Neutral Citation Number: [2025] EWHC 1616 (Ch)

Case No: BR-2023-000696

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

RE ANJANA NATALIA

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 July 2025

Before :

ICC JUDGE AGNELLO KC

- -

Between :

CIDDY LIMITED	**Petitioner**
- and -	
ANJANA NATALIA	**Respondent**

Ms Mairi Innes (instructed by **RWK Goodman**) for the Petitioner
Ms Ella Vacani (instructed by **Lester Aldridge LLP**) for the Respondent/Debtor

Hearing dates: 18 March and 15 April 2025

- -

JUDGMENT

ICC Judge Agnello KC :

Introduction

1. This is the hearing of a bankruptcy petition presented on 30 August 2023 whereby the Petitioner claims the sum of £657,516.32 arising from a loan agreement dated 22 January 2020 entered into between the Petitioner, Anjana Natalia, the Debtor and Mr Ketan Natalia. The Debtor asserts that the petition debt is disputed on two grounds:-

   (1) The loan upon which the petition debt is based is unenforceable because the relationship between the parties was unfair within the meaning of sections 140A-140C of the Consumer Credit Act 1974 (CCA); and/or

   (2) The Debtor is not liable to pay the debt stated in the petition because it reflects a default interest provision which is an unenforceable penalty.

Background

2. According to the evidence, Mr Natalia, the then husband of the Debtor, approached the Petitioner seeking a loan. The loan was arranged through a broker, Mr Abhineet Rai. There was no contact as between the broker and the Debtor according to the evidence. The loan to be provided was agreed as between him and the Petitioner. The loan provided a facility of £562,500 which was to be repaid within 12 months. In accordance with the terms of the agreement, interest was to be charged at the rate of 10% per year and default interest would thereafter apply at a rate of 2% per month (24% per year) with anything unpaid, compounded.

3. The Debtor accepts that she signed the loan agreement and did so in the presence of a solicitor, a Mr Neil Pota, at his offices in January 2020. She also accepts that she signed the mortgage documentation which secured the loan against a property known as Tuscany, Oak Glade, Northwood, HA6 2TY (the property). She also accepts that she signed a declaration for exemption relating to businesses article 60C and 60O of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

4. The Debtor states that she was unaware of subsequent dealings as between the Petitioner and Mr Natalia. She understands that the loan was not repaid by its repayment date, being 22 January 2021. The evidence shows that Mr Natalia arranged with the Petitioner for the unpaid sums to be settled pursuant to an agreement entered into on 14 January 2022. The Debtor states that she was unaware of that agreement (the settlement agreement) and she was not a party to it.

5. Receivers were appointed on 7 April 2022 to sell the property. The Debtor asserts that the first contact that she had with the Petitioner directly was in August 2022. The Debtor wrote to the Petitioner's solicitors seeking information relating to the loan and the amounts said to be outstanding, including asking for a breakdown of the interest charged and being charged. The Petitioner did not reply to the Debtor with all the information she sought and in particular failed to provide the breakdown sought in relation to the interest.

6. The property was sold at auction on 28 March 2023 for £1,320,000. The Petitioner received the sum of £563,471.93. In the petition, the Petitioner claims effectively a shortfall of £590,418.86 in relation to interest and costs which have accrued according to it based on the terms of the loan agreement. The net proceeds of sale of the property were not used to reduce the capital owed but instead placed, it appears, against the outstanding interest. This therefore enabled further interest at the default interest rates to be charged and continued to be charged on the outstanding capital.

The legal principles in relation to challenging statutory demands and/or petitions.

7. There was agreement between the parties as to the well known principles which apply. The applicable test is that for summary judgment, whether the party disputing the debt would stand a real prospect of success at trial, or put another way, is the debt disputed on grounds which appear to the court to be substantial. Reference was made to the well known passage in *Collier v P & MJ Wright Holdings* [2007] EWCA Civ 1329 in which Arden LJ explained:

"*In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it was inherently implausible or if it was contradicted, or was not supported, by contemporaneous documentation (see also per as Lawrence Collins LJ states in Ashworth at [34]). But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties*." (at paragraph 21)

The Debtor's case

(1) Unfair relationship

8. The Debtor asserts that the relationship as between her and the Petitioner is unfair within the meaning of section 140A-140C CCA. She submits that her assertion requires full consideration and assessment in the County Court which has the jurisdiction to determine these types of challenges. The unfair relationship provisions apply to any agreement between an 'individual' and any other person pursuant to which the creditor provides that individual with 'credit of any amount' (section 140C.) Ms Vacani submitted that essentially, these provisions replaced the 'extortionate credit bargain' legislation under sections 137-140 CCA 1974. It is the County Court which has the jurisdiction to deal with these applications for a declaration and/or order pursuant to sections 140A-140C, pursuant to section 140B(4). When such an allegation of unfair relationship is raised a Debtor, the burden of proof is on the creditor to disprove the allegation (section 140(B)(9)).

9. Ms Vacani took me to the scope of factors which the court considers in these types of challenges, which she submitted, are extremely broad. Section 140A states:-

"(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the Debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the Debtor because of one or more of the following —

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the Debtor)"

10. Ms Vacani also referred to the variety of orders which could be made if the Court determines that there is an unfair relationship under section 140A. As is set out in section 140B, these orders can encompass the following:-

"(1) An order under this section in connection with a credit agreement may do one or more of the following–

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the Debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the Debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the Debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons."

11. Based upon these provisions in the CCA, Ms Vacani submits that as the Debtor has raised an allegation that the relationship was unfair, it is for the creditor (the Petitioner) to disprove that allegation as provided for in section 140B CCA. This would have been the process had the Petitioner issued a County Court claim for the recovery of the amounts. The Debtor would have counterclaimed for orders pursuant to section 140B. The declarations signed by both the Debtor and Mr Natalia as part of the loan agreement expressly preserved the powers of the court to make an order under section 140B CCA 1974.

12. She submits that the unfair relationship allegations cannot be properly assessed on a summary basis in this court and that this is reason in itself to dismiss the petition on the grounds that it is disputed. The unfairness allegations relied upon by the Debtor are as follows:-

    (1) The extreme inequality of knowledge and understanding as between the Debtor and the Petitioner. She submits that whilst this is present in many loan cases, the Petitioner ought to have been well aware in this case that the Debtor was not properly informed about the loan.

    (2) There is a lack of evidence that the very onerous default interest provisions were drawn to her specific attention.

    (3) The Debtor asserts that the Petitioner has been aggressive in its pursuit of an enforcement as against the Debtor after it was made aware that the Debtor had had been economically coercively controlled by Mr Natalia.

(4) The existence of the asserted penalty clause in the loan agreement. Whilst the debtor also challenged the interest provisions as being an unenforceable penalty clause, its existence in the loan agreement is another factor towards the assertion of this being an unfair relationship.

13. The Debtor's evidence explains that the Petitioner had no direct communications with the Debtor at any time until 2022 which was after the loan term had expired. The Debtor asserts that her signature on the Indicative Term Sheet was not her signature. I have no evidence in support of this assertion by the Debtor. That would require expert evidence. Whilst the Debtor accepts she received legal advice, she submits that in itself is not conclusive to the issue of unfair relationship. The declaration she signed makes it clear that the unfair relationship provisions would still apply. Furthermore, although Mr Pota stated in the letter that he was satisfied that the Debtor fully understood the nature of the loan and its contents, his letter does not state that he explained any specific parts of the loan to the Debtor and in particular the onerous default interest terms.

14. The Debtor asserts that Mr Pota's advice was limited, stating as follows:-

"*At no point did Mr Pota explain how the amounts due under the Loan would increase if we failed to repay on time. He did not warn me that we could end up in debt. He did not explain the interest provisions of the Loan at all. He did not explain whether or how Ciddy could look to recover any of its costs from us if Mr Natalia defaulted on payment. He did not explain that Ciddy could appoint receivers if there was a default or what that would mean or how that would work. He explained things about the Loan in only the most general terms*."

15. In particular, the Debtor relies upon the failure by her to sign the settlement agreement dated 14 January 2022, asserting that the Petitioner was therefore clearly aware of her lack of knowledge relating

to the loan agreement and its terms. The Debtor asserts that even when it was made clear to the Petitioner and its solicitors that the Debtor had been the subject to the coercive control by Mr Natalia, the Petitioner failed to provide proper disclosure to the Debtor. The Petitioner did not respond to a request from the Debtor for a breakdown of the Petitioner's calculation in relation to interest and other charges.

16. The evidence sets out that when the loan was due to expire, there was email correspondence with Mr Natalia. Whilst one of the emails was addressed to Mr and Mrs Natalia, there was no reply from or any separate messaging with the Debtor. The Debtor submits that this demonstrates that the Petitioner should have been aware of the lack of engagement by the Debtor in any negotiations or in relation to the loan itself. The correspondence leading up to the settlement agreement is devoid of any communication with the Debtor. The communications are between Mr Natalia and the solicitors acting for the Petitioner who were then chasing a 'wet' signed copy of the settlement agreement. As no signed copy was provided, the solicitors then sought electronic signatures. There were no communications with the Debtor and no explanation as to the lack of engagement with the Debtor. These emails were only sent to Mr Natalia's email address and therefore the Debtor asserts that there was an awareness and knowledge of the Petitioner that the Debtor was not involved in any of these matters relating to the settlement.

17. The Debtor asserts that this conduct relating to the settlement agreement demonstrates that no proper attempts were made by the Petitioner to engage with the Debtor in relation to the enforcement of the agreement. The Debtor also asserts that the alleged forbearance of the Petitioner in the enforcement of the loan agreement does not show any attempt to communicate with the Debtor. The Petitioner was content to accrue the substantial amounts of default interest under the terms of the loan

agreement which meant that the forbearance was advantageous to the Petitioner.

18. The Debtor relies upon her email dated 29 August 2022 addressed to the Petitioner's solicitors as evidence of her lack of knowledge surrounding the loan agreement, the settlement agreement and the failure of her former husband to repay the loan. In that email, she asks for information so that she can take advice and consider her position. The letter dated 7 September 2022 in reply to her email challenges her lack of knowledge, asserts she was aware of the appointment of the receivers and the proposed sale of the property and of the requirement for her to vacate the property. The letter admits that correspondence was sent to Mr Natalia's email only, but states that it was also posted and addressed to both of them. There is a refusal to provide some of the information sought and in particular the breakdown of the interest calculations. The letter confirms that default interest had been accruing as from January 2021. This means that default interest was being charged prior to the sale of the property in March 2023. As the Petitioner was entitled to appropriate the sums recovered from the sale of the property, then the proceeds were used to pay the interest rather than discharge the principal. The Debtor submits the refusal to provide the breakdown requested as well as the failure to engage with her properly at this time is also relevant for the unfair relationship assertion.

19. As to the second ground relied upon by the Debtor, Ms Vacani submits that the amounts which the Petitioner seeks to recover are essentially the interest which has been charged at what is described as extremely high rates. On a £562,500 loan facility, the Debtor has been charged almost £900,000 in interest notwithstanding that the Petitioner received sums totalling £563,471.93 from the net proceeds of sale of the property. The interest rates being charged comprise of standard interest at 10% and default interest at 24%, thereby totalling 34%. As at 28 August 2023,

being shortly before the presentation of the bankruptcy petition, the sum due was asserted to be £657,516.32. As at the date of the hearing, the Petitioner's calculations as to the shortfall has increased to £1,091,554.45 being £971,554.45 in interest and £120,000 in costs.

20. The interest provisions set out in the agreement are as follows:-

Clause 6.1

"*Interest for the period of 12 months from the Effective Date shall be payable by the Borrower upon completion of the Loan and shall be deducted from the Facility and retained by the Lender. Thereafter, Interest at the Interest Rate shall be paid by the Borrower to the Lender monthly in advance on the Interest Payment Date*."

Clause 6.2 deals with what occurs when there is a failure to repay the loan. The 'default rate' interest accrues at 2% per calendar month equating to 24% per annum.

"*If any part of the Loan is still outstanding on the Final Repayment Date then Interest shall accrue thereon at the Default Rate for each month or part month from the Final Repayment Date until it is actually received by the Lender after as well as before judgment (such obligation to be independent of and not to merge with such judgment).*"

Clause 6.3

"*If an Event of Default occurs at any time, then Interest shall accrue on the amount of the Loan then outstanding at the Default Rate for each month or part month from the date of the Event of Default until: -*

6.3.1 the full amount of the Loan has actually been received by the Lender; or

6.3.2 the Lender confirms in writing to the Borrower that there is no subsisting Event of Default

after as well as before judgment (such obligation to be independent of and not to merge with such judgment) and interest shall be compounded on each Interest Payment Date."

21. The law relating to penalty clauses is well established and summarised by Mr Justice Nugee (as he then was) in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [467]:

"*…the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable (per Lord Mance at [152]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255])*." (citing from *Cavendish Square Holding*)

22. Ms Vacani referred me to the following passage in *Ahuja Investments v Victorygame Ltd & Pandher* [2021] EWHC 2382 where the Court considered the question of whether a default rate of interest at 12% per month compounded, as compared to 3% per month during the loan term, was or was not an unenforceable penalty. The Court held that the default interest rate was an unenforceable penalty because it was:

"*…so obviously extravagant, exorbitant and oppressive as to constitute a penalty. Whilst I would be prepared to accept, without supporting evidence, an increase of up to 200% in the applicable rate of interest on default to reflect the greater credit risk presented by a defaulting borrower, in my judgment, and as a rule of thumb, I would expect an evidential burden to pass to a lender to adduce*

evidence to justify any greater increase, at least where the lender enjoys additional personal and real security for its loan."

23. She submits that the application of the default rate interest in the loan agreement is clearly a penalty clause. It is unclear what legitimate interest was to be served and protected by a default interest rate of 2% per month apparently compounded every month in addition to the ongoing standard rate of 10%. There is no evidence to suggest that the Debtor and Mr Natalia were a particular credit risk and moreover the Petitioner had significant security by reason of the charge over the property. Ms Vacani submits that even if the Petitioner have some unidentified legitimate interest in charging that amount and rate, the application of the default rate interest is extravagant, exorbitant and unconscionable in circumstances where the primary rate of interest is 10%. The Petitioner has failed to justify the significant increase.

24. The Debtor submits that the interest charged may well have been compounded and this has not been dealt with by the Petitioner. In so far as it has been compounded, then this again demonstrates why the provisions are penalty clauses. According to the breakdown provided by the Petitioner, the Debtor asserts that the default interest said to be the rate of 24%, from the period 22 January 2021 to 22 April 2023, the is calculated at £408,118.96. The shortfall was calculated by the Petitioner as at April 2023 as being £590,418.86, but this is on the basis that there was an entitlement to charge default interest. The net proceeds were then applied to discharging some of the default interest which has been charged rather than the capital itself. The debtor submits that the default interest is unenforceable as a penalty clause and the offer which had been made by the Debtor exceeded any sums due.

25. Ms Innes, on behalf of the Petitioner states that despite the notice of opposition filed and reliance on the arguments raised, the opposition is

either fanciful based on the evidence or on the Debtor's own case, would not reduce the debt owed to less than £5,000. She submits that in order for the court to dismiss a petition, the relevant dispute must reduce the petition debt below the bankruptcy limit. The Petitioner seeks a bankruptcy order based on what she submits must be at least the sum of £5,000 being the bankruptcy limit. She refers me to the case of *Re Field [2021] EWHC 2474 (Ch)*, a decision of ICC Judge Mullen. In that case, the Judge considered the debtor's arguments relating to a petition issued by HMRC claiming a total debt of £97,590.53 made up of unpaid self assessed taxes, penalties, surcharges and interest. The Judge determined that there had been a failure by HMRC to apply certain credits to the sums outstanding which effectively reduced the outstanding liability to HMRC. The Judge also considered issues relating to trade loss relief and whether it should be given effect and whether these constitute a free standing credit which needs to be taken into account. At the hearing, HMRC conceded that in relation to certain years and trade relief, those matters constituted a genuine dispute on substantial grounds, but there remained a liability for tax under the relevant legislation for years 2015/16 and the balance due for the years 2005/06-2009/10. The Judge held that there was also a genuine and substantial dispute relating to the argument as to a free standing credit, but taking into account the value of the alleged free standing credit, the sums due under the assessments reduced to £18,808.40. That sum fell due under the assessments which are debts created under the relevant tax legislation.

26. The Petitioner submits that even if all the interest charges are taken off the outstanding debt, there would remain the sum of £163,000 due relating to charges and costs due under the terms of the agreement. The argument that nothing would be owing to the Petitioner even after County Court proceedings, is, the Petitioner submits, fanciful. The Petitioner relies upon the original loan amount of £562,000 from which

the property realisation is then deducted (being £563,000) but that what would remain due under the terms of the agreement, even stripping out all the interest, is the legal costs of £70,000 and the expenses relating to the receivership of £42,503.33.

27. The Petitioner relies upon the passage in Lord Sumption's judgment in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* at paragraph 10 :-

'Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.'

28. Reliance was also placed upon the judgment of Lord Leggatt in *Smith v Royal Bank of Scotland PLC [2023] UKSC 34* at paragraph 19:-

'the question to be determined under section 140A(1) is not whether the relationship between the creditor and the debtor was unfair to the debtor when the credit agreement was made or at some other time in the past. It is whether the relationship is unfair to the debtor, i e at the time when the determination is made. This is reinforced by section 140B(9), quoted at para 14 above, which is likewise framed in the present tense'

29. Lord Leggatt then continued by stating that if unfairness is found, a remedy under section 140B may be awarded and that (paragraph 25), '*the purpose [of a remedy] must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair'.* Additionally, as is set out in *Kerrigan v Elevate Credit International Ltd (T/a) Sunny) [2020] EWHC 2169 (Comm)*, a remedy under section 140B *,'should not give the Clamant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place'*

30. The Petitioner relies upon the Debtor being a professional management accountant who entered into the loan agreement with the benefit of independent legal advice. There is nothing in this case which takes it beyond the usual lender-borrower relationship and that in itself cannot have been intended to give rise to an unfair relationship. The Debtor has failed to focus on the remedy that would be sought pursuant to section 140B. The remedy is only dealt with in vague terms that the Debtor would look to set aside the loan and/or various terms of the loan and/or seek an order that the Petitioner ought not to be able to enforce the loan/various terms of the loan pursuant to section 140B. This means, it

is submitted, that the court cannot be satisfied, even if challenged, that this would lead to a reduction of the sums owing to less than £5,000.

31. Effectively the Petitioner argues that in order for the Debtor to be able to satisfy the court that she should not be liable for any payment now under the loan, the court would have to be satisfied that no payment for interest or costs or charges can be due under the county court proceedings. That would prevent interest on the standard basis, costs and the default interest as well as the receivership and sale expenses. This would provide the Debtor with a windfall which is not the purpose of orders pursuant to section 140B.

32. The Petitioner relies upon four grounds which it submits do not take the case outside of the ordinary borrower/lender relationship in that :-

    (a) The provision of independent legal advice by Mr Pota to the Debtor. The letter states that Mr Pota personally interviewed the Debtor and Mr Natalia and he stated that he was satisfied that they fully understand 'the nature of the security and the commercial transaction'. Complaints made by the Debtor well after the execution of the loan agreement relating to what she asserts was defective legal advice should not be placed at the door of the Petitioner in seeking to enforce the loan agreement.

    (b) The Debtor has failed to provide any contemporaneous documents in support of her position. The Petitioner asserts that it is simply not believable that she was not aware that in taking out the loan, the amounts due under the loan would increase if payment was not made by the due date. The loan agreement effectively was a re finance of previous lending

(c) The relationship is no longer unfair as it stands now before the court as the Debtor is well aware of the terms and there is no unfairness now.

(d) The Debtor has not explained what remedy she considers she would be entitled to even if her case is accepted.

33. Even if the terms of the loan were particularly onerous and in particular the default interest provisions, the Petitioner asserts this does not give rise to an unfair relationship. In any event, the maximum the court would do is to disapply the default interest provision and this would leave £70,312.50 in standard interest as well as ongoing standard interest payable by the Debtor.

34. The Petitioner does not accept that it sought to enforce its rights in an aggressive manner. It submits that the evidence demonstrates that the Petitioner has been very accommodating to the borrowers. They have had many years to pay off the debt. There is no evidence relating to complaints made about the sale process or the conduct of the receivers. The Debtor ignores that the receivers act as agents to the borrowers and not act on behalf of the Petitioner. Even if there is some valid criticism from the Debtor, the reality is that the Debtor has had over three years to pay off the sums due under the loan agreement and has failed to pay.

35. Reference is made to clause 12.2 of the agreement which states:-

'Neither the Lender nor the Receiver shall be bound (whether by virtue of section 109(8) of the LPA 1925, which is varied accordingly, or otherwise) to pay or appropriate any receipt or payment first towards interest rather than principal or otherwise in any particular order between any of the Secured Liabilities'

36. Accordingly, the Petitioner asserts that it can select where it appropriates the proceeds of sale of the property. It appropriated the

proceeds of sale to the interest charged, including the default interest rather than to the capital.

37. As to the asserted penalty clause, the Petitioner provided little argument relating to why the default interest clause was not a penalty clause. Its argument focused on its assertion that even if the default interest was a penalty clause, there would remain outstanding sums due to the Petitioner and therefore a bankruptcy order should be made.

Discussion

38. I will consider the default interest provision as a penalty clause first. In my judgment, I am satisfied that there is a dispute on substantial grounds relating to the default interest clause and whether it is effectively unenforceable as a penalty clause. There is no evidence to support the calculation of the default interest rate as being in some way aligned to a particular borrower risk in this case. Furthermore, this was not an unsecured loan but a loan for which significant security was demanded and provided, being the charge over the property. In my judgment, there is a good arguable case that the rate of interest at 34% after the default is exorbitant and unconscionable and not a true reflection of the risk represented by the borrowers. Moreover, it appears that the interest was compounded but the evidence before me on this point was not clear. The Petitioner did not explain its interest calculations or confirm whether the interest was compounded. I therefore accept Ms Vacani's submissions on this issue as outlined above.

39. In relation to the unfair relationship argument, I do not accept that on the evidence the claim by the Debtor is fanciful. The issues raised by the Debtor which, in my judgment, demonstrate a good argument that the relationship was beyond that of a normal borrower creditor relationship include (1) the default interest rate, for which there is a good argument,

represents a penalty clause, (2) the lack of clarity in relation to whether the interest was being compounded, (3) the failure of Mr Pota specifically to highlight the existence of the extremely onerous default interest rate and the risk that it fell to be compounded, (4) the failure by the Petitioner's solicitors to provide a detailed breakdown of the interest calculation when asked or to consider the issues raised by the Debtor in a case where on the evidence it is clear that communications and contacts were with Mr Natalia and not the Debtor, including the events leading up to the settlement agreement.

40. In relation to the argument by the Petitioner that the unfair relationship argument was fanciful, this needs to be considered in the light of the default interest clause and it being a penalty clause. The Petitioner would have been well aware that this was an extremely onerous and potentially unenforceable clause. In those circumstances, in my judgment, it is certainly arguable that the Petitioner is not entitled to rely on legal advice received by the Debtor which fails to highlight the default interest rate as a penalty clause. The law in this area is well settled and the existence of this clause in the loan agreement clearly demonstrates that the Petitioner was seeking something which it was not entitled to enforce. That, in my judgment, is one of the factors which takes this outside of a normal borrower/creditor relationship. Such a relationship is outside a normal relationship when there are penalty clauses imposed by the terms of the lender.

41. Equally, the conduct of the Petitioner in seeking to negotiate the settlement agreement in such a way whereby it was clear there was no communication between the Debtor and the Petitioner is another aspect of this matter which is important in relation to taking this outside of the normal borrower/creditor relationship. I do not comment upon all the factors relied upon by the Debtor, but have highlighted the ones which in my judgment clearly take this case outside of the normal

borrower/creditor relationship. This is not to say that the other issues and arguments raised by both sides are not relevant, including arguments relating to the professional qualifications of the Debtor, but in my judgment, it is not part of my jurisdiction to assess all aspects or arguments which would be raised in County Court proceedings. I am satisfied that the debtor has established that she has a dispute on substantial grounds for the purposes of challenging the loan agreement pursuant to section 140A-C of CCA 1974.

42. I do not consider that the arguments raised by the Petitioner relating to the debtor's professional qualifications as demonstrating her knowledge of the terms of the loan agreement, a heavy reliance on the independent legal advice received by her and a denial that the Petitioner acted aggressively or that any of its conduct can be questioned, renders the section 140A-140C claim fanciful. Ultimately it will be for the County Court to assess and determine the claim being made by the Debtor in section 140A-140C proceedings. Those proposed proceedings are the correct place for all the issues raised before me to be ventilated. In relation to the submission that the Debtor is no longer in ignorance so any unfairness has been redressed, this argument lacks merit. Even after the Debtor raised the arguments relating to unfair relationship and the default interest rate being a penalty clause, the Petitioner still maintains that the default interest clause is enforceable.

43. The Petitioner asserts that even if the default interest is determined as a penalty clause, there would remain a substantial sum outstanding for standard interest as well as costs and the receivership expenses which are due under the terms of the loan agreement. These sums well exceed the bankruptcy level and accordingly the Petitioner submits that based on these sums, the bankruptcy order should be made. In relation to the unfair relationship argument, the Petitioner submits that it is clear from the case law that the Debtor is not to receive a windfall from a section

1240A-140C order and accordingly, the Debtor will owe sums to the Petitioner even if successful in the section 140A-140C proceedings. A court will not allow the Debtor to obtain what the Petitioner says would have been an interest free loan. Ms Vacani submits, as is clear from the breakdown provided by the Petitioner, a year's interest on the loan was already part of the loan itself and therefore the argument about an interest free loan is incorrect. Moreover, she reminds me of the very wide powers provided to the County Court by section 140B CCA 1974 and accordingly the county court may determine that the Debtor does not owe any further sums.

44. The Petitioner relied upon *Re Field* to demonstrate that the court can determine that a sum which is clearly due can remain the subject of a bankruptcy petition. In my judgement *Re Field* is very different from the case before me and does not provide the authority for the Petitioner's submission. In *Re Field*, HMRC relied on assessments which are treated under the relevant tax legislation as being debts owed. What the Judge was concerned with in *Re Field* was whether the Debtor could argue that certain credits he was claiming were valid existed or whether there was a dispute on substantial grounds relating to their existence. Such credits would then go towards discharging the sums due under the assessments. In that case, the Judge determined that there was an outstanding balance due and owing under the assessments.

45. Before me, the Petitioner effectively invites me to determine that there must remain a liability under the terms of the loan agreement and that this can form the basis for the bankruptcy order. The sums said to be due and owing vary from being the standard interest, to the legal costs, to the receivership costs. The submission was also made that in any event there must be a sum due which exceeds the bankruptcy level of £5,000 and that is all the Petitioner needed to establish. In my judgment, this is the incorrect approach to this case. Having determined that the Debtor

has established substantial grounds relating to her section 140A-C CCA 1974 claim, any sum which remains outstanding will be determined in those proceedings. It is not for me to predetermine exactly what sum would be due under those proceedings. Unlike in *Re Field* there is no liquidated debt due because the actual sum of what, if anything, is due still needs to be determined by the County Court. What the Petitioner is effectively inviting me to do is to quantify what sum the County Court will determine is due. In my judgment, that type of assessment forms no part of the bankruptcy jurisdiction. As I have determined that the Debtor has a good arguable case in relation to both unfair relationship and also the unenforceability of the default interest provisions, then until those proceedings have been determined, the Petitioner is not entitled to seek from the bankruptcy court an assessment in the form of a preliminary summary assessment that under the loan agreement there must be at least a particular sum still due and owing. Such an approach is also unfair to the Debtor who may be able to pay whatever sum is determined due by the County Court but may face a higher sum under the current petition.

46. This type of submission formed no part of *Re Field* because the assessments therein were actual debts which were not being challenged. Instead, the Debtor was raising arguments relating to the existence of free standing credits or other credits which would have the effect of reducing the assessments. I therefore reject that the petition can proceed with an assessment by me that a particular liquidated sum must remain outstanding such that a bankruptcy order should be made.

47. In any event on the facts of this case, I would also, in the exercise of my discretion not follow the approach of the Petitioner. It is clear that the Petitioner elected to bring bankruptcy proceedings and to maintain these proceedings even after it was clear the grounds of opposition related to assertions of unfair relationship and penalty clauses. The

Petitioner did not seek to proceed by way of ordinary proceedings. That was its election. In the exercise of my discretion, even if there was an argument that some sum must remain outstanding under the terms of the loan agreement which exceeded the bankruptcy level, this is not an appropriate case on its facts to allow the petition to proceed. The Debtor needs to know what sum is due and owing if its arguments are successful. It is for the County Court to determine the sum due. That will create a liquidated debt. That is not to be determined before me for the reasons set out above. Accordingly I will dismiss the petition.