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Gough Square Chambers' consumer credit column: March 2023

by George Spence-Jones, Gough Square Chambers

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Ruth Bala, Lee Finch, Sabrina Goodchild and George Spence-Jones are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the March 2023 column, George Spence-Jones considers the High Court decision of HHJ Lesley Anderson KC in *Arthistory Ltd v Campbell and Campbell [2022] EWHC 848 (Ch)*. The case concerned whether an arrangement constituted a regulated mortgage contract under the Financial Services and Markets Act 2000 (FSMA), whether it was entered into "by way of business" and whether there was an unfair relationship under section 140A of the Consumer Credit Act 1974 (CCA).

High Court considers meaning of regulated mortgage contracts, by way of business and CCA unfair relationship provisions

Following the High Court decision of HHJ Lesley Anderson KC in *Arthistory Ltd v Campbell and Campbell [2022] EWHC 848 (Ch)* (8 April 2022), this column considers the meaning of a regulated mortgage contract (RMC) with regards to assessing whether 40% of land is used in connection with a dwelling, and also whether the RMC in question was entered into by way of business. In addition, it looks at the consequences of a finding of an RMC for the unfair relationship provisions under the Consumer Credit Act 1974 (CCA).

Background

The defendant elderly couple (Ds) entered into the following four written agreements with the claimant property company (C), all dated 9 September 2015:

- **Facility agreement.** A facility agreement under which C loaned £123,215 to Ds at a rate of 28% per annum, to be repaid within 36 months. If not repaid, default interest at 2.5% per month was payable. There was also an arrangement fee of 15% of the facility and an exit fee of 3%.
- **Legal charge.** An all monies on demand legal charge was executed over Ds' property.
- **Option agreement.** An option agreement under which if C exercised the option, the sale of the property would be subject to the continued occupation of Ds under a tenancy agreement. The option would lapse if not exercised within 36 months.
- **Buy-back option agreement.** A buy-back option agreement, under which Ds would purchase the property for an amount equal to the sums outstanding under the facility agreement and legal charge, together with certain price additions depending on the year in which the option was exercised.

Shortly after entering into the agreements, in October 2015, C exercised the option agreement. Ds failed to properly execute the transfer, and so, C brought the claim, seeking specific performance and/or an order that Ds execute a property transfer. Ds opposed the claim, essentially alleging that the suite of arrangements did not properly reflect the agreements between the parties and that they were unfair.

The principal issues at trial concerned:

- Whether the facility agreement and legal charge constituted an RMC for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO) (see Was there a regulated mortgage contract?).
- If so, whether C was entering into an RMC "by way of business" for the purposes of sections 19 and 22 of the Financial Services and Markets Act 2000 (FSMA) (see

Was the regulated mortgage contract entered into by way of business?).

- Whether the suite of agreements constituted an unfair credit relationship to Ds such that they should be set aside or varied under sections 140A to 140C of the CCA (see Was there an unfair relationship under the CCA?).

Was there a regulated mortgage contract?

Ds contended that the facility agreement and legal charge were an RMC for the purposes of article 61(3) of the RAO, taking into account its three-stage test.

The first two stages under article 61(3)(i) and (ii) were satisfied.

As to article 61(3)(iii), the secured land was Ds' rural freehold property. That property included a bungalow home, paddock fields, former commercial stables, and garages and vehicle storage areas. Therefore, the court was faced with the not-so-straightforward assessment of whether, at inception, 40% of that whole land, by area, was "used, or intended to be used, ... as or in connection with a dwelling".

The single joint expert (SJE) had used aerial photographs of the property and had demarked the different relevant areas of Ds' property. These comprised:

- A dormer bungalow with front and rear gardens, representing 11.11% of the area.
- A paddock, representing 44.44% of the area, broken down as:
  - a garage and vehicle storage area, which accounted for 11.11% of the area; and
  - fields no longer used as livery stables but where Ds kept horses they owned, which accounted for 33.33% of the area.
- A lower field and commercial stables, representing 44.44% of the area.

The SJE opined that the lower field and commercial stables (44.44%) and the vehicle storage land (11.11%) were for non-domestic use. The 11.11% dormer bungalow was evidently for domestic use. However, the SJE did not seem to proffer an opinion on the remaining 33.33% for the paddock fields that were not part of the vehicle storage area.

The judge agreed with the SJE and went on to find that the undetermined 33.33% paddock with its private stables, not including the garage and vehicle storage area, was "used in connection with" the dwelling-house. It was adjacent to and used in conjunction with the dwelling-house, and there was access to it from the dwelling-house. This was, therefore, the type of situation described in planning guidance notes as being a "residentially incidental horse".

Therefore, 44.44% was for domestic use, and the facility agreement and legal charge were an RMC.

For more information on the definition of an RMC, see Practice note, What is a regulated mortgage contract?.

Comment

Although an SJE was instructed, it seems that the assessment of the use of land was properly within the ambit of judicial determination. Ultimately, the judge considered the guidance documents and submissions and made their own assessment of the multi-use fields. This is helpful for litigants, as they may only need an expert to help use aerial photographs to divide land into sections and percentages, but the use of each section will still remain a matter for judicial determination.

In addition, although the 33.33% paddock field had an element of non-domestic use to it, the judge did not make an assessment, for example, to further divide that land artificially to reflect that mixed-use (such as to say 50% is domestic and 50% is non-domestic use). Instead, the judge made a yes/no determination that that land was for domestic use.

This is also a welcomed outcome for litigants. There are clearly situations where land will have mixed use. Take, for example, where an individual works from home in a dedicated study room. This yes/no outcome on mixed land seems to marry with the FCA's view, set out in its Perimeter Guidance manual (PERG) at PERG 4.4.7, which looks at whether certain land has an "existence independent" of the residential property. If not, then it can remain domestic use.

Was the regulated mortgage contract entered into by way of business?

Given the judge's findings as to the RMC, the judge then had to consider Ds' contention that C was offending the prohibition set out in sections 19 and 22 of FSMA by entering into the RMC "by way of business".

Although unlikely to be the sole motivation, the judge accepted C's evidence that this was "a one-off transaction which was not entered into for commercial purposes". Further, applying *Bassano v Toft [2014] EWHC 377 (QB)*, C was in the business of buying and selling property, but C was not in the business of providing secured lending generally.

For more information on what it means to carry on a regulated activity by way of business, see Practice note, Carrying on regulated activities by way of business.

Comment

The "by way of business" assessment is not new for the courts. However, the judge did not refer to the typical factors set out in *Helden v Strathmore Ltd [2010] EWHC 2012 (Ch)* or PERG 2.3. On an aside, presumably, the judge had the relevant PERG provisions available to them, as PERG had been referred to when making the 40% of land assessment earlier. Instead, the decisive factor to this judge appeared to be the one-off nature of this mortgage transaction.

This is an attractive outcome for two reasons. Firstly, *Bassano v Toft*, a decision under the CCA regime, has now been applied to the FSMA regime. In principle, there was no reason why the case should not be deployed, as the CCA regime looked at whether an agreement was made "in the course of a consumer credit business" which is similar to the "by way of business" test, notwithstanding Newey J's observations about the different regimes set out at [82] in *Helden*.

Secondly, the "one-off" nature of a transaction seems to be a powerful factor indicating away from a finding that an agreement was entered into "by way of business", as the judge did not need to concern themselves with the usual factors set out in *Helden v Strathmore* and PERG.

Was there an unfair relationship under the CCA?

Having found the facility agreement and legal charge to be an RMC, the judge then went on to consider Ds' case that the suite of arrangements gave rise to an unfair relationship for the purposes of section 140A to 140C of the CCA.

The judge looked at the usual factors and concluded that the relationship was unfair. The salient reasons included:

- The initial interest rate (28%) and exit fee (3%) were supposed to be waived by a promised side letter.
- The option agreement went well beyond what was accepted by C as being intended to be security for the arrangement. There were "no sound commercial reasons" for the option agreement, and it "did not represent a legitimate and proportionate attempt by C to protect its position" when what C was looking for was simply adequate security.

Although the judge largely kept the facility agreement and legal charge in force, those two agreements were significantly altered. However, the option agreement, buy-back option and transfers were then set aside.

Comment

It is seemingly an error that the judge went on to consider the debtors' counterclaim for an unfair relationship. Section 140A(5) of the CCA states:

> "(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts ...)."

The factual finding of the judge was that the facility agreement and legal charge constituted an RMC. Therefore, section 140A(5) seemingly prohibits the court making the orders that it did.

Given this, in this author's view, the judge erred in entertaining Ds' counterclaim for an unfair relationship and making the various orders in relation to the suite of arrangements, and this provision was seemingly overlooked by both judge and representative. Therefore, the decision is to be followed with some caution.

As an aside, it seems to me that section 140A(5) of the CCA does not appear to be something that a creditor/lender needs to plead in the same sense as pleading a limitation defence. The comparative wording of limitation provisions, "an action ... shall not be brought", is distinct to section 140A(5), where "an order ... shall not be made". Therefore, it is unlikely that a creditor can tactically choose to not bring section 140A(5) of the CCA to the court's attention.

Conclusion

In summary, the following practical points arise from the decision:

- The assessment of 40% of land being "used in connection with a dwelling" looked at the area of the land. An SJE was instructed to assist in dividing the land, but the determination of use of land remained a judicial one.
- From this decision, multi-use sections of land have a yes/no answer as to whether they are "used in connection with a dwelling", rather than being subject to a further division to reflect multi-use.
- The "one-off" nature of this transaction kept it from being entered into by the lender "by way of business". This "one-off" nature is a seemingly strong factor, as the judge did not concern themselves with *Helden v Strathmore* or the provisions in PERG.
- The judge seemingly erred in entertaining the debtors' counterclaim for an unfair relationship, pursuant

to sections 140A to 140C of the CCA, given the earlier factual finding that the suite of agreements constituted an RMC. Further, the section 140A(5) restriction on an order being made in connection with an RMC does not appear to be something that has to be pleaded, but rather something that ought always to be brought to the court's attention.

This error is, perhaps, a gentle reminder that the provisions of the CCA require specialist experience and a nuanced understanding to ensure that the court arrives at the correct outcome in law.

Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see Practice note, Gough Square Chambers' consumer credit column.