Neutral citation number: [2024] EWHC 3080 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Case No. CH-2024-000005

Courtroom No. 7

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Tuesday, 15th October 2024

Before:
THE HONOURABLE MR JUSTICE ADAM JOHNSON

B E T W E E N:

CBI PROPERTY PROJECTS LIMITED

and

TRIPIPATKUL & TRIPIPATKUL

MR A KINGSTON-SPLATT (instructed by RWK Goodman LLP) appeared on behalf of the Claimant
MR J MILLER (instructed by Aston Bond Law Limited) appeared on behalf of the Defendants/Appellants

JUDGMENT
(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE ADAM JOHNSON:

The Basic Issue

1. The critical question in this case at trial was whether the relationship between the creditor Claimant and the debtor Defendants was "*unfair*" within the meaning of section 140A of the Consumer Credit Act 1974. The judge, HHJ Dight, decided not. The debtor Defendants (I will refer to them as "*the debtors*") now seek permission to appeal against that determination. Permission was refused on the papers by Fancourt J. The debtors now renew that application at an oral hearing.

The Judgment below

2. The context is a loan agreement. The Claimant, which I shall refer to as "*the creditor*", agreed to lend the sum of £1.4 million to the debtors. There was security, namely a charge over a property at 100D Eaton Square, London. And here is the main point: the agreed interest rate was 8% per annum, but in the event of default, this was to increase to 12%. It is this feature, in particular, that the debtors say gives rise to unfairness within the meaning of section 140A, and this had practical effects because in the event there was a default and the loan, which was intended to be a short-term bridging loan for a 12-month period, was not repaid when it fell due. Instead, it remained outstanding but with the default interest rate then applying to later periods in place of the original 8% interest rate.
3. In addressing the question of fairness under the Consumer Credit Act, HHJ Dight, at paragraphs [107] to [118] of his judgment, applied the guidance set out by Hamblen J in *Deutsche Bank Suisse (SA) v Khan and Others* [2013] EWHC 482 (Comm). He accepted the evidence of the creditors' director, Mr Coleman, that the interest rates under the loan agreement were not uncommon given the context, namely the fact that it was a bridging loan. He considered that the relevant terms protected the creditor against a legitimate risk, namely, the risk of default by the debtors. He thought that the lending was commercial or, at least, quasi-commercial in nature. He thought the evidence showed a degree of give and take between the parties in negotiating the terms and, to that extent, thought there was an equality of bargaining power between them. He saw nothing questionable in the creditor's conduct at the time the bargain was struck. He thought it was significant that the debtors had had the benefit of legal advice. He also thought it significant that the debtors had not complained at the time the contract was entered into or, indeed, for about four years afterwards. Neither did he see that the creditor had acted improperly after the agreement was entered into. Taking all those factors into account, he rejected the submission that there was any unfairness in the relationship between the parties.

The Grounds of Appeal

4. In challenging this conclusion the debtors originally relied on four Grounds of Appeal. They now also seek to rely on a new one which depends on the admission of fresh evidence. I will come to that later.
5. The four original Grounds are, to some extent, all variations on the same theme, or so it seems to me. At their heart, as see it, is the following point: namely, that the 12% default interest rate cannot really have been designed to protect any legitimate commercial interest of the creditor because its only real interest was in being repaid with 8% interest. That interest was adequately protected by its security. It is said that the proof of this lies in the fact that actually, application of the 12% interest rate had the effect that the amount

eventually owed exceeded the amount of the security, so there is now an excess amount to be paid by the debtors; but had the interest rate remained at 8%, then there would have been surplus payable to the debtors on realisation of the security.

6. What follows from this say the debtors is that the default interest rate must be regarded as a penalty because it cannot have been protecting any proper interest of the creditor which was only, and I quote from the debtors' Skeleton Argument "*in repayment of the loan or enforcement of its security*". The point of the default interest rate must therefore have been to punish the debtors. It was, therefore, unenforceable as a penalty and *ipso facto* unfair for the purposes of the test in the Consumer Credit Act.

7. The debtors accept that their argument that the 12% default interest rate amounted to a penalty was not a point advanced at trial, but they say it is a pure point of law which can legitimately be taken on appeal. As to that, I am not wholly persuaded that the point is a pure point of law but I do not find that issue an easy one. For the purposes of this application, I will assume that it is. Even so, and even assuming, therefore, that the penalty argument is available as an appeal point, I would nonetheless refuse the debtors permission to appeal.

8. The reason is that although the debtors' arguments have been very attractively put by Mr Miller, I think they are wrong in principle. They rely on the inference that because the creditor undeniably had a proper interest in recovering interest at the original rate of 8%, it can have had no proper interest in also recovering interest at a higher default rate.

9. I do not think that follows at all. The rate of interest applied to borrowing routinely reflects the strength of the borrower's covenant to repay. It makes perfect sense to say that if there is a default but the parties, nonetheless, leave the loan outstanding, the strength of the covenant to repay is diminished and the risk to the lender increases. In such circumstances, it seems to me obvious that the lender has a proper interest in charging more for its funding while it remains outstanding in an environment of increased risk. I do not think it makes any real difference if there is security because the value of security can go down as well as up: so the security is only one element in the overall package for the lender who, even with security, has a proper interest in charging more for the use of his money if there is a greater risk of him not getting it back, which plainly there is if the borrower has not honoured the terms originally agreed on.

10. For those reasons, I am not persuaded there is any real prospect of success on Ground 1 and I therefore reject it.

11. Ground 2 rests on the proposition that the creditor bore the burden of proof at trial in terms of showing that the relationship between the parties was not unfair for the purposes of section 140A. It is argued that the creditor here failed to discharge the burden of proof because it did not properly explain the rationale underlying the 12% default rate, for example, by producing expert evidence.

12. Again, I am not persuaded that this Ground has any real prospect of success. The creditor, at trial, relied on evidence from its director, Mr Coleman. The judge accepted that evidence as regards the terms of the lending arrangement being common at the time. The judge's reasoning, as I have shown, demonstrates him balancing the various factors derived from Hamblen J's judgment in the *Deutsche Bank* case. The view the judge came to in light of that evaluation was that the creditor had discharged the burden of showing that the relationship was fair. I think he was entitled to reach that view and, indeed, was correct to do so. In his witness statement, Mr Coleman said that the terms of the loan arrangement were intended to reflect the risk to the creditor given that the funding advanced represented many years' net profit to a sister company which had ultimately made the funding available. That seems to me to be a sufficiently clear account of the rationale from the creditor's point

of view. The criticism made of this by the debtors is to say that Mr Coleman did not distinguish between the alleged risk to justify the 12% rate of default interest and that which must have been factored into the non-default 8% rate. However, that is really just the point I have dealt with already: there is plainly increased risk if there has already been a default and thus a legitimate interest in charging more for keeping one's money in play in an environment of increased hazard.

13. Ground 3 is a development of the same theme. The debtors challenge the judge's finding that the default interest rate was designed to protect any legitimate interest of the creditor on the basis that the creditor's protection against default was its security. In my opinion, however, this adds nothing to Ground 1 and has no real prospect of success for the reasons already given.

14. A similar point may be made as regards Ground 4. The gist of the complaint here is that the effect of increasing the interest rate to 12% was essentially perverse in that it resulted in increasing the amount owed to the creditor and effectively increasing its risk of non-payment, as demonstrated by the fact that the amount eventually due turned out to be greater than the value of the security. Had the interest rate remained at 8%, it is said, the creditor would have been repaid in full from its security.

15. In my opinion, however, there is mistaken logic here. Again, the main thrust of the argument is that the creditor had no proper commercial justification for the increase in the interest rate because its only real interest was in securing payment under the originally applicable terms including the 8% rate of interest. Once one accepts that there *was* a legitimate purpose in applying the default interest rate which, in my opinion, there was, then the logic of the argument breaks down. The creditor's risk profile did not change because the interest rate increased and, therefore, it was likely to be owed more. That is looking at things the wrong way around. The risk profile changed because the debtors failed to honour the originally applicable terms, thus indicating a greater chance of non-payment in the future. In such circumstances, the bargain was that the terms would change and would become more onerous for the debtors given the greater level of risk for the creditor in the context of what was originally intended to be only a short-term arrangement. As I see it, there is nothing at all perverse about such a structure; on the contrary, it seems to me entirely logical. For those reasons, neither am I persuaded that Ground 4 has any real prospect of success.

16. That deals with the existing Grounds of Appeal.

Fresh Evidence?

17. The next point though is that the debtors seek to amend their Grounds of Appeal under rule 52.17 so as to be able to rely on fresh evidence. This engages the principles under rule 52.21(2)(b). The question whether to admit fresh evidence upon appeal must be addressed in light of the overriding objective, but the old pre-CPR cases remain relevant: see *Hamilton v Al Fayed (Joined Party)* [2001] EMLR 15, per Lord Phillips MR at [11]. The older authorities include the well-known decision in *Ladd v Marshall* [1954] 1 WLR 1489, and the parties are agreed here that I should have regard to the *Ladd v Marshall* factors, *viz*.:

    (1) The evidence could not have been obtained with reasonable diligence for use at trial.
    (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case.
    (3) The evidence is such as to presumably be believed, i.e., it should be apparently credible though not incontrovertible.

18. What is the fresh evidence here? It is said to be evidence of the creditor making payment of a secret commission to the debtors' accountant and agent, Mr George Stern.

19. Mr Stern was involved in the discussions which led to the loan agreement. Indeed, he was described by HHJ Dight in his judgment at [55] as "*the lynchpin for the negotiations for the loan agreement having been the long-term accountant for both the defendants and the claimant*". Indeed, Mr Stern was the person who introduced the debtors to the creditor. The loan agreement itself refers to the fact of an arrangement fee of £14,000 being payable on drawdown, but says it is payable to the creditor, not Mr Stern. It is said that the idea of it being paid to Mr Stern was first revealed to the debtors only recently in a conversation after the trial in May 2024.

20. The First Appellant who is known as "*Jane*" has put in a witness statement in which she says the following, referring to a conversation with Mr Stern, referred to as "*George*":

> "*On this phone conversation in May 2024 George told me he was meant to get a 1% fee from Daragh for arranging the lending. He also said it was meant to be £14,000. I do not know if George was ever paid but he said he was meant to get it. I remember him saying something like, 'Up to now he hasn't even given me the £14,000 he was supposed to'. I was very surprised when George said he was supposed to get £14,000 as he is my accountant and I did not know about it.*
>
> *George then sent me an email on 23 August 2024 (pages 28 to 29 of 'JT3') and at the bottom of page 29 of 'JT3' is an email from Rebecca Gardner at Goodman Derrick LLP (CBI's solicitors who acted on the lending and which my solicitor has told me is now RWK Goodman, CBI's solicitors in these proceedings) that she sent to Daragh and George on 21 June 2017, mentioning an arrangement fee of £14,000 and asking where it should be sent*".

21. The email of 21 June 2017 is available. It shows the creditor's solicitors as at June 2017 saying they hold the sum of £14,000 in respect of the arrangement fee to the order of the creditor and asking for directions as to where it should be sent. That email is copied to Mr Stern who, as already mentioned, provided it recently to the First Appellant. Although the papers show correspondence prompted by the discussions with Mr Stern from May 2024 onwards, including requests by the debtors' solicitors for further documents, it is only in the last 24 hours or so that two further emails in the same chain have emerged. These are an email dated 22 June 2017, from Mr Stern to Mr Coleman asking for the arrangement fee to be paid to an entity called "*Trutmoor Limited*" and saying:

> "*As we agreed, I negotiated the arrangement fee to cover my time, and, therefore, will not be charging you or Jane for my time. Jane has also paid your legal fees*".

22. There is then a further email from Mr Coleman dated 23 June 2017 to Ms Gardner at Goodman Derrick but copied to Mr Stern saying that the request for payment from Mr Stern was okay with him.

23. The debtors say this is all suspicious and a matter of real concern. They have pointed to the strict rules governing the payment of bribes or secret commissions to agents: see, for example, *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm) at paragraphs [70] to [73]. They make the point that an agreement secured by means of a bribe is liable to be set aside, that there are likely also to be claims for damages, and say that such an agreement would necessarily be unfair within the terms of the Consumer Credit Act. They say there is credible evidence that the commission was paid, or at any rate that that was

the arrangement, and also credible evidence that the debtors knew nothing about it, i.e., the First Appellant's witness statement in which she expresses surprise at what she was told in May 2024 by Mr Stern.

24. Once again, these points are all very skilfully and seductively advanced by Mr Miller. However, despite that I have come to the view that I should not permit the fresh evidence to be adduced and should, therefore, refuse the application to amend the Grounds of Appeal.

25. My main reason for saying this relates to limb 1 of the *Ladd v Marshall* test. I am very far from satisfied that the evidence could not have been obtained with reasonable diligence for use at trial. I say that for the following reasons.

26. To start with, the First Appellant's own evidence in her witness statement suggests that Mr Stern did not seek to hide the fact that he was due to be paid an arrangement fee. Indeed, he appears to have volunteered the information spontaneously, complaining about the fact that he had not received it. This suggests to me that as far as Mr Stern was concerned, there was nothing much to hide and that he would have been clear about the arrangement fee point if enquiries had been made of him earlier. Mr Miller, in submissions, said that one could not be sure about that but it seems to me it is a fair inference from the limited evidence available.

27. To that, I would add the fact that since Mr Stern was *the debtors' agent*, any documents in his possession would have fallen within the debtors' own control for disclosure purposes.

28. In this regard, I was shown a letter from the debtors' solicitors, Aston Bond, dated 4 October 2023. i.e., before the trial. This made various requests for specific disclosure of the creditor, including requests for copies of all communications between the creditor and Mr Stern. Such communications would have included the email chain on 21-23 June 2017 I have referred to. In response to the 4 October 2023 letter, the creditor's solicitors denied that such materials were relevant and the matter seems not to have been followed up by the debtors.

29. This seems to me puzzling in light of the debtors' own position that the materials sought *were* relevant. Be that as it may, the point for present purposes is this: that the critical email communications which the debtors now rely on were all within their own control before trial because copies were in the hands of their own agent, Mr Stern. Not only that but they were communications the debtors themselves were saying were relevant and ought to be made available. It is not explained why the disclosure requests were not pressed and neither is it explained why separate requests were not made of Mr Stern who, it seems to me, would likely have complied. Even if not, the debtors had it within their power to require him to produce documents and, indeed, to subpoena him to give evidence at trial. In the event, Mr Stern did not give evidence for either side, which was a matter of surprise for the judge as he said in his judgment at paragraph [55].

30. Faced with these points, Mr Miller argued that one should not be overly critical of the debtors' conduct. It was not up to them to investigate whether there was a secret payment that they knew nothing about but up to the creditor and/or Mr Stern to explain what was going on. I see the force of that submission but the question posed by *Ladd v Marshall* is whether the new evidence could, with reasonable diligence, have been procured for the trial. Here, I find it very difficult to resist the conclusion that it could, because all that reasonable diligence required was for the debtors to follow up the enquiries they had already made, for documents they themselves maintained were relevant, and which were within their own possession, custody or control.

31. For those reasons, based on *Ladd v Marshall* limb 1, I think it right to refuse the application to rely on fresh evidence. What it really amounts to is a request to mount an entirely new case. There must be finality in litigation, however. It seems to me correct in principle to say

that the debtors should not be permitted to advance a new case which they could have been in a position to advance at the trial which has now already occurred. Although I accept that the fresh evidence would probably have had an important influence on the trial, at least in the sense that it gives rise to some unanswered questions, and also accept that it is credible, I am not persuaded that the interests of justice as reflected in the overriding objective require it to be admitted at this very late stage. The application is, therefore, refused.

End of Judgment.

Transcript of a recording by Acolad UK Ltd
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

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