

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Peter Smith
[2011] EWHC 1757 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2012

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIMER
and
LORD JUSTICE PATTEN

Between :

(1) TREVOR CHARLES HORN
(2) CARLO DINARDO
(3) ROWANMOOR TRUSTEES LIMITED
- and -
COMMERCIAL ACCEPTANCES LIMITED

**Claimants/
Respondents**

**Defendant/
Appellant**

Mr Justin Fenwick QC and Mr Hugh Jackson (instructed by **Mishcon de Reya**) for the
Appellant, Commercial Acceptances Limited
Mr Edmund Cullen QC (instructed by **Forbes Anderson Free**) for the **Respondents**

Hearing date: 25 April 2012

Judgment

Lord Justice Rimer :

Introduction

1. This appeal by the defendant, Commercial Acceptances Limited (“CA”), is against a judgment for £503,436.09, interest and costs entered against CA by an order made by Peter Smith J on 8 July 2011 after a three day trial in the Chancery Division. The successful claimants, now respondents, are Trevor Horn, Carlo Dinardo and Rowanmoor Trustees Limited (‘the trustees’). CA was represented before us by Justin Fenwick QC (who did not appear below) and Hugh Jackson (who did), and the trustees were represented before us by Edmund Cullen QC, as below.
2. The case turned primarily on the interpretation of an agreement and trust deed and the judge preferred and accepted the trustees’ suggested interpretation of them. The trustees also advanced alternative arguments to him, including a claim to rescind the agreement. That claim also succeeded and CA also challenge that part of the judge’s decision. In order to explain the issues, I proceed straight to the facts and the documents.

The facts

3. CA’s business was the lending of money on short term loans (not exceeding 12 months) on the security of land. Its lending criteria did not permit it to make loans in excess of 75% of the loan-to-value ratio (‘LTV’) of the security, ‘value’ meaning the forced sale value. The trustees are the present trustees of the Horn Productions Limited 1983 Pension Scheme. On 19 April 2006 the then trustees of the Scheme entered into an agreement (‘the agreement’) with CA. Its purpose was to provide for the terms upon which they would contribute to loans being made by CA. The trustees’ involvement, by way of what CA’s evidence described as ‘top-up lending’, enabled CA to offer loans of up to 85% of LTV. The trustees were to take on the riskiest part of the lending. I turn to the agreement.

The agreement of 19 April 2006

4. The agreement opened by reciting (1) that the trustees were to ‘provide funds to and participate with CA in connection with its business as more particularly defined and described hereafter’; and (2) that ‘CA will make any loans as hereinafter defined as trustee for CA and the Trustees in the proportions and beneficial interests as set out in this Agreement’. Clause 1 set out some definitions, of which the following are material:

‘(iii) “CA’s Business” means the business carried on by CA of lending money on the security of ... properties secured by way of Legal Charges ... for periods not exceeding twelve months;

(iv) “Contributions” means the contributions to each Loan ... made respectively by CA and the Trustees, and “the CA Contribution” means the sum of money contributed by CA to each Loan, and “the Trustee Contribution” means the sum of money contributed by the Trustees in respect of each Loan and paid to CA for such purpose; ...

(vii) “Legal Charge” means the first party or third party (as the case may be) first or second charge (as the case may be) by way of legal mortgage by which each Loan is secured. CA will be the chargee in respect of the Loan as trustee for CA and the Trustees in the forms set out in the First and Second Schedules hereto;

(viii) “Loan” means a loan made in the course of CA’s business to a Borrower in respect of which the Trustees agree to make Trustee Contributions.

(ix) “LTV Percentage” means the amount advanced by CA to the Borrower in respect of each Loan expressed as a percentage of the value of the property concerned on a forced sale basis.

(x) “Trust Deed” means the Trust Deed of even date executed by CA set out in the Fourth Schedule hereto.’

5. Clause 2, headed ‘The Trustee’s [sic] Contributions’, provided for the trustees to provide ‘Trustee Contributions to CA for the purpose of CA’s making loans to Borrowers in the course of CA’s Business on a case by case basis ...’. Clause 2.2 provided that in each case in which the trustees did agree to make a trustee contribution, the subsequent provisions of the agreement would apply. Clause 3, headed ‘Decision to make Trustee Contribution,’ provided that when requesting the trustees for a trustee contribution, CA would provide them with an up to date forced sale valuation of the security made by a valuer previously approved by the trustees, and clause 3.4 provided that the trustees should have a discretion in each case as to whether or not to make a trustee contribution in respect of the proposed loan, such decision to be notified by Mr Miller. The following are the material provisions of clauses 4 to 7 and 12:

‘4. Provision of funds to each Borrower

4.1 In respect of each Loan advanced to each Borrower in the course of CA’s business the LTV Percentage shall not exceed 85% and the CA Contribution and the Trustee Contribution shall be provided in the proportions as set out in paragraph 5 below.

5. Percentage of Loans to be provided by each party.

5.1 The CA Contribution will be up to an amount equal to a LTV Percentage of 70%.

5.2 The Trustee Contribution will be up to an amount equal to a LTV Percentage of 15%.

5.3 The CA Contribution and the Trustee Contribution referred to in 5.1 and 5.2 above will be decided by agreement between CA and the Trustees.

6. Repayment and apportionment of risk

6.1 On the repayment of each Loan by the Borrower CA will forthwith repay to the Trustees the outstanding Trustee Contribution in respect of that Loan together with interest accrued and any other monies owing to the Trustees (plus interest [at a described rate]) up to the date of payment to the Trustees ...

6.2 In the event that sums repaid by the Borrower and sums recovered under any security shall be insufficient (1) to repay the Contributions and (2) to discharge interest due to CA and the Trustees and (3) to discharge any fees and expenses owing to CA and the Trustees, the repayments made and the sums recovered shall be applied in the following order of priority:-

6.2.1 The outstanding CA contribution, to CA.

6.2.2 Any reasonable fees and expenses incurred by CA wholly and exclusively in connection with the recovery of monies from the Borrower [and there was a provision for the resolution of any dispute as to amount] to CA

6.2.3 The outstanding Trustee Contribution, to the Trustees.

6.2.4 The sum that would be payable to CA in respect of simple interest on the CA Contribution if CA were entitled only to simple interest (at the rate ... specified in the Legal Charge relating to that particular loan ...) from the Borrower.

6.2.5 Outstanding interest owing to the Trustees in respect of the Trustee Contribution, to the Trustees.

6.2.6 Any fees and expenses owing to the Trustees, to the Trustees.

6.2.7 The balance of any interest due from the Borrower to CA, to CA.

6.3 In calculating the sums due to CA and the Trustees in accordance with the order of priority set out at paragraph 7.2, CA shall bring into account all sums received from the Borrower since the inception of the Loan whether by way of capital, interest or otherwise.

7. Trust

7.1 CA will hold the benefit of the Borrower's repayment obligations and the Legal Charges (and the Debentures where appropriate) (including all monies repaid or recovered thereunder) on trust for CA and the Trustees in accordance with the Trust Deed ...

12. Undertakings

12.1 CA shall: ...

12.1.6 Not to [sic] factor or discount any Loan without the Trustees prior written consent, such consent not to be unreasonably withheld. ...

12.1.8 Not to [sic] enter into any agency agreement with any third party in respect of any Loan.'

6. The first schedule to the agreement set out the form of the first party legal charge (defined in clause 1.1(vii)) to be entered into between a borrower and CA. There is no need to refer to more than clause 1, by which the borrower covenanted 'with the Lender [CA] to pay to the Lender (as Trustee for itself and the Pension Scheme) on

demand all sums of money and liabilities ...'. The second schedule set out the form of any third party legal charge to be entered into to secure the CA loan, but there is no need to refer to its terms. The third schedule set out the form of debenture to be granted in the case of loans to companies, and there is also no need to refer to it. The fourth schedule set out the form of trust deed defined in clause 1.1(x) of the agreement, and a trust deed in that form was entered into on 19 April 2006 between CA and the trustees. The trust deed recited that it was supplemental to the agreement, that it related to 'the provision of contributions by the Trustees to CA to enable CA to make loans ... to Borrowers on the security of first or second legal charges', and that it was made 'for the purposes of declaring the rights of the parties hereto in respect of the Loans made by CA as trustee for CA and the Trustees'. The deed then provided, so far as material:

'1. CA shall hold the benefit of the legal charges and Debentures ("the Legal Charges") which shall secure each Loan (including the benefit of the repayment covenants and the redemption monies when they are received by CA) in trust and as trustee for CA and the Trustees in the proportions that CA and the Trustee shall have contributed to the Loan in accordance with paragraph 5 of the Agreement.'

More facts

7. Following the agreement of April 2006, CA made a number of loans to borrowers in which the trustees participated. The advantage to CA of their participation was that the increase in the LTV ratio to, say, 85% enabled the charging of higher interest rates to the borrower, from which CA was able to benefit without incurring the increased risk to itself of being associated with lending at 85%. That was because it was the trustees who were making the riskiest, top slice of the lending: in the case of a shortfall on realisation, CA was to be repaid its capital first (see clause 6.2). The arrangement between CA and the trustees was not, therefore, one of syndicated lending, under which the parties contributed rateably and bore the risks rateably. The higher rate of interest chargeable to the borrowers exceeded the interest payable by CA to the trustees under clause 6.1 and so it also enabled CA to make a turn on the money that the trustees were contributing.
8. The loan leading to this litigation was made in October 2006. On 4 October 2006, CA offered a loan of £2,186,000 to Goziam Nwamu and Theo Ogburu to be secured by a first legal charge on four flats at 100 Kingsway, London N12. The facility was repayable on demand and in any event within 90 days from the advance. The interest rate was 2.5% above Barclays Bank Plc's base rate on the outstanding indebtedness calculated with 30 day rests; and there was a 'facility fee' of 1.5% of the outstanding indebtedness, per 30 days or part, also calculated with 30 day rests, such fee being reducible to 0.75% per 30 days or part when the facility was not in arrears or default. CA received valuations of the proposed security of £2,854,000 (market value) and £2,572,000 (90 day market value, or forced sale value). On 12 October 2006, CA sent an information sheet with such valuations to Mr Miller, the trustees' representative for the purpose of notifying the trustees' decisions as to whether or not to lend (clause 3.4 of the agreement). The information sheet in fact contained a subsequently corrected error, with the ultimate position being that the trustees were invited to make a contribution of £514,200, or 15% of LTV, which was agreed to by Mr Miller on their behalf. The trustees understood that CA was therefore providing the senior amount of

£1,671,800 towards the offered loan of £2,186,000. The proposed loan to the borrowers was made and on 19 October 2006 they entered into a legal charge with CA securing its repayment, clause 1 following the form referred to in [6] above.

9. The borrowers failed to make the repayments within 90 days and over the following year the flats were sold, one sale being to David Goldstein, a friend of one of CA's then directors. I come to his more significant role in a moment, but note that nothing turns on the fact that he bought one of the flats and it is accepted that he paid a full price. The total realisations from the sales were £1,792,450. After deducting costs, CA paid Mr Goldstein £835,900 and recouped an identical amount for itself. That left a balance of £101,708, which CA paid to the trustees. The trustees thus suffered a capital loss of £412,492 on the transaction, which is the sum for which they sued CA.
10. On what basis did they do so? It involves Mr Goldstein. What the trustees did not learn until after the loan had gone sour was that CA had only contributed £835,900 (or 32.5% of LTV) of its own money to the loan to the borrowers. The other 32.5% had been provided by Mr Goldstein. CA and Mr Goldstein entered into a trust deed on or around 12 October 2006. Recital 1 stated that it was supplemental to the legal charge granted by the two borrowers, said to have been made 'in consideration of sum of £1,671,800 ("the Principal Sum")'. That was an inaccurate description of the sum for which the legal charge constituted security, which was the £2,186,000 advance plus interest: £1,671,800 was simply the senior slice of the total advance that CA and Mr Goldstein were providing. Recital 2 recited that:

'[CA] was in fact granted the Legal Charge by [the borrowers] on behalf of itself and Mr Goldstein in the shares and proportions thereafter mentioned and the Principal Sum was lent by the Mortgagee and Mr Goldstein in equal shares and proportions'.

That too was inaccurate. If the 'thereafter' was, as one might perhaps think, a reference to something in the legal charge, that document will be read in vain for a reference to the arrangement between CA and Mr Goldstein: the beneficiary of the legal charge is there said to be CA 'as trustee for itself and [the trustees]'. Clause 2.1 of the operative parts of the trust deed provided that:

'[CA] shall hold the net residue of the Principal Sum or the proceeds of sale if less of the Property on Trust to divide the same in shares equally between itself and Mr Goldstein'.

11. It is at the heart of the primary issue between the parties that the relationship between CA and Mr Goldstein was not that of debtor and creditor. Mr Goldstein was not lending £835,900 to CA so as to enable CA then to advance out of its *own* money the whole of the senior debt to the borrowers, with CA thus carrying the entire risk as to the recoverability of the whole of the senior debt. As between it and the borrowers, CA was of course advancing the whole of the senior debt, just as it was also advancing the trustees' top slice. But, as regards the risk in respect of recoveries, it was intending to be personally at risk only as to half of the senior debt. In making its advance to the borrowers, it was acting not just as an agent for the trustees as to the top slice of the debt, but also for Mr Goldstein as to half of the senior debt. The trustees, however, knew nothing of Mr Goldstein's involvement.

The judge's decision

12. The trustees' primary case was simple. It was that CA had not been entitled to deal with the net proceeds of sale, after deducting the costs, in the way it did. Their case was that CA could only apply them in accordance with the terms of the agreement and trust deed (meaning the trust deed supplemental to the agreement), being documents which made no provision for payment to Mr Goldstein. That was because 'CA Contribution' within their meaning did not and could not include the contribution to the loan that CA had made as agent for Mr Goldstein. The 'CA Contribution' therefore amounted only to £835,900. CA's position was the reverse, namely that the 'CA Contribution' within such meaning could and did include the Goldstein contribution and therefore amounted £1,671,800. For reasons succinctly explained at [54] to [57] of his judgment, the judge agreed with the trustees. As he pointed out, CA received sufficient proceeds to repay the capital advanced by the trustees. It ought, therefore, to have repaid the trustees its capital entitlement in full but did not. It instead made the payment it did to Mr Goldstein, which left it with insufficient to pay the trustees in full. The judge therefore entered judgment against CA for the claimed sum and interest.

The appeal

13. Despite valiant arguments by Mr Fenwick that CA's arrangement with Mr Goldstein fell within what the agreement and trust deed entitled it to do, and so entitled CA to distribute the redemption proceeds as it did, I consider that the judge was correct in his different interpretation of the documents. The critical documents are the agreement, the trust deed and the borrowers' legal charge. The arrangements between CA and Mr Goldstein are relevant insofar as they identify the limit of CA's contribution out of its own money to the loan. They are otherwise irrelevant: they cannot affect the trustees' entitlement as against CA under the prior arrangements between those parties.
14. In my judgment the interpretation of the documents is uncomplicated and points unerringly to the correctness of the judge's conclusion. Recital (1) of the agreement records the trustees' willingness to participate with CA in connection with its business, defined in clause 1 as '*lending money*'. Recital (2) recites that CA 'will make any loans *as trustee for CA and the Trustees in the proportions and beneficial interests* [thereafter] set out'. The emphasised words can only mean that CA and the trustees were respectively to advance their own money on their own account, for their own benefit and at their own risk; and, in CA's case, as part of its business of lending money, that is its own money. The language admits of no scope, as against the trustees, for CA to make loans on behalf of a third party, with such party bearing the risk in respect of his contribution, although no doubt it could declare a sub-trust of its own interest in any loan in favour of such a third party. In that event, however, the third party would be claiming under CA but not against the trustees. Clause 1 defines 'Contributions' as, respectively, 'the CA Contribution' and 'the Trustee Contribution' and so means, consistently with recital (2), the contribution that each is respectively making on its own account. The definition of 'Legal Charge' contains the important second sentence that spells out, as does the scheduled form of charge itself, that CA 'will be the chargee in respect of the Loan *as trustee for CA and the Trustees ...*'. Again, there is no scope there for CA to be a trustee of any part of the loan for any third party: the document simply does not contemplate it. Clause 4.1 provides that the

LTV percentage of any loan shall not exceed 85%, and provides for the ‘CA Contribution’ and ‘Trustee Contribution’ to be as specified in clause 5. That is a reference to the combined contributions in respect of the repayment of which CA is to be a trustee for itself and the trustees; and clause 5.1 provides for the CA Contribution to be up to an amount equal to a 70% LTV ratio and for the Trustee Contribution to be up to an amount equal to 15%. Clause 5.3 provides that the total contributions just referred to ‘will be decided by agreement between CA and the Trustees’. There is no scope there for CA to make a private side arrangement with a third party and claim that the trustees were bound by it.

15. Clause 6.2 deals with the priorities as between CA and the trustees in the event that the sums recovered under the loan are insufficient to pay them both in full as to capital and interest. The first slice goes in or towards satisfaction of the CA contribution. CA is then entitled to recover certain fees and expenses. The next slice goes in or towards satisfaction of the trustees’ contribution. Clause 7.1 provides, in short, for CA to hold the moneys realised under the legal charge on trust for CA and the trustees in accordance with the trust deed. The latter provides, by clause 1, that CA is to hold the redemption moneys ‘in trust and as trustee for CA and the Trustees in the proportions that CA and the Trustee shall have contributed to the Loan in accordance with the paragraph 5 of the Agreement’. The ordinary meaning of that is, again, that such moneys are to be held *beneficially* by CA and the trustees respectively and is inconsistent with CA being entitled to act as lending agent for an undisclosed third party who has also contributed to the loan. Finally, by clause 12.1.8 of the agreement CA undertakes not to enter into any agency agreement with any third party in respect of any loan. The arrangement between CA and Mr Goldstein, a third party, was one by which CA acted as Mr Goldstein’s agent in advancing his share of the loan. That is what the agreement prohibited CA from doing and what its scheme contemplated it would not do.
16. In my judgment, the natural sense of the agreement and trust deed is therefore that the parties were respectively contributing their own money to any loan and were also assuming a personal risk in respect of their respective contributions. Of course they could borrow from a third party in order to make their loans, but in that event they would still be lending their own money. What, however, I regard as clear is that CA – which stood first in the queue – could not syndicate its senior lending slice with others so as to share any risk with them. I do not consider that it would occur to the reasonable man when perusing the documents that they could bear such a meaning. He would read them as reflecting an exclusively two-party commercial arrangement between the trustees on the one hand and CA on the other, with each putting in and risking their and its own money; and, no doubt, with an understanding that, when the trustees made their assessment as to whether to contribute in a particular proposed loan, they would probably be influenced by the consideration that, if CA was prepared to take on the senior debt risk, the trustees could reasonably take on the risk of contributing the top slice of the loan.
17. I therefore respectfully agree with the judge’s interpretation. When CA received the redemption moneys, its obligations under the agreement and trust deed were to apply them in the order of priority specified by clause 6 of the agreement so that the only payments that could be made in priority to the trustees’ capital entitlement were CA’s own capital contribution £835,900 and their reasonable fees and expenses referred to

in clause 6.2.2. Having come to that conclusion, I regard it is unnecessary also to consider the alternative arguments upon which the judge also found in favour of the trustees. I would dismiss the appeal.

Lord Justice Patten :

18. I agree.

Lord Justice Laws :

19. I also agree.