IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS

No. FS-2019-000012

Neutral Citation Number 2020 EWHC 1644 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 15 May 2020

Before:

DEPUTY MASTER LINWOOD

B E T W E E N :

BHATTACHARYA & ANOR — Claimants

- and -

OMNI CAPITAL PARTNERS LTD — Defendant

MR D. BERKLEY QC (instructed by AKL Solicitors) appeared on behalf of the Claimants.

MR S. CHIRNSIDE (instructed by Gowlings WLG LLP) appeared on behalf of the Defendant.

J U D G M E N T

(**via Skype for Business**)

DEPUTY MASTER LINWOOD:

1 This is my judgment on the application of the defendant, Oaksix Holdings Ltd, represented by Mr Stewart Chirnside of counsel, for summary judgment and/or strike out of part of the claim for repayment of monies by Mr and Mrs Bhattacharya, the claimants, represented by Mr David Berkley QC, and the like in respect of the claimant's claim for a declaration.

2 OHL's application is for an order that the claimants' claim insofar as it relates to the recovery of monies paid by the claimants to Oaksix Holdings Ltd ("OHL") prior to 9 August 2013 be struck out pursuant to CPR 3.4(2)(a) and/or that summary judgment be granted in favour of OHL pursuant to CPR 24.2 in respect of the pre-9 August 2013 repayment claim on the grounds that it is statute barred.

3 The evidence in support is the first witness statement by Mr Rastegar, a director of the defendant. The claimants have, rightly and understandably, not filed any witness statement evidence in reply.

4 The defendant's position, in essence, is that the claimant's claim for repayment of interest and fees paid to OHL, under what I will refer to as the first loan agreement, is statute barred under s. 9 of the Limitation Act 1980 as the claim was issued more than six years after payment of the monies to OHL. Accordingly, the defendant also submits that the declaration of enforceability sought by the claimants as to the first loan agreement would serve no useful purpose.

5 One of the key requirements of Chancery Directions Remote Hearings is an agreed statement of issues for determination. This has been provided here, together with an efficient and easy to read bundle. The issues here are:

(1) whether the claimants' claim under s. 28(7) of the Financial Services and Markets Act 2000 ("FSMA") for repayment of amounts totalling £867,239 paid to OHL under the first loan agreement prior to 9 August 2013 should be struck out and/or summary judgment entered in favour of OHL;
(2) whether the claimants' claim for a declaration that the first loan agreement was a regulated mortgage contract and was therefore unenforceable pursuant to s. 26.1 of FSMA should be struck out and/or summary judgment entered in favour of OHL.

6 The essential factual background is set out by Mr Rastegar and is agreed by the parties for the purpose of this application. I therefore adopt, with thanks, Mr Chirnside's helpful summary.

7 In December 2011 the claimants applied for a loan from OHL. On or about 6 February 2012, OHL offered the claimants a nine-month bridging loan of £4,830,000 secured by a first legal charge over their property (which I will call "the Property"), which the claimants agreed to on 17 February 2012. This was the first loan agreement which provided that OHL could deduct, on completion: (1) £477,711 representing nine months' interest; (2) an arrangement fee of £61, 245 from which OHL would pay £20,415 to the claimants' broker; and (3) an administration fee of £595 plus, the claimants say but the defendant disputes, legal fees of £4030. For the purpose of this hearing, the defendant accepts that those legal fees are part of the monies paid by the claimants to the defendant. Completion took place on 28 February 2012. Repayment was due on 28 November 2012.

8 On or before 28 November 2012, the claimants and OHL agreed to amend the terms of the first loan agreement to extend the availability period by six months to 28 May 2013. The terms of this first extension agreement were subsequently recorded in an amendment agreement between the parties dated 25 March 2013.

9 Under the first extension agreement, the claimants agreed: (1) to repay the sum of £1,250,000, thereby reducing the principal amount outstanding on the first loan agreement to £2,833,000; and (2) to pay the following amounts in respect of additional interest and fees: (i) £220,974 representing an upfront payment in respect of a further six months' interest on the outstanding balance of, as I have said, £2,833,000; (ii) a one per cent extension fee of £28,333; (iii) an extension arrangement fee of £5000, and (iv) an administration fee of £895. On or about 28 November 2012, the claimants repaid the principal sum of £1,250,000 and paid the amounts I have explained above in respect of the additional interest and fees as agreed under the first extension agreement.

10 On 28 May 2013, the first extension agreement came to an end and the loan was due for repayment. However, the parties agreed to extend the term of the first loan agreement for a further two months until 28 July 2013 in return for the claimants making additional interest payments of £36,829 per month during that second extension agreement. The claimants subsequently made additional interest payments of that amount from 7 June 2013 to 10 July 2013 respectively.

11 In July 2013, the claimants applied for a new loan from OHL to refinance their existing loan. OHL sent an undated written offer to the claimants for a new six-month loan in the sum of £3,118,000 to be secured by a first new legal charge over the property, subsequently accepted by the claimants on or about 27 August 2013.

12 Under the second loan agreement, the following amounts were to be deducted from the loan amount on completion: (1) £243,204 representing six months' interest; (2) an arrangement fee of £31,180; (3) an administration fee of £895; (4) a broker fee of £2500; and (5) legal fees of £3360. On or about 27 August 2013, OHL advanced the sum of £3,118,000 to the claimants, which was used to finance the amounts outstanding on the first loan agreement.

13 On 27 September 2013 the claimants obtained a new loan from a third-party lender, Fern Trading Ltd. They used this to repay the amounts due to OHL under the second loan agreement.

14 On 8 August 2019, the claimants issued these proceedings against Omni Capital Partners Ltd. That was an error and an application was made by the claimants to correct the name of the defendant to OHL, which was consented to by the defendants approved by me at the outset of this hearing.

15 In the particulars of claim, the claimants seek: (1) declarations the first and second loan agreements were unenforceable under s. 26(1) of FSMA because they were regulated mortgage contracts and OHL was not an authorised person under s. 19 of FSMA; and (2) repayment of the interest and fees paid to OHL under both the first and second loan agreements. The total amount claimed by the claimants in the particulars of claim is £986,512, which is split between £867,149 in respect of the first loan agreement and £119,363 in respect of the second loan agreement.

16 OHL served its defence and counterclaim on 14 February 2020 in particular pleading the claimant's claim for repayment of the amounts paid by them under the first loan agreement was statute barred, plus, neither loan agreement was a regulated mortgage contract as at all

relevant times the claimants occupied or intended to occupy less than 40 per cent of the property.

17 The claimants in their reply and defence to counterclaim pleaded as to limitation at para. 3(2):

"The claimants' claim is for a declaration that the loan agreements were regulated and that the defendant was unauthorised and was in contravention of the general prohibition in s. 19 of FSMA and so the consequences of s. 26 and s. 28 are automatically engaged and the loan agreements were and are unenforceable against the claimants."

18 Mr Rastegar says this at para. 47,

> "The claimants' only pleaded defence to OHL's case on limitation is that their claim is for a declaration that the loan agreements are unenforceable and so the consequences of s. 28 of FSMA are 'automatically engaged'. However, I understand from OHL's solicitors that this is not an answer to the limitation point. The claimants' claim for a declaration of unenforceability in respect of the two loan agreements is an action on a specialty for which the time limit is 12 years under s. 8(1) of the Limitation Act 1980.
>
> However, this time limit does not apply to the extent that the claim is for the recovery of money. This is because s. 8(2) of the Limitation Act 1980 expressly provides that s. 8(1) does not affect any shorter limitation period set out in the Act and s. 9(1) of the Limitation Act 1980 provides that the time limit for any claim to recover any sum recoverable by statute is six years only."

The law

19 There is no difference between the parties as to the law which I will summarise briefly. However, turning first to CPR 3.4(2)(a), in that respect OHL must show the particulars of claim disclosed no reasonable grounds for bringing the claim in that it is unwinnable or the claim is bound to fail.

20 As to CPR 24.2, OHL must show the claimants (a) have "no real prospect of succeeding on the claim" and (b) that there is no other compelling reason why this claim should not be disposed of at trial. The proper approach and principles are summarised in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm) by Simon J at para. 15,

> "The principles which apply have been set out in many cases, are summarised in the editorial comment in the White Book Part 1 at 24.2.3 and have been stated by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], approved subsequently (among others) by Etherton LJ in *A C Ward & Son v. Caitlin (Five) Limited* [2009] EWCA Civ 1098 at [24]. For the purposes of the present application it is sufficient to enumerate 10 points."

21 I particularly note at para. 15(8) Simon J says,

> "Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is

determined the better, see the *Easyair* case. On the other hand the court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116]."

22 And at para. 10,

> "So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Miles v Bull."*

23 Section 26 of FSMA is headed "Agreements by unauthorised persons,"

> "(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
> (2) The other party is entitled to recover:
> (a) any money or other property paid or transferred by him under the agreement; and
> (b) compensation for any loss sustained by him as a result of having parted with it."

24 Section 28 is headed "Agreements made unenforceable by section 26 or 27" and continues,

> (1) This section applies to an agreement which is unenforceable because of section 26 or 27.
>
> (2) The amount of compensation recoverable as a result of that section is:
> (a) the amount agreed by the parties; or
> (b) on the application of either party, the amount determined by the court.
>
> (7) If the person against whom the agreement is unenforceable:
> (a) elects not to perform the agreement, or
> (b) as a result of this section, recovers money paid or other property transferred by him under the agreement, he must repay any money and return any other property received by him under the agreement.

25 Section 8 of the Limitation Act 1980 provides "Time limit for actions on a specialty,"

> "(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.
> (2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

26 Section 9 provides "Time limit for actions for sums recoverable by statute,"

> "(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Issue 1: Is the claim as to the first loan agreement statute barred?

27 Mr Chirnside submits the first part to Issue 1is does s. 9 apply in these circumstances? No limitation period is prescribed in s. 26 or 28 of FSMA. Further, but for FSMA, the claimants would have no claim. Therefore, he submits, s. 8 and s. 9 apply as they provide the appropriate periods for statute-based claims.

28 The claims for declarations that the loan agreements are unenforceable under s. 26(1) are subject to the 12-year period in s. 8(1) as an action on a specialty includes one based on a statute (*Collin v Duke of Westminster* [1985] QB 581).

29 But, Mr Chirnside submits, the claims for repayment of the fees and charges are "sums recoverable by statute" and therefore the six-year period in s. 9(1) applies, even though the declaration claim is subject to s. 8(1) and a 12-year period is applicable.

30 Three of the authorities cited by Mr Chirnside and Mr Berkley concern the Consumer Credit Act (as amended). The first was *Rahman v Sterling Credit Ltd* [2001] 1 WLR 496. Mr Chirnside submits that this is authority that the repayment claim under statute is subject to a six-year limitation period, whereas the claim to reopen the loan agreement pursuant to s. 139 here, later amended to s. 140A-D of the Consumer Credit Act 1974 was subject to a 12-year period. Mr Chirnside referred me to Mummery LJ's speech at 501H onwards, and in particular paras. D and E on p. 502,

> "It follows that, insofar as Mr Rahman seeks, whether by counterclaim or by separate action, to make a claim to reopen the loan agreement under s. 139, that claim is not barred by limitation: that cause of action arose in 1989, less than 12 years ago. If he is successful in his claim the court may make an order relieving him in whole or in part from the obligation to make future payments. That in turn would make it necessary for the court to reconsider whether it was appropriate to leave the 1990 possession order in place. If, however, Mr Rahman were to claim repayment of sums of money already paid by him under the credit bargain, an objection could be raised that s. 9 applies. The limitation period would be six years. Mr McDonnell stated that the counter claim would be amended to exclude any claims for repayment of monies."

31 *Nolan v Wright* [2009] 3 All ER 823 also concerns s. 139 of the Consumer Credit Act 1974 and limitation. This was a decision of HHJ Hodge QC and Mr Chirnside cited paras. 10 and 11 and, in particular, para. 14, p. 134 of the bundle,

> "In my judgment, it was an integral part of the Court of Appeal's reasoning and decision in *Rahman* (by which I am bound) that a claim to reopen an extortionate credit bargain constitutes a statutory cause of action within the meaning and for the purposes of section 8 of the 1980 Act. As such, a 12-year limitation period applies unless the claim expressly extends to the repayment of money previously paid under the credit bargain, in which event the application will be governed by s. 9 and subject to a six-year limitation period accordingly. The subsequent decisions in *Re Priory Garage (Walthamstow)* Ltd and *Hill v Spread Trustee Ltd* demonstrate that

> the applicable period of limitation may change depending upon the nature of the relief that is claimed. Speaking for myself, I have little difficulty in understanding why a shorter period of limitation may be appropriate where the relief sought is the repayment of sums previously paid by the debtor to the creditor rather than the future regulation of the loan relationship between them."

32 In *Patel v Patel* [2009] EWHC 3264, Mr G Leggatt QC referred to *Rahman* and *Noble* in paras. 58 to 60 of his judgment and considered the relevant date for the purpose of the Act at which the fairness or otherwise of the consumer credit relationship had to be determined. At para. 66 he said,

> "When the debtor's cause of action accrues for the purpose of s. 9 of the Limitation Act depends on when all the material facts have come into existence which the debtor needs to allege in support of an application for an order under s. 140B: see e.g. *Coburn v Colledge*. Those facts are, first, that a credit agreement has been entered into between the creditor and the debtor and, second, that the relationship arising out of that agreement is unfair to the debtor. If I am right in my analysis of the date at which the fairness of the relationship between the creditor and the debtor falls to be assessed, the result is that the debtor's cause of action is a continuing one which accrues from day to day until the relevant relationship ends. It follows, in my view, that an application under s. 140B can be made at any time during the currency of the relationship arising out of a credit agreement, based on an allegation that the relationship is unfair to the debtor at the time when the application is made, or at any later time (as s. 140A(4) expressly permits) until the expiration of the applicable period of limitation after the relationship has ended. (That period is 12 years except insofar as the relief sought is the recovery of money which has been paid by the debtor, in which case the effect of s. 8(2) is that the six-year period prescribed by s. 9(1) of the Limitation Act applies.)"

33 The last sentence is relied on by Mr Chirnside as he submits the wording of s. 140B(1)(a) of that Act is to the same effect as s. 26.2(A) here, which I accept.

34 Mr Berkley relies on *Patel* as authority that if a six-year period applied by virtue of s. 9 it would continue so long as the debtor/creditor relationship existed as opposed to being triggered at the date of the agreement (see para. 59). Here, there were two distinct loan agreements and the monies received by OHL under the first agreement were, at the latest, received on 10 July 2013, as appears in the schedule at para. 44 of Mr Rastegar's witness statement which sets out the date of receipt of the constituent parts of the £867,239 - again agreed. There is no claim, of course, for repayment of the capital which was repaid on 27 August 2014.

35 Mr Berkley further submits that the decisions in *Rahman*, *Nolan* and *Patel* are not on point, as they concern the Consumer Credit Act, not FSMA. Mr Berkley emphasised that this application has drawn the court into a juridical minefield and is therefore not amenable to strike out or summary judgment. He referred me to Professor Andrew McGee's work on Limitation Periods, 8th Edition 2018 where, commenting on the distinction between actions by statute - 12 years - and the exception in s. 9 - six years - Professor McGee observed,

> "It is perhaps necessary to admit that the law in this area is now in an almost irretrievable state since it appears that no satisfactory distinction can be

drawn between cases all of the highest authority whose ratios appear to be in fundamental conflict."

36 As to that, Mr Chirnside referred me to para. 11-003 in which Professor McGee states under the heading "Actions to recover sums due under statute,"

> "The difficulty under this heading turns upon the meaning of the phrase 'sum of money'. Six classes of statute may be identified. …
>
> (d) those which provide that in given cases a person shall be entitled to recover a specified or unspecified sum of money from another."

And 11-004,

> "At the other extreme there can surely be no doubt that actions in categories (d) are caught by s. 9. They are the paradigm case of an enactment making a sum of money due, though it may also be observed that there are very few statutes falling within category (d)."

Then, at 11-009,

> "It therefore appears that the six categories identified above may be capable of being reduced for practical purposes to four categories; (b) and (d) may be merged despite their conceptual differences whilst category (f) cases resolve themselves on examination to category (d) cases. There is no doubt that the underlying trend here is to categorise any action which may be regarded as based on the statutory provision, to use a deliberately neutral term, as falling within s. 9 and thus having a six-year limitation period. The only major exception now is the category (e) case where it is clear that no sum of money can be payable under the statute. These cases have a 12-year limitation period."

37 Mr Berkley further submits that s. 28(7) of FISMA is more akin to equitable remedies or accounting in restitution where, as neither are founded in contract or tort, there is no period of limitation and so the doctrine of laches applies.

38 Mr Berkley relies upon *Brueton v Woodward* [1941] 1 KB 680, a claim to recover gaming debts under the Gambling Acts 1835 and 1922. Mr Chirnside distinguishes the position there, as appears in the paragraphs on p. 44 of the report as the submission was that,

> "The plaintiff is not claiming on the statute but is merely seeking to enforce a cause of action given to him by statute."

Accordingly, Mr Chirnside submits Mr Justice Singleton did not determine the point with which I agree.

39 Further, in *Central Electricity Board v Halifax Corporation* [1962] AC 785, the headnote at p. 786 stated, referring to s. 2.1(D) of the 1939 Limitation Act, which is the same as s. 9,

> "The Act did not retain the former distinction between bringing an action on a statute and those in respect of a cause of action given by a statute."

That, Mr Chirnside submits, answers Mr Berkley's point as to *Brueton*.

40 Mr Berkley's submission, however, as to *Brueton* is that I must exercise substantial care as, as Singleton J stated in these circumstances, "Each case must of course depend on its facts and the exact terms of the statute in question," at the top of p. 686.

41 Mr Berkley cited *Pratt v Cook, Son & Co (St Paul's) Ltd* [1940] AC 437, which was a claim to recover deductions from wages forbidden by the Truck Act 1891. He submitted that probably the original judgment was not delivered before the coming into force of s. 21(D) of the 1939 Limitation Act, the issue being whether it is a claim under statute or a statutory right of action. That, Mr Berkley submits, is a difficult distinction and he referred me to p. 446 and Lord Russell's speech on p. 449, the point being that although *Pratt* predates the 1939 Act, the complexity of the issues remains.

42 Mr Berkley also referred me to the commentary by Professor McGee on *Brueton* at the end of para. 4014,

> "*Brueton v Woodward* is perhaps the best example of this. The claimant sued for recovery of gaming debts pursuant to the Gaming Acts 1835 and 1922. Singleton J held this was an action on a statute rather than a cause of action given by statute, so the period was 12 years. Singleton J relied on some earlier authorities, but it must be said that the distinction sought to be drawn in this case is a very difficult one."

Then below,

> "As to *Central Electricity Board*, it is by no means easy to see how this can be reconciled with *Pratt v Cook, Son & Co (St Paul's) Ltd* where the House of Lords held an action to recover deductions forbidden by the Truck Act 1896 was an action upon a specialty. It is perhaps necessary to admit the law in this area as now in an almost irretrievable state since it appears no satisfactory distinction can be drawn between cases all of the highest authority whose ratios appear to be in fundamental conflict."

43 Mr Berkley's submission is that the lack of judicial determination of these tests to the specific right of action in this case is an area which is such a minefield, which means it is unsuitable for summary judgment. Plus, this is not commercial litigation, as the powers under the statute are to be seen in the context of consumer-centric legislation. Accordingly, these provisions of FSMA have a broad application, not only to the claimants here but to others who may have been sold mortgages by unauthorised persons and therefore these are matters which a court should only look into in the course of a trial, especially as any judgment I give will have ramifications beyond these contracts.

44 Mr Chirnside submits that, as to Mr Berkley's reliance by analogy on *Pratt*, *Pratt* was brought under s. 3 of the Civil Procedure Act 1983 where there was no equivalent to s. 9 of the Limitation Act. See Professor McGee at 11-001,

> "The problems of categorisation relating to actions to recover sums of money due under an enactment were discussed in chapter 4 and maybe noted here that this category of action did not exist as a separate class for limitation purposes before the Limitation Act 1939. Prior to that time, statutes were treated as a class of specialty and the standard 20-year period applicable to specialties applies to them too. Consequently, all the cases dealing with what is now s. 9 of the Limitation Act 1980 post-date the coming into force of the 1939 Act."

So *Pratt*, he submits, is not on point. I think that has to be correct.

Issue 1: when does time start to run?

45 As to the second part to Issue 1 I think it is common ground that a claimant's cause of action for the purposes of s. 9 of the Limitation Act depends on when all the material facts have come into existence which the claimant needs to support the claims (*Coburn v Colledge* [1897] 1 QB 706-707, as cited in *Patel* at 66).

46 Mr Chirnside submits that all the material facts were in the claimants' minds more than six years before the claim was issued as (a) the first loan agreement was entered into on 17 February 2012 and (b) the payments to OHL by the claimants, as appear in Mr Rastegar's table, all pre-date by more than six years the issue of proceedings on 8 August 2019 as they were paid over the period 28 February 2012 to 10 July 2013.

47 Mr Berkley differs and submits as the powers of the court under FSMA are consumer-centric they are not equivalent to monies due to the claimants. Accordingly, the question of whether the cause of action accrues is not certain, save it certainly accrues once the court has made a declaration of enforceability and then the court turns to the question of what should be repaid.

48 Mr Chirnside relies on *Nolan* at para. G on p. 135 where it is stated,

> "Although strictly unnecessary for the purposes of this decision, and without having heard any argument on the point, I acknowledge that if the claim is one to recover a sum of money previously paid to the creditor, and is therefore subject to the six-year limitation period prescribed by s. 9, time may not begin to start running until the payment has been made."

Although I do consider that that is heavily caveated. Mr Berkley also referred me to s. 28 of FSMA which provides "Agreements made unenforceable by s. 26 or 27,"

> "(1) This section applies to an agreement which is unenforceable because of s. 26 or 27, other than an agreement entered into in the course of carrying on a credit-related activity.
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow:
> (a) the agreement to be enforced; or
> (b) money and property paid or transferred under the agreement to be retained."

49 Mr Chirnside submits that if he is correct there is no need to go forward in terms of the remedy under FSMA to s. 28(3) and, in any event, s. 28(3) is a statutory defence which only arises if the court finds the claimants are entitled to recover. I agree with that submission.

50 Mr Berkley submits the claimants' cause of action only accrues when the declaration of unenforceability is made. I do not think that can be correct as that could be at any time in the future. This would also conflict with the legally certain position of 12 years' limitation as an action on a specialty. However, Mr Chirnside submits that s. 36 of the Limitation Act will apply by analogy, as set out at the end of sub-section (1) and therefore s. 9 would apply if this was a claim in equity, which I think must be correct.

Decision – does s9 apply?

51 I accept Mr Chirnside's submissions that the claimants' claims under s. 28(7) of FSMA are subject to a six-year limitation period as they are a claim for recovery of money which arises only under that statute for these reasons:
(1) The decisions in *Rahman*, *Nolan* and *Patel* are, I consider, applicable by analogy; there is little or no difference between s. 139 and 140(B) of the Consume Credit Act as applied in those three decisions and ss. 26 and 28 of FSMA.
(2) This is supported by Professor McGee where, as he puts it, "There is no doubt that the underlying trend is to categorise any action based on statute as falling within s. 9 and having a six-year limitation period."

Decision – when does the cause of action accrue?

52 I have no doubt that knowledge of the facts as to payment is the operative start point. Here, that was the dates of each payment made by the claimants to the defendant under the first loan agreement, as set out in the table in Mr Rastegar's statement, as those are the payments that would, if the claimants otherwise succeeded, be caught by the operation of s. 26(2) of FSMA.

53 Accordingly, the claim in respect of payments totalling £867,239 are time barred, having been paid over by the claimants to the defendant more than six years before these proceedings were issued.

Issue two: should the claimants' claim for a declaration that the first loan agreement was a regulated mortgage contract and unenforceable by s. 26(1) of FSMA be struck out or summary judgment entered in favour of OHL?

54 Mr Chirnside submits that if I find in his favour on both parts of Issue 1, subject to one further aspect I will come to, then as the repayment claim is time barred as far as the first loan agreement is concerned, the declaration the claimant seeks serves no useful purpose.

55 In *Financial Services Authority v Rourke* [2002] CP 14 Neuberger J, as he then was, said at p. 107,

> "It seems to me that when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

56 In *Pavledes v Hadjisavva* [2013] EWHC 124 Ch 24, Richards J quoted Aikens JL in *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387 as to whether the court could make a declaration and said,

> "(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question."

57 *Ainsbury v Millington* [1987] 1 WLR 379, cited Viscount Simon, Vice Chancellor, in *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111,

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties.
>
> I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

58 Mr Berkley submits otherwise in that first the claim in *FSA* was for a declaration for a freestanding remedy, which was a relevant consideration deciding whether to allow the claim, and here the defendant, he submits, is in breach of a general prohibition.

59 Secondly, consideration of the declaration as to the first loan agreement will inform the second agreement as the defendants would say, relying on sub-section 5, that it had no reason to think it was doing anything unlawful. Thirdly, the point is not academic, he submits, as it is a matter of public importance and especially important to these claimants.

Issue 2: Decision

60 I can see no point in the court considering a claim for a declaration as to the first loan agreement for these reasons:
(1) It is of academic interest only; it serves no useful purpose and there are no other good reasons to hear it. There will be no denial of justice to the claimants.
(2) The point as to public interest is not applicable as the claim for the declaration in the second loan agreement survives.
(3) There is no real and present dispute between the claimants and the defendant in respect of the first loan agreement.
(4) If, as Mr Berkley submits, the declaration has a purpose, namely the defendant being in breach of FSMA, then again that has no real purpose or point in these proceedings; it is a regulatory matter for the FSA.
(5) The scope of the factual enquiry at trial will be reduced, thereby saving time and costs and court resources, in accordance with the overriding objective.

No other compelling reason

61 I mentioned at 54 above that there was another aspect I must consider, namely whether there is any other compelling reason why the limitation defence, and thereby the declaration, should be disposed of at a trial.

62 Mr Berkley made what I would describe as a series of overarching points as to why summary judgment should not be granted, which I will consider in the context of whether

are they or any of them a compelling reason to find against OHL and refuse summary judgment.

63 First, he submitted that, whilst accepting, as in *JSC VTB Bank*, that the court should grasp the nettle if it can, that is not appropriate where detailed argument is heard and mature reflection is necessary. Here, the substance and detail of the defendant's submissions show that summary judgment is not appropriate.

64 I disagree. There is no dispute on the facts; this is a question of law. There are considerable advantages in determining such points now, especially again in the reduction of costs and court time.

65 Mr Berkley also submitted that as on the merits the defendant has contravened s. 19 of FSMA and committed a criminal offence I should, for the purpose of this application which is to strike out a meritorious claim, think very carefully as to how can limitation be dealt with by me without a proper trial.

66 Again, I disagree. Here are self-contained points of law eminently suitable for determination on a summary basis. The question of contravention, as I mentioned in 64 above, is a matter for OHL's regulator. It is not a reason for a full trial of this claim.

67 Further, many issues in the second loan agreement are similar to the first one and so it therefore is unlikely to be just or convenient for the issue to be dealt with by summary judgment. Again I disagree. My determination of it will save time and costs and court resources and accord with the overriding objective.

68 Mr Berkley further submits there is no direct authority. Clearly he is correct on that, but I have applied by analogy the decisions in *Rahman*, *Nolan* and *Patel* and Professor McGee's views so as to satisfy myself that I can award summary judgment.

69 The court is in a juridical minefield inappropriate for summary judgment. I disagree and I have set out above why I consider I can and should "grasp the nettle".

70 The claim would be best properly case managed, and I could direct the trial of a preliminary issue. I disagree. There is no point in case managing with consequent time and expense where that is unnecessary both as to the repayment claim and the declaration. Further, preliminary issues are notoriously difficult to manage to ensure they assist the court and the parties.

71 In addition, I cannot see that a trial, in terms of the addition of disclosure and oral evidence, could assist the claimants here because, as I have said several times, the facts are agreed.

72 I will therefore grant the defendant summary judgment on its application for the above reasons as there is no real prospect of the claimants succeeding on their claims for a payment of monies paid by them to the defendant pursuant to the first loan agreement. Likewise, the claim for a declaration falls away.

Deputy Master Linwood 15th May 2020

This transcript has been approved by the Judge