

## **The case law behind Alexander v West Bromwich Mortgage Company**

Dispute Resolution analysis: As the Court of Appeal considers the submissions in this dispute over mortgage conditions, David Bowden, freelance independent consultant, outlines the case law and academic literature behind the submissions.

### **Background**

For further discussion of the submissions in the Court of Appeal, see Court of Appeal considers mortgage condition challenge.

### **Are there any prior authorities on what happens when contractual documents conflict with each other?**

For the appeal, PAG118 relied on three authorities not cited below:

*Glynn v Margetson* [1893] AC 351, [1891-4] All ER Rep 693

This concerned a bill of lading for a consignment of oranges which were to be transported from Spain to England. The printed terms allowed the ship to proceed by any port or sea whatsoever. However, the House of Lords held that the printed clause must not be construed so as to defeat the main object and intent of the contract, which was to carry the oranges from Malaga to Liverpool and that the liberty must be restricted to ports which were in the course of the voyage.

*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137

In this case, Lord Clark said that 'the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant' and also 'where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense'.

*Kuoni Travel Ltd v Boyle* [2013] EWHC 877 (QB), [2013] All ER (D) 108 (Apr)

In April 2013, HHJ Mackie QC had to construe a sale and purchase agreement for the purchase of share capital in a travel company whose terms were said to conflict with those of a tax deed. He held that 'I do not see the case law which discourages the finding of inconsistency in contractual provisions of much application to a specific clause providing for what is to happen in the event of a conflict' and concluded that the 'purpose of Clause 5.7 is to protect the relevant terms of the Deed from contrary indications in the SPA'.

### **Are there any prior authorities on lender's right to call in loans on notice where the borrower is not in default?**

In relation to commercial contracts there have been two observations in previous appellate cases that the borrowers rely on. Firstly, the Court of Appeal in *Digital Integration Ltd v Software 2000* [1997] EWCA Civ 787, [1998] ECC 289 said 'whether by reference to the likely commercial purpose of an exclusive distribution agreement anticipated to last for two years or simply by reference to business common sense, it seems to me that to adopt a construction...which renders the agreement virtually terminable at will is inappropriate.'

Secondly, the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361, [1966] 2 All ER 61 said 'one may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.'

### **What do the academic commentators say about this?**

The most recent update to *Emmet and Farand on Title* say this about the decision below:

'Remarkably, Teare J was able to construe the relevant Mortgage Conditions as "qualifying" or "complementing" the apparently absolute terms of the Offer of Loan, so that what the mortgagors (understandably, it might be thought) took to be 25-year tracker mortgages with interest rates pegged to Base Rates were in fact repayable at any time in the absence of default and at rates variable more or less at the mortgagor's discretion. Adopting an approach perhaps more appropriate for situations where the parties negotiate terms than for those where one party accepts non-negotiable standard form documents prepared by the other.'

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