



Neutral Citation Number: [2023] EWHC 1706 (KB)

Appeal no: QA-2021-000195

County Court case nos.: G10CL064/065/066

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2023

Before :

MR JUSTICE SOOLE

Between :

SECULINK LIMITED

Respondent/
Claimant

- and -

EREN SALIH

Appellant/
Defendant

The Appellant did not appear and was not represented at the hearing

Mr Barnaby Hope (instructed by **Viceroy Legal**) for the Respondent

Hearing date: 18 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SOOLE :

1. This is an appeal by Mr Eren Salih against the Order of HHJ Gerald (the Judge) dated 26 July 2021 whereby he gave judgment for the Respondent (Seculink) in the sum of £850,000 on a secured bridging loan agreement. Pursuant to the permission granted by Sir Stephen Stewart and the Amended Grounds of Appeal, the challenge is to the Judge's rejection of (i) his defence that the provision for payment of interest on default (12% per month compounded) was unenforceable as a penalty (ii) his defence and counterclaim that there was an unfair relationship within the meaning of ss.140A-D Consumer Credit Act 1974 as amended (CCA).
2. Mr Salih now acts in person on this appeal. By e-mail to the Court from his sister Ersil Salih, dated 17 May 2023, Ms Salih advised that her brother was very unwell and in a care home, would be unable to attend Court and was unlikely ever to be able to do so. She had hoped to attend on his behalf but had herself been admitted to hospital that day. Her brother was content for the Court to proceed with the appeal in his absence and on the basis of the papers submitted. These include the Amended Grounds of Appeal and a skeleton argument drafted by Counsel Mr James Malam.
3. Seculink appear by Counsel Mr Barnaby Hope, who did not appear below. I am grateful for the assistance he has given and for the fairness with which he has presented his arguments.

Background

4. Mr Salih was the owner of three investment properties, 'buy to let' residential flats in London. Each of these was subject to a mortgage. By the subject loan agreement dated 1 June 2018, Seculink advanced him the total 'Loan Sum' of £355,000 for a 6-month term at a rate of 2.5% per month simple interest. That total comprised (i) £250,000 bridging loan (ii) £37,500 'rolled-up' interest for the 6-month term; (iii) £36,605 facility fee (iv) £30,000 broker's fee; and (v) £895 lender's legal and professional fees.
5. By clause 7(e), in default of repayment of the total Loan Sum at the end of the term, the interest rate on the outstanding sum increased to 12% per month compounded. The loan was secured by a second legal charge on each of the three properties.
6. By clause 3 of the agreement, Mr Salih warranted that the loan was for business purposes; and made declarations in terms which included that he understood that he did not have the protection and remedies that would be available under the Financial Services and Markets Act 2000 or the CCA if this were a regulated agreement under those Acts; but that this declaration did not affect the powers of the court to make an order under section 140B CCA.
7. It was and remains common ground that the unfair relationship provisions of the CCA apply to this agreement. For the purposes of this appeal it is sufficient to cite the following provisions of ss. 140A-B:

Approved Judgment*'140A Unfair relationships between creditors and debtors*

(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).

...

140B Powers of court in relation to unfair relationships

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

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

...(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;

...(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.'

8. Mr Salih defaulted on the repayment of the loan at the end of the 6-month term and no part of the Loan Sum was thereafter repaid. By separate Claim Forms in respect of the three properties, each dated 12 February 2019, Seculink sought possession and a money judgment.
9. By Amended Defence and Counterclaim, settled by Counsel, Mr Salih disputed the claims and in particular contended that (i) he had not had an opportunity to read through the documents before signing when sitting in his wheelchair on the street; (ii) the Legal Charges had not been validly attested; (iii) the default rate (equating to 289.6% p.a.) was void as a penalty; (iv) his relationship with Seculink was unfair and should be remedied within the provisions of ss.140A-B CCA.
10. At paragraph 49 the pleading particularised the alleged unfair relationship as arising from:

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'(a) The entire manner in which the Defendant was required to sign the various documents, including the Legal Charges, in the street, and without being given an opportunity to read them...;

(b) The arrangement fee of £36,605 was unjustifiably high;

(c) The original interest rate (which equated to 30% per annum) was unjustifiably high;

(d) The provision in clause 7(e) that, in the event of default, the interest rate would increase to 12% per month and would be compounded (resulting in an interest rate of 289.06%¹ per annum) was wholly unreasonable;

(e) The failure of the Claimant to provide copies of the documents he signed on 1 June 2018 was unreasonable; and

(f) Since the expiry of the agreement on 7 December 2018 both the Claimant and [its] solicitors have failed to provide prompt or adequate replies to questions asked and failed to properly provide copies of all relevant documents.'

11. By its Reply and Defence to Counterclaim, Seculink put all these matters in issue. As to penalty, it *'denied that Clause 7(e) of the Offer is void as a penalty and the Defendant is put to strict proof.'* As to unfair relationship, its responses to the cited particulars included that the arrangement fee and the original and default interest rates were each *'within a range that is standard within the industry; and entirely appropriate in all of the circumstances of this case'*.
12. Following a directions hearing before the Judge on 9 April 2021, the recital to the Order recorded that Seculink had agreed to limit the value of its money claim to £850,000. This contrasts with the contractual amount which by the date of the trial totalled c.£13.3m. The Order provided for exchange of witness statements and for a 3-day trial from 26-28 July 2021.
13. Seculink served a (third) witness statement dated 25 June 2021 from its Manager Mr Jody James Martin. As to the effect of the unpaid debt he stated: *'...the debt has left a huge gap in Seculink's product. Money is our product; if the borrowers hold onto our product for longer than agreed then we do not have enough product to give to other potential borrowers. Any gap in our product, especially the size of Mr Salih's loan, stops the company providing certain loans and making profit for the business to grow. Legal fees, staffing costs and time have all had to be spent trying to recover the loan from Mr Salih which has financially restricted the business and caused significant losses and missed opportunities'*: [paras. 3 and 4].
14. As to the voluntary cap: *'Mr Salih's debt to Seculink has been capped at £850,000 because, at this stage, anything more than that would be unreasonable and not fair to Mr Salih at his financial level. It was his business decision to take out the loan. Seculink provided the funding and service he needed. But, after so long, there is no point pursuing a debt figure that realistically does not exist, so it was logical to cap the debt.'*: [para.12].

¹ In fact, 289.6%

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15. The statement did not deal in terms with the allegation of an unfair relationship.
16. Mr Salih's short witness statement (25 June 2021) referred to his ill health which had made it very difficult for him to deal with the litigation; and agreed with the contents of his sister's witness statement of the same date. That set out their evidence on the history of the transaction and concluded with the expression of Mr Salih's view that *'he had been the victim of a loan agreement where the interest rates were appallingly high. In addition, in view of his illness, the lender had taken advantage of him so as to create what amounted to an unfair relationship.'*[para.22].
17. On the trial date, Mr Salih was represented by Counsel, but with instructions for the hearing which were limited to making an application to adjourn the trial on a number of grounds including his ill health. The application was opposed by Seculink and refused by the Judge. There is no appeal against that decision. Mr Salih's Counsel then withdrew and the trial proceeded in his absence.
18. Counsel for Seculink called Mr Martin who simply confirmed under oath the contents of each of his three witness statements. In addition the Judge heard an audiotape of a conversation between Seculink's agent and Mr Salih shortly before signature of the agreement on 1 June 2018 and viewed a video recording of the signing ceremony: Judgment paragraph [5].
19. The Judge was also shown a document (described in this appeal as 'the Flowchart') which purported to demonstrate that Mr Salih's failure to repay the Loan Sum since December 2018, together with estimated litigation costs of £100,000 and enforcement costs of £1000, – i.e. a total £456,000 – had resulted in the loss of use of that money to make further loans and a consequential loss of £1,758,215. I was told that this document was provided with Seculink's skeleton argument for the trial, i.e. 3 or 4 days beforehand; and that there was no formal application to adduce this material, nor was it verified by Mr Martin or any other witness.

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20. The Judge concluded from the evidence (including the video) that Mr Salih was *'fully cognisant of what he was signing'* and had entered the agreement voluntarily and under no form of pressure (paras. [11] and [12]); and that the Legal Charges had been executed and witnessed in accordance with the relevant legislation (paras [13] and [14]). He rejected complaints about failure to provide a copy of the loan agreement after execution or to comply with the relevant pre-action protocol (paras. [15] and [16]).
21. The Judge turned to the amount recoverable under the agreement. Noting the default interest rate and the contractual total of c.£13.3m. he continued: *'Of course, when you state that, it seems an astonishing amount of money, which, if somebody did not understand the situation, would conclude must be questionable, but that is the contractual rate.'* [17]. Noting the voluntary cap of £850,000, he observed *'That is considerably less than the amount which is contractually due, but that is of no materiality, because all the claimant wants is to confine its claim to a money judgment of £850,000.'*[18].

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22. Turning to the issues of penalty and unfair relationship, the Judge stated: *'Technically, it is not necessary for either of those defences or counterclaims to be dealt with, because both would require evidence, and there is no evidence before me, and therefore no judgment can be made on either of those arguments in the absence of evidence.'*[19].
23. As to penalty, he continued: *'20. That is thrown into sharp relief in relation to the penalty argument because the basis of that part of the claim would be that the 12% rate was so high that it amounted to a penalty, and that would require for there to be evidence. The furthest the defence goes is to aver that that 12% compound rate, "is void as a penalty. For the avoidance of doubt, both the rate and the fact that it is compounded render it a penalty."* 21. *To make good that allegation, it would be necessary for there to be evidence, certainly of market practice or similar, as to what such similar rates were, and whilst 12% compounded does seem high, in the arcane world of penalties, it is not necessarily high, and here the claimant has provided an explanation as to the commercial effects, or what the claimant would have been able to recover had money been lent and repaid and therefore effectively recycled by lending. That provides some support for the proposition that the rate they are claiming is not a penalty, but as I have said, it is not necessary to go any further, simply because there is no evidence from the defendant, and it is not now advanced before me.'*

The Judge's reference to *'an explanation as to the commercial effects'* was evidently to the Flowchart which had been placed before him.

24. As to unfair relationship, the Judge noted that *'...six points are put forward to justify the claim being unfair. Each of them are allegations which are a mixture of fact and requiring expert evidence.'* [22]. This was a reference to the particulars (a)-(f) in paragraph 49 of the Amended Defence and Counterclaim. As to (a), he held that this failed on the facts for the reasons already given. There is no appeal against those findings.
25. As to (b) and the challenge to the arrangement fee of £36,605: *'That, of itself, is quite surprising because, whilst the defendant did, either by himself or via an agent, before 31 May, challenge one of the fees, this is something which he did not challenge, and therefore it is rather strange for him now to be challenging it.'*[25].
26. The Judge continued at [26]: *'There are then allegations about the 2.5% interest rate applicable during the six-month period being unjustifiably high, and various other amounts being unreasonable. All of those allegations would require expert evidence, of which there is none. More fundamentally, from the experience of the Court, the rate of 2.5% a month during the six months of a bridging loan is pretty much par for the course, and is often under that which would be charged by other lenders.'*
27. He continued at [27]: *'The only reason for going through all of those points is because I am very conscious that the defendant has not given evidence and also is not represented, and whilst technically it is not necessary for me to consider those aspects of the defence and counterclaim as distinct from the question of whether or not the legal charge was duly executed, I simply refer to them to demonstrate that some attention has been given to them, and there is an absence of evidence to support*

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them. Furthermore, they do not strike one as being likely to succeed, even had there been any evidence, which there is not.'

28. Then at [28]: *'The only other point to make is that this is not a case of looking at the interest which is charged and the Court deciding that it is too high, and an alternative rate of interest being imposed on the defendant. The reason I say that is because that aspect of the defendant's case has not been advanced and is not supported by evidence, and the claimant really makes no comment about that at all but simply says, whatever the contractual position is, by way of concession, it will only recover £850,000. Therefore, where a claimant, prima facie entitled to considerably more than sought by judgment, confines its claim to £850,000, a specific sum, the Court will simply make that order without further ado.'*
29. The Judge duly ordered possession of the three properties, judgment for £850,000 and costs.

The appeal**Penalty**

30. Mr Salih challenges the rejection of his case on penalty on the following essential bases.
31. First, the Judge erred in rejecting the case on the grounds that it was necessary to provide evidence in support of the contention that clause 7(e) constituted a penalty. On the contrary, the question of whether a contractual provision was a penalty was a matter of construction, albeit evidence might be relevant. This was reaffirmed by the Supreme Court in Cavendish Square Holding BV v Makdessi [2016] AC 1172 at [9]: *'The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed.'*; and at [28]: *'Moreover, the penal character of a clause depends on its purpose, which is ordinarily an inference from its effect. As we have already explained, this is a question of construction, to which evidence of the commercial background is of course relevant in the ordinary way.'*
32. Secondly, and in any event, the Judge was wrong to conclude there was no evidence to justify the complaint that the clause was a penalty. Amongst other matters, the evidence showed that a debt of £355,000 at the expiry of the 6-month term increased, by virtue of the default interest clause, to c. £13.3 million by the date of trial 2 years 8 months later. As also stated in Cavendish Square, *'The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.'* [32]. An increase of this order was out of all proportion to any legitimate interest of Seculink in the performance of the primary obligation to repay the Loan Sum at the end of the 6-month term.

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33. As to that, Mr Martin's evidence in his third witness statement did not begin to justify a default interest rate which imposed that disproportionate detriment. This was further supported by his explanation that the claim had been capped at £850,000 because *'at this stage, anything more than that would be unreasonable and not fair to Mr Salih at his financial level, based on the value of the properties and his income.'*
34. The Judge was thus wrong to reject the penalty argument on the basis of the absence of evidence; and ought to have concluded that the clause constituted a penalty.

Unfair relationship

35. Mr Salih submits that the Judge was again wrong to conclude that it was for him to provide evidence of an unfair relationship. That overlooked the reverse burden of proof: s.140B(9). Thus the issue having been raised and particularised by Mr Salih, the onus was on Seculink to prove that the relationship was not unfair. Seculink provided no, or no adequate, evidence to justify that conclusion.
36. As to the Judge's comments on the matters particularised in paragraph 49 of the Amended Defence and Counterclaim:
- (b) the fact that a challenge was belated did not, without more, provide any proper basis to reject it;
- (c) it was not necessary for Mr Salih to provide expert, or any, evidence in support of the contention that the initial interest rate was unreasonably high. Nor was the absence of any or any adequate evidence from Seculink remedied by the Judge's reference to his experience from other cases; and in any event this did not deal with the default rate of interest or the other charges and fees.
37. Further, the Judge's observation that the points raised in the pleaded case *'do not strike one as being likely to succeed, even had there been any evidence, which there is not'* both overlooked the burden of proof and amounted to no more than a provisional conclusion.

The response**Penalty**

38. Mr Hope did not disagree with the Appellant's summary of the law based on Cavendish Square. In consequence he accepted that the Judge fell into error in his approach to the penalty issue. It was a question of construction; and it was not necessary to have evidence from Mr Salih on that issue. Mr Hope further accepted that clause 7(e) fell within the type of clause which was capable of being a penalty clause, namely as a secondary obligation (to pay default interest) imposed upon breach of a primary obligation (to make repayment by the date agreed): Cavendish at [14].
39. However he submitted that the Judge's ratio for rejection of the case on penalty was not confined to the absence of evidence on the issue. On a fair reading of paragraph [21] the Judge was also relying on the evidence from the Flowchart as providing support for Seculink's legitimate interest in the level of the default interest rate.

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40. Mr Hope then turned to place reliance on the statement in Cavendish Square at [35]: *‘...the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.’*
41. In this case the parties were of equal bargaining power. Mr Salih was refinancing his property portfolio; he was not an unsophisticated and vulnerable borrower; and, as the Judge found, he had entered the loan in full and specific knowledge of the consequences in the event of default. In those circumstances the parties to the loan agreement were the best judges of what was legitimate.
42. Furthermore, Seculink’s case was supported by Mr Martin’s third witness statement which had given a rough outline of the impact of the default on the company’s financial position. This was then further supported by the Flowchart, which demonstrated the financial consequence to Seculink of Mr Selih’s failure to repay the loan on the due date.
43. Mr Hope then submitted that a high default rate was legitimate protection in the context of an inherently risky business model which provided secondary lending quickly; and which in consequence did not involve extensive credit or other background checks and, usually as at best a secondary mortgagee, had minimal security.
44. Mr Salih had not adduced any evidence to suggest that the clause was out of the norm for such lending situations. It was his defence and he had chosen not to put forward any evidence on the issue.
45. Thus, whilst the Judge’s reasoning for rejection of the defence of penalty was flawed, his conclusion was correct.
46. In argument, Mr Hope acknowledged that advancement of these and other reasons in support of the Judge’s decision required a Respondent’s Notice, which there was not.
47. I also referred Mr Hope to the decision of the Court of Appeal in Notting Hill Finance Ltd. v. Hussein [2019] EWCA Civ 1337. In that case the same default interest rate of 12% per month compound fell for consideration, albeit in the context of whether it was right to allow the issues of penalty and unfair relationship to be raised as new points on an appeal. At [45] Snowden J (as he then was) observed²: *‘In the instant case, the default interest rate of 289.6% per annum was, on any view, remarkably high for a secured loan... It was also apparent that the mortgage debt on a scheduled payment on maturity of £71,000 was claimed to have risen by over £20,000 in the space of a little over six weeks between the issue of proceedings and the hearing. Those numbers are sufficiently striking but I would have expected them to have rung alarm-bells for the District Judge, even given his busy list. Whilst I do not express any view as to whether the District Judge was under any positive duty to do so, in my view he could not possibly have been criticised if he had raised the issue of whether such a term was penal or unfair to the Defendant of his own motion.’*

² Longmore and Peter Jackson LJJ agreed.

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48. Mr Hope very properly informed me that Notting Hill Finance Ltd is an associate company of Seculink; and that this association is reflected in the same default rate of interest.

Unfair relationship

49. Mr Hope first emphasised the distinctive remedies upon a finding of penalty and a finding of unfair relationship. If a clause was penal, it was unenforceable: Cavendish Square at [9].
50. By contrast, s.140A was framed in wide terms (see also Plevin v. Paragon Personal Finance Ltd [2014] UKSC 61; [2014] 1 WLR 4222 at [10]) and the discretionary powers under s.140B were broad. Thus if, hypothetically, an interest rate was regarded as too high, the likely appropriate remedy would be reduction to a fair rate; rather than to find that no rate was recoverable. In consequence, and given the voluntary cap of £850,000, the Court would need to be satisfied that the necessary remedy was to reduce the debt below that figure.
51. As to s.140B(9), that placed the legal, not the evidential, burden on the lender. In the absence of evidence from Mr Salih, the Judge was entitled to find for Seculink. However Mr Hope accepted that Mr Salih had sufficiently raised his challenge to the default interest rate.
52. As to the arrangement fee, the Judge was entitled to attach weight to the lack of earlier complaint. As to the interest rates (initial and default), Mr Hope accepted that the Judge was wrong to state that it was necessary to have expert evidence on the point. However the Judge was entitled to take account of his knowledge of interest rates from other cases of this type; albeit he had done so only in respect of the initial rate (at [26]).
53. As to the default rate, Mr Hope again relied on paragraph [21] as a finding on that issue. He accepted that if (contrary to that submission) the Judge had not made any such finding and the penalty issue had to be considered afresh, the same must apply to the claim of unfair relationship which had clause 7(e) at its core.
54. Mr Hope's skeleton argument then cited a range of other matters (including those cited in Seculink's skeleton argument below) which were said to justify the conclusion that the relationship was not unfair. However he again accepted that a Respondent's Notice would be necessary in order to advance those additional reasons.

Remedy on appeal

55. Mr Hope agreed that, if this appellate Court concluded that the Judge had erred in the ways alleged in the appeal, it was not in a position to determine the issues of penalty and unfair relationship as if sitting at first instance. There would have to be a re-trial.

Conclusions

56. The Judge was placed in a difficult position once the application to adjourn had failed and Mr Salih's Counsel had withdrawn. However I respectfully conclude that his reasons for dismissing the cases of both penalty and unfair relationship cannot be sustained; and that the only appropriate course is to order a re-trial on those issues.

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57. First, as Mr Hope rightly accepts, the Judge was wrong to hold that the case on penalty could not succeed without evidence. As Cavendish Square reaffirms, the question is one of construction, albeit evidence may be admissible and relevant.
58. Secondly, that was the only basis on which the Judge rejected the defence of penalty. Whilst paragraph [21] of the Judgment refers to the Flowchart evidence as providing some support for the proposition that the default interest rate is not a penalty, its final two lines clearly reinforce the Judge's statements in paragraphs [19] and [20] that the reason for his rejection of the penalty defence was the absence of evidence from Mr Salih. In any event it would have been wrong to take account of the Flowchart in circumstances where no witness had verified the document and no application had been made to adduce such evidence at that very late stage.
59. Thirdly, the Judge did have evidence before him, in particular the agreed facts of the default interest rate and its arithmetical consequence.
60. Furthermore, as Mr Hope rightly accepts, there is no basis for this appellate Court to consider the various other matters advanced by Seculink (whether here or below) in support of its case that clause 7(e) did not constitute a penalty.

Unfair relationship

61. I also conclude that the Judge was wrong to reject the claim of unfair relationship on the basis that he did, namely that Mr Salih had provided no evidence on the matter.
62. First, this takes no account of the reverse burden of proof: s.140B(9). On the assumption, but without deciding, that there is an evidential burden on the borrower (cf. the discussion in Goldhill Finance Ltd v. Smyth [2023] EWHC 362 (KB) at [79]-[81] and [118]), this was discharged at least to the extent that Mr Salih contended that the default rate of interest was too high.
63. Secondly, as Mr Hope accepts, the Judge was wrong to hold that a challenge to that rate (or indeed to the initial rate of interest) could not succeed without expert evidence in support. Of course, and depending on the particular facts and circumstances, one or other party may fail if it does not call expert evidence; but it does not necessarily fail without it.
64. Mr Hope was right to acknowledge that, if the Court were to conclude that the penalty issue must be remitted for retrial, then the same must apply to the claim of unfair relationship. Whilst Mr Salih's pleaded case on unfair relationship relies on a number of other factors, clause 7(e) is evidently at the heart of his complaint.
65. It follows that the money judgment and order for costs (paragraphs 3 and 4 of the Judge's Order) must be set aside and the issues of penalty and unfair relationship remitted to the County Court for re-trial before another judge. Those issues will have to be considered afresh, save in respect of the matters identified in paragraph 49(a)(e) and (f) of the Amended Defence and Counterclaim, where there is no challenge to the Judge's conclusions of fact.

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