



Neutral Citation Number: [2021] EWHC 995 (Ch)

Case No: BR-2020-000382

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
London
EC4A 1NL

Date: 23/04/2021

Before :

CHIEF ICC JUDGE BRIGGS

Between :

MELISSA JACKSON
(Trustee in Bankruptcy of Stephen Anthony Ayles)

Applicant

- and -

- (1) STEPHEN ANTHONY AYLES**
(2) CECILIA GAY AYLES
(3) TREVOR JON PUMPHREY
(4) KAREN LESLEY PUMPHREY

Respondents

SIMON PASSFIELD (instructed by **FREETHS LLP**) for the **Applicant**
REBECCA FARRELL (instructed by **LACEYS**) for the **Second Respondent**
THOMAS SAMUELS (instructed by **HENCHLEYS**) for the **Third and Fourth Respondents**

Hearing dates: 14, 15 April 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00 hrs on 23 April 2021

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.

.....

CHIEF ICC JUDGE BRIGGS

Chief ICC Judge Briggs:

1. Mr and Mrs Ayles undertook property development. They were unable to obtain finance from a conventional lender. Mr Pumphrey lent money secured on their matrimonial home.
2. Mrs Jackson was appointed Mr Ayles' Trustee-in-Bankruptcy after he was adjudicated bankrupt in 2016 with debts in excess of £3,600,000. The property of Mr Ayles is now vested in Mrs Jackson for the purpose of distribution to his creditors. Mrs Jackson has to collect in his property and now seeks possession and sale of the matrimonial home for that purpose. Enforcement of the security against the home would result in no available proceeds for the creditors of Mr Ayles.
3. Mrs Jackson makes this application within the bankruptcy proceedings seeking a declaration that the security held by Mr Pumphrey is unenforceable pursuant to the Financial Services and Markets Act 2000.
4. A second charge in favour of Mr and Mrs Pumphrey, secured against the matrimonial home several years later, is also challenged but on different grounds. It is said that the second charge is void as it was granted in the period between presentation of the bankruptcy petition and the making of the bankruptcy order. Shortly before trial the issue was conceded.

Background

5. The facts leading to the provision of finance and the taking of security are generally agreed. In particular there is no dispute regarding the following evidential matters:
 - 5.1. Mr Pumphrey left school at 16 to train as a tool maker. At the early age of 23 he started a manufacturing business which made plastic injection mould tools. The business operated from Modern Moulds Business Centre ("MMBC") and traded as a limited company. It was very successful. In 1990 he sold it to a listed company for an undisclosed but significant sum. A few years later he purchased MMBC from the buyer. In his written evidence he explains that he made the business into "a 'one-stop-shop' for custom moulded plastic products" where he "continued to focus on the design, engineering and manufacture of the plastic injection mould tools". He also started another plastic business known as "Whistle Stop Plastics Ltd" and sold both businesses in 2012;

- 5.2. He was an early investor in real property, residential and industrial, in the UK and the United States. The rental income he receives is significant;
- 5.3. As a result of these activities Mr Pumphrey is a wealthy individual who was prepared to make loans to individuals and businesses;
- 5.4. Mr Pumphrey holds his rental property business, among other things, from MMBC;
- 5.5. Mr Ayles is a plasterer by trade but has learnt to be a general builder and manage building sites;
- 5.6. His experience has given him the ability to identify building projects capable of development with a view to profit;
- 5.7. Mr and Mrs Ayles are foster parents and desired a stable home to care for children;
- 5.8. They had little savings and needed money for a deposit to buy a home;
- 5.9. Mr Ayles was unable to obtain main-stream funding for projects that he had identified and turned to Mr Pumphrey;
- 5.10. Mr Pumphrey was willing and able to lend money on a secured basis, taking a charge over the property under development or improvement;
- 5.11. On each occasion he lent money to Mr Ayles he required monthly compound interest;
- 5.12. The loans made were expressed to be for a fixed short term;
- 5.13. In June 2008 Mr Ayles entered into the first funding agreement with Mr Pumphrey to build and develop 11A Canada Road in West Sussex (“Canada Road”);
- 5.14. Six or so months into the development Mr Ayles was diverted to assist Mr Pumphrey develop a property known as the Quadrant which did not complete until February 2011;
- 5.15. The sale of Canada Road was completed in March 2010. The sale proceeds were insufficient to repay the loan and interest due to Mr Pumphrey. Mr and Mrs Ayles

received nothing from the proceeds. Mr Pumphrey received the return of his capital and £41,273.24 in interest. There was a short-fall of £6,563.16;

- 5.16. Soon after the sale, Mr and Mrs Ayles move into a property known as Anne Howard Gardens which requires development. Mr Pumphrey provides the finance on substantially similar terms as he provided finance on Canada Road namely, 1% per month for the first eight months of the loan and 2% thereafter, compounded monthly;
 - 5.17. After development or improvement by Mr Ayles, Anne Howard Gardens is sold. In July 2013 Mr and Mrs Ayles receive £7,305.53 from the sale proceeds. The capital advanced by Mr Pumphrey is returned to him with interest of £105,103.23;
 - 5.18. In the same month Mr Ayles seeks funding to purchase a home in Weymouth (the “Weymouth Property”) intended to be a family home for Mr and Mrs Ayles. The mother of Mrs Ayles lent £30,000 and Mr Pumphrey agreed to lend £180,000 to acquire the property. The purchase of the Weymouth Property completed in September 2013. The loan made by Mr Pumphrey was secured by a first charge with interest at 0.75% per month for twelve months compounded monthly. After the initial twelve month period the interest rate increased to 1% compounded monthly. I shall refer to this loan as the “Weymouth Loan”;
 - 5.19. Mr Ayles identified a development opportunity in Lyme Regis in 2014 and obtained funding from a bank to build 5 new homes. Mrs Ayles’ unchallenged evidence is that in June 2015 one of the subcontractors lost his life on the building site which had a significant effect on Mr Ayles. He was investigated by the Health and Safety Board and the bank withdrew its funding. Although Mr Ayles was acquitted of all charges he became financially paralysed by the incident; and
 - 5.20. The inability to build-out the Lyme Regis site meant that there were no profits to repay Mr Pumphrey for the lending on the Weymouth Property.
6. In dispute is whether lending to individuals and businesses amounts to a business. Mr Pumphrey says not.
 7. In cross-examination he said:

“I am not in that business- I had a significant business from manufacturing and renting property- that is my main stay of my income and not from what I consider to be helping people.”

8. Counsel for Mrs Ayles persisted and elicited the following response from Mr Pumphrey to the question of whether he intended to make a profit on the loans he made:

“yes no one has said that I did not want to make a profit- it is a fair profit”

9. There is some dispute about when Mr Pumphrey first met Mr Ayles. His written evidence is that Mr Ayles mentioned to him that he may have seen him at a motorcycle event in 2006. Mr Pumphrey does not recall meeting him until 2007 or 2008. He was pressed on the issue in cross-examination and responded: “I may have met them prior to that date”.

10. There is documentary evidence supporting a meeting in early 2008 between Mrs Ayles and Mr Pumphrey’s assistant at MMBC, Emma Swan. Mrs Ayles approached MMBC to hire a shipping container for the purpose of storing building equipment and materials. Mr Pumphrey acknowledged that he was likely to have met Mrs Ayles during the course of the transaction that resulted in a formal agreement for hire of the container. He would also have met Mr Ayles. There is no evidence of an earlier relationship or meeting.

11. In cross-examination Mr Pumphrey was asked why people asked him to lend money. He speculated that people knew he was interested in helping local business and had available funds: “friends approach me for money; I think they do so because I am approachable and have money.”

Legal structure

12. Certain activities in respect of “regulated mortgage contracts”, including “entering into a regulated mortgage contract as lender” or making arrangements “for another person to enter into a regulated mortgage contract as borrower”, if carried on by way of business, are regulated activities and, accordingly, cannot be engaged in by unauthorised persons: Section 19 Financial Services and Markets Act 2000 (“FMSA”); Art 61(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

13. In *Helden v Strathmore Ltd* [2010] EWHC 2012 Newey J found that Strathmore Ltd (“Strathmore”) contravened s.19 and the loans were unenforceable by reason of sections 26 and 28 FSMA. He explained [64]:

“Section 19 of FSMA bars anyone but an ‘authorised person’ or an ‘exempt person’ from carrying on a ‘regulated activity’ in the United Kingdom (the ‘general prohibition’). Section 22(1) provides that an activity is a ‘regulated activity’ if, among other things, it is ‘an activity of a specified kind which is carried on by way of business’ and either (under section 22(1)(a)) ‘relates to an investment of a specified kind’ or (under section 22(1)(b)) ‘in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind’. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 . . . specifies kinds of activity for the purposes of section 22 of FSMA (see article 4). The activities specified include certain activities relating to ‘regulated mortgage contracts’, [an expression] defined in article 61.”

14. Section 26(1) provides: “An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party”. Section 26(2) entitles the other party to recover money transferred under the agreement and compensation for loss sustained but as Newey J found [69] that is more likely to relate to where the “other party” has made an investment rather than been lent money. Section 28 FSMA is significant in this case. It provides:

“(1) This section applies to an agreement which is unenforceable because of section 26 . . .

(2) [Deals with the amount of compensation].

(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –

(a) the agreement to be enforced; or

(b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must –

(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); . . .

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

. . .

(7) If the person against whom the agreement is unenforceable –

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

he must repay any money and return any other property received by him under the agreement”

15. In this case (as in *Strathmore*) there is a concession that Mr Pumphrey has conducted an ‘activity of a specified kind’ for the purposes of FSMA, and it is common ground that he is an unauthorised person. Mr Pumphrey contends (as *Strathmore* did) that because the activity had not been carried on ‘by way of business’ it was not regulated and so did not infringe s.19.

16. In *Strathmore* Newey J found, as a matter of fact, that it did carry on the activity ‘by way of business’ but the court exercised its discretion pursuant to s 28 of FSMA to allow the loan agreements rendered otherwise unenforceable, to be enforced.

17. Paragraph 4.3.7 of the Perimeter Guidance Manual issued by the Financial Services Authority states: “the ‘by way of business’ test in section 22 could be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done by “way of business” in all other respects)”. This is reflected in the judgment of Newey J [85] where he reasoned that section 22: “cannot be intended to mean that the relevant activity should itself represent a business. Section 22 must extend to cases where an ‘activity of a specified kind’ is carried on in the course of a wider business, not limited to undertaking that activity”. Following some guidance found in *Khodari v Al Tamimi* [2009] EWCA Civ1109 Newey J weighed the factors and found the following evidential matters were indicators of ‘carrying on by way of business’:

17.1. Strathmore made a sizeable number of loans, including the loans to Mr Helden;

17.2. The loans were made over a number of years and with some regularity;

17.3. Substantial amounts of money were advanced;

17.4. The loans were made with a view to profit;

17.5. Mr Helden was seeking funding and a friendship grew out of their financial relationship, not the other way around;

17.6. There was some informality but solicitors were often instructed;

17.7. The loans were generally secured;

17.8. The loans formed part of a chain of not dissimilar transactions; and

17.9. Stathmore was a limited liability company with commercial objects.

18. On appeal [2011] EWCA Civ 1633 (Ch) Lord Neuberger M.R. commented that “no attack has been, or I think could be, made on the accuracy of the eight factors which the Judge identified...”.

19. As foreshadowed above, where a person is found to have carried on a regulated activity in contravention of the general prohibition, it is ‘unenforceable’ pursuant to section 26(1) FSMA, but section 28(3) provides the court with a discretion to allow the agreement to be enforced if it is just and equitable to do so (in all the circumstances) having regard to

‘whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition...’.

20. It is instructive to see how the Court in *Strathmore* dealt with the ‘just and equitable issue’.

21. The Court found that Strathmore did not appreciate FSMA applied and that it was reasonable for it not to have done so. In this respect the Judge took account of the recent introduction of the provision. He concluded that the lack of appreciation was an important factor in considering the exercise of discretion but not the only factor. Newey J (and the Court of Appeal) reached the conclusion that it was just and equitable to permit enforcement as:

21.1. Mr Helden had benefitted from the use of the property which Strathmore’s loans enabled him to buy without making any interest payments or paying any rent;

21.2. The other side of the above coin was that Strathmore received no return for the £1m loan made. It is likely that it could have received some return if a performing investment had been made elsewhere;

21.3. The property had increased substantially in value which would afford Mr Helden a profit (£800,000 gross);

21.4. Strathmore was not willing to make the loan on an unsecured basis;

21.5. Mr Helden had been a mortgage broker and was experienced in property matters. He had not been taken advantage of. The arrangements had been to his advantage since he was able to make lump sum repayments without incurring a penalty;

21.6. Mr Helden preferred not to pursue alternative funding because of his concern that he should be able to make lump sum repayments without penalty . . . ;

21.7. He failed to identify respects in which he would have been better placed if Strathmore had been an ‘authorised person’ for FSMA purposes; and

21.8. It was not reasonable for the lender to realise that FSMA could apply.

22. It is apparent from these indicators that Court was weighing the respective sophistication and experience of the parties, whether the borrower was taken advantage of, motivation for the borrowing and if he benefited from the transaction. Importantly to my mind, and something I canvassed with counsel in closing submissions, is the language ‘just and equitable’ in the context of unregulated lending and FSMA. In my judgment Newey J had this in mind when (i) directly addressing the issue of whether Strathmore reasonably believed it was not contravening FSMA and (ii) if the borrower would have been better served if the lender had been an ‘authorised person’.

23. In the Court of Appeal Lord Neuberger considered the meaning of “reasonably believed” and indicated that ignorance is unlikely to avail a person relying on section 28(3) FSMA. In doing so he hinted that he might disagree with the approach adopted by Newey J: [47]

“Believing that one is not doing something is simply not the same thing as not believing one is doing something: to believe wrongly that one is not committing an act requires a degree of knowledge as to what that act is or entails, whereas wrongly not believing one is committing an act requires a degree of absence of knowledge, which renders it easier to contend that it would apply where one is ignorant of the existence of the act.”

24. Although he thought there was ‘considerable force’ in that analysis he considered (by contrast) that there was ‘some force’ [48]:

“In the point that it is unlikely that Parliament could have intended that a person who wrongly, but reasonably, believes that he is not contravening a statute should be better off than a person who was reasonably unaware that the statute applied.

Having said that the answer to that point may be that people who carry on regulated activity and are ignorant of the law, even if reasonably so, should be more at risk because they are more of a danger to the public...”

25. He declined to decide the point because it was unnecessary for him to do so.

26. This is the legal framework within which this application is made. It will be apparent that there are three questions for the court:

26.1. Was the making of the Weymouth Loan an activity “carried on by way of business” within section 22(1) FSMA;

26.2. If the consequences of section 26(1) FSMA apply is it “just and equitable” to allow the Weymouth Loan to be enforced; and if so

26.3. how should the court exercise its discretion.

The witnesses

27. I heard first from Mr Pumphrey. He has provided two witness statements. I have little doubt that he tried to assist the court with his evidence. I find that in some matters his evidence was not reliable. In my judgment the lapse of time between the events and the court hearing was in part to do with his mistaken testimony. He had convinced himself of certain matters over time when they were not true. He is an intelligent individual who at times anticipated questions before they were asked but when he was not clear about something he sought clarification. His counsel described him as “commercial to the core”. He would probably take some pride in that description. He expressed triumph about the road he had taken to financial success. Mr Ayles said that he was a man with whom one could not negotiate. It is not inconsistent for a businessman to be a hard negotiator. When questioned, Mr Pumphrey could not understand why any lender would agree to a simple interest provision and thought he would be unlikely to favour family members with a soft loan. He described Mr and Mrs Ayles as friends, but did not seek to define or explain the basis of the friendship. A few meetings and a business association appeared sufficient. He had a tendency to view himself as altruistic, lending to help others less fortunate. In my judgment his desire to enrich himself was and is his first priority. The combination of counting Mr and Mrs Ayles as friends, and his belief that he was lending for their benefit is played out in the transactions he entered. The profits he made on the sale of Canada Road and Anne Howard Gardens measured against the profits received by Mr and Mrs Ayles are disproportionate. When asked why he was not more generous to people he counted as friends he retorted that they needed an incentive to get the work done and firmly believed in the bargain struck.

28. Mrs Pumphrey also gave evidence. She had no personal knowledge of the matters I have to decide. She met Mr and Mrs Ayles through Mr Pumphrey, had nothing to do with the lending for the Weymouth Loan and had visited them for a dinner on one occasion. She had also seen either Mr Ayles alone or he and his wife at their house. Some of her evidence was mere assertion. Mrs Ayles stated in her written evidence that Mr Pumphrey was only interested in profit. Mrs Pumphrey thought that he would never say such a thing and that they were empathetic to their situation. She was an honest witness albeit not detached from her husband's motivation to contest this application.
29. Mr Ayles gave evidence on the second day of the trial. He suffers from post-traumatic stress. Part way through cross examination his camera was switched off. I had thought that there may be a technical problem when Mrs Ayles appeared to explain that her husband could not continue; he was ill and he found cross-examination stressful. Towards the end of his cross-examination he repeated a phrase that gave some indication of him not wanting to continue: a kind of giving-up. When counsel put to him that he was the author of his own misfortune and that he had opportunities to sever the ties with Mr Pumphrey but did not take them because Mr Pumphrey was a good lender he simply responded "you can say that". He was invited to agree or disagree, he quickly disagreed and the camera went out. During the short period of his evidence I found his evidence cogent and truthful.
30. Mrs Ayles was an impressive witness. I find the evidence she gave was straight forward, truthful and given the time that has elapsed since the events took place, in most part reliable.

By way of business

31. As stated in paragraph [26] above the first question is whether the making of the Weymouth Loan was an activity carried on by way of business. In answering this question, I have in mind that the relevant activity may include an activity that is carried on in the course of a wider business. In my judgment the focus of the factual analysis is on the activities of Mr Pumphrey as lender and not so much on Mr and Mrs Ayles.
32. On this issue Mrs Pumphrey could provide no relevant evidence. Her evidence of Mr Pumphrey's business affairs was limited and/or had little or no bearing on this issue.

33. Mr Pumphrey, in cross-examination, agreed that he was interested in profit but only “a fair profit”. He accepted that the reason for taking security on each occasion was to protect his interests: “if I am lending money I think it right and proper that I take security.” He was asked directly if he was in the business of lending money. He thought the loans he had made were not dissimilar to putting money in a savings account with a bank: “if I put money in the building society I would not be in the business of lending money.” He eschewed the notion that lending to business and individuals as he had done was his business. When asked why he charged compound interest to people he counted as friends, he responded that it would be “ridiculous” to do otherwise.
34. I find, on the balance of probabilities that Mr Pumphrey’s lending was carried on by way of business for the following reasons:
- 34.1. The relationship between Mr and Mrs Ayles and Mr Pumphrey arose out of commercial dealings and not a prior friendship (see para 10 above);
 - 34.2. On his evidence he had sought advice from a lecturer of law at Kingston University about “private lending”;
 - 34.3. He had obtained a charge template for the purpose of securing his lending to “ensure I got my money back”;
 - 34.4. The lending to Mr and Mrs Ayles was “not built on trust”;
 - 34.5. The Weymouth Loan did not constitute an isolated lending occasion. Mr Pumphrey made several loans to Mr and Mrs Ayles over many years;
 - 34.6. Since 2005 he has lent more than £3.5m (albeit not at the same time) to 14 different individuals and companies. None of the loans were soft;
 - 34.7. He accepted that he wanted a return on his money; and
 - 34.8. All loans made entitled him to the receipt of interest in excess of market rates.
35. For the sake of completeness I do not find that lending money was his only business. It formed a part, likely to be a small part, of his overall enterprise. Although the relationship between bank and customer is that of debtor-creditor, Mr Pumphrey’s analogy between lending money to the Ayles and placing money on deposit is disingenuous. First, Mr

Pumphrey described in cross-examination how he would carry out his own investigations as to the viability of the building project Mr Ayles was embarking on before lending. Mr Pumphrey would not do the same of a bank which would use the deposit for its own purpose. He would not lend if he thought he would not receive the bargained return from the building project. Secondly, he only lent on a secured basis. He would not obtain security from a bank. Thirdly, he was able to negotiate or insist on the terms of the bargain. He would have not have been able to do so when making a deposit. Lastly he insisted on compound interest returns. The investigations, negotiations and taking of security are all indicators that part of his business was making a profit on loans made.

36. Accordingly, as Mr Pumphrey was not an ‘authorised person’ or an ‘exempt person’ he was therefore barred from carrying on a ‘regulated activity’, did carry on a ‘regulated activity’ in the course of a wider business and was in breach of the general prohibition. It follows that the Weymouth Loan is ‘unenforceable’ pursuant to section 26(1) FSMA.

Just and Equitable in the circumstances

37. Counsel for Mr Pumphrey and the Trustee-in-Bankruptcy argued that the opposite party did not need to enter into the Weymouth Loan. It is true that neither party was pressured into entering the agreement. It seems to me that this results in a neutral evaluation.

38. Mr Pumphrey relies on the following factors in support of a declaration that he be entitled to enforce:

38.1. Mr and Mrs Ayles could not obtain main stream funding or found it difficult to do so;

38.2. The Weymouth Loan was intended to be short term;

38.3. It would not have been made without security;

38.4. The Loan has not been repaid, with the last interest payment being made after the presentation of the petition for bankruptcy;

38.5. The Ayles reside at the Weymouth Property;

38.6. The Ayles may have benefited from an increase in the value of the Weymouth Property;

- 38.7. A company established by Mr Ayles had borrowed large sums of money for the Lyme Regis project in 2014; and
- 38.8. The relationship between Mr Ayles and Mr Pumphrey was friendly.
39. Another factor may be added as it was considered in the *Strathmore* case namely, there is no evidence that Mr and Mrs Ayles would have received different or better treatment if Mr Pumphrey had been regulated. On the other hand it was submitted, and I accept, it is likely that traditional mortgages don't compound interest. I make clear that the interest charged was not, in my judgment, usury.
40. The contra-indicators are as follows:
- 40.1. Weighing the respective sophistication and experience of the parties from a financial perspective Mr Pumphrey was sophisticated and experienced;
- 40.2. There is no evidence that Mr Ayles was experienced or had any special insights into the world of finance;
- 40.3. As a sophisticated and experienced man of business Mr Pumphrey calculated his risk and charged interest accordingly;
- 40.4. He chose not to seek enforcement at the end of the initial period of the Weymouth Loan, content to allow interest to accrue; and
- 40.5. He received high returns in respect of the performing loans.
41. Mr Passfield submits two other factors should be weighed: (i) unsecured creditors now have an interest in the estate of Mr Ayles; and (ii) Mr Pumphrey may have other remedies available to him if he cannot enforce the security. Neither of these are contested. In relation to the first of these I do not find it a powerful factor as the Trustee-in-Bankruptcy merely stands in the shoes of the bankrupt. If the security in favour of Mr Pumphrey made the proceeds of sale in the Weymouth Property unavailable to Mr Ayles it makes it equally unavailable to the Trustee.
42. In my judgment it is not the case, as I think Mr Samuels accepted in closing, that Mr and Mrs Ayles have benefited from an increase in the value of properties subject to loans made by Mr Pumphrey. As I have found, Mr Pumphrey benefited disproportionately in

respect of Canada Road and Anne Howard Gardens. Mr Ayles will not benefit from any increase in market value in respect of the Weymouth Property due to the compound interest obligation in the Weymouth Loan and the bankruptcy.

43. If the Court permits enforcement of the Weymouth Loan the entire proceeds of sale enures for the benefit of Mr Pumphrey.
44. The respective sophistication and experience of the parties is an important factor. If one stands back from the situation it is hard to see how, with the long build or renovation times for each project, it was ever likely that Mr Ayles would make a profit on a building venture funded by Mr Pumphrey. That may be particularly so when Mr Pumphrey asked Mr Ayles to assist on a building site of his own while working on the Canada Road site. Each month that passed reduced the chance of a fair outcome for Mr Ayles.
45. Factually, Mr Ayles has not profited from any of the building ventures funded by Mr Pumphrey. Mr Pumphrey would say that Mr Ayles knew of the bargain and any delays were his. That is not the whole story, as the Canada Road site venture demonstrates. These are finely balanced matters.
46. I now turn to the statutory requirement to consider section 28(5) FSMA namely, was it *reasonable* to believe that FSMA applied to the Weymouth Loan.
47. It is possible to draw out the following apposite matters from the circumstances in the *Strathmore* case: (i) the lender had employed solicitors to represent the lender in connection with the loan and did not inform the lender of the FSMA provisions; (ii) the Financial Services legislation had not, until shortly before the loans were made, extended to any mortgages; (iii) although in the business of lending, the lender did not usually enter transactions to which FSMA applied; and (iv) the lender had not attended, through its agent, a course concerned with FSMA.
48. It is conceded that Mr Pumphrey did not know of the FSMA provisions.
49. It is axiomatic that the FSMA provisions had been introduced many years before the Weymouth Loan. Unlike *Strathmore*, Mr Pumphrey as lender had not employed a solicitor to advise on lending. He has spoken to a law lecturer several years before the

Weymouth Loan in the context of making loans to businesses. He is unable to claim that he relied on professional advice.

50. It was conceded that Mr Pumphrey had not attended any course. Although a factor in *Strathmore* it carries little weight where there is ignorance of the FSMA provisions. It would have some relevance if a lender had attended a relevant course. In such circumstances it would be less likely that a lender could assert that it reasonably believed that it was not acting in contravention of the provisions.
51. In my judgment Mr Pumphrey has considerable financial acumen and has gained through experience considerable businesses knowledge and understanding. He would have used lawyers to assist with certain transactions such as the sale and purchase of his businesses, and the acquisition of his property portfolio which is run through a limited company. It is more likely than not that he had sufficient resource to engage solicitors for the purpose of advising him on the transaction and chose not to do so.
52. His evidence is that he would have expected solicitors acting for Mr and Mrs Ayles to have advised him. In my judgment, if that were true at the time, that was an unreasonable expectation. There is no evidence that he communicated directly with the solicitors acting for Mr and Mrs Ayles let alone sought their advice.
53. Section 28(5) FSMA contemplates, in my judgment, a subjective test as to whether a person believed he was not contravening the Act and an objective test, whether the belief was reasonable. In my judgment it was not ‘reasonable to believe’ in circumstances where (i) the lender is an experienced businessman with the financial acumen of Mr Pumphrey; (ii) there was no impairment on seeking legal advice; (iii) a choice was made not to take legal advice on lending; (iv) the FSMA provisions had been operative for a number of years; and (v) the lender is content for the borrower alone to act through legal professionals.
54. As I have found that it was not “reasonable to believe” it is strictly unnecessary to consider the subjective element of the test. In my judgment the subjective element does not require mental gymnastics to operate clearly and consistently. To believe in something requires some knowledge. There can be no belief, if a person is ignorant of the relevant provisions. In other words if one is ignorant of the existence of a law such ignorance is an insufficient basis for a person to contend that they believed that they had

not contravened the law. In this regard the obiter remarks of Lord Neuberger are powerful that “people who carry on regulated activity and are ignorant of the law, even if reasonably so, should be more at risk because they are more of a danger to the public”.

55. As Mr Pumphrey cannot make good a contention that he believed or that the belief was reasonable he cannot avail himself of section 28(5) FSMA. This is a “weighty factor against the grant of relief”. If Mr Pumphrey had satisfied the section it would not have necessarily meant that relief should be granted but as he has not satisfied the provision he must demonstrate circumstances that outweigh the “weighty factor” and it is “just and equitable” to enforce. Taking account of the factors advanced in favour of allowing enforcement I find that they are not sufficient of themselves or to outweigh the “weighty factor against the grant of relief.”

56. It follows that the discretion of the court is not engaged. If it were engaged I would not have exercised it in favour of Mr Pumphrey due to the factors I have mentioned.

Conclusion

57. In conclusion, Mr Pumphrey was not an ‘authorised person’ or an ‘exempt person’ for the purpose of FSMA. He was barred from carrying on a ‘regulated activity’ and did carry on a ‘regulated activity’ in the course of a wider business. He was in breach of the general prohibition. The Weymouth Loan is ‘unenforceable’ pursuant to section 26(1) FSMA.

58. Weighing the indicators and contra-indicators the balance, in my judgment, tips against it being just and equitable to enforce the Weymouth Loan.

59. In the circumstances of this case, ignorance of the existence of the prohibition is an insufficient basis to conclude that Mr Pumphrey believed that the lending was not in contravention of the provisions of FSMA and in any event it was unreasonable to so believe.

60. As Mr Pumphrey has failed to make out a case that it is just and equitable to enforce the Weymouth Loan the discretion vested in the Court is not engaged. If it was engaged the reasons giving rise to the failure to make out a just and equitable case would militate against exercising the discretion in favour of Mr Pumphrey.

61. I invite the parties to draw an order.

