Neutral Citation Number: [2026] EWCA Civ 830

Case No: CA-2026-000054

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
Richard Farnhill (sitting as a Deputy Judge of the Chancery Division)
[2025] EWHC 2749 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2026

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

Between:

(1) MRS NURAY HOUSSEIN
(2) HOUSSEIN ALI HOUSSEIN
(as executor of the estate of Ali Houssein deceased)
(3) CEK INVESTMENTS LIMITED — **Appellants**
- and -
(1) LONDON CREDIT LIMITED
(2) VICTORIA LIDDELL AND ANNIKA KISBY
(as joint Fixed Charge Receivers) — **Respondents**

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Gary Cowen KC and Edward Blakeney (instructed by **Hugh Cartwright & Amin**) for the **Appellants**
Giles Wheeler KC (instructed by **Stephenson Harwood LLP**) for the **Respondents**

Hearing dates: 11-12/06/2026

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Approved Judgment

This judgment was handed down remotely at 11.00am on 01 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. There are three potential issues on this appeal:

   i) What must a borrower under a secured loan do, short of actual repayment, in order to stop interest running on the loan?

   ii) Was the default interest rate specified by the secured loan documentation in this case a penalty?

   iii) If it was, is the lender nevertheless entitled to statutory interest on the outstanding debt?

2. Mr Richard Farnhill (sitting as a judge of the Business and Property Courts) dealt with those questions as follows:

   i) The borrowers had not done enough to stop interest running on the loan;

   ii) The default rate of interest specified in the loan documentation was not out of all proportion to the lender's legitimate interests and was not, therefore, a penalty.

   iii) This question did not arise.

3. The judge's judgment is at [2025] EWHC 2749 (Ch).

The previous trial and the appeal

4. The order under appeal was made by the judge following a hearing that had been remitted to him after an appeal. In the first trial conducted in the spring of 2023 (at which the judge resolved many issues that no longer arise) the judge held that the default rate of interest specified in the loan documentation was a penalty. His judgment following that trial is at [2023] EWHC 2382 (Ch). London Credit Ltd (LCL) successfully appealed against that decision. In a judgment given on 28 June 2024 ([2024] EWCA Civ 721) this court held that the judge was wrong in his approach to the question whether the default rate was a penalty. But the court decided that it could not decide the question for itself and instead remitted the question for further hearing by the judge.

5. The remitted hearing also raised a question which had not been raised at the first trial. LCL counterclaimed for repayment of the outstanding sums due. The borrowers' Defence to Counterclaim in March 2025 denied liability for interest on the ground that LCL had failed to accept offers of repayment when made. The question, therefore, was whether the borrowers had done enough to stop interest running on the loan which, as I have said, the judge answered "no".

The facts

6. The facts relevant to these issues, as found by the judge, are as follows.

7. Over a number of years Ali Houssein (Mr Houssein) had built up a portfolio of residential properties. One of those properties was the family home (71 Hamilton Road), five others were held as buy to let investments (the Downhills Way Properties). While Mr Houssein had been the driving force in building and managing the portfolio, some of the Downhills Way Properties were held in the name of his wife, Nuray Houssein (Mrs Houssein), or in their joint names. 71 Hamilton Road was also held jointly.

8. The Downhills Way Properties, but not 71 Hamilton Road, were used as security for various loans. In June 2020 one of those loans (the Bridge Loan) needed to be refinanced. That was a bridging loan and what Mr Houssein needed was another loan. He and his son, Houssein Houssein, asked a relative if they could recommend anyone to assist in the process; they were referred to Andreas Liondaris of Premier Finance Ltd (Premier).

9. Andreas Liondaris in turn introduced Mr and Mrs Houssein and Houssein Houssein to Chris Stylianides (Mr Stylianides), a Business Development Manager at LCL. Ultimately, LCL and the Appellants entered into the following relevant agreements:

   i) A facility letter (the Facility Letter) granting a loan of £1.881 million (the Loan), entered into between CEK Investments Ltd (CEK), a company owned by Mr and Mrs Houssein who were also its directors, as borrower and LCL as lender.

   ii) Personal guarantees from Mr and Mrs Houssein of CEK's obligations under the Facility Letter.

   iii) Charges over the Downhills Way Properties and 71 Hamilton Road.

10. As an unregulated moneylender, LCL was not authorised to make loans to individuals secured by way of mortgage over the property where they resided. To address this, two steps were taken:

    i) The Loan was taken out by CEK rather than by Mr and Mrs Houssein personally.

    ii) The Facility Letter specified that the Borrower was not to reside at any secured property, which included the family home of 71 Hamilton Road.

11. The use of CEK as borrower was not a sham designed to disguise the "true" nature of the transaction as a loan to Mr and Mrs Houssein. LCL was entirely transparent in its use of a loan to a corporate borrower with security from Mr and Mrs Houssein. Moreover, it had no incentive to conceal the true nature of the Loan because, had the non-residence requirement of 71 Hamilton Road been met, a direct loan to Mr and Mrs Houssein would equally not have constituted a regulated loan.

12. Houssein Houssein had taken over the day-to-day running of the property portfolio and largely took the lead on the refinancing with LCL. At all materially relevant times

he was aware of the non-residence requirement, but he did not communicate it to his parents, on whose behalf he was acting.

13. On 29 July 2020 an inspection of 71 Hamilton Road was carried out by Mr Stylianides on behalf of LCL. The purpose of the inspection was to confirm that 71 Hamilton Road was vacant prior to drawdown on the Loan. The inspection was a sham, concocted to create the impression that renovation works were ongoing when in fact the Housseins still resided there. Mr Stylianides, Andreas Liondaris and Houssein Houssein (but not Mr or Mrs Houssein) were fully aware of the true position. Mr Stylianides' knowledge was imputed to LCL such that it, too, was treated as being aware of the true position when drawdown under the Facility Letter occurred on 7 August 2020.

14. Very shortly after drawdown LCL was informed by one of its investors that the Housseins continued to reside at 71 Hamilton Road. On 8 September 2020 LCL declared an event of default. In November 2020 LCL's solicitors, Gunnercooke, wrote to the Housseins requiring them to vacate the property, relying on the non-residence provision of the Facility Letter. When the Housseins refused to do so LCL appointed Ms Liddell and Ms Kisby as joint LPA receivers.

15. On 31 December 2020 Mr Houssein died.

16. The default on which LCL relied in taking enforcement action was the alleged breach of the non-residence obligation. The effect of the judge's finding about Mr Stylianides' knowledge was that the default on which LCL had purported to rely had in fact been waived when it permitted drawdown with the knowledge, imputed from Mr Stylianides, that at the date of drawdown the Housseins were still in residence at 71 Hamilton Road. The enforcement steps taken in respect of that alleged breach were accordingly void and of no effect. Most pertinently, for the purposes of this appeal, LCL's claim to be entitled to interest at the Default Rate for any period before 7 August 2021 was invalid.

The facility letter

17. The opening paragraph of the Facility Letter stated that a loan facility of up to £1,845,000 had been made available subject to the terms of the Facility Letter. This was subsequently increased to £1,881,000 by deed of variation. That global sum included "rolled up" interest for the contractual period of the loan.

18. Clause 1 contained a number of definitions, including a definition of "Property". In short, property (a) was 71 Hamilton Road and properties (b) to (f) were the Downhills Way properties. Clause 2 set out the purpose of the loan which was to assist CEK to grant a loan to Mr and Mrs Houssein (whose address was given as 61 Hamilton Road rather than 71 Hamilton Road) for the refurbishment of 71 Hamilton Road and the refinancing of loans secured on the Downhills Way properties.

19. Clause 5.1, which appeared under the heading "REPAYMENT", provided as follows:

> "Interest due on the Loan shall be paid, together with the Loan amount and all other sums due to the Lender under the Finance Documents, in full by no later than 12 noon on the Repayment

> Date. The Facility shall be cancelled in full on the Repayment Date."

20. "Repayment Date" was defined in clause 1.1 as "12 (Twelve) months from the Drawdown Date" and the "Drawdown Date" was defined as "the date on which the Lender's solicitors confirm in writing to the Lender that the Loan has been transferred to the Borrower's specified bank account". Drawdown occurred on 7 August 2020, and the Repayment Date was agreed to be 7 August 2021.

21. Clause 5.1 provided that interest due on the Loan would be paid together with all other sums due in full no later than 12 noon on the Repayment Date. But clause 5.3 entitled the Borrower to pay or prepay the whole or part of the Loan in tranches of £50,000.

22. Clause 6 was headed "INTEREST". Where relevant, it provided as follows:

> "6.1 The Borrower shall pay interest on the amount outstanding under the Facility, as from the Drawdown Date and at a rate of 1.00% (One per cent) per month (the "Interest Rate"). The Interest Rate is a discounted rate and assumed strict compliance with the terms of the Finance Documents. Such interest shall be calculated on the basis of a year of 365 days and shall accrue on a daily basis.
>
> 6.2 The first Interest Period for the Loan shall commence on the Drawdown Date and for each Interest Period thereafter, the last day of the preceding Interest Period.
>
> 6.3 The full amount of interest, which is payable pursuant to the terms of this Facility Letter (the "Interest Full Payment"), shall be due and payable on the Drawdown Date and the Loan drawn down on the Drawdown Date shall be utilised towards payment in full of the Interest Full Payment.
>
> 6.4 An Interest Period shall not extend beyond the Repayment Date.
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> . . .
>
> 6.6 Default interest:
>
> (i) Upon the occurrence of an Event of Default and/or if the Borrower fails to repay any amount payable by it under any Finance Document on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment (both before and after judgment) at the standard rate, being 3.00% (Three per cent) per month above the Interest Rate (the "Default Rate"); and
>
> (ii) Default interest that has accrued under this Facility Letter, shall be due and payable on the last day of each Interest Period and will accrue daily on the balance outstanding on the Facility

> and shall, to the extent not paid on the last day of each Interest Period, be compounded and shall itself bear interest at the Default Rate."

23. "Interest Period" was defined in clause 1.1 as ". . . one calendar month".

24. Clause 9 provided:

> "All payments of principal and interest and any other amounts due from the Borrower to the Lender under this Facility Letter shall be made in Sterling and in immediately available funds to such account as the Lender specifies to the Borrower. Whenever any such payment would (but for this Clause 9) fall due on a day which is not a Business Day then the due date for payment thereof shall be postponed to the next succeeding day which is a Business Day unless such day falls in the next calendar month (in which event such payment shall be made on the immediately preceding Business Day). All such payments shall be made free and clear of any restrictions or conditions and free and clear of, and (subject as provided in the next sentence) without deduction for any taxes. If any such deduction is required by law to be made from any such payment, the Borrower shall pay in the same manner and at the same time such additional amounts as will result in receipt by the Lender of such amount as would have been received by the Lender had no such deduction been required to be made."

25. Clause 10 contained covenants. In summary, clause 10.1 provided that the "Borrower", CEK, undertook to observe and perform the covenants in clause 10 and acknowledged that if it failed to do so in any material respect, LCL might give notice in writing demanding immediate repayment of the Loan, together with interest, fees and commission. Clause 10.2(k) contained a covenant not to occupy 71 Hamilton Road, nor to allow any "Related Person" to do so. The Property was defined to include 71 Hamilton Road and in general terms, "Related Person" was defined to include spouses and relatives of the Borrower.

26. Clause 11 contained representations and warranties. Clause 11.1(h) was in similar terms to clause 10.2(k). It warranted that the "Borrower", CEK, had no intention to occupy the "Property" nor to allow any "Related Person" to do so.

27. Clause 12.1 provided that on the occurrence of any event of default set out in clause 12.2 the Lender could accelerate the Loan and thereupon the Borrower shall repay and the facility would terminate. Clause 12.2 set out a large number of events of default:

> "(a) If the Borrower fails to pay any sum due to the Lender on the due date; or
>
> (b) if there shall occur any material breach of (or any material default in) the observance or performance of any term, condition, undertaking or covenant contained in the Finance Documents and such breach or default remains unremedied for

a period of 3 (three) Business Days after written notice from the Lender to the Borrower specifying the breach complained of and requiring its remedy; or

(c) if any borrowed monies of the Borrower become due and payable prior to its stated maturity (otherwise than at the Borrower's sole option) or are not paid on or before the due date or within any applicable grace period; or

(d) if the security for any secured obligations of the Borrower is enforced; or

(e) if any execution, distress, sequestration or other process is levied or enforced upon or against any material part of the property or assets of the Borrower and is not discharged or removed within 3 (three) Business Days (save in circumstances where the Borrower has obtained a written Opinion from Counsel to the effect that there are reasonable grounds upon which to contest such action); or

(f) if any judgment or order in an amount not less than £20,000 (twenty thousand pounds Sterling) made against the Borrower is not complied with within 3 (three) Business Days (save for any judgment or order in respect of which the Borrower has obtained a written Opinion from Counsel to the effect that it has reasonable grounds upon which to contest the judgment or order), or

(g) if any rights conferred by any provision of the Security Documents in any respect cease to be in full force and effect or to be continuing or are or become invalid or unenforceable (otherwise than as a result of the Lenders default); or

(h) if at any time any representation or warranty set out in Clause 11, if repeated by reference to the circumstances then subsisting, would be incorrect or incomplete in any material respect; or

(i) if a default shall arise or occur in respect of (or under) the related Facility Letter; or

(j) it is or becomes unlawful for the Borrower to perform any obligation under a Finance Document; or

(k) the Borrower repudiates a Finance Document or evidences an intention to repudiate a Finance Document; or

(l) (i) any part of the Property is destroyed or damaged; and

(ii) in the opinion of the Lender, taking into account the amount timing of receipt of the proceeds of insurance effected in accordance with the terms of this Facility Letter, the destruction

> or damage has or will have (in the Lender's opinion) a material adverse effect; or
>
> (m) the Property or any other asset secured by the Finance Documents is the subject of a compulsory purchase order; or
>
> (n) where the loan facility is inter alia secured by way of a second or subsequent legal charge(s), any default in the repayment or other terms of the facility(ies) secured by any prior legal charge(s); or
>
> (o) where the loan facility is inter alia secured by way of a second or subsequent legal charge(s) failure by the borrower to provide the lender within seven days from the end of each calendar quarter with documentary evidence to indicate default/compliance with the repayment term(s) of the facility(ies) secured by the prior legal charge(s); or
>
> (p) the Guarantors die or by reason of illness or incapacity or conviction of an offence becomes unable to manage his own affairs.
>
> (q) If the Borrower fails to comply observe and perform the covenants stipulated in Clauses 10.2(m) and 10.2(n)."

28. Clause 12.5 provided:

> "Any monies falling due for payment by the Borrower pursuant to this Facility Letter and for the time being unpaid shall bear interest at the rate specified in clause 6.1 or 6.6, if applicable, calculated on a day to day basis from the date of so becoming due until the date on which payment is received by the Lender as well after as before judgment. Interest shall be compounded on a monthly basis in these circumstances."

The dispute and attempts to refinance

29. In consequence of LCL's assertion that an event of default had occurred by reason of the Housseins' occupation of 71 Hamilton Road, it claimed interest at the Default Rate.

30. CEK and the Housseins disputed LCL's entitlement to interest at the Default Rate and in January 2021 (after Mr Houssein had died) Mrs Houssein instructed Next Step Mortgages to take steps to refinance the loan. In February 2021 Mrs Houssein and CEK instructed Hugh Cartwright & Amin (HCA) to act as her solicitors in connection with the dispute. Correspondence between HCA and Gunnercooke continued for many months thereafter as the parties tried to compromise the dispute. It is not necessary to rehearse the whole of that correspondence; but I will in due course refer to three particular letters in March and April 2021 which Mr Cowen KC argued were sufficient to stop interest running on the loan. Before doing that, it is necessary to discuss the principles by which those letters must be evaluated.

Tender

31. The essential bargain between mortgagor and mortgagee is that the mortgagor has the use of the mortgagee's money and in return agrees to repay that money together with interest for the time that the loan remains outstanding. Until the mortgagee has had his money back, interest continues to run. Despite the essence of that bargain, equity has developed a principle which stops interest running even though the money has not actually been repaid if it has been tendered. Before delving into the shape of that principle, it is, I think, necessary to ask: what is the justification for the principle?

32. The justification, in my view, is that the mortgagee could have had the money at the date of the tender but has declined to take it; and it remains available for him to take. That is why the cases have traditionally held that the mortgagor must put the tendered money aside so that it remains ready for the mortgagee to accept. As Joyce J put it in *Edmondson v Copland* [1911] 2 Ch 301, 310:

> "The law upon this is variously stated in the different books; but I think it clear that, even after tender improperly refused, it would be unreasonable that the mortgagor should have and make full use of the mortgagee's money without paying any interest. On the whole I think that, in order to avoid payment of interest after tender improperly refused, the mortgagor must either pay the money into Court, if there be any proceedings in which that could be done, or keep the money ready, and either make no profit, or, if he make profit,—e.g., if he get interest by placing the money on deposit—he must account for such profit to the mortgagee."

33. In his very impressive judgment in *Shearer v Spring Capital Ltd* [2013] EWHC 3148 (Ch) Mr Daniel Alexander QC (sitting as a judge of the Chancery Division) put it this way at [124]:

> "In order for a tender to be valid, the sum for payment must not just be tendered: it must be set aside in some way so that it is, in an effective way, treated as the mortgagee's money to be had on demand."

34. It was the failure to set the tendered money aside that led to the continuation of interest in *Gyles v Hall* (1726) 2 P Wms 378. That, and other cases to the same effect, were cited by Lord Neuberger (albeit in a minority opinion) in *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 4)* [2013] UKPC 20, [2016] AC 923 at [130] to [132]. In the same case Lord Sumption (again in a minority opinion) referred at [186] to the long-standing common law principle that:

> "… to stop the running of interest, the money must not just be tendered but held available thereafter if it is rejected. The borrower is not expected to pay interest to the lender at a time when it is also bearing the cost of financing the fund which the lender has declined to accept."

35. To return to *Shearer*, Mr Alexander summarised the general principle at [139]:

> "The general principle is that the money must actually be tendered and it was formerly the case that the money had to be produced…. If a tender is refused by a mortgagor, to stop interest running, the mortgagee must either pay the money tendered into court, if there are proceedings in which that can be done, or keep the money ready and either make no profit on it or, if he makes a profit, he must account for that to the mortgagee. He must put the money on one side for the payment of the debt."

36. That is also why the cases distinguish between a tender and an offer to repay. In *Bishop v Church* (1751) 2 Ves Sen 371 Lord Hardwicke LC said (in a passage cited by Stirling J in *Kinnaird v Trollope* (1889) 12 Ch D 610):

> "There are several instances of mortgages, where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment…; yet if a strict tender is not made, the court cannot stop the interest: though cases may be, where the court wish to do it…"

37. The same distinction was drawn by the New Zealand Court of Appeal in *Devon Nominees v Hampstead Holdings Ltd* [1981] 1 NZLR 477.

38. Mr Cowen argued that in the context of a loan intended to be discharged by refinancing, these principles needed modification. In such a case the new lender will not in practice release funds to the borrower until the old lender discharges the security. It would be sufficient to amount to a tender if the borrower had an offer of new finance from the new lender. His ultimate submission was that where:

    i) The borrower offers to repay what is properly due to the lender in full;

    ii) The borrower has an offer of finance from a new lender capable of acceptance by the borrower (whether or not that offer has actually been accepted);

    iii) The lender refuses to accept the offer;

    then

    iv) Liability to pay interest on the loan will be extinguished from the date when, in accordance with the offer, redemption would have taken place, even if the offered funds are no longer available.

39. The problem of refinancing is not a new one. *Rourke v Robinson* [1911] 1 Ch 480 was a refinancing case, albeit an unusual one in which the borrower, accompanied by his solicitor and the manager of the bank which was prepared to make the new loan, attended at the offices of the lender's solicitor and actually put cash on the table. *Barratt v Gough-Thomas* [1951] 2 All ER 48 was another refinancing case. Dankwerts J held that the lender was entitled to interest down to the date of actual repayment, despite the fact that the borrower had earlier said that he was in a position immediately to repay the loan. He said:

> "I have been referred by counsel on his behalf to a number of cases which seem to me to establish the principle that, even if there has been a tender by a borrower of the amount due for principal and interest, that tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time."

40. Turning to the facts, he said:

> "I consider that the matter depends really on the special circumstances of those cases. It seems to me that I ought to apply the principle which was laid down in the earlier cases to which I have referred. Indeed, the present case is stronger, because it appears that there was no actual tender at all in the present case, and it is very much open to doubt whether the plaintiff was in a position to pay off the mortgage on 14 December 1943. It may be he would have had to raise the money from a bank or in some other way in order to do it. It is true that the plaintiff stated in his affidavit that he was ready and willing to pay off on 14 December 1943, but the correspondence seems to me to be to some extent inconsistent with that, and there is, as I see the case, no evidence that any money was set aside for the purpose and was available for payment off of the mortgage on 14 December 1943, or during the period subsequent to that date. It seems to me, therefore, that the plaintiff should be liable to pay interest on the mortgage at the mortgage rate down to the date of actual payment off of the principal. *After all, it has to be considered that he has had the benefit of the money, which has to be regarded in the circumstances as the defendant's, the mortgagee's, money, at all times during that period. Therefore, it seems to me there is nothing inequitable in directing that the interest should be paid to the defendant as the mortgagee, and I so hold*." (Emphasis added)

41. Mr Alexander dealt with the question of refinancing in *Shearer*. That was a case in which the tendered monies were held in the borrowers' solicitors' client account. Mr Alexander tentatively formulated a statement of principle at [251]:

> "If a mortgagor (i) tenders the whole sum owed (including costs) to which he actually has immediate access (de jure or de facto), (ii) keeps that money set aside and available for payment to the mortgagee but (iii) says it will only be paid (or, even if he does not say so, it will in fact only be paid) if the mortgagee does something which a mortgagee can ordinarily and reasonably be expected to do in the context of a redemption namely release the security simultaneously with payment, the tender is valid. Whether the court would nevertheless consider it right to exercise the jurisdiction to curtail interest then depend on general equitable principles."

42. I cannot accept Mr Cowen's submission, which goes much further than any previous statement of principle. Why, one may ask, should interest on a loan stop running when the borrower still has the use of the lender's money, and where the lender has neither received payment nor the opportunity to apply immediately available funds in or towards satisfaction of the debt? There is, in my view, no reason to undermine the essential bargain between lender and borrower in that way. If that means that interest continues to run until the new lender actually releases the funds, that is entirely consistent with that bargain. In the same way if the borrower intends to discharge the mortgage on a sale of the property, interest will continue to run until completion of the sale. It may well be the case that if the borrower has a binding commitment from a new lender to lend (albeit conditional on the release of the security) that would be enough to constitute available funds; but that is not this case.

43. If, as a result of the lender's refusal to accept the offer, the borrower never draws down the offered funds (and hence never has to pay interest on those funds), it cannot be the case that the borrower continues to enjoy the use of the old lender's money indefinitely without having to pay any interest. The essence of a tender is not only that the borrower offers to pay all that is properly due to the lender but is able to do so and remains willing and able to do so.

44. There is one other point that I should deal with before looking at the letters relied on; and that is the case in which the mortgagee demands more than is properly due. That was the position in *Kinnaird v Trollope*. In that case the original mortgagors granted a mortgage to secure a loan of £12,000 and subsequently assigned the equity of redemption to Lord Glasgow (subject to the mortgage). Lord Glasgow took out a second mortgage to secure a loan of £8,000 in favour of the same mortgagee. The original mortgagors attempted to redeem but the mortgagee in that case refused to accept an offer to do unless the sum outstanding on both charges was paid. It was held that the mortgagors were entitled to redeem on payment of what was due under the original mortgage only. The question before the court was liability for interest. Stirling J held that interest continued to run. He said:

> "I think the Court ought to be satisfied of the existence of that continued readiness to pay, which both at law and in equity are essential to the success of a plea of tender. In this case the only materials I have for forming an opinion on this point are, first of all the proceedings in the action, and secondly, the statements in the special case and the correspondence there set out; and, looking at the letter of the 5th of October, 1886, and to the course taken by the Defendants in the action, I think the just inference is that though the Defendants were willing to redeem on payment of £12,000 interest and costs, they were not either ready or willing to part with their money until it was ascertained that they could redeem on those terms, and that the summons of the 12th of November, 1886, was really taken out as a cheap and speedy mode of ascertaining their rights."

The letters relied on

45. Before quoting the letters on which Mr Cowen relied, I should refer to the judge's assessment of the correspondence as a whole. The background to the offers is the

dispute between the parties about whether an event of default had occurred because of the Housseins' residence at 71 Hamilton Road. The context, therefore, is that the offers were made in an attempt to repay the loan and settle that dispute. The judge said this at [69] (viii):

> "In my view these communications do not demonstrate a borrower seeking to repay a sum due who is being thwarted by an obdurate and opportunistic lender. The opposite is the case. LCL engaged with the negotiations and often responded with counter-offers, many of which were either clarifications or attempts to inject certainty into vague and highly contingent proposals. There is nothing to be criticised in any of that. By contrast, throughout this process the Claimants have cavilled, prevaricated, temporised and delayed often with a view to improving their outcome. Most obviously, since my First Judgment it has been clear that the Claimants would have to repay the outstanding balance of the Loan. Rather than doing so, they have put forward multiple lines seeking to justify why they should not have to. That aspect of my First Judgment was not appealed and so is final. They have sought to improve their position on settlement and have retained the capital due to LCL as part of that. A party is entitled to adopt such a strategy in a negotiation, but they expose themselves to the risk of interest accruing where, as here, it fails."

46. The first letter on which Mr Cowen relies is dated 16 March 2021 from HCA. That was a response to a letter from Gunnercooke asking for clarification of a previous proposal made by HCA. In their letter Gunnercooke said that if the refinancing proceeded at a satisfactory pace LCL might be willing to consider their position with regard to default interest at the point the refinancing was complete. The material parts of HCA's response read as follows:

> "To be absolutely clear, an entirely without prejudice to my clients' rights, what my client is offering is:
>
> 1. £1.2 million by the middle of April 2021;
>
> 2. A further £650,000 again by the middle of April 2021;
>
> 3. In return, my client would expect a discharge of all the securities (including for the avoidance of doubt, 71 Hamilton Rd) in favour of LCL and a concessionary default interest rate to be agreed between the parties which my clients will pay;
>
> 4. In the meantime, neither your client nor the Receivers will take any steps to dispose of any of the properties the subject of securities in favour of your client.
>
> Please confirm that the above is agreed and I will arrange for my client to accept the bridging finance offer that they have received so that redemption of your client's mortgages can be

> achieved in accordance with the above timeline. Now that there seems to be some possibility of an agreement between LCL/Receivers and my clients I will try and come back to you early next week with a firm date by which time the redemption can occur."

47. The second is a further letter from HCA dated 23 March 2021. The material parts of that letter read as follows:

> "Nevertheless, in the interests of narrowing the issues in accordance with the overriding objective, our clients' proposal will be set out in open correspondence as follows:
>
> 1. The loan of £1.2 million will be secured over three properties (199, 201 and 203 Downhills Way). LCL will be required to release its charges over those properties in order to receive the funds.
>
> 2. A further loan of £650,000 will be made but a third-party charge over 71 Hamilton Road is required, so LCL will also be required to release its charge over that property.
>
> 3. Once the £1.85 million has been paid to LCL the only outstanding issue will be the issue of the Receivers' costs and the default interest rate claimed by LCL. These are disputed sums. The complaints made by our clients have been canvassed in previous correspondence. The net effect will be that our clients would be paying the redemption amount almost 6 months early. In addition, the 2 remaining buy to let properties valued in excess of £1.1 million and in respect of which you have seen mortgage offers of £800,000 will be retained by your client upon the terms specified below.
>
> 4. Our clients' proposal in regard to the 2 remaining buy to let properties is as follows:
>
> a. LCL continues to maintain its security for the 2 remaining buy to let properties which are valued at £575,000 each.
>
> b. The issue that our clients wish to litigate about (see paragraph 3 above) can then be a discrete litigation as to whether your client is entitled to the Default Interest as specified in the Facility Letter and/or the costs of the Receivers (as well as any other costs).
>
> c. To ensure that matters are dealt with swiftly, our clients will provide an undertaking to issue proceedings within 28 days of the payment of £1.85 million.
>
> d. Your clients will provide an undertaking that neither they nor the Receivers will take any steps to sell the remaining 2

> properties pending the outcome of the litigation referred to above.
>
> e. If our clients' application is unsuccessful, then our clients will be afforded some time (to be agreed at the relevant time) to refinance and discharge the debt, failing which your client will be entitled to enforce its security and recover what is due to it and return the balance to our clients.
>
> f. The sum in question is around £500,000. The Receivers are under a duty to act in good faith and for the purposes of obtaining repayment of the debt owed. Your clients are also under a duty to act in good faith and not exercise its powers for a collateral purpose. We believe that the mechanism set out above and will be in the interests of both our client and your client. Your client will receive £1.85m (without the need for the Receivers to do anything) and still have sufficient security in relation to its claim to be entitled to the default interest and costs which are disputed."

48. The third is a further letter from HCA dated 7 April 2021, the material parts of which read as follows:

> "Our clients' position is as follows:
>
> 1. Our clients do not accept that there was a breach of the Facility Letter. However, if there was a breach, it was only a technical breach which has not caused LCL to suffer any loss. In any event, it appears that assertions have been made on behalf of our clients and/or CEK by the mortgage broker which were not authorised and which LCL ought not to have relied upon.
>
> 2. It is our clients' position that the rate of interest specified in the Facility Letter is an unlawful penalty, being a 400% increase to the normal interest claimed. In this regard, even if the allegations made by your clients were correct (which is denied) the breach would have been technical at best. Without making any admissions on behalf of our clients, on the worst-case analysis LCL would not suffer any damage until at least the end of the term in August 2021. In the circumstances, there is a strong arguable case that the penal rate of interest is unenforceable.
>
> 3. Our clients maintain that LCL have unnecessarily, improperly and oppressively exercised their power to appoint Receivers under the Legal Charges. Rather than acting as an agent for the Borrower, our clients believe that, throughout their appointment, the Receivers have been acting on the direction of LCL. Furthermore, the costs incurred by the Receivers are certainly not "reasonable or properly expended"

as required by the Legal Charges. The broker was aware that the Guarantors were unable to communicate in English and it is not disputed that Mrs Houssein is unable to communicate in English language.

4. Nevertheless, in the interest of resolving matters without recourse to legal proceedings we make the following proposals which our clients believe will meet any reasonable concerns which your clients have.

4.1 Our clients will procure completion of the 3 buy to let re-mortgages and the bridging finance. Because of the delay that has occurred as a result of LCL's belated offer, completion is now unlikely to take place by 14 April 2021. We understand that our clients should be able to make payment of **£1.85 million** by **21 April 2021**. Can you please confirm that this is acceptable?

4.2 Upon receipt of the funds referred to in paragraph 4.1 above, your clients will provide executed discharges in respect of the 3 buy to let properties and 71 Hamilton Road.

4.3 Your clients will take immediate steps to discharge the receiverships in respect of all of the Properties and your clients will undertake not to enforce their security (including for the avoidance of doubt appoint any receivers) in respect of the remaining 2 buy to let properties pending either the grant of probate and completion of the refinance of those 2 properties and/or 9 August 2021 (whichever is the later).

4.4 Mr Ali Houssein's probate will be available in the near future (potentially by July 2021). On receipt of the probate, Mrs Houssein will complete the refinancing of those 2 properties as quickly as possible and pay LCL with the sum of £350,000 in return for the executed discharges, subject to the lenders of the 2 buy to let properties agreeing to extend their mortgage offers. Compliance by Mrs Houssein of this obligation is conditional upon Mrs Houssein receiving independent financial advice from an adviser who can communicate in the Turkish language, which is proving to be difficult due to the pandemic and her vulnerability.

5. Please note that the sums referred to in paragraph 4.4 above will be paid strictly on the understanding that our clients do not accept that there has been any breach of the Facility Letter in August 2020 which would have entitled LCL to appoint receivers and/or claim default interest and in any event, the Default Interest claimed is in our clients' opinion a penalty."

Were these offers tenders?

49. Mr Cowen made the point that (as it turned out) because LCL were not entitled to claim interest at the Default Rate, the offered sum of £1.85 million was more than the amount (inclusive of interest) properly due to LCL. At the time when the offers were made, the borrowers had offers of finance which had been (or would shortly be) supplied to LCL. They were therefore in a position to repay what was properly due to LCL on the proposed redemption date. The reason why LCL refused those offers was that it was maintaining what turned out to be a bogus claim for Default Interest. The grounds of refusal were therefore improper. These were offers that LCL should have accepted.

50. It is true that LCL lost the argument about whether it was entitled to interest at the Default Rate because of the knowledge of Mr Stylianides attributed to it. The mere fact that a mortgagee asks for more than is due does not, however, displace the usual requirements of tender. Mr Cowen did at one stage suggest that the claim to interest at the Default Rate was advanced in bad faith, but the judge made no finding to that effect, and I do not consider that such a conclusion inexorably flows from the findings of fact that the judge did make.

51. It must be remembered that the three letters on which Mr Cowen relied were not freestanding offers that came out of the blue. They were part of a continuous chain of correspondence that began in February 2021.

52. The judge dealt specifically with each of the letters on which Mr Cowen relies. In relation to the first letter (16 March 2021) he said at [71]:

> "Self-evidently that is neither a tender of payment nor an offer of payment under the terms of the Facility Letter because the funds are not immediately available. Nor do I accept this was a freestanding offer of payment at some point in the future because it is conditional on settling the default interest dispute; I struggle to see how, objectively, one can read the "In return" language in point 3 in any other way."

53. I agree that the offer of £1.85 million was not an unconditional offer which could be accepted whether or not the dispute about the Default Rate remained live. It was conditional upon settlement of that dispute. It gave no firm date for redemption which HCA said that they would provide early in the following week. Moreover, as the letter itself makes clear, the borrowers had not at that stage accepted the offers of finance. The offers of finance themselves were conditional. In relation to the borrowers' offer to pay the tranche of £650,000, the borrowers had no offer at that time (or at least none that was shown to LCL). In addition, all the securities were to be released on payment of £1.85 million, leaving any amount subsequently agreed in settlement of the dispute about the Default Rate outstanding as an unsecured loan. The Facility Letter made no provision for redemption or release of security without payment in full.

54. The judge's ultimate conclusion about the second letter (23 March 2021) was encapsulated at [82]:

> "The Claimants had offered payment when what they meant was that they would pay if they could secure financing. That would, in my view, fall some considerable way short of what could properly be termed an offer of payment. Put at its highest it could only ever be a conditional offer of payment at some time in the future, should funds become available. LCL was entitled to want more certainty than that under the terms of the Facility Letter."

55. Again, I agree. In addition, there was no stated timescale for securing the moneys, and again the proposal was that LCL should release part of its security before repayment of the debt in full, an event for which the Facility Letter makes no provision. This offer was, nevertheless, in some respects an improvement on the previous offer because it envisaged LCL retaining security on two of the properties while the dispute over the Default Rate and the receivers' costs was determined.

56. Gunnercooke's response to that proposal was to require sight of the "offer letter" in relation to the £650,000 bridging loan; to require a timescale for the refinancing; and a reiteration of LCL's willingness to consider a settlement figure for the default interest. In fact, there was no offer letter in relation to the bridging loan. That is why in their reply of 25 March 2021 HCA said that they understood that the offer letter was being finalised and would be available shortly. In fact, what was sent to Gunnercooke on the following day was not an offer letter but a term sheet. But that term sheet was conditional (among other things) upon the provision of a personal guarantee by Mr Houssein Houssein. No evidence was provided to LCL (or indeed to the judge) that he was willing to give that guarantee.

57. The third offer (7 April 2021) was a response by HCA to a proposal put forward by Gunnercooke on 30 March 2021. That proposal essentially agreed that LCL would release part of its security on payment of £1.85 million by 14 April 2021 and offered to cap default interest at £350,000.

58. As far as the third letter (7 April 2021) is concerned, HCA asked for a further week in which to make the payment of £1.85 million (although they had previously asked for a redemption statement up to 14 April). The release of the securities was agreed. Paragraph 4.4 of the letter appeared to accept LCL's proposal to cap the default interest at £350,000 but that acceptance was, as the judge observed, hedged about with uncertainties. Mr Houssein's probate had not been received, it was not known whether the proposed lenders of the two buy to let properties would extend their mortgage offers, and the whole proposal was conditional on Mrs Houssein receiving financial advice from an adviser who could communicate in Turkish.

59. The toing and froing of proposals for settlement continued over the next couple of months until on 12 May 2021 HCA said that their clients would take their chances in the litigation and withdrew all offers of settlement.

60. In my judgment the judge was both entitled and correct to conclude that the various offers of settlement on which Mr Cowen relied fell far short of anything that, even in the context of refinancing, could properly be described as a tender.

Does equity have a wider power to disallow interest?

61. Mr Cowen's next contention is that the scope of equity's power to stop interest running has been enlarged by the majority decision in *Çukurova*. In that case Çukurova borrowed USD 1.352 billion from Alfa secured by an equitable charge over shares. One of Alfa's remedies on an event of default was to appropriate the shares in or towards satisfaction of Çukurova's liabilities. In April 2007 Alfa alleged that there had been events of default, and later in the month Alfa gave notice that it had appropriated the shares. In May 2007 Çukurova tendered the amount due (including interest) but Alfa refused to accept it because it was made late. The tendered sum was then paid into an escrow account with JP Morgan (the Namrun account) in the name of Namrun, a subsidiary company ultimately owned by Çukurova. There it remained until 25 May 2010, when it was paid out to Namrun. The first main question which the Privy Council had to decide was whether Çukurova should be granted relief against the forfeiture of the shares that Alfa had appropriated. It is important to note that the case concerned relief against forfeiture. The Board decided that it had jurisdiction to grant relief against forfeiture and that, by analogy with the principles governing relief against forfeiture of leases, it had a wide discretion as to the terms on which relief should be granted. In a further judgment, the Board considered what those terms should be. It is that judgment which is relevant to this appeal. The majority opinion was delivered by Lord Mance, with Lords Neuberger and Sumption dissenting.

62. The starting point for the majority opinion was that the appropriation of the shares had discharged the debt in law and that it did not continue to run in a parallel equitable world: [12]. At [16] Lord Mance distinguished between "a situation where an extension of time to redeem is being sought while a loan remains outstanding and a situation like the present where the loan has been discharged at law by appropriation." He continued:

> "In the former situation, the role of equity is likely to be circumscribed by the consideration that obligations will have continued to fall due for performance and actually remained unperformed. It will be correspondingly difficult to identify any reason why they should not, if unperformed, be performed as a condition of relief. In the latter situation, the discharge of the loan will mean necessarily that no obligations will have fallen due for performance in the meantime and that there may have been other developments (including, though not relevant in this case, relevant benefits obtained by the lender from the appropriation, which equity will require to be brought into account). In the latter situation, therefore, equity's role must extend to considering such matters, and it would, in the Board's view, be remarkable if the principles of equity were so inflexible that it was unable to take any account of circumstances making it inequitable or unconscionable to insist on treating the loan as if it had run continuously until relief was actually granted under a court order."

63. In the former situation, both he and the minority approved an observation of mine in *Law Debenture Trust Corpn plc v Concord Trust* [2007] EWHC 1380 (Ch*)* at [53]:

> "The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late. Apart from time stipulations, I do not consider that the court, in the exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor … To do that would in effect allow the mortgagor to benefit from his own breach of contract. So the question I must answer is: what liabilities are secured by the security?"

64. That he accepted as the standard rule but said that the issue before the Board was whether "exceptional circumstances may make it inequitable or unconscionable to apply the general rule in the latter situation identified in the previous paragraph." The "latter situation" was, of course, the situation in which the debt had been discharged at law. That is not this case. In this case the loan remained outstanding. So, this case is the "former" situation in which the role of equity is likely to be circumscribed by the consideration that obligations will have continued to fall due for performance and actually remained unperformed.

65. Having considered a number of cases relating to tender Lord Mance concluded at [42]:

> "The conclusion which the Board would reach … is that equity can and should respond by a special order as to interest or costs in exceptional situations where the mortgagee has by words or conduct rejected, made impossible or delayed repayment of the mortgage debt, and that such a situation may exist where there is a tender or offer of repayment, particularly one backed by moneys actually paid into court or an account."

66. But he sounded a warning at [44]:

> "Nevertheless, the Board emphasises that it is in no way suggesting that equity recognises any general or open-ended discretion. The Board's reasoning and decision in this case are based on and confined to what it sees as an exceptional situation, in which it would, in the Board's view, be both inequitable and unconscionable to ignore the background and circumstances of the tender made on 27 May 2007 and to treat the grant of relief as conditional on the loan reviving and remaining outstanding for six years as if nothing would have or had ever happened in the meanwhile. The unusual facts of this case are in this respect probably unlikely to be repeated."

67. Having reiterated some of the essential facts, Lord Mance then explained what made the case exceptional. At [47] he said that:

> "The making of the tender, backed by the Namrun account, is thus in the Board's view of critical relevance in relation to the conditions on which relief should be afforded. It means that ÇH and ÇFI were at all times both willing and able to redeem the shares forfeited by ATT's appropriation."

68. At [48] he concluded:

> "In these circumstances, ATT should be viewed as having had and rejected the opportunity on 25 May 2007 to receive payment in full. The tender, coupled with the opening and maintenance of the Namrun deposit account for the next three years, should prevent interest running from 25 May 2007 to 25 May 2010. Thereafter, ATT should receive interest, but this should not be on the basis that ÇH and ÇFI remained in default. Rather, the essential reason why the loan remained unpaid after 25 May 2007 can be identified as having been ATT's rejection of the full repayment then tendered. As from 25 May 2010, ATT should therefore receive interest at the standard contractual rate of LIBOR plus 8% per annum with annual rests on the amounts outstanding as at 25 May 2007."

69. It is notable that, even in a case in which equity had the power to relieve the borrower of liability to pay interest, the Board only did so during the period in which the money had actually been set aside in the Namrun account. It was during that period that Çukurova was both willing *and able* to repay the loan. Once the money had been paid out to Namrun (so that it had the use of the money), the liability to pay interest revived. As Mr Alexander said in *Shearer* at [143]:

> "The approach appears to have been to ask whether the money remained, for practical purposes, available such that it could and would be paid over at any time."

70. Mr Cowen's main argument is that the scope of the jurisdiction asserted by the majority in *Çukurova* is wider than the judge thought. It is not limited to tenders or offers that a lender is *obliged* to accept as a matter of contract but extends to tenders or offers of payment that a lender *should* accept as a matter of equity.

71. I cannot accept this submission. First, let it be assumed that as a matter of contract a lender is obliged to accept an offer or tender (itself a dubious legal proposition: see *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273). As a matter of contract the lender, on this assumption, was only obliged to accept an offer or tender if it complied with clause 9, i.e. in immediately available funds, and was not required to release any of its securities unless repaid in full. It is not, I think, suggested that any such offer or payment was in fact made. I find it difficult to understand what offer a lender "should" accept if it is made outside the contractual framework. In so far as it goes wider, the proposed test that Mr Cowen formulated is, in my view, too vague and unspecific to constitute an acceptable test.

72. The facts in *Çukurova* were such that it was the setting aside of the tendered funds in the Namrun deposit account that stopped interest running. Once the money in that account was actually paid out to Namrun interest started running again. In other words, it was a classic case of tender. In this case there never was any money set aside. Nor indeed was any money immediately available. The loan remained outstanding, unlike the position in *Çukurova* where the loan had been discharged at law by the appropriation of the shares. Even if *Çukurova* has extended equity's reach,

it has not done so in a way that would eliminate the distinction between an offer of future settlement on the one hand and a tender on the other.

Conclusion

73. In my judgment nothing that the borrowers did in this case stopped interest from running.

Is the default rate of interest a penalty?

74. The judge set out his understanding of the law at [113] to [129]. In the course of that discussion he quoted from *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172:

> "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."

75. Before embarking on his application of his understanding of the law to the facts, the judge had to resolve an issue about what had actually been remitted to him by this court on the first appeal. Mr Wheeler argued for a narrow interpretation of the remitted issue; but Mr Cowen argued for a wider one. Since the judge accepted Mr Cowen's submission, it is important to see what it was:

> "[132] By contrast, Mr Cowen, in oral opening, suggested that what was required was a broader re-evaluation. Applying *Makdessi*, it would be insufficient merely to show that the Default Rate was not extortionate by reference solely to LCL's legitimate interest in repayment; if it was extortionate or unconscionable by reference to legitimate interest underpinning any primary obligation, the Default Rate as a whole would be unenforceable. He also referred me to the terms of the Court of Appeal's order, which is broader than paragraph [57] in providing:
>
> 4) The following issues are remitted to the Judge for further consideration:
>
> a. Whether the default interest in the Facility Letter (as defined in the Appeal Judgment) is an unenforceable penalty at common law;
>
> [133] This, he submitted, put everything back in play, and the question in the Court of Appeal Judgment must be read in light of it."

76. Since the judge accepted that "everything [was] back in play" he was required to carry out an evaluation of LCL's legitimate interests, and to consider whether, in relation to any one of those legitimate interests the Default Rate was "out of all proportion".

77. At the first trial the borrowers called Mr David Griffiths as an expert witness. He had had long experience as a banker in relation to property lending. He presented two expert reports to the court; and was cross-examined at the first trial. He was not recalled for the remitted hearing. LCL called Mr Alex Kyriacou whose experience was as a mortgage broker. Broadly speaking, the judge accepted Mr Griffiths' evidence.

78. But as the judge noted at [271] the problem was that neither expert witness presented a report that addressed the particular issues that the judge was asked to decide at the remitted hearing (i.e. the identification of a primary obligation and the legitimate interest in its enforcement, followed by an assessment of whether, by reference to that interest, the provision in question was out of all proportion to the interest in question). Rather, the experts addressed the interest rate holistically by looking at what was available in the market. Nor did either expert address the proportionality between the legitimate interest in question and the default rate.

79. I should mention in passing that it appears to have been common ground between the experts that it was normal, in loans of this kind, that a default rate of interest would be compounded. Indeed, in paragraph 3.92 of his second report Mr Griffiths said that it was "unusual for lenders to apply default interest on a simple interest basis".

80. In the way that the borrowers framed the issue for decision at the remitted hearing, it would have been open to them to have applied to recall Mr Griffiths to deal with the issues that they now said the judge had to decide. But they did not. As the judge observed at [101] of his judgment on consequential matters, it was not his role to explain to a party any weaknesses in its case or to ask them whether they would care to bolster their position. The burden was on the borrowers to show that the Default Rate was a penalty, and if there were evidential gaps that is not a fair criticism of the judge who had to deal with such evidence as was presented to him.

81. In so far as it was suggested that the judge himself should have asked for Mr Griffiths to be recalled or should have put his analysis of LCL's legitimate interests and the proportionality of the Default Rate to the borrowers before giving judgment and that his failure to do so was a procedural irregularity causing substantial injustice, I reject that suggestion. The judge did precisely what the borrowers invited him to do on the basis of the evidence that the parties chose to place before him.

82. At [156] to [159] the judge considered whether the Default Rate was a secondary obligation engaged on the breach of a primary obligation; and held that it was. At [160] to [252] he considered the question: what were LCL's legitimate interests which the Default Rate was intended to protect? He did so by reference to each of the events of default that were relevant to the facts of the case. At [265] to [268] he considered whether there was a strong presumption that the parties themselves were the best judges of what was legitimate (as stated in *Makdessi* at [35]); and held that there was. The judge recognised that a sum of money which becomes payable on breach of a number of different primary obligations, some of which may be more serious than others, is more susceptible to being characterised as a penalty than a sum which

becomes payable on breach of a single primary obligation. He therefore considered each relevant event of default separately. He had already reminded himself at [120] that *Makdessi* had held that deterrence is not penal if there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract. At [270] to [351] he considered whether the Default Rate was extortionate in relation to each of the legitimate interests that he identified; and held that it was not. He therefore concluded that the Default Rate was not a penalty.

83. Mr Cowen accepted that the judge correctly identified the law but said that he was wrong in his application of the law to the facts. He also accepted that the judge was entitled to separate out LCL's legitimate interests that were to be protected by the Default Rate but said that he did so in a manner which was not legitimate. The particular interest on which Mr Cowen focussed was what the judge called "the Credit Risk". The judge explained what he meant by that at [169]:

> "In principle a lender has a legitimate interest in primary obligations that go to preserve a borrower's ability to repay the debt when due (the **Credit Risk Interest**)."

84. The judge distinguished between two types of credit risk. One he described at [171] as "predictive" (given what we know now, what is the likelihood of a borrower like this one defaulting on its payment obligations?). That was the sense in which the judge used it in relation to the primary obligations (i.e. the events of default).

85. The other he described at [172] as "descriptive":

> "… given that the borrower has defaulted, we know they were not good for their debt. I am not suggesting that such a descriptive use of the term "credit risk" is illegitimate, provided that we do in fact know that the borrower was not good for their debt, but one can see immediately that it is different. It is assessed from a different point of time (post-payment default, not pre-payment default), is therefore based on different evidence (most obviously, one knows there was a payment default) and so answers a different question (what happened, rather than what might happen)."

86. As Lord Hodge pointed out in *Makdessi* at [249], whether a provision is a penalty is, in essence, a value judgment. The approach of an appeal court to a value judgment made by a trial judge is summarised in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [76]:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

87. I have also warned against reliance on selective snippets of evidence to undermine a trial judge's conclusion (what elsewhere I have called "island hopping": *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26 at [114]); and have also made the point that an appeal court is bound, unless there is compelling evidence to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration even if he does not mention a specific piece of evidence: *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2](iii). When an appeal court is asked to overturn a judge's finding of fact, the acid test is whether that finding is rationally supportable (see, for example *Volpi* at [2] (v) and *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, [2024] FSR 17 at [110]; *Gift v Rowley* [2025] UKPC 37).

88. Mr Cowen's criticisms of the judge concern the conclusions that he drew from Mr Griffiths' evidence.

89. The judge discussed the Credit Risk Interest at great length. He concluded that the contemplated exit route from the loan via refinancing was at best viable but no more. Its viability would be called into question if the rate of interest sought by a refinancing lender changed for any reason. One reason why they might change was any default of the borrower, whether on the loan itself or any other borrowing. At [339] the judge summarised his view thus:

> "A refinancing of this portfolio was far from straightforward. Applying realistic assumptions, a reasonable lender in LCL's position in July 2020 would, in my view, properly conclude that there was no or almost no margin for error. Even on the best case of a 125% interest cover ratio used by Mr Griffiths the refinancing squeaked home. Any of the events of default that I have referred to in the Credit Risk Interest could reasonably be expected, in my view, to move the interest rate sufficiently to cause the refinancing to collapse. Some, such as unpaid judgment debts, might be more dramatic in their effect than others, but they would all cause the same outcome – realisation of the security. There was nothing available to LCL to suggest that the Housseins had alternative means of bridging the gap – beyond a certain point, a miss was as good as a mile. All the events of default listed could have the same effect; it was right to treat them in the same way."

90. Thus, the judge reasoned at [346] that it would have been very much in the interest of any lender to see that the Housseins did not default. Accordingly, the judge said that the Default Rate:

> "…was tied to the need for refinance in order for the hypothetical lender in LCL's position to be repaid, and so in turn the Credit Risk Interest is tied to the sensitivity of that refinancing to any move in interest rates."

91. He concluded in relation to that interest:

> "[347] As I have noted, Mr Griffiths plainly thought that 4% was, at best, at the limit of commercially acceptable rates. As I have also noted, however, that is not the test. Moreover, and in any event, in light of the evidence I now have I consider that Mr Griffiths' use of a 125% interest cover ratio was too optimistic. A lender in LCL's position, working with Mr Griffiths' model, would have understood the critical importance of the refinancing interest rate remaining at or below the assumed rate of 5.5%; even a small change could derail any refinancing. It would have therefore attached, and rightly attached, very significant weight to anything that might affect that refinancing rate. The weight to be attached to it would only be increased where, as here, the LTV on the portfolio was already compromised by the Housseins' residence of 71 Hamilton Road and could be further compromised by such things as a change in the Downhills Way Properties letting arrangements to HMOs or even a change in the nature of the tenants to assisted tenants.
>
> [348] Given those factors, it seems to me that it was not extortionate for LCL to attach an above market default rate to the Credit Risk Interest. This was a marginal prospect; LCL had every reason to want to ensure that it did not deteriorate further. Again, therefore, I do not consider the Default Rate to be a penalty."

92. In his oral submissions, Mr Cowen focussed on what he said were three identifiable flaws in the judge's reasoning. The first was his assessment of the size of a loan that the rental income could support. Mr Griffiths had presented a table which set out his expert opinion in that respect. The top half assessed rental income on the basis that all the properties on which the loan was secured were let and income producing. The bottom half of the table assessed rental income on the basis that only the Downhills Way Properties were let (i.e. on the basis that 71 Hamilton Road which was the Housseins' family home was not income producing). The judge's assessment was based on the bottom half of the table. Mr Cowen argued that the judge was looking at the wrong half. At the time when the loan was made, he said, LCL must have been working on the basis that all the properties would be let. It did not in fact know that the Housseins remained in residence at 71 Hamilton Road because of the deception by Mr Stylianides. I do not consider that that criticism is well-founded. The judge dealt with this question at [324]:

> "To be clear, I think [Mr Griffiths] was right to assume that only the Downhills Way Properties were income generating. *LCL had been told that 71 Hamilton Road was still undergoing renovation work following which the Housseins were to move back in*, and a lender in LCL's position understanding that would not allow for any income from such a property." (Emphasis added)

93. In my judgment, that is a rationally supportable finding of fact, which I did not understand Mr Cowen to challenge. Indeed, it is supported by clause 2 of the facility letter itself. The judge repeated that finding of fact at [344]:

> "*Makdessi* requires me to ask what an objective party would have thought at the time the agreement was entered into. At that time [i.e. at the date of the contract] LCL knew that the preferred exit was refinance, had a reasonably standard interest cover model for assessing the prospects of refinance, *knew that only the Investment Properties would produce an income* and knew that as a general rule further credit default would probably affect the rate at which the Housseins could borrow to refinance." (Emphasis added)

94. Plainly the judge's reasoning was that an objective party would work on the facts as they were. Mr Cowen riposted that the facts could change. The Housseins might have left 71 Hamilton Road. No doubt that is true in theory. But equally the facts could change in relation to the buy to let properties. There might be a void, or tenants might default on their rent. The judge briefly alluded to the impact that a void or change of tenants might have by reference to the evidence of Mr Jack Liondaris to which he referred at [343]; but the point was not, it seems further explored in evidence before him. The essential point that the judge was making however, which comes through the whole of his discussion, is that the prospect of refinancing this loan was precarious and could be derailed by anything that pushed up the interest rate at which a new lender would be prepared to lend.

95. The second flaw, Mr Cowen said, was that the judge was wrong to take into account the effect of the Housseins' occupation of 71 Hamilton Road in his assessment of the loan to value ratio (LTV). But on the basis that the judge's finding of fact was that LCL had been told that 71 Hamilton Road was undergoing renovation, following which the Housseins would move back in, the judge was, in my view, entitled to take the view that he did. Moreover, looking at the facts objectively or from the perspective of a hypothetical refinancing lender, the conclusion would be the same.

96. The third flaw, Mr Cowen said, was that the judge took into account events which post-dated the loan, whereas he should have carried out his assessment as at the date of the contract. The judge recognised clearly that the relevant date was the date of the contract. His self-direction on that point was in these terms at [225]:

> "Again, *Makdessi* makes it critical to carry out the causal analysis at the right point in time, which is the point when the agreement was entered into, not the time of breach and certainly not the time of trial."

97. He repeated that self-direction at [344]:

> "*Makdessi* requires me to ask what an objective party would have thought at the time the agreement was entered into."

98. Where the trial judge gives himself a correct self-direction on the law, it is an uphill task to persuade an appeal court that he failed to follow his own direction when

assessing the facts. The point arises because in 2023 Kent Reliance (one of the lenders from whom the borrowers had an offer of finance back in the spring of 2021) refused to lend on one of the properties because it was being used as a house in multiple occupation (an HMO). What the judge thought was significant was not the date, but the fact of and reasons for the refusal. What he took from that was this:

> "Very obviously, if a lender who is known to be flexible and to whom applications had a high approval rate would not lend, that would inevitably call into question the exit strategy because it seems likely that other, less flexible lenders would take the same view. To be clear, I recognise that earlier applications on 205 Downhills Way to Kent Reliance had been approved at the level sought. *The point is that LCL had no control over how (in the sense of single unit or HMO) the Claimants let the Downhills Way Properties or to whom. Yet a shift in these factors at any time during the term of the Loan could prejudice the refinancing*." (Emphasis added)

99. Mr Cowen accepted that the possibility of the letting of one or more properties as an HMO was something that the judge was entitled to take into account in principle; but he should have assessed the probability of that happening, viewed at the date of the contract. I do not understand how the judge could have made an assessment of probability on an objective basis. There was simply no evidence upon which he could have done so. Mr Cowen suggested that the Housseins could have been asked, but any evidence that they might have given in that respect would have been wholly subjective; and in any event Mr Houssein (who was the driving force) had died before trial.

100. Allied to this point was the judge's reference to increases in the Bank of England's base rate which also post-dated the contract. Again, Mr Cowen argued that the judge should have assessed the probability of an increase in base rate as at the date of the contract. The judge's point here was no more than an increase in interest rates would imperil the prospect of successful refinancing of the loan. The increase in base rate was no more than an illustration of that point. Quite apart from that, once again I do not see how the judge could have addressed the probability of an increase in base rate based on the evidence that the parties chose to present.

101. One further point was trailed in the borrowers' skeleton argument. In the course of his cross-examination at the first trial Mr Griffiths did use the word "penalty". But that has to be seen in context. The judge recorded his findings about that as follows:

> "[284] By this stage, then, the consensus between the experts was that a 3% default rate would be "*more in line*" with the market. The Joint Statement did not go so far as to say that 4% was out of line with the market or unreasonable; it simply did not comment on it at all. Mr Griffiths obviously remained troubled by a 5% rate.
>
> [285] The issue arose again in Mr Griffiths' cross-examination. Having described 4% as "*very high*" he observed that: "*Mr*

> *Kyriakou and I were really hovering around the 3%.*" He then returned to the 4%:
>
> For it to be four times the contractual rate to me is excessive.
>
> And of course the other point to make is that saying 4% a month is all well and good, but if you compound that it becomes 60% per annum. It's a huge, huge penalty.
>
> [286] The test for penalty had not been put to Mr Griffiths at that stage and I did not and do not take him to be saying that the legal standard was met. On the contrary, in his Report he very fairly acknowledged that this was a matter for the court, not for him."

102. In his skeleton argument Mr Cowen posed the question: given that one of the key questions was whether the Default Rate was a penalty, what else could Mr Griffiths have meant by that answer? But the answer to that question is also given by the judge at [288], namely that when Mr Griffiths was asked directly whether the Default Rate was extravagant or unconscionable he did not answer the question directly. In addition, as the judge also recorded at [282] and [290], Mr Griffiths expressed the view in his report that a 4% default rate was at the borderline of commercial acceptability. The judge said at [292]:

> "While the typical default rate market in the market was 2-3%, higher rates did exist, up to and including 4%. Such rates were at the borderline of what was commercially acceptable, even in the context of an interest that merited strong protection."

103. Wisely, Mr Cowen did not pursue this point in oral submissions.

104. I do not consider that these alleged flaws undermine the judge's evaluative decision.

105. Finally, in his skeleton argument Mr Cowen argued that on the basis of Mr Griffiths' evidence, the Credit Risk Interest was adequately protected without the deterrent of a default interest rate of 4% per month compounded monthly. He continued:

> "That interest rate was *therefore* a penalty in relation to that interest and, *accordingly*, it was a penalty at common law." (Emphasis added)

106. In my view that is a non-sequitur. The question is not whether the legitimate interest is "adequately" protected. That would be to resurrect the now discarded "pre-estimate of loss" test. Rather the question is whether the Default Rate is "out of all proportion" to the legitimate interest in common. In addition, in the light of Mr Griffiths' evidence about the commercial acceptability of a 4% default rate, the premise underlying the syllogism is itself highly questionable.

107. In my judgment, Mr Cowen has failed to demonstrate an identifiable flaw in the judge's judgment such as would entitle an appeal court to overturn his evaluative judgment.

Is LCL entitled to statutory interest on the outstanding debt?

108. This question only arises in the event that the Default Rate is held to be a penalty. In the light of my conclusion that the judge's decision that it was not a penalty cannot be disturbed, the question does not arise.

Result

109. I would dismiss the appeal.

Lord Justice Newey:

110. I agree that the appeal should be dismissed, essentially for the reasons lucidly given by Lewison LJ. However, I would wish to reserve one point arising from Lewison LJ's judgment for consideration in a future case where it matters.

111. Suppose that A buys a property with finance from Lender 1 at an interest rate to x%; that market interest rates fall; that A obtains a binding commitment from Lender 2 to provide alternative funding at x-y%; that Lender 2's offer is expressed to be open for, say, three months; and that within that period A seeks to redeem Lender 2's mortgage but is rebuffed. As Lewison LJ has said in paragraph 42 above, it may well be that a binding commitment such as A secured would be enough to constitute available funds. In the event, however, the offer from Lender 2 will have expired without A having drawn down any funds or, therefore, incurred any liability for interest to Lender 2. If, as Lewison LJ says in paragraph 43, "[t]he essence of a tender is not only that the borrower offers to pay all that is properly due to the lender but is able to do so and remains willing and able to do so", it can be said that A did not continue to be in a position to pay Lender 1: the offer from Lender 2 will have come to an end. It can also be argued that it would make no sense for A to be relieved of any liability to pay interest to anyone. On the other hand, there is much to be said for the view that A should not continue to have to pay interest to Lender 1 at x% when, but for A's offer having been rejected, interest would have been payable to Lender 2 at only x-y%.

112. For my part, I would not wish to be taken to be expressing any view on what the position would be in such a case. Nor do I consider that I need to in the context of the present appeal. The reasons which Lewison LJ gives for concluding that the offers of settlement on which Mr Cowen relied fell short of anything that could properly be described as a tender do not as I understand it include the fact that money did not remain available. As Lewison LJ notes in paragraph 42 above, this is simply not a case in which there was a binding commitment from a new lender to lend enough to repay the existing indebtedness.

Lord Justice Arnold:

113. I agree that the appeal should be dismissed for the reasons given by Lewison LJ subject to the reservation expressed by Newey LJ.