

Case No: KB-2024-001360
[2024] EWHC 2056 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 15 May 2024

BEFORE:

MR JUSTICE CHOUDHURY

BETWEEN:

CALVIN JEREMY SWABY

Claimant

- and -

KHK ONE LIMITED

Defendant

MR O OGUNBIYI appeared on behalf of the Claimant
MR S NABI appeared on behalf of the Defendant

JUDGMENT

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1. MR JUSTICE CHOUDHURY: This is an application made by the defendant for an order setting aside an injunction granted by Mould J on 3 May 2024 upon a without notice application made by the claimant. The defendant also seeks to strike out the claimant's claim.
2. The background to this matter can be summarised as follows. The defendant granted the claimant a loan facility of £590,000 under the terms of a loan agreement dated 23 February 2023. As security for the loan, the claimant charged two properties at 175 Glenister Park Road, SW16 5DY and 53 Grange Park Road, CR7 8QE. Those properties were charged to the defendant by deed under a legal mortgage also dated 23 February 2023.
3. There was an application to the Land Registry to register the legal charge against the titles on the properties. That application was made on 2 March but that remains pending.
4. The loan and mortgage are unregulated. Under the terms of the loan agreement, the claimant is required to repay by 24 February 2024. The claimant defaulted and failed to repay the loan by that date and the defendant thereafter acted to enforce its security by placing the properties for sale by auction with Auction House London. That auction was scheduled to be held on 17 April 2024.
5. I should mention that before the default date the claimant had sought an extension of his facility by way of an email in January 2024 but that request for an extension was refused as is made clear by an email from the defendant of 30 January 2024.
6. On 14 March 2024 the defendant wrote to the claimant stating that the final repayment date had passed without the loan being repaid and stating that the only option for recovering was a quick sale by auction. It was made clear that these properties will be auctioned with Auction House London and that the date of the auction was 17 April 2024. The email concludes by saying:

"It is very much in your interests to continue to work with [the defendant] to provide as much information as possible about these properties so that we can hopefully avoid appointing a receiver and

achieve the best possible sale price and minimise costs. If you are able to repay the loan in full before 17 April 2024, the properties will be withdrawn from auction."

A notice of event of default was sent to the claimant on the same date stating that the loan was now repayable immediately.

7. There followed correspondence between the parties and their respective solicitors. The net outcome of the correspondence was that the claimant was unable to repay the secured debt before 17 April and the defendant was unwilling to accept anything less than full repayment. There was on 4 April 2024 a suggestion made by the claimant's advisers that the defendant accept partial redemption in the sum of £370,000 for the Glenister Park Road property. In fact, as the defendant's response the same day makes clear, there was no such concession, and the claimant was once again informed that the auction would be proceeding.
8. Redemption statements were sought from the defendant, and these were provided. One redemption statement in particular has taken on some significance. That is one sent by the defendant on 2 April 2024 at 3.18 pm. This states:

"Please note the revised redemption statement for this loan. The updating redemption statement factors in auction, legal and admin costs. [The defendant] is still waiving substantial fees and costs at its absolute discretion."

There is then a table containing the details of the redemption statement, identifying the reference number and the owner of the property and other details. The table also contains a "valid until" date of 24 April 2024.

9. On 12 April 2024 the claimant's solicitors wrote to say that additional borrowing had been secured from Coventry Building Society although the precise details were not provided. The email seeks confirmation that upon receipt of the additional loan, subject to recovering costs and full redemption of outstanding loans, the properties would be withdrawn from the auction. The response, sent on the same day, 12 April at 11.40 am states that:

"As you are aware, the auction is on 17 April. In so far as we would consider this option, we need to have sight of the offers realistically by Monday at the latest."

10. By further email that day at 12.17 pm the defendant says that it has the power by its charging order to sell these properties. It goes on to state:

"It is too late for us to consider any other exit These properties are going under the hammer on Wednesday and the only way to avoid this is to repay us in full before Wednesday."

11. The claimant responds, not by referring to payment but by querying the power that the defendant has to auction properties without a court order. At 5.00 pm on the same day the defendant responds to say that it is the first charging order of the loan outstanding which was due to be repaid on 24 February and suggests that the claimant seeks legal advice. There is a request then from the solicitor for a copy of the security document and at 1.30 pm on 12 April the defendant says:

"There is no need to apply to court. This exercising the lender's power of sale under section ... of the Law of Property Act 1925."

12. A further couple of emails were sent by the claimant on 12 April and 15 April asking for further information in relation to the 1925 Act. There does not appear to be any response from the defendant to those.
13. The properties were duly auctioned on 17 April 2024. Contracts were exchanged for the sale of both properties for £440,000 and £334,000 respectively. The contractual completion date is today.
14. On 3 May 2024, the claimant applied for an injunction without notice to restrain completion. That states there to be four grounds for seeking injunctive relief. Firstly, that the defendant had failed to redeem the mortgage notwithstanding his offer to pay the sums due. Secondly, that clause 9.3 of the loan agreement required the defendant to initiate court proceedings before acting to secure its loan by selling the properties. Thirdly, that the defendant frustrated redemption by refusing to provide a settlement figure resulting in an unfair relationship as per the Consumer Credit Act 1974.

Fourthly, that under the loan agreement, the defendant had no authority to sell the properties at auction.

15. The application came before Mould J on the afternoon of 3 May. The claimant was acting in person. The injunction was granted to restrain the defendant from completing any sale until further order of the court. Directions were given for the claimant to issue Particulars of Claim and the claim was listed with a time estimate of one hour on the first available date after 7 May.

16. Paragraph 2 of Mould J's reasons provides:

"The applicant says that the defendant has acted unlawfully and in contravention of the terms of the loan facility agreement in placing the two properties for sale at auction on 17 April 2024. The applicant has given very little information about the auction and sale and no Particulars are exhibited and no information about the price achieved and other details which I would have expected the applicant to have access to. Nor is there any explanation as to why this application has not been made until this Friday afternoon, 3 May, just before the Bank Holiday weekend when it appears the auction for sale took place on 17 April 2024."

Paragraph 3:

"As against that, the applicant says that the sale of the properties is to be completed within 20 working days of 17 April. Plainly if the applicant has [an arguable case that] the defendant has acted unlawfully or in breach of the loan facility in auctioning the properties, completion of their sale will prejudice the applicant from obtaining a sufficient remedy."

Paragraph 4:

"I am therefore prepared to grant the order without notice but on a strict deadline to enable the defendant to challenge the order and to put its case in ..."

17. The reference to the sale at auction being a breach of the loan agreement seems to have been the principal basis on which the injunction was obtained. The judge was clearly concerned by the lack of material placed before him, even as to the auction sale which had by then taken place, but granted the injunction, nevertheless.

18. The claimant duly lodged his claim and Particulars of Claim as directed on 7 May 2024. The claimant was still acting in person. He seems erroneously to have issued proceedings by way of a Part 8 claim. I do not take any issue with that given that he was acting in person. The Particulars, which were obviously not drafted by counsel but by the claimant himself, make no allegation of any unfair relationship under the Consumer Credit Act 1974, nor do they allege that the claimant had tendered full payment with the defendant refusing to redeem, nor do they allege that the defendant did not obtain the proper price.
19. The pleaded claim gives rise to the allegation that the defendant acted in breach of the loan agreement by placing the properties at auction without first issuing legal proceedings and that it did so without the consent or authorisation of the claimant. It is also said that the defendant's actions amount to a repudiatory breach of the loan facility agreement. The claimant claims return of the properties, the prevention of sale by auction or any other means and claims damages which are unspecified.
20. On 13 May 2024 the defendant issued this application to set aside and strike out the claim. Mr Nabi for the defendant submits that there was no proper basis for seeking the injunction and that there is no serious issue to be tried, that damages are an adequate remedy in any event and that there are no other special factors warranting injunctive relief. As to the substance of the claim, he contends that the pleaded grounds, including that the sale was in breach of the loan agreement are unlawful, are misconceived.
21. Dealing first with the application to set aside. It is clear in my judgment that there was no proper basis for making the application for injunctive relief. The defendant was not given any notice, informal or otherwise, of the application. There was no justification in my judgment for issuing proceedings on a without notice basis. The parties were in correspondence. There is no secrecy about the dispute or anything that would have defeated the purpose of the application if it were made known to the defendant. Moreover, there was no urgency justifying a without notice application on the Friday before a Bank Holiday when completion, which was the target of the application was not due for almost a further two weeks. Had the claimant been acting on a represented basis, that would have been sufficient in itself to set aside the injunction at this stage.

22. But allowing some latitude to the claimant as he was acting in person, I am going to consider the application on its merits. There is in my judgment no serious issue to be tried. The principal basis on which the judge was persuaded to grant relief was that there may have been a breach of the loan agreement in proceeding to auction. The claimant relies on clause 9.3 of the loan agreement. That provides that at any time after the balance outstanding had become repayable under the provisions of paragraph 9.1 of its contract, the lender "**may**" without notice institute such proceedings as the lender determines in its absolute discretion to enforce repayment of the Facility or the Security.
23. Mr Ogunbiyi, who appears for the claimant, submits that the effect of that clause was somewhat unclear and led the claimant, not unreasonably, to the expectation that proceedings would be issued before any enforcement action was taken.
24. I see no basis for acceding to that submission. The terms of the clause are absolutely clear. There is a discretion not a requirement to issue proceedings in these circumstances. There is certainly nothing in the loan agreement which renders it unlawful or indeed unfair for the lender, the defendant in this case, to proceed to exercise the power of sale without first instituting proceedings.
25. Mr Nabi has also pointed out that the defendant as mortgagee had the power of sale under section 101 of the Law of Property Act 1925. I need not set out the relevant provisions suffice it to say that the effect of them is clear, and to be fair to Mr Ogunbiyi, he does not seriously contend otherwise.
26. This is a case where a mortgage was made by deed. The mortgage money was due and not repaid by the date of repayment and the sale at auction was expressly permitted.
27. There is nothing in the terms of the loan agreement or the charge preventing the sale of the properties at auction. Clause 9.1 of the charge document expressly refers to the power of sale under section 101 of the 1925 Act and clause 9.2 provides that section 103, which regulates the exercise of the power of sale, did not apply. The power of sale was therefore at all times as clear as could be.

28. The fact that the charge itself was not registered with the Land Registry does not affect the power of sale. (See *Swift 1st Limited v Colin and Others* [2012] Ch 206 at 13 to 14).
29. The other bases of claim relied upon before Mould J are no longer being pursued in the Particulars of Claim. However, Mr Ogunbiyi submits that one should not focus only on the Particulars of Claim and that one should have regard to the documents lodged by the claimant as a whole in order to discern the claims being made. Whilst some latitude is to be granted to a litigant in person in that regard, the order made by Mould J was unambiguous in requiring the claimant to set out the claim against the defendant in order that the defendant could understand the claim it had to meet.
30. In those circumstances, the court is entitled to look to the Particulars to see what the claim comprised. Where the claim relied upon is not referred to, it can fairly be treated as no longer being pursued.
31. Even if I were to take a broader view, none of the claims that did not make it onto the Particulars disclose any arguable case. There is no failure to redeem the mortgage in the light of an offer to pay. It is clear from the correspondence that no such offer to repay the loan in full was ever made in clear and unequivocal terms. Mr Ogunbiyi raises an item arising out of the redemption validity period which is not an argument made in the Particulars of Claim but first appears in the statement in support of the application for an injunction. The argument as I understand it is that as the redemption validity period extends to some seven days after the auction, it was not unreasonable for the claimant, a litigant in person, to understand that he had at least until 24 April to repay the loan and that it was unfair in those circumstances for the defendant to proceed to auction the properties on 17 April.
32. Forcibly though that was point was made, I do not see any real merit in it. The correspondence is unequivocal in stating that the auction was to be held on 17 April and that unless the loan was repaid in full by that date, the auction would proceed. The position was made clear to the claimant on two or three occasions prior to the auction date itself.

33. I see nothing in the documents which could conceivably have caused the claimant to be misled as to the defendant's intentions and the likelihood of the properties being sold at auction if the loan were not repaid. Indeed, the understanding of the claimant's solicitor at the time appears to have been that the loan needed to be repaid on or before 17 April.
34. The other matters relied upon by the claimant in its application for an injunctive relief including the failure to provide a settlement figure resulting in an unfair relationship and the suggestion that there was no power to sell at auction under the terms of the loan agreement are not pursued by Mr Ogunbiyi. In my judgment, he is right not to do so given their inherent lack of merit.
35. As to the balance of convenience, I agree with Mr Nabi that this is a clear example of a claim where damages provide an adequate remedy. The claimant's only real claim could be for an improper exercise of that power, for example, sale at a substantial undervalue. That claim has not been made. Mr Ogunbiyi sought to persuade me that the reference in the claimant's statement to the Zoopla or online prices for the properties gave rise to a claim that the properties were sold at undervalue. That does not seem to me to be realistic. The claimant knew that the properties were to be sold at auction. There is a risk that auction values will not be as high as a sale in other circumstances. But that does not mean that there is a sale at undervalue. This is not a claim that the claimant has made either expressly or implicitly in my judgment.
36. There is no cross-undertaking provided by the claimant and there is no information before me as to the claimant's current financial circumstances save to say that Mr Ogunbiyi submits that the claimant is in a position to repay the loans in full. That is not sufficient in the context of an application for injunctive relief to amount to a cross-undertaking in damages or to support a cross-undertaking in damages.
37. There are no other factors which would suggest that the balance of convenience favours injunctive relief. Indeed, the prejudice to the defendant in not being able to proceed to completion today seems to me to outweigh the claimant's unpleaded, unparticularised losses.

38. For these reasons, I have no hesitation in setting aside the injunction.
39. As to the application to strike out the claim, it seems to me that the criticisms which Mr Nabi makes of the Particulars are unanswerable for the reasons already set out. The particular claim based on clause 9.3 of the loan agreement and/or under the loan agreement generally seems to me to be wholly unarguable and in fact does not disclose any reasonable basis for a claim. There was no requirement on the defendant to issue legal proceedings before proceeding to a sale by auction.
40. As to the other claims which have been developed by Mr Ogunbiyi, forcefully though the submissions were made, they do not in my judgment cross the threshold of establishing an arguable claim. It seems to me that the claim as it stands had no real prospect of success and it is appropriate to terminate it at this stage by striking it out.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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