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# Lender allowed to recover money under an unsigned secured bridging loan agreement in restitution

*Lancashire Mortgage Corporation Limited v. Ivor John Richardson*
[2017] Unreported, Manchester County Court

## Article by David Bowden

**Lender allowed to recover money under an unsigned bridging loan agreement in restitution**
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**Executive speed read summary**
A bridging loan of £30,000 was made to enable a farmer to buy vintage steam engines. This was secured by 2nd mortgage over his farm. He made some payments. The lender brought possession proceedings and a claim for nearly £50k that was outstanding. The loan was not regulated by the Consumer Credit Act 1974. The lender could not find a copy of a loan agreement signed by both parties. The judge found that there was no concluded contract. However the judge allowed the lender to make a claim based in restitution on the basis that the borrower had been unjustly enriched. After hearing expert evidence, the judge ruled that the 2% per month charged in interest was what would have been available anyway to someone in the borrower's shoes. The lending had a 5% postponement fee if the advance was not repaid on the loan anniversary. The lender refunded all postponement fees but the first. The judge ruled that the borrower had to repay the principal sum and interest at 2% per month after giving credit for payments made. As there was no signed agreement, the unfair relationship provisions under section 140A of the CCA did not apply. However, even if they had, the judge ruled that she would not have found an 'unfair relationship' to have existed. This was because the 2% interest rate was at the lower end of the appropriate range and even adding a 5% postponement fee did not produce an overall interest rate that could be said to be extortionate or excessive.

*Lancashire Mortgage Corporation Limited v. Ivor John Richardson*
[2017] Unreported 13 January 2017
Manchester County Court (Miss Recorder Amanda Yip QC)

**What are the facts?**
Mr Richardson ('the borrower') owns a commercial farm called Hill Top Farm which is subject to a first legal charge. In 2006 the borrower wanted to buy some vintage steam engines. In October 2007 the borrower approached the lender via a broker. The lender agreed to provide a bridging loan. This was to be secured by means of a 2nd legal charge over the farm. The loan was for £30,000 with a £695 arrangement fee. Eleven monthly instalments of £613.90 were payable on the 9th day of every month. The interest rate was 2% per month. The principal amount of the loan of £30,000 was to be repaid 1 year after the loan agreement but if it was not, there was a 5% postponement fee of £1500 payable on each anniversary of the loan agreement. The postponement fee was is additional to the interest due if the principal sum was not repaid. The borrower made some payments. The lender brought proceedings for possession of the farm or in the alternative for £48,988.70 being the sum due under the loan agreement.

Solicitors were instructed who registered a legal charge. Despite a search the lender was unable to find a copy of the loan agreement that both parties had signed. The borrower defended the possession proceedings and counterclaimed saying he had overpaid.

**Did the Consumer Credit Act 1974 ('CCA') apply to this loan?**
The funds were advanced by the lender on 9 November 2007. At that time the regulated financial limit for a secured 2nd charge loan agreement under the CCA was £25,000. This bridging loan was not regulated by the CCA. However, by April 2008 (when the transitional provisions under the CCA 2006 expired) the lending was not a 'completed agreement'. This meant that the '*unfair relationship'* provisions under the CCA applied to any lending to an individual (even where the loan had not been CCA regulated) where there was an agreement between a lender and a borrower.

**What were the issues the judge had to resolve at trial?**
The 6 issues for the judge were:
- Was the agreement signed on behalf of the lender or not?
- If the loan agreement was not signed, was there still a concluded contract?
- What was the proper construction of the loan agreement and what was the lender entitled to under it?
- Could a term be implied into the loan agreement permitting a lender to disapply a condition of the loan agreement where it has omitted to sign the loan agreement but has in fact released the funds?
- Was there an 'unfair relationship' under section 140A of the CCA?
- If the lender is unable to rely upon its loan agreement, what is the quantum of its claim in restitution?

**What did the judge make of the witnesses?**
The scales on this were quite evenly balanced because the judge was critical of the witnesses for both sides. Mr Goldberg is the Chief Executive of Together which is a group of lending companies to which

the lender belongs. He gave evidence as to the lender's standard procedures with the judge accepting that she was satisfied that '*he was not seeking to mislead the court but rather was limited by his lack of actual knowledge of what occurred on this case. He was reliant on the documents in the case and his knowledge of what usually happens'*. Nevertheless the judge still found that he was '*unnecessarily evasive when answering questions*'. As to whether the loan agreement was signed, the judge found that Mr Goldberg '*could not explain why the filing system had then broken down if the agreement had been signed*'.

Comparatively this pales into insignificance when the judge assesses the evidence of the borrower. The borrower claimed that his understanding of the bridging finance was that he paid interest over the 1st 12 months and then repaid the loan capital over 50 months. As to this the judge found that '*quite frankly, I did not believe that this is what the Defendant had been told and I do not accept that this was his reasonable belief*'. Her assessment was far worse when she came to assess what the borrower said about his credit rating and his access to other sources of borrowing. On this the judge said that '*I am afraid that I did not find the Defendant to be an impressive witness. I did not accept that all that he was saying was truthful*'. As to what advice the solicitor gave to the borrower before completion, the judge was equally scathing of what the borrower said remarking '*I simply cannot accept that she gave the advice claimed by Mr Richardson which I do not consider any reasonable lawyer could have done having regard to the agreement itself*'.

Finally as to whether the borrower was a '*rather naïve or an unsophisticated borrower'* or not, the judge was clear this was not the case with her assessment that this '*was not at all the impression I had of the Defendant when he gave his evidence. He demonstrated a firm grasp of calculations and a very good understanding of how to calculate equivalent APR*'.

**What expert evidence was before the court?**
David Griffiths was appointed as a single joint expert. He produced 2 reports:

- Main report dated 3 November 2016,
- Supplementary report dated 15 November 2016.

The expert was not required to attend for cross-examination at trial.

His expert opinion was that the borrower's '*credit rating in November 2007 would have been viewed as being in the "*poor*" category. His credit score was such as to exclude him from all but the bridging and sub-prime markets. His prospects of being able to borrow from any lender other than a bridging provider would have been extremely small*'.

His view was that '*interest rates available to someone in the Defendant's position would have been in the 2-3% per month range*' and that '*most bridging lenders will not lend for longer than 2 years'*. He also said that the postponements granted by lender were '*equivalent to a series of short term loans and the available interest rates are likely to have remained consistent throughout the period in question'*.

**What did the judge conclude on whether the lender had signed the loan agreement or not?**
The judge ruled that the lender had not signed its own loan agreement. Her conclusion was that the lender had '*not, on the evidence before me, discharged the burden of showing that it was more likely than not that the agreement was signed on its behalf*'.

**Did the judge rule there was a concluded contract or not?**
On her finding that the lender had not signed the loan agreement, the judge ruled there was no concluded contract. She said that '*in light of my finding that the Claimant did not sign the offer letter as required, the agreement did not take effect*' and that the lender was '*therefore unable to pursue its claim on the contract*'. However this was not the end of the matter because the judge went on to determine what the lender was entitled to based on a restitutionary claim that the borrower had been unjustly enriched.

**What did the judge decide the lender was entitled to under its unsigned loan agreement?**
The judge decided that the lender was entitled in restitution to the repayment of its advance as well as interest at 2% per month. She observed that '*the lender's accidental failure to sign has no impact upon the borrower and causes him no prejudice*'.

**Are there any other prior authorities of relevance?**
These authorities are relevant in this case:

*Chartbrook Ltd v. Persimmon Homes Ltd* **[2009] UKHL 38, [2009] 1 AC 1101** (House of Lords - Lords Hope, Hoffmann, Rodger, Walker & Lady Hale)
When construing contractual provisions a court is concerned to identify the objective intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to mean. Subjective evidence of the parties' intentions is to be disregarded.

Skandinaviska Enskilda AB (Publ) Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd **[2011] 3 SLR 540; [2011] SGCA 22** (Court of Appeal of Singapore – Chief Justice Chan Sek Keong and Justices of Appeal Chao Hick Tin and Andrew Phang Boon Leong)
The defendant's enrichment by the sum of S$347,671.23 was unjust because it received that sum without providing any consideration, and because the claimant paid that sum (and, likewise, the rest of the SEB S$45.3m) into the bank account under an operative mistake. Where there have been payments between the claimant and defendant, the net amount will constitute the relevant enrichment

*Marks and Spencer v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* **[2015] UKSC 72** (Supreme Court – Lord Neuberger PSC and Lords Clarke, Sumption, Carnwath & Hodge JJSC)
A term is not to be implied into a contract merely because it appears fair or because one considers that the parties would have agreed to it if it had been suggested to them. Those are necessary, but not sufficient, grounds for including a term.

*Hallman Holding Ltd v. Webster* **[2016] UKPC 3** (Privy Council – Lady Hale DPSC, Sir Michael Briggs and Lords Wilson, Hughes & Hodge JJSC)
In order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract. It must be so obvious that it goes without saying. It must be capable of clear expression. It must not contradict any express term of the contract.

**Did the judge allow any terms to be implied into the lending arrangement or not?**
No.

Clause 14 of the loan agreement provided that it would '*only take effect which it is signed'* by the lender. As the judge found the loan agreement was not signed, the lender unsuccessfully tried to persuade the judge to imply these words into the loan: '*save that in the event that the Lender mistakenly omits to sign, the agreement will take effect once the funds are released'*. The judge dismissed this brave submission shortly saying '*in my judgment, the claimant is not able to rely upon the implication of a sub-clause in order to avoid the operation of the express term at clause 14*'.

**What did the judge rule on the 'unfair relationship' point?**
As the judge found there was no loan agreement signed by both the lender and the borrower, then the 'unfair relationship' provisions do not apply because they only apply to 'agreements'. Nevertheless the judge, who was also the trial judge **[2012] EW Misc 24 (CC)** in the leading case of *Plevin v. Paragon Personal Finance Ltd* on this which went on appeal all the way to the Supreme Court **[2014] UKSC 61**, decided to express her view.

She said that that '*in light of my finding that the agreement was ineffective, it is not necessary for me to make findings on the Defendant's argument that there was an unfair relationship. As the agreement did not come into effect, the postponement fees cannot be recovered from the Defendant*.'

She ruled that even if she had '*been persuaded that the agreement was effective I would not have found that there was an unfair relationship such as to require me to grant relief under section 140B'* of the CCA. This was because the *'interest rate of 2% per month was at the lower end of the appropriate range according to the expert evidence'* and that '*even when the postponement fee of 5% is added on that does not produce an overall interest rate that can be said to be extortionate or excessive'*. Based on the expert evidence she found that the '*rate overall would still have been well within the range for this type of lending*'.

**What had the House of Lords previously decided in *Sempra Metals Ltd v. IRC*?**
In *Sempra Metals Ltd v. IRC* **[2007] UKHL 34; [1996] AC 669** (House of Lords - Lords Hope, Nicholls, Scott, Walker and Mance) ruled that a claim for the use value of money is available where money has been paid which was not due to the defendant. In *Benedetti v. Sawiris* **[2013] UKSC 50** (Supreme Court - Lord Neuberger PSC and Lords Kerr, Clarke, Wilson and Reed JJSC) the Supreme Court in an unjust enrichment case ruled that where a restitutionary award is made, it is to be calculated as the value of the benefit received by the defendant at the expense of the claimant. Where the benefit takes the form of

services, that will normally be the market value of the services performed. The market value may depend on the personal characteristics of the defendant, such as his buying power in the relevant market.

**What did the judge rule on restitution in relation to the interest the lender was seeking?**
Applying *Sempra* and *Benedetti*, the judge assessed '*the award for the use value of the loan capital on the basis of simple interest of 2% per month that is £613.90 per month to date'*. However she ruled that the *'postponement fees which would have become due under the agreement will form no part of the award in restitution'*. She went on to rule that credit had '*to be given for the sums already paid by the Defendant*'.

After her judgement was circulated in draft, the borrower asked that her judgment on this be amended. The judge gave both sides an opportunity to make further written submissions. She decided that she would amend her judgement to reflect the fact that the borrower had sent the lender a cheque for the £695 fees. Nevertheless this did not make a great difference because the judge said '*the reality is that the Defendant had received a net sum of £30,000 rather than £30,695'*. She said that her conclusion was that the lender '*is entitled to an award for use value of the money on the basis of simple interest at 2% per month to date remains but this is to be assessed by reference to the net sum of £30,000, which is £600 per month*'.

Finally she rejected the borrower's submissions that the payments he had made were intended to repay capital rather than interest. She ruled on this that the payments made by the borrower '*were not intended or treated by either party as capital re-repayments*' and that the borrower was '*not to be treated as having repaid the capital by instalments*' but rather '*he was paying what (on my findings of fact) he understood to be the proper sum owing by way of interest on the basis of the loan agreement, which both parties understood to be in place but which through an oversight on the part of the Claimant was not in fact effective*.'

**Did the judge grant a possession order?**
No.

**Will there be an appeal?**
The judge refused Richardson permission to appeal. He had until 3 February 2017 to seek permission to appeal in time. Although this is a multi-track case, the new Destinations of Appeals Order mean that an appeal no longer lies to the Court of Appeal but to the High Court.

**Comment**
If the lending had been regulated by the CCA then the judge would have had some more complex analysis to carry out. If the agreement had been made before 6 April 2007 and had not been signed, then it would fall within a small class of lending that was irredeemably unenforceable. For lending after 6 April 2007 irredeemable unenforceability disappeared when the repeal of section 127(3) of the CCA took effect. If a post 6 April 2007 loan within the CCA's scope had not been signed by a lender, then a court would have to carry out a balancing exercising weighing up culpability on the one hand, and prejudice on the other, in deciding whether to grant a lender an order permitting it to enforce the loan under s127 of the CCA and if so, on what terms. Finally section 135 of the CCA allows a court to impose conditions or suspend the operation of any order it is minded to make.

As to prejudice, the judgement in this case does not make clear whether the farmer did in fact buy the vintage steam engines or not. If he had and carrying on enjoying their use, then as the judge found the conveyancing solicitor made the financial terms clear to him, a borrower would face an uphill struggle in persuading a court not to make an enforcement order in these circumstances.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.