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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

SWIFT ADVANCES PLC

Plaintiff/Respondent

and

KEITH SCOTT and ELIZABETH MARY MYTHEN

Defendants/Appellants

_____

HORNER J

A. INTRODUCTION

[1] Swift Advances Plc ("Swift") lent to Keith Scott ("Scott") and Elizabeth Mary Mythen ("Mythen") £28,500 secured on premises known as 14 Hazel Grove, Castlederg, County Tyrone (Folio TY16518) ("the Property"). The issue that this court is asked to determine by the consent of all the parties is whether the loan agreement between Swift of the one part and Scott and Mythen of the other should be treated as two separate agreements each for credit not exceeding £25,000 or whether it should be treated as one all-encompassing agreement for credit exceeding £25,000, that is £28,500. The consequence of how the loan from Swift to Scott and Mythen is treated is of great significance. Credit agreements of £25,000 or below at the time of the advance were regulated under the Consumer Credit Act 1974 ("the Act"). But credit agreements for sums above £25,000 were not regulated agreements under the Act. Therefore, if the sum of £28,500 is the subject of two separate agreements of £25,000 and £3,500, then those loans are irrecoverable for want of compliance with the Act's formalities. If, on the other hand, there is one agreement for a loan of £28,500 that is unregulated by the Act, then Swift may be able to recover its loan and accrued interest from the sale proceeds of the Property. However, there are other issues which remain to be resolved and even if the loan is unregulated there are potential arguments available to the applicants if Swift are found to have

behaved improperly. But, it is this primary issue of whether the agreement is regulated or unregulated that the parties wish the court to rule upon first.

B. BACKGROUND INFORMATION

[2] The history of this litigation can be set out briefly as follows. Scott and Mythen were partners who in 2003 lived together at the Property. They applied through Ocean Finance, a credit broker, for a loan of £25,000. The purpose of this loan was to pay off outstanding credit card loans amounting to approximately £16,000 and to use the balance to carry out renovations to the Property which at that time was worth £120,000 approximately and was unencumbered.

[3] Scott was variously described as a self-employed painter and decorator but he was someone of limited means and income. He claimed that he was living with Mythen, who was unemployed. Neither Scott nor Mythen had ever taken out a mortgage or a loan before. It was a strict condition of their being offered this loan, they both claim, that they took out Personal Protection Insurance ("PPI") with the Norwich Union Life and Pension Fund, London and Edinburgh Insurance Co Limited and with the policy being administered by Premier Writers Limited. The cost of this was £3,500 but it only provided protection for 5 years even though the mortgage was for 10 years. There was no discussion of the commission earned on this policy. On the limited facts known to this court the PPI was a product which was singularly ill suited to the needs of Scott and Mythen although it earned Ocean Finance, the Credit Broker, substantial commission. The mortgage application form states that Scott's income was £450 per month and Mythen was said to be earning £170 per month as a childminder. In fact Scott earned less than was claimed and Mythen was unemployed. It is also true to say that by signing various documents including the Confidential Application Form and the Income Affordability Letter, Scott represented this information as being true. Mythen also signed documents confirming information which she now claims was false. Swift say that on the basis of this information given to it, it was entitled to conclude in good faith that both Scott and Mythen were able to pay the £427 per month due in respect of the money lent to them jointly.

[4] Predictably Scott and Mythen were unable to pay the monthly sums as they became due and owing and with interest and various charges their loan escalated out of control. By September 2014 their loan of £28,500 had been transformed into a debt of some £78,000, a three-fold increase.

[5] On 10 June 2009 Master Kelly made an Order for Possession of the property in favour of Swift. On 19 September 2014 Master Wells granted a stay on enforcement of the said Order for Possession on the basis that the net proceeds of sale be held on the joint account between the solicitors of Swift and the solicitors for Scott and Mythen. At that time Scott and Mythen were jointly represented. Solicitors came on record for Mythen to represent her interest when she and Scott separated afterwards.

She swore an affidavit making it clear that she had a very limited understanding of the nature of the transaction with Swift.

[6] Master Hardstaff heard Swift's application for the stay to be removed in 2016. In respect of the critical issue of whether this was an "unregulated" loan of £28,500 or two "regulated loans" of £25,000 and £3,500 each, he concluded it was a simple unitary agreement and thus was not regulated under the Act. Consequently, he made an order removing the stay and giving Swift liberty to enforce the 2009 Order. He did this on 2 November 2016. He noted the conflict between the claim made by the borrowers that the loan of £25,000 was made subject to an express requirement that an additional £3,500 was paid as a premium for payment protection insurance and Swift's contention that it was not. He was unable to resolve this conflict between the evidence of Scott and Mythen and the description of the PPI as optional in Clause 4 of the agreement. It is not necessary for me to resolve this dispute for the purpose of determining the issue presently before this court. It is an issue to which this court may have to return.

[7] This order was then appealed and the first hearing commenced on 30 March 2017. As I have noted, Swift, Scott and Mythen at that time were all separately represented and submitted different skeleton arguments. Further directions were given for the hearing of the appeal. The case was then reviewed on 6 October 2017 and listed for hearing on 25 January 2018.

[8] Mythen gave evidence to the following effect at the hearing:

(i) Scott had arranged a loan through Ocean Finance without consulting her.

(ii) Mythen had not spoken to Ocean Finance who arranged the loan.

(iii) The loan was for home improvements.

(iv) Mythen had no idea the loan was secured on the Property. She had never had a loan or been in debt before.

(v) Scott was told that the loan was approved but that PPI had to be taken out.

(vi) Mythen had no idea what PPI was.

(vii) Mythen did sign forms but she had no idea what they were or that Swift was involved until she unexpectedly received a call from someone at Swift. She did not deny that she had signed these forms.

(viii) They received £25,000 in two tranches of £12,500 each. A new kitchen was installed.

[9] Further submissions were then received following replies to interrogatories designed to elicit the precise nature of the relationship between Ocean Finance and Swift and whether Ocean Finance was the agent of Swift or of the borrowers or of both Swift and the borrowers. There were a number of other issues which were strenuously debated but these have been parked pending the court's decision on whether the loan was regulated or not. Final written submissions were received in August 2019.

[10] It is noteworthy that this appeal does not challenge the original Order for Possession which, I understand, was made without objection from Scott or Mythen. The challenge is to the decision of Master Hardstaff on 2 November 2016 when he removed the stay. The argument relates to who shall have the benefit of the sale proceeds, because as I have previously recorded the Property has now been sold. This will have to be the subject of a further hearing only if I rule that it is an unregulated agreement. As I have noted if I rule it is a regulated agreement then both sides agree that Swift can have no claim on the sale proceeds because the agreement was not properly executed in accordance with the Act.

C. RELEVANT STATUTORY PROVISIONS

[11] In Section 8 of the Act (as in force at the time of the Agreement) it states:

> **"8 Consumer Credit Agreements.**
>
> (1) A personal credit agreement is an agreement between an individual ("the debtor") and other person ("the creditor") by which the creditor provides the debtor with credit of any amount.
>
> (2) A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £25,000.
>
> (3) A consumer creditor agreement is a regulated agreement within the meaning of this Act if it is not an agreement (an "exempt agreement") specified in or under Section 16.
>
> Accordingly a regulated agreement is one which fulfils the following characteristics –
>
> (a) It is a personal credit agreement.
>
> (b) It is dealing a sum of credit which does not exceed £25,000.

(c) It is not an exempt agreement under Section 16."

There is no dispute between the parties that the agreement is a personal credit agreement and that it is not one of the exempt agreements contained within Section 16.

[12] Section 18 provides:

> **"18 Multiple Agreements**
>
> (1) This section applies to an agreement (a 'multiple agreement') if its terms are such as –
>
> (a) To place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or
>
> (b) To place it, or part of it, within two or more categories of agreement so mentioned.
>
> (2) Where a part of an agreement falls within sub-section (1), that part shall be treated for the purposes of this Act as a separate agreement.
>
> (3) Where an agreement falls within sub-section (1)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly.
>
> (4) Where under sub-section (2) part of the multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceeding in any court relating to the multiple agreement be apportioned by the court as may be requisite."

Accordingly, this section sets out the rules for determining whether a consumer credit agreement is a multiple agreement and, if so, whether part of such an agreement will be treated for the purposes of the Act as a separate agreement. According to Chitty on Contracts at 39.50:

> "… of all the sections in the Act, it is this section which has given rise to the greatest difficulty of interpretation."

[13] At that time Section 60(1)(a) of the Act provided that regulated agreements must follow the form prescribed in the Consumer Credit (Agreements) Regulations 1983 and Section 61(1)(a) of the Act provided that if the agreement failed to comply with Section 60(1) it was not properly executed. Under Section 65(1) of the Act, an improperly executed regulated agreement cannot be enforced without an order of the Court. Section 127(3) prohibited the making of such an enforcement order where Section 60(1)(a) had not been complied with. So if Swift's argument succeeds the unregulated agreement can be enforced as I have already observed, although there are other arguments/defences open to the borrowers. However, if these are two regulated agreements as Scott and Mythen contend, then Swift will almost certainly be unable to recover the money lent to them.

D. DISCUSSION

The Arguments

[14] All counsel are to be congratulated for the quality of their arguments which were made both in writing and orally on the issue as to whether or not this was a regulated agreement. My terse summary of the arguments advanced on behalf of their respective clients does not reflect the nuances and breadth of the arguments made before me. Needless to say I have not felt obliged to rehearse each and every argument addressed to the court on behalf of each party, although I have taken them all into account in reaching my final decision.

Swift

[15] Mr Warnock on behalf of Swift said that this was a single loan agreement with two elements which cannot be dissected as opposed to two separate agreements dressed up as a single agreement. The loan is correctly described in the agreement as not being regulated. In the words of Section 18, the agreement placed the whole of the agreement into two relevant and disparate categories so that Section 18(1)(b) applied. This was not a case in which "the terms place part of the agreement in one category and part in another". To borrow Professor Goode's language the agreement was a "unitary" one. Although there were restricted and unrestricted use elements in the loan, it was not possible to collect from the document as a whole what amounted to the respective terms of two or more separate agreements.

Scott

[16] The agreement between the parties was one where the terms placed part of it within one category and another part within a different category as set out in Section 18(1)(a). Therefore, under Section 18(2) each part must be treated as a separate agreement for the purposes of the Act. As a consequence the agreement

comprises two regulated agreements under the Act. This accords with the purpose of the Section which was to prevent frustration of the Act's protection to borrowers by the aggregation of two or more agreements into one agreement so as to take the total credit negotiated above the £25,000 limit and thus ensure that the agreement was not regulated under the Act.

Mythen

[17] Mythen's counsel submitted that there were two categories of loan. These were:

(a) The actual loan of £25,000 which Scott and Mythen had applied for.

(b) The insurance product foisted upon them at a cost of £3,500.

The authority of *Southern Pacific Mortgage Limited v Heath* [2010] 2 WLR 1081 did not support the argument made by Swift. In that case the Court of Appeal in England held that Section 18(1)(a) of the Act referred to an agreement which was in parts. If the agreement was in parts, then the question is whether the parts were in different categories. If they were, then by Section 18(2) they are to be treated as separate agreements. The re-mortgage transaction failed this test in Heath. This was a unitary agreement because it could not be divided into parts. Therefore, it fell within Section 18(1)(b) and Section 18(3) and was not to be treated as separate agreements.

The Present Proceedings

[18] There has been much ink split over what exactly Section 18 of the Act means. There is however no difficulty in determining what it is for. It is intended to prevent frustration of the Act's protection to borrowers "by the artificial combination of two or more agreements in one so as to take the total credit negotiated above the limit qualifying for protection": see Auld LJ in *National Westminster Bank Plc v Story and Pallister* [1999] Lloyd's Rep. Bank 261. But as Auld LJ goes on to say;

> "The provision is unclear and its construction has attracted much academic and professional controversy."

[19] Decisions in the County Court, and indeed in the High Court in England and Wales on Section 18 of the Act have not always been "consistent and are often contradictory". As I have said there have been no written decisions in Northern Ireland on the meaning of Section 18 of the Act. On one side of the debate as to how Section 18 should be construed is Professor Sir Roy Goode, author of Consumer Credit Law and Practice. On the other side is Sir Francis Bennion, the draftsman of the Act. In between lie different shades of opinion.

[20] The two differing approaches can be summarised briefly as follows although I appreciate that these summaries do not do justice to the arguments marshalled by either side.

The Goode Interpretation

[21] Professor Goode is of the opinion that an agreement is not a multiple agreement unless it falls within at least two different categories, of which one must be a statutory category. So if both or all the categories are the same, the agreement is not a multiple agreement. Further, the categories must be disparate, that is, mutually inconsistent. So the fact that an agreement is a debtor/creditor/supplier agreement for fixed-sum restricted-use credit does not of itself make it a multiple agreement, for the categories debtor/creditor/supplier, fixed-sum and restricted-use are not mutually inconsistent. They belong to three distinct classifications. Again, an agreement is not a multiple agreement though the form of the agreement is divided into parts offering different options falling into different categories, if the customer can select only one option, for his selection then excludes the other options from consideration: see 25.101A of Goode's Consumer Credit Law and Practice.

[22] This analysis was accepted by the Court of Appeal in England & Wales in *Southern Pacific Mortgage Limited v Heath.*

The Bennion Interpretation

[23] Sir Francis Bennion maintains that every type of agreement mentioned in the Act is a category. Therefore, all regulated agreements are multiple and Section 18 only has a practical effect where it needs to. Bennion refers to this as "weightless drafting". He says that the wording of Section 18(1) is highly compressed statutory language. It applies cumulatively, that is both paragraph (a) and (b) can apply to the same agreement even though "or" is used to link them. Bennion says that Section 18 has a practical effect only where it needs to have one, and can otherwise be ignored.

[24] Geraint Howells in "The Consumer Credit Litigation Explosion" LQR 2010 at 625 states:

> "The heart of the Bennion/Goode debate centres on whether, if there are different categories of agreement such as those set out in Pt II of the CCA (such as a money loan and a money purchase loan), this automatically means that there are different parts to the agreement that should be treated by virtue of Section 18 as separate agreements. This may affect both whether the agreement is regulated at all and what is required to comply with CCA formalities. Bennion considers they do form different parts, which he notes is evidenced by Schedule 2, example 16. There is a lot of sense in this if Section 18

> is viewed as an anti-avoidance device. Goode, on the other hand, takes the view that while some such agreements might be *multi-part* so that the parts can be separated, many will be *unitary* and not divisible into parts. In other words Goode considers that just because an agreement may contain different categories it does not mean necessarily it is in different parts. In similar vein, the Office of Fair Trading in the 1996 Discussion Paper, *Multiple Agreements and Section 18 of the CCA*, suggested that an agreement is not in parts if the categories are so interwoven that they cannot be separated without affecting the nature of the agreement as a whole. This of course makes it more likely that due to the combined amounts any financial threshold will be exceeded … and less likely that an agreement can be challenged on the basis of technical errors based on a failure to disaggregate the figures between the parts which represent separate agreements.
>
> The Goode approach has been supported by the majority of courts."

The Court's Decision

[25] There have been a number of decisions in the County Court supporting the Goode interpretation, such as *National Home Loans Corporation v Hannah* [1997] CCLR 7. There have been a lesser number of County Court decisions supporting the Bennion approach such as *Ocwen v Coxall and Coxall*[2004] CCLR 7.

[26] Obviously, the advantage of the Goode approach is that it reduces the risk of any agreement being found to be unenforceable. The advantage of the Bennion approach is that it makes enforcement of the Act easier by preventing lenders from combining loans so as to escape the burden of the loan being a regulated agreement.

[27] It seems that there are four different situations caught by Section 18's definition of multiple agreement. They are:

(i) Where the terms of the agreement are such as to place a part of that agreement within one category of agreement mentioned in the Act and another part of it within a category, not so mentioned. Thus, a save and loan agreement is one where the loan part is within the Act and the savings part is outwith the Act.

(ii) Where the terms of the agreement are such as to place a part of it within one category of agreement mentioned in the Act, another part of it within a different category of agreement mentioned in the Act: see Section 18(1)(a).

(iii) Where the terms of the agreement are such as to place a part of it within two or more categories of agreement mentioned in the Act, the other part or parts falling outside the Act, or within one category, or likewise within two or more categories: see Section 18(1)(b).

(iv) Where the agreement is a unitary agreement, not in parts, and the terms of the agreement are such as to place it within two or more categories of agreement mentioned in the Act: see Section 18(1)(b).

For further discussion see Encyclopaedia of Consumer Credit Law at 2-019 and Chitty Volume II of 39-050.

[28] In all these situations there is a multiple agreement. But where part of an agreement falls within the first three factual scenarios mentioned above that part is to be treated for the purposes of the Act as a separate agreement, and the Act applies to it. But where the agreement falls within the last situation then that agreement has to be treated as an agreement in each of the categories in question, and the Act applies to it accordingly: see Section 18(3). It is not dissected into separate agreements as the opening words of sub-section (2) make that sub-section applicable only where part of an agreement falls within sub-section (1): see Encyclopaedia of Consumer Credit Law at 2-019.

[29] Rosenthal on Consumer Credit Law and Practice – a Guide (5th Edition) says at page 100:

> "If an agreement falls within more than one category and those categories are not disparate categories so that they can be combined within one agreement, the agreement can be drafted as a single multiple unitary agreement, i.e. as a single agreement with the same provisions applying to each category of agreement comprised in that agreement. If, on the other hand, the agreement is in parts or the agreement is one within two or more categories which cannot be combined within one unitary agreement, e.g. a conditional sale agreement in respect of a motor vehicle together with a personal loan agreement for fixed-sum credit to finance a caravan, each must be drafted as a separate agreement."

[30] The most authorative discussion of the construction of Section 18 is that of the Court of Appeal in England & Wales in *Southern Specific Mortgage Ltd v Heath* [2009] EWCA 1135. In that case Lloyd LJ gave judgment and in doing so discussed the academic debate raging between Professor Goode and Francis Bennion. The facts of the case were that the total loan exceeded £25,000 but comprised the sum of £19,000 used to discharge a previous mortgage on the property and the remainder the lender

could use as she chose. Therefore, part of the loan was for the category of restricted use credit and the other category was unrestricted use credit falling respectively within Section 11(1)(a) and Section 11(2) of the Act.

[31] The Court of Appeal recognised that an agreement as a whole might fall within more than one category without being an agreement in parts. The task of the court was to find out from the terms of the agreement whether the agreement was one under which there were two or more parts, in different categories, or whether it, or part of it, fell into two or more categories; therefore for the purposes of both paragraphs (a) and (b) of Section 18(1) "categories" mean disparate rather than comparable categories. Further, that there was nothing in the terms of the agreement that permitted a conclusion that part of the agreement was to be placed in one category, that is restricted use credit and another part in unrestricted use credit. The court concluded that there was a single agreement containing a term that the existing mortgage should be paid off out of the total advance, not that it should be paid out of any particular part of it, and so it could not be dissected into separate parts. Lloyd LJ said at paragraph 41:

> "[41] It seems to me that the argument for the respondent is correct. The starting point is that it is from the terms of the agreement that one must find out whether the agreement is one under which there are two or more parts, in different categories, or whether it, or part of it falls into two or more categories. It is not correct to start from the proposition that more than one disparate category is concerned, and to conclude from this that the agreement must fall into two or more parts. That the starting point is the terms of the agreement is consistent with Mr Bennion's view, as noted in the passage which I have quoted at [36] above. In addition I agree with Mr Waters that it is significant that it is the agreement which is to be placed in one or more categories, not the credit provided under the agreement."

He then goes on to say at paragraphs 52 and 53:

> "52. Turning back to the facts of the present case, the appellant had from the respondent the offer of a single facility, which could only be drawn down as a whole. It was to be secured by a first mortgage on the property, which was at the time subject to the existing mortgage in favour of Halifax. It was a term of the loan agreement that any existing mortgage was to be paid off out of the loan. Assuming, in the appellant's favour, that this means that the part of the credit which would be used to redeem the existing mortgage was

> restricted-use credit, nevertheless I find nothing in the terms of the agreement which permits a conclusion that part of the agreement is to be placed in one category (restricted-use) and part in another (unrestricted-use). It is a single agreement which cannot be dissected into separate parts. To go back to Mr Bennion's words at paragraph 36 above, it is not possible to collect from the document as a whole what amount to the respective terms of two or more separate agreements. Nor can it be brought within the words of Auld LJ quoted at [30] above. The whole credit facility had to be drawn together or not at all as Judge Purle QC noted at [2009] 2 All ER (Comm) 287 at [38].
>
> 53. I consider that the agreement was one whose terms placed the whole of the agreement in two relevant and disparate categories under the Act, so that Section 18(1)(b) applied. It was not one whose terms placed part of the agreement in one category and another part in another. The agreement could not be taken apart in that way. It was a unitary agreement, in Professor Goode's language. Accordingly, it is not to be treated as two separate agreements, and because the amount of the credit provided exceeded £25,000 it was not a regulated agreement."

[32] The decision of the Court of Appeal in England & Wales is a persuasive authority that the Professor Goode approach to the vexed issue as to how to interpret Section 18 is the correct one. I am mindful that the Act applies to both England and Wales on the one hand and Northern Ireland on the other. It would be unfortunate if a section of the Act was construed differently in Northern Ireland to the way in which it is interpreted in England and Wales. Certainly it is the practice of the Court of Appeal in Northern Ireland to follow the decisions of the English Court of Appeal where it has pronounced upon a topic, even where the Northern Ireland Court of Appeal thinks that another conclusion might be preferable. This practice was set out in the judgment of Holmes LJ in the Irish Court of Appeal in *McCartan v Belfast Harbour Commissioners* [1910] 2 IR 470 at 494-495, where he said:

> "It is true that, although we are not technically bound by decisions in the co-ordinate English Court we have been in the habit, in adjudicating in questions as to which the law of the two countries is identical, to follow them. We think that uniformity of decision is so desirable it is better, even when we think the matter

> doubtful, to accept the authority of the English Court, and leave error, if there be error, to be corrected by the Tribunal whose judgment is final on both side of the Channel."

[33] The correctness of this principle has been regularly accepted since that date in Northern Ireland eg see *Beaufort Developments v Gilbert-Ash* [1997] NI 142 at 155.

[34] However, there has not been a decision in the Court of Appeal or in the High Court in England & Wales (or in Northern Ireland) dealing with the precise circumstances presently before this court. In Manchester County Court, His Honour Judge Platts in *Yates and Lorenzelli v Nemo Personal Finance and another* (14 May 2010) had to deal with a case in which the sole amount borrowed was £77,968.75 which included £60,500 described as a cash loan to pay off existing debts, £15,168.75 being the premium for the PPI and a £2,000 broker's fee. The trial judge concluded at paragraph 6 that Miss Lorenzelli was "under the impression that if they did not agree to the PPI then they would not get the loan. I accept that that was her understanding." He then decided that the PPI on the facts was a separate facility. He said at paragraphs [60] and [61]:

> "60. It is right to say that other terms are common to parts of the agreement, that is the interest rate and the payment on the other terms and conditions of the loan. The fact that single monthly payments are common and that there is a uniform interest rate, in my judgment, does not matter and I accept the submission made by Mr Say, albeit late, that Section 18(4) does seems to assume that some of the agreements whilst being in two parts may nonetheless have single repayments, hence the power of the court to deal with that under Section 18(4)
>
> 61. I stand back and ask myself is this agreement in two parts? In my judgment the answer is yes. There are two parts. There is a cash loan part and there is a Payment Protection Insurance policy part and the loans are for those two specific purposes and they are different. I conclude therefore that under Section 18 in my judgment it is a multiple agreement."

[35] Recorder Yip QC in Manchester County Court reached a different view in *Susan Plevin v Paragon Personal Finance Limited and another* [2012] GCCR 11469. This case did go to the Supreme Court but on a different issue. The facts of that case were that Susan Plevin contracted through a broker for a principal loan of £34,000 and a PPI premium loan of £5,780. Recorder Yip QC said at paragraph [38]:

"I have weighed the factors advanced on each side in the balance. To do so it is necessary to go to the terms of the agreement itself. The terms treat the loan being advanced as a single loan with a single interest rate and single monthly repayments, and on one single set of terms. The principal loan is over the limit for a regulated agreement. It is not the case that two separate sums both falling within the limit are being separated out in order to avoid the provisions for regulated agreements. A PPI loan could not and would not exist in isolation from the main loan. It was taken out as an adjunct to the principal loan. Without the principal, the PPI loan would not exist. As against those points, there are said to be different legal consequences and different legal rights created between the creditor and debtor when the two loans are compared. In particular, the PPI element and the loan for it can be terminated on notice whereas the main loan cannot. I have considered the reasoning of HHJ Platts in the case of Yates to which I have been referred in which he found that the PPI element was a separate agreement and as such was a regulated agreement. Nevertheless, my analysis in this case differs. Although I agree that the PPI loan was separate in that the main loan could not have been taken without it and to that extent the PPI was **separate and additional**, the same argument does not work in reverse for the reasons articulated by Mr Wilson. Without the main loan, the PPI loan would not have existed. It could not stand alone. In my judgment, once the offer of PPI was accepted by the Claimant, it was subsumed into the main loan, becoming part of it. The capital advanced for the PPI was amalgamated with the capital for the main loan and interest was charged and repayments taken on the basis of the total sum. The fact that the loan comprised a restricted-use and unrestricted use element did not itself place the agreement within Section 18(2) of the Act. Certainly, the agreement as a whole falls within more than one category but that does not make it an agreement that is to be dissected into different parts. I adopt the reasoning set out by Professor Goode at paragraph 25.107 … I will not repeat the passage here but having considered it carefully … I accept the submissions made at paragraph 58 of Mr Wilson's skeleton argument. I also accept Mr Wilson's arguments that the fundamental purpose of Section 18 is anti-avoidance and that avoidance of the

> regulations did not lie behind the treatment of the principle (sic) loan and the PPI loan as one agreement."

[36] As I have recorded the decision of Recorder Yip QC was appealed and it ended up in the Supreme Court but not for determination of the issue which this court has to decide. For the sake of completion I also note that the Encyclopaedia of Consumer Credit Law at 2-019 states that in respect of a debtor-creditor agreement (whether for restricted-use or unrestricted-use credit):

> "Opinion is divided as to whether the inclusion of a single premium payment protection insurance gives rise to **parts**. Both the principal agreement and the insurance element are loans. But the Act does provide for significantly different consequences in respect to debtor/creditor supplier agreements and debtor/creditor/supplier agreements and debtor/creditor agreements. Many creditors who offer such insurance with debtor/credit agreements have again elected, from prudence, to treat the insurance element as a separate agreement in their documentation."

[37] As I have said I have concluded after considerable deliberation that paragraphs (a) and (b) of Section 18(1) are dealing with different situations. Paragraph (a) of 18(1) deals with the situation with respective elements within the agreement may be viewed as constituting separate parts of that agreement. Paragraph (b) of Section 18(1) on the other hand, deals with the situation where they cannot be seen as making up separate parts, but constitute a single unitary agreement.

[38] The terms of the loan in the instant case make it clear that the sum advanced of £28,500 was done so as a single loan with precisely the same terms and the same rate of interest. The whole of the indebtedness was to be secured on the one and the same property. I do not consider that there is a substantial disparity between the different elements "having regard to their subject-matter, their legal nature and the operation of the Act": see 39-052 of Chitty Volume 2. This is a very different agreement to, for example, the one in *Davies v Black Horse Ltd* (2/8/2012 Liverpool County Court) where there were two separate parts: "the personal loan and the PPI part. The financial information relating to the two parts was set out in two separate schedules under the headings Personal Loan and Payment Protection Plan".

[39] In my view this was an integrated package which could not be split up without affecting the nature of the transaction: see Goode on Consumer Credit Law and Practice. I prefer the approach and reasoning of Recorder Yip QC. It follows therefore that this was a credit loan in excess of £25,000 and therefore was not regulated under the Act. Any doubt harboured by this court about whether to

follow the Goode approach was assuaged by the adoption of the Goode approach by the Court of Appeal in the *Heath* case.

[40] Finally, my decision as to the nature of the agreement means that I do not have to decide **at this stage** whether:

(a) Ocean Finance made a representation that taking out PPI was a condition of being given the loan of £25,000;

(b) if such representation was made, whether Ocean Finance made it as agent of Swift;

(c) whether Scott and Mythen were induced by the representation in taking out PPI?

Conclusion

[41] It has been a far from easy task for the court to understand precisely what Section 18 of the Act means and how it should work. However, standing back and concentrating on the actual terms of the agreement I consider that the Master was correct when he said:

> "In short it seems to me that all of the terms of the contract documents signed on or created on 19 March 2003 exist to give effect to one credit agreement which may or may not fall into a number of categories. It is to that extent in my view appropriate to describe it as a unitary agreement following the rational (sic) both of Professor Goode and Lloyd LJ."

I am satisfied that it was a unitary loan, being one for £28,500 secured on the Property. Thus, it is not regulated under the Act. There are other issues which still remain unresolved between the parties and I invite them to submit an agreed list of those issues and to make final written representations upon them. I will then provide a prompt judgment in respect of those outstanding reasons as for a variety of reasons this part of the appeal has taken rather longer than was originally anticipated. In the meantime, I reserve the issue of costs pending that further determination.