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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London

Before MR STEPHEN HOUSEMAN QC
(SITTING AS DEPUTY JUDGE OF THE HIGH COURT)

IN THE MATTER OF

MR AND MRS AVISON (Claimants)

-v-

MR WHITE (Defendant)

MR T SAMUELS appeared on behalf of Claimants
THE DEFENDANT appeared in person

JUDGMENT
10th FEBRUARY 2022
(APPROVED EX TEMPORE JUDGMENT)

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STEPHEN HOUSEMAN QC (sitting as a Deputy Judge of the High Court):

1. I am grateful to the parties for their good spirited and efficient conduct of this trial which took place before me in the Rolls Building over two days on Monday 7 and Tuesday 8 February 2022. As indicated at the conclusion of trial I took steps to fix a short further hearing, a remote hearing, this week to hand down an ex tempore judgment based on notes prepared by me for such purpose. This is my judgment.

2. The present claim is brought by Mr and Mrs Avison against the defendant, Mr White, seeking repayment of a personal loan. The principal sum of £210,000 was advanced to Mr White as a co-borrower on 2 September 2014. The claim is said to be for £1,794,100 plus daily accruing interest. It was commenced in the Commercial Court on 27 November 2020 and subsequently transferred to the Circuit Commercial Court. The claimants are a retired couple, they are represented by solicitors and counsel. Mr White has represented himself - very ably, if may say so.

3. The written loan agreement was at least part-signed in late August 2014 and is dated 2 September 2014. It comprises 12 numbered clauses. The lenders are the claimants, Mr and Mrs Avison and there are two borrowers - Ms Claudia Emmanuel and Mr White who are stated in clause 4 to be jointly and severally liable. The borrowers also gave a wide indemnity in clause 7 in respect of "all costs and expenses" incurred in connection with enforcing the loan or any collateral or security. The purpose of the loan was to provide short-term bridging finance to Mr White for use in connection with the international financing of a project located in the Caribbean. Mr White's then business associate and co-borrower, Ms Emmanuel, also provided a legal charge over her residential property in London. That legal charge was executed by Ms Emmanuel at the same time as both borrowers signed the loan agreement in the presence of a notary.

4. As near neighbours in Worthing Mr White and Mr Avison had developed a friendship and I sense mutual trust and respect over the years leading to this loan proposal. Their personal dynamic is potentially relevant when seeking to understand their dealings and the legal effect of such dealings. The original proposal from Mr White to Mr Avison in early July 2014 was to borrow the sum of £200,000 for a period of 60 days in return for lump sum interest of 20 per cent, i.e. repaying a total of £240,000 on or possibly before Day 60. There was no discussion of any pro rata or daily rate of interest nor what would occur if the full amount was not repaid by Day 60. The proposal envisaged a fixed block of interest. It was expensive finance.

5. After Mr Avison made it clear that the loan would need to be secured against reliable security, it was agreed that a legal charge would be created and registered against Ms Emmanuel's property in Blackheath, London. This proposal was crystallised in an email from Mr White to Mr Avison on 8 July 2014. The first draft outline loan agreement created

by Ms Emmanuel and sent by Mr White to Mr Avison a week later recorded Mr Avison as lender and Ms Emmanuel as borrower. It reflected the essence of the proposed loan: £200,000 borrowed for 60 days in return for lump sum interest of 20 per cent, i.e. £40,000.

6. Prior to this there had been discussion between Mr White and Mr Avison to the effect that Mr White would be a borrower under the proposed loan. It is in the context of these conversations in the first half of July 2014 that, according to Mr White, he was given an oral assurance by Mr Avison that any recourse to him (Mr White) under the loan would be conditional upon prior exhaustion of all available remedies against the security belonging to Ms Emmanuel. I return to this aspect below.

7. Mr Avison then engaged his solicitor, Mr Steed, to produce a more detailed draft for the loan requesting that both he, Mr Avison, and his wife be named as lenders "to limit the tax liability on the interest receivable", quoting from an email on 21 July. Mr Steed produced a draft loan agreement by 8 August 2014 on this basis naming both Mr White and Ms Emmanuel as borrowers on a joint and several basis. Mr White later asked if the loan amount could be increased to £210,000 which was agreeable to Mr and Mrs Avison.

8. At some point in August 2014 an updated draft loan agreement was sent to both Mr White and, either directly or indirectly through him, Ms Emmanuel. Neither had any substantive comments on the text and proceeded to sign the loan in late August as already described. The loan provided for repayment within 120 days in return for 40 per cent lump sum interest, i.e. £84,000, with an option for early repayment within 60 days in return for 20 per cent lump sum interest, i.e. £42,000. In parallel with this contractual process a professional valuation was obtained in relation to Ms Emmanuel's property in Blackheath. The valuation was £650,000. Making allowance for Ms Emmanuel's existing mortgage liabilities of £330,000 odd at the time this left free equity of about £320,000 for the purposes of securing the loan.

9. The sum of £210,000 was paid to Mr White on 2 September 2014. It appears to be common ground that the period of 120 days expired on 31 December 2014. For reference purposes I call that 'Day 120'. As regards the substantive terms of the loan agreement the two that matter the most are clauses 2 and 3 dealing with repayment and interest. They provide as follows:

"*2. Subject as provided for in the following clause, the loan shall be for the term ("the term") of 120 days (here meaning ordinary calendar days and not working days) from the date of drawdown and shall bear interest at the agreed rate of forty per centum (40%) from the date of drawdown until 3pm on the date of repayment in cleared funds which shall be paid to the Lenders solicitors in accordance with paragraph 8 of this agreement and subject also to the Borrowers complying with the terms of this agreement.*
3. The borrowers shall have the option to repay the loan on or before the 60th day of the term as prescribed in the preceding clause whereupon the rate of interest to be charged by the Lenders shall be abated to the rate of twenty per centum (20%) until repayment repayment as previously prescribed."

10. I pause here to note that the loan agreement is silent as to any annual rate of interest, any pro rata adjustment to the figures provided for in clause 2 or 3 or, indeed, the rate of interest after maturity on Day 120. It is common ground that Day 120 came and went without any payment being made. Mr White spent some time with the Avisons over the Christmas period. He had explained to them that due to issues with the international

financing of the relevant business project the loan would not be repaid in time but that everything remained on track so it would be repaid in due course. There was no discussion or even reference at this time to any interest rate applicable once the loan went into default post-Day 120. The relationship was characterised by warmth and trust.

11. This dialogue continued and repeated itself far into 2015 and some way into 2016. By November 2015, driven by concerns on the part of Mrs Avison it seems, the issue was raised as to repayment and interest on the loan since the beginning of that calendar year. There was a meeting at a café in Worthing on Saturday 7 November 2015 where this issue was discussed. According to the agreed chronology before me, Mr White agreed at this café meeting "to pay interest at £700 daily rate on a pro rata basis". I am not aware of any written reference to a £700 daily rate of interest prior to an email from Mr Avison to Mr White eight days later on 15 November 2015.

12. I will deal in due course with the question as to the meaning and effect of the loan agreement as regards repayment and interest. It suffices to say here that the claimants do not contend for any meaning based on a pro rata or daily rate of interest. They do, however, contend in the strict alternative to their primary construction case that Mr White and Mr Avison reached a legally binding agreement in or around November 2015 as confirmed through their email exchange on 15 and 18 November to the effect that interest accrues on the capital balance of £210,000 "at the pro rata rate of 40 per cent for each 120 day interval from … 1 January 2015 onwards". I consider that alternative case, pleaded in paragraph 13 of the Reply, below. I note that the pleaded agreement in November 2015 does not concern a daily rate of £700 at all; it concerns a rolling or repeating block of 40 per cent interest for each period of 120 days.

13. I pause here to observe that the £700 daily rate is a mathematical product of the lump sum interest regime applicable under either or both of clause 2 (i.e. 40 per cent interest for a 120-day loan) and clause 3 (i.e. 20 per cent interest for a 60-day loan). In either case this assumes repayment <u>on</u> Day 120 itself or Day 60 itself, respectively. The interest thereby equates to £700 per day. As discussed further below there is no pro rata reduction for repayment prior to Day 60 (under clause 3) or between Day 61 and Day 119 (under clause 2).

14. No accrued or accruing interest calculation was ever prepared or provided. Mr White continued to assure the Avisons that all was well in the underlying business project and that they would get their money back in due course. All was not well, however. The money had long since been paid away and there was no source of alternative finance to repay the loan to the Avisons. Mr White kept making empty promises to repay the money. In a letter dated 20 July 2016, for example, he confirmed that he would "satisfy the outstanding debt of £290,000, which represents principal and interest, on 26 August 2016". His reference to £290,000 was intended to be £294,000, i.e. the £210,000 principal plus 40 per cent lump sum interest of £84,000. Nothing was repaid.

15. In a Letter Before Claim dated 2 August 2016 the Avison's then-solicitor summarised the claim to be made against Mr White and Ms Emmanuel under the loan agreement. This sought payment within 14 days of £294,000 plus statutory interest running from the date of default, 1 January 2015 (what I have called Day 120), at a rate of 8.5 per cent per annum, which had accrued for 567 days and would continue to accrue at £68.47 per day. Mr White responded on 6 August 2016 stating that he was unable to pay in that time frame and asking that the interest rate of 8.5 per cent remain static.

16. The Letter Before Claim on behalf of the Avisons made no reference to any agreement reached in November 2015 nor any contractual post-maturity interest. When asked about this by Mr White in cross-examination, Mr Avison said that his solicitor at the time had advised offering a sweetener to Mr White to resolve the dispute, or words to that effect, without waiving privilege in such advice. It is a startling admission in a formal letter of claim or letter before action where such claim is premised on contractually agreed interest running from the date of default.

17. No claim was commenced, however, because Ms Emmanuel herself commenced legal proceedings seeking to enjoin enforcement of the legal charge. That claim failed in September 2016. Ms Emmanuel then commenced a declaratory action against both the Avisons and Mr White as first to third defendants in February 2017 alleging that her signature on the legal charge was a forgery. That action was dismissed in May 2019 after a full trial before HHJ Hand QC in mid-2018. Ms Emmanuel's appeal was dismissed by Birss J (as he then was) in July 2020.

18. Mr White was criticised by the trial judge in that earlier action as an untruthful witness who had fabricated documents to serve his interests. Although Mr White said in evidence to me that he did not agree with that characterisation of him by the trial judge, it appears that he did not seek to challenge it in any meaningful way as co-respondent to the appeal. Mr White's credibility as a witness and his integrity as a business counterparty have been put in issue by Mr Samuels, counsel for the Avisons, in this trial before me. I am not persuaded that such matters make a material difference to the issues that I have to decide in order to dispose of this claim.

19. Two months after dismissal of the appeal in July 2020 the Avison's new solicitors, Gardner Leader, sent a Letter of Demand dated 11 September 2020 to Mr White. Unlike the Letter Before Claim four years earlier this letter demanded payment of £1,752,480, i.e. the £294,000 plus post-default interest of £1,457,400 on the basis that interest had been accruing since Day 121, as I would put it, and would continue to accrue at a daily rate of £700. Mr White's response was by letter dated 24 September 2020. He disputed the interest rate compared to the going rate for secured lending at the time of around 1 to 3 per cent. He also alleged, amongst other things, that the claim was time-barred and that any claim for interest as now alleged was unenforceable as a penalty. He also cited a provision of the CPR concerning the use of witness statements served in prior proceedings. Mr White confirmed in evidence to me that he had done some legal research and spoken to others with legal knowledge when preparing this rebuttal letter. His aim was, he confirmed, to set out the reasons why he was not liable to repay the loan.

20. This action was commenced two months later on 27 November 2020. The pleaded claim is for breach of contract according to the claim form. The particulars of claim allege at paragraph 6 that the loan was due to be paid back at the expiry of the 120-day term being Wednesday 31 December 2014. The pleaded breach set out in paragraph 7 occurred when payment was not made that day or perhaps the next. The "period of default" is said to have started on 1 January 2015: see paragraph 11. A contractual rate of interest of £700 per day is claimed for that entire period amounting to £1,500,100 at the date of issuance on top of the £294,000 due by the end of the defined term of the loan. In the alternative, statutory interest is claimed. The rate sought, as clarified by counsel, is the same 8.5 per cent as claimed in the original Letter Before Claim in August 2016.

21. Mr White's defence to liability is based on so-called promissory estoppel, better understood as the equitable doctrine of forbearance, by reference to the oral assurance he says he was given by Mr Avison also on behalf of Mrs Avison prior to entering into the loan to the effect that they would not seek recovery from him until they had exhausted until avenues of recovery against the security, namely the legal charge on Ms Emmanuel's property. This line of defence, such as it is, was not foreshadowed by Mr White in his 24 September 2020 letter summarised above.

22. Mr White's defence to the interest claim was twofold. First, that the provision was void for uncertainty. Secondly, insofar as there was a rate of £700 per day post-Day 120 as claimed, that is unenforceable as a penalty. Both of these points were foreshadowed in his letter dated 24 September 2020.

23. By trial Mr White made clear that he no longer pursued the defence to interest based on such provision being void for uncertainty. Whether or not the penalty defence arises depends on what the post-term or default interest provision actually is and means. Some of Mr White's points about uncertainty feed into that prior and, in my view, paramount question as to the meaning and effect of the loan agreement as regards interest both generally and specifically for the period post-maturity.

24. As noted already it was only in the Reply, and not foreshadowed in either the Letter Before Claim in August 2016 or Letter of Demand in September 2020 or the Particulars of Claim, that the claimants alleged the existence of a standalone binding agreement whether by variation or collateral agreement in November 2015 as regards post-term interest.

25. The issues for my determination are, therefore, as follows:
(1) Are the claimants estopped or prevented in equity from pursuing a claim against Mr White under the loan agreement until they have first exhausted all rights and remedies as against the security provided by Ms Emmanuel?
Assuming that estoppel or equitable argument fails then:
(2) Are the claimants as lenders entitled to any post-term or post-maturity or default contractual rate of interest and, if so, what as a matter of proper construction of the loan agreement?
(3) Did the parties make a legally binding agreement in mid-November 2015 as to post-term interest and, if so, on what terms?
(4) Would such contractual rate of interest, if so agreed, be unenforceable according to the penalty doctrine?

26. I can deal briefly with Issues (1) and (4) up front.

Issue (4) - Penalty

27. This issue does not arise, in my view. This is because of my conclusions on Issues (2) and (3) which I will deal with more fully below. But even if there was agreement for rolling or renewing blocks of 40 per cent interest for each successive 120-day period or, indeed, agreement as to a daily amount of £700 interest, although not pleaded strictly that way, in either case amounting to about 122 per cent per annum simple interest, that was the same rate - with emphasis on the word same - as agreed for the initial term subject to the early repayment discount in clause 3. There is no surcharge or uplift for default interest as in the decided cases exemplified by *Lordsvale Finance v Bank of Zambia* [1996] QB 752. No question arises as to the proportionality or otherwise of the rate or, indeed, any uplifted rate.

The rate of interest applicable to the secondary obligation once in breach matches the rate of interest applicable to the primary obligation of the original loan term, on this premise. The question of penalty does not arise for consideration.

28. It was, in this context, or anticipating the penalty defence that Mr Samuels submitted by way of alternative construction of the loan agreement that it was repayable "on demand" and such demand was not effectively made until much later in the day. I reject that analysis. Clause 2 of the loan agreement is tolerably clear to the effect that this is a fixed term loan of 120 days. The loan matured on Day 120. It went into default at 3 pm that day, or at latest the following day, Thursday 1 January 2015. That is the pleaded case and only sensible interpretation or characterisation of this loan agreement.

Issue (1) – Estoppel/Equity

29. I turn to Issue (1) - estoppel or the equitable doctrine. My conclusion on Issue (1) is that no such estoppel or equitable forbearance arose or could operate in the way contended for by Mr White. It matters not for this purpose whether promissory or equitable estoppel is a species of estoppel in the true sense or whether the case law in this arena illustrate equitable forbearance. The requirements are not in dispute. It is telling that there was no mention of the alleged oral assurance until Mr White's pleaded defence in these proceedings. Not in any of the many communications through 2015 into 2016 and beyond when it seems Mr White was looking to work with the Avisons against Ms Emmanuel.

30. During those years it was obviously in Mr White's interest to motivate the Avisons to enforce the securities against Ms Emmanuel and optimise their prospects of doing so. His assistance in that cause is consistent with his self-interest and does not corroborate his understanding as to some form of pre-contractual side arrangement with the Avisons protecting him from primary recourse under the loan. As noted above, it is more telling that Mr White made no mention of this alleged oral assurance in his detailed letter of rebuttal to the Letter of Demand in September 2020. He investigated legal defences and sought to explain in that letter why he was not liable on the loan agreement. He took points about penalty, time-bar and contractual uncertainty. He would have included this main line of defence based on estoppel if it possessed any real merit.

31. It is entirely possible that some kind of loose or informal reassurance was given by Mr Avison to Mr White at some point during the genesis of the loan to the effect that he, Mr White, need not worry about being chased for the money in light of the security being provided. The phrase "first port of call" featured prominently in Mr White's evidence to capture the gist of what he says he was told by Mr Avison. Ms Emmanuel's property had free equity of £320,000 or so at the relevant time according to the professional valuation, giving headroom above the £294,000 total due by way of repayment upon maturity of the proposed loan. But words of comfort like this do not amount to a clear and unequivocal representation of the kind needed to found an estoppel including a promissory or equitable estoppel.

32. On balance of probabilities I find that no assurance was given of the quality and certainty that would be required to found an estoppel or invoke equitable forbearance as alleged by Mr White. It is not even clear what the alleged assurance actually means in practice. At what point would exhaustion of any primary recourse against the security of the co-borrower occur? What if the Avisons wished to reach a settlement with Ms Emmanuel alone? This and other questions are prompted by Mr White's assertion as to conditional or

contingent protection against recourse. Anything said by Mr Avison was no more than an informal and non-binding indication of how in the ordinary course of events recovery would be sought to be made for any default on the loan. He and his wife would look to the security first, naturally, but that is not the same thing as promising to do so and limiting their future free choice as lenders and chargees as to how to exercise their various legal rights as against one or both of the borrowers. I see nothing in the email dated 8 July 2014, on which much emphasis was placed, that leads me to a contrary conclusion on the facts.

33. If a unilateral protection of this nature had been intended to have legal effect I would expect it to be set out in the agreement itself. This was Mr Avison's observation when giving evidence. On the contrary, as already observed, the loan agreement provides that the two borrowers are jointly and severally liable (clause 4) and contains a wide indemnity in clause 7 on such basis. Furthermore, I have ethical concerns about this alleged side understanding, even if advanced as an estoppel rather than a standalone agreement between lenders and unsecured co-borrower. This feeds into my prior observation. If the basis of the loan was, as Mr White contends, it could and would - and, I would add, should - have said so on its face so that the position inter se of the co-borrowers was made clear and consented to by all parties. This was not so.

34. There are separate and fundamental obstacles to such an estoppel, in any event. Promissory estoppel or equitable forbearance only operates suspensively to protect a representee or promisee against strict enforcement of legal rights against him by the representor or promisor. It is not a substantive defence to liability, and it does not operate to modify the terms of the parties' agreement. A suspensory equitable doctrine pre-supposes a pre-existing legal relationship, it does not arise out of pre-contractual exchanges. The outcome contended for by Mr White is substantive in effect and pre-contractual in basis. It could only work either as an implied term or collateral agreement, if enforceable, but does not work or make sense through the doctrine of promissory estoppel or equitable forbearance in my judgment.

35. Moreover, there was no reliance by Mr White on such alleged oral pre-contractual assurance. He accepted with refreshing candour during cross-examination on the second day of trial that he would "still have taken on the loan on the same terms" even without Mr Avison having given him the alleged oral assurance in July 2014. This reflects the commercial reality of the situation and, indeed, the business impetus for the loan in the first place. Mr White needed this cash, and soon, to show the international financiers that he had 5 per cent of the relevant project budget - about US$750,000 - on deposit. Mr White was not in a position to bargain hard with the Avisons, as evidenced by the generous lump sum interest he was willing to pay under the loan as originally proposed by him.

36. Absent any reliance by Mr White it could not be inequitable to allow the Avisons to resile from whatever oral assurance may have been given by Mr Avison including on behalf of Mrs Avison in the run up to signature of the loan agreement. Such assurance, whatever it may have been or meant, if made at all, was immaterial to Mr White's decision to sign the loan. This he confirmed in clear and unequivocal terms in the witness box. For all these reasons I reject the estoppel or equitable defence.

Issue (2) - Post-term Interest

37. That leads to the question of post-term interest, Issues (2) and (3). By 'post-term' I refer, of course, to the period as from and including Thursday 1 January 2015, what I call Day 121.

38. I deal first with Issue (2), proper construction of the loan agreement. The claim advanced on behalf of the Avisons in their solicitor's Letter of Demand in September 2020 is based upon a daily rate of £700 accruing on and from Day 121 onwards. The pleaded claim appears to be on this basis in places. This is the analysis of clause 2 advanced in the opening skeleton argument of Mr Samuels at paragraph 18 albeit addressing the now abandoned defence based on uncertainty.

39. The problem with that construction is that nowhere in clause 2 or elsewhere in the loan agreement is there any reference to a *daily rate of interest* expressed as a certain figure in pounds sterling or an annual rate of interest expressed as a percentage of the principal or any other sum. No mention was made of the £700 per day 'interest rate', if I can use that expression as shorthand, until November 2015 it seems. It appears in writing for the first time in Mr Avison's 15 November 2015 email which is addressed under Issue (3) below.

40. Clause 2 of the loan agreement comprises a single sentence. It does not even contain an express obligation to repay the loan; instead it says the loan "shall be for the term of 121 days … from the date of drawdown". This is defined as "the term". It is nevertheless clear enough that this imposes an obligation to repay on or before Day 120; it is difficult to see what else the clause could mean (see paragraph 28 above).

41. Clause 2 says that the loan "shall bear interest at the agreed rate of [40%] from the date of drawdown until 3 pm on the date of repayment in cleared funds …". The remainder of the clause concerns the method of payment by reference to clause 8 and general observance of conditions. It appears that the reference here to clause 8 should have been to clause 9 of the loan agreement: clause 8 concerns drawdown whereas clause 9 concerns repayment. Nothing turns on this drafting error.

42. Clause 3 contains or confers upon the borrowers an "option to repay the loan on or before the 60th day of the term as prescribed in" clause 2. If that occurs then interest is abated to a rate of 20 per cent "until repayment as previously prescribed", i.e. in clause 2. Neither clause 2 nor clause 3 admit or permit any pro rata alleviation as to interest liability in the event of full or part early repayment on or between either (i) Day 61 and Day 119 (pursuant to clause 2) or (ii) Day 2 and Day 59 (pursuant to clause 3). In other words, the two interest regimes (20 per cent for a 60-day repayment and 40 per cent for a 120-day repayment) are both rigid and indivisible blocks of time and money. Repayment on Day 61 costs the same as repayment on Day 120 under clause 2, just as repayment on Day 2 would cost the same as repayment on Day 60 under clause 3, by way of illustration.

43. There is no pro rata regime for interest *within* the prescribed term or *within* the early repayment period within that prescribed term. No such flexibility can be spelt out of the language. None is necessary to give it business efficacy. The claimants did not suggest that it could or should. In this sense the £700 'daily rate' is something of a misnomer. This derived daily amount assumes full repayment on Day 120 itself with 40 per cent interest per clause 2 (i.e. £84,000 divided by 120) or on Day 60 itself with 20 per cent interest per clause 3 (i.e. £42,000 divided by 60). This is so even though clause 3 says "on <u>or before</u> the 60th

day of the term" (with emphasis added) and clause 2 just refers to "the day of repayment" which is not defined. It does not adjust to any staged or part payment. The £700 per day figure is a mathematical product calculated after the event not a contractual rate of interest agreed at the relevant time. That is the position *within* the prescribed loan term.

44. Clause 2 is silent as to what happens *after* Day 120, i.e. if the loan is not repaid within the term. The wide indemnity in clause 7 might, at a stretch, be argued to cover the lenders for their loss of value of the money once the loan goes into default on Day 121, but that is not a natural fit with the indemnity wording or its obvious purpose. Neither side referred me to clause 7 in this regard.

45. The claimants' case at trial evolved in terms of the meaning and effect of clauses 2 and 3. Mr Samuels contended that the post-term interest regime operated like a rolling or renewing block of time and money consistent with the alternative pleading as to the November 2015 agreement or variation. In other words, on Day 121 another 40 per cent (£84,000, assuming no compounding) became payable and this remained the position through to Day 240. On Day 241 another 40 per cent became payable. And so on. I compared this during closing submissions to the pricing model for a call-out plumber. One minute after the first hour, i.e. 'Minute 61', the customer is liable to pay for the second whole hour of work even if the plumber leaves then or say a minute later.

46. I reject this construction of clause 2. It is not what the clause says or contemplates. If such a post-term regime or perhaps rolling term regime had been intended it could and would have been included in the loan agreement. Such a regime is capable of operating harshly and arbitrarily as illustrated above. It would also mean that the defined "term" became a fluid concept by process of silent and automatic renewal after each period of 120 days. There would be no concept of default on this basis. That is not just contrary to the pleaded case premised expressly on default having occurred and commenced on Day 121, i.e. 1 January 2015; it is also contrary to the whole rationale of this short-term bridging loan. Nobody expected repayment not to occur within 120 days.

47. Indeed, the original proposal was for a 60-day loan at 20 per cent lump sum interest. This contemplation or aspiration was preserved in clause 3, as discussed. The construction advanced by Mr Samuels in closing submissions, what I call the renewing block construction, is not even tendered by clause 3. This is because clause 3 speaks of "the 60th day of <u>the term as prescribed in the preceding clause</u>" (emphasis added), i.e. "the term" as defined in clause 2 which runs for 120 days from original drawdown. When I tested this construction thesis in closing submissions the claimants' position was, as it had to be, that repayment on or between Day 121 and Day 180 would cost the same in terms of additional lump sum interest for the second 120-day period as repayment between Day 181 and Day 240. This is because the early repayment rebate in clause 3 could not apply outside or after the original 120-day "term" provided for in clause 2.

48. Not only is that harsh it also suggests that the renewing block interpretation of clause 2 itself is wrong. Clauses 2 and 3 were intended to operate together providing a hard stop of 120 days (clause 2) with a somewhat blunt or binary earlier repayment option and incentive in clause 3. The claimants' post-term interest analysis divorces the two provisions after Day 120. It also, as observed above, creates an arbitrary and pernicious regime for the accrual of interest. I reject this interpretation of the loan agreement.

49. I also reject any interpretation so far as advanced by the end of trial based on a pro rata mechanism by reference to a daily rate of £700 interest. That daily rate is itself something of a misnomer or arbitrary figure. It is not even a rate so much as a liquidated sum or amount or figure. It is the product of a calculation performed long after the execution of the loan agreement and, indeed, well into the period of default or breach of contract as defined in the particulars of claim. This derived daily interest sum equates to an annual interest rate of just under 122 per cent per annum. Whilst nobody suggested that annualised rate was extortionate per se, and there is no suggestion that any statutory regulation or intervention is applicable to this loan agreement, it is on any view far in excess of a reasonable commercial rate of borrowing in 2014 or at any potentially material time even for short-term bridging finance and especially when secured by a legal charge over surplus equity in real property within the jurisdiction.

50. What then did the contractual parties agree as regards post-term or default interest? The answer is that, in my judgment, they did not agree anything. They did not have to in order for their agreement to make business sense or work in practice. They did not contemplate default. Perhaps this was naïve or over trusting on the part of Mr Avison given the personal friendship he enjoyed with Mr White at the time and for some time thereafter. If repayment had occurred within 60 days or 120 days then the Avisons would have made a very healthy return on their money.

51. Mr Avison appears to have wished to include his wife as a co-lender in order to mitigate the incidence of taxation on such interest. This is the bargain they struck and from which they hoped to make a quick and handsome profit. There is nothing wrong with that, of course; but there is no basis for finding that the parties intended the same lump sum interest model to apply for any longer than the agreed term of 120 days.

52. The legal position, therefore, is that - subject (if relevant) to Issue (3) below - the court has a discretion under section 35A of the Senior Courts Act 1981 to award pre-judgment interest on such amount or amounts at such rate or rates and for such period or periods as it thinks fit in all the circumstances. The claimants seek a rate of 8.5 per cent per annum on the amount of £294,000 as from 1 January 2015 to the date of judgment. This reflects the interest sought in their Letter Before Claim in August 2016. Mr White does not contest this interest rate or its application to the full period starting on 1 January 2015. He confirmed this to me in writing at my request after conclusion of the trial. Unless I am persuaded, therefore, that there was a legally binding agreement in November 2015 to impose, in effect, an interest rate of 122 per cent per annum as from 1 January 2015 onwards, the appropriate outcome is statutory interest at the rate of 8.5 per cent per annum.

Issue (3) – Agreement in November 2015?

53. I turn then, and finally, to Issue (3) - Was there a a legally binding agreement about accrued and accruing post-term or default interest in November 2015? The context for this analysis is twofold as already addressed. First, the loan agreement did not contain an agreed rate of post-term or default interest, hence there was no renewing block of interest in 120-day cycles. Secondly, the concept of interest accruing at £700 per day is not strictly speaking a rate of interest at all. It implies or equates to a rate of 121.67 per cent per annum by virtue of the fact that 365 divided by 120 is a fraction of just over a third, hence that multiplied by 40 per cent gives the annualised rate of just under 122 per cent.

54. The background to the exchange of emails on 15 to 18 November 2015 was a series of conversations between Mr Avison and Mr White building to a meeting at Cock's Café in Worthing on Saturday 7 November 2015. It seems clear that the concept of a pro rata default interest regime was in play in this dialogue for a while. Mr Avison says this meant and could only have meant £700 per day whereas Mr White says he was using this as some kind of shorthand for a fair and reasonable ad hoc rate or amount of interest on the accrued debt of £294,000 that would be agreed at some point. Mr Avison's email of 15 November 2015 sets out for the first time in writing that the interest payable for the initial term of borrowing "equates to £700 per day" (emphasis added). He goes on to say:

> "*You made a separate verbal offer to pay "Pro Rata" interest for the additional days of your delays as the Loan Agreement settlement by yourselves has extended far beyond the 120th day referred to in the Loan Agreement (being I believe the 3rd January 2015) Please calculate this amount yourselves, once you know the date of my solicitors having received the cleared funds of your repayment of capital and interest prescribed in our formal Loan Agreement contract.*
> *For the payment of your offered "Pro Rata" amount, please can you write a cheque for that sum made out to "Ginny and Andrew Avison" we can sort that matter out between ourselves after ... the formal Loan Agreement monies have been satisfied...*
> *Unless you and I decide otherwise, I think that the "Pro Rata" money could be described as a* Compensation *payment. Have you any specific thoughts on this as to how you wish it to be considered?*
> *Would you like Ginny and I to provide you with a separate receipt for your company accounts and express / describe ?*"

55. Mr White responded three days later in a short email dated 18 November 2015. The opening paragraph simply says, "Thanks for your email and I have noted the content." No calculation or proposal was forthcoming. Nor was any payment. As already described, Mr White continued to keep the Avisons sweet for as long as possible with pretexts and what may have been or become fraudulent statements. It was in this extended dialogue about potential future repayment that Mr White forged a series of letters from a supposed business associate called Titus Van Heur. HHJ Hand QC in his judgment following the trial of the 2017 action brought by Ms Emmanuel commented on Mr White's fabrication of documentation, as already noted.

56. The question for me is whether this exchange of emails in November 2015 confirmed or constituted a legally binding agreement as to post-term interest such as to displace the default position as to the applicability of statutory pre-judgment interest as from 1 January 2015 outlined above. This is said to have arisen either as a variation to the loan agreement or as a standalone collateral agreement: see paragraph 13 of the Reply. I have concluded that it does not.

57. The crucial email exchange lacks the clarity and connectivity one would expect to see in offer and acceptance or meeting of the minds viewed objectively. This is so whether it is relied upon to found a variation of the loan agreement or a standalone collateral agreement. As an aside I observe that it is not obvious that Mr White by this point in time had any actual authority on behalf of Ms Emmanuel to bind her to any contractual variation. Nor is it clear why Mr White would wish to bind himself to a new default interest regime by way of collateral agreement without also binding his co-borrower, Ms Emmanuel. Such asymmetry could cause problems with any contribution claims between borrowers down the line.

58. It was suggested in closing submissions that Mr White obviously had ostensible authority on behalf of Ms Emmanuel but the basis for this is not clear. Authority was not a pleaded issue and did not form part of this dispute for the purposes of disclosure or cross-examination. This alternative case as to the November 2015 agreement was only introduced by way of reply and Mr White did not seek to serve or file a rejoinder - something for which he cannot be criticised as an unrepresented defendant. This feature of the contractual formation or foundation nevertheless illustrates the analytical difficulties of the alleged post-term interest agreement case run in the alternative by the claimants.

59. The real problem for this case on which the claimants carry the burden of proof and persuasion is the lack of clarity and connectivity in the email exchange on 15 to 18 November 2015. Mr White was not told, for example, that there was by that date already 319 days of default interest on the clock amounting to £223,300 and counting. That would mean a total interest load of £307,300 by such date on the original loan of £210,000 bringing the total outstanding sum to £517,300. It is unlikely that Ms Emmanuel's property had increased so much in the intervening 15 months or so to cover this rolling up of the debt and no evidence was brought to my attention to suggest that she had cleared her pre-existing mortgage indebtedness in that time so as to create surplus equity above the original estimated £320,000 on which the Avisons' legal charge could bite.

60. It is not sufficiently clear from the email exchange that Mr White was agreeing to or even being asked to agree to a daily amount of interest of £700 as from 1 January 2015. No allowability for part or staged repayment was factored in, for example. It is even less clear that Mr White was agreeing to or being asked to agree to some form of rolling or renewing block of 40 per cent interest for each 120-day period as is the sole pleaded agreement on behalf of the claimants. Nothing in the email suggest this was on the table or in anybody's minds at this stage. On close analysis, as is justified in a situation like the present, there is no direct connection in the 15 November email between the derived daily amount of £700 interest for the original 120-day term on the one hand and the suggested "Pro Rata" interest for the post-maturity or post-term period. There is no reference at all to any rolling or renewing block regime for post-term interest.

61. Mr Avison refers to Mr White having made a "<u>separate offer</u> to pay 'Pro Rata' interest" and later refers to this as "<u>your offered</u> 'Pro Rata' amount" (emphasis added). This is not said to be £700 per day. He asks Mr White to calculate this amount up to the date when the loan, with 40 per cent accrued interest, is repaid in cleared funds. He requests that the additional default interest is paid by cheque and described as a "compensation payment" but raises with Mr White how it should be described and whether a separate receipt should be provided to Mr White. None of this suggests any 'buy in' by Ms Emmanuel, it should be observed.

62. This email and Mr White's cursory response three days later do not contain a sufficiently specific agreement to pay a daily rate of £700 from 1 January 2015 until full payment. As already noted it is silent as to the possibility of part or stage repayment - a noted vice in the £700 flat rate per day addressed in the context of Issue (2) above.

63. I noted during Mr White's cross-examination that in the agreed chronology the description of the meeting between himself and Mr Avison at Cock's Café on 7 November 2015 includes the following: "D agrees to pay interest at £700 daily rate on pro rata basis". Mr White said in evidence that he did not mean by that that there was a <u>binding</u> agreement. His evidence throughout on this point was that he was proposing to Mr Avison that they

agree a fair and reasonable figure for the accumulated default interest - something commensurate with the loan amount and accrued contractual interest - and that that is what he meant and understood by 'pro rata' in this context. No proposal was made, or agreement reached, as to such amount. Mr White did not repay the loan and so no calculation became relevant as requested in the 15 November email.

64. Mr Avison's then solicitor sent their Letter Before Claim the following August as already described. It made no mention of any contractual post-term interest or subsequent variation or agreement as to post-term interest. They claimed statutory pre-judgment interest of 8.5 per cent for the 567 days accrued by then, as already described.

65. I am conscious that some of this discussion delves into the subjective understanding or intention of one or both of the relevant protagonists. I do so in order to audit the inherent probabilities and relative equities of the alleged variation or collateral agreement; not as a qualification to or substitute for the objective approach to such matters under English contract law. I conclude that there was no legally binding agreement reached in mid-November 2015 as to post-term or default interest. This is so whether advanced (as pleaded) on the rolling or renewing block basis or (as not pleaded) on a daily pro rata basis. The position remains, therefore, as stated in the conclusion to Issue (2) above.

66. In light of the contingent common ground at and after trial as to the 8.5 per cent per annum as the appropriate rate of interest accruing on or from 1 January 2015, and in all the circumstances of this case as appearing to me at trial, I am satisfied that such rate is fair and just for the purposes of section 35A of the Senior Courts Act 1981. This rate far exceeds the prevailing market interest rate over the relevant period. In a sense the procedural accord existing as to this rate gives effect to Mr White's professed understanding and expectation that the principals would seek to agree a fair and reasonable rate of interest for the default period, albeit this figure is statutory pre-judgment interest applicable to the liability of Mr White alone, and not a contractual rate applicable to Ms Emmanuel.

67. I order that this rate be applied to the sum of £294,000 on a simple basis from and including 1 January 2015 until the date of this judgment. That concludes my judgment. I apologise it took more than half an hour to get through.

This transcript has been approved by the Judge