IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2019] EWHC 203 (Ch)

CH-2018-000004

Rolls Building

London, EC4A 1NL

Thursday, 17 January 2019

Before:

MR JUSTICE FANCOURT

B E T W E E N :

PILGRIM ROCK LTD — Appellant

- and -

MR IWANIUK — Respondent

MS M. MACRO (instructed by Christofi Law) appeared on behalf of the Appellant.

MR M. BRADLEY (instructed by Bishop & Sewell LLP) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared from poor quality audio)

MR JUSTICE FANCOURT:

1 This is an appeal by the claimant against an order of His Honour Judge Luba QC made in the County Court at Central London on 15th December 2017. By his order the judge declared that the relationship between the claimant ("Pilgrim") and the defendant was unfair for the purposes of s.140A of the Consumer Credit Act 1974, and he granted relief under s.140B of that Act varying the terms of a loan agreement. The loan agreement was made for the purpose of a purchasing property known as 23 Silver Lane, Purley, Surrey. The loan agreement was made in writing between Brooke Investments Limited ("Brooke"), and the defendant on 31st October 2006 at about the same time as the execution of a legal charge over the property. Pilgrim is the assignee of the rights, including the security of Brooke. The judge found that Pilgrim and Brooke were corporate vehicles used and controlled by a Mr George Semka.

2 The complaint that Pilgrim seeks to pursue by its appeal, for which permission was granted by Mr Justice Zacaroli in May last year, is that the judge wrongly held that the relationship between Pilgrim and the defendant was unfair, as a creditor-debtor relationship, by reason of the nature of the relationship between Mr Semka and the defendant. Pilgrim asserts that that relationship is irrelevant to the questions that the judge had to decide under the 1974 Act, in the absence of a finding that Mr Semka was either the agent or an associate of Pilgrim. It is common ground that no such finding was made.

3 Pilgrim contends that, without relying on the nature of the relationship between Mr Semka and the defendant, the judge could not have concluded that the relationship between it and the defendant was unfair. Therefore, there was no jurisdiction to vary the terms of the loan agreement. Were the terms of the loan agreement unvaried, it is common ground that the claimant would have obtained judgment for a very much higher sum than it did in respect of accrued and unpaid interest.

4 In response to Pilgrim's particulars of claim, the defendant had pleaded in detail the nature of his relationship with Mr Semka, and how the original loan came to be made by Brooke, following Mr Semka's communication to the defendant of interest in investing £1 million or more in UK property. Essentially his case was that the purchase of the property and the loan were part of an informal joint venture between him and Mr Semka who were longstanding friends. Despite this defence, Pilgrim chose not to call Mr Semka to give evidence at trial, and called only a Mr Corby, who became a director of Pilgrim in 2014, and who had no prior knowledge of the matter, though he too had known Mr Semka for many years.

5 But the judge heard in detail about the dealings between Mr Semka and the defendant from the defendant himself. The judge considered that in two respects only the defendant had somewhat exaggerated his evidence, but otherwise found him to be a reliable and truthful witness, and accepted his evidence. In the absence of any competing evidence on behalf of Pilgrim, the judge made various factual findings about the origins of the £1.2 million loan by Brooke to the defendant. These were therefore mainly based on the defendant's factual account, which was largely unshaken in cross-examination, as the judge noted.

6 These findings included the following:

(i) first, that Pilgrim was a single-purpose vehicle that had no assets other than the loan in issue.

(ii) Second, although Pilgrim's shares are owned by nominees on behalf of Mrs Victoria Senker, Pilgrim acted at the direction of Mr Semka, and Mr Semka was controlling this litigation, subject only to a degree of discretion for Mr Corby.

(iii) Third, Pilgrim was one of many alter-egos of Mr Semka used for his business interests.

(iv) Fourth, all those with formal authority to act on behalf of Pilgrim acted at the direction of Mr Semka.

(v) Fifth, Mr Semka proposed to the defendant a form of joint venture or partnership in relation to the proposed acquisition and development of the property, which Mr Semka would substantially finance, and then they would share the net profits.

7 Sixth, prior to purchase, the lender was originally to have been a company called Colegate Management Limited, but then Brooke was substituted as lender at a late stage. Seventh, it was Mr Semka's decision to channel the finance for the project through Brooke as a corporate vehicle. Eighth, the defendant relied on his friendship with Mr Semka, and accepted his assurance that the terms of the loan documents were standard terms, although his solicitors advised him that they were non-standard and "a bit harsh". Ninth, despite the finality of the loan agreement, there was nothing formally agreed about the terms of the joint venture or partnership, or about how the development works would be funded, but the defendant and Mr Semka had reached some agreement on these matters as friends. Tenth, shortly after the loan agreement, the legal charge and the purchase of the property were completed, Mr Semka decided to substitute one corporate vehicle for another, and the benefit of the loan and the charge were assigned by Brooke to Pilgrim. It is unnecessary for the purposes of this appeal to go further into the findings that the judge made about what happened subsequently.

8 On paper, Pilgrim had sought to challenge some of the factual findings made by the judge. There were various grounds of appeal advanced that included challenges to factual findings. In summary, these asserted that the judge was wrong to find, first, that Pilgrim was one of the many corporate alter-egos of Mr Semka used for his personal business interests; secondly, that Mr Semka and the defendant reached an informal agreement on the joint venture to develop the property, and third, that the terms of the loan were out of the ordinary in the market, at least as regards the compounding of interest at quarterly rests.

9 At the hearing however, Ms Morwenna Macro, who appeared on behalf of Pilgrim, more realistically accepted that it was very difficult for it to contend that the judge was wrong to make these findings, although she did contend nevertheless that the findings about Mr Semka were legally irrelevant. The finding that Pilgrim and for that matter Brooke were alter-egos of Mr Semka was a secondary finding of fact, a conclusion based on other evidence expressly given about the circumstances of the joint venture, the arrangements for the loan, and Mr Semka's involvement with and apparent control of Pilgrim. Based on the primary facts found by the judge, as I have explained, the finding appears to me to have been a perfectly reasonable and probably correct conclusion to reach. There was no evidence to the contrary.

10 As regards the finding of fact that Mr Semka and the defendant reached an informal joint venture agreement to develop the property, this was a primary factual finding based on the evidence, mainly of the defendant, which the judge accepted. Mr Semka was not called to give evidence; the only witness who was called by Pilgrim could say nothing about what had been agreed or discussed in 2006. In those circumstances, the ground of appeal really amounted to an assertion that the judge should have rejected all, or most, of the defendant's evidence; there were no reasons advanced on paper why he should have done so. The judge was clearly entitled to accept the evidence that he did, to the extent that he did.

11 So far as the challenge to the finding that the terms of the loan were out of the ordinary is concerned, it is important to bear in mind that the burden of proving that the terms were not unfair lies on Pilgrim: see s.140B(9) of the Act. Accordingly, once the challenge to the interest provisions had been raised by the defendant, it was for Pilgrim to prove that the terms were not unfair because they were in line with market terms, or for other reasons; not for the defendant to prove that they were unfair.

12 In the absence of any evidence from Pilgrim at the trial to that effect, the judge was entitled to reach the conclusion that he did. So, in the event this appeal proceeded on the basis of the judge's factual findings.

13 At trial the defendant's only defence that was pursued was based on s.140A of the 1974 Act. Unfairness in a creditor-debtor relationship can only arise under that section because of one or more of the following matters: the first, in s.140A(1)(a): "any of the terms of the agreement or of any related agreement"; second, in s.140A(1)(b) "the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement"; and thirdly, in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)".

14 Section 140A(2) provides:

> "In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)". Section 140A(3) provides:
> "For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor". "Associate" is a defined term in s.184 of the Act.

15 As explained by Lord Sumption JSC in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61, although there is little in the way of statutory guidance about how the broad discretion conferred by section 140A is to be exercised, some general points about it are clear. Those he identified as the following:

> "First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one [that is to say the case the Supreme Court was concerned with] where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate

> harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub paras (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone."

16 In that case, the Supreme Court was concerned with whether the relationship between the borrower and an intermediary broker, and various omissions of the broker, were material to the assessment of unfairness of the creditor-debtor relationship. It was held that the words "on behalf of" in section 140A connote a relationship of agency, not something less than that, though at the same time the court identified that s.140A(3) also provides that something done by an associate of the creditor is treated as something done by the creditor.

17 In view of his factual findings, the judge in this case held that the relationship between Pilgrim and the defendant was unfair on the basis of certain terms of the loan agreement, so that is under s.140A(1)(a); and on account of the way that Pilgrim had sought to enforce its rights, so that is under s.140A(1)(b); but not on account of any other thing done or not done on behalf of the creditor falling within s.140A(1)(c). The judge therefore did not conclude that Mr Semka, as an agent or associate of Pilgrim or Brooke, had done anything, or failed to do something, that itself, or in combination with other acts or omissions, made the relationship unfair. He held that the terms of the loan agreement made the relationship unfair, and that Pilgrim's own conduct after the term date of the loan made the relationship unfair: see paras.82 to 88 of the judgment.

18 In reaching those conclusions, the judge had regard to the fact that both Brooke and Pilgrim were only vehicles carrying out the wishes of Mr Semka for his personal benefit, not commercial lenders; and that Mr Semka and the defendant were joint venturers and friends, not arm's length lender and borrower. The reasons for the judge's decision that the creditor-debtor relationship was unfair, are on a fair reading of para.82 to 88 of the judgment, four-fold.

19 Of these four reasons, two depended on the fact that Mr Semka had agreed a joint venture with the defendant in relation to the property, and was using Brooke and Pilgrim to that end. Of the two that did, the first is the escalation of the interest rate at the end of an artificially fixed term date that was not a true assessment of when the redeveloped property was likely to be sold, thereby facilitating the repayment. And the second is the fact that, in view of the joint venture agreed between Mr Senker and the defendant, one would have expected interest provisions that were less onerous than terms obtainable in the open market.

20 Of the two reasons that seem to me to be independent of any involvement of Mr Semka, the first is that interest, including interest at an escalated rate, was compounded at quarterly rests rather than annually or not at all. And the second is the fact that after the term date, while interest was being compounded at an escalated rate so that the debt far exceeded the value of the property, Pilgrim did nothing for four years to notify the defendant of the amount of the debt or to enforce the loan.

21 The judge considered that he was bound to take into account the true nature of Pilgrim (and before it Brooke) as lender, namely the fact that they were corporate vehicles of Mr Semka, by reason of s.140A(2): "The court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)". He held that by reason of the language of that subsection, the court's enquiry was not limited to matters legally attributable to the creditor. He considered that the terms of the loan agreement and Pilgrim's enforcement should be assessed, bearing in mind that the lending was not a commercial loan at arm's length but a means of Mr Semka funding a joint venture agreed between him and his friend, the defendant. Looked at it in that context, the judge considered that the terms of the loan agreement identified above, and the method of enforcement by Pilgrim, made the creditor-debtor relationship unfair to the defendant. For that reason the judge considered that he did not need to decide whether or not Mr Semka was an agent or associate of Pilgrim.

22 As I have said, Pilgrim argues that the judge was not entitled to take into account what Mr Semka and the defendant did or agreed prior to the loan agreement, given that he was not found to have been an agent of Pilgrim or an associate. The judge should therefore have looked only at the relationship between Pilgrim and the defendant disclosed by the loan agreement and the legal charge, and treated any involvement or actions of Mr Semka as being irrelevant to that analysis. Ms Macro contends that the *Plevin* case establishes that only the acts of an agent or associate of the creditor are relevant to the assessment of unfairness.

23 In my judgment, on this main argument, Pilgrim fails to distinguish between two separate matters material to the assessment of unfairness under s.140A. On the one hand, there are questions of attributing to the creditor acts or omissions of other persons, where acts or omissions are relied upon for the contention that the relationship arising out of the credit agreement is unfair. On the other hand, there are matters relating to the circumstances of the creditor and debtor, and the background to, and true nature of the transaction between the creditor and the debtor, including whether or not it is commercial or quasi-commercial in nature. These are two quite different things.

24 Where acts of an agent or associate of the creditor are relied upon by the debtor, such acts or omissions can be material as acts or omissions of the creditor for the purposes of assessing unfairness under para.(c) and possibly para.(b) of section 140A(1). Acts or omissions not done or omitted to be done by the creditor or by any agent or associate of it, for example, by someone independent, someone such as an independent broker, are not relevant as acts or omissions alleged to give rise to unfairness in the relationship.

25 The *Plevin* case was concerned with omissions under para.(c): non-disclosure of commission received from the taking out of collateral PPI policies, and failure to assess the suitability of the policies for the debtor's requirements. Section 140A(2) was not in issue in that case, and was only referred to in general terms, as previously indicated.

26 In giving his reasons, the judge did not rely on any acts or omissions of others that were to be attributed to Pilgrim for the purposes of para.(c). He made that clear at para.88 of his judgment, notwithstanding that in para.76 he had said that, "To leave George's role, actions and omissions out of account would be both unrealistic and unreasonable". He was not there referring to acts or omissions to be attributed to Pilgrim. What he did rely upon were the terms agreed by Brooke, in whose shoes Pilgrim now stands, and the inaction of Pilgrim

itself after the term date of the loan. These were matters falling exclusively within paras.(a) and (b). of section 140A(1).

27 The judge assessed those matters in the light of the true nature, identity and role of Brook and Pilgrim, namely that they were not commercial lenders but mere corporate vehicles and alter-egos of Mr Semka, through which it was convenient for Mr Semka to channel the funding for the agreed joint venture for the development of the property. The true nature and circumstances of Pilgrim as creditor were required to be considered by the judge under s.140A(2) if he thought it was relevant.

28 In my judgment, the judge was clearly right to consider the true nature of Brooke and Pilgrim and in what capacity and role they entered into the loan agreement. These circumstances make clear that Brooke and Pilgrim were not independent lenders acting in an arm's length transaction, but emanations of Mr Semka himself, who had approached the defendant to seek to establish a friendly joint venture with him. The unfairness of the terms of the loan agreement fell to be considered by the judge in that very different light.

29 In my judgment, the judge did not err as Pilgrim contends in attributing to Pilgrim acts or omissions of a person who was not found to be an agent or associate of Pilgrim or Brooke. He took account of the evidence about the origins of the loan agreement, and the understanding reached between Mr Semka and the defendant, to establish the true nature of the creditor-debtor relationship. It had been Pilgrim's case at trial, repeated in the appeals against the judge's factual findings, that this was a commercial lending relationship in which the whole benefit of the intended development would accrue to the defendant. The judge rejected that case in expressing his conclusion in para.80 of his judgment in the following terms:

> "I find that Mr Iwaniuk entered into the borrowing agreement as part of the informal agreement that he and George had made for the redevelopment of the Purley house. Mr Iwaniuk was depending on George to do the right thing when providing the funds. He trusted and respected him. In the context that was entirely understandable. Mr Iwaniuk signed the paperwork not because it was satisfactory to him, or his legal advisers, but because of the assurance that he had from George that it was all quite standard, and that he, George, could be relied upon to act fairly given their long enduring friendship."

30 The judge then proceeded to give reasons why, in that light, various terms of the loan agreement and the four-year silence from Pilgrim after the loan term date made the creditor-debtor relationship arising out of the loan agreement unfair. If Pilgrim were right in its argument that the judge was not permitted to do that absent a finding that a relevant actor was an agent or associate, any court exercising the statutory jurisdiction would often be forced to take a credit agreement at face value, and be unable to investigate the evolution and true nature of the creditor-debtor relationship. Such a conclusion is clearly at odds with the purpose of the jurisdiction itself.

31 However, in my judgment, s.140A(2) makes it clear that the court must have regard to any such material that the court considers relevant. Whether it can hold the creditor responsible for the relevant acts or omissions of others in assessing unfairness is a different question of attribution, which is addressed and answered in principle in *Plevin*.

32 In any event, for the reasons that I have given, two of the reasons given by the judge, including the one that he identified as the "major telling factor as to the unfairness in the terms of the agreement", is the compounding of interest at quarterly rests; the other one being the omission of Pilgrim itself to take action after the term date. These had nothing to do with any conduct or omission of Mr Semka. Those reasons are therefore not susceptible to challenge by Pilgrim in any event on the basis of its main argument. In view of my conclusion, however, it is not necessary to consider whether these two, on their own, justify the judge's decision.

33 As ground nine of its grounds of appeal, Pilgrim contended that even if the judge was justified in finding the creditor-debtor relationship with the defendant to be unfair, there was no reasonable basis for the judge to have varied the loan agreement as he did. What he did was to extend the term of the loan to eight years, make the interest rate a variable rate of 1.25 per cent above Bank base rate, and replace the compounding of interest at quarterly rests with compounding at annual rests.

34 However, the ground of appeal advanced that argument on the basis that the variation "wrongfully deprived the claimant of the benefit of a commercial loan taken for a speculative venture which simply benefited the defendant": The premise not being established, the ground cannot succeed on the terms originally drafted. Pilgrim's skeleton argument nevertheless contended that the alteration of the length of the term and the interest rate was arbitrary, that the original fixed interest rate was not exorbitant, and that the increase in rate on default was commercially justified as reflecting an increased risk to the lender.

35 At the hearing, Ms Macro argued that the package of variations was outside the bounds of what could be regarded as reasonable in its cumulative effect. Given the broad discretion afforded to the trial judge by the terms of s.140B of the Act, Pilgrim had to argue that the discretion was wrongly exercised by the judge as a matter of law. As is well known, that is a high hurdle and requires an appellant either to contend that a judge's conclusion was irrational and beyond the wide ambit of discretion afforded to the trial judge, or alternatively that something material to the assessment had been overlooked or something immaterial allowed to influence the decision.

36 No such arguments were advanced beyond the bare assertations that I have just mentioned. Instead, on instructions in court for the first time, Ms Macro contended that I should substitute for the judge's package of variations a six-year loan term, a fixed interest rate of 4 per cent and compounding of interest at six-monthly rests.

37 The defendant argues that the variations made by the judge can be seen to derive directly from his reasons for finding the creditor-debtor relationship to be unfair, and that as such they were rational, not arbitrary, and a reasonable exercise of discretion. I accept that the variations to the length of the term, the default interest and the compounding of interest are so derived and are justified for that reason. But it is at least arguable that replacing a fixed interest rate of 6 per cent with a variable rate was not, and results instead from the benefit of hindsight of the fall in interest rates following 2006.

38 However, the defendant alternatively submits that whatever might have been reasonable as between a commercial lender and a developer, a 1.5 per cent margin over base rate was perfectly reasonable as a first fixed return on the finance for the development provided by a party to a joint venture, and that in the light of his findings about Mr Semka the judge was

entitled to select such a return, which was supported by the actual margin on the date of the loan agreement resulting from the use of the rate of 6 per cent.

39 I accept that argument. It is not possible to say that the judge's package of variations went beyond how a judge could reasonably have exercised the broad discretion given to him. It may be that other judges would not have interfered with the fixed rate of interest, but that is legally irrelevant. The test is whether no judge could reasonably have decided what Judge Luba QC did decide. In view of the reasons that the judge gave for his conclusion on the unfairness of the relationship, his variations of the terms of the loan agreement were not unreasonable and were within the scope of his discretion. For these reasons, I dismiss Pilgrim's appeal.

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