Neutral Citation Number: [2014] EWHC 377 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
AND IN THE CENTRAL LONDON COUNTY COURT

Case No: TLQ/12/0906

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2014

Before :

THE HON. MR JUSTICE POPPLEWELL
(sitting additionally as a judge of the Central London County Court)

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Between :

KATHRYN BASSANO	**Grantor/Claimant**
- and –	
ALFRED TOFT	**First Defendant**
PETER BIDDULPH and PETER BIDDULPH LTD	**Second Defendants**
BORRO LOAN LTD and BORRO LOAN 2 LTD	**Third Defendants**

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Mr Bassano (by leave of the Court) for the **Claimant**
Mr Allston (instructed by **Hartnells LLP**) for the **First Defendant**
Ms Taylor (instructed by **Rubinstein Phillips Lewis LLP**) for the **Second Defendants**
Mr Payton (instructed by **Wright & Wright LLP**) for the **Third Defendants**

Hearing dates: 14-17 January 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell :

Introduction

1. The Claimant, Mrs Bassano, is a professional musician. For many years she owned a valuable viola, whose manufacture is attributed to Ceruti in Cremona in 1803. In 2009 she and her husband were experiencing financial difficulties. Between 2009 and 2011, she used the viola to raise finance by way of successive loans from the Defendants. In these proceedings the Defendants seek to enforce repayment of the loans, in part against the proceeds of sale of the viola.

2. The first loan in time was made by the Second Defendants, who are Peter Biddulph and Peter Biddulph Limited, the company through which Mr Biddulph deals in fine instruments. Nothing now turns on any distinction between Mr Biddulph and his company and I shall refer to both simply as Peter Biddulph. Peter Biddulph lent Mrs Bassano £50,000, interest free, in the summer of 2009, to be repaid from the proceeds of a sale of the viola which he was to seek to achieve. No part of that sum was repaid by Mrs Bassano.

3. The second lender was the First Defendant, Mr Toft, who is also by profession a dealer in fine stringed instruments. In February 2010 he lent Mrs Bassano £100,000 for 12 months with interest payable monthly. Mrs Bassano paid interest for the first 10 months, but has not thereafter paid any further instalments of interest or repaid the capital.

4. The last lender was the Third Defendant, which is named as Borro Loan Limited and Borro Loan 2 Limited, who are members of the same corporate group. I shall refer to both as "Borro" save where it is necessary to distinguish between the two. Borro carries on business as a pawnbroker. In July 2011, Borro lent Mrs Bassano £130,000 on the security of the viola by way of pledge. The loan carried interest. No part of the capital or interest has been repaid.

5. The issues in the action have become simplified as a result of an agreement reached between the Defendants inter se shortly before the trial, and two orders I made at the beginning of the trial to give effect to their agreement (to which Mrs Bassano did not consent). The effect of those orders was as follows:

   (1) The viola was sold to Peter Biddulph for £230,000, being the best price reasonably obtainable in the light of unsuccessful attempts to sell the viola at an acceptable price for the previous 4 years.

   (2) The proceeds of the sale were paid into court to abide the outcome of the proceedings.

   (3) The issues between Peter Biddulph and Mrs Bassano fell away. Peter Biddulph undertook, as one of the terms on which the sale was ordered, no longer to pursue any claim for the repayment of the £50,000 advanced to Mrs Bassano, and made no claim against the proceeds of sale to be paid into Court.

Mrs Bassano abandoned a small damages claim previously advanced against Peter Biddulph alleging minor damage to the viola.

(4) The Defendants resolved between themselves the previous competing claims to security in the viola or its proceeds of sale. Peter Biddulph fell out of the proceedings. Mr Toft does not pursue a claim to have any security interest in the viola or its proceeds. It was agreed (between the Defendants) that Borro had a valid and enforceable claim and security interest as pledgee in respect of the amount of its loan plus interest.

6. As a result, the remaining claims which fall to be determined in the action are the following:

(1) Mr Toft's claim for a money judgment for repayment of his loan plus interest;

(2) Borro's claim for a money judgment to enforce repayment of its loan plus interest;

(3) Borro's claim to a priority security interest in the proceeds of sale of the viola by virtue of its position as pledgee.

7. Mrs Bassano was not well enough to attend the trial. She was represented, with my permission, by her husband Mr Bassano, who conducted her case with conspicuous skill. In relation to the claim by Mr Toft, she challenges the enforceability of the loan by reference to the provisions of the Consumer Credit Act 1974. In relation to the claim by Borro, her pleaded position (in a pleading previously settled on her behalf by counsel) was that Borro's loan and security was valid and enforceable. That validity and enforceability had been challenged on behalf of Peter Biddulph prior to the settlement between the Defendants inter se, on grounds which were pleaded and elaborated upon in a written skeleton argument settled by counsel for Peter Biddulph. At the hearing I gave permission for Mrs Bassano to advance against Borro the arguments challenging the enforceability and validity of the loan and security interest claimed by Borro which had previously been advanced by Peter Biddulph against Borro before Peter Biddulph dropped out of the action. The arguments advanced are (1) that the agreement was not properly executed, and/or (2) that Borro has lost its security interest by parting with possession of the viola.

8. Before addressing those issues, I should set out a fuller narrative of events.

Narrative

9. Mrs Bassano approached Peter Biddulph in June 2009. She agreed with Peter Biddulph that he should seek to sell the viola on her behalf. In return he agreed to advance sums, interest free, which were to be repaid out of the proceeds of sale. He took possession of the viola in order to sell it and insured it for £350,000. He lent her another viola for her to play, and between June and August 2009 advanced to her a total of £50,000 in three separate instalments.

10. Mrs Bassano sought to raise further finance later that year. Mr Toft came to be approached in late 2009 by a fellow member of the congregation at his church, Mr

Atkinson. Two documents were drawn up by Mr Atkinson and a firm of solicitors proposed by him, whose fees were paid by Mrs Bassano. The first was a document entitled "Offer of Loan Finance" signed by Mr Toft on 8 February 2010 and by Mrs Bassano on 10 February 2010. It recorded that Mr Toft was to lend £100,000 for the private use of Mrs Bassano for a period of up to 12 months, extendable by mutual agreement, with simple interest at the rate of 2.5% per month payable monthly in arrears. The offer was expressed to be subject to a loan agreement being drawn up, and to Mr Toft inspecting the viola to satisfy himself as to its authenticity, value and suitability as security for the loan. Mr Toft, together with members of his family, met Mrs Bassano at Peter Biddulph's premises in London to examine the viola, and agreed to proceed with the loan on the terms of the Offer of Loan Finance document against the security of the instrument. He was not told and did not know of the previous advance to Mrs Bassano of £50,000 by Peter Biddulph.

11. The loan agreement was embodied in a chattel mortgage deed executed by Mrs Bassano and Mr Toft on 19 February 2010 ("the Chattel Mortgage"). The Chattel Mortgage recorded the terms of the loan and contained a covenant to repay the principal and interest. Clause 4 conferred a charge by way of first mortgage over the viola as security for repayment of the loan and interest.

12. Mrs Bassano made the monthly payments of interest of £2,500 per month for each of the 10 months from March to December 2010 but made no further payments of interest or capital.

13. The Chattel Mortgage was not registered as a bill of sale, as was necessary to perfect a security interest in the viola. Moreover the form of the Chattel Mortgage was defective in that it failed to comply with the Bills of Sale (1878) Amendment Act 1882 ("the 1882 Act"). As a result of section 9 of the 1882 Act, it was thereby rendered void. The result is that the Chattel Mortgage is ineffective and unenforceable as a document conferring a security interest, or as a document containing an enforceable covenant to repay: ***Davies v Rees*** (1886) 17 QBD 408. In due course an application to register the Chattel Mortgage as a bill of sale out of time was made to the Queen's Bench Division, but such application was not ultimately pursued, because of the defect in the form of the document and because any such late registration would be subject to prior security interests and would therefore be subjected to the security interest of Borro which Mr Toft does not dispute.

14. Peter Biddulph endeavoured to sell the viola, and for these purposes allowed potential purchasers to take possession of the instrument in order to assess and play it, as is normal when seeking to sell such an instrument by private treaty. In due course Mrs Bassano was approached by a dealer who lived in Tokyo called John Duffy who told her he had a purchaser who was interested in the viola. She authorised Mr Duffy to collect the viola from Peter Biddulph in order to allow a player in the Far East to try it out, to which Peter Biddulph agreed. The player decided not to buy the viola and Mr Duffy returned it not to Peter Biddulph, but to Mrs Bassano. When Peter Biddulph learned of this he demanded the return of the viola to him so that he could sell it with a view to recouping his loan from the proceeds. Mrs Bassano refused to return it.

15. In October 2010 Mrs Bassano took out a loan of £4,750 from Borro Loan 2 Limited under a written pawn agreement secured on another viola and various bows and jewellery. In March 2011 she had discussions with Nikki Gibson of Borro with a view to taking out a more substantial loan by pawning the 1803 Ceruti viola. On 15 March 2011 Ms Gibson offered her £130,000 at a monthly interest rate of 2.49% but she sought a lower interest rate. After further conversations on the phone, she met Ms Gibson at Borro's premises and said that she needed money very quickly in order to pay school fees. In April 2011 Borro spoke to Sean Bishop of Bishop Strings Ltd (collectively "Bishop"), a dealer in musical instruments, to advise it over the valuation of the viola. At this time Ms Gibson told Mrs Bassano that the offer of £130,000 remained available on condition that the viola was to remain in Borro's vaults, and the loan could not be made with the viola being held by Bishop. In a conversation on 19 April 2011, Mrs Bassano pressed Ms Gibson to agree to provide the loan without the viola being held by Borro, so that it might be tried out by potential purchasers, but the latter responded that the best that Borro could offer would be that the viola be held at Coutts Bank and be viewed there for sale if need be. This impasse was resolved in June 2011 once representatives of Borro visited Bishop and agreed terms on which they would be happy for Bishop to hold the viola as security for the loan to be provided for Mrs Bassano. It was envisaged that a tripartite document would need to be signed in due course.

16. On 1 July 2011 Borro Loan Ltd agreed to lend £130,000 on the security of the viola by way of pledge. All loans by Borro are made online. The agreement was contained in a written document generated online when Mrs Bassano was present at Borro's offices in the company of a representative of Borro ("the Borro Loan Agreement"). There is a dispute whether the agreement so generated was executed by Mrs Bassano in a manner which complied with the Consumer Credit Act 1974. The Borro Loan Agreement provided for £130,000 to be lent at monthly compounded interest of 2.49% until 31 December 2011, after which Borro would have a right to sell the viola.

17. £130,000 was transferred to Mrs Bassano by Borro Loan Limited pursuant to the Borro Loan Agreement. At that stage no agreement had been entered into with Bishop and accordingly the viola was retained by Borro in its vaults. Ms Gibson's notes suggest that it was intended to execute the tripartite agreement with Bishop the following week; in the event that did not occur because, according to Mrs Bassano, Mr Bishop and his company were unwilling to enter into such an agreement.

18. When the loan from Borro was agreed and advanced, Borro was not told by Mrs Bassano of the prior loans or the purported security in favour of Mr Toft. Nor was Mr Toft or Peter Biddulph told of the subsequent pawning of the viola to Borro.

19. In November 2011 Mr Bishop told Mrs Bassano that he had someone interested in buying the viola. Accordingly she approached Borro and explained the position. Borro agreed that it would allow the viola to be released to Bishop provided the dealer signed an agreement confirming that it would be kept in safekeeping in the dealer's vault. As a result a written tripartite agreement was drawn up between Bishop Strings Limited, Mrs Bassano, and Borro Loan 2 Limited. Mr Buckley-Sharp, who drafted the bespoke agreement on behalf of Borro, gave evidence

which I accept that naming Borro Loan 2 Limited as party to the agreement was a mistake on his part, arising from the fact that that had been the group company which had provided the first loan to Mrs Bassano; and that the intention had been for the agreement to be with Borro Loan Limited which was the party which had entered into the pawn agreement with Mrs Bassano which governed this viola. The terms of the written tripartite agreement, which was signed on behalf of each party, provided that Borro authorised Bishop to hold the viola to the order of Borro, to deal with it in accordance with Borro's instructions, and not to release the viola whilst any amounts remained outstanding to Borro under the loan agreement. Bishop agreed to keep the viola stored and locked in a safe room at night, and not to allow access to, or any movement of, the viola without prior written consent from one of two named representatives of Borro. Mrs Bassano agreed only to request access to the viola via Borro and agreed that Borro would only grant written authorisation to Bishop where in Borro's sole opinion it was deemed appropriate.

20. Bishop did not, however, abide by the terms of that agreement. Without the consent of Borro, the viola was passed to another dealer, Jurg Dahler, apparently to enable it to be tried out by a potential buyer.

21. On 3 December 2011 Mr Dahler took the viola to Peter Biddulph's shop. Mr Dahler left the viola at the shop when he went to lunch. It was recognised by Peter Biddulph as the viola in respect of which he had been in dispute with Mrs Bassano whose return he had been demanding since 2010. He explained the position to Mr Dahler and took possession of the viola with Mr Dahler's agreement.

22. In December 2011 and January 2012 there was considerable correspondence between the various parties claiming an interest in the viola. Mrs Bassano's solicitors demanded the return of the viola. Mr Toft (via new solicitors) applied to the High Court to extend the time for registering the unregistered Chattel Mortgage. Mrs Bassano issued proceedings against Peter Biddulph in the Sheffield County Court for delivery up of the viola. The proceedings were consolidated in the High Court, and consent orders were made for the viola to be sold by Mr Ingles, then head of the musical instruments department at Sotheby's. The viola remained unsold until the commencement of the trial when it was sold to Peter Biddulph in accordance with the order I made.

The claim by Mr Toft

23. The fact that the Chattel Mortgage is void, and that the covenant to repay which it contains is unenforceable, does not entitle Mrs Bassano simply to keep the money. There is in such cases an implied agreement to repay the money independently of the defective bill of sale: ***Davies v Rees*** (1886) 17 QBD 408 per Ld Esher MR at 411. In this case it is clear that there was an express agreement for loan on the terms set out in the Offer of Loan Finance document signed by the parties, and further evidenced by the terms of the Chattel Mortgage and by the payment by Mrs Bassano of interest at the agreed rate for each of the first ten months.

24. Such an agreement is a consumer credit agreement within the meaning of the Consumer Credit Act 1974, and is therefore only enforceable against Mrs Bassano

to the extent permitted by the Act. Because s. 141 of the Act provides that actions to enforce agreements regulated under the Act may only be brought in the county court, I have sat additionally as a judge of the Central London County Court for that purpose.

25. On behalf of Mr Toft it was submitted that the Act is no bar to enforcement for the following reasons.

    (1) The agreement is not a regulated agreement, being an exempt agreement by reason of s16B of the Act.

    (2) Alternatively, if the agreement is a regulated agreement:

        (a) it was not made by Mr Toft in the course of a consumer credit business, which removes any bar to enforceability arising from the fact that Mr Toft is unlicensed; and

        (b) it is a non-commercial agreement, which removes any bar to enforceability arising from the fact that the agreement does not comply with the detailed requirements laid down in Part V of the Act and the regulations made thereunder.

    (3) Alternatively the Court should exercise its discretion under sections 65 and 127 to enforce the agreement.

Exemption under s. 16B

26. Under section 8(3) of the Act, a consumer credit agreement is not a regulated agreement if it is an "exempt agreement" as specified in or under (amongst other sections) section 16B. Section 16B (1) provides that the Act does not regulate an agreement granting credit of more than £25,000 "*if the agreement is entered into by the debtor ….wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him*". Section 189(1) defines "*business*" as including a "*profession or trade*".

27. Mr Allston submitted that the loan by Mr Toft was entered into wholly or predominantly for the purposes of her profession as a professional musician. I am unable to accept that submission. The only evidence on which it was based was the fact that Mrs Bassano was a professional viola player. But that is not of itself sufficient to give rise to the inference that the finance was predominantly required to enable her to continue to play professionally. Borrowers regularly take out finance for purposes other than their business trade or profession. The Offer of Loan Finance document recorded that the purpose of the loan was for "the private use of the Borrower".

28. Moreover, although in Mrs Bassano's case there is no direct evidence of the purpose of the loan from Mr Toft, the evidence reveals two instances of her borrowing money from others for purposes other than for her professional activities. Her witness statement suggests that the purpose of seeking finance from Peter Biddulph, some six months before Mr Toft was approached, was to discharge legal costs incurred in a long running dispute with builders who had

carried out work on her home which had resulted in a second charge on the property. When it came to the loan from Borro in 2011, she told Ms Gibson that she needed the money to pay school fees. These examples demonstrate that it would be illegitimate to infer from no more than the fact of her profession that the predominant purpose of the loan by Mr Toft was to enable her to pursue that profession.

Agreement made in the course of a consumer credit business

29. Under section 21(1) of the Act, a licence is required to carry on a consumer credit business. Under s. 40 of the Act, regulated agreements by unlicensed creditors are unenforceable if made by the creditor "*in the course of a consumer credit business*" (unless retrospectively approved by the OFT). The term "*consumer credit business*" is defined in s. 189(1) of the Act as meaning "*any business being carried on by a person so far as it comprises or relates to (a) the provision of credit by him, or (b) otherwise his being a creditor*".

30. Mr Toft's business as a dealer in instruments does not ordinarily involve his making loans. His unchallenged evidence was that the loan to Mrs Bassano was the only occasion on which he had ever done so, and was therefore a one off.

31. The argument that Mr Toft falls foul of the licensing requirement is as follows. The loan and its repayment with interest would have been accounted for by Mr Toft through his business as a dealer. Moreover if Mr Toft had been able to realise the intended security for the loan and take possession of the viola, it would have become part of the stock of his business. Accordingly the loan was a business transaction, carried on as part and parcel of his business as a dealer in fine instruments. Although the dealer business was not consumer credit business as such, the loan was a business transaction, and to that extent he was carrying on consumer credit business which required a licence because consumer credit business is defined as meaning any business *so far as* it relates to or comprises the provision of credit.

32. It is clear from the authorities that such an argument is unsound. Transactions are not to be regarded as occurring "in the course of" a business unless they have some degree of regularity such that they form part of the normal practice of the business. In ***Davies v Sumner*** [1984] 1 WLR 1301 a self employed courier used his car almost exclusively for his business. He sold the car falsely stating that it had done 18,000 miles when its true mileage was 118,000 miles. His conviction for applying a false trade description to the vehicle "in the course of a trade or business" contrary to s. 1(1) Trade Descriptions Act 1968 was quashed by the Divisional Court whose decision was upheld by the House of Lords. Lord Keith said:

> "Any disposal of a chattel held for the purposes of a business may, in a certain sense, be said to have been in the course of that business, irrespective of whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion section 1(1) of the Act is not intended to cast such a wide net as this. The expression "in the course of a trade or business" in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is

to be observed that the long title to the Act refers to misdescriptions of goods, services, accommodation and facilities provided in the course of trade. ……..”

33. The same principle was applied to the Consumer Credit Act licensing provisions by the Court of Appeal in ***Hare v Schurek*** [1993] CCLR 47 (1993) GCCR 1669. Section 40 in its then form rendered regulated agreements by unlicensed creditors unenforceable unless they were “*non-commercial agreements*” which bore the definition then, as now, in section 189(1) as meaning “*a consumer credit agreement ……not made by the creditor or owner in the course of a business carried on by him*” . The Court held that if the transaction between the parties was ”one off” or “of a type only occasionally entered into by the applicant in the course of his motor trade business” or “unique or a manifestation of occasional transactions” it did not fall within the licensing requirements because it was not made in the course of a business. This conclusion was supported by s.189(2) which provides “*A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type*.” Mann LJ observed that such a conclusion was consonant with the purpose of the Act which is to regulate those who carry on particular forms of business as a trade or profession. See also *Goode: Consumer Credit Law & Practice* Issue 41 para 23.141 which in my view correctly summarises the position and how the judgment of Mann LJ in ***Hare v Schurek*** is to be interpreted. An occasional or one off consumer credit transaction does not require the creditor to be licensed because it is not carried out in the course of *any* business, whether consumer credit business or any other business.

34. The loan agreement with Mr Toft was not therefore such as to require him to be licensed. As a one off transaction it was not made in the course of carrying on a consumer credit business, nor was it made in the course of his business as a dealer, or any business.

Non-commercial agreement

35. Under section 74(1) of the Act, Part V does not apply to a non commercial agreement, which is defined in s. 189(1) as meaning “*a consumer credit agreement ……not made by the creditor or owner in the course of a business carried on by him*” and is subject to s. 189(2) which provides “*A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type*.”

36. For the reasons already given, the loan agreement with Mr Toft was not made in the course of a carrying on a consumer credit business, nor was it made *in the course of* his business as a dealer or any business. Accordingly it was a non commercial agreement and Part V has no relevant application.

37. That is sufficient to entitle Mr Toft to judgment for the loan, together with interest. If I had reached a different conclusion on whether it was a non commercial agreement, I would have exercised my discretion under sections 65 and 127 of the Act to enforce the loan in full against Mrs Bassano. She suffered no real prejudice from the fact that there was no formal document complying with the requirements of Part V and the Regulations made thereunder. The terms of the loan were

simple and did not involve compounded interest. They were set out in writing in the Offer of Loan Finance and in the Chattel Mortgage in clear terms. There can be no doubt that Mrs Bassano understood them perfectly well at the time and had a clear and sufficient written record of them. There is little culpability attributable to Mr Toft for failure to comply with the requirements of form prescribed by the Act. It resulted from the failure on the part of his then solicitors to effect a timely registration of the Chattel Mortgage.

The claim by Borro

38. Two points arise in relation to Borro's claim. The first is the argument previously advanced on behalf of Peter Biddulph which is adopted on behalf of Mrs Bassano, that the Borro Loan Agreement was not executed by her in a manner which complied with the Consumer Credit Act 1974 because she did not sign it. The second is that Borro lost any security interest in the viola (a) when it was delivered to Bishop or (b) when it was delivered by Bishop to Mr Dahler or (c) when it was delivered to Mr Ingles of Sotheby's pursuant to the order of the Court that it should be sold.

Execution of the Borro Loan Agreement

39. Section 61(1)(a) of the Act provides that a regulated agreement is not properly executed unless a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor and by or on behalf of the creditor. The issue is whether the Borro Loan Agreement was "signed" by Mrs Bassano so as to fulfil this requirement.

40. The agreement was reached and documented as follows. Mrs Bassano was present at Borro's offices in the company of a representative of Borro. All loans by Borro are made online. The customer has to create an account online with personal information, including his or her name, and choose a password. When the loan terms are agreed, as a first stage the customer is presented on screen with a pre contract agreement setting out the proposed terms of the loan. The customer then acknowledges and accepts this information, following which the formal loan agreement is presented on the screen. It includes amongst other things the name of the borrower as part of the agreement. The customer indicates acceptance of that loan agreement by clicking on an acceptance button marked "I Accept" which is in a defined field on the screen. The concluded agreement is then generated in PDF form, which is available to the customer at any stage by logging on to the customer account and using the chosen password; and is available to be printed as a PDF document. The agreement is incapable of being changed after the customer has clicked on the "I accept" button. The agreement so generated also operates as the pawn receipt required by s114 of the Act, as its terms make clear.

41. Mrs Bassano followed this procedure so as to bring into existence the Borro Loan Agreement. It recorded on the first page amongst other things her name and that of Borro Loan Ltd. In a box on the second page it stated:

"This is a credit agreement regulated by the Consumer Credit Act 1974

The client signed it by clicking "I Accept" in their account in the presence of a Borro representative and has agreed to be legally bound by its terms.

Date of signature 01/07/2011

Time of Signature: 14:05:41"

42. Generally speaking a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email: see ***Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd*** [2012] 2 All ER (Comm) 978 at [32]. Section 7 of the Electronic Communications Act 2000 recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity.

43. Section 61 of the Act requires the agreement to be signed "in the prescribed form". The form prescribed at the time was that required by The Consumer Credit (Agreements) Regulations 2010 (SI 2010 No 1014). Regulation 4 governs signing. The only relevant prescription is in regulation 4(3)(a) which provides that the signature must be in a space indicated in the document for that purpose and dated. Regulation 4(5) recognises that a regulated agreement may be concluded electronically and that the document may contain "information about the process or means of providing, communicating or verifying the signature to be made by the debtor." There is therefore nothing in the Consumer Credit Act 1974 to suggest that regulated agreements should not be capable of electronic signature; and I can see no reasons of policy why a signature should not be capable of being affixed and communicated electronically to an agreement regulated by the Act, just as it can for other documents which are required to be signed.

44. Mrs Bassano electronically communicated to Borro her agreement to be bound by the terms of the Borro Loan Agreement by clicking on the "I Accept" button and thereby generating a document sent to Borro bearing her typed name which authenticated the document and communicated her agreement to be bound by its terms. That constituted signing it so as to fulfil the requirements of s. 61 of the Act.

45. There arises a further question whether the location of such signature is in the form prescribed by Regulation 4(3)(a) which requires it to be in "the space in the document indicated for the purpose". The words "I accept" appear in such a space, but Mrs Bassano's name appears on the previous page. In my view the statutory regulation is fulfilled. A signature need not consist of a name, but may be of a letter by way of mark, even where the party executing the mark can write: ***Baker v Dening*** (1838) 8 Ad & E 93. The signature may consist of a description of the signatory if sufficiently unambiguous, such as "Your loving mother" (***In re Cook*** [1960] 1 All ER 689) or "Servant to Mr Sperling" (***In re Sperling*** (1863) 3 Sw & Tr 272). In the Borro Loan Agreement, the signature is made by the electronic communication of the words "I Accept" which are in the space designated for a signature. They constitute a good signature because the word "I" can be treated as being the mark which is unambiguously that of Mrs Bassano

affixed for the purposes of authenticating and agreeing to be bound by the terms of the document. The signature is therefore in the designated space by reason of the words "I Accept" being in that space. The name on page one is of relevance because it is evidence that "I" is Mrs Bassano's mark, if any were needed in addition to the evidence that it was she who clicked the button; but it is the words "I Accept" which constitute the signature, not the name on the previous page.

46. For completeness I should record that had I reached a different conclusion, I would have acceded to the invitation from Borro to exercise my discretion under s. 65 and 127 to enforce the agreement in full. If, contrary to my conclusions, the means by which the agreement was concluded and generated did not involve a signature complying with the prescribed form, the defect was purely technical and Mrs Bassano suffered no prejudice as a result. There can be no doubt that she deliberately indicated her consent to be bound by the terms of the document, a copy of which she had as a pawn receipt. It contained all the matters prescribed by the Act and the regulations thereunder in the prescribed form. It was her pleaded case in a verified statement of case (P/Claim paragraphs 21 to 23) that she had entered into and executed the agreement, and the signature point was only subsequently adopted because it had been advanced (but not pursued) on behalf of Peter Biddulph. No significant culpability would attach to Borro for such technical defect, if defect it were. I was told that the form and means of concluding this agreement was the standard form recommended by The National Association of Pawnbrokers.

Loss of security interest by loss of possession.

47. A pledge is a common law security interest created by bailment of property as security for the performance of an obligation, most usually payment of a debt. Pawn is the term often used for pledges of chattels for short term loans to consumers. The pledgee's interest carries with it a right to possession so far as is necessary to secure the debt and an implied right to sell the chattel for such purpose. Pledge agreements with consumers are regulated under the Consumer Credit Act 1974 and regulations made thereunder. Section 120 of the Act confers on the pledgee an express right to sell the goods after the time allowed to the pledgor to redeem has expired.

48. Mrs Bassano adopted the submission articulated in the skeleton argument served on behalf of Peter Biddulph that Borro's security interest in the viola was lost when Borro parted with possession. The submission was that it was the parting with physical possession which destroyed the security interest.

49. The exact nature of the pledgee's interest in the pledged goods is not settled. It is variously described in the authorities as a "special interest" or a "special property". The latter description was criticised by the Privy Council in ***The Odessa*** [1916] 1 AC 145 at 158-9, in which it was said that the pledgee has no proprietary interest in rem in the pledged chattel, but merely a personal right, conferred by the pledgor as owner of the property, to detain and sell the chattel for the benefit of both parties, such that the right is indistinguishable from the right of lien save for the power of sale. But in other cases the pledgee's interest has been treated as a proprietary interest which is capable of assignment and transfer, unlike a lien which is merely a right of possession: see ***Coggs v Bernard*** (1703) 2 Ld

Raym 909 per Holt CJ at 916, and ***Donald v Suckling*** (1866) LR 1 QB 585 per Blackburn J at 614. It is not necessary for the purpose of this case to determine the extent to which the interest is properly called proprietary, as to which see *Beale on The Law of Security and Title-Based Financing* 2nd Ed at 5.03-5.05.

50. Although it is necessary for a pledgee to take actual or constructive possession of the chattel (or document of title) in order to vest his special interest in the first place, it is clear from a number of authorities that it is not every parting of possession which is sufficient to defeat his interest.

51. In ***Donald v Suckling*** (1866) LR 1 QB 585 it was held that a sub pledge by the pledgee does not destroy the pledge or the pledgee's special interest.

52. In ***Babcock v Lawson*** (1880) 5 QBD 284, the Court of Appeal held that a pledgee did not lose his special interest when he surrendered the goods back to the pledgor pursuant to a fraudulent representation that the pledgor had secured a sale and would account to the pledgee for the proceeds. In such circumstances whilst the goods remained in the hands of the pledgor, the pledgee was entitled to their return; but once the pledgor had surrendered the goods to a bona fide third party for value, the latter acquired priority in the goods.

53. In the Scottish appeal in ***North Western Bank v Poynter*** [1895] AC 56 (HL), Lord Herschell LC made clear at p. 67-68 that it was beyond argument that the law of England was that if a pledgor surrendered his possession to an agent for the particular purpose of effecting a sale, he did not thereby lose his security, even if the surrender was to the pledgor. This principle was applied in ***In Re David Allester Ltd*** [1922] 2 Ch 211, 216. This is because the surrender is not of possession in the legal sense, but merely of custody: see ***Official Assignee of Madras v Mercantile Bank of India Ltd*** [1935] AC 53 (PC) at per Lord Wright at 64 and ***Reeves v Capper*** below.

54. In ***Reeves v Capper*** (1838) 5 Bing (NC) 136 a ship's master, Captain Wilson, pledged a chronometer to his owners, Messrs Capper, in return for an advance. The shipowners permitted him to retake possession in order to use it on a voyage. After the voyage the captain returned the chronometer to the makers to be held by them for him. He subsequently purported to grant the property in it to an attorney pursuant to a transaction settling a threatened execution of a writ of fieri facias. The attorney took possession and returned it to the makers to hold for him. In the Court of Common Pleas Tyndal CJ held that the Defendant shipowners retained their security interest in the chronometer in priority to the attorney, and had not lost it either by parting with possession to the captain for the purposes of the voyage, or when the captain had delivered it to the makers thereafter:

> "And as to the second point, we agree entirely with the doctrine laid down in *Ryall v Rolle* (1 Atk. 165), that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge: but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were that "they would allow him the use of it for the voyage:" words that gave him no interest in the

chronometer, but only a licence or permission to use it, for a limited time, whilst he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper; just as the possession of plate by a butler is the possession of the master; and the delivery over to the Plaintiff was, as between Captain Wilson and the Defendants a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself. We therefore think the property belonged to the Defendants, and that the rule must be made absolute for entering the verdict for the Defendants."

55. This case therefore supports the further proposition that if a pledgee surrenders custody to an agent for a limited purpose consistent with retention of his interest as pledge, he does not thereby lose such interest if the agent parts with possession without his consent or authority. In ***Donald v Suckling*** (sup) Blackburn J identified this as a difference between pledge and lien, the latter being lost by unauthorised transfer of possession (see p. 612).

56. These cases make clear that a pledgee does not lose his special interest merely by parting with physical possession. He will not do so merely because:

(1) he loses possession as a result of theft or fraud (***Babcock v Lawson***);

(2) he delivers up the goods to an agent to be sold on his behalf (***North Western Bank v Poynter***) or to be retained by the agent for a specific purpose (***Reeves v Capper***);

(3) such agent makes an unauthorised delivery of possession to a third party (***Reeves v Capper, Donald v Suckling***);

(4) he sub pledges the goods, at least in circumstances where he retains the ability to redeem the subpledge if the pledgor seeks to redeem the pledge (***Donald v Suckling***).

57. I consider the relevant principle to be this. The pledgee's special interest, whether or not properly described as proprietary in nature, may be defeated by a superior property interest held by someone other than the pledgor, such as that of a true owner from whom the pledgor had derived no good title, or a subsequent bona fide purchaser for value without notice of the pledge (see ***Babcock v Lawson*** (1880) 5 QBD 284 per Bramwell LJ at 286). But in the absence of a superior property claim by a third party, the pledgee's special interest is not lost by parting with possession of the chattel unless he does so in circumstances which constitute a voluntary surrender of his interest. What is required is a voluntary surrender of his special interest as pledgee, rather than simply a surrender of physical possession. The voluntary surrender of possession will not be treated as a surrender of his special interest as pledgee unless the circumstances of such surrender are inconsistent with the preservation of that special interest. If the loss of possession is involuntary, or where voluntary, consistent with an intention to preserve his special interest, such interest is not thereby lost.

58. Applying such principles to Borro's dealing with the viola in this case, it is clear that there was no loss of its special interest as pledgee:

(1) Delivery by Borro to Bishop was delivery by Borrro to its agent for the purposes of safe keeping and demonstration to potential purchasers, in order to enable it to be sold and the proceeds used to repay the loan. There was no surrender of possession in the legal sense, merely surrender of custody. The transfer of custody was not inconsistent with preserving the special interest of Borro as pledgee; on the contrary it was for the purposes of protecting that interest. This conclusion is unaffected by the error in naming Borro Loan 2 Ltd in the written tripartite agreement. The bailment to Bishop was a bailment on the terms of the agreement and clearly understood by both Borro Loan Ltd and Bishop to have been such. The document evidenced the terms orally agreed on which Bishop was to take possession of the Viola from Borro as bailee.

(2) Delivery by Bishop to Mr Dahler was unauthorised by Borro. It was contrary to the terms on which it was agreed that Borro would hold the viola. It was not a voluntary surrender by Borro of its special interest so as to defeat it, just as the owners' special interest in ***Reeves v Capper*** was not destroyed by the master's unauthorised transfer to the attorney by means of the attornment by the makers in that case. It was not a voluntary surrender of possession by Borro at all.

(3) The delivery of the viola to Mr Ingles of Sotheby's pursuant to the order of the court, to which Borro consented, was a transfer of custody to an agent for the purposes of sale. Again there was no surrender of possession in the legal sense, merely surrender of custody. It was not inconsistent with Borro preserving the special interest as pledgee; on the contrary it was for the purposes of protecting that interest by realising the security by selling the viola.

Conclusion

59. Mr Toft's claim for £100,000 and contractual interests at the rate of £2,500 per month (uncompounded) succeeds. Borro Loan Ltd's claim for £130,000 and interest at the contractual rate succeeds. Borro Loan Ltd is entitled to be paid such sum from the proceeds of sale of the viola in Court in priority to Mr Toft.