[2013–14 Gib LR 325]

M. PARTRIDGE and S. PARTRIDGE v. BARCLAYS BANK PLC

SUPREME COURT (Dudley, C.J.): December 13th, 2013

Banking—banker and customer—duty to customer—banks not under duty to customers to consider prudence of purpose for which loans requested or to advise accordingly, unless duty arises (i) by contract; (ii) on assumption of responsibility by bank; or (iii) when bank owes fiduciary duties to customer—ordinarily, lending not fiduciary in nature

Banking—banker and customer—duty to customer—bank obtaining and disclosing valuation of property to be mortgaged not assumption of responsibility to customers for its accuracy when responsibility clearly excluded in mortgage agreement

The claimants brought an action against the defendant for breach of duty and misrepresentation.

In 2005, the claimants, who were husband and wife, took out a loan of €5.6m. from the defendant bank to fund the purchase of a property in Spain. Neither of the claimants had experience in the Spanish property market. In 2006, they borrowed an additional amount of just over €800,000 to fund improvements to the property, and in early 2008, the loans were redeemed and replaced by one larger loan, totalling just under €8.5m. €900,000 of the third loan was invested with the defendant. All three of the loans were secured by a legal mortgage over the property.

The defendant obtained independent valuations before each loan was made. Before the first loan, the property was valued at €8.35m., before the second, it was valued at €11m., and before the third, €15m. Although these valuations were disclosed to the claimants, the first and second loan agreements, and the application form for the third loan—all signed by the claimants—contained clauses specifying that the bank was not to be taken as having given any advice, nor any confirmation of the prudence of the loan.

In 2008, however, the Spanish property market experienced a sharp fall in prices, and the value of the property fell to an estimated €3.5m. In December 2008, the claimants stopped making repayments to the bank, which issued default notices in early 2009. Other than through those notices, however, the defendant did not try to recover the moneys or to take possession of the property. As of 2012, the defendant said the

claimants owed just under €8.5m. in respect of the loans, and were €1.1m. overdrawn.

The claimants brought the present proceedings against the defendant; maintaining that that the bank had breached its duty to them to ensure they could repay the loans, or that the property would provide sufficient security for the debt, and that notwithstanding exemption clauses in the loan agreements and application form, by providing the claimants with copies of the valuations, the defendant either adopted the valuations as its own or represented to the claimants that the valuations could be relied upon.

The defendant applied to have the claims relating to the purported breach of duty struck out, submitting that the claimants had no reasonable grounds for bringing the claim, as (i) it was established law that banks do not owe a duty to consider the prudence of, or advise customers in respect of, transactions for which loans from the bank are requested; and (ii) although in some cases a valuer instructed by a bank might owe a prospective borrower a duty of care, even though there was no contractual relationship between them, it did not by obtaining and disclosing a valuation assume responsibility for it. And, since none of the defendant's employees was involved in the production of the valuation, no question of vicarious liability arose.

The claimants applied to amend the particulars of claim, *inter alia*, to (i) add the allegation that the second claimant entered into the mortgage as a result of undue influence from the defendant or, alternatively, that the defendant was aware that the first claimant (her husband) had overborne her free will and reasoning; (ii) apply the "LIBOR-fixing" allegations (it had recently been discovered that certain banks were manipulating the LIBOR rate to their advantage) by analogy to EURIBOR, by reference to which the interest rates on the loans were calculated; and (iii) add the allegation that the defendant had wrongfully and unconscionably purported to redeem the loans by creating an unsecured overdraft, and that such a redemption was a unilateral settlement of the charge, so that as a matter of Spanish law the charge over the property was now extinct.

The defendant opposed the amendments, submitting that (i) two claimants acting together must present a joint case, so that the undue influence allegations (which applied to the second claimant only) should not be allowed; (ii) simply applying the LIBOR-fixing allegations to EURIBOR by analogy did not allow the defendant to deal with the relevant allegations, and did not disclose a cause of action; and (iii) the defendant consolidated the loans and the overdraft for internal bookkeeping reasons only.

Held, dismissing the appeal:

(1) The parts of the particulars of claim alleging a breach of duty by the defendant regarding the prudence of taking out the loan would be struck out as the claimants had no reasonable grounds for bringing the claim. There was a general rule that a bank did not owe its customers a duty to

consider whether the transactions for which a loan was requested were prudent, or to advise the customers accordingly. The exceptions to this rule were that such a duty could arise (i) by contract; (ii) on an assumption of responsibility by the bank; or (iii) in cases in which they owed fiduciary duties to the customer. In this case, the disclaimers in the first and second loan agreements and in the application form for the third agreement were sufficient to exclude such a duty arising by contract or the assumption of responsibility by the defendant, and the claimants had raised nothing to suggest that the case did not fall within the ordinary principle that the basic banking transaction of lending was not fiduciary in nature (paras. 15–19).

(2) The parts of the particulars of claim alleging that the defendant adopted the valuations as its own or represented that they could be relied upon would be struck out as the claimants had no reasonable grounds for bringing the claim. Obtaining and disclosing a valuation did not mean the bank was assuming responsibility to the claimants (as the persons acting on it) for the accuracy of that valuation. The first and second valuations contained statements by virtue of which the valuers themselves might have owed no duty to the claimants, and in the application form for the third loan, signed by the claimants, it was clearly stated that the defendant did not represent anything or assume any responsibility to the claimants as regards the valuation (paras. 20–21).

(3) The contested amendments to the particulars of claim would not be allowed, as (i) the undue influence allegations were withdrawn on instructions after it was pointed out that the claimants must act together to present a joint case; (ii) applying the LIBOR-fixing allegations to EURIBOR by analogy did not allow the defendant to deal with the relevant allegations, and meant there was no alleged factual matrix disclosing a cause of action; and (iii) it was unclear how consolidation of the accounts disclosed a cause of action, and the status of the charge under Spanish law was a matter for the Spanish courts in the context of any possession proceeding that might be taken (paras. 24–28).

Cases cited:

(1) *Bank of Scotland* v. *A Ltd*., [2001] 1 W.L.R. 751; [2001] 3 All E.R. 58; [2001] 1 All E.R. (Comm) 1023; [2001] Lloyd's Rep. Bank. 73; [2001] EWCA Civ 52, referred to.

(2) *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575; [1963] 1 Lloyd's Rep. 485, referred to.

(3) *Murphy* v. *HSBC Plc*, [2004] EWHC 467 (Ch), referred to.

(4) *National Comm. Bank (Jamaica) Ltd*. v. *Hew*, [2003] UKPC 51; (2003), 63 W.I.R. 183; [2004] 2 LRC 396, considered.

(5) *Royal Bank of Scotland Plc* v. *Etridge (No. 2)*, [2001] UKHL 44; [2002] 2 A.C. 773; [2001] 3 W.L.R. 1021; [2001] 4 All E.R. 449;

[2001] 2 All E.R. (Comm) 1061; [2002] 1 Lloyd's Rep. 343; [2001] 2 F.L.R. 1364; [2001] 3 F.C.R. 481, referred to.

(6) *Smith* v. *Eric S. Bush*, [1990] 1 A.C. 831; [1989] 2 W.L.R. 790; [1989] 2 All E.R. 514, considered.

(7) *Williams & Glyn's Bank Ltd.* v. *Barnes*, [1981] Com. LR 205, considered.

F. Evans, *Q.C.* for the claimants;
D. Murray and *D. D'Amato* for the defendant.

1 **DUDLEY, C.J.:** There are two applications requiring determination. The first in time is one filed on March 18th, 2013 on behalf of the defendant ("Barclays") seeking to have certain paragraphs of the claimants' particulars of claim struck out pursuant to the Civil Procedure Rules, 3.4(2)(a) on the grounds that the claimants have no reasonable grounds for bringing that part of their claim. Alternatively, Barclays seeks summary judgment against the claimants and the dismissal of the claims framed in those paragraphs of the particulars of claim. The second application is one by the claimants filed on August 14th, 2013 in which they seek to amend their particulars of claim.

Factual background

2 The claim arises as a consequence of three loan agreements, which are governed by the law of Gibraltar, entered into between the claimants (who are husband and wife) and Barclays. These are very adequately summarized in Mr. Murray's skeleton argument, from which I draw liberally:

(1) By an agreement contained in a facility letter dated December 12th, 2005, the claimants borrowed from Barclays €5.6m. repayable in monthly instalments over 33 years ("the first loan agreement"). The loan was made to enable the claimants to purchase a property known as "Urbanizacion Lomas de los Caballeros" in Ojen, Spain ("the property"). The claimants' obligations were secured by a legal mortgage over the property.

(2) By an agreement dated November 24th, 2006, the claimants borrowed an additional €814,989.55, also repayable in monthly instalments over 33 years ("the second loan agreement") to enable them to make improvements to the property, which was also secured by a legal mortgage over the property.

(3) By an agreement dated February 15th, 2008, the loans made under the first and second agreements were redeemed and replaced by a further loan in the sum of €8,442,900, repayable over 29 years ("the third loan agreement"). The claimants' obligations under this loan were also secured by a legal mortgage over the property.

3 Before each of the loan agreements was concluded, Barclays obtained valuations of the property as follows:

(1) On December 17th, 2005, Seek (Intl.) Ltd. valued the property at €8.35m.

(2) On October 23rd, 2006, Seek (Intl.) Ltd. valued the property at €11m.

(3) On February 14th, 2008, Savills Consultores Immobiliarios valued the property at €15m.

4 Of the sum borrowed by the claimants under the third loan agreement, the claimants invested €900,000 (which, converted into sterling, amounted to £718,300) into an investment fund arranged by Barclays called the "Barclays Growth Portfolio (Luxembourg Series)" ("the investment"). According to Barclays, although the investment should have been charged in favour of Barclays to secure the claimants' obligations under the third loan agreement, the claimants obtained the redemption proceeds which amounted to £581,863.31 for themselves, and did not pay them over to Barclays.

5 It is not in dispute that in December 2008 the claimants stopped making payments under the third loan agreement. It is said for Barclays that the claimants thereby committed events of default, and that default notices were issued by it in February and April 2009. However, Barclays has not taken steps to recover the moneys (other than by way of counterclaim in these proceedings) or to obtain possession of the property. It is also said on behalf of Barclays that as at May 2012, the claimants owed it €8,477,036.98 in respect of obligations under the loan agreement, and a further €1,104,002.38 in respect of their overdrawn current account, with interest on these sums continuing to accrue.

The claimants' claim

6 As aforesaid, the first and second claimants are husband and wife. According to the particulars of claim, Mr. Partridge is unemployed, but previously derived his income from property rental and "spread betting." Mrs. Partridge is the homemaker. They deny any experience in the Spanish property market. The particulars, which are not particularly well structured, primarily assert that Barclays owed the claimants a duty of care at common law and fiduciary duties to ensure that customers are "seized [*sic*] of full and accurate information as to all transactions which they enter with [it]," and assert that it is a breach of duty on the part of Barclays to lend moneys to a customer in circumstances in which the customer may be unable to repay or adequately secure the facility, and that the larger the sum the more detailed the scrutiny by the bank ought to be.

7 In respect of the first loan agreement, the claimants' case is essentially that Barclays did not have data upon which it could reasonably rely to show that the claimants were capable of meeting the monthly payments of €23,706 over a 33-year term. The case also advanced is that the property was, on Barclays's instructions, valued by a Mr. Nicholas Gale, MRICS (of Seek) at €8,350,000, and that by Mr. Gale handing to Mr. Partridge a copy of the valuation, Barclays made a representation to the claimants "that the valuation was accurate and could be relied upon." It is also said by the claimants that they were not advised to obtain their own market valuation. It is noteworthy, however, that the valuation report, which is entitled "Valuation of Residential Property for Security Purposes for Barclays Bank Plc" has the following provision in the first page:

> "*Important Notice to Prospective Borrower*: The purpose of the report and valuation for mortgage is to enable the Lending Institution to assess the security offered by the property for the proposed loan and, where applicable, to enable the Directors to fulfil the requirements of s.13 of the Building Societies Act 1986."

Notwithstanding that provision, the claimants' case is that Barclays knew, or ought to have known, that the claimants would rely on Barclays to ensure that their interests were safeguarded, and also that Barclays should have obtained the valuation from a suitably competent valuer, experienced in the Spanish market; Barclays knew that the claimants had not obtained an independent valuation and knew that they had no knowledge of the Spanish property market; Mr. Gale's experience in the Spanish property market was limited, and that Barclays should have brought its own expertise to bear and have brought shortcomings in Mr. Gale's valuation to the claimants' attention. It is also said that Barclays was aware that property prices in Spain had increased dramatically over the preceding 15 years, and that the market was set for an adjustment, which would involve a significant reduction in prices.

8 Allegations are also made in relation to an under-declaration of the purchase price in the Spanish "Escritura," and that no translation was provided. These are matters which in my view are not material or relevant in the context of the case being advanced.

9 In respect of the second loan agreement, it is said by the claimants that Barclays again instructed Mr. Gale, who valued the property at €11m., which showed an appreciation in the value of the property of 23.5% over a 10-month period. The case advanced is that although the valuation was stated to be for the sole use of Barclays, Barclays produced it to the claimants, thereby inducing in them the belief that the property was worth almost twice the amount secured by the mortgage, and that, in reliance upon that valuation, they obtained the further advance.

10 According to the claimants, buoyed by the apparently healthy loan-to-value ratio as shown by the 2006 valuation, they sought a further increase of the loan for the purposes of recurring expenditure needed on the property. It is said that they again approached Barclays, through a Mr. Clive Bridgeman, an English-speaking mortgage broker doing business in Spain, who had made the original introduction. According to the claimants, Mr. Bridgeman informed them that Barclays would only consider increasing the facility if a portion of the further moneys to be advanced were invested with Barclays. For the purposes of this facility, Barclays instructed Mr. Robert Cohen, MRICS of Savills. According to the claimants, an employee of Barclays, a Mr. Wayne Stalley, told Mr. Partridge that Mr. Cohen had valued the property at €15m., and further stated that the rising value of the property "allowed for continued and further mortgage lending." It is said by the claimants that they entered into the third loan agreement in reliance upon the valuation of the property as communicated to them by Mr. Stalley. The loan of €8,442,900 was secured by a first legal mortgage over the property, and a charge on the investment.

11 Essentially, it is the claimants' case that, by providing them with the valuations, Barclays represented to them that they could incur debts of up to €8,442,900 and to invest further money in the property, and that Barclays should have known that the valuations were catastrophically incorrect. In the alternative, it is said by the claimants that Barclays failed to inform them that market data (of which it was, or should have been, aware) showed that Spanish property values were hyperinflated and that it was only a matter of time before the "bubble" burst and that therefore it was reasonably foreseeable that the market value of the property would fall to its estimated current value of €3.5m. or less. It is said by the claimants that in reliance upon Barclays' misrepresentations, they invested €5m. in the property, and have accrued a debt to Barclays of at least €8.4m. and that, but for Barclays' misrepresentations and omissions, they would not have acquired the property at €8m. and incurred the related debt.

12 The claimants also advance a claim in respect of an alleged breach of duty in respect of the suitability of the investment. The position adopted by Barclays in that regard is that it owed the claimants a limited advisory duty, with which duty it complied at all times. However, Barclays does not seek the strike-out or summary dismissal of the investment claim, and accepts that some of the allegations made and issues raised are not suitable for summary determination. However, Mr. Murray highlights that the maximum value of the investment claim is £136,436.69, being the difference between the £718,300 invested and the redemption proceeds of £581,863.31 which the claimants received.

Barclays' application

13 Mr. Murray, in my view, accurately distills the claims advanced in respect of the loan agreements as being essentially two:

(1) Barclays owed the claimants a duty to ensure that they would be able to meet their repayment obligations under the loan agreements and/or that the value of the property would provide sufficient security to cover their indebtedness; and

(2) In providing the claimants with copies of the valuation reports (which the claimants say over-valued the property), Barclays should be treated as having adopted the valuations as its own, or as representing that they could be relied on.

Breach of duty

14 Mr. Murray submits that this aspect of the claim is rendered unarguable by a long and consistent line of authorities which establish that a bank that is asked by its customer for a loan owes the customer no duty to advise the customer on the soundness of the transaction for which the loan is required.

15 In *Williams & Glyn's Bank Ltd.* v. *Barnes* (7), Gibson, J. (as he then was) rejected the argument that the bank was under a duty to advise its customer as to the prudence of borrowing £1m. for the purchase of shares, when it knew or ought to have known that the company in which the shares were to be acquired was exposed to serious risk. The judge put it in the following terms ([1981] Com. LR at 207):

> ". . . in such circumstances, no duty in law arises upon the bank either to consider the prudence of the lending from the customers point of view, or to advise with reference to it. Such a duty could arise only by contract, express or implied, or upon the principles of assumption of responsibility and reliance stated in *Hedley Byrne*, or in cases of fiduciary duty. The same answer is to be given to the question even if the bank knows or ought to know that the borrowing and application of the loan, as intended by the customer, are imprudent . . . The essential reason why the principle of *Donoghue* v. *Stevenson* cannot be extended to the transaction of lending in the way contended for by the [customer] is that, in this case, the [customer] asked for the loan; the bank lent the money; and the Bank did not act other than that which the bank was asked to do . . . The suggestion that a bank, dealing with a businessman of full age and competence, without being asked, or assuming the responsibility to advise, must consider the prudence from the point of view of the customer of a lending which the bank is asked to make, as a matter of

> obligation upon the bank, and in the absence of fiduciary duty, is in my judgment impossible to sustain."

That approach is also to be found in the Privy Council decision of *National Comm. Bank (Jamaica) Ltd.* v. *Hew* (4), where Lord Millett said ([2003] UKPC 51, at para. 22):

> ". . . [T]he viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound."

16 It is, however, clear from *Williams & Glyn's Bank Ltd.* v. *Barnes* that although the general rule is that there is no duty of care on the part of a bank to consider the prudence of the lending from the customer's point of view, it is, however, a duty which may arise by contract upon the principles of assumption of responsibility or in cases of fiduciary duty. None of these exceptions to the rule are articulated or developed by Mr. Evans, save for generic references to general principles of the law of contract. Nonetheless, I explore the exceptions in the context of the case as pleaded.

17 The first and second loan agreements provide, at cl. 11.1.3 and cl. 14.15, as follows:

> "The borrower represents and warrants to the bank that . . . the borrower has received such information and taken such advice (including legal, accounting and tax advice) as he requires in connection with the loan and the execution of this letter and the security and has not relied on any statement or information from the bank in this regard."

and

> "The bank has not nor shall the bank be treated as having provided any investment, financial, taxation or legal advice to the borrowers. The bank has not given and shall not be treated as having given any confirmation that the loan is suitable, adequate or appropriate for the purpose for which the borrowers intend to use it."

In respect of the first loan agreement (but not the second), the claimants assert that they have no recollection of having signed the facility letter, and, in the case of Mrs. Partridge, it is said that she has no recollection of ever having seen it. In an exhibit to the witness statement of Mr. D'Amato, in support of Barclay's application, the December 12th, 2005 facility letter appears to have been countersigned by Mr. and Mrs. Partridge. No

evidence has been filed by the claimants by way of opposition or explanation.

18 In relation to the third loan agreement, it is said on behalf of Barclays that a provision in almost identical terms to cl. 11.1.3 above is to be found at cl. 8(h) of the third loan agreement. That provision is to be found in conditions contained in a document entitled "Spanish Cross-Border Mortgage Currency Loan Agreement (Individual Borrower)." However, it is not readily apparent from the facility letter, dated February 13th, 2008 (countersigned by the claimants on February 15th, 2008), that it was those conditions which were incorporated. Nor is there specific reference to their incorporation in the witness statement of Mr. D'Amato, filed in support of the application. It may be that, in due course, their incorporation could be established by Barclays, but for present purposes I do not rely upon that provision. However, in any event, the Barclays application form dated January 26th, 2008, which formed the basis for that facility, contained a declaration by the claimants (numbered 13) that they understood that: " . . . the making of an advance in itself does not imply any warranty as to the reasonableness of the purchase price or value of your property."

19 In my view, it is evident that the terms of the agreements exclude a duty arising by contract or indeed the assumption of a *Hedley Byrne* (2) duty. As regards the existence of a fiduciary duty it is accurate to say that that bald assertion is pleaded, albeit not developed as to how such a duty arises in this case. It is settled law that the basic banking transaction of lending is not fiduciary in nature (see *Bank of Scotland* v. *A Ltd*. (1) and *Murphy* v. *HSBC Plc.* (3)), and there is nothing in the pleaded case which takes it outside that ambit.

The claim arising from the valuations

20 Mr. Murray submits that this claim is also misconceived because the three valuations were carried out by independent contractors instructed by Barclays for its own purposes, as part of its assessment of the claimants' application for a loan. The three valuations were addressed to Barclays. No Barclays employee was involved in their production, so there can be no question of vicarious liability. Mr. Murray relies upon the House of Lords decision in *Smith* v. *Eric S. Bush* (6) as the leading authority on the circumstances in which a valuer, instructed by a bank to value a property for mortgage purposes, may owe a duty of care to the borrower notwithstanding a lack of contractual relationship between them. In that case, the judgments also consider whether a mortgagee may owe a similar duty. Of particular relevance in the context of the present application is a passage in the speech of Lord Templeman, who said ([1990] 1 A.C at 847):

> "*I agree that by obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation.*

> But in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house. The valuer can escape the responsibility to exercise reasonable skill and care by an express exclusion clause, provided the exclusion clause does not fall foul of the Unfair Contract Terms Act 1977." [Emphasis supplied.]

It is exceptionally difficult to see how the claimants can overcome the principle that a mortgagee does not assume responsibility to the purchaser for a valuation. Particularly in this case, given the statement in the Seek valuations set out at para. 7 above, by virtue of which the valuer himself may owe no duty. Possibly even more significant is the declaration by the claimants (numbered 9) in the Barclays application form, completed for the purposes of the third loan agreement, by which they understood that Barclays would obtain a valuation of the property (in the event, the Saville valuation) and which provides:

> "[Barclays] will not warrant, represent or give any assurance to you that the statements, conclusions and opinions expressed or implied in the professional mortgage valuation will be accurate or valid. You understand that we will supply the professional mortgage valuation to you without any acceptance of responsibility on our behalf."

No substantive arguments are advanced on the claimants' behalf to counter Mr. Murray's analysis.

21 For the foregoing reasons, it follows that in so far as the particulars of claim advance a case premised on an alleged breach of duty as to whether or not the borrowing was prudent and a case that in providing the claimants with the valuations Barclays adopted these as its own or represented that they could be relied upon, there are no reasonable grounds for bringing such claims.

The claimants' application to amend

22 Barclays does not oppose the proposed amendments to the investment claim, as set out at paras. 72, 73A, 118 and 119A–E of the draft amended particulars of claim on the basis that the investment claim as a whole is fit for trial and there is little point in arguing in respect of inconsequential amendments. Similarly it does not oppose the proposed amendments to paras. 1, 3 and 6 and is prepared to consent on the usual terms as to costs.

The mortgage claim

23 Barclays' position is that in so far as the application for amendment relates to the mortgage claim (*i.e*. paras. 7–65C, 143, 144 and paras. 5–5B of the prayer) the application should be dismissed. Mr. Murray, in opposing the application, divides the amendments into seven categories, of which I adopt the first two.

Undue influence: paras. 10, 14(ii), 14(xi), 16, 16A–16D and 17

24 By these proposed amendments the second claimant was intending to rely upon the doctrine established by *Royal Bank of Scotland* v. *Etridge (No. 2)* (5). At para. 16B of the draft amended particulars of claim, the claimants aver that the second claimant entered into the mortgage and/or the investment as a result of the defendant's undue influence and that, as against the second claimant, the first claimant was acting as the agent of Barclays, and, in the alternative, it is averred that Barclays was aware that the first claimant had overborne the second claimant's free will and reasoning. It is a well-established rule that, as put by the learned authors of the commentary to the Civil Procedure Rules, r.19.1.1 in the *White Book 2014*, "In a claim brought by two or more claimants, the claimants must act together to present a joint case throughout the proceedings and also at the trial, unless the court specifically orders otherwise . . ." Faced with that difficulty, Mr. Evans sought instructions, and withdrew those proposed amendments at the hearing.

LIBOR: un-numbered paragraph following para. 15; paras. 15A–15G and para. 16A

25 The second substantive amendment to be found in the draft amended particulars rely upon what has come to be known as the "LIBOR-fixing." Given that the interest rate under the loan agreements was set by reference to EURIBOR, the claimants state that "[the claimants] will set out [their] case regarding LIBOR and will aver that the said allegations apply to EURIBOR *mutatis mutandis*."

26 The purpose of pleadings is to identify the issues between parties and the extent of disputes between them. It may be that if the interest rate under the loan agreements had been set by reference to LIBOR, that the draft amended particulars would have disclosed a cause of action. But simply to seek to apply by analogy the LIBOR allegations to EURIBOR does not allow Barclays to deal with allegations pertinent to this case, and indeed, more fundamentally, it means that there is no alleged factual matrix disclosing a cause of action against it.

Other amendments

27 It is unnecessary to consider the remaining proposed amendments in any detail, in that they essentially seek to develop either the breach of duty or the valuation claims but they do not materially affect my determination or they are inconsequential and/or irrelevant. There is, however, what appears to be a fresh claim which requires some brief consideration. At para. 65A of the draft amended particulars (the draft pleading, no doubt in error, contains two paragraphs numbered 65A, and this claim is to be found in the second) alleges that Barclays has "wrongfully and unconscionably purported to redeem the mortgage loans by creating an unsecured overdraft facility." Thereafter, it asserts that the redemption amounts to a unilateral settlement of the charge against the property, and that as a matter of Spanish law, the charge over the property has been rendered extinct. According to Mr. Murray, Barclays consolidated the claimants' loan account and the overdraft on their current account for the purposes of internal bookkeeping. I fail to see how the consolidation of both accounts establishes a cause of action, and whether or not as a matter of Spanish law the mortgage is discharged is presumably a matter which would fall to be determined by the Spanish courts in the context of possession proceedings.

28 In the circumstances, save for the proposed amendments referred to at para. 22 above, the application to amend the particulars of claim is dismissed.

29 I shall make orders accordingly and hear the parties as to costs.

Orders accordingly.