Neutral Citation Number: [2014] EWHC 4174 (Comm)

Case No: 2014 FOLIO 507

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2014

Before :

MR JUSTICE BURTON

- -

Between :

NRAM PLC	**Claimant**
- and -	
(1) JEFFREY PATRICK McADAM	**Defendants**
(2) ANN HARTLEY	

- -
- -

Malcolm Waters QC and Patrick Goodall QC (instructed by **Ashurst LLP**) for the **Claimant**
John Taylor QC and James McClelland (instructed by **Simmons & Simmons LLP**) for the **Defendants**

Hearing dates: 18 and 19 November 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BURTON

Mr Justice Burton :

1. The Claimant, previously known as Northern Rock PLC, is the successor company to which Northern Rock Building Society transferred its business in 1997. It was nationalised in February 2008 and is indirectly wholly owned by HM Treasury. Since nationalisation it has not undertaken any new lending, but holds a substantial book of historic residential mortgages and unsecured lending, dating back before nationalisation. Although there has been more than one change of name, and change of ownership and entity, I shall refer throughout this judgment to the Claimant.

2. Between 1999 and March 2008 the Claimant entered into a large number of unsecured credit agreements, as part of a product called the 'Together Mortgage'. This allowed borrowers to borrow up to 95% of the value of their home on a secured basis, and in addition to take out a fixed sum unsecured loan of up to 30% of the value of their home, capped at £30,000. It was an advantageous feature of the product that, for so long as the secured loan remained outstanding, interest on the unsecured loan was charged at the same rate as in respect of the secured loan.

3. The Defendants are two of those who borrowed on such basis, their unsecured loan being the maximum of £30,000. This action is brought against them effectively to enable the Court to resolve a dispute between the Claimant and some 41,000 other borrowers who stand in the same position as the Defendants; their legal costs are being indemnified by the Claimant. I have been greatly assisted by counsel, and am conscious that where, for ease, I refer to the leading counsel on each side, much assistance has been given by their team.

4. The dispute arises in this way. Prior to 6 April 2008, by virtue of s.8(2) of the Consumer Credit Act 1974 ("the 1974 Act") a consumer credit agreement was regulated if the amount of credit provided under it did not exceed £25,000. Thus a regulated agreement was one where the principal loan was £25,000 or less. There were detailed provisions relating to regulated agreements, both in the 1974 Act itself and by virtue of a number of regulations, including variously the Consumer Credit (Agreements) Regulations 1983 ("the Agreements Regulations"), the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 and the Consumer Credit (Disclosure of Information) Regulations 2004. There were thus substantial rights and remedies available and protections given in respect of a regulated agreement by virtue of the statutory scheme. Additionally (and with particular relevance in this case), as from 1 October 2008 s.77A of the 1974 Act, which was introduced into the 1974 Act by the Consumer Credit Act 2006 ("the 2006 Act"), effective as from that date, provided for periodic statements to be provided to the debtor by the creditor under a regulated agreement for fixed sum credit. The form and content of such statements is prescribed by the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 ("the 2007 Regulations"), which came into force on 1 October 2008. Pursuant to s.77A(5) and (6), where the creditor fails to give a statement under the section to the debtor within the time specified in s.77A(1E), one of the consequences is that the debtor shall have no liability to pay any interest or default sum in respect of the period of non-compliance (as defined in s.77A(7)). By virtue of Schedule 3 to the Consumer Credit Act 2006 (Commencement No.3) Order 2007, the creditor's obligation to provide statements under s.77A took effect on 1 October 2008 and applies (materially) to regulated agreements made both before and after 1 October 2008.

5. The paperwork for the unsecured credit agreements entered into by the Claimant between 1999 and March 2008 did not differentiate between regulated and unregulated agreements, in that the same documentation was used for unsecured loans of more than £25,000 as was used for loans of £25,000 or less. Thus, even though the amount of credit exceeded £25,000, such agreements were documented as though they were regulated by the 1974 Act. The issue that falls to be determined in these proceedings is the effect of the unregulated agreements having been documented in this way: were the rights and remedies available under the 1974 Act, or protections equivalent to such rights and remedies, imported into such agreements notwithstanding that they fell outside the statutory scheme?

6. The particular circumstance in which this issue arises is that the Claimant did not implement the requirements of s.77A and the 2007 Regulations correctly – a fact of which it became aware in late 2012. In particular the statements provided to borrowers (provided by the Claimant in the same form whether or not the amount of credit exceeded £25,000) did not state the amount of credit originally provided to the borrower under the agreement as required in relation to a regulated agreement by paragraph 3(b) of Schedule 1 to the 2007 Regulations. In relation to borrowers who had regulated agreements, and who received statements since 2008 which also did not comply with the requirements prescribed in the 2007 Regulations, the Claimant has provided redress by furnishing them with a set of corrected statements and by re-crediting to their account any sum wrongly debited on account of interest and default sums in respect of the period of non-compliance, repaying those sums insofar as they had already been paid out by those borrowers to the Claimant.

7. However, the Claimant has not provided the same (or any) redress to borrowers who entered into agreements before 6 April 2008 under which the amount of credit provided exceeded £25,000, such as the Defendants, on the basis that such agreements were not regulated by the 1974 Act, and, accordingly, such borrowers did not have any rights under s.77A. The obligation of the Claimant, if any, is thus to be resolved in these proceedings, issued under CPR Part 8.

8. Some 277 complaints have been received by the Claimant from borrowers who entered into Unsecured (Together) Loan Agreements which, although the amount of credit provided exceeded £25,000, were documented as if they were regulated by the 1974 Act; and some 79 borrowers have complained to the Financial Ombudsman Service, of which none have been successful. I have not seen any of those adjudications, and have had the benefit of very full and careful submissions by counsel for the Claimant and for the Defendants, and it is agreed that the Court's decision, whether or not favourable to the Claimant, will assist the Claimant by clarifying a number of key issues which bear on the question whether, and if so on what basis, the Claimant should provide redress to borrowers, who like the Defendants, had entered into agreements which were not regulated but were documented as though they were, reliance being placed on the Court's approval of similar scenarios in **Office of Fair Trading v Abbey National PLC** [2009] 1 AER (Comm) 717 at paragraphs 4-6 and in **Re London Scottish Finance Ltd (In administration)** [2014] Bus LR 424 at paragraphs 16-20. If the Claimant is obliged to provide redress to the approximately 41,000 borrowers in the same position as the Defendants, the current cost of doing so will be about £258 million.

9. As it is put by Mr Taylor QC in his skeleton argument (at paragraph 5), it is common ground that the Defendants' agreement was not a regulated agreement. However both within the Loan Agreement itself and in the wider suite of pre-contractual and contractual documentation, as will appear, the Claimant repeatedly informed the borrowers that the loan was regulated by the 1974 Act and that they would benefit from the rights available under that enactment. The central issue in these proceedings is thus what (if any) effect those statements (and the Claimant's related conduct) had as a matter of contract, and, in the alternative and if necessary, whether they were sufficient to amount to a "*shared assumption*" for the purposes of estoppel by convention or constituted representations such as to found estoppel by representation.

10. The ambit of the Part 8 claim is set out in the claim form pleaded by Mr Waters QC and Mr Goodall QC for the Claimant namely:

> "*11. The remedy sought by the Claimant is declarations that:*
>
> *(a) the rights and remedies available under the 1974 Act or protections equivalent to such rights and remedies, in particular under section 77A, were not imported into the Agreement;*
>
> *(b) the Claimant is not in breach of its obligations under the Agreement by (i) issuing the Defendants with statements which do not comply with section 77A, and (ii) not repaying or re-crediting to the Defendants interest or default sums paid by them during the alleged period of non-compliance; and*
>
> *(c) neither (i) the statements in the documentation referred to in paragraphs 4 or 5 above nor (ii) the Claimant's subsequent conduct in providing statements to the Defendants were sufficient to give rise to a shared assumption between the Claimant and the Defendants or constituted representations to the effect that:*
>
> *(i) the Agreement was a regulated agreement under the 1974 Act in effect from time to time; and/or*
>
> *(ii) the Defendants were entitled to section 77A rights; and/or*
>
> *(iii) the Claimant would treat the Defendants as if the matters in (i) and/or (ii) were in fact the case.*
>
> *12. For the avoidance of doubt, it will not fall to be determined in this CPR Part 8 claim what (if any)*

assumptions were shared between the Claimant and the Defendants by reason of matters other than (i) the statements in the documentation referred to in paragraphs 4 and 5 above and/or (ii) the Claimant's conduct in providing statements to the Defendants and nor will any issue of reliance be determined in this CPR Part 8 claim."

Although there was a witness statement explaining the background, given by Mr Edward Sparrow of the Claimant's solicitors, and from each of the Defendants, given the parameters of the issue before me, and in particular what is set out in paragraph 12 of the claim form above, nothing turns at this stage on the contents of those statements, and the case will turn upon the clear words of the pre-contractual and contractual documents, to which I now turn, and the appropriate construction of them.

The Documents

11. It is not in issue that the documents produced in this case, relating to the Defendants, are in the same form as that used for all borrowers during the period from 31 May 2005 until the withdrawal of the Together Mortgage product in March 2008, whether borrowing an unsecured amount of less than £25,000 (the "*under £25Ks*") or of more than £25,000 (the "*over £25Ks*"). There were some differences in the statutory wording used in the documentation prior to 31 May 2005 but it was not suggested that these were material to the issues which I have to decide. S.2 of the 2006 Act in fact provided for the removal of the £25,000 limit, but did not come into effect until 6 April 2008, whereafter all these agreements, if then entered into, would have been regulated.

12. The material passages are as follows:

(i) **Pre-contract information**

After setting out the lender and the borrowers and key and other financial information there is then a box under the heading "*Key Information*" which includes the following passage:

"*IMPORTANT – READ THIS CAREFULLY TO FIND OUT ABOUT YOUR RIGHTS –*

The Consumer Credit Act 1974 lays down certain requirements for your protection, which should have been complied with when this agreement was made. If they were not, we cannot enforce the agreement against you without a court order.

This Act also gives you a number of rights. You can settle this agreement at any time by giving notice in writing and paying off the amount you owe under this agreement. Examples indicating the amount you might have to pay appear in this agreement.

> *If you would like to know more about your rights under the Act, contact either your local Trading Standards Department or your nearest Citizen's Advice Bureau.*"

There is then a further box, headed up "*YOUR RIGHT TO CANCEL*":

> "*Once you have signed this agreement, you will have a short time in which you can cancel it. The Lender will send you exact details of how and when you can do this.*"

(ii) The secured part of the loan was the subject of a **Mortgage Application**, which contained the following passage:

> "*37. Regulated Mortgage Contract . . . Mortgages where less than 40% of the land used as security is used as or in connection with a residential dwelling, and all unsecured loans, are not classed as FSA Regulated Mortgage Contracts, although all unsecured loans will be regulated under the provisions of the Consumer Credit Act 1974.*"

(iii) The **Offer of Loan**, which dealt primarily with the mortgage offer, provided in section 3 "*Your Mortgage requirements*" the following: "*You also wish to borrow £30,000.00 as an unsecured loan – see section 12 for details.*" Section 3a included the provision: "*You are under no obligation to accept this Offer of Loan or to enter into the Consumer Credit Agreement, or any other agreement with us*". The section 12 to which attention was drawn by section 3 reads under "*Unsecured borrowing*": "*An unsecured loan of up to £30,000.00 is also available with this mortgage. The interest rate for the unsecured borrowing is the same as that charged for the secured mortgage . . . this additional feature is not regulated by the Financial Services Authority, but is regulated under the Consumer Credit Act 1974. You will receive separate documentation regarding this additional feature, describing the detailed terms on which this borrowing is available.*"

(iv) This leads to the unsecured **Loan Agreement** itself, which is significantly headed up as "*Fixed-sum loan agreement regulated by the Consumer Credit Act 1974*". There is then the same "*Key Information*" as was provided in the Pre-contract information set out in (i) above, in identical terms, including the rubric "*IMPORTANT – READ THIS CAREFULLY TO FIND OUT ABOUT YOUR RIGHTS*", followed by the same notice setting out "*YOUR RIGHT TO CANCEL*". The reference to the 1974 Act is then repeated in the clearest terms over the borrower's signature, namely: "*This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms.*"

(v) Finally there was sent to the Claimant to the Defendants seven days after the signature by them of the Loan Agreement a "*Statutory Notice Relating to a Regulated Consumer Credit Agreement*", relating to their right to cancel (expressly provided for, as set out above, in the Loan Agreement (and the Pre-contract information)), namely the right to cancel expressly provided in respect of a regulated agreement by s.67 of the 1974 Act and required to be

included in regulated agreements by Regulation 2(3) of, and paragraph 5 of Part 1 of Schedule 2 to, the Agreements Regulations.

The Issues

13. It is, as set out in the Defendants' skeleton argument to which I made reference in paragraph 9 above, common ground that the agreement was not a regulated agreement, and I shall return further to address this below. But at the outset of the hearing, after having been given, and taken, the opportunity to read the papers in the case, I pointed out to the parties that what is set out above appeared to me to constitute the clearest possible warranty that the agreement was regulated, such that, given that it was not regulated, the Claimant was in breach of that warranty. The loss suffered would thus be the sums which the Defendants would have received had it been a regulated agreement, namely the same payments as were made to those who actually had regulated agreements, referred to in paragraph 6 above. This case did not appear in the pleadings or in the skeleton arguments for either party. While reserving his client's position as to this analysis, which seems to me to be difficult if not impossible to resist, Mr Waters pointed out that any claims for breach of warranty would, given that the warranties would have been breached, in every case, prior to 6 April 2008, and in many or most cases considerably earlier, all be statute barred (save in the case of a claimant under a relevant disability at a material time) and he had no instructions to waive such limitation defence. The consequence is, on the Claimant's case, that the statements or assurances given in the documents set out above are of no legal effect.

14. I deal first with some common ground:

(i) The Claimant and Defendants agree that parties cannot agree to convert a contract into a regulated agreement (see e.g. similarly in relation to a statutory tenancy **Rogers v Hyde** [1951] 2 KB 923 at 931 and **Tomlin v Reid** (1963) 185 EG 913), nor clothe the Court with jurisdiction to exercise powers, for example under Part IX of the 1974 Act "*Judicial Control*", conferred by the Act.

(ii) It does not seem as if the Claimant was the only bank to use the same documentation for all its borrowers whether of less or more than £25,000. It has plainly occurred sufficiently frequently to be addressed in the two leading text books, **Goode Consumer Credit Law and Practice** (paragraph 23.7: "*It sometimes happens that an agreement which is not in fact regulated is nevertheless drawn up in accordance with the statutory formalities for a regulated agreement and is thus presented to the debtor or hirer as a regulated agreement*") and **Guest & Lloyd Encyclopaedia of Consumer Credit Law** (Ed Lomnicka) at 2012: ("*In order to use the same documentation for all their agreements, whether "regulated" or not, some creditors/owners use the "regulated agreement" documentation (complying with the Act and regulations thereunder) in relation to agreements that do not fall within s.8(3)*"). Goode speculates at 23.7 as to the variety of reasons for this occurring, but none is put forward in this case. The Defendants' skeleton argument (at paragraph 8(4)) points out that for a considerable number of years the Claimant "*obtained the benefit of using a single set of pro-forma documentation, rather than training its agents to*

differentiate between, and then separately document, regulated or non-regulated loans according to their value". On any basis the borrowers were consumers, trading on the Bank's standard terms and would have the benefit, as **Guest** points out, of the contra proferentem rule.

(iii) As appears from the way in which the claim form is pleaded, if the Defendants succeed in contract, then the Claimant is without more obliged to pay out the various sums claimed. If the Defendants do not establish a case in contract, then they have an alternative case in estoppel:

(a) Estoppel by convention and/or contractual estoppel, if either can be established, do not require proof of reliance by, or detriment to, the party seeking to rely on the estoppel; but, if either were established, the Defendants would run up against the argument that estoppel can only be used as "*a shield not a sword*", such that it would not of itself constitute a cause of action, needed in order for those such as the Defendants to recover monies that they have already paid.

(b) Estoppel by representation or acquiescence, if established, or promissory estoppel, if it be within the ambit of the claim form, would in addition need evidence of proof of reliance and detriment. There would be the additional difficulty in relation to promissory estoppel, that it is only of suspensory effect.

None of these consequential matters can now, on a Part 8 claim without oral evidence, be established before me, and I would need to limit my findings as set out in paragraph 12 of the claim form, cited in paragraph 10 above.

Contract

15. I invited the Defendants to open at the hearing to establish their case that there is a binding obligation upon the Claimant to pay out the sums, by reference to section 77A.

16. Mr Taylor put his case as follows:

(i) Although this is <u>not</u> a regulated agreement, it was an agreement by which the Claimant agreed to give to the Defendants the rights under and benefits of the 1974 Act, as made clear in the documents set out in paragraph 12 above, particularly in the Loan Agreement itself, and to treat them *as if* it was a regulated agreement (so far as possible). An agreement that the Defendants <u>should</u> so benefit is clearly not contrary to any public policy, as contrasted with the specific provision in s.173(1) prohibiting any provision <u>excluding</u> borrowers from the rights or benefits of the Act: per contra the sceptical view of **Goode** at 23.9 that an average conservative County Court Judge's view was likely to be that "*if they cannot lawfully contract out of the* [1974 Act], *they cannot contract into it either*".

(ii) The *over £25Ks* would thus be treated (so far as possible) the same as the *under £25Ks*, who, with the same paperwork, would be treated in accordance with the terms of the regulated agreements (and thus the 1974

Act). The assurance of rights and benefits, a contractual entitlement of the *under £25Ks*, would thus be also the contractual entitlement of the *over £25Ks*, and cannot simply be described as 'descriptive', and not contractual, as contended by the Claimant.

(iii) This is realised by construction of the Agreement (within its factual matrix of the paragraph 12 documents). The primary way in which Mr Taylor puts it is by reliance upon the incorporation of the 1974 Act into the Agreement, save insofar as the provisions of the 1974 Act are not inapplicable. In particular he relies upon 3 authorities, **Adamastos Shipping Co. Ltd v Anglo-Saxon Petroleum Co. Ltd** [1959] AC 133, **Larussa-Chigi v CS First Boston Ltd** [1998] CLC 277 and **Brandeis Brokers Ltd v Black and Ors** [2001] 2 Lloyd's Rep 359. In **Adamastos** a US Statute, which expressly provided that it was inapplicable to charterparties, was found by the House of Lords to be incorporated into a Bill of Lading; and although, in Viscount Simonds' words, there was (155) "*much in the Act which in relation to this charterparty is . . . inapplicable and must be disregarded*", he concluded (152) that, by virtue of the provision in the Bill of Lading expressly incorporating the Act, "*the contract must . . . be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits*". In **Brandeis**, where the terms of a contract were provided to be "*subject to the SFA Rules*", Toulson J (at 363) accepted that "*the parties cannot have intended to incorporate the SFA Rules, holus bolus, because they contain matters which would have no bearing on the way in which Brandeis was to perform the services which it contracted to perform, and could not be sensibly transposed into the contractual arrangements between the parties. But the relevant parts of the SFA Rules are those which do potentially have such a bearing.*" This is particularly significant here, where, for example, Part IX includes provisions, plainly inapplicable here where the parties cannot clothe jurisdiction upon the Court, for a right for a party to a regulated agreement to apply to the Court for an enforcement order against the debtor to enforce an improperly-executed regulated agreement (s.65), or to reduce or discharge any sum payable by the debtor in the event of a contravention in respect of such improper execution (s.127), or to vary an agreement (s.136). Further and in the alternative Mr Taylor founds his construction of the contract upon an implied term that, if the Agreement was not regulated, the provisions of the Consumer Credit legislation would apply so far as applicable.

(iv) For the purposes of (iii), the Defendants need to establish that incorporation or implication as to such legislation includes subsequent amendment, because Section 77A had not been implemented (or, in the case of other potential claimants with agreements prior to 2006, had not been enacted) by the time of their Agreement. Mr Taylor submits that the incorporation of the Consumer Credit Act and/or its implication upon which he relies would both include by way of necessary construction subsequent statutory amendment. He recognises that by reference to **Brett v Brett Essex Golf Club Ltd** [1986] 1 EGLR 154 and **Brewers' Company v Viewplan Plc** [1989] 2 EGLR 133 (per Morritt J at 134): "*Where a deed incorporates the*

provisions of a statute or subordinate legislation, in the absence of express words, there is no presumption either way as to whether it was intended that that reference should include a reference to the law for the time being in force. The question depends on the proper construction of the words of incorporation in the context in which they are used". However he submits that not to accept his construction in this case would be an absurdity, as he sets out in paragraph 52(3) of his skeleton: "*Where a contract is "regulated under the* [1974 Act]", *then it is regulated by the* [Act] *as in force from time to time. . . The* [Act] *is a large and restless statute which is subject to a rolling process of incremental change. If the Bank were right and the references to the* [Act] *should be read as referring to the* [Act] *as at the date of formation, then this would lead to absurdity. The Bank maintains that it has contracted on similar terms with 41,000 borrowers . . . If the Bank's argument holds good, then each of these agreements would be geared to a snapshot of the* [Act] *as it stood on the day of formation, giving rise to a fractured kaleidoscope of obligations which it would be impossible for the Bank to administer.*"

(v) The Claimant's contentions would, he submits, amount to a disregarding of all the terms and assurances set out in the documentation in paragraph 12 above. Indeed, as will be seen below, Mr Waters expressly so states in his skeleton, when contending (paragraph 23) that: "*statements in the Agreement that it was regulated by the 1974 Act were inoperative as contractual terms and are to be disregarded*". Any court in construing a commercial contract, Mr Taylor submits, must do its best to apply a common sense approach, and one which, as per Romilly MR in **Re Strand Music Hall Co Ltd** [1865] 35 Beav. 153 at 159, adopts the "*proper mode of construing any written instrument* [so as] *to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.*" This was close to a submission, by reference to the well worn Latin tag, of construction "*Ut res magis valeat quam pereat*": the reference to the 1974 Act must be given effect.

17. Mr Waters sets against this case the following:

(i) Because the Agreement is not a regulated agreement, the reference to the Act must be disregarded as inappropriate or immaterial (as referred to in paragraph 16(v) above) and the Court should in each case treat the statements in the Agreements referring to the 1974 Act as notionally qualified by the words "if applicable". He submits that the Court is well able to disregard those parts of a standard form which cannot be applied to a particular transaction, and he refers to **Stewart & Co v Merchants Marine Insurance Co Ltd** [1886] 16 QBD 619 at 621-622. In relation to an insurance policy where: "*provisions with regard to corn, fish, salt, fruit etc which have nothing to do with an insurance of the ship are left in*", Lord Esher MR concluded that "*as it is a policy on the ship we must strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship*".

(ii) The statements relied upon by the Defendants set out in the paragraph 12 documents are purely descriptive and of no contractual effect. They are not the consequence of the parties' agreement, but are incorporated into the form, by reference to e.g. Schedules 1, 2 and 5 to the Agreements Regulations, by a statutory requirement if this were a regulated agreement, and they are inapt.

(iii) Many if not most of the provisions of the 1974 Act are inappropriate and cannot be incorporated. Mr Waters refers as such to the provisions of ss.61-63, whereby a regulated agreement may be improperly executed, and only be enforceable under s.65 by an order of the Court (obviously irrelevant here); however that may not arise, since it is likely to be only an agreement which is in a properly executed form so as to be a regulated agreement (such as those in issue here) which could be contended to be treated *as if* it were a regulated agreement. But there are in any event the other inapt provisions which, if the agreement were regulated, would trigger the role of the Court, to which I have referred in paragraph 16(iii) above. Then there are provisions in the Act by reference to rights of cancellation (s.67), rights to receive notice (s.76) and early settlement (s.94), which he submits to be unnecessary because there are at least similar, if not identical, provisions in the Agreement, which, as **Goode** points out at 23.10, give rights to the debtor "*not by virtue of the* [1974 Act] *but as contractually incorporated provisions of the Act*".

(iv) No terms should be incorporated or construed as implied such as the Section 77A provision for repayment or discharge of liability, which are inconsistent with the express terms for payment in the Agreement. In any event, as discussed in paragraph 16(iv) above, Section 77A postdates the Agreement, and, contrary to Mr Taylor's submissions, no incorporation or implication of subsequent amendments should be construed in that regard. He submits (in paragraph 30.3 of his skeleton) that in circumstances where it is not in dispute that the statutory regime did not apply to the Agreement by reason of the 1974 Act, but it may instead be suggested that *as if* rights applied by reason of contract, there is nothing to indicate that, at the time of contracting, the parties intended such contractual rights as existed should "*vary unpredictably with the vagaries of future legislation*": he is thereby referring to the first instance judgment of David Donaldson QC in **Ashworth Frazer Ltd v Gloucester City Council** The Times, 1 April 1999, in which the Judge concluded that the parties in that case did not so intend. He also refers to **Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd** [1980] 1 WLR 425 at 431F-432H.

(v) He submits that there is no justification for incorporation of such terms of the 1974 Act as can be incorporated, so as to treat the Defendants *as if* they had borrowed under a regulated agreement, nor an implication that they should be treated *as if* so entitled. That is simply not what the Agreement says; and the Claimant relies upon the words of Upjohn LJ, with whom Davies LJ agreed, in **Tomlin v Reid** (supra), a case where the landlord's agent assured the defendant that he would have the protection of the Rent Acts in taking up a tenancy. Upjohn LJ said, at 915-7, in rejecting a case

that the parties had entered into a "*contract which will give them a lease which has much the same inciden*[ts] *as a tenancy under the Rent Restriction Acts*", that "*I think it is quite plain that there is no such contract in this case . . . There is no sign of any such contract here*". He then concluded that there could not be such an *as if* contract unless both parties knew that there was not (for our purposes) a regulated agreement: such that there could not be an *as if* contract if, as here, plainly at least the borrowers believed that there was a regulated agreement and there is no evidence one way or the other as to the Claimant's state of knowledge.

18. Before I turn to resolve this dispute, I should give at least a summary of the views expressed by the two leading textbooks, to which I have made reference in paragraph 14(ii) above:

(i) **Goode** only addresses estoppel as the answer, and points out (at 23.9) that there is, as yet, no reported case in which a debtor or hirer "*finding himself in possession of an agreement which would otherwise be unregulated but has been made on a printed form applicable to regulated agreements*" had successfully raised any of such estoppel arguments.

(ii) **Guest** addresses the contract argument. He says (at 2012):

> "*Prima facie none of the statutory provisions applicable to 'regulated agreements' apply to agreements that do not fall within that definition (i.e. non-regulated agreements). However, it is clearly possible for the parties, as a matter* [of] *contractual intention, to agree that their agreement (although not 'regulated' within the meaning of Act) should have the protections that the Act confers on 'regulated agreements' – insofar as this is contractually possible. The question then resolves itself into (a) what protections did the parties intend to apply (bearing in mind the contra proferentem rule) and (b) are there any protections that cannot be so extended to non-regulated agreements by contract.*
>
> *As to (a), the statutory form of regulated agreement refers to a number of statutory rights (see especially ss.75, 75A and 94) and hence it seems clear that the parties would be regarded as having agreed that these rights are conferred on the debtor or hirer. More problematic are rights or protections conferred by the Act but not referred to in the statutory form of the agreement (see, for example, s.56 - not referred to in the Agreements Regulations 2010 (SI 2010/1014)). It is suggested that (especially in the light of the contra proferentem rule), by stating that the agreement is a "regulated by the Consumer Credit Act 1974" the parties would be taken to have agreed that (subject to*

> *(b), below) the debtor or hirer is intended to have the rights and protection conferred by that Act.*
>
> *As to (b), it is clear that criminal liability cannot be voluntarily undertaken. Moreover, it is suggested that the parties cannot, by agreement, confer jurisdiction on the court to make enforcement orders under s.127 and hence that all the provisions (e.g. s.65) that might result in an application under that section cannot, by agreement, be rendered applicable to non-regulated agreements.*"

19. I turn to consider in some further detail the rival contentions of the parties and the authorities upon which they rely:

(i) I am not attracted by Mr Waters' contention that the statements and assurances can and should be disregarded. The case of **Stewart** does not engage with the Defendants' incorporation argument. The question of ignoring immaterial parts of a contract or policy such as in **Stewart** is straightforward, but here there is an express reference to the 1974 Act and to the Defendants' rights. I prefer to apply the concept of 'disregard' to the provisions of the legislation which, as in **Adamastos**, would be inapplicable or, as in **Brandeis**, not *holus-bolus* incorporated. As Mr Taylor points out, the principle derived from **Adamastos** that a statute can be incorporated even if large parts of it are irrelevant is not only applied in **Brandeis** but also in **Larussa-Chigi**, where the transaction was said to be "*governed by*" [not far distant from *regulated by,* as in the Loan Agreement here] a Code of Conduct established by the Bank of England, and applicable provisions were incorporated (at 294). The *disregard* which Mr Waters seeks to establish is, in my judgment, not such as to rule out any reference to the Act, but only to the portions of it which are not applicable because the agreement is in fact not regulated, and thus not subject to the special statutory jurisdiction of the Court under Part IX.

(ii) I am also satisfied that the legislation to be incorporated was the legislation as amended from time to time. This is not any question of the *vagaries of future legislation*, which is in my judgment taken out of context in relation to the judgment in **Ashworth Frazer**, where, as the judge put it "*the provisions of the legislation are not referred to for their normative content but simply used as a convenient shorthand to describe a factual situation*" – reference to a building development for uses within the then extant Town & Country (Use Classes) Order 1963. In **Frobisher** also there was no question of construing an express incorporation of the provisions of an Act into an agreement between the parties, but rather of postulating (but discounting) the possible impact of future legislation. I agree with Mr Taylor that what is addressed here is a basic feature of the Claimant's regulatory environment, where the parties have tied their Agreement to the provisions of a regulatory regime which is known to evolve over time. It was, as Arden LJ said in **Lymington Marina Ltd v MacNamara** [2007] 2 All E.R. (Comm) 825 at paragraph 33 "*part of the factual matrix known to both parties*" that statute law could develop.

(iii) Plainly if the provisions of the Act are (as appropriate) incorporated, then that will by express term inevitably override or qualify the payment provisions in the Agreement, as being read subject to the provisions of the legislation, just as they would be if, as Viscount Simonds stated in **Adamastos** at 152, those provisions were "*written out*" in the Agreement.

(iv) I am also unpersuaded that words which are plainly contractual in the agreements of the *under £25Ks* are not contractual in the agreements of the *over £25Ks*; and the fact that they derive from statutory or regulatory provisions is in my view irrelevant.

20. But I must turn to deal with what seems to me to be the central case for the Claimant, namely that by reference to **Tomlin v Reid**, and to the fact that the legislation cannot be incorporated into the Agreement so as to constitute it as a regulated agreement, the *as if* argument for which the Claimant contends cannot be established. This requires some consideration of the authorities relied upon, and first **Tomlin v Reid**. As to this:

(i) Ormrod LJ considered (at 915) that the statement by the landlord's agent "*creates no contractual obligation of any kind and . . . there was no intention that it should. Therefore there was neither a contract for a tenancy which would embody the provisions of the Rent Restrictions Acts, nor was there any form of contract that the Rent Restriction Acts would not be invoked by the plaintiff if he wished to have possession. That, I think, is sufficient to dispose of that part of the case*". He went further by saying that "*as at present advised, I am bound to say, having regard to . . . in particular . . .* ***Rogers v Hyde*** *that even if there was a contract that the plaintiff would not invoke the provisions of the Rent Acts, such a contract would not have the force of law because it would have the effect of ousting the jurisdiction of the Court*". However he expressly added: "*That question has not been argued, and in the circumstances, I propose to say nothing more about it*". He considered estoppel, and concluded that it was not available because (i) estoppel could not be based upon a representation of law – not now the law, as discussed below, and (ii) he formed a view of the then new, and somewhat dubiously received, concept of promissory estoppel, as per Denning J's judgment "*in the case reported in [1947] 1 KB 130, which is generally known as the "High Trees" case*", which seems to me to have misunderstood or misapplied it.

(ii) Upjohn LJ considered that an *as if* agreement was "*theoretically possible*", though he concluded that "*such a contract necessarily involves the underlying basis that the parties knew that the premises were not rent-controlled; whereas in fact it is quite clear, and the learned judge so found, that the contract was on the footing that the premises were rent-controlled*" (as discussed in paragraph 17(v) above). He also found against the hapless tenant, who had plainly acted to his detriment in vacating another tenancy, on grounds of estoppel, because "*one cannot by estoppel confer upon the Court jurisdiction where it does not exist anymore than one can by estoppel oust the jurisdiction of the Court where in fact it applies*" and, additionally, as per Ormrod LJ he concluded that: "*an erroneous statement of law cannot possibly found a defence based on estoppel*".

(iii) Davies LJ agreed with both judgments.

21. Leaving aside the alternative case on estoppel, it appears that Ormrod LJ, with whom Davies LJ agreed, concluded that what the landlord's agent had said had no contractual effect – i.e. there was no contract – but, although expressing a view, confirmed that the question of an *as if* contract had not been argued. Upjohn LJ, with whom Davies LJ also agreed, concluded that an *as if* agreement (e.g. *as if* the agreement was regulated or the tenancy protected) was *theoretically possible*, but only if both parties knew that it was not protected, or regulated: on the other hand Ormrod LJ said that this point had not been argued. It is unclear in those circumstances what can be drawn out as ratio from this case.

22. In **Daejan Properties Ltd v Mahoney** (1996) 28 HLR 498, in which it seems that **Tomlin v Reid** was not cited, a very distinguished Court of Appeal of Bingham MR, Hoffmann LJ and Saville LJ came to a different conclusion, in relation to a claimant who had been told by the landlord's agent that she had a joint tenancy, when in fact there had not been a transfer to her from her mother, the original tenant and would-be joint tenant. Bingham MR concluded (at 504) that there was no agreement capable of being relied upon, because the mother had not been party to it (with which the rest of the court agreed: 511 per Hoffmann LJ, 512 per Saville LJ, agreeing with Bingham MR's judgment), so that an agreement could not be spelt out to the effect of the representations which he (and the Judge below) found to have been made. He concluded (at 505) that "*since the appellant did not become a joint statutory tenant by an agreement in the only form sanctioned by Parliament she could not become such by estoppel*". However he then continued "*but have the landlords, by their representation on which the appellant and her mother relied, estopped themselves from denying that the appellant and her mother would be treated by them as if they were joint tenants (and so joint statutory tenants, since a statutory tenancy was the only tenancy in existence at the relevant time)? That seems to me to be a natural and unstrained construction of what the landlords said, and this construction is not subject to the vice already described, because it is implicit in it that the appellant and her mother were not joint statutory tenants but would be treated as if they were*". That cannot mean that the parties, the landlord and the would-be tenant, knew that the tenant and her mother were not joint statutory tenants, because there is no finding to that effect – and they obviously did not. It is an *as if* representation, which would have been an agreement, but for the technicality which the Court found.

23. Two further matters of significance arise out of Bingham MR's judgment:

(i) He expressly referred as supporting his conclusion to a learned article in (1951) 67 LQR 505 by (the later) Megarry VC, who had been the successful counsel in **Rogers v Hyde**, and discussing its conclusion (relied on in **Tomlin v Reid**) that the parties could not by a contractual provision bring the house within the protection of the Rent Restriction Acts. Megarry, in the article approved by Bingham MR, however placed a qualification on that:

> "*There seems no reason why a landlord of premises within the Rent Acts should not by contract deprive himself of the right to seek possession on one or more of the grounds set out in the Acts. Again, even if the*

premises or letting is outside the Acts, why should not the landlord by contract give the tenant the same protection as if the Acts applied? It has, indeed, been said that the court may make an order for possession of an entire house conditional upon the landlord giving the tenant such protection for part of the house. The difference is between saying, 'The Acts shall apply' and saying, 'I agree to your having by contract the same rights as if the Acts applied'. However, in **Rogers v Hyde** *the tenant advanced no argument that the agreement was to be construed in the latter sense, and so the point must await decision in some other case.*"

(ii) The difficulty of construing there to be *as if* protection for the tenant, who could not actually rely on a statutory tenancy and the Court's statutory jurisdiction, was referred to (at 506), because the landlords "*drew particular attention to the difficulty of registering an increased rent if the appellant was not in law a statutory tenant, and to problems which could arise on succession. I am not on the facts of this case clear how any problem could arise on succession. Nor am I sure that the difficulty of assessing an increased rent is necessarily insuperable. But I am prepared to accept that the landlords could face real difficulties in these respects. That does not however in my judgment provide a good reason for relieving the landlords from the effect of a representation which, as I conclude, they made and on which the appellant and her mother relied*".

This seems to me to be clearly analogous to the situation here, in which the Defendants, if entitled to be treated *as if* they had the rights under and benefits of a regulated agreement, could not access the full panoply of the Court's special jurisdiction; though of course none is required in order to enforce the Section 77A rights.

24. In **Wroe v Exmos Cover Ltd** [2000] 1 EGLR 66, before a two judge Court of Appeal (Chadwick and Clarke LJJ), the case was based on an alleged tenancy by estoppel as a result of a representation, by reference to a letter and to a landlord's notice under Section 25 of the Landlord & Tenant Act 1954; and Chadwick LJ found there was no estoppel. He said however, after referring to **Daejan** and to the Megarry article (at 69-70) "*In relation to security of tenure and the restrictions on any increase in rent, at the least, there is no reason why the landlord should not agree to treat the tenant as having the same protection as he or she would have if the tenancy fell within the Act*".

25. On the one side therefore there is set **Tomlin v Reid**, in which it seems clear that the *as if* argument was not, at any rate fully, argued, but in which the theoretical possibility of an *as if* agreement was foreseen, albeit subject, if Upjohn LJ be right, to insuperable obstacles which would prevent it being of any value in most cases. On the other hand there are the following:

(i) The conclusion of the Court of Appeal in **Daejan**, in which it seems to me clear that, had they been able to find that there was an agreement, they would have found an *as if* agreement to the same effect as the

representations which all three members of the court concluded had the effect of an estoppel.

(ii) The words of Chadwick LJ (with which Clarke LJ agreed) in **Wroe** referred to in paragraph 24 above.

(iii) The words of Willmer LJ in **Kingswood Estate Co Ltd v Anderson** [1963] 2 QB 169 at 178-9 when he recorded that "*It was not contested on behalf of the plaintiffs that it would be theoretically possible*" to make an *as if* agreement, but such would not be possible to achieve by any such "*loose oral arrangement as appears to have been made in this case*" so that he found it "*quite impossible to spell out of the evidence that was given any agreement whereby the defendant was to have a tenancy having the like incidents as a statutory tenancy under the Rent Acts*".

(iv) The view of **Guest**, which I have set out in paragraph 18(ii) above, that construction of an agreement as an *as if* agreement is "*clearly possible*".

(v) Finally I turn to the field of 'contractual estoppel', which is plainly the nearest to an enforceable contract that the law can bring it, based upon a shared or agreed assumption. In **Peekay Intermark Ltd v Australian and New Zealand Banking Group Ltd** [2006] 2 Lloyd's Rep 511 Moore-Bick LJ said (at paragraph 56):

> "*There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel.*"

This was addressed by Andrew Smith J in **Credit Suisse International v Stichting Vestia Groep** [2014] EWHC 3103 (Comm), when he said that it was "*widely accepted as an authoritative statement of the principle of law that has in recent years been dubbed "contractual estoppel", and it was endorsed by Aikens LJ in **Springwell Navigation Corp v J P Morgan Chase Bank** [2010] EWCA Civ 1221 at paragraph 144. It is irrelevant that one party or both (or all) parties knew or could reasonably have discovered that the state of affairs was not as agreed.*" It is plain that in circumstances where the Court is satisfied that parties reach an agreement to treat a situation as A *whether or not* A is the case, it does not (notwithstanding Upjohn LJ) depend upon whether the parties knew (or could reasonably have discovered) that A was the case.

26. In the course of argument, I suggested that the construction being contended for by the Defendants was a *whether or not* contract rather than an *as if* contract, and I came to prefer that as a description. I conclude that, on the proper construction of the loan agreement, as contended by the Defendants, it was agreed, *whether or not* it was a regulated agreement, that it was to be treated as if it was one, such that the *over £25Ks* and the *under £25Ks* would all be treated the same. Like Bingham MR, I do not see insuperable difficulties in the fact that the paraphernalia of the regulated agreement would not entirely apply. Indeed in this case there are, as became clear in the light of an exchange of written submissions after the hearing, a number of respects in which, by referring to the legislation, terms are incorporated into the contract, which supplement the express provisions already made in the agreement. Although there is, as Mr Waters submitted (paragraph 17(iii) above), reference in the Agreement to issues such as cancellation and notice, there is no doubt that, by the incorporation or implication of provisions such as Sections 77 (giving of information to debtor), 83 (liability for misuse of credit facilities), 88 (contents and effect of default notice), 89 (compliance with default notice) and 97 (duty to give information in relation to early payment), much clearer and fuller protection is given to the borrower. I am satisfied that, on a proper construction of the Agreement, whether by reference to the concept of incorporation (so far as applicable), which I prefer, or implication, the Defendants were given the rights under and benefits of a regulated agreement *whether or not* it was a regulated agreement.

27. Mr Taylor submitted that there was room for a warranty obligation (referred to in paragraph 13 above) alongside this: so that, insofar as the borrowers could be put into the same position *as if* under a regulated agreement, they were, including the entitlement to the s.77A repayments, and, insofar as they could not be, then, if they could prove a loss as a result, they would be entitled to claim breach of warranty, subject of course to the limitation point. However I do not need to decide this.

28. I am satisfied that the Defendants are entitled to recover, pursuant to contract, the Section 77A repayments.

Estoppel

29. I shall deal more shortly with estoppel, which was also dealt with shortly at the hearing, although at length in the respective skeletons. I am satisfied that there was a shared assumption capable of giving rise to an estoppel by convention, and/or a contractual estoppel, by reference to the content of the Agreement, and I cannot resolve (and do not need to in any event by virtue of my conclusions in contract) whether that would be met by the issue of estoppel not being capable of being used as a sword but only as a shield, as referred to in paragraph 14(iii) above. There is well established authority that a shared assumption for the purposes of such estoppel can include an erroneous assumption of law (see for example **The Vistafjord** [1988] 2 Lloyd's Rep 343 at 351, **Republic of India v India Steamship Co Ltd (No 2)** [1998] AC 878 at 913 and **ING Bank NV v Ros Roca SA** [2012] 1 WLR 472 at 64. As in relation to contract, the Court cannot be given jurisdiction by estoppel (**J & F Stone Lighting and Radio Limited v Levitt** [1947] AC 209, and **Hiscox v Outhwaite** [1992] 1 AC 562), and indeed as is apparent from the authorities discussed above, what cannot be done by agreement can also not be achieved by estoppel. However the *shared assumption* in question, which I am satisfied to find, was that *whether or not* the agreement was a regulated agreement, it would be treated as such, and, so far

as possible, the Defendants would have the protection and rights conferred by the legislation.

30. As for estoppel by representation – that the agreement was a regulated agreement, that the Defendants would be entitled to its benefits - there is of course authority in support of such a finding (subject always to the necessary accessories referred to in paragraph 14(iii) above), in the cases to which reference has been made in detail above, in particular **Daejan**. The Claimant submits that any such representation was "*demonstrably false because it was apparent on the face of the agreement that the amount of credit provided under it exceeded £25,000*", and referred to the **Gleeds Retirement Benefits Scheme** [2014] Pens LR 265 at 43, whereby Newey J similarly concluded that the fact that the documents had not been executed in accordance with statute was apparent on the face of the documents. That seems to me to be a decision limited to the facts of that case, and such cases as **Daejan** itself, **Peekay** and **Zoan v Rouamba** [2001] 1 WLR 1509, where knowledge of the Consumer Credit legislation was not ascribed to a hirer, would certainly suggest a contrary result. **Gleeds** itself is support for the proposition that, just as an agreed assumption for the purposes of estoppel by convention "*need not be of facts but may be of law*" (per Bingham LJ in **The Vistafjord**), this applies also to estoppel by representation: and the Court of Appeal in **Daejan**, and indeed in **Wroe** had they found an estoppel, would not have been daunted by the suggestion that a representation that the Rent Acts applied, or that the landlord would treat the tenant as having the same rights *as if* the Acts applied, would stand in the way of a finding of estoppel by representation; by virtue of its either being a representation as to law or a representation as to future intention.

31. **Goode**, despite his reservation as to judicial conservatism in 23.9, "*suggested that the principle to be applied is as follows: the creditor is estopped from resiling from all express statements as to the debtor's rights and immunities (whether expressed directly or by reference to the* [1974 Act]) *which could validly have been made terms of the agreement and which represent the common assumption of the parties. With regard to terms which are not expressly spelled out in the agreement, the position is more doubtful. If the estoppel principle were to be taken to its logical conclusion, the debtor might be entitled to avail himself of* [and a number of provisions are set out]." It is not in my judgment necessary to deal with the minutiae of **Goode's** considerations there. I have already concluded that Section 77A is one of the provisions of which the Claimants can take advantage, and there are a number of others, set out in paragraph 26 above, including Sections 77, 83, 88, 89 and 97. It would in my judgment be sufficient to say that the representation by which the Claimant would be estopped would be that the Defendants were entitled to the rights and benefits endowed on a party to a regulated agreement, insofar as that party could take advantage of them.

32. I have already said in paragraph 14(iii) above that the parties have agreed, by reference to the content of the claim form, that, if the Claimant only in establishing the convention or representations sufficient to found an estoppel, I could and should go no further by reference to concluding that there is an estoppel. As for promissory estoppel, although this was addressed by Mr Waters in his skeleton, it was neither addressed by counsel at the hearing nor by Mr Taylor in his skeleton, and in any event it is not within the terms of paragraphs 11 and 12 of the claim form set out in paragraph 10 above. I therefore reach no conclusions about it, and, given the

additional requirement referred to in paragraph 14(iii)(b), it is even less necessary in the light of my findings on contract for that to be addressed.

Conclusion

33. With regard to the proposed declarations set out in paragraph 10 above, I shall hear further arguments from counsel in relation to the form of any order but:

(i) I am satisfied that the rights and remedies in relation to Section 77A were imported into the Agreement.

(ii) I conclude that the Claimant was in breach of its obligations under the Agreement by virtue of its failure to indemnify the Defendants in respect of its breach of Section 77A.

(iii) I have not addressed the "*Claimant's subsequent conduct in providing statements*" referred to in paragraph 11(c) of the claim form, although that would plainly be entirely consistent with a continuing course of conduct relevant to the representations and shared assumption which I have found constituted by the agreements in paragraph 12 themselves. I would however, in the light of my somewhat truncated findings, by virtue of my conclusions as to contract, make a declaration to the reverse of that which is sought by the Claimant in paragraph 11(c) of the claim form.