Case No: A3/2014/3464

Neutral Citation Number: [2015] EWCA Civ 1194

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER DISTRICT REGISTRY
HIS HONOUR JUDGE HODGE QC (Sitting as a High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2015

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE BRIGGS
and
THE RIGHT HONOURABLE LADY JUSTICE KING DBE

- -

Between:

DICKINSON & ANR	**Appellants**
- and -	
UK ACORN FINANCE LIMITED	**Respondent**

- -
- -

Mr Mark Warwick QC & Mr Pepin Aslett (instructed by **Abbey Solicitors Limited**) for the **Appellants**
Mr Stephen Jourdan QC (instructed by **Powells Law**) for the **Respondent**

Hearing dates: 12th November 2015

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Judgment

Lord Justice Longmore:

1. The question in this appeal is whether, in circumstances in which a secured loan is prima facie unenforceable because the lender was not authorised to carry on the business of lending money on the security of a particular type of property under the Financial Services and Markets Act 2000 ("the Act"), it is an abuse of process, on the facts found below, for the borrowers to seek to rely on that unenforceability after a possession order has been granted and numerous applications have been made to set aside that order and have been refused.

The Legislation

2. Section 19 of the Act provides:-

> "(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
>
> (a) an authorised person; or
>
> (b) an exempt person.
>
> (2) The prohibition is referred to in this Act as the general prohibition."

Section 22 defines a regulated activity:-

> "(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –
>
> (a) relates to an investment of a specified kind; or
>
> (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.
>
> …
>
> (7) "Specified" means specified in an order made by the Treasury."

Section 23 provides that a person who contravenes the general prohibition is guilty of a criminal offence unless he shows that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

Section 26 then provides:-

> "(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover –

(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it."

3. Section 28 applies to an agreement unenforceable because of 26 and provides:-

"(2) The amount of compensation recoverable as a result of that section is

(a) The amount agreed by the parties; or

(b) on the application of either party, the amount determined by the court.

(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –

(a) the agreement to be enforced; or

(b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must –

(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or ….

…

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

…

(7) If the person against whom the agreement is unenforceable –

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

he must repay any money and return any other property received by him under the agreement.

…

(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26…"

4. One specified kind of activity is defined in article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 in the following way:-

"(1) Entering into a regulated mortgage contract as lender is a specified kind of activity.

(2) Administrating a regulated mortgage contract is also a specified kind of activity, where the contract was entered into after the coming into force of this article.

(3) In this Chapter –

(a) "regulated mortgage contract" means a contract under which –

(i) a person ("the lender") provides credit to an individual or to trustees ("the borrower"); and

(ii) the obligation of the borrower to repay is secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom, at least 40% of which is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person;"

5. One of the issues which will arise if the current proceedings go ahead will be whether the borrowers' obligation to repay was secured by a first legal mortgage on land 40% of which was used in connection with a dwelling. It is agreed that the phrase "40% of land" is a geographical rather than a financial expression.

Facts

6. On 5th November 2010, UK Acorn ("the lender") loaned £630,000 to the Dickinsons secured by way of legal charge ("the Mortgage") over Fogga Farmhouse, Coniston Cold, Skipton ("the Property"). The term of the loan was six months, after which time the full loan amount plus interest became due and owing. It was a short term bridging loan made to refinance existing debts relating to the Dickinsons' business and was needed to refinance a mortgage which secured an earlier Lloyds TSB loan. The valuation report, produced as a condition of the loan, revealed that the property comprised a farmhouse, two holiday cottages, a farm building in grounds containing 0.75 acres of garden and 1.5 acres of grass paddock. It is a question whether the paddock, like the garden, was land "used in connection with the dwelling".

7. At the end of the term of the loan, the sums due were not paid by the Dickinsons. Following demands for payment, UK Acorn issued mortgage possession proceedings in the Skipton County Court on 21st September 2011. On 20th October 2011, District Judge Buchan made a possession order in favour of UK Acorn which was not to be enforced until 31st January 2012 on condition that they paid £12,000 per month for the following 3 months. The Dickinsons did make those (and some other) payments but large sums remained due and owing.

8. The Dickinsons then applied to set aside that order on the basis (inter alia) of the existence of a sub-charge which was said to prevent the lender exercising its rights. That necessitated a number of hearings. On 19th July 2013, Deputy District Judge Temple, in a lengthy judgment, dismissed that and other applications made by the Dickinsons and permitted the issue of a warrant of possession. An appeal against his order was dismissed by His Honour Judge Behrens on 30th September 2013 who ordered, however, that the warrant of possession was not to be issued before 28th October 2013. The lender did then issue a warrant and secured an eviction appointment for 1st November.

9. On 29th October, however, the Dickinsons issued their own proceedings, the subject of this appeal, contending that the Mortgage was unenforceable pursuant to section 26 of the Act. On 6th December 2013 the lender applied to have the claim struck out on the grounds of (1) cause of action estoppel (2) issue estoppel and (3) abuse of process. District Judge G. D. Smith held that neither estoppel could prevail against section 26 but that it was an abuse of process to seek to litigate the questions arising out of the Act at that late stage, more than 2 years after the making of the original (albeit suspended) order for possession. That order was upheld on 6th October 2014 by HH Judge Hodge QC sitting as a Judge of the High Court in Manchester. Lewison LJ gave permission to appeal to this court on 21st January 2015.

The Legal Background

10. The abuse of process relied on by the lender is of the Henderson v Henderson ((1843) 3 Hare 100) variety (the fifth variety of res judicata identified by Lord Sumption in Virgin Atlantic Airways v Zodiac Seats UK Ltd [2014] A.C. 160 para 17). This is the principle that a litigant should in general bring forward all his claims in one proceeding rather than successively, otherwise a defendant will be doubly harassed by the litigation. This is not an immutable principle, however, and must be applied in accordance with the well-known dictum of Lord Bingham in Johnson v Gore Wood & Co [2002] A.C. 1, 31:-

> "There should be a broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

11. That broad merits-based judgment is, of course, that of the judge at first instance (here DJ Smith). It is not an exercise of discretion but a multi-factorial evaluation. In Aldi Stores Ltd v WSP Group Plc [2008] 1 WLR 748 this court held that it would be reluctant to interfere with a judge's decision, reached by balancing relevant factors,

unless he or she had taken into account immaterial factors, omitted to take account of material factors, erred in principle or had come to a conclusion that was impermissible or not open to him.

12. When DJ Smith came to his decision on abuse of process he said this:-

> "It seems to me that in this situation there are in fact two competing public policy issues, namely the public policy of preventing unauthorised lenders from relying upon unenforceable agreements and the public policy against abuse of process. Weighing these two public policies against each other, it seems to me that the balance clearly comes down in favour of applying the public policy against abuse of process. The factors which I have listed in paragraph 26 of this judgment seem to me to demonstrate the clearest possible example of an abuse process. Not only does this affect the parties, but it also affects the public generally in that the court has limited resources. Very significant resources have already been devoted to the dispute between the parties in the possession proceedings. As I have indicated, I deal very regularly with possession proceedings, and I cannot recall a case which has occupied the court to the same extent as the possession proceedings between these parties in circumstances where there was no objection to the original order being made."

The factors which the judge had listed in paragraph 26 at the invitation of counsel then successfully appearing for the lender (Mr Gary Cowen, who also appeared successfully in front of Judge Hodge) were:-

> "i) these proceedings are a clear collateral attack on the previous decision in the possession proceedings;
>
> ii) these proceedings constitute unjust harassment of the defendant. The possession order was obtained over two years ago and has been the subject of numerous applications to suspend and to strike out. The issue raised in these proceedings could have been dealt with in those proceedings;
>
> iii) there has been no explanation by the claimants of why the issue raised in these proceedings was not raised in the previous proceedings;
>
> iv) there is prejudice to the defendant as a result of the delay. The Property may now be in negative equity. The valuations relied upon by the parties at the hearing before Deputy District Judge Temple varied between £750,000 and £900,000. The sum currently outstanding is at least £1,003,914.66 (this is the figure stated in paragraph 4.3 of the particulars of claim on 29th of October 2013. I refused to accept late evidence from the defendant purporting to update this figure).

v) This claim was brought without any notice to the defendant.

vi) The costs awarded in the previous proceedings have not been paid by the claimants.

vii) The court's resources have already been extensively used in a dispute between the parties, there having been in the region of eight hearings in the possession proceedings.

viii) Overall, the claimants are seeking to gain a tactical advantage."

Submissions

13. Mr Mark Warwick QC, appearing for the Dickinsons, submitted that on a strike-out application by a defendant, the court had to assume that the facts contained in the particulars of claim were true and, on that basis, the judge had indeed, when he came to the point of decision, omitted the highly relevant fact that the lender was an unauthorised lender and that the loan was unenforceable. He submitted further that these facts meant that the judge's decision could (and should) only have been to allow the question of enforceability of the loan to be litigated. If the Act was not exactly a trump card in the claimants' favour, it was of such importance that it must virtually dictate the rejection of the abuse of process application. (One may surmise that it was this "point of principle" which persuaded Lewison LJ to grant permission for this second appeal). In this connection Mr Warwick placed particular reliance on the decision of the Privy Council, on appeal from the Supreme Court of the (old) Federation of Malaya, in Kok Hoong v Leong Cheong Mines Ltd [1964] A.C. 993.

14. Mr Stephen Jourdan QC submitted that DJ Smith had had the relevant provisions of the Act well in mind, had rightly treated the Act as nothing like a trump card in the Dickinsons favour and that his evaluation of the many factors in issue could not be faulted for any of the Aldi reasons. Any doubt in relation to that could be set at rest by Judge Hodge's affirmation of the District Judge's decision.

Discussion

15. There can be no doubt that DJ Smith had the provisions of the Act well in mind. In paragraph 34 itself he referred expressly to the "public policy of preventing unauthorised lenders from relying upon unenforceable agreements". It is true that he thereafter referred exclusively to the factors set out in paragraph 26 on which Mr Cowen had relied and did not seek expressly later to bring back the policy of the Act into the equation but that is just a matter of the manner in which the judgment is expressed. It is idle to suppose that the Act was not then in the judge's mind.

16. Mr Warwick's response to this was to say that the competing public polices which the judge purported to balance were of wholly different weight. The Act rendering unauthorised agreements unenforceable was an expression of Parliamentary will which should, on any view, prevail over the judge - made principles of abuse of process even though they dated back to 1843 and have recently been endorsed by decisions of the highest authority. This submission does raise directly the point of principle for which permission to appeal was given.

17. Kok Hoong was not an abuse of process case at all but a conventional application (or rather non-application) of the doctrine of res judicata. The legislation concerned was a combination of the Bills of Sale Ordinance 1960 and the Moneylenders Ordinance 1961 which, no doubt like their English counterparts, made transactions which contravened their provisions "invalid" or "void" (see pages 1014-1015 of the report). The underlying agreement was one for the hire of machinery but complementary to an agreement whereby the defendant had agreed to sell the machinery to the claimant who, thus, became the owner under the hire agreement. The hire agreement was alleged by the defendant to be in the form of an unregistered bill of sale as well as an illegal money lending transaction. In earlier proceedings the claimant had obtained a default judgment for one instalment of hire. When the claimant sued for further instalments, the defendant relied on the ordinances to which the claimant responded that the defendant was estopped from so relying by the judgment in default, which had already been given. The Privy Council held that the defendant's case (that the obligation to pay hire was part of a transaction the real nature of which was the borrowing of money on the security of goods) raised an issue which had not been raised in the first action, the default judgment in that action had not decided that issue and there could therefore be no estoppel. (No argument was put forward that the issue should have been, but was not, raised in the first action). That was sufficient to decide the case.

18. But the judgment, reporting the opinion of the Judicial Committee to the Head of Malaysia, chose to deal with a further argument of the defendant that there could no estoppel in the face of a statute. Mr Dingle Foot QC (as he then was) accepted (page 1002) that, if the statute had said the agreement relied on was illegal, there could be no estoppel but, he submitted, different considerations applied where the statute merely provided that the agreement was unenforceable. The Committee did not accept this argument. The judgment was delivered by Viscount Radcliffe who said (page 1016-17):-

> "It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or on grounds "of general public policy". (see In re A Bankruptcy Notice, per Atkin LJ). But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (Cater v James) override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (Welch v Nagy).

> General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of persons enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See In re Stapleford Colliery Co. per Bacon VC.
>
> These principles, as their Lordships understand them, would point very directly to the conclusion that there can be no estoppel in face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a "protected person" for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. The analogy between the latter Ordinance and the Deeds of Arrangement Act, 1914, which was the subject of decision in In re a Bankruptcy Notice, is very close."

19. It seems, therefore, that issue estoppel cannot be set up against statutory provisions enacted for the protection of certain vulnerable categories of person or for the protection of others who engage in dealings with such persons. The old Moneylenders Act and Bills of Sales Acts fall into that category. That was no doubt part of the reason why DJ Smith decided in the present case that the lender could not rely on either cause of action estoppel or issue estoppel.

20. But it does not follow that the lender in this case cannot rely on the principles of abuse of process as it has developed since Henderson v Henderson. These principles are quite different from the somewhat technical doctrines of cause of action estoppel and issue estoppel and require a broader approach in which Mr Dingle Foot's distinction between transactions rendered illegal by statute and transactions rendered unenforceable by statute may well be important. There may, moreover, be distinctions between degrees of unenforceability. A blanket unenforceability might be equivalent, depending on circumstances, to a prohibition; but a nuanced unenforceability, such as occurs in the Act with which this case is concerned, cannot be equivalent to the blanket unenforceability contained in the old Moneylenders and Bill of Sale Acts. I have already quoted section 28(3) of the Act under which an agreement can be enforced

> "if the court is satisfied that it is just and equitable in the circumstances of the case."

Section 28(7) is also material; it provides that, if a defendant "elects not to perform the agreement", "he must repay any money received by him under the agreement". This shows that unenforceability depends on the borrowers' election and is conditional on the return of any money lent. Again, there is no blanket unenforceability. If there are circumstances in which the agreement can be enforced, it cannot be said that the application of the Henderson principle means that the court is enforcing an unenforceable agreement. Nor can it be said that there is any inconsistency between the District Judge's decision on cause of action and issue estoppel on the one hand and abuse of process on the other.

21. There is thus no reason why the Henderson principle should not apply and every reason why it should, provided one approaches it in a "broad merits-based way" as envisaged by Lord Bingham in Johnson v Gore Wood. It played no part in Kok Hoong no doubt because its application in cases where the earlier judgment was a default judgment is debatable. Moreover as Lord Sumption pointed out in Virgin Atlantic the modern application of the Henderson principles only dates from the later Privy Council judgment of Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] A.C. 581.

22. The Act of 2000 cannot therefore be a trump card or dictate the result of the abuse of process application. It is all a matter of evaluation and this court will on well recognised principle refrain from interfering with the decision of the first instance judge unless he has made the errors indicated in Aldi. I do not think he has made any such error. In any event, I agree with the judge that the matters set out in paragraph 26 of his judgment are all relevant.

23. It is moreover very telling that there has been no attempt by the Dickinsons to pay the costs incurred to date, which must all be for their account on any view. The inability to pay even those sums is a good indication that, even if the agreement were ultimately held to be in principle unenforceable, they would be unable to repay the amount originally lent and thus comply with section 28(7) of the Act. The whole argument would probably, therefore, even if allowed to be made, be ultimately futile.

Conclusion

24. I would therefore affirm the decision of HHJ Hodge which itself affirmed the decision of DJ Smith and dismiss this appeal.

Lord Justice Briggs:

25. I agree.

Lady Justice King:

26. I also agree.

IN THE COURT OF APPEAL

Appeal ref 2014/3464

WEDNESDAY 25TH NOVEMBER 2015

LORD JUSTICE LONGMORE
LORD JUSTICE BRIGGS
LADY JUSTICE KING

ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION, MANCHESTER DISTRICT REGISTRY
HIS HONOUR JUDGE HODGE QC (Sitting as a High Court Judge)

BETWEEN:

(1) WILLIAM ANTHONY DICKINSON
(2) PAULINE DICKINSON

Claimants/Appellants

and

UK ACORN FINANCE LIMITED

Defendant/Respondent

ORDER

UPON hearing counsel for the parties

IT IS ORDERED that:

1 The appeal is dismissed.

2 The Appellants are to pay the Respondent's costs of the appeal, summarily assessed at £38,930.80, to be paid by 9 December 2015.

3 The application by the Appellants for permission to appeal to the Supreme Court is refused.