join the Trustee was only issued on 12 February 2020 over 2 months after the Redemption Claim was issued and a month after the 17 January hearing where this issue was raised by the Bank. There was no explanation for this delay.

70. Further, he says that once SLF exercised the Option Agreement in 2018 it became a binding contract for sale entitling SLF to apply to discharge of mortgage under s.50 LPA. S.50 LPA provides that any party to a sale or exchange, may apply to the High Court for a declaration that land is free from any incumbrance upon payment into court of the sums necessary to meet the incumbrance, which in this case he says would be a sum sufficient to redeem the mortgage.

71. The Bank accepts in principle that a party who has validly exercised an option to purchase is treated as having an interest in the Equity of Redemption. However, the continuing validity of the Option Agreement and whether SLF has validly exercised the Option Agreement are the subject of the Specific Performance Claim.

72. As with the Specific Performance Claim there is no proper explanation for the timing of the issue of the Redemption Claim in December 2019, 12 months after the Option Agreement should have completed if validly exercised and 18 months after Mrs Durnford withdrew her consent to SLF paying the mortgage.

73. The 5 December Order sought to stay the execution of a warrant in relation to the Possession Order. There is a dispute between the parties which I address below about the extent of any disclosure provided to the court and the basis on which the court was persuaded to make the 5 December Order. The county court subsequently stayed execution of the Possession Order pending determination of the application for permission to appeal the Possession Judgment.

74. Pursuant to the 5 December Order SLF was to pay into court £45,000 towards the arrears (roughly half the arrears then outstanding) and thereafter to pay into court £5,665.76 per month being the sum it understood to be the monthly payment due in respect of the mortgage as at December 2019. As at 27 July 2020 there was no evidence from SLF that the payments had been made, however, Mr Katz told the court that the payments had been made.

75. The Redemption Claim was briefly set out in both the claim form and Mrs Goldman's first witness statement. Both provide a truncated chronology and background including that the Option Agreement had been exercised in November 2018. The claim form sets out the substance of the claim as follows:

> "9. … [SLF] is interested in the equity of redemption and/or the mortgage money for the purposes of s.91 (2) of the Act.
>
> 10. Alternatively, [SLF's] Interest in the equity of redemption and/or the mortgage money is derived from a beneficial interest in the Property and/or the mortgage money by constructive trust, resulting trust and/or by proprietary estoppel.
>
> 11. In the further alternative, for the reasons set out herein [SLF] is a party to a sale or exchange for the purposes of s.50 of the Act and, if required or the court thinks fit, the Claimant seeks a declaration discharging the mortgage upon payment into court of the redemption monies.

> 12. [SLF] seeks: (1) An order under s.91 (2) of the Act for **redemption of the mortgage and sale of the Property to the Claimant on the terms set out in the Option**; (my emphasis)
>
> (2) Alternatively, upon payment into court of the redemption monies, a declaration under s.50 of the Act that the mortgage is discharged.
>
> (3) Such other relief as the court thinks fit.
>
> (4) Costs.

76. Thus, the primary relief sought by SLF was an order for redemption and sale on the terms of the Option Agreement. The validity of the Option Agreement being the subject matter of the Specific Performance Claim and a dispute between Mrs Durnford and SLF, not the Bank.

77. Mrs Goldman says that upon discovering the arrears SLF instructed Malcolm & Co LLP to write to the Bank confirming that SLF was immediately offering to clear all mortgage arrears and to redeem the mortgage. The March 2019 letter she relies on says:

> " our clients are able to clear the arrears and meet the monthly payments as they fall due, which our clients have done for the past 7-years. Indeed, as previously stated SLF is able to redeem the mortgage in full as per the terms of the Option."

78. A curiosity of Mrs Goldman's evidence generally is that it does not explain what if any action SLF took in 2018 when the mortgage payments started to be returned by the Bank nor does it provide any evidence of SLF having funding in place to redeem the mortgage and complete the Option Agreement in December 2018. Indeed, there is no evidence to support the assertions made in the correspondence or her witness evidence about SLF's ability to fund any redemption at the time the Redemption Claim was issued. Her evidence was that the Bank had rejected all offers of payment or redemption of the mortgage and had sought to enforce the Possession Order.

79. At paragraph 25 to 27 of her witness statement she sets out the relief sought:

> "25. This claim is primarily an action for redemption and sale under s.92(2) of the Law of Property Act 1925 ("the Act"). [SLF] is interested in the equity of redemption for the purposes of s.92(2) as a consequence of [Mrs Durnford's] failure to complete the sale and the substantial sums paid by [SLF] to reduce the Mortgage.
>
> 26. Furthermore, even if the Option did expire on 30 August 2012 (which is denied), [SLF] has a beneficial interest in the Property, or alternatively in the mortgage money, by constructive trust and/or resulting trust or by proprietary estoppel. It is [SLF's] alternative case that, after to discharge of

> the mortgage, [SLF] holds the entire beneficial interest in the Property.
>
> 27. Further and in the alternative, if so required or the court thinks appropriate, [SLF] seeks a declaration under s.50 of the Act that, upon payment into court of the redemption monies, the Mortgage is discharged."

80. Mr Katz submits that the use of s.91 in the circumstances of this case is a proper use of the jurisdiction and that the claim is properly formulated and sufficient to avoid any strike out. Mr Wood argues that the Redemption Claim is inchoate, incoherent, and insufficient and should be struck out pursuant to CPR3.4(2)(a).

81. Redemption claims are uncommon. They were described by Sir Donald Nicholls VC in *Palk v. Mortgage Services Funding plc* [1993] Ch 330 ("*Palk*") at [336E] as "*almost unheard of today"* and that was nearly 30-years ago.

82. Prior to the coming into force of the LPA, a mortgagor had limited rights to redeem:

> "a legal first mortgagee of a freehold was vested with the fee simple, and once the legal date for redemption had passed, the mortgagor's right to redeem was merely equitable. "Foreclosure" was the name given to the process whereby the mortgagor's equitable right to redeem was declared by the court to be extinguished and the mortgagee was left owner of the property, both at law and in equity" (Megarry & Wade, The Law of Real Property, 9ed, at 24-006)."

83. In order to avoid the consequences of foreclosure, which would otherwise cause the mortgagor's interest in the equity of redemption to be extinguished they could seek to redeem the mortgage. The mortgagor would tender the entire sum owed, thereby retaining the (net) equity in the property. If the mortgagee refused to accept tender of the debt, the mortgagor would apply to court for an order permitting redemption of the mortgage.

84. Thus, historically a redemption claim would result in an order

> "that an account be taken of what is due to the mortgagee in respect of his mortgage, including the costs of the redemption action and that upon the mortgagor paying to the mortgagee the amount certified by the Master to be due within six (calendar) months… the mortgagee shall surrender his mortgage term… and deliver up the title deeds" (Cousins on The Law of Mortgages, 4ed, at 29-48).

85. Mr Wood emphasises that the usual terms of such an order required that "*payment has to be made strictly in accordance with the terms of the order…* [the mortgagor] *comes*

of his own volition to the court professing to have his money ready" (*Cousins at* 29-51).

86. Mr Wood submits that as SLF has neither offered (nor pleaded) what he says is the pre-requisite of a readily and obviously funded offer to redeem the mortgage. In support of this contention, he relied on *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 per Viscount Finlay at 443-444

> "In my opinion the present suit was improperly brought and ought not to be entertained… then quoting from Scrutton LJ in the Court of Appeal …the unsatisfactoriness appears to me to arise from the fact that the Plaintiffs have brought into the Commercial Court an action in which they have picked out such parts of an action for redemption as are in their favour and have avoided the consequences against them which would have followed in bringing the action for redemption in the proper Tribunal, in the Chancery Division. If they had proceeded in the Chancery Division for redemption they would have had to offer the sum found due by the court. They do not want to do that apparently, they want to redeem if they can pay in roubles, but they have no particular anxiety at present if they have to pay in sterling."

87. He argues that SLF in not providing an unconditional offer to redeem with evidence of available funding was in the same position as *Russian Commercial and Industrial Bank*. SLF was seeking to pick out which parts of the Redemption Claim it pursued. He argued that this is particularly relevant in the context of the Specific Performance Claim. SLF's offer to redeem the mortgage was conditional upon its success in the Specific Performance Claim. He submits that such a conditional offer undermines the Redemption Claim and is inconsistent with the requirement that a claimant come to court with its money ready. He says it is clear from paragraph 12 (1) of the claim form, the 5 December Order, the 13 March Application, and SLF's proposal to consolidate the Redemption Claim with the Specific Performance Claim that SLF's intention was to seek to deprive the Bank of the benefit of the Possession Order whilst it pursued the Specific Performance Claim. He argued that SLF was seeking to use the s.91 statutory claim for an ulterior motive and to go behind [37] of the Possession Judgment.

88. Mr Wood submits that contrary to Mrs Goldman's evidence SLF has not made any offer to immediately to redeem the mortgage. The correspondence upon which she relies provides only unsupported statements to the effect that "*SLF is able to redeem the mortgage in full*". He says that no unequivocal offer to redeem has been made.

89. Mr Katz rejects these complaints. His primary argument is that Mr Wood has misunderstood the Redemption Claim being made. He argues that it is plain from paragraph 12 of the Redemption Claim that SLF is seeking an order for redemption and sale on the terms of the Option Agreement rather than a simple Redemption Claim. Thus, he essentially confirmed that it was SLF's intention that the Bank's right to enforce its Possession Order should be delayed until after the resolution of the

Specific Performance Claim and the Redemption Claim. He relied on *Fisher & Lightwood* at 48.2

> "As a general rule the mortgagor is not entitled to bring the mortgagee before the court except for the purpose of redemption. Hence a mortgagee cannot be made a party to a claim relating to the mortgage unless there is expressly or by implication an offer to redeem."
>
> "This rule… does not apply where the mortgagor's claim is for sale and not redemption. See S91 LPA"

90. Mr Katz says that whilst SLF have in any event made an express offer to redeem, since the Redemption Claim is for a sale and not just redemption there is no requirement for there to be an express or implied offer to redeem in advance of the court having exercised its discretion to determine what order to make. The court has a broad statutory discretion and an offer to redeem is not a pre-requisite and the court's discretion is unfettered.

91. Mr Wood relies on the pre-1926 authorities which make it clear that the claimant was expected to come to court with his money ready. However, since 1926 the more common approach has been for mortgagees to seek a possession order to enable them to exercise their powers of sale. To avoid repossession, rather than offering to redeem the entirety of the mortgage, mortgagors more often pay off arrears by instalments (under the jurisdiction conferred by s.36 AJA) or will seek to sell or re-mortgage.

92. As a consequence, it is rarely necessary for mortgagors to rely on s.91 in the context of residential mortgages. However, s.91 had something of a resurgence following the recession in the early 1990's. It was identified as a possible remedy by those trapped in negative equity. Mortgagees would often refuse to allow a sale if it would result in a shortfall against the mortgage even if it would reduce the borrowers' indebtedness to the mortgagee and the amount of monthly instalments. It was this problem that Sir Donald Nicholls VC was considering in *Palk.*

93. Mr Katz points to the outcome in *Palk* as supportive of SLF's position that an offer to redeem is not a pre-requisite of a claim for redemption and sale. In *Palk*, a sale was ordered notwithstanding that the mortgage would not be fully redeemed from the proceeds of sale.

94. In *Palk* Sir Donald Nicholls VC said at [339D-E] and [340]

> "The discretion given to the court by section 91(2) is not hedged about with preconditions. The question on this appeal is how ought the court to exercise its discretion under the statute in the particular circumstances…
>
> Section 91(2) gives the court a discretion in wide terms. The discretion is unfettered. It can be exercised at any time. Self-evidently, in exercising that power the court will have due regard to the interests of all concerned. The court will act judicially. But it cannot be right that the court should decline to

> exercise the power if the consequence will be manifest unfairness. In my view this is a case in which a sale should be directed even though there will be a deficiency. It is just and equitable to order a sale because otherwise unfairness and injustice will follow."

95. Although the facts are case specific it is clear that the court, in reaching its decision, was considering the interests of all parties and all the circumstances not just Mrs Palk's position. Mrs Palk was caught in negative equity. She was being compelled to participate in the Respondent's scheme which involved holding on to the property to see if the market turned in the Respondent's favour. The delay would have caused Mrs Palk's debt to the Respondent to increase. The court considered the evidence about the Respondent's scheme and Mrs Palk's alternative proposal and determined having considered all the factors to exercise its discretion in favour of an immediate sale thus fixing Mrs Palk's liability for the shortfall rather than allowing it to increase further.

96. Mr Katz also referred me to other negative equity authorities. He sought to differentiate the position of SLF in this case on the basis that it was in occupation, paying the mortgage payments into court and was not going to frustrate a sale to itself which is what it wanted to achieve. Mr Katz submitted that the Bank's position was therefore fully protected, and, in any event, there was said to be sufficient equity in the Property to fully protect the Bank. SLF put the value of the Property at between £2.5m and £3m. Finally, he pointed to SLF's alternative claim to a beneficial interest in the Property arising from the payments they had made.

97. Mr Wood does not agree. He argues that the pre-1926 authorities such as *Russian Commercial and Industrial Bank* have more application as they are not concerned with negative equity cases such as *Palk.* However, he did acknowledge that given the age of the authorities and the fact that they pre-dated the LPA there must be some discretion.

98. In order to exercise its' rights to seek an order for sale and redemption SLF first needs to have such a right. SLF's rights depend on the validity of the Option Agreement and the notice given pursuant to it which are the subject of the Specific Performance Claim. Mr Katz referred me to and relied on the first and second footnote in *Fisher & Lightwood's Law of Mortgages, 15ed* at 48.8. The first footnote says as follows:

> "But an application to strike out a redemption claim, on the ground of lack of title in the Claimant, was held bad, where the mortgagor had parted with his interest in the security to an assignee for whose benefit he was seeking redemption, though the assignee must be a party to such a claim: Winterbottom v Taybe (1854) 2 Drew 279."
>
> "If the right to redeem is dependent on the validity of an instrument, there will be no declaration as to the terms of redemption until the question of validity has been settled: Blake V Foster (1813) 2 Ball 85 B 387."

99. Thus, Mr Katz argues that in any event the Redemption Claim should not be struck out until after the Specific Performance Claim has been determined which would then determine if SLF's Option Agreement was valid and validly exercised. If it were then it would just be a matter of completion on the terms of the Option Agreement as sought in the Redemption Claim.

100. Mr Wood argues that delaying the Bank's right to enforce the Possession Order would be a collateral attack on the Possession Judgment. District Judge Wilkinson made it clear at [37] that the Specific Performance Claim (to determine SLF's rights under the Option Agreement) should not prevent or delay the Bank from enforcing its rights under the correctly obtained Possession Order. She further noted that SLF's interest could not defeat the Bank's entitlement to possession. Mr Wood argues that SLF exhausted its right to challenge the Possession Judgment when permission to appeal was refused on 3 March 2020. He says that SLF's collateral attack and/or abuse of process is hiding in plain sight. SLF's Redemption Claim specifically seeks a sale on the terms of the Option Agreement.

101. He argues that following the Possession Judgment any attempt to delay the Bank's exercise of its rights pending a determination of SLF's rights under the Option Agreement would be an abuse in the face of a judicial determination which was now final. There was no discretion left for this court in light of the terms of the Possession Judgment and in particular at [37]. The Specific Performance Claim should not be permitted to delay the Bank's rights to enforce its possession order.

102. Although Mr Katz's primary position is that it is not a precondition of any Redemption Claim which seeks redemption and sale for there to be payment into court or a readily and obviously funded offer to redeem, nonetheless he argued that SLF had expressly made an offer to redeem. In support of this submission, he relied on Mrs Goldman's correspondence with the Bank:

    i) On 27 February 2019 Mrs Goldman said that Mr Giles was in a position to clear the arrears and redeem the mortgage;

    ii) On 8 March she wrote that she was instructed SLF has access to funds to clear the outstanding mortgage;

    iii) On 12 March she repeated her instructions;

    iv) On 19 March in addition to asking the Bank to agree to a short adjournment so that an application could be made to the High Court she said SLF was financially able to redeem the mortgage and asked the Bank to provide a redemption statement;

103. Mrs Goldman's evidence and the correspondence simply does not go far enough. It is unsupported and vague assertion. I do not accept that it can be said to amount to an express offer. The high point of SLF's funding evidence was a letter from a broker dated 19 February 2020. It is clear that no specific offer of funding had been sought from or obtained by the broker. The broker says that they had carried out a "fact find" and "found dozens of options available". The writer indicates that short-term bridging loans or mortgage options are available, and they therefore see no difficulty raising finance of around 60% of what he has been told is the purchase price.

104. Mrs Goldman's evidence relying on the brokers's letter asserts that:

> " the Claimant is willing to provide evidence of funding from a preferred funder. It is [SLF's] position that a number of different funding sources are open to [SLF] and [SLF] has therefore the financial means to fully redeem the mortgage."

105. The letter provides no evidence at all that SLF is in a position to raise funding to redeem the mortgage. The "dozens of options" are options that require the funding to be secured over the Property. It is clear that the form of funding to which Mrs Goldman refers would rely on the success of the Specific Performance Claim and an ability to charge the Property to secure the funding. Such a funding mechanism would also require SLF to satisfy any mortgagee that it could meet the mortgage payments. Thus, SLF's position appears to be that its ability to fund the redemption is conditional on success in the Specific Performance Claim as submitted by Mr Wood. Indeed, Mr Katz did not seriously suggest otherwise.

106. Mr Katz is critical of the Bank for not providing a redemption statement to SLF. He suggests that inhibits SLF from providing evidence of funding as it does not know what sum it has to fund. The Bank had provided details of the outstanding sums due under the mortgage during the possession proceedings and again in the Redemption Claim. In addition, Ms Butler and Mr Prideaux provided details of the Bank's costs in the Redemption Claim. The complaint about the absence of a redemption statement was raised at the hearing on 17 January 2020. It is clear that SLF was able to ask a broker to "fact find" on the basis of assumptions. I made it clear on 17 January and remain of the view that the absence of a redemption statement does not preclude SLF from providing evidence of an ability to fund the redemption of the mortgage.

107. The authorities to which I have been referred, even those in the 1990's, did not need to grapple with a more modern problem. Regulatory and compliance obligations brought about by anti-money laundering and proceeds of crime legislation require both paying parties and receiving parties to provide satisfactory evidence of source of funds. It seems to me self-evident in 2020 that any funding proposal would have to be one that could meet the mortgagee's reasonable due diligence requirements.

108. In this case where the evidence suggests that SLF is subject to a Freezing Injunction in the Seychelles under anti-money laundering legislation and that its director is disqualified it was surprising that SLF did not grapple with this issue in a more straightforward way. A due diligence requirement on the part of the Bank in relation to source of funds ought to be expected and ought to be able to be met.

109. An additional aspect of the Bank's position was therefore that in the absence of evidence of readily available funds to redeem the mortgage and the source of those funds SLF should not be permitted to delay or prevent the Bank from enforcing its security.

110. The logic of SLF's position is understandable. From its point of view, why would it want to unconditionally commit to redeeming the mortgage if the Option Agreement were found to be invalid, I am not persuaded that it obviates the need for SLF to be able to satisfy the court and the Bank that it would be in a position to redeem the

mortgage in any event for the purposes of the Redemption Claim. That it might choose in the end to secure any funding against the Property if it were successful in the Specific Performance Claim is nothing to the point.

111. In any event I do not accept that the evidence supports Mr Katz's submission that SLF have made an unequivocal express offer to redeem the mortgage.

112. SLF is asking the court to exercise its discretion to order redemption and sale. Evidence of the ability to fund the redemption is necessarily a factor which the court has to consider as part of the exercise of its discretion when considering all the factors or circumstances in the Redemption Claim, it cannot work in a vacuum. For it to be otherwise would risk the costs and time of all parties and the court in an entirely arid argument about the entitlement to redeem and would not be in keeping with the overriding objective.

113. It seems to me that evidence of the availability of funding and the source of funding is an essential part of any redemption claim. Even in cases such as *Palk,* Mrs Palk explained her proposal, which albeit did not fully redeem the mortgage, was evidenced in advance of the determination of the claim so that the court could consider it against the mortgage company's alternative scheme and weigh it in the balance. To my mind the availability and source of funding must be credible and more than hypothetical.

114. Mr Wood identifies other factors which he says raise concerns about SLF's ability to redeem at any time. First, he notes that SLF is a Seychelles registered company. Even in the absence of the freezing injunction that adds to the risks in relation to funding. Second, he rightly points to the fact that when SLF obtained the 5 December Order they only offered to pay approximately half the arrears then outstanding leaving half the arrears in December 2019 unpaid. Third, he points to the fact that the interim costs order made by District Judge Wilkinson on 19 November 2019 was not paid until after the hearing on 17 January 2020.

115. It seemed to me clear and not seriously contested by SLF that it was looking to use s.91 to delay the Bank's entitlement to enforce its rights pending resolution of its dispute with Mrs Durnford. In doing so it was potentially causing a detrimental impact to all the other parties with an interest in the outcome of SLF's Redemption Claim.

116. It seems to me that that is an important factor for the court to take into account in this case where the position of the Trustee and creditors also needs to be considered. In particular any costs due to the Bank as a consequence of this dispute would reduce the equity in the Property (because the costs would be likely to be added to the mortgage debt), to the extent that they are not paid by SLF. In the absence of any credible evidence of an ability to fund the redemption in due course, irrespective of the outcome of the Specific Performance Claim, this was a factor for the court to consider not only when considering exercising its discretion under s.91 but also when considering the position on an application to strike out.

117. All these matters would be factors that would need to be taken into account in relation to the Redemption Claim and the credibility of any evidence of the availability of

funding. They are also factors for the court to weigh in the balance when considering the exercise of its discretion on an application to strike out.

118. Mr Wood sought to argue that the Redemption Claim is inchoate not just because on his analysis no obviously funded offer to redeem was available but also because SLF had chosen not made it clear to the Court or the Bank (or the Trustee) what specific relief they were seeking. He accepts that the court has a broad discretion as to the terms on which it could make an order but argues that is precisely why SLF needs to set out the relief they are seeking. I agree: SLF needs to say what it wants. Even with a broad and unfettered discretion the court still needs to know what it is being asked to do and why. It can then consider whether in the exercise of its discretion it is prepared to make an order in the terms sought. I note that in reality it is clear that SLF will be seeking an order for sale on the terms of the Option Agreement which Mr Wood says is a collateral attack on the Possession Judgment. However, it had not sought to make that clear in the Redemption Claim.

119. Mr Wood argues that if the remedy being sought is as it appears, an order for sale on the terms of the Option Agreement is an egregious and impermissible attempt to thwart the Bank's entitlement to exercise its rights under the Possession Order and mortgage and a collateral attack on the Possession Judgment. It would prevent or delay the execution of the Bank's Possession Order and seeks to impermissibly go behind or around the Possession Judgment and its consequences.

120. SLF wants to become the owner of the Property and Mr and Mrs Giles want to occupy it. The Redemption Claim is the current mechanism by which SLF seeks to achieve that outcome. It is, however, conditional on SLF having a right to bring the Redemption Claim which itself depends on the validity of the Option Agreement.

121. Mr Wood reminds me that SLF does not have an immediate right to possession of the Property as against the Bank. Its director, Mr Giles, and his wife occupy as unauthorised licensees. The right of redemption is not to be confused with a mortgagor's right of occupation. In any event any tenancy or licence said to exist in favour of SLF or Mr Giles was a further breach of the mortgage conditions. Both matters were considered by the District Judge in the Possession Judgment.

122. Although SLF is pursuing the Specific Performance Claim, that is a personal claim against Mrs Durnford for specific performance and/or damages in relation to the Option Agreement. Even if the Option Agreement is found to be valid that does not resolve SLF's difficulties as against the Bank. It still does not affect the Bank's prior charge and interest which still rank in priority to SLF. The Option Agreement would still be a breach of the mortgage conditions as would Mr and Mrs Giles's occupation which would have entitled the Bank to exercise its rights to seek possession.

123. Consequently, Mr Wood argues that since SLF's interest is at best that of option holder, if successful, in the Specific Performance Claim at most it would be entitled to seek an order preventing the Bank from exercising its power of sale pending determination of the Redemption Claim. It should not be permitted to stop the Bank from taking possession pursuant to the Possession Order.

124. He argues that there is no reason to conclude (and no allegation) that the Bank would exercise its power of sale other than lawfully and properly and therefore no reason to

exercise judicial control over its right to pursue its properly obtained Possession Order.

125. Mr Katz did not accept that pursuing the Redemption Claim was a collateral attack on the Possession Judgment. Whilst he accepted that on its face the Possession Judgment appeared to take into account broader considerations, he argued that those must be viewed in the limited context in which they took place and did not give rise to issue estoppel, res judicata or collateral attack.

126. He submitted that whilst the submissions before the District Judge covered those broader issues and included reference to the equity of redemption, those submissions were made in the context of SLF having issued the Specific Performance Claim. He says that he did not argue equity of redemption in the context of a claim pursuant to S91(2). Therefore, whilst there is reference to 'the equity of redemption doctrine' in the Possession Judgment the District Judge had exceeded her remit by determining issues that were wider than the applications before her.

127. Thus, he submits that despite the apparent terms of the Possession Judgment the District Judge only determined whether SLF had an interest in the equity of redemption for the purposes of SLF bringing itself within s.39 and s.36 AJA.

128. Mr Wood submits that the s.36 AJA claim and the Redemption Claim are fundamentally both about the relationship between SLF and the Bank. He says they are two sides of the same coin. He says that the question for the court in both cases was whether it should regulate or interfere in that relationship.

129. Mr Wood argues that the effect of the Redemption Claim, and especially of the 5 December Order, and 13 March application were to directly interfere with the ongoing litigation in the Possession Claim. He submits that in light of the dismissal of SLF's application for permission to appeal, it was very difficult to see how SLF could properly invite this Court to make an order in its favour in the Redemption Claim without relying on or asking the court to make findings that were inconsistent with those in the Possession Claim.

130. He argued that the determination of the Redemption Claim would require the court to consider whether and if so on what terms SLF ought to be entitled to interfere with the Bank's priority rights, and particularly whether and if so on what terms the Bank should be made to await determination of the Specific Performance Claim. He says that in light of the Possession Judgment any decision delaying the Bank's right to possession would be a collateral attack on that decision.

131. These submissions seemed to me to have considerable force and present SLF with a number of difficulties in relation to both collateral attack and the *Aldi guidelines* to which I return below.

132. The Possession Judgment made clear findings about the Bank's priority interests and determined that SLF interest could not defeat the Bank's claim and importantly in the context of what Mr Katz seeks to achieve in the Redemption Claim made it clear at [37] that SLF's pursuit of its claim against Mrs Durnford by means of the Specific Performance Claim should not prevent the Bank from executing its Possession Order. It seems to me therefore that on the particular facts of this case any attempt by SLF to

use the Redemption Claim to thwart the Bank's rights to enforce its Possession Order is a direct attack on the Possession Judgment. In the absence of the Possession Judgment Mr Katz's argument that the Redemption Claim should sit behind the Specific Performance Claim would have more merit. However, it seems to me that the consequences of the Possession Judgment and its effect on the remedies now available to SLF are self-inflicted.

133. Mr Wood does not limit his submissions that the Redemption Claim is an impermissible abuse of the Court's process because it amounts to a collateral attack on the Possession Judgment. He argues that SLF's Redemption Claim was one that it ought to have come clean about in the possession proceedings. He says that SLF's failure to raise its intention to bring the Redemption Claim before the District Judge was an egregious breach of the *Aldi guidelines* and another ground for striking out the Redemption Claim as an abuse of process.

134. In *Aldi Stores Ltd v. WSP Group plc and others* [2008] 1 WLR 748 (**"*Aldi*")** the court considered the doctrine of abuse of process and its limits and the approach and behaviour to be adopted by parties when not inviting determination of all possible relevant issues and claims in a first action. In this case Mr Wood argues that SLF's applications within the possession proceedings are the first action.

135. Thomas LJ set out at [29] – [31] what have become known as the *Aldi guidelines*:

> "29 I also wish to add a word as to the approach that should be adopted if a similar problem arises in the future. In circumstances such as those that arose in this case, the proper course is to raise the issue with the court…
>
> 30 Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.

> 31 However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

136. Thomas LJ at [5] set out the general principles applicable to any application to strike out a claim that could and should have been brought in previous proceedings. He noted that it was neither necessary nor helpful to refer to the accretion of authority prior to Lord Bingham of Cornhill's speech in *Johnson v Gore Wood* [2002] 2 AC 1 ("***Johnson***") and that the underlying public interest was that:

> "there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

137. Thomas LJ said it was not necessary that the parties in the second action be identical to the first. The court must carry out a broad merits-based assessment to determine whether the second action, in this case the Redemption Claim, raised matters which should properly have been raised in the first action, the challenge to the Possession Order. This approach was consistent with the approach identified in *Johnson.*

138. In *Gladman Commercial Properties v. Fisher Hargreaves Proctor* [2014] PNLR 11 ("***Gladman***") the Court of Appeal held that a failure to comply with the *Aldi guidelines* was itself a factor indicating that a party was abusing the Court's process with a subsequent action. Briggs LJ (as he then was) explained it in the following way, at [64]-[65]:

> "[Thomas LJ in Aldi] plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources. He described a failure to do so as inexcusable. Furthermore, in the Stuart case, both Sedley L.J. and Sir Anthony Clarke MR spelt out in express terms that a failure to follow the Aldi guidelines involved the claimant running a risk that the pursuit of a second claim would constitute an abuse.
>
> As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to

> follow *guidelines* laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation."

139. Kitchin LJ citing *Gladman* with approval said in *Clutterbuck v. Cleghorn* [2017] EWCA Civ 137 ("***Clutterbuck***") at [81] that the *Aldi guidelines* should be regarded as mandatory and an inexcusable failure to comply with them was a relevant factor in assessing whether a party was abusing the process of the court by seeking to raise before the court an issue in one set of proceedings that could have been raised in prior proceedings.

140. In *Stuart v. Goldberg Linde* [2008] 1 WLR 823 ("***Stuart***"), referred to in *Gladman*, Sir Anthony Clarke MR had held (at [96]):

> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated. "

141. Mr Katz does not accept that the Redemption Claim is a breach of the *Aldi Guidelines* in so far as they apply at all. He says that there was no failure to bring the Redemption Claim within the possession proceedings because the county court simply did not have jurisdiction to hear the Redemption Claim as set out in s.91(8).

142. His primary argument is that the issues in the Redemption Claim have not already been decided nor is SLF impermissibly seeking to relitigate them. The Redemption Claim is the first time SLF has sought to make a claim pursuant to s.91(2) against the Bank. Had SLF been successful before the District Judge, its argument under s.36 AJA would have been an entirely different to the position it adopts in the Redemption Claim. In light of the Possession Judgment SLF has not had an opportunity to argue the s.36/s.39 AJA issues. In reality SLF was effectively shut out from the county court proceedings when the District Judge determined that SLF had no standing to make a claim within the possession proceedings as it could not derive any title to do so under s.36 AJA.

143. Consequently, he argues that the Redemption Claim cannot be said to be an attempt to circumvent or usurp the county court's powers and decision-making nor can it be said to be a collateral attack on the Possession Judgment as the only issue before the county court was the interpretation of s.36 and s.39 AJA. The Redemption Claim was issued under a different statutory framework over which the county court had no jurisdiction.

144. He suggests that the Bank is confusing an argument under s.39 AJA, that the Claimant derived title under the original mortgagor, and SLF's argument in the Redemption Claim that it has an interest in the equity of redemption for purposes of s.91(2).

145. I do not accept that the Bank's submissions confuse the s.36 AJA arguments and the s.91 arguments. The Bank's argument is much simpler: Mr Wood says that to run the two claims as separate claims one after the other without following the *Aldi guidelines* was an impermissible abuse of the court process.

146. Mr Katz further sought to submit that as SLF were not the claimants in the possession proceedings it was arguable that the *Aldi guidelines* did not apply. This later point seemed to me to be a bad point. If the *Aldi guidelines* apply, they apply to all the parties to the proceedings equally – the authorities do not make that distinction at all and indeed contemplate that the second claim may involve other parties.

147. He referred me to the extract from Clarke LJ's decision in *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 at [49]-[53] in *Aldi.* Clarke LJ summarised the principles to be derived from *Johnson* and identified that there may be legitimate reasons why a party may decide to bring an action against one party first and only later and if necessary, against another party. It seemed to me that this said no more than Lord Bingham in *Johnson,* each case depends on its own circumstances and a broad merits-based test is to be applied.

148. He argued that it would be unsustainable if in every case at an early stage a party had to identify all possible claims they might want to bring. He submits that SLF should not be barred from bringing the Redemption Claim simply because it had not brought to the Bank's attention the possibility of the Redemption Claim in the possession proceedings.

149. He suggested that the nature and quality of SLF's involvement in the possession proceedings was a relevant factor. He pointed to the fact that SLF was only a party to the possession proceedings for a short period of time on the basis of its applications which were unsuccessful.

150. Mr Katz argued that pursuing the s.36 AJA argument first and separately was a sensible and reasonable and proportionate course of action. If SLF had brought itself within s.36 AJA it would have simplified the dispute and there would have been a real possibility of dealing with the entire claim shortly. It would have potentially avoided any other claim although he notes that SLF intimated that a redemption claim was available to it.

151. It was clear from Mr Katz's submissions that SLF's approach was to take a staged approach. SLF had intended to pursue the Specific Performance Claim after the possession proceedings. He argued that if that were successful the Option Agreement

would have been found to have been validly exercised and SLF would therefore have been able to complete on 21 December 2018 before the Bank obtained its Possession Order in January 2019. It was accepted by the Bank that the Option Agreement, if valid, would entitle SLF to pursue the Redemption Claim.

152. The final stage in the SLF approach was to pursue the Redemption Claim. However, SLF had considered it necessary to issue the Redemption Claim following on from the Possession Judgment before the Specific Performance Claim was determined to protect its position. Mr Katz sought to argue that the Redemption Claim was at an early stage and it was not in the interests of justice to shut SLF out from the Redemption Claim. I note that it was of course issued at about the same time as the application for permission to appeal the Possession Judgment including the application for a stay and the without notice application resulting in the 5 December Order.

153. Mr Katz sought to suggest that the staged and measured approach adopted by SLF issuing the Redemption Claim in December 2019 did not amount to any delay in progressing SLF's claims despite being over a year after the Option Agreement was exercised and 9 months after the applications were issued in the possession proceedings (and for completeness 6 months after the Specific Performance Claim was issued). He argued that SLF had taken a reasonable and proportionate approach by taking a staged approach. It was not delaying (which he did not accept) without paying since SLF was paying the monthly mortgage payments into court. Consequently, it could not be argued that the Redemption Claim was oppressive as against the Bank as its position was protected by the payments into court and in any event given the substantial equity in the Property its position was fully secured. To strike out the claim as an abuse of process would deprive SLF of an otherwise valid claim with a potential value of over £1m.

154. Mr Katz argued that it was inconceivable that the Bank would have acted any differently if it had been made aware of the intention to issue the Redemption Claim earlier. He argued that the Bank's past behaviour indicated that it would not have agreed to SLF making the Redemption Claim and staying the county court applications.

155. He simply did not accept that there had was any requirement to raise the proposed Redemption Claim within the possession proceedings nor that the *Aldi guidelines* applied in this case. If they did apply, he argued that the broad merits-based approach identified in the authorities would clearly favour the staged approach adopted by SLF and thus would not be considered a breach of the *Aldi guidelines*. Consequently, it could not be said that if there was any delay in issuing the Redemption Claim it prejudiced the Bank.

156. To my mind given the apparent importance to SLF of concluding the sale under the Option Agreement SLF's approach appears at least leisurely. SLF had known for some time that Mrs Durnford had firm views about the validity of the Option Agreement. She had taken action in both 2015 and 2016 to seek to evict Mr and Mrs Giles and withdrew her consent to the mortgage payments in mid-2018. SLF did not issue the Specific Performance Claim until July 2019, on its best case that was 7 months after the Option Agreement should have completed and 4 months after it told the county court it was going to take action against Mrs Durnford. SLF then waited

until after the determination of its applications in the county court before issuing the Redemption Claim in December 2019.

157. I do not agree with Mr Katz. It seems to me that, even setting to one side the question of whether delay is a free-standing issue in relation to abuse, objectively SLF's conduct of its dispute with Mrs Durnford and the Bank has been slow and there has been delay. For the reasons set out below it seems to me that the *Aldi guidelines* clearly apply in this case and I do not consider that when considering the *Aldi guidelines* that the staged approach adopted by SLF in this case was reasonable or proportionate.

158. Since the proposed issue of the Redemption Claim was not raised before the District Judge neither she nor the Bank had the opportunity to consider or agree to any proposal which would have allowed for all the parties' rights and obligations to be determined once. The court was denied the opportunity of considering whether and if so, how those claims should be managed in a reasonable and proportionate manner in accordance with the overriding objective.

159. The Bank also relied on the circumstances in which the 5 December Order came to be made as further support for the Bank's application as well as a free-standing ground of abuse.

160. Mr Wood argues that both the application for a stay and the manner in which SLF obtained the 5 December Order was a further improper attempt to intermeddle in the possession proceedings and to delay the Bank's enforcement of its security whilst SLF attempted to conclude the Specific Performance Claim.

161. He points to a long list of what he says are failings in relation to SLF's conduct of the interim application including in particular and perhaps most significantly not providing the court with a copy of the Possession Judgment or highlighting the District Judge's conclusion in relation to the Possession Order. I expressed concern about the shortcomings in the approach adopted by SLF including its subsequent failure to get its house in order in terms of service on 17 January 2020.

162. Mr Katz seeks to minimise the suggested shortcomings in the application for the stay. He notes that the court was informed of the effect of the Order made on 19 November 2019. Mr Katz, Mrs Goldman, and Mr Giles attended before the court on a without notice application on 5 December. It seems to me that the evidence put before the court was not as fulsome as subsequent events and evidence demonstrate it ought to have been and in particular the failure to provide the court with a copy of the Possession Judgment or direct the court's attention to the Possession Judgment and in particular at [37] is unexplained.

163. Mr Wood sought to argue that the shortcomings in relation to the obtaining of the interim order were so egregious that even if not sufficient in their own right to amount to a free-standing basis to strike out they added significant weight to the merits of the overall application.

164. Mr Katz points to the decision in *Cheltenham & Gloucester v. Krausz* [1997] 1 WLR 1558 (*Krausz)*. In *Krausz* the Court of Appeal held that the county court, as part of its inherent jurisdiction, could not properly suspend an order or warrant for possession so

as to enable a mortgagor to apply to the High Court for an order under s.91, the mortgagor must seek from the High Court any relief which the court is empowered to give before the warrant was executed. Thus, he argues that SLF had to apply to the High Court for the stay it sought on 5 December.

165. He does not explain why SLF did not seek a stay, pending any application for permission to appeal, from the District Judge on 19 November 2019.

166. Mr Katz says that the court was entitled to stay the warrant for possession under its inherent jurisdiction and, indeed, the Order dated 5 December 2019 expressly provided for any further order made in the permission to appeal application and noted that s.36 AJA is not available to SLF.

167. Whilst the High Court may have jurisdiction in relation to s.91 rather than the county court that does not address the criticisms raised by the Bank in relation to the manner in which SLF sought and initially obtained a stay of enforcement of the Possession Order in the High Court. The s.91 jurisdiction does not assist Mr Katz on that point. The application for a stay to the High Court in this case was overlapping with the existing application for a stay pending determination of the permission to appeal application. It was not free-standing or necessarily required, in this case, in support of the Redemption Claim. This was a case in which the county court had jurisdiction to grant a stay, was asked to do so and did, in due course, grant a stay pending determination of SLF's application for permission to appeal.

168. Shortly after this hearing the Court of Appeal handed down its judgment in *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018. The parties both made further short written submissions in relation to it. Mr Wood relied on it as a further useful summary of the issues that arise in relation to collateral attack and as reinforcing his argument that the obtaining of the 5 December Order could itself amount to an abuse of process. He argued that although the 5 December Order was limited in a way that linked it back to the permission to appeal, the application itself and the submissions made in support of it were broader. Mr Katz's note of the hearing makes it clear that, in his oral submissions, he was asking the court to make the order in support of the Redemption Claim. On Mr Wood's case that would be a direct challenge to the Possession Judgment as the application's very purpose was to stop the Bank enforcing its rights pending resolution of the Redemption Claim.

169. Mr Katz's submissions in relation to *Koza* did not to my mind advance his position. He maintained that the District Judge had no jurisdiction over either the Specific Performance Claim or the Redemption Claim and so was not in a position to grant the stay sought. This seemed to reinforce Mr Wood's argument that the purpose of the application was to obtain a stay in support of the Redemption Claim rather than to prevent the eviction pending determination of the application for permission to appeal.

170. It seems to me that this was not a case where there was any need at all in December 2019 to apply to the High Court for a stay on the grounds that the county court did not have jurisdiction. I also note that the reason for the urgency of the application for the stay was not that the county court did not have jurisdiction but because it had not yet determined the application for a stay. As the stay obtained in the High Court effectively fell away when the stay was granted in the county court this is hardly a

case where it can be argued that Mr Katz's only option was the High Court and in support of the Redemption Claim. I reject Mr Katz's submission that SLF had no choice but to seek its stay from the High Court in this case. To my mind *Krausz* does not assist SLF.

171. Whilst the court should exercise its power to strike out sparingly it should do so in a clear and obvious case.

172. It seems to me that SLF's own explanation of why its Redemption Claim, the 5 December Order and the 13 March 2020 application were not an abuse of process identify clearly that they are part of a concerted attempt to get around the Possession Judgment. They are an abuse of process and a collateral attack on the Possession Judgment and the determination at [37] that the Bank should not be deprived of its right to enforce the Possession Order by the Specific Performance Claim. It is plain from Mr Katz's submissions that that is precisely what he was and is asking the court to do. As Mr Wood suggested it was hiding in plain sight in paragraph 12.1 of the Claim Form and the 13 March 2020 application and by the use of the 5 December Order. It was clear throughout his submissions.

173. It is also clear that SLF did not comply with the *Aldi Guidelines* which in my view were engaged in this case. The *Aldi* guidelines apply to all parties not just claimants and are about case management. Just because the applications before the District Judge were, as it turned out, unsuccessful and so SLF was only a party for a short period of time is the wrong place to start and is a bad point.

174. A failure to comply with the *Aldi guidelines* may result in a second action being an abuse of process and in this case, I am satisfied that it is such an abuse of process.

175. I take into account the various matters identified in this Judgment and in particular the following matters when considering the Bank's application and concluding that the Redemption Claim is both a collateral attack on the Possession Judgment and a breach of the *Aldi guidelines* and that in each case, and cumulatively, it is appropriate for the court to exercise its discretion to strike out as an abuse of process.

176. As is clear from the Report on Title referred to above SLF entered into the Option Agreement at its own risk and having received clear legal advice that it was likely to be in breach of the Bank's mortgage conditions. SLF was advised that the Bank would be able to overreach its interest in the event of Bank exercising its power of sale. It was advised of the risk of not being able to enforce against Mrs Durnford due to her financial difficulties.

177. SLF and Mr and Mrs Giles have been in dispute with Mrs Durnford since at least 2015 when she unlawfully evicted them from the Property. They continued to make the mortgage payments on her behalf until 2018 thus monthly increasing the sums of money they put at risk, on their case. They did not seek to exercise the Option Agreement. They did this in face of Mrs Durnford's possession proceedings in 2016 and the ongoing dispute between SLF, Mr and Mrs Giles and Mrs Durnford.

178. SLF did not seek to exercise the Option Agreement until November 2018 several months after the Bank had started to return the mortgage payments.

179. Completion did not take place in December 2018 and yet SLF did not issue the Specific Performance Proceedings against Mrs Durnford until July 2019, 8 months after it had served the notice to exercise the Option Agreement, some years after the dispute with Mrs Durnford had commenced and 5 months after it received the notice of eviction from the Bank.

180. Since the Bank obtained the Possession Order, SLF's attempts to relieve itself of the consequences of entering into the Option Agreement in breach of the mortgage conditions have delayed the Bank's right to enforce its Possession Order. SLF's application for permission to appeal against the Possession Judgment was refused on 3 March 2020. It now seeks to use the Redemption Claim to provide it with relief against the Bank for the consequences of the risk it took.

181. I have commented on the state of readiness of SLF's funding in relation to the redemption of the mortgage above. There is also no evidence that SLF had funding in place to enable it to complete in December 2018. Given that one of Mr Katz's submissions was to the effect that SLF would have completed in December 2018 in advance of the Possession Order pursuant to the option notice that is perhaps a little surprising. It ought to, at least, have resulted in Mrs Goldman being in a position to provide something more concrete than the letter from the broker.

182. SLF did not tell the District Judge or the Bank about the Specific Performance Claim until the hearing in August 2019. It did not issue any Redemption Claim until December 2019.

183. It did not bring to the attention of the District Judge the claims it was considering pursuing preferring to take action stage by stage. Had it done so even if the District Judge did not have jurisdiction in relation to the Redemption Claim consideration could have been given to how best to manage the combination of the s.36/s.39 standing issue, the Redemption Claim, and the Specific Performance Claim. In the absence of raising those interconnected matters with the District Judge the position now is that the Possession Judgment is only one part of a number of claims which SLF has or intends to pursue.

184. It does seem to me that Mr Katz's submissions failed to grapple with the simple point made by the Bank that the issues that are now raised in the Redemption Claim either were or should have been raised before District Judge Wilkinson in August 2019. Whether the District Judge had jurisdiction to determine the issues raised in the Redemption Claim is not the relevant question when considering the application of the *Aldi guidelines*.

185. The court has an interest in managing its own process. As the *Aldi guidelines* make clear and as reinforced by Briggs LJ in *Gladman* there is a requirement for parties to refer a contemplated future claim to the Judge in the earlier claim. Such a requirement serves the public interest in the efficient use of court resources and a failure to do so has long been recognised as running the risk that the subsequent pursuit of the second claim would constitute an abuse of process.

186. As Thomas LJ said in *Aldi*, "the proper course is to raise the issue with the court….". Briggs LJ in *Gladman* went further and made it clear that the *Aldi guidelines* were intended to mean that a contemplated future claim should be raised with the Judge

who was determining the earlier claim as a matter of case management and in *Cleghorn* it is said that the *Aldi guidelines* are mandatory. Put simply, a failure to raise a contemplated future claim with the Judge in the first claim runs the risk of the second claim being considered to be an abuse of process.

187. It seems to me that there can be no dispute that SLF failed to follow the *Aldi guidelines* during the Possession Claim: it did not at any time bring to the court's attention the fact that it intended to pursue separate proceedings against the Bank or seek the court's guidance as to whether any such claim should be advanced within the Possession Claim (including by transferring the Possession Claim to the High Court so that all the issues could be considered at the same time). It only told the court about the Specific Performance Claim at the hearing in August 2019.

188. This is precisely the type of case in which the court would be likely to want to take on a robust case management role. The approach adopted by SLF appears to me to be entirely inconsistent with the *Aldi guidelines*, the overriding objective and good case management. As the MR said in *Stuart* it is necessary to come clean or take the risk of being struck out for abuse. Mr Katz's submissions focus wrongly on what the Bank may or may not have agreed to rather than good case management and the overriding objective.

189. Parties are required to help the court to further the overriding objective (CPR1.3) to enable the court to actively manage cases justly which includes ensuring that cases are dealt with expeditiously and fairly, proportionately and taking into account the court's finite and limited resources.

190. Importantly active case management includes identifying at an early stage the issues, who should be parties to the proceedings, which issues need full investigation and hearing, and which do not and the procedure to be followed in each case including the order in which issues are to be resolved. There is no merit in the argument that as SLF were only parties for a short period of time in relation to their applications that that somehow exempts them from compliance with the CPR or the *Aldi guidelines*.

191. Although I cannot speculate about what the District Judge would have done in August 2019 it seems to me that it is likely that if all the matters had been raised with the District Judge or been in the mix at that time it may have been considered necessary or appropriate for all of the claims to have been transferred to the High Court to have been dealt with together including the Specific Performance Claim. At least the argument about whether that should have occurred would have taken place before the parties' costs and time and the court resources were used up on multiple applications and hearings in relation to different claims. Had that occurred then SLF would not be in breach of the *Aldi guidelines* even if the District Judge had then decided not to do anything and to allow SLF to issue a separate Redemption Claim.

192. SLF had all the material knowledge it needed to enable it to raise the Redemption Claim at the time it made its applications in the county court. There is simply no satisfactory explanation as to why the known Redemption Claim could not have been raised or indeed pursued earlier.

193. In not identifying or raising it with the District Judge, SLF failed in its duty to cooperate with the court to ensure that the court was able to case manage these claims

in a reasonable, proportionate and efficient way. Such consideration is not one-sided but takes into consideration what is fair, reasonable and proportionate for the other parties such as the Bank and Mrs Durnford and now the Trustee and creditors.

194. Turning to the question of collateral attack, it is necessary to consider, as best I can, how closely the issues in the Redemption Claim approximate to the issues that were before the District Judge.

195. Having reviewed the background as set out above I agree with Mr Wood. It is plain that the substance of the applications in the county court and the Redemption Claim are two sides of the same coin.

196. The s.36 claim and the Redemption Claim are fundamentally about the relationship between the Bank and SLF. Although they proceed under a different statutory framework it is already clear from the submissions made in this application how closely the facts and matters and submissions relied on by SLF overlap. Such an overlap and interrelationship between the s.36 and Redemption Claim simply highlight the need to comply with the *Aldi guidelines* to ensure that the court is able to manage the claims in a reasonable and proportionate manner and to minimise the risk of inconsistency.

197. Mr Katz's argument that as the s.36 AJA argument was not fully ventilated because the District Judge found against him does not assist him. It seems to me that he is impermissibly seeking to come around the Possession Judgment. Using the Redemption Claim in that way is clearly a collateral attack on the Possession Judgment. The same issues and facts would need to be considered in the Redemption Claim as were considered in the Possession Judgment. This just emphasises why the *Aldi guidelines* exist and their purpose.

198. There is now a collateral attack on the Possession Judgment and there would be a significant risk of inconsistency if the Redemption Claim were to continue. It is clear from Mr Katz's submissions that that SLF's approach to the Redemption Claim is intended to cause the court to reach an outcome which is inconsistent with the Possession Judgment. I do not accept Mr Katz's submission that there is no risk of inconsistency between the Possession Judgment and the Redemption Claim as they were considering different claims.

199. I am particularly troubled in this case by Mr Katz's submissions that the Possession Judgment considered matters outside the remit of SLF's applications in the possession proceedings and the District Judge exceeded her jurisdiction, whilst at the same time accepting that the submissions made had been broader than the applications before the District Judge themselves. The District Judge was clearly aware of this issue which she identified at [26]. The application for permission to appeal the Possession Judgment was unsuccessful and the opportunities to challenge the Possession Judgment are now exhausted. It seems to me that Mr Katz's submissions that the District Judge had exceeded her authority and remit was plainly a further collateral attack on the Possession Judgment.

200. History does not relate what in fact was argued before the District Judge and it would be inappropriate for this court to revisit those submissions. I am therefore limited to the Possession Judgment and the submissions made at this hearing. It seems to me

any attempt to persuade me by reference to what was put in submissions and argued in the county court rather than by reference to the Possession Judgment only highlights the difficulties caused by not having raised all the potential issues to be determined before the District Judge for her to decide how to case manage the claim.

201. As noted by the District Judge the Option Agreement, the Restriction and the tenancy arrangement are all breaches of the mortgage conditions as against the Bank. SLF's claims could not defeat the Bank's entitlement to possession in the circumstances of the case. The Possession Judgment concludes in the knowledge of the ongoing Specific Performance Claim that that claim should not delay or interfere with the Bank's right to enforce its Possession Order. The District Judge rightly acknowledged that the Specific Performance Claim was a dispute between Mrs Durnford and SLF.

202. Using the Redemption Claim, the 5 December Order, and the 13 March application to delay the Bank's right to enforce its Possession Order by seeking to obtain a stay in the face of the clear terms of the Possession Judgment is a clear and obvious collateral attack on the Possession Judgment.

203. I do consider the justice of the matter in the round. I acknowledge that SLF appears to have paid a large sum of money to Mrs Durnford or on her behalf much of which has been used to pay the mortgage on the Property over a period of years.

204. If the Specific Performance Claim is successful against Mrs Durnford but the Bank has exercised its power of sale that would leave SLF with a claim for damages or its alternative claim to a beneficial interest in the Property. SLF says that the Property has substantial equity with a value of £2.5m to £3m. Of course, any claim for damages or a beneficial interest may now be subject to any rights the Trustee may assert on behalf of creditors more generally but on the face of it there is ample equity to meet a claim for damages subject to any claims by the Trustee.

205. So far as that risk is concerned, I have already noted that SLF was on notice of the risk of the Bank's right to overreach and Mrs Durnford's financial difficulties when it entered into the Option Agreement. The Option Agreement on which SLF rely is a continuing and irremediable breach of the mortgage terms. It does not seem to me that SLF should be entitled to avoid the consequences of that risk at the expense of the Bank, or indeed any other creditors of Mrs Durnford, and in the face of the clear terms of the Possession Judgment.

206. I also take into account that although it appears that Mr and Mrs Giles have been occupying the Property for some time (I accept that Mrs Durnford believes they do not live there currently but are in Spain), they have always been unauthorised occupiers as against the Bank and any tenancy or licence they may have does not have priority over the Bank's rights and is a breach of the mortgage conditions. Again, so far as this results in a claim for damages, I have noted the substantial equity position in relation to the Property.

207. Both Mr Katz and Mr Wood referred to the effect of the clause 20 power of attorney in the Option Agreement. This was considered in the Possession Judgment as set out at paragraph 53 above. The simple point is that it would not have conclusively resolved any aspect of the dispute for the reasons given by Mr Wood but in any event SLF has still failed to produce an executed version or any evidence that an executed

version ever existed in these proceedings or the possession proceedings. Any re-argument of the clause 20 power of attorney issue must be a collateral attack on the Possession Judgment. It does not add to or assist SLF on the issue of strike out.

208. Importantly there is also a need for finality and a need to avoid the risk of inconsistent outcomes or findings in relation to the various proceedings that are ongoing in relation to the Property. For the reasons set out in this judgment it seems to me that there is a real risk that the Redemption Claim in revisiting issues canvassed in the Possession Judgment albeit potentially from a different direction would result in inconsistent outcomes or findings.

209. It would not be in keeping with the overriding objective or indeed the *Aldi guidelines* to allow this claim to continue.

210. The Redemption Claim is seeking to use the procedural machinery of the court to have a second or third bite of the cherry. SLF is seeking to have another go using the Redemption Claim to come around the back of the Possession Judgment having failed to bring the possibility of the additional claims to the attention of the District Judge. Such conduct is a clear and obvious collateral attack on the Possession Judgment and an inappropriate use of the court's time and resources in breach of the *Aldi guidelines*.

211. The court cannot continue to use its time and resources to allow SLF to raise new claims or applications about the same underlying dispute again and again. It is not just or proportionate having regard to the prejudice to the other parties affected by these continuing disputes and the need to manage cases fairly and efficiently and also having regard to the need to manage the court's resources.

Conclusion

212. For all these reasons I find that the Redemption Claim, both in its own right and in combination with the 5 December Order and 13 March 2020 application, is an abuse of process and should be struck out pursuant to CPR3.4(2)(b).

213. I have taken into account in coming to that decision the shortcomings in relation to the 5 December Order. The somewhat lax approach to the application for the stay could have had serious consequences and appears to have been an unnecessary urgent application at the time at which it was made. Although Mr Katz argues that there was no prejudice to the Bank, it is likely that it has increased the costs incurred by both SLF and the Bank and took up unnecessary court resources both in relation to the without notice application itself and the subsequent hearing on 17 January. In the circumstances of this case, it adds to and reinforces my view that the Redemption Claim is abusive. However, despite the lax approach taken by SLF to the application it does not in my view amount to sufficient to justify a freestanding strike out for breach of the rules under CPR3.4(2)(c).

214. It seems to me there is some force in Mr Wood's submissions in relation to CPR3.4(2)(a). It is certainly arguable that the claim is inchoate in the absence of any credible evidence of funding. As I set out above to my mind there should be some credible evidence of an ability to fund the redemption and that in 2020 that ought to address the source of funds in a regulatory and compliance sense as a matter of course. There would be limited purpose in a claim continuing if there were no real

possibility of the redemption being funded. However, I am not persuaded that that would itself be a ground to strike out given the court's powers to require security to be given at the request of the Defendant pursuant to s.91.

215. Mr Katz says that SLF merely has to show that that it has a real as opposed to fanciful prospect of establishing that it has an interest in the equity of redemption. He further argues that given the broad scope of the court's discretion to make such order as it thinks fit that it is not possible for the court to determine that the Redemption Claim is unwinnable or is bound to fail. I am not persuaded that simply because the court has a broad discretion it excludes the court finding that a claim is unwinnable or bound to fail. A claim has to have in place the necessary building blocks even where ultimately the court has a broad discretion in relation to the nature of the remedy.

216. I had some sympathy with Mr Wood's argument that the absence of a clear statement of the remedy sought by SLF was also part of the inchoate nature of the claim. It is not for the court to make it up but for SLF to set out what they want and explain to the court why they are entitled to what they seek. It would plainly have been easier if SLF had set out clearly and in a straightforward manner what they were seeking from the court. However, strike out is to be used sparingly and only in a clear case. Where the shortcomings can be resolved by amendment the more usual course would be to permit a party to address such shortcomings by way of an amendment rather than strike out in the first instance. However, in this case, for the purposes of this application, the relief sought was clear from the evidence and submissions and any such amendment would have only made the abusive nature of the claim even clearer.

217. If, however, I am wrong, and the Redemption Claim does not amount to an abuse of process pursuant to CPR3.4 (2)(b) in the circumstances of this case I would direct that SLF amend the Redemption Claim to set out clearly the terms of the relief they were seeking and that, pursuant to the court's discretion under s.91, it pay into court the full redemption sum pending determination of the Redemption Claim subject to any adjustment for the sums paid into court since December 2019.

218. Finally, as I have struck out the Redemption Claim I address the Bank's security for costs application only briefly, it is only in the event that I am wrong on the strike out that it would be necessary for the security for costs to be further considered. Security for costs requires the court to consider both a threshold test and an exercise of discretion. The Bank seeks security on the basis that SLF is an overseas company and there is reason to believe it will be unable to pay the Bank's costs if it is ordered to do so (CPR25.13 (c)).

219. SLF is a company registered in the Seychelles which appears to be the subject of a freezing injunction under anti-money laundering legislation and whose director appears to be disqualified in England. It did not pay the costs order made in the possession proceedings in November 2019 until February 2020. It offered to pay only half the mortgage arrears then outstanding in December 2019. SLF has provided no evidence at all of its financial means. Such evidence as it has provided of its ability to fund the redemption is not persuasive for the reasons set out above. These matters all raise serious concerns about its ability to meet any order for costs. The only asset SLF appears to have in this jurisdiction is its interest in the Option Agreement which is the subject of the Specific Performance Claim. It is not right to say, as Mr Katz seeks to suggest, that there is no risk of non-recovery because of the equity in the Property.

Unless SLF is successful in the Specific Performance Claim and then able to complete, it cannot rely on the equity in the Property. Its interest is limited to the interest in the Option Agreement and its claim to a beneficial interest both of which are the subject of litigation.

220. Mr Katz argues that it would be punitive and wholly disproportionate to order security. There is no evidence from SLF that an order for security for costs would stifle the claim.

221. I take into account the overriding objective and the need to deal with cases justly and at proportionate cost and the potential prejudice to SLF if required to provide security. There is no evidence that it is unable to do so and I therefore balance that potential prejudice against the prejudice to the Bank if security is not provided in the circumstances of the case.

222. I am satisfied that the threshold test is met. It seems to me on the evidence before the court that as a matter of discretion taking into account the matters identified above which have been considered in more detail in the Judgment this is an obvious case in which SLF should provide security for costs. I do not in light of the strike out at this stage consider quantum or the timing of the provision of security.

223. I give judgment accordingly and the Order should record the strike out pursuant to CPR3.4(2)(b) and for completeness the joinder of the Trustee on the terms proposed.

224. This judgment will be handed down remotely. I invite the parties to seek to agree the terms of the order. Any consequential matters including in relation to costs if not agreed should be dealt with at a later consequentials hearing.

Addendum

225. Since the hearing I understand that Mrs Durnford's bankruptcy has been discharged and that she has made a further application to annul the bankruptcy which has not yet been determined. Neither of these events change the current position. Any beneficial interest she had in the Property, at this stage, remains vested in her bankrupt estate.