Neutral Citation Number: [2024] EWHC 2427 (Ch)

Claim No: FS-2022-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (CHD)

25 September 2024

BETWEEN:

DONNA BREEZE
(AND THE OTHER INDIVIDUALS IDENTIFIED AT SCHEDULE 1
TO THE RE-AMENDED CLAIM FORM)

Claimants

— and —

TSB BANK PLC

Defendant

- -
- -

Mr Tim Lord KC, **Mr Oliver Campbell KC, Mr William Hibbert** and **Mr Ben Woolgar** (instructed by Harcus Parker Limited) appeared for the Claimants

Ms Sonia Tolaney KC, Mr James Duffy KC and **Mr Tim Goldfarb** (instructed by Hogan Lovells International LLP) appeared for the Defendant

Hearing dates: 22 July – 25 July 2024

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JUDGMENT

- -

Mr Nicholas Thompsell:

1. BACKGROUND

1. In the early years of this century, Northern Rock PLC ("**Northern Rock**") offered what seemed to be highly attractive mortgage packages. These included attractive fixed rates and a high loan-to-value ratio for the mortgage loan. For some of its customers the offer was made yet more tempting under the so-named "Together" offers. These offered a package comprising a mortgage loan (the "**Together Mortgage**") alongside an unsecured loan (the "**Together Loan**") offered at the same interest rate, but with that rate being available on condition that the mortgage loan was kept in existence by the borrower. By taking both loans, some borrowers were able to borrow more than the assessed value of the property that was mortgaged.

2. There was a catch, of course. After an introductory period, usually of a small number of years, the fixed rate would move up to a (generally) higher floating rate or, in some versions of the mortgage offers, at a discount to this rate (the "**SVR**", the definition of which is discussed further below).

3. The attention of the mortgage customers was clearly drawn to this feature of the loans. There was a suggestion that the impact of this may have been softened by Northern Rock's marketing literature which suggested that, before applying the SVR, Northern Rock would expect to offer a new fixed rate, but this was not the subject of evidence and I make not finding on this matter.

4. Unfortunately for both the shareholders and customers of Northern Rock, Northern Rock proved to be one of the early casualties of the global financial crisis of 2008. In February 2008, Northern Rock was nationalised, with its entire issued share capital being transferred to HM Treasury. Following the implementation of a restructuring plan in 2010, Northern Rock was transferred to UK Asset Resolution Ltd, a wholly owned subsidiary of HM Treasury, and ceased to operate as an active lender. Northern Rock was subsequently transferred to an affiliate of Cerberus Capital Management, and later, in July 2016, a portfolio of the mortgages still held by Northern Rock was transferred to the Defendant, TSB Bank PLC ("**TSB**").

5. TSB has operated these mortgages under what it calls its "Whistletree" brand and I will adopt TSB's terminology in referring to these mortgages as the "**Whistletree mortgages**".

6. The SVR, as I am calling it, was defined in different editions of Northern Rock's Mortgage Offer General Conditions (the "**General Conditions**") as the "Standard Variable Rate" or as the "Standard Variable Mortgage Base Rate" but, as discussed below, these terms are defined in almost exactly the same way in each edition of the General Conditions. Within this judgment I will use the term "**SVR**" to refer to either such defined term, except where I am drawing a distinction between the two defined terms.

7. At the time when TSB acquired the Whistletree mortgages in July 2016, the SVR that was being applied to the Whistletree mortgages was 4.79%, which was 4.29% above the Bank of England's Base Rate (the "**BoE Base Rate**") at that time. Following its acquisition of the mortgages, TSB has subsequently varied this variable rate from time to time, both up and down and, in each case, consistently with changes to the BoE Base Rate.

8. TSB also maintains and applies other standard variable rates to different categories of variable-rate mortgages. These other standard variable rates include:

    i) its "Homeowner Variable Rate" ("**TSB's HVR**"), which is the rate being advertised and used for new mortgage loans;

    ii) its "Standard Variable Mortgage Rate" ("**TSB's SVMR**"), which is a rate that is applied to a portfolio of variable rate residential mortgages applied for before 1 June 2010 (which I understand to be mortgages TSB acquired from Lloyds Bank); and

    iii) a Buy to Let Variable Rate.

9. The Claimants in this action are some 392 former mortgage customers of Northern Rock whose mortgages and/or loans were transferred to TSB (or are alleged to have been so transferred – TSB claims that it has not verified that all of these Claimants are, or were, its customers). They are undertaking a group legal action against TSB. I understand that there are a further 2,000 or so mortgage customers who are in a similar position that have intimated claims against TSB and have entered into a standstill agreement with TSB pending the outcome of this group litigation, or at least of the preliminary issues that I am dealing with in this judgment.

10. These Claimants regard themselves as being (or as having been) "mortgage prisoners" in that they are (or were) trapped into paying an unduly high variable rate on their mortgages.

11. TSB challenges this description, pointing out first that a very substantial percentage of the former Northern Rock customers have been able to remortgage and obtain the benefit of lower rates and secondly that the court does not have the evidence before it to determine whether the former Northern Rock customers are mortgage prisoners.

12. Nothing turns on the description, as regards the matters before me, and there has been little evidence or argument on the point. Accordingly, I will resist offering my own opinion on the aptness of this description, acknowledging that the point is best determined by a court that has all the evidence before it.

13. The Claimants are seeking a number of remedies including:

    i) damages for breach of the express and/or implied terms of the mortgage contracts; and/or for breach of the rules in the FCA's Mortgages Conduct of Business Sourcebook ("**MCOBS**"); and/or

ii) declarations as to the rate of interest chargeable by TSB under the terms of the mortgage contracts; and/or

iii) accounts as at the date of trial of all sums wrongly paid to TSB with orders for payment by TSB of all such sums found to be due on the taking of the account; and/or

iv) as regards Claimants whose mortgage contracts were entered into by them before 31 October 2004 and Claimants who had taken out the Together loans, a declaration that the relationship between each of such Claimants and TSB and/or Northern Rock was and/or is unfair within the meaning set out in section 140A Consumer Credit Act 1974 (the "**CCA 1974**"); and an order to repay such sums as would redress that unfairness; and

v) interest under section 35A of the Senior Courts Act 1981; further or other relief; and/or costs.

2. THE PRELIMINARY ISSUES

14. It was not, however the purpose of the trial of preliminary issues before me to determine these claims. The purpose was to determine, originally, three preliminary issues which may be summarised, and to which I have assigned labels, as follows:

i) The "**Express Terms issue**". This is the question whether TSB has breached the express terms of the Claimants' mortgage contracts by charging the Claimants interest rates based on what TSB describes as the "Whistletree SVR" and not on the TSB SVMR.

ii) The "**Implied Term issue**". This is the question whether, as argued by the Claimants:

> "it is an implied term of the Claimants' mortgage contracts that any discretion to set and/or vary interest rates should not be exercised dishonestly, for improper purpose, capriciously, or in a way in which no reasonable mortgagee, having the relevant discretion and in the context of the parties' expectations, acting reasonably, would do".

and

iii) The "**CCA issue**": This is the question whether s.140A(5) CCA 1974 precludes an order being made under s.140B(1) in relation to a regulated mortgage contract or quantified by reference to sums payable under a regulated mortgage contract, irrespective of whether that regulated mortgage contract is the "credit agreement" or a "related agreement".

15. Deputy Master Hansen had ordered that these three preliminary issues should be determined before a trial of the remainder of the issues arising as a result of the Claimants' claim. I agree with the learned Deputy Master that this was a

sensible approach as the determination of these issues should greatly cut down the time required for trial of the remaining issues.

16. For the purposes of the trial of the preliminary issues, the parties have helpfully agreed a Statement of Agreed Facts that I should assume to be correct. I should emphasise that this document was produced purely for these purposes, and in relying on the Statement of Agreed Facts, I am not making any determination of those facts. In particular some of the facts assumed may or may not be correct in relation to particular mortgage customers and in relying on these assumed facts I should not be taken as having determined any of these facts has been true in relation to any particular mortgage customer.

3. THE IMPLIED TERM ISSUE

17. Shortly before the trial of these preliminary issues started the parties agreed a resolution in relation to the Implied Term issue. They agreed that an implied term did apply as follows:

> "It is an implied term of the Claimants' mortgage contracts that the discretion to vary interest rates should not be exercised dishonestly, for improper purpose, capriciously, arbitrarily or in a way in which no reasonable mortgagee, acting reasonably, would do."

18. In other words, TSB has accepted the Claimants' proposed wording subject to deletion of the phrase "*and in the context of the Parties expectations*".

19. The wording as so amended conforms with that approved by the Court of Appeal in *Paragon Finance v Nash* [2002] 1W.L.R. 94 and I agree that the parties were sensible in agreeing upon this point.

20. The question whether there has been any breach of such an implied term is not one for me to determine. It will fall for determination at a later stage of the proceedings.

21. The other two preliminary issues remain outstanding, and I determined that I should hear from the parties in relation to these issues in turn.

4. INTRODUCING THE EXPRESS TERMS ISSUE

22. The Mortgage Offers required mortgage loans, after a period during which a fixed rate or tracker rate would apply, to bear interest at the SVR.

23. By the time that TSB acquired the relevant mortgage loan portfolio, all or the vast majority of, the loans comprised in the portfolio had moved onto the SVR. On obtaining the loan book, TSB initially continued to charge such borrowers interest at the same rate that they had been charged previously, referring to this as the "Whistletree SVR" (reflecting the fact that for marketing purposes they were referring to the former Northern Rock borrowers as their "Whistletree borrowers"). TSB later moved the interest rate up and down in a manner that matched changes in the BoE Base Rate.

24. The Claimants argue that they were wrong to do this. They argue that under the General Conditions TSB had a choice either to keep the rate as it was or to move it to TSB's own standard variable rate, being the rate that it used for its other customers. In fact, TSB had more than one such rate. In such circumstances the Claimants argue that TSB should use the most relevant rate, being the one that had been used for mortgage customers who had taken out their mortgage in a similar timeframe to the former Northern Rock customers.

25. The SVR was defined in the General Conditions, and I will deal in more detail with the definition below. However, to introduce the point, it is only necessary to note that the core element of the definition is:

> "… such rate as we from time to time decide to set as the base from which to calculate Interest on our variable rate mortgage loans…".

26. This definition was easy to apply when Northern Rock remained the mortgage lender. The dispute as to the meaning arises once the mortgage loans were transferred to another lender, TSB.

27. Such a transfer was envisaged within the General Conditions. In particular there is in condition 1.1 of the General Conditions a definition of "we", "us" and "our". I will refer to this as the "**definition of "we"**".

28. Under the definition of "we" these words are said to refer to:

> "… Northern Rock plc and anyone who becomes entitled at law or in equity to any of our rights under the Offer (this will include any person to whom we transfer the Offer under condition 19)".

29. In other words, once there is a transfer, references to "we" and like terms in the definition of SVR, become references to (both) the transferring mortgage lender (originally Northern Rock) and the transferee mortgage lender (now TSB).

30. This formulation is difficult to apply to the definition of SVR.

31. If we take the formulation literally, and assume that the word "and" within the definition of "us" must always be read conjunctively, then the definition becomes (in the applicable circumstances):

> "… such rate as [Northern Rock and TSB] from time to time decide to set as the base from which to calculate Interest on [Northern Rock and TSB's] variable rate mortgage loans…".

32. Under such a literal reading, the SVR would exist only for so long as the outgoing lender and the incoming lender each continued to set the same particular interest rate as the base from which to calculate interest on their respective variable rate loans. As soon as one or the other set a different interest rate then there would be no such rate that met the description I have set out in the previous paragraph.

33. Furthermore, as we shall see when we come to consider other parts of the Mortgage Conditions, there are other places where the strict, conjunctive, use of the word "and" within the definition of "we" would make a nonsense of the drafting.

34. As the strict, conjunctive, use of the word "and" within the definition of "we" was unworkable, both the Claimants and TSB accepted that, where the circumstances require, the definition of "we" should be read disjunctively, so that the word "and" meant "and/or", so as to connote a reference either to the outgoing mortgage lender or the incoming mortgage lender as the sense requires. They differed, however, on how to apply this analysis in practice.

(i) The Defendant's interpretation of the core of the definition of SVR

35. The Defendant's interpretation was, in my view, the simplest and most straightforward.

36. The Defendant argued that up to the point of transfer "we", "our", and "us" referred to the outgoing mortgage lender (i.e. Northern Rock) and after the point of transfer it referred generally to the incoming mortgage lender (i.e. TSB). There was, perhaps, a period during which the rate being applied had been the one originally set by the previous lender (Northern Rock) and had not yet been set differently by the incoming lender (in our case, TSB). During this period, it would be correct to say that that rate had been set by the previous lender *and* the incoming lender, since the rate would have been originally set by the outgoing lender, and until it was changed by the incoming lender, the incoming lender must be taken to have accepted that rate as the appropriate rate and therefore in a sense itself to have set that rate.

37. It was TSB's submission, however, that this analysis did not mean, in relation to the definition of SVR, there was an automatic transfer to another rate that TSB was using in relation to its other loans. This was because the definition of SVR was referring only to the rate used to calculate interest on mortgages that were subject to the General Conditions. Any rate used to determine interest on loans that were made under different terms and conditions was not relevant.

38. TSB had a textual argument to back up this interpretation based on the definition of SVR. The definition of SVR, where it referred to "Interest" was referring to a defined term in condition 1.2.

39. In the 2005 version of the General Conditions "Interest" was defined as

> "… interest we charge under Condition 6 at the Interest Rate".

40. In other words, it is interest that is charged under a particular Condition within the General Conditions. TSB argues that, given this specific reference, the definition of SVR must be applying to the rate charged to mortgages that are subject to the General Conditions, and not to any rate that the lender (now TSB) was applying under different terms and conditions.

41. Mr Lord, for the Claimants, pointed out that the 2001 General Conditions included slightly different wording on this point.

42. First it used the term "Standard Variable Mortgage Base Rate", rather than "SVR". Neither side contends that this difference in nomenclature makes any difference to the analysis.

43. More importantly in relation to TSB's argument as outlined above, whilst the definition of "Standard Variable Mortgage Base Rate" is in the same terms as that I have outlined above. It also uses the capitalised term "Interest", but, the definition of "Interest" is different. In this edition of the General Conditions, it means "interest at the Interest Rate" and contains no reference itself to Condition 6.

44. However, when one turns to the definition of "Interest Rate", this is defined as:

> "the rate or rates of interest we charge under Condition 6".

45. As a result, I do not consider that these differences in the defined terms weaken the Defendant's textual argument as outlined above: the definition of "Interest", taken with the definition of "Interest Rate" still takes the reader to a specific reference to Condition 6, and therefore still bolsters an argument that the definition of Standard Variable Mortgage Base Rate in this edition of the General Conditions may be taken as a reference to an interest rate determined for the purposes of mortgages that are subject to the General Conditions.

46. It might be said that it follows from this argument that the SVR is logically a different rate for the mortgages under each different edition of the General Conditions, but if that is true nothing really turns on the argument. Northern Rock and its successor have consistently applied the same rate for the SVR across all mortgages to which any edition of the General Conditions applies and given that the parties accept that there are no material differences between the different editions of the General Conditions, there has been no reason to apply different SVRs to the mortgages issued under different editions.

(ii) The Claimants' interpretation of the core of the definition of SVR

47. The Claimants argued for a different interpretation. They agreed that up to the point of transfer "we", "our" and "us" referred to the outgoing mortgage lender and after the point of transfer it referred generally to the incoming mortgage lender (i.e. now TSB). However, they set greater store on the point that under the General Conditions there was a transitional period during which the rate being applied had been the one originally set by the previous lender (Northern Rock) and had not yet been set differently by the incoming lender (in our case, TSB). In their submission, during this period it might be correct that the rate remained one that was set by the outgoing mortgage lender and TSB. However, at the point that TSB changed the rate applicable to these customers, then the conjunctive use of "and" meant that it was no longer sustainable to say that what TSB was applying was a rate "set by the previous mortgage lender *and* TSB". At this point the reference to "SVR" must be taken as a reference to the standard

variable rate applied by TSB across all of its mortgage customers, or if (as is in fact the case) there is more than one such rate, the most appropriate of such rates.

48. The net result of this analysis was that if TSB purported to change the interest rate being charged to the former Northern Rock customers, it was obliged to bring those customers onto its own standard variable rate.

49. Both sides assembled a number of arguments based on the text of the General Conditions. Having set the scene as to the overall argument being pursued by each side, it is appropriate that I set out more fully the relevant sections of the General Conditions, as well as of one or two samples of the Offer Letters.

50. For these purposes, I will draw on the 2001 version of the General Conditions. It was agreed by both sides that the 2005 version of the General Conditions (the only other version that I was asked to consider) did not differ significantly, except perhaps in relation to the definitions around the term "Interest" that I have already dealt with.

5. THE TERMS OF OFFERS AND OF THE GENERAL CONDITIONS

51. The mortgage contracts comprise: (i) a letter offering the Claimants a mortgage (the "**Offer Letter**"); (ii) the General Conditions; and (iii) an Offer of Loan Acceptance Form. The Claimants' mortgages are, depending on when they were taken out, on the 2001, 2004 or 2005 General Conditions.

(i) Sample Terms of Offers

52. I was taken to various letters setting out the Offers made to different mortgage customers, in particular – a sample Offer Letter from April 2004, and sample Offer Letters from 2005 and 2006.

53. The Offer Letter was a relatively brief document, which set out the basic terms of the mortgage contract, such as the amount of the loan, its term, and the initial interest rate payable. Its format appears to have changed between 2004 and 2005, but it was common ground that nothing turns on this for the purposes of the matters that I was considering.

54. The key term of each Offer Letter for present purposes was that concerning interest. In the 2004 Offer Letter, Section A of the letter appeared as follows:

SECTION A

Loan Details

Type of Loan	Loan Amount (£)	Term (Years)	Interest Method	Initial Interest Rate (%)	Standard Variable Mortgage Base Rate (%)	Initial Monthly Payment (£)	Repayment Type
New Loan	68,400	25	Daily rest	5.24	5.99	443.54	Repayment

Property Details

[redacted]	Purchase Price (£)	Tenure of Property	Unexpired Term of Lease (Years)
	72,500	Freehold	

55. There followed a Section B, which set out "Special Conditions".

56. Condition 10 set out the future interest payable (the text quoted below is a sample based on a "Together" mortgage, which had a Tracker Special Rate):

> "Whilst your Mortgage Payments are not in arrears by two or more months, the Initial Rate of Interest charged will be guaranteed to be no more than Bank of England Base Rate plus 1.24% until 01/05/2006 and then guaranteed to be no more than Bank of England Base Rate plus 1.85% until 01/05/2009 (the Special Rate Period).
>
> …
>
> On expiry of the Special Rate Period the rate will be set at a rate guaranteed to be below our prevailing Standard Variable Mortgage Base Rate set by us from time to time for existing Northern Rock borrowers (the Guaranteed Rate). We will review the Guaranteed Rate on the 1st of each month following any change in the Standard Variable Mortgage Base Rate…"

57. The later variants of the Offer Letter consolidated these provisions in a single section, Section 4, headed "Description of this mortgage", as follows

> **"This is a Northern Rock product**
>
> This mortgage consists of the following parts:

Loan Part	Loan Amount	Repayment method	Term	Product	Initial Rate Payable
1	£152,720.00	Repayment	35 years	Together 3 Year Fixed	5.99%

> This secured mortgage is based on the following interest rate periods:
>
> • a fixed rate of 5.99% until 1 October 2008
>
> Followed by
>
> • a variable rate which is guaranteed to be below Northern Rock Standard Variable Rate, which is currently 6.59%, for the remainder of the term of the mortgage. Please note that the payments illustrated for this period, are based on Northern Rock's Standard Variable Rate."

(ii) The General Conditions

58. I will set out in full the parts of the General Conditions which are relevant to the argument. The following is based on the 2001 edition of the General Conditions.

59. Condition 1.1(a) reads as follows:

> "In these General Conditions and in the Offer "we", "us" and "our" refer to Northern Rock plc and anyone who becomes entitled at law or in equity to any of our rights under the Offer (this will include any person to whom we transfer the Offer under condition 19)".

60. The following definitions appear within Condition 1.2

i) ""**Interest**" means interest at the Interest Rate."

ii) ""**Interest Rate**" means the rate or rates of interest we charge under Condition 6."

iii) ""**Special Rate**" means the rate of interest which is payable on a Special Rate Loan during the Special Rate Period for that Special Rate Loan."

iv) ""**Special Rate Loan**" means a Loan which is stated in the Special Conditions to be a Special Rate Loan…"

v) ""**Special Rate Period**" means, in relation to any Special Rate Loan, the period stated in the Special Conditions to be the Special Rate Period for that Special Rate Loan…""

vi) ""**Standard Variable Mortgage Base Rate**" [the term used in the 2001 Condition for the SVR] means such rate as we from time to time decide to set as the base from which to calculate Interest on our variable rate mortgage loans (disregarding the restrictions on what we can charge under condition 7 or Section B of the Offer)… If we transfer or dispose of the Offer, the person to whom we make the transfer may change the rate to its own base rate which it applies to its variable rate mortgage loans. That rate will then be the Standard Variable Mortgage Base Rate under the Offer and the person to whom we make the transfer may make further changes to that rate under condition 7 or Section B of the Offer."

[Note: the 2001 edition of the General Conditions used the term "Standard Variable Mortgage Base Rate" and the other editions used the term "Standard Variable Rate" but, subject to immaterial differences, both terms are defined in the same way in each edition of the General Conditions.]

61. Condition 6 addressed the mechanics of calculation of the Interest Rate. Condition 6.6 in particular provided as follows:

> "6.6. If a Loan is a Special Rate Loan (the Special Conditions will indicate if a Loan is a Special Rate Loan), we are not obliged to renew or extend the Special Rate Period unless the Special Conditions makes it a term of that Loan that the Special Rate Period will be renewed or extended."

62. Condition 7 concerned changes in the Interest Rate, and provided in Condition 7.1 as follows:

> "7.1 We may reduce the Standard Variable Mortgage Base Rate at any time.
>
> 7.2 We may increase the Standard Variable Mortgage Base Rate at any time if one or more of the following reasons applies:
>
> (a) There has been, or we reasonably expect there to be in the near future, a general trend to increase interest rates on mortgages generally or mortgages similar to yours;
>
> (b) For good commercial reasons, we need to fund an increase in the interest rates we pay to our own funders;
>
> (c) We wish to adjust our interest rate structure to maintain a prudent level of profitability;
>
> (d) There has been, or we reasonably expect there to be in the near future, a general increase in the risk of shortfalls on the accounts of mortgage borrowers (whether generally or mortgage borrowers only), or mortgage borrowers (whether generally or our mortgage borrowers only) whose accounts are similar to yours;
>
> (e) Our administrative costs have increased or are likely to do so in the near future."

63. Condition 19 specifically addresses the setting of the SVR following a transfer of the mortgage contract as follows:

> "19.1 We may transfer or charge or otherwise dispose of the Offer or any of our rights under the Offer (including the right to set the Interest Rate) to any person at any time at law or in equity without your consent. Where we transfer to any person the right to set the Interest Rate and we have set the Interest Rate by reference to the Standard Variable Mortgage Base Rate, that person may set the interest charged under the Offer by reference to that person's own (or one of its own) standard variable rates.
>
> 19.2 On any transfer of the Offer, we as transferor will enter into an agreement with the person to whom we transfer the Offer (the "Transferee") under which:
>
> (a) we will continue to conduct arrears cases as the agent of the Transferee;
>
> (b) the Transferee will agree that its policy on handling arrears and exercising any discretion in the settling of Interest Rates will be identical to our policy as at the date of transfer.
>
> The agreement will apply for a minimum of three months after the transfer but may be terminated earlier by the Transferee if

> our performance as agent is not satisfactory or if we suffer financial difficulties or if we breached the agreement. We may terminate the agreement earlier if the Transferee suffers financial difficulties or breaches this agreement. When the agreement comes to an end or is terminated, we may no longer have the right to continue to conduct arrears cases and the Transferee may set its own policy on handling arrears and exercising any discretion in the setting of Interest Rates."

64. The Claimants' counsel provided the following background to Condition 19.2. Prior to the advent of mortgage regulation in 2004, the Council of Mortgage Lenders (now UK Finance) published a Statement of Practice on the Transfer of Mortgages (the "**Statement of Practice**"). A lender within the Council could not transfer a residential mortgage to a lender outside the Council without obtaining the borrower's consent in accordance with the Statement of Practice. The effect of Paragraph 4 and Note 2 in the Statement of Practice was that a borrower could only transfer the mortgage under a "general consent" if the transfer agreement specified that the transferee's policy in exercising any discretion in setting of mortgage interest rates would be identical to that of the original lender. In other words, the purpose of the term was to protect a borrower from harsher treatment in the exercise of discretions as regards the setting of rates.

65. **Condition 22.** Finally, I should mention Condition 22 which provides as follows:

> "If their terms are in conflict, the Special Conditions prevail over the General Conditions".

6. PRINCIPLES OF CONTRACTUAL INTERPRETATION

66. Before returning to the analysis of the terms of the Offers and of the General Conditions, it is useful for me to outline the principles of interpretation that should be applied when undertaking such an analysis. There was little disagreement between the parties as to what these were.

67. The Claimants referred me to the authoritative statement in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13] by Lord Hodge. It is worthwhile quoting from the following passages at [10] and [12] in full:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

> …..
>
> "12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

68. The Defendant drew my attention to a further convenient summary of general principles given by HHJ Pelling at first instance and adopted and endorsed by the Court of Appeal in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] and in particular to the following relevant passages within that paragraph (which I have further condensed by removing the citations justifying the various conclusions):

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …;
>
> ….
>
> iv) Where the parties have used unambiguous language, the court must apply it…;
>
> v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used …;
>
> vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other …but commercial common sense is relevant only to the extent of how matters would have

> been perceived by reasonable people in the position of the parties, as at the date that the contract was made;
>
> …
>
> and
>
> viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain …"

69. The Defendant's counsel also referred me to Lord Miller's speech in *AIB Group (UK) Plc v Martin [2001] UKHL 63* at [7] which emphasised the primacy of the words in the case of a standard form, such as mortgage terms, designed for use in a variety of different circumstances. In such cases the relevance of the factual background of a particular case to its interpretation is necessarily limited.

70. A further point to note is that the mortgage documentation represented Northern Rock's standard form contract and there was no or very little ability for an individual mortgage borrower to amend the terms of the Offer, and no opportunity to vary the General Conditions. As such, it is appropriate that the documentation should be read *contra proferentem*, meaning that if there is any ambiguity the preferred meaning should be the one that works against the interests of the party who provided the wording and in favour of the other party.

71. It was assumed for the purposes of this trial that at least some of the Claimants were consumers within the meaning of regulation 3 of the Unfair Terms in Consumer Contracts Regulations 1999 (the "**UTCCRs**"). To be clear, however, I make no finding on this point as this is outside the scope of the preliminary issues that are before me. Insofar as they were consumers, the UTCCRs provides a further gloss on interpretation. The UTCCRs continue to apply despite their revocation by the Consumer Rights Act 2015 because the mortgage contracts were entered into prior to 1st October 2015.

72. Pursuant to Regulation 7(1) of the UTCCRs, Northern Rock was obliged to ensure that the terms of the mortgage contracts were "expressed in plain, intelligible language". Regulation 7(2) provides that, if:

> "there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail".

73. This point probably adds little to the *contra proferentem* rule that I have already outlined. For both reasons, I consider that the court should, where there is ambiguity, apply the interpretation that is most favourable to the mortgage borrowers.

74. However, in doing so it is important to remember two things:

i) these rules of interpretation only apply where the court finds that there is an actual ambiguity that needs to be resolved: see for example in *Direct Travel Insurance v McGeown* [2004] 1 All E.R. (Comm) 609, where Auld LJ warned at [13]:

> "A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the *contra proferentem* rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the *contra proferentem* rule runs the danger of 'creating' an ambiguity where there is none";

and

ii) that the court should not judge the matter with the benefit of hindsight: the position should be considered in the context of the position of the parties as it was when the mortgage loans were agreed, and not having any regard to information which became available only later, such as the fact that TSB became the mortgage lender in succession to Northern Rock or the fact that TSB happened to offer its mortgage customers (or at least some of them) variable rates that were substantially below the SVR that applied to the former Northern Rock loans at the point of transfer.

7. THE CLAIMANTS' ARGUMENT ON INTERPRETATION

75. I have sketched out above the core of the argument made by the Claimants, and I will now seek to outline this in more detail. I should point out in doing so that I think that the Claimants' argument developed in oral argument over the course of the trial of preliminary issues and I am not sure that it remained precisely the same as that set out in the Claimants' skeleton argument. I will try to do my best to reflect both the argument as originally made in the skeleton argument and the argument as it developed.

(i) The Claimants' Original Interpretation

76. The Claimants start from the definition given of SVR in Condition 1.2:

> "… such rate as we from time to time decide to set as the base from which to calculate Interest on our variable rate mortgage loans."

77. They argue that this leads inexorably to the conclusion that TSB is required, once it seeks to vary the rate or adopt any rate other than Northern Rock's SVR, to charge its own SVR under the mortgage contracts, because by Condition 1.1, from the moment of the transfer, TSB becomes "We" for the purposes of the

General Conditions. Thus, they read the definition as it applies following the transfer as:

> "… such rate as [TSB] from time to time decide[s] to set as the base from which to calculate Interest on [TSB's] mortgage loans…"

78. I will call this reading of Condition 1.2 the "**Claimants' Original Interpretation**".

(ii) The Claimants' Developed Interpretation

79. This point was developed slightly differently in oral argument, in that Mr Lord acknowledged that TSB could continue to charge interest at the previous rate fixed by Northern Rock that was in force at the time of transfer, even though this was not a rate decided upon by TSB and was not used to calculate interest on other mortgage loans made by TSB and so did not fall within the reading of the definition argued for as set out in the paragraph immediately above. Mr Lord's argument was that it was only at the point that TSB purported to set a different interest rate that the reading of the definition set out in the previous paragraph will apply.

80. For reasons discussed at [126] to [128] below, I think this was a necessary development of the argument. I think, therefore, that the definition they were actually contending for is better transcribed as follows:

> "… such rate as [Northern Rock or TSB] from time to time decides to set as the base from which to calculate Interest on [the lender's] mortgage loans…"

In other words, the focus of what is meant by "we" in the definition of SVR according to the Claimants' argument has to be on who is the lender at the point of setting the rate. When Northern Rock sets the rate, it did so by reference to the considerations out in Condition 7 as applied to its whole loan book. That rate remained the SVR until there was an amendment to rates. At that point, if TSB was making the decision, it must do so by reference to the considerations set out in Condition 7 as applied to its whole loan book. I will refer to the Claimants' argument as so developed as the "**Claimants' Developed Interpretation**".

81. The Claimants argue further that the remainder of the definition takes one to the same place:

> "If we transfer or dispose of the Offer, the person to whom we make the transfer [ie. TSB] may change the rate to its own base rate which it applies to its variable rate mortgage loans."

82. They argue that this further part of the definition provides no suggestion that TSB might charge a different rate other than its own standard variable rate. They conclude therefore that TSB was acting wrongfully in applying what it

described as the "Whistletree SVR ", as this was not the rate that it was applying to its own mortgage loans.

83. The Claimants argue also that there is an important commercial purpose as to why the former Northern Rock customers should not be charged at a different rate to TSB's other customers. This was that there was an obligation of equal treatment between a bank's borrowers. This obligation prevents different borrowers on a standard variable rate mortgage from being treated differently. Mr Lord used the term "herd protection" meaning that by being required to treat all borrowers on the same "standard" variable rate, borrowers would know that there would be a commercial imperative to set that rate fairly so as to avoid borrowers who could leave from leaving and so as not to discourage potential new borrowers.

84. The Claimants argue that this construction is also supported by testing it against the other provisions of the mortgage contracts.

85. As noted above, it was their argument that a transferee may only make changes to the SVR under Condition 7.2 if it has first changed the rate applicable under that condition. TSB did, as is common ground, change the SVR a number of times in purported reliance on Condition 7.2. It could only do so, in the Claimants' contention, if it had already changed the SVR to one of its own existing SVRs.

86. It was important to this argument that Condition 7.2 permitted the relevant lender to increase the SVR by reference to various factors, a number of which were referable to its own circumstances: for example, to maintain a prudent level of profitability or by reference to its administrative costs. Therefore, the argument runs, if TSB were to exercise any power to increase the SVR, it would need to do so having regard to its own costs of funds, profitability and administrative costs. If TSB had been entitled to take as its starting point the difference between the BoE Base Rate and the SVR as determined by Northern Rock (as it did), then that, in the Claimants' submission, made a nonsense of Condition 7.2. If the margin between the SVR and the BoE Base Rate had originally been set by Northern Rock to reflect its own cost of funds etc. how, then, could TSB say that it needed to increase the SVR to meet its own cost of funds when the existing rate reflected someone else's cost of funds?

87. In addition, whilst Condition 7.2 set out a detailed set of circumstances in which the lender under the mortgage contracts could increase the SVR, there was no contractual requirement under Condition 7.1 requiring the lender to reduce it should circumstances change so that the loans have become more profitable for the lender. The protection that a borrower had against a bank arbitrarily failing to reduce its rate was market competition, but that would be of limited assistance in the circumstances of the Whistletree Borrowers (who, according to the Claimants' argument, were unable to take advantage of market competition as they or many of them were mortgage prisoners), unless they had to be treated equally with TSB's other customers. That is why it should be regarded as critical that there is such an obligation of equal treatment.

88. There was a further textual point backing this argument based on the use of the word "standard" in the defined term SVR. Mr Lord referred me to the FCA's definition of a standard variable rate, I think, with a view to persuading me that the choice of this defined term was intended to echo the FCA's definition. The Claimants' argument is that the use of the word “standard” in the defined term is significant. It connotes that it will be the relevant lender’s “standard” rate, rather than a bespoke one for a particular group of borrowers. A borrower could reasonably take comfort from the fact that there would be an element of protection from market forces in their interest rate being kept at the same level as other borrowers of the same bank.

(iii) Discussion of the Claimants' arguments

89. The points based on Condition 7 and the requirement for a "standard" rate across different groups of borrowers were heavily relied upon by the Claimants as arguments why their reading of the Conditions must be correct, but I find them less than persuasive. This is for a number of reasons.

90. First, the "herd immunity argument" is one of those points that makes more sense viewing the matters with the benefit of hindsight than it does in looking at the position of the mortgage arrangements when they are entered into. When these contracts were entered into the "herd" that might have been in the mind of the parties was that of Northern Rock customers only. Whilst transfers to another lender were clearly contemplated, there could be no knowledge of what the nature and circumstances of any new lender would be. The lender might be another bank or building society that would have other customers, but equally or even perhaps more likely, it might be special purpose vehicle such as a securitisation vehicle or a vehicle used to administer closed books which would not have other customers so there would be no additional herd immunity arising from the transfer.

91. Even if the transferee was a bank or mortgage lender with an existing book, there would only really be additional herd immunity protection if either the lender was still offering mortgages using that rate, so that an uncompetitive rate would discourage new customers, or if the existing customers of the new lender had a smaller proportion of mortgage prisoners than was the case for the former Northern Rock customers - if the existing customers of the new lender included a greater proportion of mortgage prisoners then the incentive to keep the variable rates above market rates might be even more tempting than it was before the transfer.

92. Given the uncertainties of the future, it would be very difficult to say that the Northern Rock customers were relying on any future replacement lender offering additional herd immunity, to such an extent that this should be viewed as a fundamental principle to be taken into account in interpreting the General Conditions.

93. Secondly, the argument that herd protection was needed to protect against unfair decisions made in relation to increases or reductions of the interest rate is

weakened by what is now the common position of the parties as regards the implied term issue.

94. Thirdly, the argument that moving on to TSB's variable rate was necessary to make sense of Condition 7 does not follow as a matter of logic. The effect of TSB not having the same starting point as Northern Rock so as to justify rate changes by reference to a change in conditions applicable to the lender does not make Condition 7 unworkable – it merely constrains the aspects of Condition 7 that TSB might reasonably rely upon.

95. There were no conditions to be satisfied before a reduction in the SVR could be made. As regards increases there were conditions. Some of them did look at the position of the lender as regards such matters as profitability and administrative expenses, but others did not.

96. If TSB had purported to justify increases in the base rate by reference to conditions that related to increases in its administrative costs or reductions in its profitability or any other factor applying to it individually, then I can see that it might have had problems in establishing the justification for the rise since there would be no starting point for judging whether there had been an increase in costs or a reduction in profits. But that would be TSB's problem and one that it would need to take into account when taking on the mortgage portfolio. However, in practice TSB only ever increased the rate to reflect increases in the Base Rate and under the express language of condition 7.2 it was entitled to do so irrespective of its profitability or administrative costs.

97. Of course, it may be that TSB's approach was in breach of the implied condition. The Claimants argue by reference to TSB's accounts that TSB was making an unwarranted level of profits out of the Whistletree mortgages and it may be that on the basis of this they can establish a breach of the implied term discussed above. However, this is a discussion for another day. It is not a point to be decided at this stage of the proceedings.

98. As regards the use of the word “standard” in the definition of "SVR", I agree that it is true that the courts have found that it is permissible to take account of the label that the parties choose to put upon their defined terms.

99. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] A.C. 1101, Lord Hoffmann said:

> "But the contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement."

100. Nevertheless, I am loath to put too much reliance on the use of the word "standard" within the defined term in this case. This is for two reasons.

101. First, it is by no means clear what precisely the word "standard" connotes in its context. Clearly the SVR was "standard" in the sense that it was the one being applied to all Northern Rock customers who are on a variable rate. I think it is reading too much into the choice of this word in a defined term to say it must mean that if the former Northern Rock borrowers become part of a larger group of borrowers it necessarily connotes that there must be one standard rate applying to all borrowers. This is particularly the case since it is clear elsewhere in the General Conditions that it was envisaged that a transferee lender might have more than one variable rate that it uses for its customers.

102. Secondly, whilst I think this is a point to take into account, in my view the wording of the definitions in the contract and the iterative approach to understanding the contract as a whole will take precedence over this particular point.

103. For completeness I should add that, in addition to arguments about the definition in Condition 1.2, Mr Lord referred to terms about interest in one of the Offer Letters where it said:

> "On expiry of the Special Rate Period the rate will be set at a rate guaranteed to be below our prevailing Standard Variable Rate set by us from time to time for existing Northern Rock borrowers".

104. This wording related to one of the Together Offers. Mr Lord took me to definitional provisions in the Loan Conditions (i.e. those relating to the Together Loan) which defined "*Lender*", "*us*", "*we*", "*our*", and "*Northern Rock*'" to mean "*Northern Rock plc and its successors and assigns*". He took from this the conclusion that the wording referred to in the previous paragraph, following transfer to TSB, must mean the standard variable rate set by TSB from time to time for existing TSB borrowers: i.e. following the transfer to TSB it would read:

> "On expiry of the Special Rate Period the rate will be set at a rate guaranteed to be below TSB's prevailing Standard Variable Rate set by TSB from time to time for existing TSB borrowers".

105. This point arose late in the argument and seemed to me to involve something of a recantation from the Claimants' Developed Interpretation. I am not sure that Mr Lord fully resolved the tension between the Claimants' Developed Interpretation and the implications of his arguments here, which seemed to take him back to the Claimants' Original Interpretation, with the problems I highlight at [126] to [128] below, in interpreting Condition 19.

106. Equally importantly, consideration of this wording in the Offer Letter (or some of them) adds little or nothing to the analysis around the definition of SVR in Condition 1.2.

107. If the Claimants' interpretation of the definition of SVR is accepted, then this wording is compatible with that interpretation.

108. However, this wording is equally compatible with the interpretation of the definition of SVR that is contended for by the Defendant (i.e. the Standard Variable Rate used by Northern Rock and following transfer by TSB to calculate Interest for the purposes of the General Conditions), so that the reference to "existing customers" must be taken as "existing customers" who are subject to the General Conditions – ie its customers who are former Northern Rock customers.

109. If we accept the Defendant's interpretation and take full cognizance of the fact that the definitional provision referred to in the Loan Conditions talks of "*Northern Rock plc **and** its successors and assigns*" which in this context should in my view be read loosely to mean "*and/or*" (as the parties each accepted in relation to the use of "and" in the definition of SVR), then the Defendant's reading of the wording seems to fit at least as well as that contended for by the Claimants. The Defendant's reading would be:

> "On expiry of the Special Rate Period the rate will be set at a rate guaranteed to be below Northern Rock's or (where there is a successor, its successor's) prevailing Standard Variable Rate set by Northern Rock and/or its successor from time to time for existing borrowers [who pay Interest under the General Conditions at the Interest Rate].

110. The argument based on the wording in the Loan Conditions, therefore, does not assist in choosing between the Claimants' interpretation and the Defendant's interpretation. It is also of arguable relevance given that the interpretation of the General Conditions needs to work for all the mortgage loans advanced by Northern Rock, and this wording would have been available only to some of them who held Together Mortgages. For all these reasons, I will attach no weight to the argument based on this wording.

(iv) The Claimants' attack on TSB's argument

111. I believe the points above capture the main thrust of the Claimants' argument in favour of their interpretation. The remainder of their argument was attacking what they perceived to be the argument being made by TSB.

112. In particular, the Claimants understood that TSB was claiming that it had a right to create a new standard variable rate purely for the Whistletree customers. The Claimants deployed arguments against this contention including that:

i) The natural and ordinary meaning of the definition of SVR is that it is limited to a pre-existing variable rate which the transferee already had in place. A specially-created new variable rate is not “one of [TSB]’s own standard variable rates”.

ii) If TSB was entitled to create a new rate for the Whistletree borrowers, then logically it was not limited to charging a single, new rate to all Whistletree customers. It could have evaluated each new Whistletree Borrower separately, and devised a new interest rate for each of them,

> and charged them that rate, leading to hundreds of new "SVRs". That would be absurd, and would give no effect to the meaning of the provision.

113. However, these arguments were attacking a different argument to the argument that TSB advanced in oral submissions. TSB's argument was that TSB was operating the original SVR, not a new rate. The fact that it rebadged this as the "Whistletree SVR" was just a marketing convenience. The result of the definition of "we" was that following the transfer TSB was in the position originally occupied by Northern Rock so that it had become entitled to set the Standard Variable rate and in fact had done so. The arguments made that I have summarised in the previous paragraph therefore are not pertinent to the argument that TSB is now pursuing.

114. The Claimants made a number of other points by way of an attack on the position put forward by TSB. I will deal with these as I explain TSB's position.

8. TSB'S ARGUMENT ON INTERPRETATION

115. I now turn to dealing with TSB's argument in more detail.

116. As I have already described at [35] to [40], it is simply this. As a result of the definition of "we", following its acquisition of these mortgage loans TSB stood in the place of Northern Rock for all purposes under the contract and became entitled to fix the SVR. References to "we" in conditions 6 and 7 became references to TSB.

117. When TSB was amending what it referred to as the "Whistletree SVR" it was merely continuing to operate the same SVR which had originally been operated by Northern Rock. The fact that it called this by a different name, to distinguish it from other rates that it operated for other customers, was immaterial.

118. TSB disposes of the Claimants' argument that the phrase within the definition of SVR referring to "such rate as we from time to time decide to set as the base from which to calculate Interest on our variable rate mortgage loans" must mean that one looks at TSB's other mortgage loans, by pointing out that the reference to "Interest" makes it clear that this reference is alluding only to loans that are made under the General Conditions, and not to loans made under other terms and conditions.

119. As a result, TSB argues that it was entitled to continue to keep the Whistletree borrowers on the same rate and to operate the entitlements under Condition 7 to vary that up and down, and that is what it did.

120. I find this interpretation compelling, and certainly a far more natural reading of the provisions than that contended for by the Claimants.

9. WHICH INTERPRETATION WORKS?

121. The matter comes into sharp relief when one considers the provisions of Condition 19.1 (reproduced at [63] above). Condition 19.1 records that if the

lender chooses to transfer its rights under the Offer to another mortgage lender it can do so without the consent of the borrower and that there are two powers in particular that it can confer on the transferee lender:

i) first the right to set the Interest Rate; and

ii) secondly, where the Interest Rate is set by reference to the SVR an option (connoted by the word "may") instead to set the interest charged under the Offer by reference to that person's own (or one of its own) standard variable rates.

122. TSB's interpretation is, in my view, compelling. It presents no real contextual difficulties; it allows the General Conditions to be interpreted in an entirely consistent manner; and it provides the result that is also consistent with the way that one would expect transfers of mortgages to work. Neither is it, in my view, a term that would be expected, at the time it was entered into, to operate unfairly as regards the mortgage customers.

123. To take first the question of lack of contextual difficulties. The Claimants' interpretation ignores the implications of the use of the capitalised term "Interest" within the definition of SVR. I agree with Ms Tolaney that the use of this capitalised term clearly ties the definition of SVR into referring to the rates that are set as the base from which to calculate the interest payable under these General Conditions. It cannot refer to rates that are charged on loans that are not subject to the General Conditions.

124. The Claimants have no real argument against this point. The most that can be said is that the reference to condition 6 in the definition of "*Interest*" (in the 2004 General Conditions) or in the definition of "Interest Rate" (in the 2001 General Conditions) is a reference to a condition relating to the *payment* of interest rather than anything to do with the *calculation* of the rate of interest. That argument is not material. The point is that the reference to Condition 6 is still effective to have the effect that references to "*Interest*" must mean interest payable under the General Conditions, and therefore the reference to "*Interest on our variable rate mortgage loans*" must refer only to interest on loans that are subject to such General Conditions.

125. The Defendant's interpretation allows a consistent view of how to apply the definition of "we". It operates as one would expect: in all contexts within the General Conditions where there has been a transfer, references to "we" and the like terms are to be replaced by references to the transferee lender, with the only exception being provisions such as Condition 19.1 where the clause is clearly dealing with the position of both the transferor lender and the transferee lender where it is clear from the context that "*we*" in places continues to refer to the transferor lender.

126. The Claimants' interpretation gets into particular difficulties when one tries to apply it to Condition 19.

127. The Claimants' Original Interpretation of the SVR definition as set out in their skeleton argument, and reproduced at [77], had the effect of causing the SVR immediately following the transfer to become the rate of interest calculated by TSB on its mortgage loans at large. This rapidly becomes an unsustainable argument when one tries to apply Condition 19, since if the SVR already means the interest rate charged by the transferee lender to its other customers, then there is no meaning to the provision in Condition 19.1 that the transferee lender could transfer from that rate to its own standard variable rate – they would be the same thing.

128. This point, no doubt, is why in oral argument Mr Lord moved to the Claimants' Developed Interpretation explained at [80] above: this at least allows some meaning to Condition 19 in that it could involve a move from the original rate set by Northern Rock to another rate. However, it still requires a more convoluted application of the definition of "*we*", so that "*we*" in the definition of SVR continues to mean Northern Rock until there is a new rate decision, and only at that point does it refer to the new lender.

129. Further, it still does not resolve the interpretation of Condition 19.1. The natural reading of Condition 19.1 is that the transferee lender can be given two powers (1) the right to set the interest rate and (2) (separately) the right to set the interest charged under the Offer by reference to that person's own standard variable rates. The Claimants' interpretation allows only the second power. If the Claimants' interpretation was the intended interpretation, the clause would have been drafted differently to make this clear.

130. A further textual difficulty with the Claimants' proposed interpretation is that the definition of SVR that it contends for only works if the transferee lender already operates another mortgage book. The lender would not have another rate without this. This, therefore, appears not to work in the case of a transfer to a special purpose vehicle such as a securitisation vehicle or a vehicle for holding a closed book of mortgages.

131. Mr Lord attempted to explain this away by saying that such a special purpose vehicle would have its own rate, since it would adopt a rate for the purposes of these mortgages, but this is unconvincing as this is precisely the behaviour that he says that TSB is not allowed to undertake.

132. The Claimants' interpretation is also difficult to apply if the transferee company has more than one variable rate that it uses for its other business. Such a state of affairs was clearly envisaged within clause 19.1 and yet the point is not dealt with in the definition of SVR and would need to be if the Claimants' interpretation was correct.

133. Moving onto my second point, the result is consistent with the way that one would expect transfers of mortgages to work. The expectation of someone who takes out a mortgage that includes terms allowing for the rights under the mortgage loan to be transferred to another lender is that they would expect the same treatment from that other lender, not a better or worse treatment.

134. In the particular circumstances of the transfer to TSB, the former Northern Rock customers would be better off if they were transferred to the TSB SVR or the TSB HVR. But that could not be guaranteed had there been a different transferee. If the Northern Rock mortgages had been transferred to a mortgage lender that operated a higher standard variable rate for its existing customers, then the Claimants' interpretation would work against their interest.

135. Mr Lord had an argument to counter this on the basis that the terms of the Offer Letters or at least some of them dealing with the Together Loans referred to increases in the SVR only under Condition 7, and therefore if the result of a transfer to another mortgage rate was to increase the amount payable this could not take place.

136. I found this point unconvincing for two reasons.

i) First, the wording I was taken to was in the following form:

> "Section A of this Offer of Loan will indicate whether Interest is charged on an annual or daily basis. Please refer to Clause [*sic*] 7 of the Mortgage Offer General Conditions 2001, which gives details of when the Standard Variable Mortgage Base Rate may change"
>
> This wording seemed to be designed merely to draw the attention of customers to Condition 7 of the General Conditions. The Offer Letter expressly applied the General Conditions to the Offer and this wording did not seem to be sufficiently clear to oust the clear terms of Condition 19.

ii) Secondly, I did not see how unsecured loans offered to some only of the mortgage customers could change the interpretation of General Conditions that needed to be used for all customers.

137. In summary on this point, I find the interpretation put forward by the Claimants to be too far removed from the clear terms of the General Conditions to be a credible interpretation of them, whilst I see no problems with the interpretation put forward by TSB.

138. There were some arguments raised by the Claimants as regards TSB's interpretation that I should deal with.

139. In the Claimants' skeleton argument, the point was made that TSB relies heavily on the fact that Condition 1.2 states that TSB "*may*" (and not "*must*") change the Interest Rate to its own SVR.

140. This is true, although I think that TSB would place emphasis on the use of the word "*may*" within Condition 19.1, rather than in Condition 1.2. I agree with TSB that Condition 19.1 is the better place to look, as Condition 1.2 is there only to explain the use of the term "SVR": Condition 19.1 is the substantive provision saying how a handover will work. Condition 1.2 should be regarded

as merely a summary for indicative purposes of the provisions properly set out in Condition 19.1.

141. However, the Claimants' objection made on the basis of this point depends on its contention that TSB does not (and could not) contend that it was applying the Northern Rock SVR. In fact, that is precisely what TSB is claiming - that following the transfer they were in the shoes originally filled by Northern Rock and were continuing to administer the same SVR as Northern Rock had administered for the purposes of calculating Interest as defined in the General Conditions. This point disposes of this objection of the Claimants and also of a number of other arguments they made that proceeded on the basis that the Whistletree SVR was a new rate and was not the continuation of the Northern Rock SVR.

10. CONCLUSION AS REGARDS THE EXPRESS TERMS ISSUE

142. It will be clear from the analysis above that I answer the Express Terms Issue as follows.

143. The Defendant has not breached the express terms of the Claimants' mortgage contracts by charging the Claimants interest rates based on the Whistletree SVR and not on the TSB SVR. The Whistletree SVR should be regarded as the continuation of the original SVR originally operated by Northern Rock, and not as a new rate.

11. THE CCA ISSUE

144. The CCA issue concerns the application of s.140A(5) CCA 1974 to the circumstances of the "Together" Offers.

145. As I have mentioned, the Together Offers comprised an unsecured loan (the "**Together Loan**") that was offered alongside a regulated mortgage (the "**Together Mortgage**"). The Together Loan was linked to the Together Mortgage in that the interest rate under the unsecured loan was set to match that made applicable from time to time to the Together Mortgage, but would increase to a substantially higher rate if the Together Mortgage was repaid. Through these arrangements borrowers could borrow on mortgage up to 95% of the value of their residential property, and at the same time obtain an unsecured loan up to a further 30% of the value of the property (capped at £30,000).

146. The Claimants that have, or have had, Together Loans (the "**Together Claimants**"), which I am told number about a half of the total number of Claimants, bring a claim on the basis that the relationship between them and TSB arising out of the Together Loans, either alone or taken with the Together Mortgages, was unfair. The unfairness they allege relates to various matters, including the manner in which interest was charged as addressed above, the fact that Together Claimants were encouraged to borrow well in excess of 100% of the value of their property, and the fact that the rate increase that would occur if the mortgage was redeemed was very high, out of proportion to any increase in risk, and a disincentive to remortgaging.

147. In bringing their claims on this basis, the Together Claimants are looking to bring themselves within provisions in s.140A to s.140C CCA 1974 (the "**CCA unfair relationship provisions**"). The drafting within the CCA unfair relationship provisions that is most relevant to this issue is as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following -
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."
>
> …
>
> (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)."
>
> ….
>
> **140B Powers of court in relation to unfair relationships**
>
> (1) An order under this section in connection with a credit agreement may do one or more of the following -
>
> (a) require the creditor … to repay (in whole or in part) any sum paid by the debtor … by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
>
> (b) require the creditor … to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

> (c) reduce or discharge any sum payable by the debtor … by virtue of the agreement or any related agreement;
>
> …
>
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor … by virtue of the agreement or any related agreement;
>
> (f) alter the terms of the agreement or of any related agreement;
> …"

148. S.140C includes various interpretive provisions that need not be examined for the purposes of this judgment.

149. In summary, if the court determines that there is an unfair relationship arising out of a credit agreement (or out of a credit agreement taken together with a related agreement), it may make an order under s.140B in connection with that credit agreement. The court has a broad discretion under s.140B as to the remedies it may impose, and can require, among other things, the repayment of sums paid under the credit agreement or a related agreement.

150. However, as a result of s.140A(5), the court cannot make an order, "*in connection with*" an agreement that is exempt by virtue of article 60C(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

151. An exempt agreement would include any regulated mortgage contract entered on or after 31 October 2004. The parties agree, therefore, that s.140A(5) has no application to any Together Mortgage that was entered into before this date - no problem arises under s.140(A)(5) in treating such mortgages either as credit agreements in their own right or as a related agreement in applying the CCA unfair relationship provisions.

152. The parties agree that:

i) The Together Loans themselves are credit agreements that may form the basis of a claim under s.140(A); and that

ii) s.140A(5) has the effect that such a Together Mortgage entered after 31 October 2004 cannot be treated as a credit agreement in its own right to form the basis of a claim under s.140(A)(5).

153. However, the CCA issue arises because the parties do not agree as to the effect of s.140(5) where a Together Mortgage that was a regulated mortgage contract entered on or after 31 October 2004 is claimed to be a related agreement to a Together Loan.

154. The Together Claimants argue that they do not seek an order under s.140B "*in connection with*" the Together Mortgages; they seek an order "*in connection with*" the Together Loans. They submit that when deciding what order to make in connection with the Together Loans:

i) the court is not precluded from having regard to the terms or implementation of a Together Mortgage in assessing or from making an order under s.140B redressing unfairness in the relationship arising out of the Together Loans "taken with" the Together Mortgages; and

ii) by the express terms of the opening words of s.140B, such an order, even if it orders repayment of monies paid under the Together Mortgage as a related agreement, is an order "*in connection with*" the Together Loan.

155. The Claimants' case is that the Together Mortgage is a "*linked transaction*" in relation to the Together Loan, such that it is legitimate to have regard to the terms of the Together Mortgage when considering the fairness of the relationship arising between the Together Claimants (in their capacities as borrowers under the Together Loans) and TSB – even if the Together Mortgage is a regulated mortgage contract entered after 31 October 2004.

156. Conversely, TSB argues that, even if a Together Mortgage (that was a regulated mortgage contract entered into on or after 31 October 2004) can be regarded as a related agreement to the Together Loan, if an order is made by reference to such a Together Mortgage, for example because it calculates a payment of damages by reference to interest payable under the Together Mortgage, and certainly if it requires repayment of interest payable under the Together Mortgage, then the order should be regarded as being "*in connection with*" the Together Mortgage and therefore is precluded under s.140A(5).

157. I should mention that TSB does not accept in its pleadings that the Together Mortgages are linked transactions, but this is an argument for another day. The CCA issue has been formulated in a way that is neutral on the point, as it asks the court to look at the question "*irrespective of whether that regulated mortgage contract is the "credit agreement" or a "related agreement*"". For simplicity, in addressing the matter, I will assume that the Claimants are correct that the Together Mortgage is a linked transaction and therefore a "related agreement" in relation to the Together Loan, but this should be taken as an assumption relied on for the sake of argument rather than as any determination by the court. For simplicity also, references to Together Mortgages or to regulated mortgages in the discussion below should be assumed to refer to those which are regulated mortgage contracts entered into on or after 31 October 2004.

12. THE CCA ISSUE IN MORE DETAIL

158. The Together Claimants' case on the effect of s.140A(5) is that, although it prohibits the court from making an order "*in connection with*" a regulated mortgage contract, it does not prohibit the court when making an order in connection with a credit agreement from taking into account the terms or implementation of a linked transaction (whether a regulated mortgage contract or not). Nor does it prevent the Court from making an order in connection with a credit agreement that alters or relates to the terms of (or payments under) a related agreement That is expressly permitted by s.140B, and that, in their

argument, must be so whether the related agreement is a regulated mortgage contract or not.

159. TSB's argument may be summarised as saying that, just because an order is made "*in connection with*" a Together Loan, that does not preclude it from also being "*in connection with*" a Together Mortgage; and an order that is made "*in connection with"* a Together Mortgage is prohibited by s.140A(5).

160. Looking at this in more detail, the Together Claimants argue that there are three aspects to the issue, or, as I would put it, three possible contentions as to the extent of the effect of s.140A(5).

(i) The Exclusion of Consideration Contention

161. The first and strongest contention that TSB might make is what I will call the "**Exclusion of Consideration Contention**". This arises in the context that what the court is required to determine under s.140A is the unfairness of the *relationship* between the borrower and the lender and in doing so the court can consider the terms and operation of the unsecured loan (in this case the Together Loan) and any related agreement. The Exclusion of Consideration Contention is that the effect of s.140A(5) is to exclude entirely consideration of the terms and operation of the Together Mortgages, even if they are related contracts, in judging the unfairness of the relationship.

162. In what I understand to be a late concession, TSB agreed that it was not arguing for this proposition. I agree that the Exclusion of Consideration Contention is unsustainable. There is nothing within the wording of s.140A to exclude a regulated mortgage from being regarded as a related agreement, and if it can be one, nothing to say that this category of related agreement should be excluded in judging whether the relationship was unfair.

(ii) The Exclusion from the Assessment of Loss Contention

163. The second strongest contention that TSB could make is what I will call the "**Exclusion from the Assessment of Loss Contention**". This is the contention that the effect of s.140A(5) is that, when making an order under s.140B(1), the court cannot make an order for repayment of sums paid under (or adjustments to the terms of) the Together Loan which has regard to the unfairness between the parties arising from the Together Mortgage as well as the Together Loan.

164. At first sight, this looks like the same point as the previous one, but what I think is meant here is that, when assessing what remedy should be provided to compensate an unfair relationship, the court should exclude any unfairness that is assessed by reference to something that relates specifically to the Together Mortgages, such as interest unfairly charged in relation to the Together Mortgage. In other words, when assessing the unfairness arising out of the relationship, the court must apportion that unfairness between the two loans and, insofar as the unfairness relates to a Together Mortgage that is an exempt agreement, it must be regarded as being "*in connection with*" the Together Mortgage and therefore, to avoid a breach of s.140(5), the court must exclude

any such quantification of damage or loss that relates solely to the mortgage loan from the assessment of the appropriate order to compensate unfairness.

(iii) The No Mortgage-Specific Remedies Contention

165. The third and least strong contention is what I will call the "**No Mortgage-Specific Remedies Contention**". This is the contention that the effect of s.140A(5) is that the court cannot order repayment of sums paid under or adjustments to the terms of the Together Mortgage itself.

13. PRINCIPLES OF STATUTORY INTERPRETATION

166. Each of the three contentions that I have outlined above raises a question of statutory construction, on which there is no specific, directly applicable authority. However, both sides drew my attention to general principles of statutory construction that should be applied and to the legislative background to the CCA unfair relationship provisions. It is helpful to consider these matters before turning to a detailed consideration of these provisions.

167. TSB's skeleton argument set out what TSB considers to be the relevant principles of statutory interpretation to be applied. These were not disputed on behalf of the Claimants. These points are summarised below.

168. The starting point for interpreting the meaning of a statute is the ordinary linguistic meaning of the words used (see for example *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, per Lord Nicholls at 397). The ordinary meaning of the words of a statute is generally of primary importance compared with any other interpretative criterion (see *Bennion, Bailey and Norbury on Statutory Interpretation,* 8th Edition *("**Bennion**")* at Section 11). There is a presumption that the ordinary meaning of an enactment is the meaning that was intended by the legislator.

169. In regard to this point I was referred to the comments of Julian Knowles J in *Al-Masarir v Kingdom of Saudi Arabia* [2023] QB 475, 497 at [64]. I note that in this paragraph and in the following paragraph the judge went on to refer to two decisions by Lord Bingham as follows:

> "Although Lord Bingham pointed out in *R (Jackson v Attorney General* [[2006] 1 AC 262, para [30] that 'the literal meaning of even a very familiar expression may have to be rejected if it leads to an interpretation or consequence which Parliament could not have intended', this passage indicates that the grammatical meaning is the starting point and may not be rejected without cause."
>
> and
>
> "In *R v Bentham* [2005] 1 WLR 1057 Lord Bingham said:

> "Rules of statutory construction have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence which Parliament has not created. Nor should the House adopt an untenable construction of the subsection simply because courts in other jurisdictions are shown to have adopted such a construction of rather similar provisions.""

170. TSB's skeleton argument also referred me to *Kostal UK Ltd v Dunkley* [2022] IRLR 66 at [109] to establish that the meaning of the words used must be construed in the context and purpose of the provision. Here it was said:

> "We are here faced with a question of statutory interpretation. It is therefore first crucial to clarify the approach we must take. The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose."

171. Context is used in its widest sense, and includes internal and external aids to construction, such as other provisions within the Act and the legislative history of the provision: see also the comments of Lord Bingham in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, 695 at [8]:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draughtsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead to court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which gave rise to its enactment."

172. An Act must be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the Act (see the comments of Holgate J in *Cab Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2022] PTSR 1027).

173. When choosing between competing constructions, the Court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally (see comments of Lord Briggs in *Project Blue Limited v Her Majesty's Revenue and Customs* [2018] 1 WLR 3169, at [110]; and *Bennion* at Section 11.6).

174. Mr Campbell on behalf of the Claimants considered that there were also two additional principles I should take into account.

175. In relation to the first such principle, he referred me to Section 21.3 of *Bennion* which provided as follows:

> "Same words, same meaning; different words, different meaning
>
> (1) There is a presumption that where the same words are used more than once in an Act they have the same meaning.
>
> (2) There is a presumption that where different words are used in an Act they have different meanings."

176. Secondly, he referred me to Section 24.14 of *Bennion* dealing with the value that can be attached to Explanatory Notes to Acts as follows:

> "Explanatory notes to an Act may be used to understand the background to and context of the Act and the mischief at which it is aimed."

177. Within this section, *Bennion* includes two citations from Lord Justice Brooke's judgment in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2006] 4 All ER 982, [2007] 1 WLR 482.

178. The first was where he said (at [16]):

> "The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the Act is set ... In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction."

179. The second is later in [16], where Brooke LJ went on to quote the following comments of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654 at [6].

> "'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'"

180. After this citation Lord Steyn went on to explain that:

> "The value of ... Explanatory Notes as an aid to… construction is that it [*sic*] identifies the contextual scene ... That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them. "

181. Mr Campbell, I think correctly, drew from this the conclusion that Explanatory Notes have some potential relevance in understanding the background and context of the Act, but no more than that.

14. LEGISLATIVE BACKGROUND

(i) Background to the CCA unfair relationship provisions generally

182. In their setting out of the legislative background, the Claimants emphasised the consumer protection aims underlying the CCA unfair relationship provisions.

183. These provisions replaced earlier provisions under ss. 137 to 140 CCA 1974 which empowered courts to reopen an "*extortionate credit bargain*" as defined in those provisions.

184. There was some debate in oral argument whether under these former extortionate credit bargain provisions this exemption would have excluded consideration of a linked mortgage in deciding whether a regulated (non-mortgage) consumer credit agreement was an "extortionate" credit bargain. Mr Campbell argued strongly on behalf of the Together Claimants, that it did not and that it would be strange if the replacement provisions therefore, which were supposed to widen the protection for borrowers, would be any narrower on this point.

185. However, I was not satisfied that Mr Campbell had demonstrated that linked mortgages, under the old law relating to extortionate bargains, were taken into account in determining whether a bargain was extortionate – the point appeared to be linked to whether the interest rate under the mortgage was to be taken into account in the calculation of the APR under the loan. His point may be correct – I make no finding on this – but I consider that in any case the point is of little or no assistance in relation to the construction of the current provisions. They must be interpreted in accordance with their own terms.

186. The extortionate credit bargain provisions were considered inadequate to protect consumers, in particular because: (i) the "*extortionate*" test was too narrowly focussed on the cost of credit rather than the fairness of all the terms of the agreement; and (ii) the current standard of "*extortionate*" was too high to deter effectively practices that were unfair or exploitative.

187. As a result, on 16 December 2004, a Consumer Credit Bill was introduced in Parliament which eventually became the Consumer Credit Act 2006. This amended CCA 1974, including by repealing the old "extortionate credit bargain" provisions in ss.137 to 140 CCA and replacing them with the CCA unfair relationship provisions, subject to some transitional provisions contained in Schedule 3 of the Consumer Credit Act 2006.

188. The transitional arrangements are unlikely to be of relevance to many, if any, of the Together Claimants as they affected only loan agreements made before 6 April 2007 and now affect only loan agreements that became completed agreements (i.e. ones where there is no further sum that is or may be payable under the loan agreement) before 6 April 2008.

189. The Claimants have referred me to what they, I think justifiably, claim to be the leading case on the operation of CCA unfair relationship provisions: this is *Smith v Royal Bank of Scotland* [2023] UKSC 34, a case about Payment Protection Insurance. Lord Leggatt, in giving the judgment for a unanimous Supreme Court, explained a number of general points about how these sections operate,

190. First, at [12], he explained that these sections were introduced to be less technical, and to afford consumers with a greater protection based on the concept of an "unfair relationship".

191. Secondly, at [18], he explained that s.140A(1) does not require a determination of the fairness (or otherwise) of the credit agreement itself, but rather whether the *relationship* arising out of the credit agreement is unfair.

192. Thirdly, at [16], he explained that dealing with a claim under these sections is a two-stage process:

> "The first stage is to determine whether the relationship between the creditor and the debtor arising out of the credit agreement is unfair to the debtor because of one or more of the matters specified in section 140A(1). If the court finds that the relationship is unfair for that reason, the court must then proceed to the second stage and decide what, if any, order to make, selecting from the list of options in section 140B(1)."

193. Fourthly, at [22], he explained that s.140A is deliberately open-ended and "*extremely broad*", (a point also made by Lord Sumption in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 at [10]).

194. Fifthly, and finally, at [25], he noted that the set of orders which may be made under s.140B is also deliberately wide:

> "Fifth, as well as requiring the court to make a very broad and holistic assessment to decide whether the relationship between the creditor and the debtor is unfair to the debtor, the legislation also gives the court, where a determination of unfairness is made, the broadest possible remedial discretion in deciding what order,

> if any, to make under section 140B. Section 140B gives the court an extensive menu of options from which to select but says nothing at all about how this selection may or should be made. On the face of the legislation the court's discretion is entirely unfettered. It is, I think, clear that the court is not in these circumstances required to engage in the kind of strict analysis of causation, loss and so forth that would be required, for example, in deciding what remedy to award in a claim founded on the law of contract or tort…."

195. In drawing my attention to these points, I think the Claimants were seeking to emphasise both the consumer protection aims of the provisions and the breadth of the court's discretion at all stages.

(ii) Background to s.140A(5)

196. TSB's survey of the legislative background placed a greater emphasis on explaining the policy intentions behind s.140A(5).

197. In 2004 the regulation of consumer mortgages was separated from the regulation of other consumer credit. Entering into and administering regulated mortgage contracts became a regulated activity under the Financial Services and Markets Act 2000. Mortgage lenders became subject to the rules and guidance by the FCA Handbook. Regulated mortgage contracts were made exempt from the CCA 1974 by a new s.16(6C). This section provided that

> "This Act does not regulate a consumer credit agreement if- (a) it is secured by a land mortgage; and (b) entering into that agreement as lender is a regulated activity for the purposes of the Financial Services and Markets Act 2000."

198. The 2006 Act introduced the CCA unfair relationship provisions into the CCA 1974, including s.140A(5), which, in its originally enacted form, provided:

> "(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement by virtue of section 16(6C)."

199. Following the repeal of s.16(6C), s.140A(5) was amended to its current form but the differences between the current version and the originally enacted version are not relevant for present purposes: both versions were referring to the same subject matter, i.e. regulated mortgage contracts.

200. The Explanatory Memorandum to the Consumer Credit Act 2006 stated:

> "Section 140A does not apply to agreements that are exempt under section 16(6C) of the 1974 Act. Section 16(6C) exempts consumer credit agreements secured on land that are regulated by FSA under FSMA."

201. Second charge mortgage lending was made a regulated activity under FSMA and the FCA by The Mortgage Credit Directive Order 2015 (the "**MCD Order**"), thereby aligning the regulatory regimes for first and second charge mortgages.

202. Consistently with this regulatory alignment, second charge mortgages were removed from the scope of the unfair relationship provisions in the CCA 1974, as explained in the Treasury's consultation paper for the MCD Order:

> "Moving second charge lending into the same regime as first charge lending will result in the loss of some consumer protections that exist in the current consumer credit regime, such as the ability to challenge unfair relationships. The FCA are designing appropriate consumer protection in their new mortgage regime that will mitigate against the loss of these protections."

203. The FCA also directly addressed the concern that the MCD Order would dilute consumer protections for second charge mortgagees in its March 2015 Policy Statement:

> "On the unfair relationships test, the Treasury decided to switch off the CCA (including the unfair relationships provisions) for second charge mortgages, and we consider that MCOB 13 provides adequate and appropriate protections for customers in payment difficulties."

(iii) Conclusions from the legislative background

204. Two things are clear from the legislative background.

205. First, it was the intention of Parliament that the CCA unfair relationship provisions should offer a broad discretion to the courts to remedy unfair relationships arising out of consumer credit agreements, taken together with any related agreement.

206. Secondly, the intention of Parliament in enacting s.140A(5) was to exclude regulated mortgage contracts from the scope of the CCA unfair relationship provisions, on the basis that these are subject to their own regulatory framework.

207. None of this statutory background by itself makes it clear how the provisions should be interpreted when these two intentions come into conflict with one another, as they do where the related agreement in question is a regulated mortgage contract. For this purpose, it is necessary to consider the text, applying the principles of statutory interpretation as outlined above and having regard to the statutory background.

15. THE TEXTUAL ARGUMENTS

(i) TSB's textual arguments

208. Ms Tolaney on behalf of TSB offered a simple and straightforward argument on the interpretation of s.140A(5). This was that the words "*in connection with*" must be given their ordinary meaning, which was a wide one so that any identifiable connection with a regulated mortgage would be enough to invoke the application of the sub-section.

209. Ms Tolaney cited various cases to establish this principle including *Celestial Aviation Services Limited v Unicredit Bank GmbH* [2024] EWCA Civ 628, a recent Court of Appeal decision where, at [55], Falk LJ considered that the words "*in connection with*" are broad and cited a judgment of Rix LJ in *Campbell v Conoco* (UK) Ltd [2002] EWCA Civ 704, [2003] 1 All E.R. (Comm) 35 at [19] that:

> "the words "in connection with"… are widely regarded as being as wide a connecting link as one can commonly come across".

210. It may be noted, however, that Falk LJ still felt the need to look at the phrase in its context, as is apparent by the very fact that she went on to comment that they were being used, in the case before her, in conjunction with the phrase "*in pursuance of*", and that this indicated a clear intention to cast the net broadly.

211. Falk LJ went on to say:

> "I would also agree with Unicredit that the words "in connection with" do not require any form of legal dependence, for example by reference to principles of causation. Rather the question is one of factual connection."

212. In support of her proposition that the words "*in connection with*" must be given a wide meaning Ms Tolaney cited also *Eastern Pacific v Chartering* Inc *v Pola Maritime Ltd* [2021] EWHC 1707 (Comm) at [37], where Patricia Robertson QC (now KC) sitting as a Deputy Judge of the High Court said:

> "The language "in connection with" is naturally to be read as, if anything, wider than 'arising under', or variants on that phrase. "

213. Also on this point, Ms Tolaney cited *Anglo-Saxon Petroleum Co. Ltd v Admastos Shipping Co. Ltd* [1957] W.L.R. 500, where, at page 519, Devlin J (as he then was) said:

> "In *Renton v Palmyra Trading Corporation of Panama* [[1957] 2 W.L.R. 45; [1956] 3 All E.R. 957] the House of Lords held that the words 'loss or damage to or in connection with goods' in article III, rule 8, of the Hague Rules were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to 'in relation to' as 'in connection with'".

214. I think that Ms Tolaney provided more than enough authority for the proposition that the words "*in connection with*" are often taken by the courts to have a wide meaning.

215. However, the fact that the courts have applied these words in a wide manner does not mean that it will always be appropriate for the court to do so. The Claimants' counsel referred me to the Court of Appeal decision in *Lessees and Management Company of Herons Court v Heronslea Ltd & others* [2019] EWCA Civ 1423. In this case the Court of Appeal was considering the question whether an approved inspector carrying out a statutory function of checking compliance with building regulations was under a statutory duty under the Defective Premises Act 1972 to perform work in a workmanlike or professional manner. This turned on the question whether the approved inspector should be regarded as working "*for or in connection with*" the provision of the dwelling. The Court of Appeal, having been referred to various earlier decisions where the term "*in connection with*" had been interpreted broadly, nevertheless was not willing to apply a broad meaning in the context of the section of the Defective Premises Act 1972 under consideration.

216. Hamblen LJ, giving the unanimous decision of the court said at [37]

> "In my judgment little assistance is to be derived from other cases in which the words "in connection with" have been interpreted. As Mr Letman accepts, they are words that necessarily take their colour from the context in which they are used. Sometimes that will mean they are words of "the widest import", but on other occasions it will not."

217. He then went on to consider the use of the words within their context, paying careful attention to the remainder of the statute and having regard to the aims of the legislation.

218. Having regard to this precedent, and the principles of statutory interpretation outlined in section 13 in this judgment, I consider I should take a similar approach.

(ii) The Together Claimants' textual arguments

219. Mr Campbell had a number of arguments based on the text of the provisions.

220. First, he noted that s.140A(5) does not say that an exempt agreement cannot be taken into account in determining whether the relationship is fair.

221. Secondly, he noted that s.140A(5) does not say that an exempt agreement cannot be a related agreement and that it would have been very easy for Parliament to have made this clear if that was what Parliament had intended. He argued that if that was the intention of Parliament, Parliament would have dealt with the point in the drafting.

222. In fact, as Ms Tolaney later confirmed, the point had been conceded by TSB that an exempt agreement could be regarded as a related agreement and, as such, could be taken into account in determining whether the relationship is fair.

223. Thus, to the extent that the Exclusion of Consideration Contention was ever being put forward by TSB it is now withdrawn. I agree, and I find that s.140A(5) does not have the effect of excluding entirely consideration of the terms and operation of the Together Mortgages, where they are related agreements, even if they are exempt agreements, in judging the unfairness of the relationship arising out of the Together Loans or of the Together Loans taken with the Together Mortgages.

224. Mr Campbell's third point was that the words "*in connection with*" in subsection s.140A(5) track back to, or repeat, the wording in in s.140A(1). It was his submission that in the context of the CCA unfair relationship provisions, the words "*in connection with*" plainly mean something different to "*in relation to*" or "*relating to*".

225. This, in his submission, became clear when one considered the wording of s.140B(1)(a), where the same language: "*in connection with a credit agreement*" was being used. It was clear that the court's powers, to make an order "*in connection with a credit agreement*" included powers to make repayments of amounts paid under the related agreement, and it must follow that in doing so this did not prevent the order being regarded as being one "*in connection with the credit agreement*", rather than one "*in connection with*" the related agreement.

226. These observations, he considered, undermined, and were inconsistent with, TSB's case that the words "*in connection with*" when used within s.140A(5) must be given a wide interpretation meaning anything in relation to or in respect of a related agreement. He argued that the wording of s.140B makes it clear that an order may be made that does refer to, and, therefore is made *in relation to* a related agreement (including a related agreement that is a mortgage contract) but this does not prevent the order being regarded as one that is "*in connection with*" the loan agreement (and therefore, it is to be inferred not one made "*in connection with*" the related mortgage agreement).

227. Taken at face value, there was an assumption underlying his argument that if an order was made "*in connection with*" the loan agreement, it could not be an order "*in connection with*" the related agreement. This does not follow as a matter of logic. An order can be connected with more than one thing. Nevertheless, the point has some force in the context of a holistic interpretation of the provisions taken as a whole, having regard to the context of the purpose of the CCA unfair relationship provisions, which, as I have outlined, were to provide a broad protection to consumer credit borrowers from unfairness in their relationships with lenders.

228. Mr Campbell also referred in his oral argument to the case of *Smith v Royal Bank of Scotland,* which I have referred to above, and drew from the detail of this the point that I have already noted concerning the intentions behind the

introduction of the CCA unfair relationship provisions, to provide a more broadly based set of protections for debtors to apply wherever the relationship between the creditor and debtor arising out of the credit agreement (on its own or taken with any related agreement) is unfair to the debtor.

229. He drew attention in particular to the comment of Lord Leggatt at [53] that:

> "It is impossible to suppose that the regime under sections 140A - 140C of the 1974 Act was intended to operate in such a technical, complex and unsatisfactory way. And, as discussed already, it is clear on the face of the provisions that this is not how the statutory scheme works. Instead, technicality and strict time limits (until the relationship ends) have been eschewed in favour of a regime that gives the court broad, flexible, discretionary powers."

230. Mr Campbell also drew the court's attention also to the earlier case of *Plevin v Paragon Finance* [2014] UKSC 61; [2014] 1WLR 4222 where the Supreme Court again noted that the purpose of the unfair relationship provisions was to deal with the deficiencies in the extortionate bargain provisions.

231. These points all supported, he argued, the Together Claimants' argument that there is a distinction between "*in connection with*" and "*in relation to*" an order made. More particularly, just because an order is made by reference to or in respect of a related agreement under s.140B(1)(a) or (c), it is not made "*in connection with*" that related agreement – it is made in connection with the credit agreement to which it is related.

232. One of the arguments he used to support this contention was the principle "*Same words, same meaning; different words, different meaning*" as outlined by *Bennion* at section 21.3 as I have explained at [175] above.

233. The particular point based on this principle might be said to be undermined because there are a number of points elsewhere within the CCA 1974 where the term "*in connection with*" is being used within its ordinary meaning, see for example sections 14, 58, 60, 66A,84(3)(A); 85; 86B(b)(5)(b); 130A; 174A(4)(b); 179, 187A and 189. However, I think it is right to concentrate on the drafting within the CCA unfair relationship provisions themselves. These provisions were separately inserted into CCA 1974 by the Consumer Credit Act 2006 and it may be expected that when doing so Parliament would have been primarily focused on the words within this fairly self-contained set of provisions, rather than to have paid much attention to how words used within this provision were being used elsewhere. In taking this approach, I consider that I am in good company. The Supreme Court in *Smith v RBS* and in *Plevin v Paragon Finance* interpreted these provisions as effectively discrete new provisions, replacing the former extortionate credit bargain provisions.

234. As I understood it at the time, Mr Campbell's argument based on this principle enunciated by *Bennion* was that the words "*in connection with*" within these provisions had a specialist meaning that was different to a broad meaning of the

term that might be used in other statutes. The sense of his argument was that these words were being used to connote a connection with the loan that (by itself or taken together with a related agreement) gave rise to an unfair relationship, and not any wider types of connection.

235. In later submissions (after I had given both sides an opportunity to comment on the fact that the phrase "*in connection with*" is used widely elsewhere within CCA 1974), the Claimants' counsel explained that they were not contending for any special meaning of any of the phrases "*in connection with*", "*in relation to*" and "*relating to*", but merely making the general point that these words must be construed in their specific context. Nevertheless, I think it remained their point that the specific context required the court to acknowledge that the use of the words "*in connection with*" in s.140A(1) and in s.140B (where in each case the words clearly connote an attachment to the credit agreement that brings the CCA unfair relationship provisions into play) should carry over into the interpretation of the same words in s.140A(5).

(iii) Discussion of the Together Claimants' textual arguments

236. This argument is to some extent undermined when one considers one of the specific provisions within s.140B. In paragraph (1)(b) of that section one of the remedies that court may be able to consider is:

> "to require the creditor to do or not to do (or to cease doing anything specified in the order **in connection with** the agreement or **any related agreement**". (Emphasis added)

237. In other words, the words "*in connection with*" are being used in this paragraph specifically to denote something to be done in connection with the related agreement.

238. Mr Campbell accepted that in view of these words, it was untenable to say that an order made under s.140B(1)(c) that applied to a related agreement that was a regulated mortgage was not an order applying "*in connection with*" that regulated mortgage. However, in my view the implications of the use of these words in this paragraph are wider: they go towards undermining the proposition that the words "*in connection with*" used in s.140A(5) must be applied solely with a specialised meaning denoting a connection with the loan agreement on which the relationship between the borrower and the lender is focused and no other type of connection .

239. Nevertheless, in the context of a holistic reading of the CCA unfair relationship provisions, I do see some merit in the argument that the words "*in connection with*" in s.140A(5) should be read in the context of the same words within s.140A(1) and in the lead in to s.140B(1). In the words of Hamblen LJ referred to at [216] above I think they do take "*their colour*" from the context in which they are used in those other places.

240. Certainly, the primary reason for those words being used within the CCA unfair relationship provisions was to exclude a regulated mortgage agreement being

treated as a credit agreement that, of itself, could found the basis of an order under these provisions. I do not think that this means that the use of these words can have no other meaning, but this context in my view remains important in judging what would amount to a "*connection*" within this phrase as it is used within s.140A(5).

241. I view in a similar way Mr Campbell's argument that, because it is clear from the drafting of s.140B that even if an order affects a related agreement, it is nevertheless an order "*in connection with"* a credit agreement, it must follow that the order cannot be regarded as being "*in connection with*" anything else (such as a regulated mortgage). As I have mentioned, this point does not follow logically since something can be connected with more than one thing. Nevertheless, I do consider that in the context of a holistic reading of the provisions there is something in the point.

242. The point, in my view, is relevant to the *strength* of connection that is necessary for an order to be regarded as being "*in connection with*" a regulated mortgage. Because the primary use of the phrase within the CCA unfair relationship provisions relates to the connection with the credit agreement whose existence brings those provisions into play, within the context of a holistic reading, the court should be wary of taking a wide interpretation to the use of the same phrase where it is used within s.140A(5).

243. As is apparent from the judgment in *Smith v Royal Bank of Scotland* the point of an order under the CCA unfair relationship provisions is to rectify any unfairness in the relationship between the creditor and the debtor that arises out of a credit agreement or a credit agreement taken with any related agreement.

244. The order, therefore, under natural language, is made primarily, in relation to or in connection with, the unfair relationship. It is only in a secondary sense "*in connection with*" the credit agreement, although it must be regarded as being so because the phrase "*in connection with*" is used in this way within the drafting. The related agreement has an even less direct connection with the order as a potential contributor to the unfairness when taken with the original credit agreement.

245. Given the relative indirectness of the relationship between a regulated mortgage that is a related agreement and the order, I consider that something more than the fact that the related agreement has had some bearing on the framing of the order is necessary to reach the conclusion that the order is "*in connection with*" a related agreement that is a regulated mortgage and therefore is prohibited under s.140A(5).

16. CONCLUSIONS IN RELATION TO CCA ISSUE

246. Going back to the three possible contentions that I have outlined at [160] to [165] above, I consider that the proper reading of these provisions leads to the following conclusions.

247. First, as regards the Exclusion of Consideration Contention, I think it is accepted on both sides, and certainly it is my finding, that in undertaking the requirement of the court to determine whether there is an unfair relationship, the terms and conduct of a related agreement that is a regulated mortgage may be brought into consideration by the court. Undertaking a consideration of such matters in finding that there is an unfair relationship does not cause the order to be made "*in connection with*" a regulated mortgage that is a related agreement.

248. Secondly, as regards the Exclusion from the Assessment of Loss Contention, I do not consider that the effect of s.140A(5) would be to prevent the court from making an order under s.140B(1) for repayment of sums paid under (or adjustments to the terms of) the Together Loan and in doing so having regard to the unfairness between the parties arising from the Together Mortgage as well as the Together Loan. Such an order would naturally be said to be "*in connection with*" the unfair relationship that the court finds in relation to the loan agreement taken together with the mortgage agreement. It must also be said to be an order that is "*in connection with*" the loan agreement (as that is the terminology used within s.140B). But it would not in my view be an order "*in connection with*" the regulated mortgage merely because the court's assessment of the order required to remedy the unfairness in the relationship took cognizance of unfairness arising from the combination of the Together Loan alongside the Together Mortgage. That, in my view, is not a sufficient degree of nexus between the order of the court and the Together Mortgage to say that s.140A(5) applies.

249. The court is entitled to make an order to rectify the unfairness arising out of the relationship and it is doing that rather than making an order "*in connection with*" the Together Mortgage. The Together Mortgage is at least one stage removed from the order being made and this, in my view, is sufficient to say that the order is not being made "*in connection with*" the Together Mortgage.

250. I find this to be so both as a question of the natural use of language and having regard to the absurdity of a reading under which the court is allowed, and indeed required, to take account of the terms and operation of the mortgage as a related agreement in judging whether there is unfairness, but then is precluded from taking the unfairness deriving from the mortgage into account in assessing what remedy it gives.

251. However, when we come to the third contention, the "No Mortgage-Specific Remedies Contention", then here I see merit in TSB's case. If an order is made to repay sums paid under the mortgage (or to reduce sums payable in the future under the mortgage) it would be too great a departure from natural language to say that such an order is not an order "*in connection with*" the mortgage for the purposes of s.140A(5).

252. In reaching the construction above, as well as considering it to be justified through an analysis of the language of the provisions within their context, as I have explained, I consider that this structure best reflects the principles of statutory interpretation outlined above.

253. In particular, I am looking to reflect both:

i) the overall intention of the CCA unfair relationship provisions as explained by Lord Leggatt in *Smith v Royal Bank of Scotland* to provide a means that was less technical and which affords consumers with greater protection than the previous legislation relating to unfair relationships, and to focus on the unfairness of the relationship rather than the terms of a particular loan agreement or related agreement; and

ii) the specific purpose of the exemption in s.140A(5) to exempt regulated mortgages from being the subject of an order under these provisions, in the context that mortgages are separately regulated.

254. In reaching this conclusion, I am considering also the overall practical effect of this interpretation in relation to these two objectives. In my view, it provides the best fit in meeting both objectives. It allows an order that would provide full redress for an unfair relationship arising out of a credit agreement taken with the related agreement - up to the amount paid or to be paid under the credit agreement - but it does not allow for a form of redress that impacts directly on the regulated mortgage agreement itself, so as to give rise to an order that directly was "*in connection with*" the regulated mortgage agreement.

255. I acknowledge that it may lead to some degree of overlap in remedies between those provided under the consumer credit legislation and those provided through mortgage regulation, and to that extent might run counter to the policy considerations that caused s.140A(5) to be enacted. However, I consider that Parliament is more likely to have intended the possibility of some overlap than to have intended to leave the possibility of a gap in consumer protection where there is an unfair relationship arising from the consumer credit loan and a related agreement that is a regulated mortgage contract taken together but the point is not readily brought within the CCA unfair relationship provisions or the mortgage regulation regime taken individually.

256. To be clear about the implications of my findings I will take an example.

257. Suppose first that the relationship between TSB and a Together Claimant was found to be unfair because the combined effect of the Together Loan and the Together Mortgages had caused the Together Claimant to overextend himself or herself, with the result that he or she had become locked into paying mortgages at a higher rate than if the two offers had not been made and that this had caused them to pay higher rates of interest across the two loans than the Together Claimant would have done otherwise and to have been overextended in the amount of debt taken on. The result of my rulings above is as follows:

i) the court would be justified in considering the effect of the Together Loans in conjunction with the Together Mortgages;

ii) the court in assessing what order should be made in order to rectify this unfairness could take account of any loss or damage suffered by the Together Claimants whether it arose under (or primarily under) the

Together Loan or the Together Mortgage, or as a result of the two of them taken together;

iii) having assessed the loss or damage arising out of the unfair relationship the court could make an order under s.140B that compensated its assessment of such loss or damage, in particular it could:

a) order a repayment of amounts that had been paid under the Together Loan,

b) require the creditor to do, or to cease doing, anything specified in the order in connection with the Together Loan,

c) reduce or discharge any sum payable by the debtor by virtue of the Together Loan, and/or

d) set aside in whole or in part any duty imposed by the debtor by virtue of the Together Loan,

and in each case, the order could provide redress in an amount or manner that fully compensated all the loss that the Together Claimant had suffered as assessed at (ii) above; but

iv) the court could not make an order to repay amounts that have been paid under the Together Mortgage, or to discharge future obligations under the Together Mortgage, as such a remedy would undeniably be a remedy "*in connection with*" an exempt agreement.

17. CONCLUSION

258. There were originally three preliminary issues before the court.

(i) The Express Terms issue

259. This is the question whether TSB has breached the express terms of the Claimants' mortgage contracts by charging the Claimants interest rates based on what it describes as the "Whistletree SVR" and not on the "TSB SVMR".

260. I have answered this question as follows:

The Defendant has not breached the express terms of the Claimants' mortgage contracts by charging the Claimants interest rates based on the Whistletree SVR and not on the TSB SVR. The Whistletree SVR should be regarded as the continuation of the original SVR originally operated by Northern Rock, and not as a new rate.

(ii) The Implied Term issue

261. This was the question whether, as submitted by the Claimants:

> "It is an implied term of the Claimants' mortgage contracts that any discretion to set and/or vary interest rates should not be exercised dishonestly, for improper purpose, capriciously, or in a way in which no reasonable mortgagee, having the relevant discretion and in the context of the parties' expectations, acting reasonably, would do".

262. The parties have agreed, and I am pleased to confirm approval for, the slightly modified proposition that:

> It is an implied term of the Claimants' mortgage contracts that the discretion vary interest rates should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way in which no reasonable mortgagee, acting reasonably, would do.

(iii) The CCA issue

263. This is the question whether s.140A(5) CCA 1974 precludes an order being made under s.140B(1) in relation to a regulated mortgage contract or quantified by reference to sums payable under a regulated mortgage contract, irrespective of whether that regulated mortgage contract is the "credit agreement" or a "related agreement".

264. I answer this question as follows:

265. Section 140A(5) CCA 1974 does preclude an order being made under s.140B(1) in relation to a regulated mortgage contract (entered into on or after 31 October 2004) or quantified by reference to sums payable under such a regulated mortgage contract, where that regulated mortgage contract is the "credit agreement" in question.

266. Where such a regulated mortgage contract is not the "credit agreement" in question but is a related agreement to another credit agreement that gives rise to a relationship between the borrower and a lender:

i) the court, in undertaking its determination whether there is an unfair relationship, may have regard to the terms and conduct of such a related agreement and if it does find that there is an unfair relationship on the basis of considerations that include such considerations relating to such a regulated mortgage, this does not cause any order made by the court in consequence of this to be "*in connection with*" the regulated mortgage for the purposes of s.140A(5);

ii) the court, in undertaking its assessment of the loss and damage arising from any unfair relationship may have regard to loss or damage arising under the terms and conduct of such a related agreement in addition to that arising from the loan agreement to which it is related or from the combination of both loans and may make an order for repayment of sums paid under the loan agreement or any other remedy allowed by section 140B that has an effect on the loan agreement to compensate fully all

such unfairness, and where the court does so this does not cause the order to be made "*in connection with*" such regulated mortgage for the purposes of s.140A(5) (even where the related agreement is a regulated mortgage entered into on or after 31 October 2004); however

iii) the court would breach s.140A(5) if it made an order to repay amounts paid under the regulated mortgage or sought to apply any other remedy allowed by section 140B that has an effect on the regulated mortgage itself if the related agreement is a regulated mortgage entered into on or after 31 October 2004.

267. A consequentials hearing should be set at the earliest convenience of the court and the parties to deal with any matters consequential upon this judgement, including the settling of a form of order and any application for costs.