Banking Law: An Inadequate Judgment Gives Adequate Finality

The Case of *Commercial First Business Ltd -v- (1) Jonathan Munday (2) Freda Munday* [2014] EWCA Civ 1296

The Facts

In June 2007, Jonathan Munday and his mother, Freda Munday ('the Borrowers') obtained a loan in the sum of £1,352,000 from Commercial First Business Ltd ('the Bank') to assist their farming business. The loan was secured by a charge on the Borrowers' home – Wakeham Farm House, South Milton, near Kingsbridge ('the Farm' and 'the Farm Loan' respectively).

By way of a separate agreement, the Borrowers obtained a second loan from the Bank in the sum of £1,007,500 to enable them to complete the conversion of some adjoining barns into holiday cottages ('the Cottages'). This loan was secured by a charge on the Cottages ('the Cottages Loan').

The Farm Loan and the Cottages Loan both contained an '*all monies*' clause requiring the payment of:

> … all monies now or at any future time due to [the Bank] from [the Borrowers] under each and every loan agreement now or at any time made between [the Bank] and [the Borrowers] …

It is worth noting at this stage that the all monies clauses contained in the Farm Loan and the Cottages Loan meant the Bank could seek repayment of the Farm Loan pursuant to the charge on the Cottages and, likewise, it could seek repayment of the Cottages Loan pursuant to the charge on the Farm. However, this was not the Borrowers' intention and they were never advised by the Bank or their own solicitors on the true meaning and effect of the all monies clauses. Incidentally, the Bank also misunderstood the true meaning and effect of the all monies clauses.

By September 2007, the Borrowers were in arrears in respect of both loans and the Bank commenced two separate sets of proceedings:

1. The first sought possession of the Farm and repayment of the Farm Loan pursuant to the charge on the Farm; and

2. The second sought possession of the Cottages and repayment of the Cottages Loan pursuant to the charge on the Cottages.

On 13 November 2007, the Court gave two Judgments:

1. The first required the Borrowers to give up possession of the Farm and ordered them to repay £1,422,622 in respect of the Farm Loan; and

2. The second required the Borrowers to give up possession of the Cottages and ordered them to repay £1,060,562 in respect of the Cottages Loan.

The Bank subsequently obtained a Warrants of Possession for both the Farm and the Cottages which were both suspended on 18 April 2008.

In September 2008, the Borrowers sold part of the Farm and used the proceeds of sale to reduce the amount of the Farm Loan. By February 2009, the Farm Loan had reduced to £116,000. Thereafter, the Borrowers made monthly repayments to the Bank in accordance with the Farm Loan and so the Bank recognised it was likely a Court would continue to suspend the Warrant of Possession applicable to the Farm.

The position regarding the Cottages was very different. In early 2009, the Bank obtained actual possession of the Cottages. (The Bank could then exercise its powers of sale pursuant to the charge on the Cottages and use the proceeds of sale to discharge (or at least reduce) the Cottages Loan).

However, by June 2009 the Cottages Loan had increased to £1,343,811 but the Cottages had been valued at £1,250,000. In September 2011 and despite it could have sought repayment of the Cottages Loan pursuant to the all monies clause contained in the charge on the Farm, the Bank applied to the Court for a charging order against the Farm to cover the difference between the amount of the Cottages Loan and the capital value of the Cottages.

The Borrowers opposed the Bank's application on the basis, *inter alia*, that they had a counterclaim against the Bank arising out of its failure since early 2009 to either let the Cottages in return for rent or to sell the Cottages. The Bank abandoned its application for a charging order in early 2012.

By 7 September 2012, the Bank realised the true meaning and effect of the all monies clause contained in the charge on the Farm because it wrote to the Borrowers claiming for the first time that this clause meant it could seek repayment of the Cottages Loan pursuant to the charge on the Farm and, on 13 November 2012, the Bank obtained a Warrant for Possession in respect of the Farm on this basis.

In December 2012, the Borrowers applied to the Court for an order setting aside the Warrant for Possession on the ground that they deliberately structured the borrowing as two separate loans each with its own independent security over an independent property.

On 25 January 2013, Deputy District Judge Hall refused to set aside the Warrant of Possession on the ground that the all monies clause contained in the charge on the Farm extended to cover sums due under other loan agreements with the Bank including the Cottages Loan.

The Borrowers appealed and, on 3 October 2013, His Honour Judge Cotter QC allowed their appeal and set aside the Warrant for Possession on the ground that the Bank was '*estopped*' from relying on the all monies clause.

The Bank appealed against HHJ Cotter QC's decision.

The Court of Appeal's Judgment

Lord Justice Patten handed down the Court of Appeal's Judgment on 9 October 2014 to which Lord Justices Underhill and Briggs agreed.

The Court accepted the Bank and the Borrowers shared a common misunderstanding about the meaning and effect of the all monies clause (at least until 7 September 2012) which is an essential requirement when attempting to establish an estoppel.

However, the Court found the Bank was not estopped from relying on the all monies clause because:

1. The Bank's actions up to 7 September 2012 and, in particular, its application for a charging order against the Farm, did not amount to it '*conveying*' its misunderstanding to the Borrowers in the expectation they would rely upon it.

2. In any event, the Borrowers did not rely on the misunderstanding. In other words, the Borrowers were not induced by the misunderstanding to take no action to reduce the Cottages Loan. On the contrary and on the Borrowers' own evidence, they did their best to promote an early sale of the Cottages to reduce the Cottages Loan.

3. Furthermore, the Borrowers had not acted to their detriment. Although the Cottages Loan had increased, on the Borrowers' own evidence and consistent with their counterclaim, the Bank's failure to let or sell the Cottages was not attributable to anything which they were responsible for.

That said, the Court went on to scrutinise the decision made by DDJ Hall on 25 January 2013 and stated it was well established that once a Judgment is obtained for an amount due under a loan agreement:

1. The loan agreement '*merges*' in the Judgment so the lender no longer has a cause of action based on the loan agreement – the lender's only remedy is to enforce its Judgment.

2. The lender's cause of action '*merges*' in the Judgment so the lender is prevented from bringing in subsequent proceedings (a) a cause of action which is identical to that already litigated and decided upon in the earlier proceedings and (b) points relevant to the lender's cause of action that could have been raised in the earlier proceedings but were not raised.

In this case, the Bank had obtained a Judgment against the Borrowers for an amount outstanding under the Farm Loan and a separate Judgment for an amount outstanding under the Cottages Loan.

The Court stated the Bank's cause of action based on the Farm Loan had merged with Judgment in respect of the Farm Loan and, likewise, the Bank's cause of action based on the Cottages Loan had merged with the Judgment in respect of Cottages Loan.

As a result, the Bank could not seek to recover the amount outstanding under the Cottages Loan based on the charge on the Farm. The Bank's only remedy in respect of the amount outstanding under the Cottages Loan was to enforce the Judgment it obtained in respect of the Cottages Loan. That Judgment, however, did not include an order that the Borrowers give up possession of the Farm.

In the circumstances, the Court of Appeal upheld HHJ Cotter QC's decision to set aside the Warrant for Possession but for reasons that differed from those given by HHJ Cotter QC.

<u>Opinion</u>

On the face of it, the Bank was the losing party in this case – its Warrant of Possession in respect of the Farm was set aside by the Court of Appeal.

However, the Bank retains the benefit of the Judgment it obtained against the Borrowers for the sum outstanding under Cottages Loan. Whilst it cannot enforce this Judgment by obtaining and executing a Warrant of Possession in respect of the Farm pursuant to CPR 55, it is the author's opinion that the Bank can, and probably will, seek to enforce this Judgment by resurrecting its application for charging order against the Borrower's Farm followed by the commencement of Part 8 proceedings for an order for sale pursuant to CPR 73.

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