Case No: HC11CO3617

Neutral Citation Number: [2013] EWHC 1282 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 24 April 2013

BEFORE:

HIS HONOUR JUDGE COOKE
(Sitting as a High Court judge)

BETWEEN:

CHUBB & BRUCE

Claimant/Respondent

- and -

DEAN & ANR

Defendant/Appellant

MR M FELDMAN (instructed by Lightfoots LLP) appeared on behalf of the Claimant

MR J DEAN AND MRS J DEAN appeared in person

Digital Transcript of Wordwave International Ltd (a Merrill Corporation Company)
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7421 4036 Fax No: 020 7404 1424
Web: www.merrillcorp.com/mls Email: courtcontracts@merrillcorp.com
(Official Shorthand Writers to the Court)

Judgment

1. **JUDGE COOKE**: This hearing arises in connection with adjourned issues in relation to the claimant's claim for an order for sale of a residential property known as Flat A, 1 Montagu Place in London. That property is owned by the defendants, Mr and Mrs Dean. On 31 August 2012, Master Price made an order for sale and defined three issues to be adjourned to the judge, and it is those issues that I have been dealing with today.

2. By way of summary of the factual background, which I take gratefully from Mr Feldman's skeleton argument, the original claim against the defendants arose out of a short-term bridging loan of £176,000-odd made by the claimant to them in November 2007. It was secured by way of a second charge over their home, which is at Flat B, 1 Montagu Place; so, next door, I assume, to Flat A. The loan was intended as a short-term bridging loan, and it provided for repayment after five or six months but the defendants were not able to, and did not, make repayment when that was expected. Subsequent to that, they made some small payments on the loan account but no significant amount to discharge it.

3. That led to proceedings for possession of Flat B under the mortgage, which were issued at the Central London County Court. On 22 October 2008, District Judge Silverman made an outright order for possession on 3 December 2008, and an order for money judgment payable by the same date of £212,022.75 including the cost of the possession proceedings.

4. In October 2009, Flat B had not yet been sold but the claimant obtained a final charging order over the defendants' interests in Flat A. It did that because it anticipated that there was likely to be a shortfall on the sale of Flat B because interest continued to run on the bridging loan-account, which was, of course, a second charge, and there was a substantial amount due to the first charge-holder.

5. The claimant subsequently obtained possession of Flat B, and it was eventually sold on 3 September 2010 for a gross sum of £690,000. From that, £441,000-odd was paid to the holder of the first charge and, after payment of the costs of sale, £215,848.29 remained to be applied towards the balance due to the claimant. There then followed the order that I have referred to on 31 August 2012.

6. The three issues defined by Master Price in that order and adjourned to the judge were, firstly, whether the claimant is entitled to maintain in this action a claim in respect of facility fees and/or interest at the contractual rate or is entitled to retain such sum from the sale proceeds if a sale proceeds under this order. Secondly, whether the facility fees and/or contractual interest give rise to an unfair relationship under section 140A of the Consumer Credit Act 1974, and whether an order should be made in favour of the defendants under section 140B of that Act. Thirdly, how, in calculating the account between the parties, the proceeds of sale of Flat B are to be appropriated. The reference to a facility fee is to what was described as a facility fee in the mortgage advance documentation. That documentation provided for contractual interest to run on the mortgage amount outstanding at 1.85 per cent per month compounded on a monthly basis. In addition, there was what was described as a facility fee of 1.25 per cent per month payable on the same dates but expressly provided to be waived if the loan was repaid in full by a set date. Of course, it was not, and the claimant initially at least maintained its entitlement to be paid the facility fee, which was added to the

account every month after that. The defendants argue that this, effectively, amounted to additional interest simply referred to by another name under the facility, and that the facility fee, either itself or in combination with the contractual interest, made the relationship between the parties unfair.

7. Subsequent to the hearing before Master Price, the claimant has agreed to waive the facility fee, and all the figures said to be due under the mortgage count in the judgment debt have been recalculated, completely stripping out the element of the facility fee and any interest that would have been charged on the account by virtue of the facility fee itself.

8. I propose to deal with those issues not quite in the order defined by Master Price. In doing so, I think it is important to bear in mind that there are, effectively, two separate accounts that need to be calculated here. One is the amount due under the original mortgage contracts for Flat B, and the second and separate account, which potentially has a different balance outstanding on it, is the amount secured in the light of the judgment debt, which is, in turn, secured by the charging order. At the start of the relevant period, that is to say on the date of the judgment, the two amounts were the same because the judgment was for the balance outstanding on the mortgage account including all the contractual interest and the amounts charged at the date of the judgment. Thereafter, they may have diverged either by virtue of any difference in the interest rate applicable, which is a matter in dispute, or if additional liabilities were incurred on the mortgage account that were not for some reason part of the judgment debt.

9. The first issue, then, is as to whether the claimant can maintain a claim in this action in respect of the facility fees or interest at a contractual rate. "This action", of course, means the claim for an order for sale. Since the order for sale is an order to enforce the judgment debt, the question is whether either the facility fees or interest at the contractual rate are to be added to the amount of the judgment debt as set out in the order of the district judge. That judgment attracts interest itself. It bears interest by virtue of a combination of section 74 of the County Courts Act 2009, which provides for the Secretary of State to make regulations under which judgment debts would carry interest. The relevant regulations are the County Courts Interest on Judgment Debts Order 1991, and those regulations provide that, in respect of County Court judgments, subject to exceptions none of which is relevant in this case, interest will accrue at the rate payable under the Judgments Act, the Judgment Act itself being directly applicable only to High Court judgments. So, by that somewhat convoluted route, County Court judgments such as this one attract interest at the rate payable under the Judgments Act, which is currently 8 per cent and has been throughout the relevant period.

10. The question for me, therefore, is whether this court in this claim has power to order the payment of interest at any other rate on the judgment or pursuant to the charging order. Mr Feldman referred me to the decision of the House of Lords in the Director General of Fair Trading v First National Bank [2001] UKHL 52 in which the question at issue was as to whether a contractual provision for interest to run after judgment as well as before in a consumer credit contract led to an unfair relationship. In the course of that hearing, their Lordships referred to the difficulties that arise when, as is normally the case in England, a judgment attracts interest only at the Judgment Act rate but there may be a continuing contractual liability to pay interest at a higher rate. The

debtor is thus vulnerable to a second set of proceedings in order to recover the difference between the two amounts, assuming the contractual rate is higher than the judgment rate. Lord Hope of Craighead set out the position in Scotland, which is that the Scottish courts will normally order at the time of judgment payment of continuing interest to run at the contractual rate until payment. The effect of that is that contractual interest is recoverable on the judgment, and the debtor is not faced with the possibility of further proceedings. However, as he and Lord Millett in particular acknowledged, it is not the practice of the English courts to make any such order. Lord Millett and Lord Hope left open the question of whether the English courts have any power to do so. If there were a power to make such an order, one might think that it would be exercised relatively frequently, and that it might not even have been necessary to make provision in the County Courts Act and by the statutory instruments for interest at judgment rate to run on County Court debts.

11. I note in the very brief time that I have been able to look at the matter by way of further research that there is reference in the White Book at paragraph 40.8.3 to a case at first instance, Rocco Giuseppe & Figli v Tradax Export SA [1984] 1 WLR 742, in which Jonathan Parker J held that there was no power to vary the rate set out in the Judgments Act. It seems to me that must imply that he considered the court had no jurisdiction of its own to award post-judgment interest aside from the provisions of the Judgments Act. Lord Millet in the First National Bank case referred to very old authority in which the court had previously made such an order. But it does not seem, at least in modern times, that that power, if it exists, has been used. Whether any such power exists and, if so, the extent of it are no doubt very interesting questions that may, in an appropriate case, need to be gone into in some detail. But it seems to me that, even if the power exits, it cannot be of assistance to the claimant in this case since it would of necessity be a power for the court to make an order for post-judgment interest in the original claim. That claim was concluded by the order of District Judge Silverman. It is not now before this court. This court is concerned only with the enforcement proceedings, and those arise by virtue of a separate claim. This court has no power to amend or vary an order that was made by another court in earlier proceedings. Insofar as this court has before it the enforcement of the judgment arising from those proceedings, it has, of course, power to enforce that judgment and not to vary it. There is power in these proceedings to add the costs of enforcement to the security conferred by the charging order but there is no power, it seems to me, to add amounts that might arise by virtue of other claims that the claimant would be entitled to make against the defendants but has not yet done.

12. On the first question, therefore, I hold that there is no power of the court in this claim to add any amount beyond the statutory interest to the amount of the judgment debt, and that applies both to the contractual interest and, if the point had still been live, the amount of the facility fee.

13. Next, I propose to deal with the question of apportionment. I have in evidence before me an up-to-date statement on the mortgage account and a calculation of the interest that the claimant says is due on the amount of the judgment debt. That calculation has been made on two alternative bases; one is on the basis of the contractual rate of interest and the other on the basis of interest at the judgment rate of 8%, which, of course, is the rate that I have decided is appropriate.

14. What the statement on the mortgage account shows is that, by the date of sale, the balance outstanding on the mortgage account had risen to, in round terms, £333,000. The net sale proceeds were, again in round terms, £215,000, and the question is how those proceeds should be allocated. At the same date, the balance on the judgment debt including interest at 8 per cent was £243,839, in round terms £244,000. The defendants' contention is that the net proceeds of sale should firstly be applied to discharge the balance on the judgment debt, and, if that were done, then there would be a difference unpaid of some £28,000, which is the basis of the figures that the master ordered to be paid as a condition of not bringing into operation the order for sale. Those figures are not, I should say, challenged. Mr Dean queried various amounts going to make up the figure but the additional charges over and above the contractual interest are relatively small and, in the end, he did not pursue a challenge to any of them so he accepts that, if interest runs at the contractual rate on the mortgage account, then the balance on that account is £333,000-odd. It follows from those figures that there is a balance due on the mortgage account of some £89,000 or £90,000 more than the amount outstanding on the judgment debt. The claimant's position is that it is entitled to appropriate, and indeed has appropriated, the proceeds of sale so as to pay that £90,000 first, leaving a smaller balance to go towards the amount outstanding on the judgment debt. That having been done, the amount outstanding on the judgment debt, it says, is £117,920-odd.

15. Briefly dealing with rate of interest accruing on the mortgage account, I think in the end Mr Dean did not submit that interest on the mortgage account runs at anything other than the rate provided for in the contract. There seems to have been some confusion about this in the past because he had produced a calculation submitted to the court made by an actuary which was on the footing that the amount to be discharged was, effectively, only the amount on the judgment debt bearing interest at 8 per cent. But that ignored the fact that there remains a contractual liability to pay interest at the contract rate on the balance due on the mortgage account.

16. In support of the claimant's argument, Mr Feldman submitted that the claimant had the right to appropriate the net proceeds of sale as it saw fit, and to satisfy the liabilities outstanding under the mortgage in any order that suited it. He based that, principally, on three propositions. The first was on section 105 of the Law of Property Act 1925, which provides:

> "The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof."

17. So, it can be seen from that that there are, essentially, three stages in the application of the funds; first, in discharge of any prior secured obligations; second, perhaps divided

into two subcategories, in respect of the costs of sale and the amount due under the mortgage pursuant to which the mortgagee sells; and, thirdly, the residue goes back to the mortgagor or the person next entitled. His submission was that, since the mortgagee is entitled to discharge the mortgage money, interest and costs, it must also be entitled to appropriate the amounts outstanding as between the different amounts secured by the mortgage insofar as necessary to do so.

18. There is obvious commercial sense in that implication but it is only an implication, and I do not think it is sufficient for me to resolve the points today in this case. The position is, however, I think made clear by the two other matters on which Mr Feldman relied. First was the decision of Neuberger J, as he was at the time, in West Bromwich Building Society v Crammer [2002] EWHC 2618. In that case the question was as to the appropriation of monies between interest and capital. Neuberger J referred to the general rule at common law that, when a mortgagor makes a payment, he has the first right to appropriate it in that he may specify when making payment which of the secured liabilities he is discharging, and, if he does so, then the mortgagee is bound to apply the monies in that way. But, if he does not do so, then the mortgagee is entitled to appropriate the funds in such a way as it may choose. It was argued in that case that the position is otherwise where the mortgagee receives monies not from a payment made by the mortgagor but by direct receipts arising from the exercise of the mortgagee's powers. Neuberger J held, if I may summarise very briefly, that the mortgagee did have the power to make an appropriation in those circumstances for one of a number of reasons, either that the position was different where direct payments were made or that, insofar as the mortgagor retained any right to appropriate, that right of appropriation had been surrendered to the mortgagee as part of the package of rights granted to the mortgagee under the mortgage.

19. It seems to me that that is decisive of the point before me. Although the appropriation concerned there was as between interest and capital, if there was a right to appropriate, it must enable the person exercising that right to appropriate between different amounts due in respect of interest and/or capital to the extent that he wishes or is required to do so.

20. Finally, in this case, if that authority were not sufficient, Mr Feldman is right, in my judgment, to say that there is an express power of appropriation given, albeit by rather roundabout route, by the terms of the mortgage advance. Those conditions provide as follows, starting at page 85 in bundle B of the document, at paragraph 35 of the conditions, which is headed, "Our other powers if we had taken possession of the property" (and I pause to say that the claimant in this case did, of course, take possession of the property). Paragraph 35.1 provides:

> "We shall have all the same powers as a receiver whether or not we have appointed one, and all the rights and powers which we would have including the rights to confer authority on others which we could exercise if we were the absolute owner of the property."

21. Firstly, the final words of that seem to me to be a statement that, insofar as an absolute owner of the property has the right to exercise a power of appropriation, that is a power that can be exercised by the mortgagee. But, also, the opening words refer to the

powers of a receiver. In clause 37, the powers of a receiver are spelt out. Clause 37.4(2) provides:

> "The receiver can exercise all powers and authorities as we shall think fit to confer. We may confer any powers or authorities which we could give if we were the absolute owner of the property."

Paragraph 37.5 says:

> "The net proceeds of sale arising from the exercise of the powers of the receiver shall.. be used to pay in the following order:"

There are then four categories set out, the third of which is:

> "Third. All other sums secured by your mortgage in such order as we may determine."

22. The combination of those provisions, it seems to me, makes it clear that, if a receiver had been appointed, he could have exercised a power of sale conferred on him by the claimant, and, if he had exercised the power of sale, he would have had the power to apply the proceeds of sale amongst the sums secured by the mortgage in such order as the claimant determined. The claimant is expressly given all the same powers that any such receiver would have, and that, it seems to me, includes, therefore, the power to make an appropriation of proceeds of sale amongst the mortgage monies in such order as it determines for itself.

23. On that basis, therefore, there is express power under the mortgage documentation to make the apportionment that the claimant has made. The result of that apportionment is that the balance due on the mortgage account was reduced to zero, and the shortfall remaining on application of the remaining funds to the amount due on the judgment debt remains outstanding under the judgment debt. It remains secured by the charging order on Flat A, and, of course, interest continues to run on that amount at the judgment rate, which is 8 per cent, and not the contractual rate under the mortgage documentation. The consequences of that for the order to be made are something that we shall explore in a moment.

24. The final issue, though, was whether the defendants were able to show that there is an unfair relationship between the claimant and the defendants for the purposes of section 140A of the Consumer Credit Act by reason of either or both of the contractual interest rate or the facility fee chargeable under that mortgage. The facility fee has, of course, been waived but, in principle, the question may still require to be asked whether the fact that the facility fee was chargeable either on its own or in combination with the contractual interest rate or even the contractual interest rate on its own is sufficient to render the relationship unfair. Of course, if the matter turned only on the facility fee, looking at the powers of relief available to the court if it finds an unfair relationship, one of those powers is effectively to disallow the charging of any amount due under the contract. So, the maximum remedy that the court would be likely to exercise if it found that a relationship was unfair merely by virtue of charging a facility fee, it seems to me, would not normally be more than an order that the facility fee should not be paid. There may no doubt be other minor consequential matters but, if that was the

foundation of the unfair relationship, it seems to me it would be removed if the facility fee was not charged. But the fact that it has been waived, it seems to me, is not a complete answer to the issue before me.

25. There remains the question whether the relationship was unfair either by virtue of the contractual interest rate or the combination of that and the fact that the facility fee was at least expressed to be payable even if, ultimately, the entitlement has been waived. I was referred to a number of cases that have grappled with the question of what constitutes an unfair relationship but it seems to me that the matter is nowhere expanded on in any respect that adds materially to what was said in the House of Lords in the First National Bank case. I think it is sufficient for present purposes to refer to the opinion of Lord Bingham, who said at paragraph 17, and I quote not the whole paragraph but extracts from it:

> "A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith ... The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations."

Now, the regulations there were the Unfair Terms and Consumer Contracts Regulations but it seems to me that those words are equally applicable to the determination of whether there is an unfair relationship for the purposes of the Consumer Credit Act.

26. In the case of the two provisions that are at issue here by virtue of the master's order, it seems to me that individually and particularly together they impose a charge at a high rate for the use of this facility but it is a rate that is clear on the face of the documents. It cannot be said to be buried in small print. It is there to be seen on the face of the documents in very legible print and something that can be clearly evaluated by somebody entering into those documents. In the present case, the defendants were legally advised. There is a separate certificate of a solicitor to the effect that he has advised them upon the contents of the documents they were signing. Mr Dean is himself a lawyer, a barrister in private practice although not in the civil field. He and his wife are clearly intelligent consumers and able both to read and understand the documents themselves and to absorb the effect of the advice that they were given. They, therefore, must be taken to have known the bargain that they made, and it seems to me they cannot say, and have not sought to say, that they were in any way misled by the documentation or did not understand what they were signing up for. The rate of interest, whether one adds the facility fee to it or not, is high. It is not, however, it seems to me, even in combination so high that it would lead the court to the conclusion that the relationship between the two parties to such an agreement was unfair even if

the consumer was fully aware of all the terms that he was entering into. There may, of course, be such cases but it seems to me that that would require a very much higher interest rate than even the combination of these two amounts gives rise to in this case. What the defendants signed up to was a stiff commercial bargain no doubt but it was not, in my judgment, an unfair one, and the relationship that it created was not unfair by virtue of those terms.

27. Mr Dean also made submission as to the unfairness of the relationship arising out of the differences of opinion between the defendants and the claimant over the process of enforcement by way of sale of Flat B. It is alleged that the claimant was in delay and managed inefficiently the process of sale resulting in a delay in receiving the proceeds during which time interest continued to run at the contractual rate. Those allegations, it seems to me, firstly are clearly not among the issues that were reserved by Master Price to this court. They have not been raised by way of counterclaim in the order-for-sale proceedings nor indeed in any separate proceedings by the defendants against the claimant. The allegations that are made about delay and inefficiency in the process of sale are strongly contested and they have not been explored by examination in evidence before me in this hearing. The defendants have made allegations that are, I may say, in rather general terms. What they have not provided is any evidence that, if they are able to establish any breach or unfairness in the way that enforcement has been carried out, they have suffered any loss by virtue of it. It seems to me there are general statements that the sale might have been concluded earlier but there is no evidence, in particular no expert evidence, that that is the case. It is, of course, very common to find that the mortgagor is of the view that the secured property could have been sold quicker or on better terms than the mortgagee has been able to achieve. It does not follow that the mortgagee is either in a breach of his duty or in equity to the mortgagor nor, in my view, does it automatically follow that an unfair relationship has been established by virtue of the way in which enforcement has been dealt with. I should say that the way in which the non- consumer has enforced or exercised his rights under a contract is one of the factors set out in section 140A as potentially giving rise to an unfair relationship. But it seems to me there is no sufficient evidence that that is the case before me even if that issue were amongst the issues that had been reserved to this court, which it is not.

28. Furthermore, it is not, it seems to me, an issue that potentially arises in relation to the issues that are before the court. Insofar as it were alleged that the claimant was in breach of its duties to the mortgagor, that could be raised by way of counterclaim in an action on the mortgage. But this is not an action on the mortgage. It is not an action for recovery of the mortgage amount although the contractual balance due under the mortgage has to be taken into account for the purposes of calculating the balance on the judgment debt, which is what is before the court. That contractual balance, however, is not disputed, and unless and until the presently unmade and unquantified claim against the claimant has been made and quantified, it seems to me that there is no sum that falls to be deducted from that contractual balance for the purposes of taking it into account in the present proceedings.

29. Given that that issue is not before the court, then it seems to me that, subject to any questions of abuse of process, then, in principle, it remains open to the defendants either to bring a claim for breach of duty against the claimant if they are so minded, and which, of course, they will have to particularise the breaches they complain of and establish financial loss. Or, in principle, they may bring a claim under the Consumer

Credit Act seeking to rely on that as evidence of an unfair relationship. But that is not one of the issues before me today.

30. Accordingly, I decline to make any adjustment to the order on the footing that an unfair relationship has been established. It has not been so established by virtue of the matters reserved to this court by the order of the master, and any other matters are not before me, and I make no decision on them.