



Neutral Citation Number: [2020] EWHC 2956 (Ch)

Claim No E00NE220

IN THE COUNTY COURT AT NEWCASTLE UPON TYNE

Date: 4 November 2020

Before :

RECORDER SUTCLIFFE QC

Between :

- (1) CLYDESDALE BANK PLC (trading as
Yorkshire Bank)
- (2) PAUL MICHAEL DIAKIW
- (3) DAVID ROBERT HEAP

Claimants

- and -

- (1) GARY WARDLE
- (2) RR & MW LIMITED
- (3) JOHN ROBINSON (trading as Robinson Truck
Bodyworks)

Defendants

MR RICHARD HANKE (instructed by Gateley Plc) for the Claimants
THE FIRST DEFENDANT in person for himself and the Second Defendant
THE THIRD DEFENDANT did not appear and was not represented

Hearing date: 15 July 2020

Approved Judgment

I direct that pursuant to CPR PD 39 a para-6.1 no official shorthand notes will be taken at this judgment and the copies of this version as handed down may be treated as authentic

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 12 James:30 a.m. on Wednesday, 4 November 2020

RECORDER SUTCLIFFE, QC:

Introduction

- 1 In the order dated 27 April 2020 resulting from my judgment handed down on 22 January 2020 ([2020] EWHC 82 (Ch)) (the **main judgment**), I ordered that the credit relationship between the First Claimant (the **Bank**) and the First Defendant (**Mr Wardle**) should be altered such that the amount of Mr Wardle's indebtedness to the Bank under the Wardle TBL¹ was to be recalculated as if he had entered into a fixed-rate loan (**FRL**) that expired on 18 January 2013, with a variable rate of interest payable thereafter. This resulted in the total sum payable by Mr Wardle to the Bank being reduced to £192,128.07 as at 20 January 2020.
- 2 Also on 27 April 2020, I directed that there should be a further hearing to determine if there should be a further adjustment to that sum as a result of Mr Wardle's case that if he had entered into a fixed-rate loan expiring on 18 January 2013, (1) he would have sold the Unit from which he operated his business and/or (2) he would not have closed his business in October 2013 and would instead have continued to operate from rented premises (the **further issue**). I gave directions for standard disclosure and permission to Mr Wardle to call evidence in relation to the further issue.
- 3 A remote hearing took place on 15 July 2020. Mr Wardle provided three witness statements and gave oral evidence, as did Mr Mark Clauzel (**Mr Clauzel**) who provided a witness statement dated 6 February 2020. Mr Richard Hanke appeared for the Bank, as he had done at the trial in September 2019, and I granted Mr Wardle's request that his McKenzie friend, Mr Mulvenna, be permitted to make submissions on his behalf (as Mr Mulvenna had done at the trial).

Summary of the parties' cases

- 4 It is Mr Wardle's case that if the FRL had been for a term of only 5 years, becoming a variable rate loan (**VRL**) in January 2013, he would not have closed down his business in October 2013 and would not have sold his tools. He says that the business would have survived long enough to have enabled him to sell the Unit for a sum sufficient to enable him to repay his borrowing from the Bank in full and then to have continued to operate his business from rented premises.
- 5 It is the Bank's case that, regardless of whether the FRL continued beyond January 2013, Mr Wardle's business would not have survived past October 2013 and certainly not sufficiently long to have enabled Mr Wardle to sell the Unit and move the business to a rented unit. The Bank also says that the basis upon which Mr Wardle has calculated his losses fails to take into account the position in which he finds himself as a result of the adjustments already made as a consequence of the main judgment and that if further adjustments were made in line with Mr Wardle's calculations, he would be over-compensated.

¹ Unless otherwise defined, I use in this judgment the same definitions as are used in the main judgment.

Context of the Further Hearing

- 6 The Bank used the calculation contained in its redress offer of October 2014 in order to determine the position Mr Wardle would have been in at that time if the FRL had been for a 5 year term as opposed to a 10 year term, in other words, having reverted to a VRL in January 2013. The total sum that Mr Wardle overpaid between January 2013 and 20 October 2014 (the date of the redress offer) amounted to £18,054, after the Bank had added interest at 8%. The Bank applied this sum as a capital repayment in respect of the sums owed by Mr Wardle with effect from 20 October 2014. At that date, the principal amount of the debt would have amounted to £180,428.21.
- 7 The operation of the restructured account thereafter was summarised in a spreadsheet prepared by the Bank which showed that the monthly sums of £435 that Mr Wardle paid to the Bank between November 2014 and January 2017 were insufficient to meet the monthly repayments that would have been due under the restructured loan (which would have been in the region of £1,400 per month). These monthly payments of £435 have been applied first towards the monthly interest payable on the loan, with the excess being applied to the principal.
- 8 After Mr Wardle ceased making any payments at all in January 2017, interest arrears accrued on the account with the result that the total arrears under the altered relationship (including capital repayments) amounted to nearly £80,000 by the time of the initial post judgment hearing that took place on 27 April 2020. The Bank did not apply any default interest or charges to these arrears but instead applied an interest rate of 2.5% from October 2014, comprising (1) the margin under the Wardle TBL of 2% and (2) a rate of 0.5% throughout the period designed to approximate to the variable LIBOR rate that would have been payable under the Wardle TBL.
- 9 At the hearing on 27 April 2020, I accepted the methodology that had been adopted by the Bank in recalculating Mr Wardle's debt. This resulted in the total sum payable by Mr Wardle to the Bank being reduced to £192,128.07 as at 20 January 2020. Since Mr Wardle claimed that he had suffered further losses as a result of the FRL remaining in place beyond January 2013, the question of whether there should be a further adjustment to this figure has been left over until after determination of the further issue.
- 10 In a letter from its solicitors dated 18 June 2020, the Bank made an offer to compromise Mr Wardle's claim for consequential loss and the issue of the terms on which the debt is to be repaid on the following basis: (1) that Mr Wardle's claim for consequential loss would be dismissed; and (2) that monthly repayments of capital and interest in respect of the debt as at 20 January 2020, namely, £192,128.07, would be updated to 18 August 2020 applying interest at 2% over the Bank's current base rate for the period, in accordance with an attached repayment schedule. That schedule showed monthly payments of capital and interest continuing to be made over the remainder of the term in the sum of £1,535, which the Bank considered could be afforded by Mr Wardle on the basis that they were less than the monthly rent being paid to him by Third Defendant. The Bank's schedule provided for a balloon payment of £81,038.44 at the end of the term (on 19 January 2028) which was broadly equivalent to the projected arrears position as at 18 August 2020 assuming Mr Wardle made no repayments prior to that date.
- 11 The Bank's proposed repayment schedule therefore allowed Mr Wardle to defer payment of the arrears to the end of the term of the VRL in January 2028 and gave him

a further two months to adjust his financial arrangements before making his first monthly payment. This offer was not accepted by Mr Wardle. He continued to maintain that he had suffered further losses for which he had not been adequately compensated by the adjustments already made by the Bank and as a result it was necessary to proceed to the further hearing on 15 July 2020.

- 12 The further losses claimed by Mr Wardle must be evaluated by reference to section 140B of the Consumer Credit Act 1974. The court has undoubted jurisdiction under subsections 140B(a) and (c) to make further adjustments to the sum payable by Mr Wardle to the Bank, or to order the repayment of sums already paid. However, the approach of the court as to the shaping of the remedy following the conclusions reached in the main judgment must be guided by the unfairness: “*the order made should reflect and be proportionate to the nature and degree of the unfairness which the court has found*”: Patel v Patel [2009] C.T.L.C. 249 at [79]. It is only if the court concludes that Mr Wardle has not been sufficiently compensated for the unfairness as a result of the adjustment already made that a further adjustment should be ordered.

The viability of Mr Wardle’s business

- 13 Mr Wardle exhibited to his third witness statement a letter and report from his accountant Mr Lawrence Silson (**Mr Silson**). Mr Silson attached to his letter several spreadsheets containing his analysis of the performance of Mr Wardle’s business between 2008 and 2013. He identified three scenarios. Under scenario 1, he provided a summary of the financial position of the business up to October 2013 with the FRL remaining in place, as set out in its annual accounts. Under scenario 2, he provided a summary of the financial position of the business up to October 2013 on the assumption that Mr Wardle had never entered into the FRL or any borrowing but the business had nevertheless performed as it in fact performed with Mr Wardle continuing to rent. Under scenario 3, he provided a summary of the financial position of the business up to October 2013 on the assumption that the FRL had terminated in January 2013 and the Unit had been sold at that date, with Mr Wardle repaying his borrowing from the Bank.
- 14 The problem with Mr Silson’s scenarios 2 and 3 is that neither of them reflects the case being advanced by Mr Wardle. The true counterfactual requires the financial position of the business to be analysed on the assumptions that (1) the FRL remained in place until January 2013 and (2) the Unit was sold, and the Wardle TBL repaid, at a later stage. This second assumption is required because it is not part of Mr Wardle’s case that the Unit could or would have been sold in January 2013. He claims that it would have been sold to Mr Clauzel in 2014 or to a trust connected to Mr Tony Allsop (**Mr Allsop**) in 2015. This analysis could only properly be carried out on the basis of cashflow predictions for the business after October 2013 which are not provided either in Mr Silson’s spreadsheets or in Mr Wardle’s evidence.
- 15 However, what Mr Silson’s report shows is that Mr Wardle’s business was in a precarious position from 2008 onwards. The unaudited accounts for the financial years between 31 March 2008 and 31 March 2013 reveal that the business (which was operated as a partnership between Mr Wardle and Mr Paterson in the years ended 31 March 2008 and 2009 and by Mr Wardle as a sole trader thereafter) made:

- a loss of £7,496 in the year ended 31 March 2008;
- a profit of £7,517 in the year ended 31 March 2009;

- a loss of £20,191 in the year ended 31 March 2010;
 - a loss of £13,621 in the year ended 31 March 2011;
 - a loss of £39,292 (or £40,373 which is the figure appearing in the 2013 accounts) in the year ended 31 March 2012; and
 - a loss of £6,700 in the year ended 31 March 2013.
- 16 Scenario 1 in Mr Silson’s report (summarising the position of the business with the FRL in place) shows that, even though there were very modest drawings from the business, the business generated a negative cash flow in each of these financial years and the business was only kept afloat by Mr Wardle introducing significant funds: £24,000 in the year ended 31 March 2011, £31,000 in the year ended 31 March 2012, £47,000 in the year ended 31 March 2013 and £7,500 in the period ended 31 October 2013, to which is added the sum of £19,780 representing the sale of fixed assets, making a total sum introduced in that period of £27,280.
- 17 Mr Wardle bears the burden of proving that, had it not been for the impact of the FRL continuing in place after January 2013, his business would have survived and he would have been able to sell the Unit in 2014 or 2015 as he claims. In order to support a claim that a business would have survived after October 2013 if it had not been subject to the FRL, one would expect to see an analysis of its actual and projected cashflow on a month by month basis showing in the projected cashflow column the impact of the reduced interest burden on the business. Mr Wardle has not provided any analysis of the impact of the adjusted cashflow on his business under a VRL after January 2013 or its projected cashflow after it closed in October 2013, taking account of the further sums he says would have been needed to enable the business to survive. I therefore have to do my best to deduce what is likely to have happened to the business had the FRL switched to a VRL in January 2013 from the limited information contained in the annual accounts and in the documents attached to Mr Silson’s report as well as Mr Wardle’s own evidence as contained in his three witness statements and tested under cross-examination.
- 18 On the basis of this evidence, I have concluded that, on the balance of probabilities, Mr Wardle would have closed the business in October 2013 even if the FRL had ceased in January 2013 and he had only been liable for interest obligations under a VRL from that point, with no liability for any break costs. Mr Silson’s cashflow analysis of the business as it was (scenario 1) shows that by early 2013 the business was in a very weak state. It had failed to generate any substantial cash from its operations. Its turnover had followed a downward trend, having peaked at £190,000 in the year to 31 March 2009 which coincided with Mr Paterson leaving the business. It was entirely reliant on large cash injections from Mr Wardle in order to survive. As Mr Silson says in the covering letter to his report, *“the most notable fact was that although your business was haemorrhaging cash throughout the period analysed, you were funding these cash drains from your own pocket”*. Mr Wardle makes no reference to these cash injections in his witness statements. When he was asked about them in cross-examination, he accepted that Mr Silson’s report showed those sums in cash as having been injected but he was unable to explain where the cash came from. He accepted he had put some money in himself but never thought it was in the amounts referred to in

Mr Silson's report, although he also accepted that he had no reason to doubt Mr Silson's figures.

- 19 It was Mr Wardle's evidence that the business was not in a good state of health at that time due to the recession. He said he would have done anything to keep the business going to give his sons employment but he realistically accepted that even if he had stayed in rented premises and not moved the business to the Unit, the business would still have been in a dire situation, not making any money and requiring funds to be contributed.
- 20 Moreover, it is clear that (in Mr Wardle's words) "*the straw that broke my business's back*" was the introduction in 2013 of EC regulations which required vehicles to obtain European Community Whole Vehicle Type Approval, a process designed to ensure that 3.5 ton vehicles (later to be rolled out to larger vehicles) met the relevant environmental, safety and security standards. These regulations required Mr Wardle to make significant alterations to his manufacturing process. As an alternative, and pending approval of his new quality control process, he could have taken advantage of a process called Individual Vehicle Approval (IVA). IVA involved less disruption to the manufacturing process which meant that Mr Wardle was more attracted to this solution. The problem with IVA, which was first introduced in September 2013, was that it involved a 12 week delay in having the vehicle tested. This inevitably slowed down the manufacturing process and delayed Mr Wardle's cash receipts. Each vehicle inspection cost £200, and more than one inspection was often required. The delay caused to finished vehicles was between two and five weeks per vehicle depending on the number of testing visits required. This meant Mr Wardle had to wait several weeks before he was able to deliver the finished vehicle to his customers and get paid for his work. The average job value per vehicle was around £3,000 and since Mr Wardle worked on approximately 100 vehicles each year, he was left with an investment in revolving stock and work in progress of between £40,000 and £50,000. As Mr Wardle frankly admitted in his second statement: "*From a financial viewpoint, the rolling out process would increasingly throttle my cash flow – i.e. I didn't have to climb an immediate cliff but to walk up an increasingly steep mountainside. ... Faced with a possible need for as much as £50,000 for finished vehicle financing and work in progress, due to the IVA process, the cash mountain (and increased uncertainty), was simply too high for me. I decided I had to call it a day*".
- 21 There is no doubt that the impact of the EC regulations upon Mr Wardle's business would have made trading increasingly difficult and had a strong negative effect upon its already tight cashflow. In his second statement Mr Wardle states that, if the FRL had terminated in January 2013, he would have been able to obtain the necessary funding through access to an overdraft from the Bank or cash that would have been available from re-mortgaging Kipling Court. The problem with both these suggested sources of funds is that they were not available to Mr Wardle, and the Bank was under no obligation to make them available.
- 22 In his third witness statement, Mr Wardle states (in contrast to his earlier statements) that he would only have required an additional £30,000 as opposed to £40,000 to £50,000 to cope with the impact of the new regulations which only affected half of his business but he still does not explain how he would have been able to obtain even this additional funding from the Bank or another source. Nor is it apparent how the additional cash available as a result of the change to variable interest payments in

January 2013 would have been sufficient to enable the business to survive. In the period between January and September 2013, Mr Wardle made payments of approximately £1,900 per month under the FRL. If his loan had become a VRL in January 2013, the payments would instead have been a little over £1,000 per month. Thus, between January and September, Mr Wardle would have saved around £7,200 which is significantly less than the £25,000 overdraft which he required as a minimum for the business to survive. Indeed, the saving of £7,200 would not have been sufficient to make the business net cash generating over the period. Mr Silson's spreadsheet gives a negative figure for "*True cash generated from ops/cash for debt*" of £9,823. It is impossible to see how Mr Wardle could have bridged this gap. Moreover, it is clear that a reduced payment obligation under a VRL in January 2013 could never alone have been sufficient to save the business.

- 23 Accordingly, I do not accept Mr Wardle's case that if the FRL had terminated in January 2013 his business could have continued to trade after October 2013 and through 2014 or 2015 until such time as he was able to sell the Unit. I find on the balance of probabilities that, even had a VRL been in place between January and October 2013, Mr Wardle would still have taken the decision to close his business in October 2013 due to the adverse impact of the economic conditions at the time and the increased costs he faced as a result of the introduction of the EC regulations.
- 24 Mr Wardle also says that as a result of the closure of his business he was forced to sell his tools and equipment and he quantifies this claim for lost tooling at £100,000, being the difference between the price for which he sold the tools and his estimate of the replacement cost of this equipment. However, I find it impossible to see how any loss resulting from the sale of Mr Wardle's tools and equipment can be attributed to the continuation of the FRL beyond January 2013. Even if such claim had been arguable, the proper measure of loss would have been the difference between (1) the actual value of the tools and equipment at the time they were sold and (2) the sale price achieved by Mr Wardle. Mr Wardle has produced no evidence to show that these items were sold for less than their true value at the time. Nor has he explained why it was necessary to sell them at a reduced value in October 2013 or why the alleged loss he has suffered is the fault of the Bank.
- 25 More fundamentally, I do not accept that Mr Wardle has proved that he was worse off as a result of closing his business in October 2013. He says in his first witness statement that, as a consequence of closing the business, he engaged in subcontracting work in Stockton which, whilst involving an inconvenient round-trip of 80 miles per day, turned out to be "*very profitable*". Had he continued to operate a loss-making business from rented premises, the probability is that he would have been in a worse position. Whilst closing the business and travelling a greater distance to do subcontracting work may not have been his preferred outcome, he was in fact financially better off. His tax return for the period 2015/2016 records that he made a profit from employment and self-employment of £47,437. This is to be contrasted with the final full year of running his business (the year ended 31 March 2013) when the total direct wages shown in the accounts as being paid to him were £14,040 whilst he contributed total net funds to the business of £47,000, which would have resulted in a net personal loss from the business of £32,960.

Was Mr Wardle prevented from selling the Unit by the FRL?

- 26 Mr Wardle claims that, had it not been for the FRL continuing in place beyond January 2013, he would have been able to sell the Unit in 2014 or 2015 and has therefore suffered losses in the form of the interest savings that he says would have resulted from the sale of the Unit in 2014 or 2015. He says that he was prevented from selling the Unit by the 10 year term of the FRL.

Offers from Mr Clauzel

- 27 Mr Wardle's case is that he lost the opportunity to sell the Unit to Mr Clauzel on two occasions, namely, in 2012 and in 2014. Mr Clauzel provided a witness statement and gave evidence at the hearing. He is a professional boxing coach and fitness club owner whose main business activity is owning and running gymnasiums. His evidence was that he made an offer for the Unit of £300,000 in 2012 with the backing of Sport England which was "*very acceptable*" to Mr Wardle but the offer fell through due to complications with Sport England for reasons that had nothing to do with Mr Wardle, the Bank or the FRL.
- 28 Mr Clauzel also gave evidence about a second offer that he made for the Unit on a date in 2014 he was unable to recall and of which there was no documentary evidence. He said that having made an initial offer of about £200,000, he increased his offer to £225,000 which he conceded was still some way below the asking price of about £250,000. He said that Mr Wardle told him he was unable to accept his offer because, having done his figures, he had worked out he was going to lose money. Mr Clauzel ended up moving to substantially larger rented property on a 12 year lease with an option to buy but said that the Unit was his preferred property at the time had Mr Wardle chosen to accept his offer.
- 29 Mr Wardle's evidence as to why he declined Mr Clauzel's 2014 offer was confused. He believed that the offer was made in early 2014, possibly even at the back end of 2013. He said that he would have been prepared to put in a further £20,000 in addition to the sum of £225,000 offered by Mr Clauzel, in order to pay off the amount outstanding under the FRL, including break costs. When it was pointed out to him that, had he done this, he would have been able to pay off the FRL (given that the debt under the FRL at the time was about £200,000 and break costs were less than £45,000), Mr Wardle said that he thought the actual indebtedness was about £275,000 (being £240,000 in outstanding debt and break costs of £35,000). It is not clear how he came to hold this view.
- 30 I consider that there were in fact two more likely reasons why Mr Wardle did not accept Mr Clauzel's 2014 offer. First, the offer was probably made at some point between November 2013 and July 2014 at a time when the Unit was being let by Mr Wardle to a laundry business and Mr Wardle was content to continue receiving rent from the laundry business at that time. Second, and in any event, Mr Clauzel's 2014 offer was not particularly attractive because, despite having been increased from £200,000 to £225,000, it was still some way below the asking price of £250,000. On the balance of probabilities, I consider that Mr Wardle decided not to sell the Unit to Mr Clauzel for reasons unconnected to the continued existence of the FRL. This was a reasonable approach for him to take, given that it involved him keeping hold of the Unit in circumstances where he had a tenant paying rent for the Unit at the time and he was carrying on a profitable subcontracting business elsewhere. Whilst he had taken the

decision to put the Unit on the market, there was no reason for him to decide to sell to Mr Clauzel for a price that was significantly below the asking price.

Offer from Mr Allsop

- 31 There is clear documentary evidence of a further offer being made for the Unit by Mr Allsop in April 2015 in the sum of £250,000. Emails disclosed by Mr Wardle passing between (1) his agents Knight Frank and (2) Mr Allsop and his financial advisers show that this was a serious offer. Heads of terms dated 23 April 2015 for the sale of the Unit at a price of £250,000 were drawn up by Knight Frank showing Mr Wardle as the vendor and DA Phillips & Co Ltd (**DA Phillips**) and Mr Allsop as trustees of 'The Premier Trust Re: A. Allsop' as the purchaser.
- 32 These same documents demonstrate that Mr Wardle's reasons for not proceeding with this sale were entirely unconnected to the FRL or any conduct of the Bank. It is clear that the sale price of £250,000 offered by Mr Allsop was acceptable to Mr Wardle even in the light of the total indebtedness under the FRL (including estimated break costs) as he believed it to be at the time. It also seems clear that the amount offered by Mr Allsop would have been sufficient to discharge all sums due under the FRL. Moreover, since by the time of the Allsop offer in April 2015 the Bank's redress offer had been made some six months earlier (on 20 October 2014), the effect of accepting the redress offer would have generated surplus cash for Mr Wardle. I therefore accept the Bank's submission that if his desire had been to sell the Unit and to pay off all his borrowing from the Bank at that time, acting reasonably, Mr Wardle ought to have proceeded with this transaction.
- 33 In his third witness statement, Mr Wardle suggests that the deal with Mr Allsop fell apart because there was never any real discussion between himself or Mr Mulvenna on the one hand and the purchaser on the other. He also appears to have been concerned about the fact that he did not know the identity of the true purchaser. He says there was a conflict between DA Phillips for whom the Unit was to be a distribution centre and the trustees for Mr Allsop and that, although Mr Mulvenna said that the conflict could have been resolved by the lawyers, the transaction never got to that stage because it was vetoed by the trustees' financial adviser, apparently because it did not meet the trustees' criteria.
- 34 Mr Wardle's explanation as to why the Allsop deal fell apart is not supported by the contemporaneous documents. What those documents show is that Mr Wardle, acting on Mr Mulvenna's advice, asked Mr Allsop to agree to a conditional sale arrangement whereby the Unit was leased to the purchaser for a period of 6 or (preferably) 12 months, with the right to buy the Unit at the end of this period. Mr Allsop's financial adviser, Mr Neil Thompson, sent an email to Mr Allsop on 29 April 2015 reporting on a telephone call that he had received from Mr Wardle that day in the course of which "*[Mr Wardle] re-iterated that he really wanted to lease the property ... (He is worried that by selling the property now, this will compromise his case against [the Bank] for the mis-selling of a Fixed Rate Tailored Business Loan*". The same email records that Mr Wardle had asked if Mr Allsop would consider leasing the Unit for "*say 12 months or even 6 months*" and that Mr Thompson had made clear to Mr Wardle that Mr Allsop was only prepared to purchase the Unit "*in a correct and standard way, without any unusual conditions as was suggested*". Mr Allsop's response by email to Mr Thompson the following day made clear that, whilst he was "*reasonably flexible and prepared to*

cooperate as much as possible”, he would “*not be prepared to lease more than 6 months [if at all]*” and that there would need to be inbuilt safeguards with regard to additional costs and fees and the vendor’s potential bankruptcy.

35 It would appear that matters then stalled for some three weeks. Mr Simon Haggie, the partner at Knight Frank, sent an email to Mr Allsop on 21 May 2015 in which he acknowledged that Mr Allsop did not want to lease and needed the certainty of a sale at the agreed price. Mr Haggie says he had suggested to Mr Wardle that he should enter into an unconditional contract for the sale of the Unit with a delayed completion having a long stop date of 31 December 2015, with the purchaser being permitted to occupy the Unit between exchange and completion upon payment of a 15% deposit with the balance being paid on completion. Less than 3 weeks later, Mr Allsop notified Knight Frank that he had found an alternative property in Middlesbrough but remained interested in the Unit “*if it came back onto the market unencumbered*”. On 13 July 2015, Mr Haggie sent an email to Mr Wardle indicating that Mr Allsop had been in contact again enquiring about the Unit as he had hit problems with the Middlesbrough property. Mr Wardle’s response the same day was short and to the point: “*I have leased factory to a company I used to work for*”. This was a reference to the Occupational Lease entered into between the Second and Third Defendants a month earlier on 11 June 2015.

36 I am entirely satisfied that the reason why the Unit was not sold in 2015 for the sum of £250,000 was no fault of the Bank or the continued existence of the FRL. The Bank had made an offer in October 2014 to terminate the FRL and to make a payment of compensation to Mr Wardle. That redress offer was not acceptable to Mr Wardle but it did provide him with the opportunity to repay the FRL without any liability for breakage costs. Mr Wardle says in his third witness statement that he needed to ask for an exchange of contracts with a deferred completion date because otherwise the Bank would simply have appointed LPA receivers and sold the Unit for £250,000, coming to Mr Wardle for any shortfall created by their costs. I do not accept this explanation. The proposal for a lease pending a deferred completion date came from Mr Mulvenna and it is difficult to see what it sought to achieve. LPA receivers were not appointed by the Bank until January 2017 and there is no indication that the Bank was considering appointing them at this time. The evidence shows conclusively that the reason the sale in 2015 did not proceed was as a result of Mr Wardle’s and Mr Mulvenna’s conduct (of which the Bank was unaware) rather than any conduct on the part of the Bank or the term of the FRL.

37 I accept the Bank’s submission that the real reason the sale of the Unit did not proceed in 2015 is that Mr Wardle lacked the desire to sell. He had decided by that time that his preference was to lease the Unit to the Third Defendant. I conclude that it is more likely than not that, if the FRL had only been for a 5 year term and had become a VRL in January 2013, Mr Wardle would have sought to retain the Unit and to rent it out following the closure of his business in October 2013.

Conclusion

38 For the reasons I have given, I do not consider that Mr Wardle has established his claim that he has suffered consequential loss in respect of which a further adjustment needs to be made. It is more likely than not that if the FRL had terminated in January 2013, Mr Wardle would still have had to close his business when he did in October 2013 since it

made no sense for the business to continue haemorrhaging cash and the introduction of the EC regulation meant he was facing an increasingly steep mountain to climb which made the future of his business even less viable. The reduction in monthly instalments due to the Bank as a result of the FRL becoming a VRL in January 2013 would not have had the effect of changing his decision.

- 39 Equally, the reason the opportunities that arose to sell the Unit in 2014 and 2015 did not result in sales was not due to the continued existence of the 10 year FRL but as a result of Mr Wardle's preference at the time for renting as opposed to selling the Unit. This was a perfectly rational decision for Mr Wardle to take. It has meant that he continues to own the Unit and has been able to achieve a rent from the Third Defendant from the time that the Occupational Lease was entered into on 11 June 2015 which is currently sufficient or nearly sufficient to pay the monthly repayments due to the Bank under a VRL.
- 40 Accordingly, having determined by my order dated 27 April 2020 that the credit relationship between the Bank and Mr Wardle was unfair and reduced the total sum payable by Mr Wardle to the Bank to £192,128.07 as at 20 January 2020, I do not consider that any further adjustment needs to be made. I conclude that Mr Wardle has been adequately compensated for the unfairness of the relationship by the reduction in the debt resulting from my order of 27 April 2020.
- 41 In his skeleton argument for the further hearing, Mr Hanke invited the court to order that the repayment schedule for Mr Wardle's indebtedness should be as set out in the letter of 18 June 2020 from the Bank's solicitors to which I refer in paragraphs 10 and 11 above. As Mr Hanke points out, although the consequence of the rejection of Mr Wardle's case as to consequential loss should be that he immediately starts repayment of his full indebtedness, this schedule provides a pragmatic and generous alternative. In particular, it provides for the substantial arrears accrued by Mr Wardle (resulting from his decision to reduce and then cease making loan repayments to the Bank) to be deferred. Those arrears will then be repaid in a single sum at the expiry of the term of the loan. Had monthly payments commenced on 19 August 2020, as anticipated by the schedule, the Bank's offer had the effect of reducing Mr Wardle's ongoing monthly payment obligation (at the Bank's current base rate) to around £1,500 per month which is an amount below the rent paid by the Third Defendant. The schedule will need to be adjusted in order to take account of the fact that the payment obligations will not commence until a date after the order resulting from this judgment has been made.