Neutral Citation Number: [2024] EWHC 170 (KB)

Case No: KA-2023-LDS-000005
Claim No: H06LV491

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
On appeal from the Order of Recorder Cameron
In the County Court at Barnsley
Sitting in the County Court at Sheffield

County Court at Leeds
1 Oxford Row
Leeds LS1 3BG

Date: 31/01/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

SANTANDER CONSUMER (UK) PLC

Respondent/Claimant

- and –

MISS MEHER-UN-NISA CHAUDHRY

Appellant/Defendant

- -
- -

Mr Thomas Brennan-Banks (instructed by **Joanna Connolly solicitors**) for the **Defendant/Appellant**
Mr Simon Popplewell (instructed by **DWF LLP**) for the **Claimant/Respondent**

Hearing date: 1 November 2023
Judgment handed down in draft on 25 January 2024

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Approved Judgment

This judgment was handed down remotely at 12noon on 31 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is a case involving a motor vehicle Mercedes-Benz E Class Saloon registered number AK15 NJU ("the Vehicle"). The Vehicle was owned by the Respondent and leased to the Appellant pursuant to a Conditional Sale Agreement dated 19 July 2018 (the "Agreement").

2. On 11 October 2020 the Vehicle was seized by the Police whilst being driven by Ms Chaudhry's brother, who had no insurance and was banned from driving [J/24]. (This shorthand is a reference to the Judgment at paragraph 24). The Police impounded the Vehicle immediately and stored the Vehicle with the Mansfield Group. It was accepted at trial that the Police could destroy the Vehicle after 7 days.

3. Mr Recorder Cameron ("the Recorder") found that the driver had taken the Vehicle with the consent of the Appellant. The Recorder found that the Appellant then lied to the Respondent about the circumstances of her brother's possession of the Vehicle, and maintained those lies in her evidence at trial before the Court [J/35].

4. On 12 October 2020, following an alert from a service known as "Crush Watch", the Respondent took possession of the vehicle from The Mansfield Group, who were holding the Vehicle on behalf of the Police and transferred the Vehicle to an auction house [J/14]. The Appellant made requests to the Respondent for the return of the Vehicle, including on the day it was taken by the Respondent [J/14], on 15 October 2020 [J/39] and on 16 October 2020 [J/40].

5. The history as found by the Recorder in the Judgment at [14] – [15] was as follows:

> *"14. The following day, 13 October 2020, Santander took possession of the vehicle from The Mansfield Group who, as I have said, were holding it on behalf of the police. It is accepted by Santander that on that day Miss Chaudhry made a demand for the return of the vehicle from Santander. It is undoubtedly the case that she also made further requests or demands for its return in the following days, including 15 October 2020. That day, however, Santander sent a letter to Miss Chaudhry…which stated that the vehicle was being kept in their safe custody and they drew a distinction in that letter between their holding it in safe custody and their repossessing the vehicle.*
>
> *15. The following day, 16 October 2020, Miss Chaudhry sent a letter to Santander …in which she stated, in summary, that she had paid over one third of the value of the goods and that, therefore, she was entitled to repayment. It seems clear to me looking at the terms of the letter that she was in effect quoting from the first of the clauses within the Agreement that I have read out."*

6. On 23 October 2020, the Appellant complained to the Respondent [J/16] about the Respondent taking possession of the Vehicle. She wrote with reference to her rights that the Vehicle should not have been taken without a court order. In respect of the allegation that the Vehicle had been used by a driver without insurance and without a valid licence with her consent, she denied that she had been in breach of the agreement in this regard or at all.

7. The Appellant did not return the Vehicle. On 7 December 2020, the Respondent served a Default Notice on the Appellant [J/16]. On 8 December 2020, Santander sent a letter to Miss Chaudhry *"…. which set out the outcome of the complaint and, in summary, they did not propose to return the vehicle to Miss Chaudhry."*

8. The Recorder found that Ms Chaudhry was in breach of clauses 4.4 and 4.5 of the Agreement [J/35]. These Clauses provided the following:

> *"Clause 4.4:*
>
> *"You will not use or let anyone use the goods illegally" and "You will keep the goods in your possession and under your control".*
>
> *Clause 4.5:*
>
> *"You will not allow the goods to be seized or removed by the Police under a statutory power, this will be treated as a breach of the agreement. In the event that the goods are seized or removed we may take the goods into safe custody."*

9. The Recorder found that the Appellant was in breach because she permitted her brother to drive the Vehicle when he was not insured and had been banned from driving. It was accepted that the Appellant had paid more than one third of the total price of the Vehicle, and that property in the Vehicle remained with the Respondent [J/18].

10. The Judge's findings included that despite having taken the Vehicle on a conditional sale agreement, the Appellant in effect sub-bailed it to her brother [J/27 – J/29] despite knowing that her brother was uninsured to drive the Vehicle and did not have a current licence. The Recorder therefore found that the Appellant was in breach of the Agreement.

11. The central question addressed in the judgment of the Recorder was: from whom did the Respondent recover possession of the Vehicle? This is set out at [J/36 – J/42]. The Recorder found that the Vehicle had been "taken from" the Police via the Mansfield Group, and therefore the Vehicle was not "taken from" the Appellant [J/38]. The Recorder also found that the retention of the Vehicle by the Respondent after the Appellant's requests for it to be returned did not amount to the Respondent taking possession of the Vehicle from the Appellant [J/42].

12. There was no dispute at trial that the Appellant had paid more than one third of the total price of the vehicle at the time it was repossessed on 12 October 2020. Likewise, there was no dispute that the Respondent did not have a court order at that time to recover possession of the Vehicle. The Recorder found that the Vehicle was repossessed by the Respondent from the Police or their bailee. Critically, for the purposes of Section 90 of the CCA, the finding was that possession of the Vehicle was not recovered from the Appellant, in other words that this was not a recovery of "possession of the goods from the debtor…"

13. The Recorder made these findings at [J/38-J/42] as follows:

> *"38. I think it is common ground that seizure by the police under their statutory powers suspends the debtor's right to possession. The moment of repossession is the moment that possession is transferred from the police or in fact a police bailee (The Mansfield Group) to Santander. There is no moment in between when Miss Chaudhry is in possession or is entitled to possession. On that basis I do not think that Santander recovered possession from the debtor.*
>
> *39. What, however, about the period thereafter? It is agreed that Miss Chaudry asked Santander to return the vehicle to her on the same day that they took possession. She asked again on 15 October. Santander's response on that day, as I have already mentioned and ref. ed to (p.79 of the trial bundle) was that it had taken the vehicle into safe custody rather than repossessed the vehicle.*
>
> *40. Miss Chaudhry wrote a letter on 16 October, to which I have already referred, which is on p.81. I think on a fair reading of that letter it was not, as Mr Popplewell suggests, an election to rely on s.90, but was intended and is to be read as part of Miss Chaudhry's demands for return of the vehicle. Her demands, therefore, remained outstanding at least until Santander's letter of 8 December (p.82 of the bundle), at which point it must have been obvious that Santander was not going to return the vehicle.*
>
> *41. Two points arise. Firstly, does Santander's retention of the vehicle amount to recovery of possession? I think the answer to this is no, there can really only be one recovery of possession and that had already taken place. The second point that arises is, is the matter affected by Santander's reliance on the safe custody provision at clause 4.5 of the Agreement? Santander took possession in order to safeguard the vehicle and retained it, initially at least, to prevent the risk of further breaches of the Agreement and not, at least until their investigation was complete, as part of the process of terminating the Agreement.*
>
> *42. I think the answer to this is that either they took possession, or they did not. There is no intermediate stage of some sort of conditional possession under which Santander was*

> *actually in possession but is considered not to be so for certain purposes. To put it another way, the reason why Santander took possession from the police is irrelevant and any change of that reason during the period in which they were in possession does not amount to a further repossession which would have the effect of triggering the application of s.90. It follows for those reasons that I do not consider that s.90 applies to this case."*

14. The Recorder ordered that the Vehicle be delivered up to the Respondent. Since the Vehicle was already in the possession of the Respondent, this was in effect an order declaring that the Respondent was entitled to possession. The Court also ordered that the Appellant was liable to pay £18,132.69 to the Respondent for breach of contract and further to pay the costs of the Respondent.

15. On the central question, the Recorder found that the recovery of possession had been from the Police and not from the Appellant and therefore fell outside section 90 of the Consumer Credit Act 1974 ("CCA"). The matter comes on appeal to this Court with the permission of the Recorder.

II Ground 1 – "From the debtor" section 90 of the CCA.

(a) Introduction

16. This ground was central to the appeal. If it succeeds, the Appellant says that the other grounds save for ground 9 do not require resolution. In any event, it occupied as much time as the other grounds put together, albeit that it was closely connected to grounds 2 and 3.

> ***"SECTION 90***
>
> ***"90 Retaking of protected hire-purchase etc. goods.***
>
> *(1) At any time when—*
>
> *(a) the debtor is in breach of a regulated hire-purchase or a regulated conditional sale agreement relating to goods, and*
>
> *(b) the debtor has paid to the creditor one-third or more of the total price of the goods, and*
>
> *(c) the property in the goods remains in the creditor, the creditor is not entitled to recover possession of the goods from the debtor except on an order of the court."*

17. While setting out section 90, consideration should be given to the following related provisions, namely:

> ***"SECTION 91***
>
> ***91 Consequences of breach of s. 90.***
>
> *If goods are recovered by the creditor in contravention of section 90—*
>
> *(a)the regulated agreement, if not previous terminated, shall terminate, and*
>
> *(b)the debtor shall be released from all liability under the agreement, and shall be entitled to recover from the creditor all sums paid by the debtor under the agreement.*
>
> ***SECTION 87***
>
> ***87 Need for default notice.***
>
> *(1)Service of a notice on the debtor or hirer in accordance with section 88 (a "default notice") is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement,—*
>
> *(a)to terminate the agreement, or*
>
> *(b)to demand earlier payment of any sum, or*
>
> *(c)to recover possession of any goods or land, or*
>
> *(d)to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred, or*
>
> *(e)to enforce any security.*
>
> ...."

(b) The submissions of the Appellant

18. The Appellant submitted that the Recorder was wrong to find that the taking of the Vehicle was not "from the debtor" but rather from the Police or its bailee. The Appellant takes issue with the statement of the Recorder that it is "common ground" that seizure by the Police under their statutory powers suspends the debtor's right to possession. The highest that this is put by the Respondent is that it was the Respondent's view that this was common ground, and that the Appellant did not correct the impression (see the

Respondent's skeleton, 26-27). (I reject the notion that a failure of the Appellant to correct an impression gives rise to common ground. I shall therefore consider the arguments on their merits without relying on some concession by silence.)

19. The Appellant submitted that the Police may have had a right to seize the Vehicle under the Road Traffic Act 1998, but this is not equivalent to the right to possession. The Appellant referred to three aspects of possession identified by Millett LJ (as he then was) in *Kassam v Chartered Trust PLC* [1998] RTR 220 at p.225-226, where he said by reference to section 90(1) of the CCA that "*in every case where the subsection applies, therefore, the immediate right to possession is vested in the hire purchase company but, by statute, it is prohibited from recovering possession from the hirer himself without an order of the court; and this includes recovering possession from a third party to whom he has parted with possession to be held as his bailee and with his consent whether for repair or resale. In such a case the legal right to possession is vested in the hire purchase company; legal possession is in the hirer; and physical possession is in the garage."* That was in the context of the recovery of possession of the goods by the creditor from the bailee of the debtor, the bailee in that case being a vehicle dealer. If it were the case that the vehicle dealer was in possession of the vehicle as bailee for the debtor rather than the purchaser or bailee for the purchaser, then the recovery of possession would have been from the debtor.

20. The Appellant also relies upon the case of *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381 (*"Costello"*). That was a case where the Police lawfully seized a vehicle in the belief that it was stolen. The statutory purposes for which the Police held the vehicle were exhausted on 5 January 1997 and the claimant asked for its return. The Police continued to hold the vehicle. The claimant claimed against the Police for the return of the vehicle and for damages for wrongful detention.

21. In the leading judgment of the Court, which was given by Lightman J, he said the following:

> *"12. The leading authority in the field under consideration is the decision of the Court of Appeal in Webb. In that case the police under the provisions of the 1984 Act seized money in the possession of the claimants on suspicion that it constituted the proceeds of drug trafficking. The claimants were not however convicted of drug trafficking. Convictions would have triggered statutory powers for the confiscation of the money. The claimants sued for recovery of the money.* ***The Court of Appeal held that, once the statutory power to seize and detain the money was exhausted, in the absence of evidence that anyone else was entitled to the money and of any legislative provision to the contrary effect, the claimants could rely on their right to possession at the date of seizure by the police as conferring sufficient title to recover the money from the police and that the police were not entitled to retain the money even if they could establish on the balance of probability that the money was the proceeds of drug trafficking.*** *The illegality of the means of acquisition of the money gave rise to no public policy defence to the claimants' claim….*

> *14(iii)* ***the statutory power of the police conferred by section 19 of the 1984 Act to seize goods and by section 22 of the 1984 Act to retain them so long as is necessary in all the circumstances places in suspension or temporarily divests all existing rights to possession over the period of the detention, but does not otherwise affect those rights or vest in the police any permanent entitlement to retain the property in the police….”*** (emphasis added)

22. The Appellant submits that the Recorder was wrong to mistake or conflate physical possession or a temporary authority to seize a vehicle with the right to possession of that Vehicle. On this basis, the Police had no right to possession of the vehicle. On the contrary, that right remained with the Appellant at all material times.

23. In oral argument, and in answer to questions from the Court, the Appellant submitted that there were temporal stages in the analysis:

(i) legal and physical possession of the Appellant prior to the seizure by the police;

(ii) a suspension of the right to possession by the lawful taking of the vehicle by the police under Road Traffic Act (“RTA”) 1998 Section 165A(2);

(iii) the release of the Vehicle by the police to an authorised person: see Road Traffic Act 1988 (Retention and Disposal of Seized Motor Vehicles) Regulations 2005 (“the 2005 Regulations”).

(iv) subsequent demands for the return of the Vehicle by the Appellant to the Respondent.

24. The Appellant submitted that the true analysis is either of the following:

(i) as between the Appellant and the Respondent, the Appellant at all times retained legal possession of the Vehicle, even when the Vehicle was with the Police; alternatively

(ii) if the exercise of the Police’s statutory powers had the effect of suspending a debtor’s right to possession of hired goods temporarily for the period of such exercise, then at the point in time of collection from the Police, the Respondent had the legal right to possession. It therefore followed at that point, the recovery from the Police was in effect a recovery as between the Appellant and the Respondent of being a recovery from the Respondent. It was therefore a recovery of possession “from the debtor” and came within section 90 of the CCA.

(c) Submissions of the Respondent

25. Section 90 does not preclude any repossession of goods by the creditor. It only precludes repossession of goods from the debtor. It does not preclude repossession from a person with the immediate right to possession of the vehicle: see *Kassam v Chartered Trust plc* above.

26. The Vehicle was repossessed from the Police and not from the debtor or an agent of the debtor. The Police did not have possession of the Vehicle with the consent of the Appellant nor was it her bailee. At the time when it was repossessed, the right of the debtor to the Vehicle was suspended: see *Costello*. There was therefore no taking of possession from a person with an immediate right to possession of the Vehicle. The Recorder was right to find that recovering possession from the Police was not the same as recovering possession from the debtor. It followed that at the time when the Respondent took possession, the Appellant was not in possession or entitled to possession [J/38].

27. The Respondent also submitted that its contentions were consistent with principles of statutory interpretation. It was submitted that its interpretation was consistent with the natural meaning of the words of section 90. It was also the case that it was neither reasonable nor rational that a legislature would have enacted legislation bearing the Appellant's interpretation. For example, in the event that a thief took away the vehicle, the creditor in a conditional sale agreement would be entitled to take possession on the basis that it was not taking possession from the debtor.

28. For these reasons, it was submitted that section 90 was not applicable.

29. The Respondent submitted that Clause 4.5 gave rise to consent from the Appellant that if the Police seize the Vehicle, then the Respondent was entitled to take the Vehicle into safe custody. This is what happened. Further, the Appellant was fully aware of her rights in relation to s.90 at the time that she gave the consent, because these are referenced on the front of the Finance Agreement – see *Mercantile Credit Limit v Cross* [1965] 2 QB 205.

(d) Discussion

30. There is little guidance from the authorities as to when possession is recovered from the debtor for the purpose of section 90 of the CCA. The Recorder referred to various instances, namely:

    (i) *Bentinck v Cromwell Engineering Limited* [1971] 1 QB 324 – where goods are abandoned, and a creditor does not recover the goods from the debtor [J/36];

    (ii) Where goods are with a debtor's bailee, and the debtor retains the right to possession: see *Kassam v Chartered Trust plc* above;

    (iii) If goods are sold or purportedly sold by a bailee to a third party, recovery from the third party would not be repossession from the debtor, because the debtor would have given up the right to possession. [J/47]

31. In my judgment, when the Police lawfully seize and retain goods, pursuant to a statutory power, this has the effect of suspending a debtor's right to possession of hired goods, for the period of such exercise. During that period, the debtor could not bring a claim of conversion against the Police for the wrongful detention of the vehicle.

32. The question which arises is what happens when the Police permit a person to remove a vehicle from the custody of the Police. At that point, is the creditor in effect removing the property from the debtor? In my judgment, this is not what is occurring. The creditor is removing the vehicle from the Police having satisfied the Police about the matters set out in regulation 5 of the 2005 Regulations in the following terms:

> *"**5.**—(1) Subject to the provisions of these Regulations, if, before a relevant motor vehicle is disposed of by an authorised person, a person—*
>
> *(a)satisfies the authorised person that he is the registered keeper or the owner of that vehicle;*
>
> *(b)pays to the authorised person such a charge in respect of its seizure and retention as is provided for in regulation 6; and*
>
> *(c)produces at a police station specified in the seizure notice a valid certificate of insurance covering his use of that vehicle and a valid licence authorising him to drive the vehicle, the authorised person shall permit him to remove the vehicle from his custody."*

33. The argument of the Appellant is in effect that at the point that the Police is handing over a vehicle, there is a scintilla temporis (a split moment in time) when the goods are released to the person who as between the creditor and the debtor, has the legal right to possession. That is artificial. In plain terms, the Police permitted the creditor to remove the vehicle from the custody of the Police. The Police did not hold the vehicle as bailee for the debtor. There was therefore no recovery of possession of the goods from the debtor.

34. The grammatical meaning of section 90 favours the Respondent's interpretation. Once the goods ceased to be with the Appellant or the Appellant's agent or bailee, there was not a recovery of possession from the debtor.

35. I do not accept the submission that this interpretation would drive a coach and horses through the protection afforded by section 90. Once the debtor is not in possession of the vehicle, there will be many circumstances where the creditor would wish to recover the vehicle for safe keeping. An example would be where the creditor found that the goods had been stolen by a thief. Another would be where the vehicle had been stolen whilst the customer was away on holiday, and the owner wished to prevent the vehicle from being destroyed.

(e) Conclusion

36. For all these reasons, I accept the submissions referred to above of the Respondent and reject the submissions to contrary effect of the Appellant. The Recorder was correct in his finding and in reasoning for the finding that there was no breach of section 90 of the Consumer Credit Act 1974.

III Ground 2: "Suspension of right to Possession" s.90(1) of the CCA

37. As noted above, I have not considered this ground on the basis that suspension was a matter of common ground. It is right to say that there was no objection to the point in the hearing in the County Court, but there was no express concession. I am not prepared to follow the lead of the Respondent in elevating to common ground something which arises from a failure of the Appellant to take an objection to an assertion of the Respondent. Despite this, there was a suspension of the right to possession by the exercise of the statutory powers. The case of the Appellant does not contradict this finding: simply it is said that there was no identification of the relevant power.

38. I am satisfied that the analysis of the Recorder and the Respondent on the appeal is correct, namely that the Police had a statutory power of the Police to take possession of the Vehicle. It does not suffice for the Appellant to challenge this on the basis that the relevant statutory power was not identified, when there was no positive case to the effect that the Police took the Vehicle unlawfully. In any event, I am satisfied that the Vehicle was taken lawfully on the basis of the Road Traffic Act 1988 s.165A, the power to take a vehicle which has been used uninsured or without a valid licence. The evidence shows that this was the case in that the Vehicle was driven by the brother of the Appellant, and on the findings of the Recorder, with her consent. There is nothing to contrary effect in the 2005 Regulations.

39. It is apparent from Costello that where there is a statutory power of the police to take a vehicle, this is capable of suspending the right to possession in this case of the debtor. I am satisfied that this is what occurred in the instant case. Whilst the 2005 Regulations provide for a method for the debtor to be able to obtain the vehicle from the police, at the point in time when the Respondent had recovered possession of the vehicle from the police, this had not happened.

40. The Recorder was not wrong to treat these circumstances as outside section 90. It is not an exception to section 90. It is that section 90 is circumscribed to cases where the debtor is in possession.

IV Ground 3: Retention of Vehicle s.90 of the CCA

41. The Appellant submits that even if Grounds 1 and 2 are not made out, the retention of the Vehicle by the Respondent in the face of demands from the Appellant for its being returned was contrary to the immediate right to possession which the Appellant had of the Vehicle at this stage. I have touched upon this argument above. I agree with the reasoning of the Recorder that once the Respondent recovered possession, this is the

only recovery of possession. After that time, there is not a second constructive recovery of possession, that is to say by construing the wrongful retention as if it was a form of recovery of possession. It is not. It may be a wrongful interference with goods in retaining possession or the old cause of action of detinue. However, this falls outside section 90, and the third issue is whether wrongful retention of vehicle is a form of recovering possession. In my judgment, it is not.

V Ground 4: Alleged or purported breach of s.90(1)(a) of the CCA

42. It is difficult to understand the purport of this ground. It is not necessary in this case to test whether there was a breach or whether there is a possibility of falling outside section 90 if there was no breach. The reason for this is that the Recorder found that the Appellant permitted her uninsured brother to drive the vehicle in breach of contract. It is therefore unnecessary to consider a case of a recovery of possession where there had not been a breach.

VI Ground 5: Default Notice pursuant to s.87 of the CCA

43. The Appellant submits that the Recorder was wrong to find that service of a valid default notice was possible after the retaking of goods by a creditor [J/47)]. The Judge found as follows:

> *"Mr Brennan-Banks argues two points. Firstly, he says Santander cannot serve a default notice if they have previously done something which they should not have done without having first served such notice. There is, as far as I am aware, no statutory or other authority for this proposition which I regard as clearly wrong. It would be a remarkable restriction on the power of creditors to protect their interests if Mr Brennan-Banks' submission was correct."*

44. The Appellant draws attention to the words of s.87 of the CCA (see above) which states that the notice is necessary before the creditor can become entitled by reason of a breach of contract among other things to recover possession of any goods.

45. The Appellant also submits by reference to the case of *Doyle v PRA Group (UK) Ltd* [2019] EWCA Civ 12 at 20-22 that the service of the default notice is pre-requisite of a cause of action. The effect of s.87 is to alter the substantive rights of the parties under the Agreement. If a creditor has no right to possession without a default notice, then the submission is that the Appellant had a right to possession.

46. The Defendant submits that the issue is not whether the Appellant had a right to possession of the Vehicle, but from whom it repossessed the Vehicle. There is no dispute that the Respondent had not served a default notice when it took possession of the Vehicle, but this does not mean that it breached s.90 of the CCA. Section 90 is in

very specific terms about recovering possession from the debtor, and it has very specific consequence in section 91, namely that the hirer should be released from all liability under the agreement and the hirer should be entitled to recover from the owner all sums paid under the agreement. For the reasons set out above, there was no breach of section 90 because the Police and not the Appellant held the Vehicle pursuant to its statutory powers. As noted above any right of the Debtor to possession was suspended: see the Costello case.

47. Even if it is assumed that there was an obligation on the Respondent to serve a default notice (under s.87 of the CCA) prior to taking possession, there is no statutory consequence in the terms of s.91 or any other specific consequence. The pleaded case is whether there was a breach of s.90 with the consequences of s.91. The Amended Defence and Counterclaim in the first two paragraphs of the prayer for relief seeks declarations that the agreement was terminated under section 91(a) of the CCA and that it was released from all liability under the agreement and that it was entitled to recover all sums paid under the agreement. The remainder of the relief is under the Consumer Rights Act 2015 and the Data Protection Act 2018. The Amended Defence and Counterclaim does criticise the notice of default of 7 December as being too late because by that stage, it is contended, the agreement was terminated in consequence of the breach of s.90 and the provisions of s.91.

48. However, the Recorder found, and this Court upholds his finding, that s.90 has no application. It follows from this analysis that in the event that the notice of default was served too late, the consequence is not one under s.91 and there is no prayer for relief or other parts of the Amended Defence and Counterclaim indicating such a consequence. There was no alternative pleaded case in the court at first instance. The Appellant could have claimed conversion of the Vehicle, but as the Recorder said at [J/43] *"She could have brought proceedings in conversion or perhaps in detinue, but there was and is no such claim."* If such a claim had been made, it would have been necessary to consider matters relating to liability and remedy, and they would have been the subject of evidence, argument and adjudication. As to liability, issue would arise as to the effect, if any, of the provision of Clause 4.5 entitling the Respondent to take the vehicle into its safe custody. Likewise, there may have been as a central consideration, rather than a passing remark, the issue of whether a default notice could be served after the recovery of possession. The case of *PRA v Doyle* might indicate that it was necessary to serve a notice of default prior to a cause of action accruing, and in this case, proceedings were not issued until after the 7 December notice of default. Further, there may have been a consideration of whether, in the circumstances of a non-remediable breach, there was any loss flowing from the taking of possession of the Vehicle. In the event, these points did not arise for consideration before the Recorder, and so do not arise on appeal.

VII Ground 6: No Contracting Out of the CCA

49. This ground is to the effect that Clause 4.5, allowing for the Respondent to take the Vehicle into its safe custody is a form of contracting out which is void under s.173(1) of the CCA. It is said that it is not an answer to section 90 of the CCA in this case. This point was not addressed in the judgment, but it was not the reason for the finding that section 90 did not apply. That was the point that the recovery of possession was

not from the Appellant. The point of no contracting out therefore does not arise on an appeal as to whether the contracting out point is correct.

VIII Ground 7: Unfair relationship under s.140A of the CCA

50. It was also argued that there is or was an unfair relationship for the purposes of s.140A of the 1974 Act. The basis for this is pleaded at para.20 of the defence and counterclaim at p.25 of the trial bundle. I do not address all of the pleaded matters individually and specifically since it is obvious that on my findings a number of them do not apply. There is, however, as stated above, a concern that Santander retained possession of protected goods without a court order. Quite plainly, however, they were concerned, and with good reason, that there might be further breaches of clauses 4.4 and 4.5 if the Vehicle was returned to Miss Chaudhry. In those circumstances, even if Santander should have returned the Vehicle, they did not act unreasonably or unfairly. If that was wrong, and there was unfairness, Miss Chaudhry's conduct, as described above, is sufficient reason to refuse any relief under s.140A to 140C. This included the Judge's findings that (a) the Claimant had permitted her brother to use the Vehicle knowing that he was uninsured, and (b) she was untruthful in her evidence to the Court.

51. The Judge found that there was no unfair relationship under s.140A of the CCA (J/45). It is important to note that the finding of unfairness is by reference to the time when the determination was made see *Smith v Royal Bank of Scotland* [2023] UKSC 34 per Lord Leggatt at [19-20]. The Judge in the instant case said that the retention of possession of the Vehicle was due to a concern that there might be more breaches of Clauses 4.4 and 4.5 if the Vehicle were returned to the Appellant. That ought to have been enough, but even if there were features to support the argument, the Recorder was right to find that the conduct of the Appellant was a sufficient reason to refuse relief under s. 140A - s.140C. Ultimately, this involves a balancing exercise. The Judge was right to find that the Claimant's conduct in permitting her brother to use the Vehicle and being untruthful in her evidence are matters which carry more weight than the concerns about the definition of "safe custody", questions about the scope and effect of Clause 4.5 or indeed the concern that there was no default notice prior to the Vehicle being repossessed.

IX Ground 8: unfair terms

52. The Appellant submits that the Judge should have found that Clause 4.5 was an unfair term under s.62(1) of the Consumer Rights Act 2015 in that the "safe custody" provision was not defined [J/10] and it was not limited in time [J/43]. Further, so long as this right was being exercised, there was a requirement on the part of the Appellant to pay without any corresponding obligation on the part of the Respondent.

53. In response, the Respondent submits, in my judgment correctly, that this point does not arise for consideration. The reasons for this are first that the Appellant accepted that if the Court was against it on the other grounds, this did not arise as an independent ground. Second, the safe custody provision was not a part of the reasoning of the Court in deciding the other points, and so even if it were unfair, it would not have any effect.

In any event, similar reasoning as in respect of Ground 7 applies to the effect that any unfairness about this term is outweighed by the conduct of the Appellant in entrusting the Vehicle to a driver whom she knew to be uninsured and not having a valid licence.

X Ground 9: breach of the Data Protection Act

54. This ground is made dependent on a finding of a breach in respect of any of Grounds 1-7: see the Appellant's skeleton argument at [36]. Since this has not occurred, this ground does not arise for consideration. It is therefore not necessary to consider the arguments of the Respondent that even if any of those grounds had succeeded, the Court ought to dismiss this additional ground.

XI Disposal

55. For the above reasons, the appeal is dismissed, and the orders made by the Recorder stands.