

[2019] UKFTT 0248 (PC)

REF/2017/0052

**PROPERTY CHAMBER, LAND REGISTRATION  
FIRST-TIER TRIBUNAL**

**LAND REGISTRATION ACT 2002**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**BETWEEN**

**SWIFT ADVANCES PLC**

**APPLICANT**

**and**

**NORMA HORTENSE BEHARIE**

**RESPONDENT**

**Property Address: 193 Great Cambridge Road, Enfield EN1 1SG  
Title Number: MX 95014**

**Before: Mr Roger Cohen sitting as Judge of the Property Chamber of the First-tier  
Tribunal**

**Sitting at: 10 Alfred Place  
On: Monday 28 January 2019 and Monday 1 March 2019**

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**ORDER**

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UPON hearing Counsel for the Applicant and the Respondent by her representative

IT IS ORDERED that the Chief Land Registrar shall cancel the application made by the Respondent dated 22 September 2016 for the removal of an agreed notice registered by the Applicant.

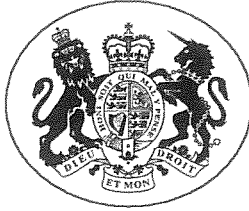
Dated this 20th day of March 2019

*Roger Cohen*

BY ORDER OF THE TRIBUNAL







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**DECISION**

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*Agreed notice – equitable charge. Respondent charged investment property to the Applicant to secure a buy to let loan. Whether condition in legal charge was on its true meaning also an agreement to charge the property in this reference. If so whether the charge was enforceable on various grounds including legislation relating to consumer credit, unfair contract terms and financial services.*

**The following authorities are referred to in the decision:**

*RE Clarke, Coombe v Carter (1887) 35 ChD 109*

**Background**

1 On 22 September 2016 the Respondent (“Ms Beharie”) applied to the Chief Land Registrar to remove a notice entered in the charges register of her home, 193 Great Cambridge Road, Enfield (either “193 Cambridge Road” or the “Property”). The Applicants (“Swift”) opposed the application which, on 11 January 2017 was referred to the Land Registration Division for decision.

2 The reference was heard on 28 January 2019 when Swift were represented by Ms Josephine Hayes and Ms Beharie did not appear and was not represented. A further hearing took place on 1 March 2019 at which Ms Hayes appeared for Swift and Ms Beharie, who did attend, was represented by a non-legally qualified representative, Mr Allen.

3 For the reasons which follow, my decision is that the Chief Land Registrar should cancel the application.

**Procedural matters**

4 On 15 October 2018 the Tribunal wrote to Ms Beharie to inform her that the hearing of the reference would take place at 10 Alfred Place on 28 January 2019 at 10.30am. On the following dates, Swift’s solicitors wrote letters to Ms Beharie referring to the hearing date:

4.1 14 December 2018 to the Tribunal copied to Ms Beharie;

4.2 8 January 2019 to Ms Beharie;

- 4.3 14 January 2019 to the Tribunal, copied to Ms Beharie.
- 5 On 18 January 2019 at 16:58 Swift's solicitor emailed the Tribunal, with a copy to Ms Beharie attaching Swift's skeleton argument, chronology and a list of issues. Each attachment referred to a hearing on 28 January 2019.
- 6 On 28 January 2019, the day of the first hearing, the Tribunal clerk telephoned Ms Beharie, who had not yet arrived for the hearing, at about 10.15am but there was no reply.
- 7 The hearing commenced promptly at 10.30am. Ms Hayes informed me that those instructing her had not heard from Ms Beharie or anyone on her behalf. Accordingly, I adjourned the hearing until 11.00am. During the adjournment the clerk telephoned Ms Beharie again but there was no reply.
- 8 When the hearing resumed at 11.00am, Ms Beharie was not present and there had been no message from her or on her behalf either to Swift (as Ms Hayes informed me) or to the Tribunal.
- 9 In those circumstances, as I ruled, I was satisfied that Ms Beharie had been notified of the hearing. Further having regard to the lapse of time since the application to HM Land Registry and Swift's wish for a decision, I decided that it was in the interests of justice to proceed with the hearing, pursuant to rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

#### **Documents and evidence**

- 10 On behalf of Swift, its Risk Manager, Mark White had made a witness statement annexing a bundle of documents. Mr White attended the hearing so as to be available, Ms Hayes told me, for cross examination by Ms Beharie. In the absence of Ms Beharie, I was content to take Mr White's statement as read without having to call Mr White to be examined by Ms Hayes or judicially examined by me.

11 Ms Beharie's case was contained in a variety of documents produced by her.  
In this decision I shall deal with the principal points made by both parties  
and my reaction to and my decision in respect of each of them.

12 The facts are taken from the documents, by reference to which I make the  
following findings of fact.

13 In 1993 Ms Beharie was registered as proprietor of the Property (title  
number MX95014).

14 On 12 October 2007, Mortgages 1 Limited were registered as proprietors of  
a registered charge over the Property (entries 4 and 5 in the Charges  
Register).

15 On 17 December 2007 the following events occurred:

- (1) Ms Beharie completed a Swift confidential application form seeking a loan  
of £188,465 secured on 16 Gippeswyk Road, Ipswich. On that form,  
Ms Beharie gave her occupation as "professional property investor".
- (2) Ms Beharie completed an income affordability letter from Swift giving her  
occupation as property investor and total gross income as £180,000 per  
annum. Ms Beharie signed the form to confirm that the above information  
was current and correct.
- (3) Ms Beharie's accountants wrote a letter to her broker expressed to be "for  
the benefit of Swift" confirming that Ms Beharie was "self-employed as a  
property investor and has been buying, renovating and letting properties".
- (4) Swift issued to Ms Beharie a form of "Unregulated Credit Agreement –  
Interest Only" (the "Credit Agreement") containing terms for the provision  
of credit by Swift to Ms Beharie secured on the property at 16 Gippeswyk  
Road. "Unregulated" meant not subject to regulation by the Financial  
Services Authority (superseded from 1 April 2013 by the Financial Conduct  
Authority). The loan was £187,465, with the monthly interest repayment  
being £1737.27. 120 repayments were to be made. The capital was due to  
be repaid on the date of the last interest payment (see terms and conditions

A1). That agreement was signed by Ms Beharie on 17 December 2007 and on behalf of Swift on 21 December 2007.

### **The legal charge**

16 Ms Beharie signed as a deed a document dated 31 December 2007 and headed:

“Legal Charge (Non FSA Mortgage)”

This was a legal charge of 16 Gippeswyk Road granted by Ms Beharie to Swift to secure the amounts loaned pursuant to the Credit Agreement. In the legal charge, 16 Gippeswyk Road was referred to as “the Property”.

17 Condition 3 was in the following terms

“You also agree to give us a legal charge over any legal interest in any property you may have now or in the future and these properties are also included in the expression “the Property”

18 So on the face of the document, the legal charge of 16 Gippeswyk provided for the charge to encumber not only 16 Gippeswyk Road but also the Property in this reference given that as at 31 December 2007 193 Great Cambridge Road was then a property in which Ms Beharie had a legal interest as its proprietor.

19 The central issue for me is whether condition 3 on its true meaning had that effect.

### **Enforcement proceedings**

20 On 2 January 2008, District Judge Dias sitting in the County Court at Edmonton made an order for possession of the Property in favour of Mortgages 1 Limited.

21 On 15 June 2010 District Judge McLoughlin sitting in Ipswich County Court ordered in favour of Swift that Ms Beharie give possession of 16 Gippeswyk Road.

22 On 21 March 2012 Swift made an application to HM Land Registry in form AN1 to enter an agreed notice against the title to the Property in respect of the 31 December 2007 legal charge, a copy of which document was lodged with the application. The form stated that Swift applied to enter an agreed notice protecting the “the legal charge made between Swift and Ms Beharie”. It also stated that “The above interest is set out in page 1 of the Legal Charge”.

23 The following notice was entered in the Charges Register of the Property 6 “(23.03.2012) Charge dated 31 December 2007 in favour of Swift Advances plc”.

24 Swift’s application was made on the basis that Swift was the person entitled to be registered as the proprietor of the estate/charge affected by the interest.

25 On 25 September 2012 16 Gippeswyk Road was sold by Swift pursuant to its powers as mortgagee. The proceeds of sale were applied to discharge in part the amount required to redeem the debt under the legal charge. However, a shortfall of £164,246.47 was at 12 October 2012 assessed by Swift as the balance required to redeem the mortgage debt. Since the sale of 16 Gippeswyk Road, the only security held by Swift in respect of the outstanding mortgage debt is such interest, if any, as Swift has as a chargee of 193 Great Cambridge Road. I was informed that the Property is being marketed by Mortgages 1 Limited who rank in priority to any charge to which Swift is entitled.

#### **Ms Beharie’s application**

26 On 22 September 2016, Ms Beharie applied to change the register by removing the entry relating to the Swift charge. Swift objected to that application on the basis that it had the benefit of the charge dated 31 December 2007.

27 The application to remove Swift’s notice and objection were not resolved between the parties and was referred to this Tribunal pursuant to section 73 Land Registration Act 2002 for determination.



### **The issues**

28 Ms Hayes formulated the issues for decision as follows:

- (1) Did the Deed of Legal Charge dated 31 December 2007 between Swift and Ms Beharie create an equitable charge over the Property?
- (2) If the answer to 1 is “yes”, has the said equitable charge determined or are there still monies outstanding and secured by the said equitable charge?

29 The case for Swift advanced at the hearing was:

- (1) in respect of the Property, being 193 Great Cambridge Road, condition 3 did create an equitable charge;
- (2) all that was necessary for Swift to show was that there was something of value to secure but it was neither necessary nor appropriate for me to make a finding as to the amount now outstanding and secured by such equitable charge, if it was found to exist.

30 Ms Beharie relied on a Final Notice dated 25 July 2011 to the Swift 1<sup>st</sup> Limited from the Financial Services Authority to the effect that the FSA had decided to impose a financial penalty of £630,000 for regulatory breaches between October 2004 and November 2009. Ms Hayes told me, on instructions, that Swift 1<sup>st</sup> Limited and Swift (the Applicant) are different companies. Swift undertakes unregulated business. I do not find the final notice to be of any relevance to the issues I have to decide.

### **Equitable Mortgage or charge**

31 The case for Swift turns on the legal charge document dated 31 December 2007 creating an equitable charge over 193 Great Cambridge Road. Halsbury: Laws, Vol 77, paragraphs 215-217 states:

32 “An equitable mortgage passes only an equitable estate or interest for the purpose of securing the repayment of a debt. It may be made by:

- (1) a mortgage of an equitable interest;

- (2) an agreement to create a legal mortgage; or
- (3) a mortgage which fails to comply with the formalities for a legal mortgage.”

33 The case for Swift is that (2) applies.

34 Halsbury continues:

“An agreement to charge real or personal estate, made for valuable consideration by a person who has power to create such a charge, operates as a valid equitable charge, even though the charge extends to all his existing property; and if, at the date of the agreement, the property agreed to be charged has been sold, the charge takes effect on the interest which the person making it has in the purchase money. A covenant to charge property ascertained or ascertainable creates a binding charge as soon as the property is ascertained. It is sufficient if the land can be ascertained by existing facts and circumstances. A valid agreement to charge will be held effectual notwithstanding any mistake which may have occurred in the attempt to effect it.

A simple agreement or covenant to charge land where no land in particular is mentioned will not create a charge, neither will an agreement for a personal security with power to call for a real one, nor is a charge created where it otherwise appears that the intention was to rely on the covenant.”

35 Halsbury: Laws Vol 77 also states:

**“103. Validity of charge on mortgagor's whole estate.**

A charge created by a mortgage and extending to the whole of the mortgagor's real and personal property, whether present or future, may possibly be unenforceable as such, either on the ground that it is too vague to be enforced or on the ground that it is contrary to public policy that a person should be allowed to deprive himself of the whole of his livelihood. Such a charge is, however, enforceable if it can be construed as confined to property existing at the date of the granting of the charge and ascertainable at the date

when it is sought to enforce it. Moreover, if the charge extends to future property but the particular types of property included in the general charge are separately specified, the charge may be treated as divisible and enforced against after-acquired property which falls within a particular class so specified and is ascertainable at the date when it is sought to enforce the charge.”

36 In this passage, Halsbury refers to the authority cited by Ms Hayes being in *re Clarke, Coombe –v- Carter* (1887) 35 Ch D 109, a decision of Kay J. This case concerned an assignment by way of mortgage of all the mortgagor’s household goods and farming stock and “also all moneys of or to which he then was, or might during that security become, entitled” and also all real and personal property “of, in, or to which the mortgagor was, during that security should become, beneficially seized, possessed, entitled or interested for any vested, contingent or possible estate or interest”. In that case, 12 years after the mortgage the mortgagor became entitled to a share of an estate and the question was whether the share was comprised in the mortgage. At page 114, Kay J said:

“The principal ... is that, where the consideration has been given, Courts of Equity will give effect to the agreement if it be in any way possible, and will not yield to the dishonest plea on the part of the covenantor that the covenant is too vague for specific performance, unless it is impossible to ascertain its meaning or to give it any reasonable effect.”

Accordingly, the share of the estate was included in the mortgage.

37 With those principles in mind, I turn to the Credit Agreement and the “legal charge (non-FSA Mortgages)”.

38 The Credit Agreement was signed by Ms Beharie on 17 December 2007 and the legal charge was completed on 31 December 2007. As stated above, Ms Beharie had been the proprietor of 193 Great Cambridge Road since 1993. The legal charge stated that the property which was security for the loan was 16 Gippeswyk Road. The conditions stated that Ms Beharie charged the property (16 Gippeswyk Road) to Swift by way of legal mortgage with full

title guarantee. The conditions stipulated that “This means that we have a legal right, if you do not keep to any of the terms of this legal charge and the agreements to apply to a Court for an order that we can repossess and sell the property.”

39 Condition 2 defined “Agreements” as meaning the Credit Agreement or mortgage offer letter between Ms Beharie and Swift.

40 I find that the Credit Agreement was an Agreement within the meaning of Condition 2.

41 The Credit Agreement demonstrates that Swift gave consideration, being the loan, for the legal charge.

42 Condition 4 of the legal charge stipulated that the legal charge secured the amounts owed under the legal charge and the agreements.

43 It was therefore plain from the documents that the legal charge was security for the loan advanced pursuant to the credit agreement.

### **Condition 3**

44 The terms of Condition 3 are set out at paragraph 17 above. On its literal meaning there is an agreement by Ms Beharie to give Swift a legal charge over any legal interest in any property she then had. The condition does not specify to what type of property it referred. Given that property that Ms Beharie had at the date of the legal charge was , by the terms of condition 3 , to be included in the expression “the Property” , a defined terms referring to 16 Gippeswyk Road, I hold that Condition 3 was referring to other real property of Ms Beharie and therefore included 193 Great Cambridge Road. It was not argued that “property” in condition 3 was limited to movable or personal property and rightly so. That would be a highly improbable reading of the condition. Accordingly, as 193 Great Cambridge Road was property that Ms Beharie owned, condition 3 on its true meaning is an agreement by Ms Beharie to grant to Swift a legal charge over 193 Great Cambridge Road. This agreement provided an additional source of security in favour of

Swift, by way of an agreement with Ms Beharie whose address was given on the legal charge as 193 Great Cambridge Road. That additional source of security was Ms Beharie's agreement to give Swift a legal charge over 193 Great Cambridge Road,

45 I have considered whether condition 3 is too vague to be enforced or whether it may deprive Ms Beharie of all her livelihood and so be contrary to public policy. Condition 3 is neither vague nor contrary to public policy. Ms Beharie was an investor in property. The relevance of 193 Great Cambridge Road was that it provided additional security for a loan. It did not amount to Ms Beharie depriving herself of her livelihood to agree to grant that additional security.

46 Accordingly, I hold that condition 3 amounts to an enforceable agreement by Ms Beharie to grant a legal charge over 193 Great Cambridge Road to Swift in consideration for the loan. The agreement to grant a legal charge could be perfected by Ms Beharie entering into a form of legal charge on the same terms and conditions as the legal charge dated 31 December 2007, but relating to 193 Great Cambridge Road in favour of Swift. Until that legal charge is completed, Condition 3 takes effect as an agreement to grant a legal charge and, accordingly, an equitable charge.

47 This conclusion is subject to 2 points raised by Ms Beharie.

48 The first point taken by Ms Beharie is that the legal charge in relation to the Property is subject to the consumer credit legislation. Ms Hayes submitted that Section 8 of the Consumer Credit Act 1974 in the terms in which it was in force at 31 December 2007 applies to consumer credit agreements by which a creditor provides a debtor with credit not exceeding £25,000. The amount of the relevant credit provided by Swift to Ms Beharie exceeded £25,000 and so, as I find, the Consumer Credit Act 1974 does not assist Ms Beharie.

49 The second point taken by Ms Beharie concerns the Unfair Terms in Consumer Contracts Regulations 1999. These regulations apply where a person deals as a consumer meaning, see Regulation 3(1), "a natural person

acting for purposes which are outside his trade, business or profession”. However, it follows from the documents referred to above that, as I find, Ms Beharie was engaged in the business of property investment. Accordingly, the Unfair Terms in Consumer Contracts Regulations 1999 do not assist Ms Beharie.

50 Ms Hayes invited me to find that the enforceability of the agreement to grant a legal charge was conclusively determined in Swift’s favour by earlier decisions of the County Court in making possession orders. I make no decision as to this; first, I have not seen all the court documents in those cases and secondly it is not necessary for me to do so having regard to my other conclusions.

#### **Agreed notice**

51 What Swift has registered and Ms Beharie seeks to have removed is an agreed notice in the Charges register of the Property to protect an equitable charge. Notices are provided for in section 32, Land Registration Act 2002.

52 Section 32(3) provides that the fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for land registration purposes. An equitable charge granted by the registered proprietor of the legal estate may be protected by an agreed notice, the interest in question being an agreement to grant a legal charge.

#### **Events after the 28 January 2019**

53 At the hearing on 28 January 2019 I reserved my decision to be delivered in writing in due course.

54 On 2 February 2019 Mr Beharie wrote to the Tribunal to say that she had written to the Tribunal on 26 December 2018 requesting an adjournment because she wanted the case transferred to the High Court. Ms Beharie said that she had not heard back from the Tribunal.

55 Although I proceeded on 28 January 2019, it was in the interests of justice that Ms Beharie have an opportunity to present her case and deal with that of Swift. Accordingly, I directed a further hearing which took place on 1 March 2019.

56 At the hearing on 1 March 2019, a representative of the Personal Support Unit based at the Royal Courts of Justice attended with Ms Beharie and Mr Allen. My impression is that the representative's presence was of assistance to Ms Beharie and I thank him for that.

57 It was agreed by Mr Allen and Ms Hayes that the hearing should be used, not to debate the consequences of Ms Beharie's absence on 28 January 2019, but to consider the substance of dispute between the parties.

58 In circumstances in which there is litigation pending in the High Court concerning the transactions relevant to this reference, I reminded the parties that my function is limited to directing the Chief Land Registrar what to do with the application by Ms Beharie to cancel the agreed notice in favour of Swift, given Swift's objection to the application. Other claims are matters for the Court.

#### **Mr Allen's submissions**

59 On behalf of Ms Beharie, Mr Allen submitted that the charge over the Property was not legally binding because Swift used "an illegal broker" in transacting the loan. Mr Allen's argument was that where a lender uses a broker, the broker must be licensed by the Financial Conduct Authority (FCA). There was a broker, Anthony Wall. He was not licensed by the FCA or its predecessor, the Financial Services Authority (FSA). The consequence was that, pursuant to the Financial Services and Markets Act 2000 (FSMA), the charge is unenforceable. In his closing comments, Mr Allen submitted that his point was a simple one. Any secured lending is regulated by the FCA because there is a first charge secured on the property. It does not matter that the charge is to secure a "buy to let" mortgage. Mr Allen suggested that I contact other lenders to check this. That is not a suggestion that I have followed up.

60 Mr Allen made reference to a bundle of documents produced by himself and Ms Beharie containing some materials not previously before the Tribunal in this reference.

61 Mr Allen referred the Tribunal to the following provisions of FSMA.

Section 19 “the General Prohibition”

(1) No person may carry on a regulated activity in the United Kingdom or purport to do so, unless he is:

- (a) an authorised person; or
- (b) an exempt person.

Section 21 which I need not set out, which contains restrictions on financial promotion

Section 22 deals with “regulated activities” and states:

(1) an activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried out by way of business and

- (a) relates to an investment of a specified kind; or
- (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind;

Section 26 provides that:

(1) an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unforeseeable against the other party.

Section 28 makes it a criminal offence to contravene the general prohibition.

62 Mr Allen did not refer me to section 22(5) which defines “specified” in terms of the kinds of activities regulated for the purposes of the above provisions, being those specified in an order made by the Treasury.



63 Mr Allen did however produce a document headed “Re: Advice” and signed by David Cox (Certified Mediator) with the Timeshare Association dated 19 October 2018. I ruled that I would consider this as supplying further detail to the submissions made on legal matters on behalf of Ms Beharie but not as witness evidence. Mr Cox stated that business loans became regulated when they were secured, as in this case. Accordingly the lending is a regulated activity. Mr Cox commented on the relevant secondary legislation including the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (**RAO**). He did not however refer to the part of that order dealing with regulated mortgages, as to which see below. The RAO is the order made by the Treasury for the purposes specifying what activities are regulated under section 22.

64 Mr Wall, the broker in question worked for Anthony & Co Financiers Limited. An email dated 29 August 2018 from the FCA to Mr Allen stated that Anthony & Co Financiers Limited did not appear in the Financial Services Register either then or historically.

65 The letterhead of Anthony & Co Financiers Limited says that the firm was licenced by the Office of Fair Trading (**OFT**). An email dated 11 December 2018 from the FCA to Mr Allen stated that:

*“The FCA took over the regulation of consumer credit from the OFT on 1 April 2014. Information about firms who went from being regulated by the OFT to us was added to our consumer credit register. We did regulate mortgage broking prior to this. Mortgage broking as an activity is different to consumer credit, however, consumer credit does include secure lending. We started regulation of residential mortgages on 31 October 2004”*

66 For the reasons discussed above, consumer credit regulation does not apply to the change over the Property. This email does not address what kinds of mortgage lending are regulated and what kinds are not.

67 Mr Allen submitted that Mr Wall was Swift's broker because he carried with him Swift's forms of documentation for a secured loan when he saw Ms Beharie in 2007. However, the documents do not support that. On 17 December 2007, Mr Wall sent a memo to Swift concerning two buy to let purchases. Mr Wall wrote, "I am so regretful that I trusted [another lender] in this matter who are quoting as late as 24 December to complete! I thought that you had stopped doing buy to lets over £100k with your current restructure otherwise I would have given them to you to begin with. I have lost over a week as a result dealing (sic) with one of the worst lenders I have ever had the misfortune to experience".

68 I did not hear any evidence about the circumstances in which the loan was transacted although I have reviewed the documents. It is unnecessary for me to make any findings of fact about that. The critical issue is whether the mortgage was or was not regulated pursuant to FSMA.

69 Mr Allen referred me to an extract from the FCA Handbook, section PERG 4 which asks what is a regulated mortgage contract? The text produced by Mr Allen was the text which came into force on 21 March 2016, over 9 years after the charge was created.

70 As the guidance says at PERG 4.4.3, in order to meet the definition of a regulated mortgage contract, the mortgage contract must meet the Conditions set out in PERG 4.4.16(i) to PERG 4.4.16(3) at the time it was entered into. So in order to answer the critical question as to whether or not the charge was regulated, it is necessary to look at the detail in the RAO current at the date of the mortgage. Mr Allen did not produce the material. Ms Hayes, however did so.

### **The RAO**

71 The RAO was made pursuant to Section 22(1) (and other sections) of FSMA.

72 It has been variously amended since it first came into force. The version in force from November 6 2006 to February 22 2011, and thus the text current and in force in December 2007 was in the following terms:

*Article 61 – Regulated mortgage Contracts*

entering into a regulated mortgage contract as lender is a specified kind of activity

In this Chapter:

a contract is a “regulated mortgage contract” if, at the time it is entered into, the following conditions are met:

- (1) the contract is one under which a person (the “**Lender**”) provides credit to an individual or to trustees (the “**Borrower**”);
- (2) the contract provides for the obligation of the borrower to repay to the secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom;
- (3) at least 40% of the land is used or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust or by a related person.

73 I accept the submission of Ms Hayes that those are the tests that must be applied to each of the charges over 16 Gippeswyk Road and the Property. I can show the results in this table

	16 Gippeswyk Rd	The Property
Credit provided to an individual	Yes	Yes
Secured by first legal mortgage	Yes	No
40% used or intended to be used as a dwelling by borrower	No	Yes

74 It follows that the legal charge in this reference is not a regulated mortgage contract. Accordingly, the function of brokering the loan was not a regulated activity and the lack of FSA or FCA registration either by Mr Wall personally (about which I had no evidence) or his firm is irrelevant to the enforceability of the charge.

75 The submissions made by Mr Allen did not consider the RAO which contained the detail as to the specified kinds of mortgage regulated by FSMA.

76 I was referred to by Ms Hayes to correspondence in 2009 from Ms Beharie. In a letter to Swift dated 6 April 2009, Ms Beharie said:

*“I am writing with regards to my unregulated loan. Before I made the decision to take out an unregulated loan with your company. I explained to the broker who arranged this loan with your company (Anthony Financiers Limited) what I was planning to do.....”*

77 On 17 April 2009 Ms Beharie wrote to Swift saying she would get the agreement looked at by a Consumer Credit Lawyer to check the unregulated loan agreement to see if it contravenes the Consumer Credit Act. Also on the date, Ms Beharie wrote to Mr Wall “having taken out an unregulated loan through you”.

78 Mr Allen submitted that, at the time of the agreement with Swift, Ms Beharie thought the arrangement was unregulated. It transpires that Ms Beharie was correct all along.

### **Loan outstanding**

79 From the documents produced to the Tribunal it seems to be agreed that the loan made to Ms Beharie by Swift, if enforceable, remains in part unpaid. The loan is enforceable. I find that there are unpaid amounts required to redeem the legal charge which Ms Beharie agreed to give over the Property. I need not and am not in a position to assess the amount required to redeem.

### **Other matters**

80 In a document dated 22 February 2019 entitled “Response to Josephine Hayes with submission on behalf of Swift Advances Plc dated 18 February 2019”, Ms Beharie criticised Ms Hayes for misleading the Tribunal. I wish to record that Ms Hays conducted her case with propriety and I thank her for her submissions. Ms Beharie’s criticism ought not to have been made.

81 The case for Ms Beharie has shifted since the application to cancel the agreed notice has referred to the Tribunal. In my judgment, none of the grounds of challenge to the charge have substance.

82 Finally, I should record that on 12 March 2019, the Tribunal received emails from both Mr Allen and from Ms Beharie, the letter attaching a letter to the Tribunal. I read those materials. Nothing in them added in any relevant way to the resolution of the issues in this reference.

### **Conclusion**

83 Accordingly, I direct that the Chief Land Registrar cancel the application by Ms Beharie.

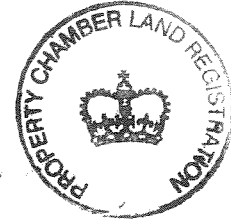
### **Costs**

84 In the jurisdiction, the Tribunal has power to make an order as to costs. The usual order is that the successful party is awarded costs. As Swift has succeeded it would ordinarily be entitled to an order for its costs. Unless Ms Beharie makes an application in writing by 5pm within 14 days after the date of this decision seeking some other order as to costs, I shall order that Ms Beharie pay Swifts costs to be assessed in default of agreement on the standard basis, the claim being made in form N260 Civil Procedure Rules.

Dated this 20<sup>th</sup> day of March 2019

BY ORDER OF THE TRIBUNAL

*Roger Cohen*



Roger Cohen sitting as a Tribunal Judge