Claim No K10CL243

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 9 June 2025

Before :

HIS HONOUR JUDGE MONTY KC

- -

Between :

AZZA KHARROUBI

Claimant

- and -

(1) HERTFORD SOLUTIONS LLP
(2) KINSAT ENTERPRISES LIMITED
(3) TARN & TARN LIMITED

Defendants

- -

Mr Keith Chipato (instructed by **Ezran Law**) for the **Claimant**
Mr Jaysen Sharpe (instructed by **Freeths LLP**) for the **First and Second Defendants**

Hearing dates: 19-23 May 2025

- -

Approved Judgment

HHJ Monty KC:

Introduction

1. In July 2020, the Claimant defaulted on a six-month £112,000 bridging loan which she had taken out in January 2020. As a result, interest began running on the unpaid amount at the default rate set out in the loan agreement. £80,000 was in due course repaid but an outstanding sum remained and it has substantially increased in accordance with the terms of the loan as no further payments have been made. The loan was secured by a first charge on the Claimant's property.

2. By this claim, it is asserted that that loan agreement was unenforceable, for the following reasons: (a) the loan agreement was between the Claimant and the First Defendant, and the Second Defendant cannot therefore enforce it; (b) certain terms of the loan agreement rendered it an unconscionable bargain, and it should therefore be set aside; (c) the loan agreement should be set aside because of undue influence and/or duress; (d) the loan agreement is unenforceable because of section 26(1) of the Financial Services and Markets Act 2000; and (e) the default interest rate under the loan agreement is unenforceable as it is a penalty.

3. The First Defendant was (as I shall go on to explain) named in some of the documentation, but was not the lender nor does it appear to have had any actual involvement.

4. The loan was advanced by the Second Defendant, and the charge over the property is in the name of the Second Defendant.

5. The Third Defendant is the receiver appointed by the Second Defendant. By an order of 9 February 2021, the Third Defendant was debarred from defending and has played no part in the proceedings. No relief is sought against the Third Defendant.

References

6. In this judgment, I shall use the following references where appropriate:

Mrs Kharroubi	Mrs Azza Kharroubi, the Claimant
HSLLP	Hertford Solutions LLP, the First Defendant
KEL	Kinsat Enterprises Limited, the Second Defendant
HS	Hertford Solutions, the trading name of KEL
Mr Izzet	Mr Taskin Izzet, director of KEL
Mr Zivancevic	Mr Alexander Zivancevic, a partner in Patron Law, a firm of solicitors
FSMA	Financial Services and Markets Act 2000

Background to this claim

7. In the briefest of summaries, the facts are these.

8. On 9 January 2020, Mrs Kharroubi met Mr Zivancevic, having been introduced by a third party. Mrs Kharroubi wanted a loan urgently, and Mr Zivancevic contacted Mr Izzet. There is a dispute as to whether a broker, Mr Bah, was involved in this process. This led to an in principle offer of a loan. Mr Zivancevic's firm, Patron Law, acted as Mrs Kharroubi's solicitor. On 10 and 13 January 2020, Mrs Kharroubi signed a number of documents, including a loan application form, the formal loan offer and a declaration of business exemption under certain provisions of FSMA, having said in the application form that the loan was for business purposes. Mr Izzet's company, KEL, is a specialist lender providing short-term bridging finance to businesses. KEL is not a regulated lender under FSMA and only makes unregulated loans for business purposes. On 13 January 2020, KEL advanced Mrs Kharroubi the net amount of £89,200, the gross loan sum of £112,000 having been subject to a number of deductions, principally the interest on the loan down to the repayment date as well as various fees and costs, including a broker's fee. The loan was repayable in 6 months. KEL took a first charge over Mrs Kharroubi's property, 65 Pioneer Avenue, Burton Latimer NN15 5LJ. Mrs Kharroubi had bought it from Kettering BC in December 2015, but in 2019 she moved out to 118 Cadbury Road, Sunbury on Thames TW16 7LR and let out 65 Pioneer Avenue to a tenant.

9. When the term of the loan expired on 12 July 2020, it was not repaid. There was some attempt to refinance or extend the loan but that came to nothing. In September 2020, Mrs Kharroubi paid KEL £80,000 which she says she did to stop the property being put into an auction for sale. Nothing further has been paid.

10. This claim was issued on 8 March 2021 in the High Court and was in due course transferred to the County Court at Central London.

11. The trial took place in person before me on 19-22 May 2025 (the first day was a reading day), with a further short remote hearing on 23 May to deal with one point on exemption declarations under FSMA. Mr Chipato of counsel represented Mrs Kharroubi and Mr Sharpe of Counsel represented HSLLP and KEL. I am most grateful to them both for their detailed skeleton arguments and oral submissions.

The witness evidence

12. I shall set out my findings of fact when I deal with matters chronologically later in this judgment, but I do need to say something here about the two witnesses of fact from whom I heard evidence.

13. I bear in mind when considering the evidence that the events in dispute go back to 2020, and that memories can fade and change even over such a relatively brief period. In assessing the oral evidence, I have at the forefront of my mind the observations about the fluidity and malleability of recollection made by Leggatt J as he then was in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 at [15-22], and also the need to look at the contemporaneous documentation and to test the evidence against that documentation, paying particular regard to the parties' motives and to the overall probabilities; see also the judgment of Robert Goff LJ (as he then was) in *The*

Ocean Frost [1985] 1 Ll Rep 1 at [57]. I do not think I need to set any of those passages out in this judgment. My task is to assess the evidence in its totality and to reach conclusions as to what is more likely than not to have happened, on the balance of probabilities. In so doing, as I have just said, I bear in mind what was said in *Gestmin* and *The Ocean Frost* (and the many other cases in which those judgments have been cited).

14. Mrs Kharroubi is an Arabic speaker and she gave evidence through an interpreter. She accepts that she speaks conversational English (she was born and was educated in Tunisia, and has lived in the UK since 2001) but she required the services of an interpreter at trial because she has difficulties with technical or legal language.

15. Mrs Kharroubi's witness statement was prepared in Arabic and signed by her, and there was a certified copy of the translation in the bundle. The Arabic version was apparently prepared in Tunis, which is where Mrs Kharroubi signed it, and it did not contain the heading of the action nor did it have a statement of truth as required by CPR 22. This being a case in our Business & Property List, the witness statement was also required to comply with PD57AC, which sets out what must be contained in statements to which that PD applies and gives guidance as to what such a statement should contain. A further version of the witness statement was also signed by Mrs Kharroubi. This version is in English and does contain both a statement of truth and the confirmation of compliance and certificate of compliance with PD57AC (precisely how that PD could have been complied with in the circumstances is not entirely clear). This process was plainly unsatisfactory, because the Arabic version should have contained all of that – and have been certified as PD57AC-compliant by a solicitor – so that the Arabic version could be complete and could be signed by Mrs Kharroubi, and then translated into English.

16. Mr Sharpe was highly critical of all of this. At the start of the trial, he attempted to persuade me that I should strike out Mrs Kharroubi's statement in its entirety because of these defects. I declined to strike out the statement. I took the view that the defects, regrettable as they were, could be dealt with by Mrs Kharroubi confirming in the witness box, through the interpreter, that the facts in her statement were true and that she understood that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth (which is the wording of the statement of truth, which Mrs Kharroubi had signed in the third, English, version of her statement), and this is how we proceeded.

17. That is not to say that the taking of Mrs Kharroubi's evidence was entirely without its problems. There were occasions when Mrs Kharroubi would say something to the interpreter, who would respond to her in Arabic without first translating what she had said, and several times I had to remind the interpreter not to do that. Having said that, I am grateful to the interpreter, Mr Fouad Abdelrazek, particularly as Mrs Kharroubi's evidence took the best part of 1½ days. Overall, I am satisfied that Mrs Kharroubi was able to give her evidence as she would have wished with the assistance of Mr Abdelrazek.

18. In the course of her evidence, there were a number of occasions when Mrs Kharroubi clearly understood the questions she was being asked in English, which was particularly noticeable when she started answering (in Arabic) a fairly detailed question I had asked

before it had been translated for her. There were also times – more than just a few – when Mrs Kharroubi corrected Mr Abdelrazek's English translation.

19. It is of particular note – as I shall go on to observe – that in January 2020 Mrs Kharroubi had not at any time asked Mr Zivancevic if she could get a translation of the many documents she was asked to sign. In cross-examination, Mrs Kharroubi said that she often had the assistance of a friend, Mr John Haddad, to translate for her, and gave the example of visits to her accountant which Mr Haddad attended and assisted her with translation. However, there was no suggestion in her witness statement or her oral evidence that Mr Haddad was at either of the two meetings Mrs Kharroubi had with Mr Zivancevic, and Mrs Kharroubi was not asked if Mr Haddad was involved.

20. As her evidence progressed, I formed the view that Mrs Kharroubi's understanding of English was greater than she was prepared to admit, although I accept that it was appropriate for her to have used an interpreter at this trial.

21. I regret to say that Mrs Kharroubi was a very poor witness, even giving all proper allowance for the fact that her evidence was through an interpreter. I will deal with her evidence later in this judgment, but by way of example:

    (1) In her statement, Mrs Kharroubi said that she had taken a tenancy of 118 Cadbury Road, whereas in fact the tenant was a company and she was simply a permitted occupier.

    (2) Mrs Kharroubi said nothing in her statement about the fact that she was a director of two companies and had been a director of other companies as well; one of the companies (set up after the events in January 2020) was a financial services company, but Mrs Kharroubi sought to distance herself from any involvement in that, saying that it belonged to a friend of her brother's; nonetheless, she was its sole director. Mrs Kharroubi's principal company, AK Services and Solutions Limited, certainly appears to have been operated by Mrs Kharroubi, as well as a taxi company called London's Voice Limited, although she denied in cross-examination that she was a businesswoman. When it was put to her that the financial services company, Aram Commercial Limited, had at least been operated by her on behalf of her brother's friend, Mrs Kharroubi did not give a direct answer, but rather she asserted that it never did any work at all, and that all of the companies were loss-making. It is clear that Mrs Kharroubi was far more experienced in business than she was prepared to accept.

    (3) Mrs Kharroubi gave evidence in cross-examination in some detail about conversations with Mr Zivancevic, none of which was in her witness statement although they related to crucial parts of her case.

    (4) The allegation in the Particulars of Claim was that Mrs Kharroubi had not signed any of the relevant documents but had been asked by Mr Zivancevic to sign some blank pieces of paper, which (she alleged) had then been dishonestly used by Mr Zivancevic on the documents to represent that she had signed them when in fact she had not. It was also alleged that Mr Zivancevic had signed the application form. In Replies to a Request for Further Information, this had changed to a contention that whilst it was no longer

asserted that the solicitor had signed the application form, it was her case that she "signed documentation in blank", which of course is not the same as the earlier assertion that she signed blank pieces of paper (plural) In her witness statement, Mrs Kharroubi said that she was told by Mr Zivancevic to sign a blank piece of paper (singular) and also several documents at the first of her two meetings, and then that at the second meeting she was also told which documents to sign. In cross-examination, Mrs Kharroubi accepted that she did in fact sign all of the documents save for the declaration of exemption, which she said was her signature which she had put on a blank page, and the wording had later been added. She also said that she did not know if it was her signature on the CH1 charge form or the RX1 application to enter a restriction form. For the reasons I will go on to set out in more detail below, it is plain that Mrs Kharroubi did indeed complete the application form, and I cannot accept her evidence that Mr Zivancevic dictated its contents to her. I also have concluded that Mrs Kharroubi signed all of the documents, including the declaration and the CH1 and RX1. In the case of the declaration, I simply cannot accept as true that she signed a blank piece of paper which happened to be in the exact correct place on the completed document.

(5) In the application form, which I find as a fact was completed by Mrs Kharroubi without any prompting by Mr Zivancevic (save for the broker's name, which was written on the form by Mr Zivancevic), the purpose of the loan was said to be "House Refurbishment, Business Float" and "Refurbishment of the House, Business float." Mrs Kharroubi described herself as "Company Director" with an income of £25,000. She said that the loan would be repaid by "House sell [*sic*] or Mortgage let to buy [*sic*]" and that the interest would be funded "from selling the House/Mortgage let to buy [*sic*]". In her evidence, however, she said that the loan was not really for business purposes (she said that it was really to pay off personal debts, and she intended to use some of it to take her children on holiday) and there was no evidence that the property needed refurbishment. There was no evidence to support an income of £25,000 per annum. Mrs Kharroubi had no intention of selling the house. Mrs Kharroubi said that this form was completed under instructions from Mr Zivancevic, but I reject this, as he could not possibly have had the knowledge about Mrs Kharroubi's circumstances to have done so. Having completed the form, Mrs Kharroubi said in her oral evidence that she told Mr Zivancevic it was all wrong, and she wanted it back, but Mr Zivancevic said he would keep it in a drawer and she was not to worry. None of this is remotely plausible and had it been true, it would have been in her statement.

(6) Mrs Kharroubi asserted that she had, at Mr Zivancevic's instruction, completed multiple application forms, but when asked to say what they were, was only able to point to documents such as the loan offer and the Patron Law letter of advice.

(7) Mrs Kharroubi referred several times to "fraudulent lawyers" (which was a theme of her witness statement and her oral evidence). She was referring not only to Mr Zivancevic and Patron Law but also to her former solicitors who had earlier been acting for her in the present litigation, Thakrar & Co.

Although Mrs Kharroubi did not include in this description Mr Marc Beaumont, a barrister who had until fairly recently been acting for Mrs Kharroubi, she was quick to blame him over what she said were inaccuracies in the pleadings. I thought all of this blame-casting was misplaced and an attempt to deflect matters away from the true position which was that Mrs Kharroubi had entered into this loan – on her own evidence without reading any of the documents, although as I shall go on to say, I rather doubt that is true, and having misrepresented the true position – and was unable to repay it, so has gone on the offensive against all of the professionals involved. It is particularly of note that at the centre of Mrs Kharroubi's ire is Mr Zivancevic and Patron Law, but no claim has ever been brought against them. This has significance in the context of the present claim, as I shall go on to explain later in this judgment.

(8) Mrs Kharroubi's evidence was that she was the victim of a scam perpetrated by Mr Zivancevic. If Mrs Kharroubi truly believed that she had been the victim of a scam, she would not have been involving Patron Law any further. However, when the repayment date was approaching, Mrs Kharroubi was corresponding with Mr Zivancevic about a further loan from the same lender or from a different lender. I do not believe her evidence about her thinking, from a fairly early stage, that this was a scam. In my view, this is an invented piece of evidence designed to distance herself from the transaction.

(9) Fairly early on in her oral evidence, it was put to her that Patron Law were her solicitors. Mrs Kharroubi said: "I didn't sign anything. They are not my solicitors. He was not my lawyer. I only went to him to get my loan." This was patently untrue. Mrs Kharroubi then accepted that she had in fact instructed Patron Law and that Mr Zivancevic was indeed her lawyer.

22. I do not need to return to all of these examples when I consider the evidence as part of the chronology, because some of them are peripheral and I need to focus on findings of fact which go to the issues in the case. Nonetheless, the clear picture is that Mrs Kharroubi is not a reliable witness. In my view, she was fully advised about this transaction, and knew what the consequences would be if she did not repay the loan on time; but has now invented a story about being pressured into the loan by a solicitor who she has chosen not to sue.

23. Mr Izzet gave evidence on behalf of HSLLP and KEL. Mr Izzet is a former solicitor who was struck off the Roll in January 2009, and was unsuccessful in his appeal against that decision in November 2009. Mr Chipato sought to attack Mr Izzet's credibility on that basis, but I thought that criticism a little unfair. As appears from the decision of the Divisional Court dismissing his appeal against the striking off, whilst the relevant conduct was serious enough to justify the decision (it included non-compliance with accounts rules and failure to comply with undertakings), none of the matters in which Mr Izzet had been involved at his then firm involved dishonesty. Further, the matters in question were a long time ago.

24. Mr Izzet was frank to admit an error in the current transaction. In his statement, he accepted he sent the wrong application form, as instead of naming HS as the lender, it named HSLLP, and he said this was because he had accidentally used an old version of

the form. In cross-examination, he frankly and without hesitation accepted that he should have picked this up and corrected it.

25. Mr Izzet emphasised that whilst he had little recollection of the details of this transaction, he did recall speaking to Mr Zivancevic and to the broker, Mr Bah (of whom more later) and I thought his explanation of the transaction and of his understanding was clear and believable. Where he could not recall, he said so, and was not tempted to speculate.

26. Mr Izzet's credibility was not challenged by Mr Chipato in cross-examination. In my view, Mr Izzet's evidence is to be accepted.

27. As Mr Chipato observed in closing submissions, this is not a case where I am being asked to prefer one side's evidence over the other, as Mr Izzet had no direct dealings with Mrs Kharroubi. Mr Chipato also said that I should not prefer Mr Izzet over Mrs Kharroubi as a witness simply because he is a professional, and of course I would not do that. But the fact is that Mr Izzet was a reliable witness, and Mrs Kharroubi was not.

Chronology of events and factual findings

28. This section of my judgment sets out my factual findings as part of the chronological sequence of events.

29. In 2019, Mrs Kharroubi had moved out of 95 Pioneer Avenue because, due to marital difficulties, she had been advised to leave Kettering for another part of the country. She rented 118 Cadbury Road, and was eventually able to rent out 95 Pioneer Avenue, but the rent received was substantially less than the rent she was paying and she was in receipt of Housing Benefit and had to borrow from friends and family. Mrs Kharroubi was also in debt and particularly she owed around £7,500 to Vodafone. Mrs Kharroubi's company, AK Services and Solutions Limited, was loss-making. Mrs Kharroubi was desperately in need of money.

30. Mrs Kharroubi told a close friend of hers, Mustafa Mosawy, about her situation and he arranged for her to meet Mr Zivancevic on 9 January 2020. Mr Mosawy suggested that she could make use of the value of 95 Pioneer Avenue, which she told him she had purchased at a discount from the Council, as it would be worth more than she had paid for it.

31. In the meantime, on 8 January 2020, Mr Izzet received a telephone call from a Mr Bah, who was a broker with whom his company had done business in the past, and Mr Bah told Mr Izzet about Mrs Kharroubi's requirements in broad outline, including giving details of the proposed security (95 Pioneer Avenue). Mrs Kharroubi denied any knowledge of Mr Bah or his involvement in any of this, but I accept Mr Izzet's evidence that he spoke to Mr Bah and was told what I have summarised above. In the later documentation which was drawn up (as set out below), Mr Bah was named as the broker, and was paid a broker's fee for the transaction. In my view, it is likely that Mr Mosawy must have contacted Mr Bah, who then contacted Mr Izzet, as there seems to be no other way by which Mr Bah could have called Mr Izzet with that information unless Mrs Kharroubi is not telling the truth and she contacted Mr Bah herself (but I do not think that happened; I accept that Mrs Kharroubi knew nothing about Mr Bah at this point in time).

32. Mrs Kharroubi then met with Mr Zivancevic on 9 and 10 January 2020. Mrs Kharroubi says that the meeting was on 9 January, and that Mr Zivancevic told her to come back the next day to sign documents, but she was unwell, and therefore came back on 13 January. I do not think this can be correct. The application form was not sent to Mr Zivancevic from Mr Izzet until 15:17 on 9 January, which must have been after the meeting, and was sent back completed together with various proof of identity documents provided by Mrs Kharroubi on 10 January at 13:52. There is also a handwritten attendance note by Mr Zivancevic of a meeting with Mrs Kharroubi on 10 January recording that she brought in various documents. I find as a fact that there was an initial meeting on 9 January at which Mrs Kharroubi told Mr Zivancevic about her requirements, and Mr Zivancevic asked her to return the next day with her documents, which she did.

33. Mrs Kharroubi said that she tried to explain "her life" to Mr Zivancevic but he told her not to worry, he could arrange a loan of £112,000 within 24 hours, all she had to do was "come back the next day and sign some papers". Mr Zivancevic told her it would be a 6-month loan, and that he would introduce her to someone called Steve Tappin who would then "arrange a cheap long-term loan" which would enable her to repay the 6-month loan. Mrs Kharroubi says that she thanked Mr Zivancevic profusely, and that she told him the loan would be used "to pay off my other debts including my phone bill." The meeting was conducted in English. Mrs Kharroubi says that Mr Zivancevic told her he was very busy and had a lot of work, and persuaded her to sign a blank piece of paper, giving her "10 minutes to go through the file and sign it so I didn't have a chance to go through all the documents and he pointed his finger at the places I needed to sign quickly."

34. On 9 January, there were no documents from any proposed lender, and I do not accept that Mrs Kharroubi can have signed any documents on that occasion.

35. On 9 January 2020, Mr Izzet sent an email to Mr Zivancevic referring to "our earlier conversation" and confirming that "we are prepared in principle to lend the sum of £112,000 gross for a period of three months to be secured by way of above property" (the email header refers to 95 Pioneer Avenue). The email sets out the sums that would be deducted from the gross sum on drawdown. These comprised a 3% arrangement fee, the total interest payment at 2% per month, a broker's fee of £3,500, lender's legal fees of £2,000, admin fees of £500, leaving a net amount to be advanced on drawdown of £95,920 (the email assumed a 3-month loan; in the event, it was agreed at 6 months, and so the interest deduction was higher when drawdown actually took place). Clearly the conversation between Mr Izzet and Mr Zivancevic cannot have taken place before Mr Zivancevic had met with Mrs Kharroubi and ascertained what she needed and what was going to be the security property. The email attached an application form.

36. The application form is headed "HERTFORD SOLUTIONS LLP". Mr Izzet had inadvertently used the wrong form; he meant to send a form headed "HERTFORD SOLUTIONS", as the lender was going to be KEL, which traded as HS, and HSLLP was to have no involvement in this transaction. I accept Mr Izzet's evidence that providing the wrong form was a simple error. In my view, as I shall go on to explain, HSLLP was not the lender, nor was it ever intended to be.

37. The application form was then completed in Mrs Kharroubi's handwriting, and signed by her at the foot of each of its 6 pages (save for page 5 which would have been for a

second applicant had there been one). At the top of the first page, next to "BROKER DETAILS", appears the name "MAHMOUNATA BAH". Mrs Kharroubi says that is not in her handwriting, and she is right about that; I think (by comparison with his attendance notes) it is in Mr Zivancevic's handwriting. However, everything else in the form is in Mrs Kharroubi's handwriting. Mrs Kharroubi gave her occupation as company director and gave an income of £25,000; she said that the funds would be used for "house refurbishment business float" and that the loan would be repaid by "House sell/ or mortgage let to buy". She confirmed that 95 Pioneer Avenue was rented and the occupant was not related to her, and she gave her business as "AK Service & Solutions Ltd" "Import/Export".

38. Mrs Kharroubi also signed a declaration at the end of the application form which stated:

> "It is important you ensure that the details provided in this Application Form are correct and that you have read and understood the contents of this declaration. By signing this Application Form you confirm that the information in it is correct.
>
> To: Hertford Solutions LLP
>
> I/We Have completed or fully read the contents of this Application Form and warrant and declare that the information contained therein is true and accurate to the best of my/our knowledge and belief."

39. The date below Mrs Kharroubi's signatures was 10 January 2020.

40. I reject the suggestion that Mr Zivancevic told Mrs Kharroubi what to put on the application or that he dictated it to her. He could not possibly have known the information set out there. I do not accept that Mr Zivancevic would have said "let to buy" rather than "buy to let" (Mrs Kharroubi said, in relation to that point, that "I just wrote what he said"). In my judgment, the content and wording of the application form came from Mrs Kharroubi alone.

41. In cross-examination, Mrs Kharroubi said this:

> "I told Alex this paper is wrong and it should be returned back to me. He said, 'Don't worry, I will keep this in my pocket'."

42. Later, Mrs Kharroubi said:

> "I have proof, I have a document asking him to send me back this paper. It is among messages exchanged between us."

No such message had been disclosed. Mrs Kharroubi said they were on her mobile phone, but she could not find them as she had changed her mobile. She then said that she had taken screenshots of the messages, and that they were in the cloud and she had been "looking for them over the last few days. No-one asked me to look for them, they only asked me for emails." Mrs Kharroubi then said that she had given all her documents "to the High Court", and that she had messages on her phone which she could show the court. I do not accept that any of this rather confusing explanation is true.

43. Mrs Kharroubi also said:

> "I asked Alex who Mia Bah is, several months later, when I realised this was a fraud. I sent an email to Alex."

Again, no such email has been disclosed.

44. Mr Zivancevic's attendance note dated 10 January records that Mrs Kharroubi had provided her passport and driver's license, council tax and bank statements, and a copy of the tenancy agreement. The note also records:

> "I have made it clear that Patron Law is not a broker / but acts independently – client understood."

45. Mr Zivancevic then sent the completed application and the supporting documents to Mr Izzet on 10 January 2020 at 13:52, saying: "If all acceptable to you, please issue the offer."

46. Shortly thereafter, at 14:45, Mr Izzet sent the mortgage offer, the RX1 and the CH1 by email to Mr Izzet "for execution in preparation for completion."

47. The mortgage offer is contained in a letter addressed to Mrs Kharroubi dated 10 January 2020. The letter comprises 7 numbered pages. It is on the headed notepaper of HSS. At the foot of the page is the text "Hertford Solutions is the trading name of Kinsat Enterprises Limited" and the company registration number and registered office for KEL is set out.

48. The offer letter names HS as the Lender, and Mrs Kharroubi as the Borrower. The amount of the advance is "£112,000 for a period of six (6) months". Interest "will be charged at the rate of 2% per month for the first six months. The six (6) months interest will be deducted from the advance on drawdown." The letter sets out the following under paragraph 5, Fees and Costs (I have omitted part of (g) and all of (h):

> "(a) Facility Fee of 3% (£3,360) of the advance will be deducted from the advance on drawdown, 2% (£2,240) will be paid to the Lender and 1% (£1, 120) will be paid to MAI BAH,
>
> (b) Brokers Fee of £3,500 will be paid by the lender to MIA BAH (your agent in this matter) and deducted from the advance on drawdown.
>
> (c) Exit Fee equivalent to two (2) months interest is to be paid to the Lender
>
> (d) A fee of £500 will be paid to the Lender and deducted from the advance to cover Bank Electronic Transfer costs, Personal References and Searches.
>
> (e) The legal and professional fees of the Lender will be paid by the Borrower, on an indemnity basis regardless of whether or not the loan is completed; In the event the loan is completed, the fees will be deducted from the loan advance on drawdown
>
> (f) The Borrower will be responsible for any and all legal and professional fees of the Lender (on an indemnity basis) in relation to the recovery of sums due to the Lender under the terms of this offer or otherwise
>
> (g) In the event of default, higher lending charges will be incurred being an increase in the monthly interest to 5% per month or pail thereof, compounded and the Exit Fee will be increased to 5% of the Loan amount outstanding on the

> day of redemption. The Lender shall have the power to appoint any person or persons as it thinks fit to be a receiver or joint receivers of the Charged Property or Borrower."

49. At paragraph 6 of the letter, there is a summary of those fees and costs which are to be deducted from the advance as set out in paragraph 5. These total £27,280.

50. Paragraph 7 states that the "Purpose of Loan" is "Business cash flow".

51. Paragraph 8 sets out "Conditions Precedent" which include a confirmation that the mortgaged property is for investment purposes only and is let on an assured shorthold tenancy, and that the borrower will comply with all terms of the mortgage offer.

52. Paragraph 9 states that there is to be a first legal charge over 65 Pioneer Avenue.

53. Paragraph 11 sets out the following under the heading "Special Conditions" (I need to set out only the first two sub-paragraphs):

> "(a) A Valuation report on the property to be taken as security for the loan is to be provided by surveyors approved by the Lender. The Valuation report is to be addressed to Hertford Solutions
>
> (b) Return of the original, fully completed and signed application form by the Borrower."

54. Paragraph 12 is headed "Independent Legal Advice":

> "This offer, once accepted, is a binding legal agreement. Before signing this agreement you are advised to seek independent legal and financial advice about the terms and conditions of the intended loan facility and the nature of the obligations that you will enter into.
>
> Your property may be repossessed if you do not adhere to the terms of repayment of this Mortgage.
>
> …
>
> This offer is conditional upon all of the Special Conditions and Conditions Precedent being satisfied and acceptance within 7 days of the date of this letter.
>
> If you have any queries regarding this offer, please do not hesitate to contact either your Broker direct or this office.
>
> Please sign the Certificate of Acceptance overleaf to show your agreement to all of the Terms and Conditions of this Loan Offer."

55. The letter is signed "For and on behalf of HERTFORD SOLUTIONS".

56. Numbered page 7 of the letter is headed "Certificate of Acceptance" and it continues, "I HAVE READ AND FULLY ACCEPT THE TERMS AND CONDITIONS OF THE ABOVE OFFER". Mrs Kharroubi's name is printed under the space for a signature, and the word "Dated" appears immediately below.

57. On 10 January 2020, there was a further meeting between Mr Zivancevic and Mrs Kharroubi at Patron Law's offices. A paralegal called Mohammed was in attendance.

There is a handwritten attendance note, in Mr Zivancevic's handwriting. Mrs Kharroubi, in cross-examination, said several times that she did not see Mr Zivancevic write anything at the meeting, which she said took no more than 10 minutes and comprised Mr Zivancevic telling her to sign various documents, which she did at his request and without reading them. I do not accept her version of this meeting. The attendance note reads, as one might expect, as a note compiled immediately after the meeting rather than during it. The note is on its face a comprehensive summary of the meeting. It includes the following:

> "The loan has been explained for a 3 month period or 6 month period
>
> The client is aware of the interest any legal fees [illegible] taken out at the outset. It is explained that once the decision is made the legal implications will be re explained.
>
> The client has explained that she will take the 6 month loan. The client's intention is to refinance with Santander normal mortgage with standard interest rates.
>
> Facility fee, exit fee, legal costs and interest will be deducted. This was explained to the client.
>
> … We act independently and cannot get involved in the negotiations with brokering a deal.
>
> No one in our firm can advise on the content of the loan or whether it is right or not. This is for you (the client) to decide. It is only for us to advise you legally.
>
> Even if you (the client) pay back within 6 months or less the exit fee will be paid.
>
> This is a commercial loan [illegible] is <u>not</u> a regulated loan by the Consumer Credit Act. [The note goes on to set out the difference between regulated and unregulated loans].
>
> Mohammed has explained that if the product is not right, then the client should not proceed.
>
> We can put in touch with a broker but we cannot recommend a product or whether a product is suitable.
>
> Client is satisfied and proceeded to sign the RX1 and Charge. The client has been explained the Charge and RX1 and understands the legal implications."

58. There are two letters to Mrs Kharroubi from Patron Law dated 10 January 2020 (the first, the engagement letter contains the year 2019 but is accepted that was a typographical error).

59. The engagement letter sets out the following under the heading "Your Instructions":

> "You have instructed us to provide legal advice and assistance to you in respect of the above matter.
>
> Our scope of work at this stage will be limited to the following:
>
> a. The nature and scope of your obligation under the Mortgage and advising you on the legal and practical implication of borrowing money
>
> b. The consequence of breach of any terms and conditions of the mortgage

> c. Dealing with the lender's requirements, completing the transaction and accounting to you.
>
> d. Generally conducting and concluding the transaction
>
> You may seek a progress report from us at any stage in this matter.
>
> Our responsibilities to you are set out in this letter and our Terms of Engagement. Your responsibilities to us include providing us with clear, timely and accurate instructions. …"

60. The second is a 6-page letter of advice from Patron Law addressed to Mrs Kharroubi. I will set out most of that letter below (the sections I have underlined below appear in red in the original):

> "Please read this letter carefully. It contains important information, advice, warranties and agreements on your part and you will be required to sign this letter. By signing this letter, you will be further confirming your instructions to us to act for you in the matter and that you have read and understood all matters contained in this letter.
>
> 1. Please note that we do not act for your broker nor do we act for your lender. We act for you and you only. We are totally independent from the Lender.
>
> 2. We have received the Loan Agreement/ Loan Offer ("Loan Agreement") and the Legal Charge ("Legal Charge") and Restriction Application ("RX1"). I enclose copies of these documents.
>
> 3. As per the Loan Agreement, you are borrowing £112,000.00 the Loan") from the Lender for a term of 6 months ("Loan Term") at the monthly rate of 2%, and a default rate of interest of 5% per month on interest only basis.
>
> 4. We are not financial advisors and therefore cannot and will not advise you on the suitability of the loan for your purposes. We will only advise you on the legal and practical implications of you entering into the Loan Agreement which will be secured on your above mentioned Property by way of a Legal Charge ("Legal Charge").
>
> 5. The fees charges and costs of the Loan are set out in the sections 5 & 6 of the Loan Agreement (on pages 2 & 3). If you have any queries relating to these, you must raise it with your broker and/or the Lender before completion of the matter. By signing this letter, you are acknowledging that you are fully aware of the financial details of the Loan including the rate of interest and all fees and costs payable under the Loan Agreement.
>
> 6. You are borrowing on interest only basis. This means that during the Loan Term you will only be paying the interest due on the Loan and not the capital element of the Loan. The capital sum of the Loan plus any redemption charges and exit fees will remain payable in full and you must arrange io« repayment of the Loan plus exit fee and charges on or before the end of the Loan Term. You must be satisfied yourself that you are able to do so.
>
> You must contact the Lender immediately if you have any reason to believe that you will not be able to repay the Loan on or before the end of the Loan Term.
>
> 7. Interest becomes payable from the Completion Date, ie the date that funds have been released to us.

8. Events of Default are set out in clause 9 of the Legal Charge which includes the following [the letter then summarises events of default which I need not set out here, but they include "Failure to pay any sum due under the loan agreement on due date" and "You are in default in any other financial obligation"].

If any of events of default occurs, interest will be charged at 5%. Exit fee will also be charged at 5% on the total balance outstanding at the time of repayment. An event of default also entitles the Lender to demand repayment of the Loan in full and if you fail to do so, the Lender will be entitled to commence possession proceedings and you will lose your property.

9. Please note that all interest payable under the Loan Agreement are on a compound basis once the Loan falls into default. This means that interest is calculated every month and added to the capital sum and then interest is charged on that new sum.

10. You can repay the loan earlier but you still have to pay the exit fee and as it is a fixed term loan, you will have to pay the full interest even if you repay the loan early.

11. The purpose of the Loan is, as stated in the Loan Agreement, business cash flow and in this regard you are signing a Declaration for Business Exemption declaring that you will use the funds wholly or predominantly for business purposes.

This means that this loan is not a Regulated Consumer Credit Agreement under the Consumer Credit Act 1974 and therefore the protections conferred and remedies available under the Consumer Credit 1974 [sic] for a Regulated Consumer Credit Agreement are not available in this case.

Where a credit agreement is regulated, the lenders are under certain obligations relating to execution of the documents, enforcements of the agreement in the event of breach and defaults.

A Regulated Credit Agreement also entitles the borrower to certain rights with regard to withdrawal from the transaction, termination of the agreement, rebate on early repayment. In cases of unregulated agreement such as the Loan Agreement you are entering with the Lender, the abovementioned obligations on the Lender and protection available to the borrowers (you) are not applicable.

Please note that using the funds for any other purpose will actually constitute a breach of the declaration that you are signing and therefore the loan terms, which will in turn constitute a default.

12. In addition to all the financial obligations in connection with the Loan, the Loan Agreement and the Legal Charge also impose various other obligations upon you and in this regard I refer you to clause 10 & 11 of the Loan Agreement and clause 9 of the Legal Charge.

13. You are required repay the Loan in full with the exit fee and any other charges on or before the end of the Loan Term. If you fail to do so or if you default, not only penalties will be incurred and interest will be charged at 5% per month but also the Legal Charge will become immediately enforceable, which includes the Property being repossessed by the Lender.

14. The Loan will be secured by way of a Legal Charge on the Property. Please note that at the Land Registry the Lender will be named as Kinsat Enterprises Ltd as per the Legal Charge and RX1.

15. Loan Agreement - by signing the Loan Agreement, you are confirming/agreeing/declaring/undertaking and warranting the following:-

15.1 you are satisfied that you will be able to repay the Loan in full with the exit fee payable on or before the expiry of the Loan Term including the monthly interest (if payable);

15.1 you will be able to repay any other mortgage secured on the Property;

15.2 you understand that it is your responsibility to make interest payments as they fall due, if applicable;

15.3 you are not aware of any disputes or other matters affecting the Property;

15.4 you accept all the obligations and conditions contained in the Loan Agreement and the Legal Charge;

15.5 you understand that this is an "all monies" charge. This means that the Lender's Legal Charge will apply to all monies, obligations and liabilities owed by you to the Lender under each and every agreement deed or document;

15.6 to pay the Lender's surveyors' valuers' and solicitors' fees in connection with the Loan;

15.8 you are authorising the Lender to deduct the advance interest, the arrangement fee, the broker fee that you may have agreed to pay to your broker, if any, as well as the fee that your Lender may pay any broker for introducing your business to them;

15.9 you are liable for all costs and expenses incurred by the Lender in connection with enforcing the Legal Charge on the Property;

15.10 you are entering into the Loan Agreement as the principal and not as an agent, trustee or nominee for others;

15.11 the valuation of the Property obtained by the Lender is the property of the Lender and you have no right to a copy of the valuation or to rely on its contents, even if shown to you;

15.12 you waive your entitlement to confidentiality and legal professional privilege in all information and documentation held by us in connection with this transaction in favour of the Lender and we will on written request provide such information and deliver up such documents to the Lender or the Lender's Solicitor for inspection and copying;

15.13 you understand and accept the obligations conditions contained in the Loan Agreement and the Legal Charge;

15.14 once the Loan is completed, you cannot grant, vary, accept surrender of any tenancy without the permission of the Lender;

15.15 you have no intention to secure further borrowing against the Property;

15.16 you are not aware of any transaction affecting your title to the Property which may have been at an under value or otherwise liable to be set aside under the provisions of the Insolvency Act 1986;

15.17 you will not alter the Property in any way, without the prior written consent from the Lender;

15.18 you will not grant vary or accept surrender of any lease, tenancy agreement or right of occupation over the Property or agree to do any of the foregoing without written permission from the Lender;

15.19 neither the Lender nor your solicitors have advised you as to the suitability of the loan you are borrowing from the Lender;

15.20 neither you nor any person related to you currently occupies or proposes to occupy the property or any part of it as or in connection with a residence,

16. Legal Charge

16.1 The Loan will be secured by way of a Legal Charge on the Property. Legal Charge is the means by which your Lender can enforce their rights to your Property in the event that you breach the terms of the Loan Agreement.

16.2 By signing the Legal Charge and the Loan Agreement you are agreeing to complying with all terms, conditions and obligations as contained in the Loan Agreement as well as in the Legal Charge. If you fail to comply with any of your obligations including the obligations to repay the Loan at the end of the Loan Term you may lose the Property. …

17. Please note that you are borrowing a substantive amount of money for a very short period of time. If you cannot repay the loan in full on or before the end of the Loan Term you will be liable to pay default rate of interest at 5% per month.

18. As soon as the Loan Term has ended, the Lender becomes legally entitled to demand repayment of the Loan together with all fees and charges and take legal action for possession of the Property. Therefore, once you fall into default not only are you becoming liable to pay a very high default rate and exit fee, you will also lose your Property.

19. Please read the Loan Agreement and the Legal Charge documents carefully and if there is anything that you do not understand and/or require further clarifications please contact me immediately before completion."

61. On 13 January 2020, Mrs Kharroubi signed a number of documents. There is a one-page manuscript note in Mr Zivancevic's handwriting which records "Documents signed" as comprising "Letter of Advice, Legal Charge (CH1), RX1 Restriction". Mrs Kharroubi now accepts that she signed the Letter of Advice and the mortgage offer, and I find as a fact that she did so on the date shown beneath her signature on each of those, which is 13 January 2020. Mrs Kharroubi also signed the client engagement letter. Mrs Kharroubi does not accept that she definitely signed the CH1 and RX1. In cross-examination she said that she wanted to see the originals. The pleaded allegation that Mr Zivancevic signed on her behalf or somehow forged her signature is misplaced and erroneous. I find as a fact that Mrs Kharroubi also signed the CH1 and RX1 on 13 January 2020.

62. A further document which appears to bear Mrs Kharroubi's signature is an exemption declaration. The text of that document is set out below (I have not corrected some minor typographical errors in the original):

> "DECLARATION FOR EXEMPTION RELATING TO BUSINESS (sections J6B and 189(1) and (2) Consumer Credit Act 1974) (articles 60C and 60o of the Financial Services and Markets Act 2000)Regulated Activities) Order 2001)
>
> I am/ we are entering into the Loan Agreement with Hertford Solutions (the "Agreement") wholly or predominantly for the purpose of a business carried on by me/ us or intended to be carried by me/ us.
>
> I/ we understand that I/ we will not have the benefit of protection and remedies that would be available to me/ us under the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974 if the Agreement was regulated under the Act.
>
> I/ we understand that this declaration does not affect the powers of the court to make an order under section 140B of the Consumer Credit Act 1974 in relation to a credit agreement where it determines that the relationship between the creditor and the debtor is unfair to the debtor.
>
> I am/ we are aware that if I am/ we are in any doubt as to the consequences of the agreement not being regulated by the Financial Services and Markets Act 2000 or Consumer Credit Act 1974 I/we should seek independent legal advice."

63. At the end of that text on the left hand side of the page are the words "Declared by: AZZA KHARROUBI" and what appears to be Mrs Kharroubi's signature is just to the right of, and in line with, her typed name. Her signature purports to be witnessed by Mr Zivancevic.

64. Mrs Kharroubi says that at one of the meetings with Mr Zivancevic, he required her to sign a blank piece of paper, and that she did so. Mrs Kharroubi said in cross-examination that the signature on the declaration is hers, but she believes this was the signature she appended to a blank piece of paper and that the words of the declaration have been typed onto that blank piece of paper which had her signature on it.

65. Mrs Kharroubi said in cross-examination:

> "He asked me to sign a blank paper. I don't know how he used my signature. He pointed to the bottom of the blank page and said if he made any mistakes, you don't need to come back. I looked at him in the eyes and said I have children, why would I need to come back in. He touched me on the shoulder. When he asked me to sign I said, please Alex, I have children, are you going to harm me, he rubbed my shoulder, he told me, I meet everyday clients like you, I don't need this paper, I need the blank paper. I told him, can I trust you? This is why he said, everyday I meet people and they trust me."

66. This extraordinary piece of evidence, if true, would have been in Mrs Kharroubi's witness statement. It was not. Apart from the unlikely happenstance of the signature being placed on a blank piece of paper in exactly the right place (which I suppose could have happened had this been a forgery, which it is not), it is so far-fetched that I am not

persuaded by it. I find as a fact that Mrs Kharroubi also signed the declaration on 13 January 2020.

67. One issue which arises in this case (and which I shall deal with when I come on to the FSMA part of the claim) is whether the declaration was part of the offer letter. At this point I simply note that there is no record of the declaration having been sent by Mr Izzet to Patron Law as a separate document, and I think it likely that although it is not paginated as page 8 of the 7-page offer, it was part of the same pdf. I need to return to this point later.

68. A further letter which I find as a fact Mrs Kharroubi signed on 13 January 2020 is a "Side Letter" to her from Patron Law, which states:

> "You have mentioned in your application that you will be repaying this bridging loan from the sale of the property or refinance of the property before the end of the 6 month loan period.
>
> We would like to draw your attention to the difficulties in the present financial climate in selling property or raising funds by way of re-mortgage. We request that you consider carefully whether you wish to proceed with this loan facility. The loan will be due for repayment in full in six (6) months from the drawdown and the amount due on that date will be £116,480. Please see clause 5(g) of the Mortgage Offer which details the fees which will be incurred if you fail to repay the loan in full on the due date.
>
> Please sign and return the enclosed copy of this letter to confirm that you fully understand the above implications and consequences of accepting this Mortgage Offer."

69. I therefore find as facts that the position therefore immediately before drawdown of the loan was as follows:

    (1) Mr Zivancevic and Mrs Kharroubi had met on a number of occasions.

    (2) Mrs Kharroubi had been given detailed advice at one of the meetings.

    (3) Mrs Kharroubi had been provided with an engagement letter and a detailed letter of advice, both of which she signed, as well as signing the side letter.

    (4) Mrs Kharroubi also signed the mortgage offer, the exemption declaration, the CH1 and the RX1.

    (5) The advice at the meeting and in the letter was a comprehensive and accurate summary of the legal implications of entering into the loan.

    (6) Mrs Kharroubi had confirmed that she knew and understood, amongst other things, that the loan was for business purposes and was unregulated, she was aware of the deductions to be made from the £112,000 on drawdown, she knew what would happen if the loan was not repaid on time.

    (7) Mrs Kharroubi knew that there was a broker involved, but did not ask for details or to be put in touch with the broker.

(8) Mrs Kharroubi had not asked for more time to consider the terms of the offer or the advice she had received.

(9) Mrs Kharroubi did not at any point say that she needed to have any documentation or advice translated or explained to her.

(10) I do not accept Mrs Kharroubi's evidence that she told Mr Zivancevic that the loan would be used "to pay off my other debts including my phone bill." I find as a fact that she told him it was, as she set out in the application form, for business purposes.

70. On 13 January 2020 (the letter again also contains the typographical error of 2019 instead of 2020), Patron Law sent an irrevocable undertaking to KEL. The heading refers to "Lender: Kinsat Enterprises Ltd t/a Hertford Solutions LLP", which I find was an error by Mr Zivancevic, as HS not HSSLLP was the trading name of KEL, and this error came about because Mr Izzet had used the wrong application form, as noted above. The undertaking was to apply to register the charge and hold all sums received to the lender's order, amongst other things; these included putting in place "no search indemnity insurance". The evidence from the file is that Patron Law complied with these undertakings, including obtaining the indemnity policy, a copy of which is in the bundle.

71. It was a special condition of the offer that a valuation report be obtained. Mr Izzet said that he did some internet research on 65 Pioneer Avenue and was satisfied that it would be sufficient security. No valuation report was obtained, but in my view this was a condition which the lender could, and did, waive.

72. Completion of the loan took place on 13 January 2020. Patron Law provided a completion statement which shows the loan, the deductions and the balance which was (as the statements in the bundle show) transferred to Mrs Kharroubi on completion (£87,283.00). I accept Mr Izzet's evidence that the broker's fee was deducted from the gross advance and sent separately to Mr Bah.

73. Mrs Kharroubi said in her statement that Mr Zivancevic had introduced her to Mr Steve Tappin "who would arrange a cheap long-term loan … I met with Steve Tapping [*sic*] after I got the loan and signed all the paperwork, and he alerted me to Alexander Zivancevic's scam."

74. The documents (the emails disclosed by Mrs Kharroubi) show a different story.

75. On 15 January 2020, two days after completion, Mr Tappin sent an email to Mrs Kharroubi with the subject line "Test". There was no text in the message. This seems to have been the first documented contact between Mr Tappin and Mrs Kharroubi, but it must have been instigated by some earlier form of contact.

76. On 3 February 2020, Mr Tappin emailed Mrs Kharroubi with a form to complete, and said, "Please complete this form for me and I'll see what I can do for you." Mr Tappin describes himself in his email signature as Senior Mortgage and Insurance Consultant with BestQuote Mortgages and Loans. The enclosed form was a BestQuote application form.

77. It is not clear if Mrs Kharroubi completed the form although it would seem that she must have done, as the emails show she did apply for a loan through BestQuote.

78. On 10 February 2020 she emailed Mr Tappin with details of her accountant. Mr Tappin then contacted the accountant "with regards to obtaining her sa302 and TYO for the last two years." These are references to Mrs Kharroubi's tax calculations (SA302 is an HMRC document evidencing the taxpayer's earnings) and tax year overview (the TYO is another HMRC document which indicates the status of the taxpayer's tax payments, which should correlate with the SA302 for the same period, and lists the tax payable, tax paid and tax outstanding).

79. On 14 February 2020, Mrs Kharroubi sent Mr Tappin a copy of the tenancy agreement for 65 Pioneer Avenue.

80. Mrs Kharroubi also sent Mr Tappin some documentation in relation to a dispute she had with Vodafone over a bill of £7,515. Mrs Kharroubi said this had been resolved, and it was being removed from her credit record.

81. On 19 March 2020, Mr Tappin emailed Mrs Kharroubi saying that her application had been declined, because of the default with Vodafone, and subsequent emails concerned whether the Vodafone issue had indeed been resolved and removed from Mrs Kharroubi's credit record.

82. At no stage during this period is there any hint of Mr Tappin having described the involvement of Mr Zivancevic as a "scam". I find as a fact that Mr Tappin said no such thing to Mrs Kharroubi.

83. In the meantime, on 15 January 2020, HS wrote to Mrs Kharroubi confirming the completion of the loan, and stating:

> "In accordance with the terms of the Loan Offer, your loan of £112,000 plus the Exit fee of £4,480 is due to be repaid on 12 July 2020. We understand that you are planning to repay this by re-financing or selling the property."

84. Mrs Kharroubi did not suggest that she did not receive this letter. I find as a fact that she did.

85. Before the loan became repayable, Mrs Kharroubi contacted Mr Izzet directly. Mr Izzet sent an email to Mrs Kharroubi on 30 June 2020:

> "Dear Mrs Kharroubi
>
> Further to our telephone conversation earlier today I would like to reiterate the options that we discussed.
>
> 1. You explained that you were still hopeful that you would receive monies from the USA for various invoices you have raised that would be sufficient for you to redeem your loan with us.
>
> 2. You would contact Mortgage Broker as soon as possible to explore the possibility of a buy to let mortgage to redeem a charge In the event that your invoices were not paid in accordance with .1 above

> 3. In the unlikely event that you were unsuccessful with points 1 and 2 above we would discuss the possibility of granting you a further six months time
>
> Kind regards
>
> Taskin Izzet"

86. It is clear from this email that Mrs Kharroubi and Mr Izzet were discussing how the loan would be repaid, and the possibility of a 6-month extension on the existing loan. I note the reference to Mrs Kharroubi having told Mr Izzet about monies coming in which seem from the context to relate to business income.

87. Mr Izzet emailed Mr Zivancevic and Mohammed at Patron Law on 3 June 2020 with figures for a new 6-month loan.

88. On 30 June 2020, Mr Izzet sent Mrs Kharroubi an email with details of what was payable on 12 July 2020 when the loan was repayable, and an illustration of a new 6-month loan. The email was copied to Mr Zivancevic and Mohammed at Patron Law, and had been requested by Mrs Kharroubi in an email she sent to Mr Izzet on 29 June 2020 which she had also copied to Mr Zivancevic and Mohammed at Patron Law.

89. Mrs Kharroubi had also applied to West One Loans Ltd, because on 8 July 2020 they sent an email to Mr Izzet asking for a redemption statement which they required "to arrange a first charge mortgage for the customer". Mr Izzet sent redemption statements.

90. It is plain from these emails that far from believing (because Mr Tappin had told her) that Mr Zivancevic had "scammed" her into taking out the loan, Mrs Kharroubi was quite content (a) to consider taking out a replacement 6-month loan from HS, and (b) to involve Patron Law and Mr Zivancevic in particular with that possibility. If Mrs Kharroubi truly believed that she had been the victim of a scam, she would not have been involving Patron Law (or Mr Izzet) any further.

91. In the event, Mrs Kharroubi did not repay the loan, nor did she take out a new 6-month loan with HS or a new mortgage advance with any third-party lender.

92. On 17 July 2020, HS sent Mrs Kharroubi a Default Notice and Notice of Appointment of Receiver. By this time, the amount due was said to be £123,480. The letter said that a receiver would be appointed if the money due was not paid by 21 July 2020.

93. At this point, another third party, EHL Group (I think they are a firm of solicitors), became involved. It would appear that Mrs Kharroubi was intending to refinance, and EHL were assisting with this. EHL's email to Mr Izzet of 13 July 2020 was responded to on 14 July 2020 with a revised statement (Mr Izzet had agreed to pro-rata the default interest rate). However, this refinancing never took place.

94. In due course a receiver was appointed. £80,000 was repaid by Mrs Kharroubi. Nothing else has been repaid.

The allegations in the present claim in detail

95. I will deal with the various points made by Mr Chipato in his skeleton argument on behalf of Mrs Kharroubi, taking into account the factual findings I have made.

(A) Parties to the loan

96. Mrs Kharroubi asserts that the proper interpretation of the loan is that although the Charge is in KEL's name, the loan agreement itself was with HSLLP.

97. I approach questions of construction of the agreement by applying the well-known principles set out in cases such as *Rainy Sky S. A. and others v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

98. In particular, in *Rainy Sky*, Lord Clarke JSC said at [21]:

> "The language used by the parties will often have more than one potential meaning....the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. 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."

99. The offer letter, which refers to HS (and not HSLLP), states at the foot of the page that HS is the trading name of KEL. The side letter says the same. Patron Law's letter of advice says expressly that the lender will be KEL. The CH1 charge is in the name of KEL, and the RX1 refers to KEL. It is plain, as a matter of construction of the loan agreement and applying the principles in the leading authorities, that the parties to the loan agreement are Mrs Kharroubi as borrower and KEL as lender. There was no involvement of HSLLP – that name is mentioned because of Mr Izzet's error in sending the wrong form, and the fact that there are references to HSLLP in Patron Law's letter is in my view immaterial.

100. It is also clear from the documents first that Mrs Kharroubi knew that the lender was not HSLLP but KEL, and secondly that Patron Law, her solicitors, knew that the lender was KEL.

101. For these reasons, I reject Mrs Kharroubi's assertion.

(B) Unconscionable bargain

102. It is pleaded that certain features of the loan render it an unenforceable unconscionable bargain.

103. The principle set out in *Libya Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) at [159-161] is that a contract can be set aside for unconscionable bargain where one party has been at a serious disadvantage to the other,

the weakness of one party has been exploited by the other in some morally culpable manner, and the resulting transaction has been overreaching and oppressive.

104. Mr Chipato submits that Mrs Kharroubi was at a serious disadvantage when the loan was taken out; she was in a desperate situation, she had never taken bridging finance before, and had little to no proper advice from Patron Law.

105. The features which are pleaded as rendering the loan unenforceable are the deductions on completion from the gross sum of £112,000 namely the interest, the facility fee, the legal fee, the broker's fee, and the lender's fee: see paragraphs 15-20 of the Particulars of Claim.

106. I reject this assertion.

107. First, it is plain that Mrs Kharroubi did receive detailed – and in my view accurate – advice from Patron Law. That advice included setting out precisely what was going to be deducted from the gross amount.

108. Secondly, the suggestion that the broker's fee was a sham is not made out on the facts, because a broker was involved (the fact that the broker did very little, just a telephone call to Mr Zivancevic, strikes me as irrelevant) and the allegation that it was a secret commission plainly fails (i) because it was not a commission but a fee, and (ii) it was clearly not kept secret. I emphasise that I do not accept the pleaded allegation that no broker was involved; I have set out my findings above. Further, I do not accept the proposition that in truth Patron Law was the broker. Mr Izzet accepted it was unusual for a solicitor to be involved at such an early stage, but I accept his evidence that he was told, when first contacted by Mr Zivancevic, that Patron Law was already instructed by the proposed borrower.

109. Thirdly, if Mrs Kharroubi did not in fact read any of the advice in the Patron Law letter, she signed it and cannot now say that she did not read or understand what she was signing. The same goes for the other documents signed by Mrs Kharroubi. In my judgment, Mrs Kharroubi indeed knew of, and agreed to, all the deductions being made.

110. Fourthly, the fact that no valuer's report was commissioned does not assist Mrs Kharroubi. As I have noted above, this requirement (which was there for the lender's protection) was waived by the lender. The same applies in relation to the absence of a waiver signed by occupants of the mortgaged property.

111. Fifthly, the legal fee charged by the lender was explained by Mr Izzet in his evidence as being a flat fee charged to all borrowers representing a share of KEL's legal fees overall. Rather than charge some borrowers nothing and others the full amount of legal fees incurred on a difficult transaction, KEL shares its legal costs equally amongst all borrowers. I see nothing unfair in this.

112. Sixthly, it is of no surprise that this bridging loan was completed quickly. Mrs Kharroubi clearly wanted it to be quick.

113. Seventhly, at no point did Mrs Kharroubi say that she did not understand any of the deductions, or that she wanted more time. It was her evidence that Mrs Kharroubi was told by Mr Zivancevic that the transaction had to complete within 24 hours – in fact it

took from 10-13 January (11-12 were the Saturday and Sunday) so 2 business days. Mrs Kharroubi had plenty of time to think about whether she wanted to take out the loan over that weekend.

114. Eighthly, I can see nothing to support the contention that the conduct of HSLLP and KEL was "morally culpable", whatever that is intended to mean, or that the loan was oppressive and overreaching and shocks the conscience of the court (these contentions are taken from Mr Chipato's skeleton argument). Far from Mrs Kharroubi having been exploited, in my view it was Mrs Kharroubi who is now, in the present claim, making assertions which are completely contrary to the true position.

115. For these reasons, I reject the contention that this loan is to be set aside as an unconscionable bargain.

(C) Undue influence

116. The legal principles at play here are those set out in *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773. The doctrine of undue influence applies where it would be unconscionable for one party, as against the other party, to insist on the benefit of a right where the right arose out of a transaction that the other party entered into as a result of undue influence. It is possible for undue influence to be actual, which is typically some conduct overbearing the other party's will, or presumed undue influence, where there is a relationship of influence and the impugned transaction calls for an explanation. In the latter case, the court can infer that in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. The presumption is rebuttable, which is a question of fact to be decided on all the evidence. A transaction is one which "calls for an explanation" if it cannot be readily accounted for by the ordinary motives of ordinary persons in that relationship.

117. As a result of my findings of fact, the allegation of undue influence fails.

118. First, as an overarching point, the court should be wary of making findings of undue influence against a non-party to these proceedings. Despite the Defendants' solicitors saying on a number of occasions during this litigation that if these allegations were to be made, Patron Law should be joined as a party, Mrs Kharroubi has not done so. I do not accept Mr Sharpe's submission that the failure to have joined Patron Law or Mr Zivancevic means that it is not open to Mr Chipato to allege undue influence, fraud or duress; as was said in *MRH Solicitors v The County Court sitting at Manchester* [2015] EWHC 1795 (Admin), [34]:

> "We well understand how the Recorder's suspicions were aroused. However, in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In *Vogon International Ltd v the Serious Fraud Office* [2004] EWCA Civ 104 at [29] May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,
>
> > 'It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such

> imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves.'"

Nevertheless, it is clear that I need to take care when I am considering these allegations which involve serious criticisms of Mr Zivancevic and Patron Law.

119. Secondly, I accept of course that the relationship between a client and solicitor is one of trust and confidence, but this was a transaction which was clearly explicable (so the presumption referred to above does not arise) and further there is a complete absence of evidence of any undue influence. Mrs Kharroubi has not established on the facts that Patron Law exerted any form of influence on her. On the contrary, their advice made it plain that the decision to enter into the transaction was for Mrs Kharroubi alone. I reject Mrs Kharroubi's evidence that Mr Zivancevic simply told her to sign the documents. Mrs Kharroubi had a poor credit rating and needed money urgently, which she could only get from a lender such as KEL (that is not intended to be disparaging) rather than a "high street" lender.

120. Thirdly, it is clear on the facts that Patron Law acted for Mrs Kharroubi alone, and were not acting for the lender, nor was Patron Law the lender's agent. It is (rightly) accepted by Mr Chipato that it is only if such an agency arose that the lender could be liable for any undue influence of Patron Law.

121. Fourthly, the lender had no contact with Mrs Kharroubi. Mr Izzet explained in his evidence that he deals only with professionals (brokers and solicitors) as he got his fingers burned in the past when he used to deal with potential borrowers direct. I can see no basis for thinking that the lender knew anything which might give it cause to doubt that the transaction was being entered into other than with the borrower's informed and freely given consent and understanding. As was said in *Etridge* at [54],

> "The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction."

Mr Izzet confirmed that so far as he was concerned everything appeared to be in order. I accept that. I do not see what more KEL could have done here. I have already rejected the suggestion that Patron Law was the broker.

122. The allegation of undue influence is rejected.

(D) Duress

123. This was not dealt with separately by Mr Chipato, but it is a pleaded allegation.

124. Duress in the present context means illegitimate pressure from or on behalf of a contracting party which caused Mrs Kharroubi to enter into the loan because she had no reasonable alternative but to give in to that pressure.

125. Firstly, this allegation can only succeed if Patron Law – against whom Mrs Kharroubi's allegations of improper pressure are directed – was the lender's agent. Since it was not, the allegation fails at the first hurdle.

126. Secondly, I do not in any event accept Mrs Kharroubi's evidence about pressure being placed on her by Mr Zivancevic to sign the documents and complete the transaction. As I have already noted, Mrs Kharroubi was a director of a number of companies and was – despite her protestation to the contrary – a businesswoman. Patron Law fully explained the transaction to Mrs Kharroubi, who understood the advice and cannot in any event complain if she did not read the documents in circumstances where they were explained to her and she signed them (on her own evidence) without reading them. In my judgment, Mrs Kharroubi fully understood the details of this loan and what it entailed.

127. This allegation is rejected.

(E) Was the default interest rate a penalty?

128. As to the principles of law concerning whether a provision for default interest is an unenforceable penalty, the Supreme Court approved a three-stage test in *Cavendish Square Holding BV v Talal El Makdessi (Rev 3)* [2015] UKSC 67, which was elucidated in the decision of Mr Fancourt KC (as he then was) in *Vivienne Westwood v Conduit Street* [2017] EWHC 350 (Ch), and I summarise this as follows:

> A liquidated damages clause will not amount to an unenforceable penalty, provided: (1) it is a secondary obligation triggered by a breach of contract (this is a threshold question); (2) the clause is in furtherance of a legitimate interest which the innocent party has in the performance of the primary obligation; (3) and the clause is not extortionate, exorbitant or unconscionable.

129. The same test applies to default interest clauses: see for example *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 and *Houssein v London Credit Ltd* [2024] EWCA Civ 721.

130. Further guidance can be derived from the speeches in *Cavendish*.

131. In *Cavendish*, it was said at [33] and [35] that whilst the penalty rule is an interference with freedom of contract which undermines the certainty that the parties are entitled to expect of the law:

> "In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."

132. At [32] it was said:

> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance."

133. Nonetheless, "compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations" – see [32] – and at [31]:

> "A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are 'unconscionable' or (which will usually amount to the same thing) 'extravagant' by reference to some norm."

134. At [145]:

> "In short, commercial interests may justify the imposition on a breach of contract of a financial burden which cannot either be related directly to loss caused by the breach or justified by reference to the impossibility of assessing such loss."

135. The question of whether a clause is a penalty is to be decided as a matter of construction of the relevant provision, because the question turns on the provision itself and not the circumstances in which it falls to be enforced: see [9]. Whether or not a clause is penal depends on its substance and not the label attached to it: see [15], [258], [291-2]. Each case will turn on its own facts and circumstances.

136. At [152]:

> "What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

137. Addressing each of the limbs of the test, I reject the submission that the default interest is a penalty.

Limb 1 – primary or secondary obligation?

138. It seems to me clear that the provisions of the loan agreement impose the default rate as a secondary obligation triggered in the event of non-payment, which is the primary obligation.

Limb 2 – legitimate interest?

139. The question is whether the provision for default interest in furtherance of the lender's legitimate interest in the performance of the primary obligation.

140. Mr Chipato contends that whilst there is a commercial justification for charging a higher rate after default, there was no evidence of any genuine pre-estimate of loss, nor

any evidence to support the rate in the agreement, and the bargaining power between the parties was unequal.

141. Firstly, Mrs Kharroubi's credit rating was very poor (as shown by the credit report obtained shortly before default), and in my view the lender had a legitimate interest in enforcing prompt compliance. As was said by Bryan J in *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) at [50]:

> "… it is self-evident in my view that there is a good commercial justification for charging a higher rate of interest on an advance of money after a default in repayment. The person who has defaulted is necessarily a greater credit risk and 'money is more expensive for a less good credit risk than for a good credit risk'. See *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763 …"

142. Secondly, as I have already made clear, Mrs Kharroubi received independent advice about the provisions of the loan, including the default rate of interest, the impact and effect of which was repeatedly emphasised to her, and she went into the transaction knowing all about the default rate.

143. Thirdly, it would be wrong to look at this limb of the test by considering what is now actually (said to be) due, because that is purely the result, in the events which have occurred, of nothing (save £80,000) having been paid and the passage of time. This issue is to be decided on the basis of the facts known at the time, that is, in January 2020.

Limb 3 – extortionate, extravagant or unconscionable?

144. Mr Chipato contends that the amount of interest is so disproportionate, it is really a punishment for default.

145. I do not agree. Again, I do not regard it as open to Mrs Kharroubi to challenge the rate on the basis of how much is now owed and/or by a comparison with what was originally lent and/or by contrasting it with how much is now (said to be) due. That would be to construe the relevant provisions other than at the time they were entered into, which is the wrong approach.

146. It seems to me that the relevant factors are (i) the agreement was negotiated and set up at arm's length with Mrs Kharroubi separately and independently represented, (ii) Mrs Kharroubi had independent legal advice and assistance from Patron Law, (iii) Mrs Kharroubi as a businesswoman, and KEL as a lender, were the best judges of what would be a legitimate consequence of breach, (iv) the consequences of a breach including the default rate was explained to Mrs Kharroubi who confirmed that she understood that explanation, (v) the default rate is in accordance with what Mr Marsh, the single joint expert, says in his report is a range of default interest rates at the relevant time.

147. I am therefore satisfied in respect of the three limbs of the test that (a) the obligation to pay default interest is a secondary obligation triggered in the event of non-compliance with the primary obligation to repay, (ii) that the imposition of default interest in the event of non-repayment is in furtherance of the lender's legitimate interest in the performance of the primary obligation, and (iii) that the rate is not extortionate,

extravagant or unconscionable. The onus was on Mrs Kharroubi to establish that the provision was penal. She has not done so.

(F) The effect of FSMA

148. Mrs Kharroubi contends that the loan was in fact a regulated loan, which the lender had no authorisation to make, and as a result the loan is unenforceable.

149. The starting point here is Article 61(3) of the RAO:

> "(3) In this Chapter
>
> (a) subject to paragraph (5), a contract is a 'regulated mortgage contract' if, at the time it is entered into, the following conditions are met—
>
> (i) the contract is one under which a person ('the lender') provides credit to an individual or to trustees ('the borrower');
>
> (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land;
>
> (iii) at least 40% of that land is used, or is intended to be used—
>
> (aa) in the case of credit provided to an individual, as or in connection with a dwelling; or
>
> (bb) in the case of credit provided to a trustee which is not an individual, as or in connection with a dwelling by an individual who is a beneficiary of the trust, or by a related person;
>
> but such a contract is not a regulated mortgage contract if it falls within article 61A(1) or (2)."

150. Section 26 of FSMA provides:

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

151. Article 60C(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") provides:

> "A credit agreement is an exempt agreement for the purposes of this Chapter in the following cases … (3) A credit agreement is an exempt agreement if— (a) the lender provides the borrower with credit exceeding £25,000, and (b) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."

152. Mr Chipato's position was that the lender bears the burden of proof to show any exemptions apply to make the loan unregulated (otherwise it would be a regulated mortgage contract under Article 61(3) of the RAO), and accepted that if a presumption arises as a result of a FSMA-compliant declaration, it would be for the Claimant to

rebut such a presumption. The sole issue here was whether the purpose of the loan was business.

153. It will be recalled that Mrs Kharroubi signed an exemption declaration, and Mr Sharpe contends that this gave rise to the presumption in the RAO Article 60C (5) that the loan is presumed to have been entered into by her wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by her, namely her residential lettings business.

154. The FCA Handbook at CONC App 1.4 deals with exemptions relating to businesses. CONC App 1.4.8 sets out the mandatory form and content of a declaration for exemption relating to businesses. The declaration in the present case has that form and content. However, CONC App 1.4.5 provides that such a declaration:

> "shall (2) be set out in the credit agreement or consumer hire agreement no less prominently than other information in the agreement and be readily distinguishable from the background medium"

155. Was the declaration signed by Mrs Kharroubi "set out in the credit agreement"?

156. As I have noted, it seems likely that the declaration formed part of the same pdf as the loan agreement, but I am not satisfied that it was "set out in the credit agreement" nor that it was incorporated into the agreement, as it is not referred to in the agreement itself.

157. Mr Sharpe says that CONC App 1.4.5 has no application to the lender, as KEL was not an authorised person under section 31 of FSMA and CONC only applies where authorised persons are concerned in regulated activities. As a result, the FCA has no power to make regulations governing KEL's behaviour.

158. Articles 60(C) and 61A of the RAO states that the business presumption applies "if an agreement includes a declaration". Only Article 60(C) requires that the statement "complies with rules made by the FCA for the purposes of this article".

159. It seems to me that the point is in truth straightforward. The requirement of the RAO is that for the presumption to arise, the declaration must be included in the agreement, because of the wording "if an agreement includes a declaration". That as a matter of construction seems to indicate that it must be part of the loan agreement itself, and not be a separate document.

160. I have therefore concluded that KEL is not entitled to rely on the presumption.

161. However, I have no doubt that as a matter of fact this was a loan for business purposes, and that even if the declaration is invalid to raise the presumption, all of the evidence points to this being a business loan.

162. I take into account that (i) Mrs Kharroubi represented that she required the loan for business purposes, and I reject her evidence that she told Mr Zivancevic anything different, (ii) she confirmed by signing all the documentation including the letter of advice that this was for business purposes, (iii) Mrs Kharroubi said she had no intention of using this loan for business purposes, and she wanted to pay off personal debts and take a holiday, but there is no evidence that this is what she did, and as seems to be the

case from the events involving Mr Tappin she did not seem to have paid off the Vodafone debt, (iv) when attempting to refinance the loan she continued to represent that there were monies coming in for her company, and finally (v) one of the documents signed by Mrs Kharroubi was the declaration, which even if ineffective to raise the presumption, is part of the picture painted at the time by Mrs Kharroubi.

163. I do not accept that the application was contradictory. Mr Chipato points out that the application refers to refurbishment, but this could have been in relation to the investment property. Similarly the reference to Mrs Kharroubi's business being "import/export" did not mean that Mrs Kharroubi's ownership of the property was not her business.

164. In *Kumar v LSC Finance Ltd* [2024] EWCA Civ 254, an exemption declaration was held to be invalid, but as was held at [28]:

> "The representation that the loan was intended wholly or predominantly for business purposes remained a term of the contract. The purpose to which the borrower intends to put the money at the time that the agreement is made is just as much a matter of fact, based on the evidence, as the borrower's intended use of the land after it is acquired. A statement made by the borrower about that purpose at or before the time when the contract is entered into is evidence of that purpose irrespective of whether the statement is in a letter to the lender, or made at a pre-contractual meeting, or appears on the face of the loan agreement itself. That evidence of the borrower's intention falls to be weighed against any evidence suggesting that the loan is not intended to be used for business purposes."

165. In my view, looked at overall, the evidence is that this was a loan for business purposes, and I so find.

166. That being so, the loan was unregulated.

167. If I am wrong about that, and the loan is a regulated mortgage contract and unenforceable under section 26 of FSMA, I have no doubt that the court should permit enforcement of the loan under section 28(3) of FSMA.

168. Section 28 of FSMA provides so far as is material:

> "(1) This section applies to an agreement which is unenforceable because of section 26 or 27.
>
> […]
>
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–
>
> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must–

> (a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or
>
> […]
>
> (5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement."

169. The test here is whether the lender held that reasonable belief. This involves both a subjective test as to what the lender believed and an objective test as to whether that belief was reasonable: *Jackson v Ayles* [2021] EWHC 995 (Ch) at [53]. The focus is on the circumstances of the individual case, in particular (i) those in which the agreement was made; and (ii) those in which it was subsequently performed: *In re Whitely* [2008] EWHC 1782 (Ch) at [35]. Legal advice obtained can also be a relevant factor: *Helden v Strathmore Ltd* [2010] EWHC 2012 (Ch) at [97(i)].

170. In my view, it is clear from all the circumstances that KEL believed that it was entering into a non-regulated loan and that such a belief was reasonable.

171. Mr Izzet believed this to be a business loan. KEL only lends for business purposes, and is an unregulated lender. The first thing he said he always checks is whether the loan is for business purposes.

172. KEL was entitled to rely on the statement in the application form and in the declaration that the loan was for business purposes.

173. KEL was also entitled to rely on the fact that Mrs Kharroubi had received independent legal advice. As it happens, that legal advice reiterated that this was a business loan.

174. Even if Patron Law knew that this was not really a business loan – and there is in fact no evidence to that effect – KEL was not fixed with that knowledge as Patron Law was not KEL's agent.

175. I therefore conclude that if I am wrong, and this was a regulated loan, KEL subjectively believed it was entering into a non-regulated mortgage contract agreement with Mrs Kharroubi, and that belief was plainly objectively reasonable in the circumstances. In my judgment it would be just and equitable to allow the agreement to be enforced against Mrs Kharroubi.

Conclusion

176. For all these reasons, the claim fails and is dismissed.

(End of judgment)