Case No: QB/2017/0099

Neutral Citation Number: [2018] EWHC 418 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand

London WC2A 2LL

Tuesday, 16 January 2018

BEFORE:

MR JUSTICE LANE

BETWEEN:

LUKAN

Appellant

- and –

GHANA COMMERCIAL FINANCE LTD

Respondent

MR CUNNINGHAM appeared on behalf of the Appellant
UNKNOWN COUNSEL appeared on behalf of the Respondent

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. **MR JUSTICE LANE:** This is an application for permission to appeal, with the appeal to follow if granted, made by Mr Lukan against the decision of District Judge Platt on 19 October 2011, who refused to set aside the judgment for possession made on 29 June 2011 by District Judge Myers, whereby possession was ordered to be given by Mr Lukan in respect of property known as 47, Langhorne Road, Dagenham, RM10 9RB in favour of Ghana Commercial Bunks Limited. That company changed its name at some point to Ghana Commercial Finance Limited.
2. Importantly, for the purposes of the High Court's jurisdiction to hear this application and appeal, Mr Lukan -- who I shall refer to from here on as "the appellant" -- does not seek to appeal paragraph 2 of Judge Platt's order, which dismissed the appeal brought against Judge Myers' decision. The challenge in this court is, instead for the refusal to set aside the possession order.
3. On 11 May 2017, the Honourable Sir Alistair MacDuff, sitting as a judge of the High Court, granted the appellant's application to bring this appeal out of time. On 14 September 2017, the High Court granted the appellant permission to pursue the appeal against Ghana Commercial Finance Limited, which was by then in liquidation.
4. Mr Cunningham appears on behalf of the appellant. He tells me that, depending upon the outcome of the proceedings in this court, it may not be necessary to pursue in the Court of Appeal to appeal against Judge Platt's dismissal of the appeal.
5. The liquidator of Ghana Commercial Finance Limited does not appear in these proceedings. The liquidator has written to say that its stance is one of neutrality and it will abide by the court's decision in the case.
6. The facts of the matter are out in the skeleton argument prepared by Mr Cunningham and dated 2 May 2017. From that, we see that on 13 November 2008 the appellant borrowed £5,000 from the respondent, secured by legal charges on an address in Corby and also on 47, Langhorne Road.
7. The agreement purported to be a secured bridging loan, regulated by the Consumer Credit Act. There was a monthly minimum payment of £208.25 and interest was paid at 3.5 per cent a month, calculated on a day-to-day basis on the outstanding balance against the arrears.
8. On 18 March 2009, the respondent company brought possession proceedings in Romford County Court against the appellant in respect of 47, Langhorne Road, claiming an outstanding debt of £7,191.73, including solicitors' costs of £128.
9. On 27 March 2009, Mr Gopee -- who controlled a number of companies including Ghana Commercial Bunks Limited and about whom I shall have more to say in due course -- made a statement on behalf of the respondent company. The possession proceedings were adjourned at the first hearing and did not come back to court for more than two years.
10. On 25 May 2011, there was a possession hearing which was adjourned as the appellant was absent in Nigeria. On 29 June 2011, in the face of the appellant's continued absence in Nigeria, possession orders were made by District Judge Moss.
11. On 13 August 2011, the court issued a warrant for possession of 47,

Langhorne Road. At that time, the appellant had returned and tried to set aside the warrant. On 23 September 2011, District Judge Moss refused to suspend the warrant for possession. A challenge was made to that order was referred on 19 October to His Honour Judge Platt who made the order against which this appeal is brought. The possession order was enforced, the appellant was evicted and with the company in control, Mr Gopee put a tenant into the property.

12. In July 2016, the appellant was informed by his accountant that a number of companies controlled by Mr Gopee did not appear to have consumer credit licences and that these matters were being dealt with in court. The appellant then took action, which resulted ultimately in the proceedings in this court today.

13. It is important for the purposes of understanding these proceedings to note to a number of cases brought in respect of companies controlled by Mr Gopee. In *Barons Finance Ltd & Reddy Corporation Ltd v Makanju* [2013] EWHC 153, His Honour Judge Mackie, sitting in the London Mercantile Court, explained how a collection of cases from county courts in Greater London had been sent to the London Mercantile Court to coordinate them. The cases involved claims arising from loans made by Barons Finance Limited and associated companies, including the present respondent.

14. The judge explained that the loans were made to:

> "...people who have arrived in this country quite recently and are under severe financial pressure at high rates of interest usually secured by charges on the borrowers' homes."
>
> He then said:
>
> " In most cases the Defendants now seek to set aside or appeal against orders obtained some years ago. These Defendants generally claim that they entered into the loans under severe financial and personal pressures and have only recently learned of the legal grounds upon which the original judgments, often obtained by default or after only perfunctory resistance, may be challenged. The Defendants often say that they were unaware of their legal rights when entering into the transaction in dispute."

15. In the judgment, Judge Mackie QC dealt with the issue of appeals being brought out of time with the relevant criteria of the CPR 3.9. He decided that the appeal in that case had a real prospect of success because of the failure to comply with the requirements of the Consumer Credit Act 1974. He did so because Barons, the company in question in those proceedings, had been carrying out business under the Act without a licence, namely agreeing an enforceable loan.

16. In his judgment, His Honour Judge Mackie QC decided that permission to appeal should be granted because:

> "...the material at present before the court suggests that Barons obtained the judgment in 2009 having known for some years, and without disclosing, that there were grounds upon which its application would fail if the court were given the full picture."

17. The skeleton argument makes reference to further cases before His Honour Judge Mackie QC, of a similar nature. Rather than going to them in detail, I consider the better course is to exercise the judgment of Gloster LJ in *Gopee v Ghana Commercial Investment Limited and Moneylink Finance Limited.*

18. In this judgment, Gloster LJ looked in detail at the judgment of His Honour Judge Mackie QC. She cited the passage in *Makanju* [2013] EWCA 153 in which Gloster J (as she then was) sitting in the High Court, described the case as:

> "...one of a number of cases we have had from courts in the Greater London area, which have been sent to the London Mercantile Court to coordinate. They all involved claims and appeals arising from loans made by Barons and companies associated with it, including Reddy Corporation Limited and Ghana Commercial Finance."
> At paragraph 9 of her judgment, Gloster LJ stated that:
> "The relevant background includes an established and lengthy record of incompetence and lack of integrity, abusing the rights of consumers."

19. The overall picture that one gets from the judgment of Gloster LJ, and from the other proceedings referred to by her, is one in which Mr Gopee and the companies he controlled engaged in what can only be described as a highly problematic manner towards persons who were in receipt of the loans from those companies.

20. I shall leave the judgment of Gloster LJ having quoted this at paragraph 53:

> "Mr Gopee has abused the legal process. He has used his position as a quasi-litigant in person further to disclose the wrong information about the legality of some of his actions he seeks to enforce and the past decisions of the courts about that. If he had made proper disclosure, it is unlikely that he would have obtained any of the judgments in the county courts. He has abused the legal process...."

21. All the litigation in question involving Mr Gopee has now been transferred to the Central London County Court and reserved there to District Judge Langham and District Judge Michael.

22. Mr Cunningham tells me that arrangements have been made in the present proceedings for any matter that may arise from my judgment to be taken up in that Court

23. Having laid out the background, I return to the facts of this case. There is no transcript or other record of the reasons why Judge Platt reached the decision which is being challenged in these proceedings. That is entirely understandable, given how long ago it was that the judge reached the decision. We are informed that the court authorities will have destroyed any recording that there may have been of what the judge had to say.

24. In the circumstances, therefore, one has to consider the appellant's submissions in the light of what is now known about the highly problematic activities of Mr Gopee and his companies, in order to establish whether the requirements of CPR 39.3(i) were met; in other words, to determine whether the possession order should have been set aside.

25. CPR 39.3 deals with failure to attend at trial. Paragraph 5 relates to application to set aside,

> **"(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –**

(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

26. This provision applies to possession proceedings. Authority for that proposition can be found in the case of *Hackney LBC v Findlay* (2011) EWCA Civ 8.

27. At paragraph 24 of the judgment of the court, we find this:

> "Thus, in my judgment, in the absence of some unusual and highly compelling factor [...] a court that is asked to set aside a possession order under CPR 3.1 should in general apply the requirements of CPR 39.3(5) by analogy. This is in addition to, and not in derogation of, applying CPR 3.9 by analogy, as this court did in *Forcelux*, as that provision requires the court to have regard to all the circumstances in any event.
>
> "However, in my judgment, for the reasons given above, in the absence of the unusual and compelling circumstances of a case such as *Forcelux*, this court should give precedence to the provisions of CPR 39.3(5) above those enumerated in CPR 3.9."

28. In the absence of any transcript or other recording of the judgment of Judge Platt, I approach the matter by way of a rehearing. I do so compatibly with what was said by the High Court in *Sari & Ors v Willard* [2002] EWHC 1243.

29. Paragraph 8 of that judgment in effect held that a rehearing rather than a review of a judge's decision will be appropriate where there no recording or record of reasons exist, if there is a good reason to take that course.

30. I consider that there is a good reason in the present case, consistent with the lapse of time and the consequent destruction of the recording to which I have made reference, taken together with the particular circumstances of this litigation involving Mr Gopee and his companies and the subsequent coming to light of the sheer scale of the impropriety that has occurred in relation to those companies and their activities.

31. As we have seen, applying CPR 39.3(5) means that all three requirements in that paragraph need to be satisfied. If they are so satisfied, however, then the judgment or the decision in question should be set aside.

32. The authority for that proposition comes from *Bank of Scotland PLC v Pereira* [2011] EWCA Civ 241.

33. At paragraph 25, Lord Neuberger said:

> "...if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order."

34. In paragraph 26, Lord Neuberger pointed out in particular in relation to the requirement of promptness that each case would be:

> "...very fact sensitive."

35. With that in mind, one turns to the question of promptness in the present case.

36. Just before the hearing before His Honour Judge Platt, a written statement from Mr Gopee was handed in. In that statement, Mr Gopee took issue with whether

the appellant in the present case had acted promptly.

37. What Mr Cunningham says about this is that the possession order in the present case was made on 29 June 2011 and the application to suspend the warrant is dated 19 September. The order refusing that application is dated 23 September 2011 and the appellant's notice was filed on 5 October 2011.

38. The whole process, accordingly, took less than four months and in the circumstances Mr Cunningham submits that that was prompt. I agree; particularly in the light of the fact that the evidence demonstrates, both from the period in question and subsequently, that the appellant was unwell in Nigeria during this period of time in the summer of 2011.

39. In these proceedings, the High Court gave permission for a letter to be produced on the issue of the appellant's state of health at the relevant time. That letter is dated 26 July 2011 and it refers to the appellant presenting at the hospital with severe pains in his legs and back pain on 30 May 2011.

40. The appellant was "in obvious pain and distressed" and a diagnosis of arthritis was made. A course of medication was to follow.

41. On 20 June 2011, the appellant was placed on four weeks of "strict bed rest and recuperation" until 26 July 2011.

42. In that regard, I note that at the time in the proceedings the appellant made reference to his difficulties. He wrote to say:

> "I have been seriously ill due to a severe back problem and arthritis."

43. In all the circumstances, I am fully satisfied that the appellant acted promptly in terms of CPR 39.3(5)(a).

44. The second issue is whether the appellant had a good reason to be absent from the original hearing. Again, Mr Cunningham submits that he did and, again, I agree. Page 55 of the bundle, to which I have just made reference shows that a satisfactory explanation was given; namely that the appellant had been unwell in Nigeria. Again, there is reference to the letter from the hospital.

45. Therefore, in my view, the appellant satisfies subparagraphs (a) and (b) of paragraph 5. I consider that Judge Platt would have not have acted as he did, had he known the relevant facts. The real issue, therefore, is that contained in (c): is there any reasonable prospect of success at trial?

46. This question has a number of aspects. First, was the loan agreement which founded the claim was regulated by the Consumer Credit Act 1974? Mr Gopee made a statement saying that it was not. In that statement, Mr Gopee contended that the loan agreement between the company and the appellant was a bridging facility, repayable on demand for the business service and as such was unregulated by the Act.

47. Mr Cunningham submits that Mr Gopee is incorrect. The issue concerns the operation of section 16C. That section provides that the Act does not regulate a consumer credit agreement if at the time the agreement was entered into, any sum due under it was secured by land mortgage where less than 40 percent of the land was used or intended to be used as or in connection with dwelling by the debtor or a person connected with the debtor.

48. In our case, the loan was secured by legal charges on two properties, which I have already mentioned. The appellant submits that 47, Langhorne Road was his

home. Mr Gopee's statement contended to the contrary. However, importantly, all correspondence addressed to the appellant in connection with the possession proceedings has been addressed to him at 47, Langhorne Road.

49. Also, importantly, in my view, at page 41 of the bundle, we find the formal statement made by the company to the appellant in connection with the proceedings; and this is addressed to the occupier of 47, Langhorne Road.

50. In all the circumstances, I agree with Mr Cunningham that the requirement in paragraph (c) is met. The appellant has demonstrated that 47, Langhorne Road was his home.

51. I also agree that the fact other people were on the electoral roll was of no significance to the determining of the issue.

52. So far as the other property in Corby was concerned, there is nothing to dispute the appellant's case that this was or was intended to be his home so his children could come to live with him.

53. For those reasons, any reliance by Mr Gopee upon section 16C is difficult to make good. On that issue, the appellant clearly has a reasonable prospect of success at trial.

54. Reliance is also placed by Mr Gopee upon section 16B: an exemption relating to businesses. This plainly does not apply, as in our case the credit in question exceeds £5,000.

55. Mr Gopee's next point is that the Reddy Corporation was acting as the agent for the Ghana company; and the Reddy Corporation was duly licenced under the 1974 Act.

56. As to this, Mr Cunningham points to the judgment of His Honour Judge Mackie QC in *McAndrew* at paragraphs 18 to 22. Judge Mackie concluded that there was nothing in the agency point. It was, in fact, a sham. I see no reason to take a different view.

57. Mr Gopee in his statement put forward arguments about the lack of promptness on the part of the appellant. I have already dealt with that. It is not necessary to say more about it.

58. Pausing at this point, the appellant has, in my view, undoubtedly made good the argument that there is a reasonable prospect of success, at the very least, at trial, insofar as concerns the regulated status of the company which obtained possession against the appellant. What follows from this? Section 65 of the Consumer Credit Act 1974 states as follows:

> "65. Consequences of improper execution.
>
> "(1) An improperly-executed regulated agreement is enforceable against the debtor or hirer on an order of the court only."

59. Was the loan agreement with the appellant improperly executed?
Mr Cunningham suggests that it was and, again, I agree. If one compares the agreement as found at page 36 of the bundle with the relevant regulations, one finds a striking number of failures.

60. Amongst them is the failure to set out the duration, or minimum duration, of the agreement.

61. Mr Cunningham says that the only places in which the agreement does meet the requirements of the regulations made under the 1974 Act can be attributed to

accident or other happenstance. Be that as it may, I am fully satisfied that the agreement entered into by the appellant is very substantially non-compliant.

62. The consequence of this is to create a further matter going to the issue of whether there was a reasonable prospect of the appellant succeeding at a trial.

63. Finally, Mr Cunningham submits that there is an issue to be determined at the trial regarding the alleged unfair relationship between the company and the appellant. We find legislation relating to that at section 140A and 140B of the 1974 Act.

64. Section 140A deals with unfair relationships between creditors and debtors:

> "The court may make an order under section 140B in connection with a credit agreement [in certain circumstances]..."

65. The court must determine that the relationship between the creditor and the debtor arising out of the agreement was unfair to the debtor for one or more of the following circumstances:

> "(a) any of the terms of the agreement or any related agreement;
> "(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
> "(c) any other thing done (or not done) by [...] the creditor."
> Section 140A(2) states that:
> "In deciding whether to make a determination under the section the court should have regard to all matters it thinks relevant..."
> Section 140B(1) provides that:
> "An order [...] in connection with a credit agreement may do one or more of the following..."

66. Mr Cunningham submits that the most relevant is paragraph (c) which confers the power to reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement.

67. In the case of *Bevin v Datum Finance Limited* [2011] EWCA 3542, Mr Justice Peter Smith at paragraph 53 stated that it would be:

> "...very difficult at a summary stage to resolve [the issues of unfair relationships]."

68. Mr Cunningham submits that, with that in mind, the issue of whether there was an unfair relationship gives a further reason why there is a reasonable prospect of a successful trial.

69. Again, I agree with Mr Cunningham. It is also relevant that in those circumstances the burden of proving the relationship was not unfair lies on the creditor.

70. Drawing the threads together, I find that the appellant has satisfied each of the three requirements of CPR 39.3(5). As I have recorded, permission to bring these proceedings out of time has already been granted by the High Court. Even if that were not so, I would have found that there are sufficiently special reasons why a decision from the County Court in 2011 should be scrutinised by the High Court in 2018. Those reasons lie in the particular nature of the proceedings and of Mr Gopee and his companies, and the sheer scale of the misfeasance exhibited in that regard.

71. I therefore grant permission to appeal and allow this appeal. The possession order is set aside.

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This transcript has been approved by the Judge