Neutral Citation Number: [2024] EWHC 2620 (Ch)

Case No: PT-2022-MAN-000058

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 18/10/2024

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

SHEILA BURNS	**Claimant**
- and -	
(1) FRED BRIDGE	
(2) PROPERTY FUNDING LIMITED	**Defendants**

- -
- -

Richard Chapman KC (instructed by **Oglethorpe Sturton and Gillibrand LLP**) for the **Claimant**
Craig Allan Mellor (Director, in person) on behalf of the **Second Defendant**

Hearing dates: 9 & 10 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ CAWSON KC:

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Introduction

1. By the present proceedings, the Claimant, Sheila Burns ("**Mrs Burns**"), seeks the determination of questions concerning:

    i) The proper interpretation of the definition of *"Lender's Debt"* in a Deed of Priorities and Variation dated 10 April 2019 and made between Mrs Burns (1), the Second Defendant, Property Funding Limited ("**PFL**") (2) and the First Defendant, Fred Bridge ("**Mr Bridge**") (3) ("**the 2019 Deed of Priority**"); and

    ii) As to whether PFL, in selling three houses at Blue Slate Farm, Salmesbury, Preston PR7 0UX ("**the Houses**" and "**the Property**" respectively), failed to obtain the best price reasonably obtainable for the Houses so as to require PFL to account for the difference between the price obtained and that which it is alleged would have been had PFL properly performed its duty in equity.

2. The determination of these questions is required in order to determine whether there is any surplus available for Mrs Burns out of the proceeds of sale of the Houses, and if so in what amount, or whether PFL has, itself, suffered a shortfall leaving no surplus for Mrs Burns as the party otherwise next entitled.

3. Mrs Burns was represented at the trial that took place on 9 and 10 October 2024 by Richard Chapman KC.

4. Hill Dickinson came off the record as acting for PFL shortly prior to trial, and I permitted PFL to be represented by Craig Allan Mellor ("**Mr Mellor**"), who is a director of PFL together with his wife, Victoria Mellor ("**Mrs Mellor**"). The sole shareholder in PFL is Juvenesco Limited, a company controlled by Mr and Mrs Mellor. Mr Mellor, who I understand to be a Chartered Accountant, made

submissions on the second day of the trial by reference to notes that he had prepared, copies of which were subsequently provided to me and Mr Chapman KC.

Witnesses

5. Mrs Burns made a witness statement dated 19 June 2024 running to some 104 paragraphs. As Mr Chapman KC frankly accepted, and had indeed foreshadowed in his Skeleton Argument, this witness statement breaches Practice Direction 57AC in respect of trial witness statements in the Business and Property Courts in a number of respects. Indeed, it is fair to say that this witness statement breaches a significant number of paragraphs of Practice Direction 57 AC, including paragraph 3.1 and thereof, and paragraphs 3.5 and 3.6 of the Appendix thereto, in a serious way. It deals with a number of matters going well beyond Mrs Burns' pleaded case, it quotes extensively from, and takes the court in some detail through, documents, it argues Mrs Burns' case, and it includes much impermissible commentary. The seriousness of the position is compounded by the fact that the witness statement contains a certificate of compliance signed by Mrs Burns' Solicitor.

6. I made it clear to Mr Chapman KC in opening that I regarded Mrs Burns' witness statement as being particularly unhelpful in circumstances where, given the issues between the parties, the evidence could have been of very limited scope, but that because of the way that Mrs Burns' evidence had been presented, it was nigh impossible to divine therefrom that which might be of assistance in determining the case. In the event, Mr Chapman KC accepted my suggestion that I should not place any significant reliance upon Mrs Burns' witness statement itself, but that I would permit Mrs Burns to give oral evidence in chief dealing with the very limited matters upon which her evidence might be of assistance to the Court. Mrs Burns thus gave oral evidence in chief and was cross examined by Mr Mellor.

7. Mrs Burns is in her 80s and does not have good hearing or eyesight. Her recollection of events is not as clear as it might be. Whilst I do not consider that she deliberately set out to mislead the Court, it was clear from her evidence that she has persuaded herself of matters for which there is no real evidence, and which are improbable and formed no part of her pleaded case, such as that PFL and Mr Bridge were in cahoots in some way to prejudice her interests. Nevertheless, there are aspects of her evidence that I accept as referred to below.

8. Although Mr Burns' daughter, Heather Burns, and Thomas Jones, made witness statements in support of Mrs Burns' case that had been exchanged, neither of them was called as a witness at trial.

9. Mrs Burns relies upon expert valuation evidence, in the form of a report dated 12 May 2023 of James Fish ("**Mr Fish**"), a Chartered Surveyor, as to the market value of the Houses and Property in the summer of 2021, when they were sold, in support of Mrs Burns' case that they were sold at an undervalue because PFL had failed to obtain the best price reasonably obtainable for the same. Mrs Burns tendered Mr Fish for cross examination, and he was cross examined by Mr Mellor.

10. Mr Mellor and Mrs Mellor each made a witness statement dated 18 June 2024, at a time when PFL was still instructing Hill Dickinson. They each confirmed their witness statements in the witness box, and were then cross examined by Mr Chapman

KC on behalf of Mrs Burns. I found them both to be frank and honest witnesses doing their best to assist the Court.

11. PFL did serve an expert's report from a Chartered Surveyor, albeit late. However, due to what Mr Mellor described as the unwillingness of PFL's sole shareholder to spend further monies on the present proceedings, this expert did not engage with Mr Fish as required by the directions given in the present proceedings. In the circumstances, PFL did not rely upon any expert evidence at trial.

Background

12. Mrs Burns was, originally, the freehold owner of the Property. By an agreement dated 27 May 2017 ("**the 2017 Sale Contract**"), Mrs Burns agreed to sell the Property to Mr Bridge. Mr Bridge agreed to purchase the Property for development purposes, intending to develop the three Houses on the Property. A deposit of only £1 was paid on exchange of contracts. The purchase price provided for by the 2017 Sale Contract was £450,000. There was written in manuscript against this, and initialled by Mrs Burns and Mr Bridge, the following: *"Land 3 x £100,000 plus share of profits £150,000"*.

13. The sale of the Property to Mr Bridge was completed on 18 September 2017. The purchase price was not paid on completion. On the date of completion, and as provided for by the 2017 Sale Contract, Mrs Burns and Mr Bridge entered into what was described as an *"Overage Deed"* ("**the Overage Deed**") under the terms of which Mr Bridge agreed to pay £100,000 upon the completion of each of the three Houses, together with a further payment of £150,000. The Overage Deed further provided for an *"End Date"* of 31 July 2018 when the full £450,000 was to be paid in any event. The £450,000 was thus treated as a loan repayable by 31 July 2018, albeit that the date for payment was subsequently extended, together with interest.

14. Further, contemporaneously with completion and the execution of the Overage Deed, on 18 September 2017 Mr Bridge executed a *"Second Legal Mortgage"* over the Property in favour of Mrs Burns ("**the Burns Mortgage**") as security for his liabilities under the Overage Deed.

15. Mr Bridge initially obtained a loan facility for development funding for the development of the Houses from Together Commercial Finance Ltd ("**Together**"), Mr Bridge's liabilities to Together being secured by way of a Legal Mortgage over the Property ("**the Together Mortgage**"). On 19 September 2017, by a Deed of Priority of that date, it was agreed that the Together Charge should have priority over the Burns Mortgage in respect of *"Lender Indebtedness"*, which was defined as meaning *"the facility sum of £365,000 plus interest costs and expenses thereon."*

16. In 2018, Mr Bridge refinanced with PFL and entered into a loan agreement dated 17 September 2018 between PFL (1) and himself (2), providing for a *"Loan Facility"* of £650,000 (inclusive of an Acceptance Fee of £13,000) for a term of nine months ("**the 2018 Loan Agreement**"). Contemporaneously therewith, Mr Bridge granted PFL an *"all monies"* Legal Mortgage over the Property as security for *"the Secured Liabilities"* ("**the PFL Mortgage**"). So far as the PFL Mortgage is concerned, I would note that:

i) *"Secured Liabilities"* were defined therein as being: *"all present and future monies, obligations and liabilities owed by the Borrower to the Lender, whether actual or contingent and whether owned jointly or severally, as principal or surety or in any other capacity, under or in connection with the Facility Agreement or this deed (including without limitation, those arising under clause 27.3(b)) together with all interest (including, without limitation, default interest) accruing in respect of those monies or liabilities."*.

ii) Clause 16.1 dealing with the application of proceeds provided as follows:

> "16.1. **Order of application of proceeds**
>
> All monies received by the Lender, a Receiver or a Delegate under this deed after the security constituted by this deed has become enforceable (other than sums received under any Insurance Policy), shall (subject to the claims of any person having prior rights and by way of variation of the LPA 1925) be applied in the following order of priority:
>
> (a) in or towards payment of or provision for all costs, charges and expenses incurred by or on behalf of the Lender (and any Receiver, Delegate, attorney or agent appointed by it) under or in connection with this deed and of all remuneration due to any Receiver under or in connection with this deed;
>
> (b) in or towards payment of or provision for the Secured Liabilities in any order and manner that the Lender determines; and
>
> (c) in payment of the surplus (if any) to the Borrower or other person entitled to it."

17. On 21 September 2018, Mrs Burns (1), PFL (2) and Mr Bridge (3) executed a Deed of Priorities and Variation ("**the 2018 Deed of Priorities**"). This was, so far as the mechanism for conferring priority on PFL is concerned, substantially in the same terms as the 2019 Deed of Priorities with which I am immediately concerned, and to which I will refer in more detail below. However, it should be noted that in the 2018 Deed of Priorities, *"Lender's Debt"* was defined as meaning: *"all monies and liabilities now or hereafter due owing or incurred to the Lender by the Borrower in any manner whatsoever up to a maximum of £650,000 plus interest and costs"*.

18. On 29 March 2019, PFL entered into a further loan agreement with Mr Bridge ("**the 2019 Loan Agreement**"). This provided for a *"Total Loan Facility"* of £807,000 (inclusive of Acceptance Fee and Solicitor's Costs).

19. As to the 2019 Loan Agreement:

i) Clause P provided that the facility would only be capable of being drawn down as to £713,500 thereof, and as to a further £88,900 *"as required to complete the development"*. It is be noted from the statement of account provided by PFL, that £138,500 is shown as having been drawn down on 15 April 2019. If

one adds the figure of £88,900 to a further amount of £50,000 that it is common ground was also advanced by PFL to Mr Bridge to enable him to pay the sum of £50,000 to Mrs Burns as provided for by the 2019 Priority Agreement, then one gets to the figure of £138,900, i.e. approximately the figure of £138,500 referred to in the statement of account produced by PFL. It is thus reasonably clear that the £713,500 represented a refinancing of the outstanding amount due (which included arrears of interest) under the 2018 Loan Agreement.

ii) Further, significantly perhaps so far as the definition of *"Lender's Debt"* in the 2019 Facility Agreement is concerned and the figure of £850,000 referred to therein to which I shall return, the total of £713,500, £88,900 and £50,000 is £852,400, i.e. just fractionally more than £850,000.

iii) Paragraph 1 of the Terms and Conditions of the 2019 Loan Agreement provided as follows so far as interest is concerned, namely that:

a) PFL agreed to lend the *"Total Loan Facility"*, and Mr Bridge agreed to repay the same together with any unpaid accrued interest by the *"Repayment Date"*, i.e., the end of the loan term of 9 months (paragraphs 1(a) and (b));

b) Mr Bridge should pay interest on the Total Loan Facility on a monthly basis at the rate provided for by the 2019 Loan Agreement, namely 1.25% per month (paragraph 1(c));

c) Interest was to be compounded, in that paragraph 1(d) provided that:

> "Interest is calculated on the due date of each monthly Interest payment by applying the interest rate per month then current under the Agreement to the Balance Outstanding on the previous due date (or, for the calculation of the Interest for the first monthly interest payment, the Balance outstanding on the date we advance the Total Loan Facility to you). The resulting amount is then added to the Balance Outstanding. The 'Balance Outstanding means the aggregate of the Total Loan Facility, fees and charges charged by us and interest added on each due date for monthly interest payments less any payments made by you."

20. The 2019 Deed of Priorities was entered into by Mrs Burns (1), PFL (2) and Mr Bridge (3) on 10 April 2019. Mrs Burns was referred to therein as *"the Seller"*, PFL was referred to therein as *"the Lender"*, and Mr Bridge was referred to therein as *"the Borrower"*. The following provisions thereof are of particular relevance:

i) The recitals included a recital that the 2019 Deed of Priority was intended to replace all previous arrangements between Mrs Burns and PFL, i.e. the 2018 Deed of Priorities;

ii) The definitions set out in clause 1.1 included the following:

a) *"Seller's Debt"* was defined as meaning *"all monies and liabilities now or hereafter due owing or incurred to the Seller by the Borrower in any manner whatsoever"*;

b) *"Seller's Security"* was defined as meaning *"the security described in the First Schedule to this deed* [i.e. the Burns Mortgage] *together with all and any additional or substituted securities whatsoever which the Seller may from time to time holds from the Borrower to secure the Seller's Debt."*

c) *"Lender's Debt"* was defined as meaning *"all monies and liabilities now or hereafter due owing or incurred to the Lender by the Borrower in any manner whatsoever up to a maximum of £850,000 plus interest and costs."*

d) *"Lender's Security"* was defined as meaning *"the security described in the Second Schedule to this deed* [i.e. the PFL Mortgage] *together with all and any additional or substituted securities whatsoever which the Lender may from time to time hold from the Borrower to secure the Lender's Debt."*

iii) Clause 2.1 provided that in consideration of the provision of the 2019 Deed of Priorities, Mrs Burns and PFL agreed: *"to regulate their respective rights under the Seller's Security and the Lender's Security"* as set out in the 2019 Deed of Priorities;

iv) Clause 4.1 recorded that a payment of £50,000, referred to as the *"Capital Reduction Payment"* had been received by Mrs Burns such that, upon receipt thereof, Mr Bridge owed Mrs Burns £400,000 in total, as against the £450,000 that had been due prior thereto.

v) By clause 5.1 it was provided that in consideration of, amongst other things, PFL continuing to grant time credit and/or facilities or accommodation for so long as it should think fit to Mr Bridge, it was agreed and declared by Mrs Burns that: *"the charges comprised in and constituted by the Lender's Security shall rank in priority to the charges comprised in and constituted by the Seller's Security in all respects."*

vi) Clause 5.3 provided that any monies received by any receiver and/or manager appointed under either the Seller's Security or the Lender's Security from realisations of the Seller's Security or the Lender's Security or otherwise should be applied to give effect to the provisions of clause 5.1 (erroneously referred to as clause 4.1), but only after *"payment of* [the receiver and/or manager's] *remuneration and receivership expenses and after providing for all costs, charges, expenses and liabilities and other payments incidental to the appointment of such receiver and the exercise of all or any of his powers and of all outgoings properly paid by him ranking in priority to the Seller's Security and the Lender's Security"*.

21. At the time of entering into each of the 2018 Deed of Priorities and the 2019 Deed of Priorities, Mrs Burns was aware that Mr Bridge had agreed to borrow monies from

PFL, but it was her evidence that she was unaware of the terms of the 2018 Loan Agreement or the 2019 Loan Agreement, and in particular that she was unaware of the actual amount of the facility provided for thereby, the rate of interest payable by Mr Bridge, and the fact that these agreements provided for the payment of compound interest. It was, however, her evidence that she had discussed with her solicitor acting for her in relation to the Deeds of Priorities that it was her understanding that the Houses (when built) would be worth approximately £600,000 each, meaning that the Property would have a value of some £1.8 million when the Houses were completed, and thus that there was, as she put it, *"enough balance"*, i.e. plenty of equity in the event that she needed to enforce the Burns Mortgage. Whilst Mrs Burns had spoken to Mr Bridge prior to entering into the Deeds of Priorities, there is no suggestion that she spoke to Mr Mellor or any other representative of PFL.

22. It was Mr Mellor's evidence on behalf of PFL that, at the time of entering into the 2019 Loan Agreement, Mr Bridge's plan was to finish and sell one of the Houses, and to then use part at least of the proceeds of sale thereof to assist to fund the completion of the development of the other two Houses. This is consistent with Clause I of the 2019 Loan Agreement concerning *"Repayment of the Total Loan Facility"*.

23. In the event, matters did not work out as expected. The Loan Facility provided for by the 2019 Loan Agreement was not repaid within 9 months, and no monthly payments of interest were paid with the result that, pursuant to the terms of the 2019 Loan Agreement, the interest payable was compounded at a default rate. The reasons for this are not, as I see it, strictly relevant. However, the Covid 19 pandemic played a part in delaying the completion of the development of the Houses and affected the ability to effect sales thereof. As I have already touched upon, in the course of her evidence Mrs Burns sought to suggest that there was some form of collusion between Mr Bridge and PFL which resulted in resources being put into another development being carried out by Mr Bridge and funded by PFL. However, this formed no part of Mrs Burns's pleaded case, Mr Mellor strongly denied that there had been *"in cahoots"* with Mr Bridge in any way, and Mr Chapman KC (realistically) did not seek to place any reliance on this as assisting Mrs Burns's case.

24. What is clear is that by the summer of 2020, in the light of the delays, Mr Mellor, on behalf of PFL, was taking a more active interest in the development of the Houses, and seeking to achieve sales thereof, in order that the loan facility provided by PFL pursuant to the 2019 Loan Agreement could be repaid. In cross examination, Mr Mellor was taken to correspondence to this effect. Thus, by an email dated 24 July 2020, Mr Mellor wrote to Mr Bridge referring to a conversation with estate agents, Mortimers, and to the latter having advised beginning to market the Houses at £450,000, £475,000 and £525,000 respectively, which Mortimers had suggested would generate viewings *"which aren't currently happening"*. Further, in an email to one of PFL's own funders dated 8 August 2020, Mr Mellor referred to taking a more hands-on approach to *"try and get these away"*, referring to the fact that Mr Bridge had agreed to lower the prices to those recommended by Mortimers.

25. As I have mentioned, it had been anticipated that one of the Houses would be sold ahead of the other two, and that the proceeds could be used, in part, to fund the completion of the other two Houses. However, as a result as I understand it of potential purchasers expressing more interest in one of the other Houses that it had not

been intended to complete first, this proved to be impractical, meaning that further external funds would be required in order to complete the three Houses.

26. In the light of continuing delays, in January 2021, PFL took possession of the Property, and thus the Houses, as mortgagee in possession. Not insignificant further funds were introduced by PFL in order to complete the Houses, and they continued to be marketed by Mortimers. This was, as referred to, necessitated by the fact that Mr Bridge has been unable to sell one of the Houses to help to fund the completion of the other two.

27. One of the Houses (plot 3) was sold by PFL as mortgagee in possession on 7 May 2021 for £450,000, another (plot 1) was sold by PFL as mortgagee in possession on 22 June 2021 for £480,000, and the final House (plot 2) was sold by PFL as mortgagee in possession on 23 July 2021 for £415,000. The total gross proceeds of sale were thus £1,345,000.

28. On the basis of its interpretation of the 2019 deed of Priorities, PFL has sought to account to Mrs Burns on the basis that there is a shortfall for PFL, and no surplus available for Mrs Burns. However, it is Mrs Burns's case that on a proper interpretation of the 2019 Deed of Priorities, and further on the basis that the Houses were, on her case, sold at an undervalue for which PFL is liable, there is a significant surplus available to her.

29. So far as PFL's case on the figures is concerned, it is its case that:

   i) The amount of the Loan Facility outstanding was £850,525, upon which interest had accrued, compounded as provided for by the 2019 Loan Facility, in an amount of £489,584.31, resulting in a total sum outstanding of £1,340,109.31. A Schedule has been produced by PFL showing drawings between 6 July 2018 and 31 May 2022 totalling £850,525, and showing the interest applied and accruing against the same.

   ii) The net proceeds of sale, after deducting the costs of sale were £1,270,141.76. Only one completion statement has been produced, namely that for plot 3 from which there is shown to be deducted from the £450,000 sale price, the following namely: estate agent fees (inclusive of VAT) of £5,460, legal fees (including VAT and disbursements) of £1,044.36, *"Hill Dickinson LLP's Invoice"* in an amount of £24,028.80, and *"Monies in respect of Mrs Burns/Schofield"* in an amount of £10,000.

   iii) Deducting the £1,270,141.76 received by way of realisations from the outstanding £1,340,109.31 leaves a balance outstanding to PFL of £69,969.55 as of 31 May 2022, and thus no surplus for Mrs Burns.

   iv) Further, there are claimed mortgagee in possession costs of £325,688.23, on which interest has accrued of £67,022.43, leaving a balance outstanding as of 31 May 2022 of £462,678.21 owed to PFL, and no surplus for Mrs Burns. These mortgagee in possession costs include the costs of completing the development of the Houses after PFL had taken possession.

30. The present proceedings were commenced against Mr Bridge and PFL on 22 April 2022. On 10 June 2022, default judgment in an amount of £495,093.36 was entered against Mr Bridge. On 3 April 2023, a bankruptcy order was made against Mr Bridge on Mrs Burns' petition. This explains why Mr Bridge has played no part in the proceedings and was not present or represented at the trial.

31. On the other hand, PFL has defended the present proceedings.

Proper interpretation of the 2019 Deed of Priorities

Introduction

32. The issue between the parties as to the proper interpretation of the 2019 Deed of Priorities turns upon the definition of *"Lender's Debt"*. As we have seen, clause 5.1 of the 2019 Deed of Priorities provides that the charges comprised in and constituted by the *"Lender's Security"* should rank in priority to the charges comprised in and constituted by the *"Seller's Security"* in all respects where *"Lender's Security"* is defined as being the security to secure the *"Lenders Debt"*. The question is what, when the definition refers to *"up to a maximum of £850,000 plus interest and costs"*, is meant by *"interest"* and *"costs"*.

33. It is PFL's case that *"interest"* means, and can only mean, interest on £850,000 as provided for by the terms of the 2019 Loan Agreement, that the expression *"costs"* covers all costs, charges and expenses that PFL is entitled to bring into account under the terms of the 2019 Loan Agreement and or the PFL Mortgage, and/or which might ordinarily be expected to be deducted from the proceeds of sale by a mortgagee selling in possession before accounting to the party next entitled, and that there is no scope for a more nuanced interpretation.

34. Mrs Burns's case is that *"interest"* is confined to simple interest as between PFL and herself at a *"reasonable rate"* on £850,000 from the date of the 2019 Loan Agreement, i.e. that the definition itself provides for the bringing into account of interest different from that as between PFL and Mr Bridge. Alternatively, it is Mrs Burns' case that if, contrary to her primary case, the definition, in referring to *"interest"*, is referring to interest as between PFL and Mr Bridge, then whilst it is accepted that the interest to be brought into account would be at the rate as provided for by the 2019 Loan Agreement, it is submitted that it is only such interest calculated as simple interest on the sum of £850,000, and not compound interest. So far as *"costs"* are concerned, it is Mrs Burns's case that the use of the expression *"costs"* without reference to *"charges or expenses"* is simply a reference to costs of proceedings relating to the realisation of PFL's security, and not other *"charges or expenses"* that a mortgagee in possession would normally to be entitled to recover.

Trust

35. Mr Chapman KC specifically raises the point, but it is not in dispute that any surplus properly arising in favour of Mrs Burns would be held by PFL upon trust for Mrs Burns. This is the effect of s.105 of the Law of Property Act 1925 ("**LPA 1925**") which provides that any money received by a mortgagee on sale, after discharge of prior encumbrances to which the sale was not made subject, should be held: *"by him in trust to be applied by him, first in payment of all costs, charges, and expenses*

properly incurred by him as incident to the sale or any attempted sale or otherwise; and secondly, in discharge of the mortgage money, interest and costs, and any other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgage property, or authorised to give receipts for the proceeds of sale thereof."

Correct approach to construction

36. Mr Chapman KC referred to the helpful summary as to the relevant principles to be applied as set out by Birss LJ in *Adaptive Spectrum and Signal Alignment Inc v British Telecommunications plc* [2023] EWCA Civ 451 at [17] to [20]. This can conveniently be adopted for present purposes:

"[17] The law on contractual interpretation was definitively established by the trio of Supreme Court cases on the subject, namely *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

[18] There is no *need* to review these authorities or any others at any length. The guiding principle is that the task of the court is a unitary exercise involving an iterative process to ascertain the objective meaning of the language used by the parties to express their agreement (*Wood v Capita* at [10] per Lord Hodge). Or putting the same thing another way, it is a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant (taken from *Britvic Plc v Britvic Pensions* [2021] EWCA Civ 867 at [29] (per Sir Geoffrey Vos MR).

[19] A further aspect is that in this exercise the court can give weight to the implications of rival constructions by reaching a view as to which construction would be more consistent with commercial common sense (*Wood v Capita* at [11] per Lord Hodge), nevertheless it is important to see that this applies when there actually are rival constructions to consider (see *Britvic*, particularly Coulson LJ at [57] and Nugee LJ at [70]). It is much harder (one might say impossible) to weigh up implications against the meaning of clear language. That is because, as Lord Hodge also pointed out in [11], there is always the possibility that a party might have accepted something which with hindsight did not serve its interest.

[20] A different issue, and not relevant in this case, is a situation in which clear language might be overridden because something has just gone wrong with the language (see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 and also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 93D-E about not attributing to the parties an intention which they plainly could not have had)."

37. As Mr Chapman points out, effect is to be given to every word in a clause insofar as it is possible to do so. In *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All ER 175, Lord Hope stated as follows at [11]:

> "[11] The court's task is to ascertain the intention of the parties by examining the words they used and giving their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise."

38. In seeking to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant, the court should have regard to the background or factual context of the contract, but:

    i) This is limited to the "*knowledge a reasonable observer would have expected and believed both contracting parties to have had"* – see *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [277] *per* Hildyard J; and

    ii) The court is not entitled to have regard to the negotiations leading to the conclusion of the contract nor evidence as to the parties' subjective intentions.

Admissible background in the present case

39. It is submitted by Mr Chapman KC on behalf of Mrs Burns that the terms themselves of the loan and mortgage documentation as between Mr Bridge and PFL are not admissible for present purposes because Mrs Burns was not party to this documentation, nor aware of the contents thereof, and in particular as to the fact that the 2019 Loan Agreement provided for the payment of compound interest. Further, he submits that as Mrs Burns was not aware of the precise amount drawn down, or to be drawn down by Mr Bridge, which cannot thus form part of the admissible background to the construction of the 2019 Deed of Priorities. The same point is made regarding what is submitted on behalf of Mrs Burns to be the inadmissibility of the 2017 Deed of Priorities on the basis that PFL was not a party thereto, and it was Mr Mellor's evidence that he only became aware of the terms thereof during the course of the present litigation.

40. I am prepared to proceed for present purposes on the basis that Mr Chapman's submissions are broadly correct.

41. However, I do consider it to be an important part of the factual background that Mrs Burns had sold the Property (and thus the Houses) on the basis that the Houses were to be developed and disposed of by Mr Bridge, and that Mr Bridge would fund the

development by borrowing on the security of the Property. It was in these circumstances that Mr Bridge had initially borrowed from Together, and subsequently borrowed from PFL pursuant to the terms of the 2018 Loan Agreement, as subsequently replaced by the 2019 Loan Agreement. Further, I consider it a relevant consideration for the purposes of construing the 2019 Deed of Priorities, that the 2018 Deed of Priorities had been in substantially the same terms as the 2019 Deed of Priorities, albeit with the definition of *"Lender's Debt"* referring to the figure of £650,000, rather than the increased figure of £850,000 that was included in the 2019 Deed of Priorities to reflect further borrowings. Mrs Burns confirmed in evidence that she was aware that after PFL had first agreed to provide facilities to Mr Bridge in 2018 replacing those previously provided by Together, the amount lent by PFL to fund the development of the Houses was subsequently increased, hence the need to enter into the new 2019 Deed of Priorities, albeit that it is Mrs Burns' case that she was not aware of the precise amount of the further borrowing.

"Interest"

Mrs Burns' case

42. As identified above, Mr Chapman KC's principal submission on behalf of Mrs Burns is that *"interest"* means interest as between PFL and Mrs Burns at a "reasonable rate", which it is submitted would be simple interest at the same rate of interest as was payable by Mr Bridge to Mrs Burns, namely 4.75%. Mr Chapman KC's alternative submission is that *"interest"* means simple interest at the rate provided for by the 2019 Loan Agreement applied to the maximum capital sum of £850,000.

43. So far as Mr Chapman KC's principal submission is concerned, his case is, in essence, as follows:

    i) It is submitted that on a proper reading of the language of the definition *"Lender's Debt"* in the 2019 Deed of Priorities, interest as provided for by the 2019 Loan Agreement falls within *"all monies and liabilities"* owing to PFL and that it is to this aggregate amount (including interest) that the cap of *"a maximum of £850,000"* applies. Consequently, so it is said, the reference to *"plus interest"* must be a reference to some other form of interest falling outside the scope of the 2019 Loan Agreement, i.e. as specifically provided for by the 2019 Deed of Priorities as between PFL and Mrs Burns for the purposes of account.

    ii) Mrs Burns did not know what the terms of the 2019 Loan Agreement were, and so did not know what it provided so far as the payment of compound interest was concerned. Further, it is submitted that a reasonable observer would not have expected and believed both PFL and Mrs Burns to have known about the terms of the 2019 Loan Agreement.

    iii) A reasonable observer with the parties' background knowledge would treat the purpose of the limit of £850,000 as being to enable Mrs Burns to recover all or part of her loan. Compound interest at a higher rate would, it is submitted, defeat this purpose and would not make commercial sense.

iv) It would, however, make commercial sense for interest to mean interest after entry into the 2019 Deed of Priority, effectively as between Mr Bridge and Mrs Burns. As the 2019 Deed of Priority is silent as to rate, it would be an implied term that interest should be a *"reasonable rate"* of interest.

44. The effect of the submissions, if successful, would be to reduce the amount of interest that PFL is entitled to deduct from the proceeds of sale to approximately £85,603, which ought to lead to a significant surplus in Mrs Burns' favour.

45. As to the alternative submission, the essence of Mr Chapman KC's argument is that the effect of paragraph 1(d) of the Terms and Conditions to the 2019 Loan Agreement is to capitalise unpaid interest, so it is then treated as capital akin to a further advance on which interest then accrues. Consequently, on the basis that the maximum of £850,000 is a cap on the recoverable capital, in giving effect to the definition of *"Lender's Debt"*, the £850,000 maximum is to be taken to be a cap on the amount not just of the *"Loan Facility"* itself, but also on the capitalised interest on the basis that has become, or is to be treated for this purpose as having become capital together with the Loan Facility to which the cap applies. The argument is that the *"plus interest"* can only be a reference to interest on this capped sum of £850,000, which can only be simple interest because the unpaid interest has already been capitalised.

46. Reliance is placed by Mr Chapman KC on the decision of the Privy Council in *Imperial Life Assurance Company of Canada v Efficient Distributors Limited* [1992] 2 AC 85, where the Privy Council had held that, in respect of a provision in a mortgage providing for the compounding of interest in default of payment of an instalment of interest, the capitalised interest became further principal advance by the lender in respect of which interest at the rate provided for by the mortgage (12%) became payable. Consequently, the relevant provision for the compounding of interest did not result in the interest charge being excess of the statutory maximum (of 20%) provided for by a Bahamian statute, which it would have done if the total interest charged (including compounding) had been calculated as a percentage of the original loan.

47. At p 91-92, Lord Keith, giving the judgment of the Privy Council, said this:

> "So the position as regards yearly or half-yearly rests taken by the custom of bankers is that unpaid interest becomes part of the principal sum owing by the borrower. In the present case the borrower was by the terms of the mortgage specifically obliged to pay each monthly instalment, including the interest element in it, as and when it fell due. <u>Unpaid interest became a principal sum owing in addition to the principal sum originally lent</u>, and as such carrying its own interest charge. With each instalment in respect of which default is made the total amount of interest payable increases, but that does not mean that there is any variation in the rate of interest chargeable on the original loan. That rate is not increased directly or indirectly but remains what it always was, namely 12 per cent." [My emphasis]

48. Quite fairly, Mr Chapman KC took me to the earlier decision of the House of Lords in *Inland Revenue Commissioners v Oswald* [1945] 1 AC 360, where the House of Lords

had held that capitalised interest still holds its quality as interest. As Lord Porter put it at p. 379:

> "At an earlier date, in *Inland Revenue Commissioners v. Holder* [[1931] 2 KB 81], the Court of Appeal had decided that the capitalization of bank interest ought properly to be regarded as a fresh borrowing of interest by the borrower from the bank followed by the application of the sum so notionally borrowed in payment of the interest due, with the result that there was a payment at the moment of capitalization. In *Paton's* case [[1938] AC 341] your Lordships held that this was not so and that the debiting of interest in the account did not constitute, as between the borrower and the bank, a payment of interest under s. 36, sub-s. 1, of the Income Tax Act, 1918. My Lords, I do not find myself able to distinguish in principle between that case and the one the House is now considering. In each case there is a debt and in each case there is a contract under which, in default of payment, a so-called capitalization of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage, but the substance, though not the machinery, is the same. Capitalization means no more than that interest, which continues to be interest, shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest. There being then no payment until the funds were handed over in pursuance of the agreement of July 20, 1939, there could be no earlier deduction and up to that time no deduction of tax had in fact taken place. The respondent was therefore under an obligation to deduct from the sum paid to the mortgagee's trustees and account to the revenue for the tax then due unless for some other reason he was excused." [Again, my emphasis].

49. As I understand Mr Chapman KC's case, even if, in the present case, compounded interest might not strictly have altered its quality as interest as such, given how the process of compounding is described in paragraph 1(d) of the Terms and Conditions of the 2019 Loan Agreement, with a reference therein to the compounded interest being added to the *"Balance Outstanding"*, then for the purposes of the 2019 Deed of Priorities at least, the interest that has been compounded is properly to be regarded as having been added to the capital sum that is subject to the cap of £850,000.

50. Although this alternative formulation would result in more interest being taken into account in PFL's favour than if Mrs Burns's primary case as to interest were to be accepted, it would still lead to a significant reduction in the amount of interest that PFL was entitled to deduct from the proceeds of sale of the Houses before accounting to Mrs Burns.

Determination of the interest question

51. I am not persuaded that the language of the definition of *"Lender's Debt"* in the 2019 Deed of Priorities points to the conclusion contended for on behalf of Mrs Burns. I consider that the language is more logically to be read as meaning that the "*maximum of £850,000 plus interest and costs"* is an all embracing cap to be applied to limit the priority afforded to PFL as against Mrs Burns in respect of the *"all monies and liabilities"* secured by PFL's *"all monies"* mortgage, the PFL Mortgage. I consider

that if it had been intended that the 2019 Deed of Priorities should provide for the payment of interest as between PFL and Mrs Burns as contended by Mrs Burns, then the 2019 Deed of Priorities would have expressly so provided, or at least specified the rate at which such interest was to be paid. I bear in mind that the 2019 Deed of Priorities was a professionally drafted document.

52. Whilst Mrs Burns may not have been aware of the terms of the 2019 Loan Agreement, considering the matter objectively, I consider that it must be taken to have been within the reasonable contemplation of any party to the 2019 Deed of Priorities that whatever terms had been agreed between PFL and Mr Bridge for the provision of development finance on a commercial basis for the development of the Houses at least might have included provision for the capitalisation of unpaid interest.

53. I accept that the reasonable objective observer with the parties' background knowledge would have regarded the purpose of the limit of £850,000 provided for in the definition of Debtor's Debt to have been to enable, or at least assist Mrs Burns to recover all or part of her loan. However, I consider that rather more by way of context is required in this analysis.

54. Mrs Burns had left virtually the whole of the purchase price of the Property outstanding in circumstances in which she was aware that Mr Bridge was looking to develop the same in order to pay her the outstanding purchase price, and that Mr Bridge was borrowing money in the form of development finance to enable him to do so. By the time of the entry into of the 2019 Deed of Priorities, Mrs Burns was further aware that both the initial lender, Together, and subsequently PFL, required Mrs Burns to enter into Deeds of Priorities in order to give it priority as lender over Mrs Burns up to particular maximum capital sums that increased as further sums were advanced, plus interest and costs. Consequently, I consider that a reasonable objective observer with the parties' background knowledge would have regarded the purpose of the 2019 Deed of Priorities, which included the definition of *"Lender's Debt"*, as being to enable PFL to recover all or part of the monies that it lent, subject to the cap, and any other monies that might be properly due to it from Mr Bridge, and to do so in priority to Mrs Burns.

55. I do not consider that it can fairly be said that the compounding of interest at the rates provided for by the 2019 Loan Agreement was such as to necessarily defeat the purpose of the 2019 Deed of Priorities from Mrs Burns' perspective, so as to mean that entering into the 2019 Deed of Priorities had little or no commercial sense from Mrs Burns' perspective if *"interest"* is construed as contended by PFL. It was in Mrs Burns' interests for Mr Bridge to be able to borrow further money in April 2019 to enable him to complete the development of the Houses. The reason why Mrs Burns now finds herself, on PFL's case, without any recourse against the proceeds of sale of the Houses is because events have turned out very differently than as planned when the parties entered into the 2019 Deed of Priorities. Recognising that the purpose of security is to cater for the situation where things do not work out as planned, the fact is that it took considerably longer than anticipated for the Houses to be completed and sold, Mr Bridge was unable to sell one of the Houses to fund the completion of the other two, and compound interest continued to accrue in the meantime. Further, the Houses did not realise as much as Mrs Burns had anticipated that they would. I have referred to the evidence to the effect that Mrs Burns discussed with her Solicitor each

of the houses realising £600,000, i.e. £1,800,000, in which case the position now be somewhat different.

56. In the circumstances, and having regard to the above considerations, I am unable to conclude that *"interest"* in the relevant definition means interest between PFL and Mrs Burns at a reasonable rate, rather than interest as charged as between PFL and Mr Bridge.

57. So far as the alternative argument advanced by Mr Chapman KC is concerned, I do not consider that *Imperial Life Assurance Company of Canada v Efficient Distributors Limited* (supra) really assists Mrs Burns' case. This latter case was concerned with the proper construction or effect of a statute in the Bahamas limiting the amount that could be charged interest to 20% of the amount advanced, and whether the effect of the compounding of interest applying the rate of interest chargeable on the original loan (12%) was contrary to the statute because the total interest charged (including the compounded interest) amounted to more than 20% of the advance. It was in this particular and somewhat discrete context that Lord Keith spoke in terms of unpaid interest becoming a principal sum.

58. The earlier decision of the House Lords in *Inland Revenue Commissioners v Oswald* (supra) does not appear to have been cited to the Privy Council. *Inland Revenue Commissioners v Oswald*, as a decision of the House of Lords, is binding upon me, whereas *Imperial Life Assurance Company of Canada v Efficient Distributors Limited*, being a decision of the Privy Council, is not, or at least not in preference to a decision of the House of Lords. Further, *Imperial Life Assurance Company of Canada v Efficient Distributors Limited* does not appear to have been applied in any subsequent decision, whereas *Inland Revenue Commissioners v Oswald* has been referred to and applied in several subsequent decisions as authority to the effect that compound interest does not become capital, and retains its character as interest – see e.g. Fisher and Lightwood's Law of Mortgage 15th Edn at 7.11 and *Whitbread Plc v UCB Corporate Services Ltd* [2000] 3 EGLR 96, CA.

59. Paragraph 1(d) of the Terms and Conditions of the 2019 Loan Agreement referred to the compounded interest being added to the *"Balance Outstanding"*, but it also referred to the latter as being an aggregate of, amongst other things, the *"Total Loan Facility"* and interest. In the circumstances, I consider that the compound interest that PFL was entitled to charge pursuant to the terms of the 2019 Loan Agreement is still properly to be regarded as interest, and did not become capital, and I do not consider that there is any proper basis for treating it as capital for the purposes of the definition of *"Lender's Debt"* in the 2019 Deed of Priorities.

60. Considering the matter objectively, I consider that the reasonable observer is likely to have concluded that the purpose of the inclusion of the figure of £850,000 in the 2019 Deed of Priorities was to cap the capital sum that PFL was entitled to priority in respect of as against Mrs Burns, in essence so to prevent PFL, through its *"all monies"* PFL Mortgage, gaining priority also in respect of any further advances that PFL might have made.

61. I consider that this conclusion is reinforced by the fact that the 2019 Deed of Priorities followed on from the 2018 Deed Priorities which had provided for a lower cap, and

that the 2019 Deed of Priorities was required because, as was known by Mrs Burns, PFL was advancing further funds to Mr Bridge.

62. If this was, or is to be taken to have been, the purpose for the inclusion of the figure of £850,000 in the definition, then I consider that the reference to *"plus interest"* can only be a reference to the interest to which PFL is entitled under the terms of the 2019 Loan Agreement, i.e. compound interest, and that there is no proper basis or foundation for otherwise construing *"interest"*.

63. The case of *Whitbread Plc v UCB Corporate Services Ltd* (supra) was not cited to me in argument, and I only came across the same when considering Fisher and Lightwood (supra) at 7.11, where it is cited, following the hearing, and indeed after I had already reached the conclusion that I have as to the proper meaning of *"interest"* for the purposes of the definition of *"Lender's Debt"*. This case involved very similar facts indeed to the present case and concerned the construction of the expression *"A capital sum of £160,000 together with interest thereon to date of payment"*, and in particular the meaning of the expression *"interest thereon"*, in a deed of priority concerning competing charges. The Court of Appeal applied *Inland Revenue Commissioners v Oswald*, and held that the reference to *"interest"* extended to compound interest that the chargee afforded priority was entitled to recover from the chargor/debtor under the relevant underlying loan agreement.

64. I consider that this latter case, and the reasoning therein, entirely supports the conclusions that I had already reached.

65. In the circumstances, I have come to the firm conclusion that neither of the alternative contentions advanced on behalf of Mrs Burns can succeed. I consider that *"interest"* for the purposes of the definition of *"Lender's Debt"* in the 2019 Deed of Priorities is properly to be construed as extending to include the compound interest that PFL is entitled to recover as against Mr Bridge under the terms of the 2019 Loan Agreement.

66. I have a number of observations on PFL's calculation of the compound interest figure of £489,584.31 that has been applied by PFL as against the proceeds of sale of the Houses. The calculations go back to the date of the 2018 Finance Agreement and includes reference to the drawings by Mr Bridge at that stage to which interest has been applied as from the appropriate date in 2018. However, the 2019 Loan Agreement, as I have referred to, referred to a drawdown of £713,500 as at the date thereof, and to a further £88,900 as being required to complete the development. In addition, although not referred to in the 2019 Loan Agreement itself, one can see that shortly after the date of the 2019 Loan Agreement, PFL advance the £88,900 referred to in the 2019 Loan Agreement, together with the £50,000 applied by Mr Bridge in making a part payment to Mrs Burns as specifically referred to in the 2019 Deed of Priorities.

67. I consider that, in the circumstances, the statement of account of should start afresh with an opening balance of £713,500 as at the date of the 2019 Loan Agreement, and that interest should only be applied as from that date (10 April 2019) to that sum, and to the £138,500 drawn down on 15 April 2019 as from that date. This would require a recalculation of the interest payable as recorded on PFL's statement of account. Further, given that these are further advances that would take the amount advanced over the £850,000 cap, I do not consider that the amounts shown as drawn on 4

October 2019, 31 October 2019, 30 November 2019 and 31 December 2020 totalling some £34,500 can properly be brought into account in the calculation of interest.

68. Consequently, some reduction is, I consider, required to the amount that PFL has deducted from the proceeds of sale of the Houses for interest, although this may be academic if it still does not produce a surplus for Mrs Burns having regard to my other finding.

"Costs"

Mrs Burns' case

69. Mrs Burns' case as to the meaning of *"costs"* in the definition of *"Lender's Debt"*, and within the reference therein to *"plus interest and costs"* on the £850,000 maximum is, in essence, as follows:

i) S. 105 LPA 1925 refers to *"costs, charges, and expenses properly incurred"* as being deductible from the proceeds of sale where a mortgagee sells the mortgage property, and clause 16.1 of the PFL Mortgage refers to priority being given to *"costs, charges and expenses incurred by or on behalf of the Lender …"*.

ii) In this context, the fact that the definition of *"Lender's Debt"* simply refers to *"costs"*, rather than to the more expansive *"costs charges and expenses"* should lead the reasonable objective observer to the conclusion that the parties had intended that the priority conferred by the 2019 Deed of Priorities should be limited to costs properly so called, i.e. any costs related to the bringing of proceedings concerning the mortgaged property. It is submitted that, given the terms of s. 105 LPA 1925 and clause 16.1 of the PFL Mortgage, if the 2019 Deed of Priorities had intended to extend to *"charges and expenses"*, and not just such *"costs"*, then it would have said so.

iii) Mr Chapman KC referred me to the meaning of *"costs"* as set out in *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, at p. 33, per Nourse LJ:

> "A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security. Often the process of enforcement or preservation makes it necessary for him to take or defend proceedings. In regard to such proceedings three propositions may be stated. (1) The mortgagee's costs, reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety are allowable. The classical examples are proceedings for payment, sale, foreclosure or redemption, but nowadays the most common are those for possession of the mortgaged property preliminary to an exercise of the mortgagee's statutory power of sale out of court. (2) Allowable also are the mortgagee's costs, reasonably and properly incurred, of proceedings between himself and a third party where what is impugned is the title to the estate. In such a case the mortgagee acts for the benefit of the equity of redemption as much as for that of the security. (3) But where a third party impugns

> the title to the mortgage, or the enforcement or exercise of some right or power accruing to the mortgagee thereunder, the mortgagee's costs of the proceedings, even though they be reasonably and properly incurred, are not allowable."

iv) Mr Chapman KC submits that the latter authority clearly differentiates between *"costs"* of bringing proceedings on the one hand, which such costs will be recoverable in two of the situations identified in the passage cited, and *"charges and expenses"* on the other hand.

Determination of the meaning of "costs"

70. I am not persuaded that *"costs"* on the one hand, and *"charges and expenses"* on the other hand, fall to be so clearly distinguished as contended by Mr Chapman KC. Certainly, the passage cited from *Parker-Tweedale v Dunbar Bank plc (No 2)* (supra) at p.31 does begin by referring to *"all costs, charges and expenses"* before going on to specifically referred to costs of proceedings. However, I consider it important to bear in mind that this was in the context of a consideration as to whether the costs of a particular type of proceedings concerned with the title of the mortgagee were properly recoverable. I do not consider that the case materially assists as to the meaning of *"costs"* in a provision such the definition of *"Lender's Debt"* in the 2019 Priorities Agreement.

71. The expression *"costs"* is, as I see it, certainly capable of encompassing *"costs, charges and expenses"*. I note that the chapter (Chapter 55) in Fisher and Lightwood (supra) on *"Costs"*, begins at 55.1 with the headings: *"General Right of Mortgagee to Costs"*, and *"Basic entitlement to recover costs out of the mortgage property"*, before then going on to deal with the usual entitlement of a mortgagee to reimburse himself out of the mortgaged property for all *"costs, charges and expenses reasonably incurred in enforcing or preserving the security."*

72. Mr Mellor helpfully referred me to clause 5.3 of the 2019 Deed of Priorities, which I have set out in paragraph 19(vi) above. The effect thereof is that, if rather selling as mortgagee in possession, PFL had appointed a receiver, then the receiver would certainly have been entitled to recover more than simply costs in the narrow sense suggested by Mr Chapman KC. The point made is that it would be odd if a receiver were entitled to recover more as against Mrs Burns than costs in the narrow sense, i.e. costs of proceedings, including certain charges or expenses in connection with sale, but PFL, acting as mortgagee in possession, were not even though the sums in question would otherwise be recoverable under s. 105 LPA 1925 or clause 16.1 of the PFL Mortgage.

73. In the circumstances, I consider that there must, as against Mrs Burns and for the purposes of the 2019 Deed of Priorities, be at least ambiguity as to the meaning of *"costs"* in the particular context, taking into account the requirement to have primary regard to the language actually used by the parties to the 2019 Deed of Priorities. Given this ambiguity, it is appropriate to have regard to matters of commercial common sense. As to this, I can see no logical or commercial reason or purpose in confining the meaning of *"costs"* in the way suggested on behalf of Mrs Burns. To my mind, it would produce something of an absurd result if, for example, PFL were

entitled to deduct costs of proceedings, but not the costs of instructing estate agents to act on the sale of the relevant properties.

74. Consistent with what I consider to be the correct interpretation of *"interest"*, I consider that the reasonable objective observer would conclude that the intention was to provide PFL with priority in respect of that which it was entitled as against Mr Bridge under the terms of the 2019 Loan Agreement and the PFL Mortgage, by way of costs, charges and expenses in enforcing its security in respect of the capital sum and interest secured by the PFL Mortgage.

75. In the circumstances, I consider that PFL was entitled to deduct from the gross proceeds of sale all amounts *properly* recoverable by it by way of costs, charges and expenses as mortgagee, and not just costs strictly construed as above.

76. This does beg the question as to whether all the costs, charges and expenses that have been deducted were reasonably and properly incurred in enforcing or preserving the security, or as otherwise provided for by s. 105 LPA 1925 or the terms of clause 16.1 of the PFL Mortgage.

77. Mrs Burns does not, in her Claim Form or Amended Particulars of Claim seek the determination of these latter issues, merely seeking an account. Consequently, the evidence relied upon by PFL does not seek to justify or deal with all the various amounts that have been deducted. In the circumstances, if there were, on the figures after effect has been given to my determination of the interest question, the prospect of a balance being available for Mrs Burns, then I would direct that an account be taken as to the amounts that PFL is properly entitled to deduct by way of costs, charges and expenses.

Alleged sale at an undervalue

The allegation

78. As I have mentioned, it is the opinion evidence of Mr Fish that the Property/the Houses had a market value of £1,545,000 as at spring/summer 2021. As this is some £200,000 less than the gross sale price achieved for the three Houses when sold by PFL as mortgagee in possession, it is Mrs Burns' case that the Houses were sold at an undervalue, and that this was because PFL, having decided to sell the Houses as mortgagee in possession, failed to obtain the best price reasonably obtainable in breach of its equitable duty to Mrs Burns as the party next entitled after PFL to the proceeds of sale.

79. The relevant breach of duty is alleged in paragraph 24.2.1 of the Amended Particulars of Claim. The *"Particulars"* thereunder allege that PFL has refused to provide information regard to the marketing of the Property/Houses, plead Mr Fish's opinion as to the market value thereof being £1,545,000 and the relevant time, and assert that:

> "In the premises, and subject to the account of the difference between the Gross Proceeds and the Applied Proceeds, the Property was sold at an undervalue of at least £200,000."

80. In the course of submissions, following the cross examination of Mr Fish and Mr Mellor, the complaint against PFL essentially boiled down to a complaint that the Property/Houses had not been properly marketed because, having taken possession as mortgagee in possession, PFL failed to sufficiently engage with Mortimers, the agents already instructed by Mr Bridge that PFL continued to use to market the Houses, failed to cause there to be proper strategic analysis with regard to the sale process, failed to cause the Property/Houses to be advertised in the local newspaper, and failed to cause an advertising sign to be erected on nearby main road (given that the Houses were on a winding country lane).

The duty

81. The relevant duty on a mortgagee to obtain the best price reasonably obtainable is an equitable duty, the breach of which requires the mortgagee to account for the difference between the price obtained, and that which it would have obtained had the mortgagee acted in accordance with his duty.

82. The duty is most authoritatively stated in the judgment of Lightman J, sitting in the Court of Appeal, in *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997, at [19]:

> "When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for the mortgaged property at the date of the sale, and not (as the claimants submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short, there may be no difference in value between the two dates and indeed in many (if not most cases) this may be readily assumed. But where there is a period of delay, the difference in date could prove significant. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay of his debt: *Palk v Mortgage Services Funding plc* [1993] Ch 330, 337-338, per Sir Donald Nicholls V-C. He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale. The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received: see *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410, 1416b."

83. Fisher and Lightwood (supra) at 13.31 comments as follows on the obligation of a mortgagee selling the mortgaged property to take advice:

> "The need for the mortgagee to exercise informed judgment in exercising its power of sale means that a prudent mortgagee will take advice, for example, with regard to valuation, as to the most appropriate mode of sale, as to how best to advertise and as to the appropriate reserve price. The

> more unusual the property, the more likely a failure on the part of the mortgagee to seek such advice would put him in breach of his duty. However, a mortgagee does not relieve himself of his duty by placing the sale in the hands of reputable agents, and he must ensure that they act with reasonable care."

84. As authority for the proposition stated in the final sentence of the passage just cited, Fisher and Lightwood refers to a number of authorities, including *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 312.

Is the alleged breach of duty established?

85. I found Mr Fish to be a good witness, clearly competent and able as a chartered surveyor who had come to an honest opinion as to the market value of the Property/Houses at the relevant time. However, as he, himself, accepted there is, in respect of his opinion as to the market value of the Property/Houses, a margin of error of some 10%. In the present case, the difference between the market value as determined by Mr Fish and the gross sale price achieved is only some 12.9%.

86. There is some relevant case law on the appropriate margin of error in the context of property valuations. Thus, for example, in *K/S Lincoln v CB Richard Ellis Hotels Ltd* [2010] PNLR 31, at [183], Coulson J (as he then was) spoke in terms of the margin of error being as low as 5% for a standard residential property, but as usually being plus or minus 10% for a valuation of a one off property, but that if there were unusual features, the margin of error might be plus or minus 15%, or even higher in an appropriate case.

87. I found both Mr and Mrs Mellor to be good and reliable witnesses who were patently telling the truth regarding the history and background of PFL's involvement in lending to Mr Bridge on the security of the Property, and then having to enforce its security. On the basis of this evidence, I am satisfied that PFL regarded it as being in its best interests to obtain the best price reasonably obtainable, not least given that it was liable to suffer a significant shortfall itself when it came to sell in 2021, if the best price reasonably obtainable was not obtained. Further, I am satisfied from Mr Mellor's evidence that he did not consider himself under pressure from any of PFL's own funders to obtain a quick sale, although it was a consideration in respect of selling the Houses when the sales thereof took place that relief in relation to the payment of stamp duty that had been provided to buyers against the background of the Covid 19 pandemic was due to be withdrawn or restricted in the near future, and Mr Mellor considered that this was liable to affect the saleability of the Houses. Mr Fish's evidence was that he did not consider that the withdrawal of the stamp duty concession had had a marked effect on property sales and valuations. However, I do not consider Mr Mellor's concern with regard to the withdrawal of the concession to be unreasonable.

88. As I have mentioned, having taken possession as mortgagee, PFL continued to instruct Mortimers to act as agents on the sale. It has not been suggested otherwise

than that Mortimers were competent and reputable agents. I recognise that, as I have identified, a mortgagee does not relieve himself of his duty by placing the sale in the hands of reputable agents and must ensure that they act with reasonable care. However, I do not consider there to be any sufficient evidence that Mortimers acted otherwise than with reasonable care in marketing the Houses.

89. As to the suggestion that PFL did not, having taken possession, seek to consult in more detail with Mortimers, or subsequently insist on there being an analysis as to how to obtain best price reasonably obtainable, Mr Mellor's evidence was that he, as supported by the contemporaneous correspondence that I referred to, had taken something of a close interest in the marketing strategy in discussion with Mortimers prior to PFL taking possession, and his evidence was that that liaison continued after PFL had taken possession, with PFL working closely with Mortimers to achieve the most beneficial sale.

90. It is not suggested on behalf of Mrs Burns as to how exactly any further liaison with Mortimers than that which actually took place, nor as to how an analytical analysis carried out by Mortimers, would have achieved more interest in the Houses or higher sales prices. Mr Fish recognised that advertisement of the Houses for sale through Rightmove was the key step to take, and that was done. I do not consider there to be any real evidence apart from speculation that placing an additional signboard on a main road, even if achievable, would have led to significant additional interest in the Property/Houses, or that more could have been achieved through advertisement in a local newspaper if already advertised on Rightmove.

91. The reality the position is, as I see it, that the Houses had been marketed for a not inconsiderable period of time by reasonable available methods prior to PFL taking possession in January 2021, but achieving sales was complicated by the Covid 19 pandemic and by the fact that there were the significant delays in completing the Houses.

92. Having regard to the above considerations and the fact that the price actually achieved was only some 3% outside Mr Fish's 10% margin of error, I do not consider that Mrs Burns has been able to show, on the evidence, that PFL failed to take reasonable care to obtain the best price reasonably obtainable for the Property/Houses with result that the best price reasonably available was not obtained.

93. Consequently, I do not consider that it is incumbent upon PFL to account for the sum of £200,000, or indeed for any other sum, on account of having sold the Houses at an undervalue.

Overall conclusion

94. I have come to the firm view that, for the purposes of the definition of *"Lender's Debt"* in the 2019 Deed of Priority, the reference to *"interest"* is a reference to the interest on the sum of £850,000 that PFL is entitled to under the terms of the 2019 Loan Agreement, and thus interest that reflects Mr Bridge's liability for interest on this sum thereunder, including his liability to pay compound interest as provided for thereby.

95. Further, I have come to the firm view that the reference to *"costs"* is a reference not merely to the costs of any legal proceedings brought by PFL, and that it extends to all costs and charges and expenses that PFL is *properly* entitled to as mortgagee having exercised its power of sale.

96. I do not consider that it has been established, on the evidence, that PFL has failed in its duty in equity to take reasonable care to obtain the best price reasonably available for the Property/Houses.

97. I do consider that Mrs Burns is entitled to an account in respect of the sums that PFL has claimed that it was entitled to deduct from the proceeds of sale of the Property/Houses in that I have a real concern that some at least of those costs may not be recoverable. However, whether it is worth directing that such an account be taken will depend upon whether or not the taking of such an account would be an academic exercise in the light of my finding so far as the meaning of *"interest"* is concerned. Further, I consider that the calculation of compound interest requires to be reworked taking into account the fact that the 2019 Loan Agreement involved a new facility that discharged the existing liability under the 2018 Loan Agreement, with there being a new starting balance of £713,500 as at the date of the 2019 Loan Agreement, and further advances of £88,900 and £50,000 made shortly after the same. However, advances subsequently made totally some £34,500 shown on PFL's statement of account should not be brought into account in the calculation of the relevant interest figure.

98. No attendance will be required on the hand down of this judgment, which will take place remotely by circulation of the judgment to the parties by email, and by release of the same to the National Archives. If all outstanding matters so far as the form of order and costs are concerned cannot be agreed prior to hand down, or if any party wishes to seek permission to appeal, then I will adjourn all outstanding matters to a short hearing (ELH 1 hour) to be listed on the first available date. I will extend time for lodging a notice of appeal with the Court of Appeal to 21 days after the adjourned hearing.