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[2017] Unreported, Central London County Court

Article by David Bowden

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Executive speed read summary

A substantial loan of £3.67million was made by way of re-mortgage to enable an individual to buy a large house. The borrower was later convicted of making a false instrument. The borrower's claim that the loan was a regulated mortgage contract because the loan was in connection with his dwelling were rejected by the judge who ruled that the mortgage was in connection with an investment that the sophisticated borrower (a lawyer and tax advised) had made. As the case was disposed of on this point, the judge's comment that the lending was made by way of business were only obiter. The judge made a number of adverse findings against the borrower and ruled that the lending contained neither unfair contract terms and nor was there an unfair relationship. Finally the judge ordered the lender to reimburse the borrower the arrangement fee of nearly £76k.

Paul Baxendale-Walker v. APL Management Ltd, Paul Levack and Taylors
[2017] Unreported 3 January 2017
Central London County Court (HHJ Lamb QC)

What are the facts?

Burleigh House is a large house in Burhill, Surrey over nearly 13,000 square feet with a basement swimming complex. In March 2013 it was valued at £7million. In November 2011 APL lent Baxendale-Walker £3m to buy another property (Amberleigh House). In March 2012 Omni Capital lend £3.661million to Baxendale-Walker to buy Burleigh House. In July 2012 Amberleigh House was sold and the APL loan was repaid. On 19 March 2013, APL replaced Omni Capital as the lender (of £3.67million by way of mortgage) on Burleigh House.

Although Baxendale-Walker had been a lawyer, he had made a living as a tax adviser. In April 2013 he retired from tax advisory practice for ill-health reasons. However on 15 April 2016 Baxendale-Walker pleaded guilty at the Crown Court at Guildford to a charge of making a false instrument in that in September 2009 he had generated correspondence purporting to come from HMRC. Baxendale-Walker failed to attend or give evidence at the July 2016 trial at Central London County Court in this case.

What were the issues the judge had to resolve at trial?

These were heavily contested proceedings with all 3 sides separately represented by leading counsel. The issues for the judge were:

- Was Burleigh House intended to be Mr Baxendale-Walker's dwelling?
- Was the secured refinancing loan by APL to Baxendale-Walker made by way of business?
- Did the mortgage contain unfair contract terms?
- Was the relationship between the lender and borrower unfair?
- Should the APL refund the brokerage fee charged to Baxendale-Walker?
- Was there misrepresentation, mistake or unjust enrichment?

What did the judge rule on whether Burleigh House was Mr Baxendale-Walker's dwelling?

The FiSMA 2000 Regulated Activities Order 2001 (**SI 2001/544**) ('the RAO') provides:

> '*a contract is a "regulated mortgage contract" if, at the time it is entered into, the following conditions are met –*
>
> *(i) the contract is one under which a person ('the lender') provides credit to an individual or trustees ('the borrower');*
>
> *(ii) the contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land... in the United Kingdom;*
>
> *(iii) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower... or by a related person...*'

The judge said the question was 'was Burleigh House his "dwelling" as at 19 March 2013?' For the judge he felt this was simple noting: '*Where a man lives or lived at a particular point in time should be readily capable of proof – reliable direct testimony, utility bills, Council tax payments, the electoral roll, a TV licence, family members, guests, the providers of domestic services, neighbours..*'

Baxendale-Walker did not give oral evidence at trial and his written witness statements were equivocal about things merely claiming that '*I did buy a house I think for around £4.5 million in September 2011. I then refinanced that and bought what has been my home since 2012, having sold the £4.5 million place in the meantime*.' The judge ruled (citing *Phipson* on Evidence with approval) that '*so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of*

the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him'.

On this the judge ruled that Baxendale-Walker's '*word cannot be relied upon'*. The judge ruled that the contemporaneous conveyancing documents showed that Baxendale-Walker had told his solicitor in March 2012 that Burleigh House was '*an investment… to let'*. However the judge ruled that Baxendale-Walker was '*unreliable*'. Instead the judge ruled that on the dwelling issue, Baxendale-Walker had '*the burden of proof'* and that he had '*failed to satisfy me'*.

Further the judge noted that Baxendale-Walker had left unanswered at least 13 questions he had from the documents and evidence at trial as to what '*were his intentions with respect to that other property or those other properties?*'

What was the judgement in *Rogers* on 'by way of business'?
In *Stevenson v. Rogers* **[1998] EWCA Civ 1931, [1999] 1 QB 1028**, Potter LJ said:

> *'… in the field of consumer protection three broad categories have been developed to identify whether a sale is made "in the course of a business", namely*
>
> *(a) A sale in a one-off venture in the nature of a trade carried through with a view to profit,*
> *(b) A sale which is an integral part of the business carried on,*
> *(c) A sale which is merely incidental to the business carried on but which is undertaken with a degree of regularity.*
>
> *In categories (a) and (b), the transaction is in the course of a business because it is the conduct of the very business itself. In (c) the transaction is in the course of such business because its regularity has made it so*.'

What did the judge rule on the 'by way of business' point?
The judge started by observing that '*there was scant evidence before the Court about APL's activities'*. In cross-examination Mr Levack (the sole director of APL) when asked '*having entered into the loan with Mr Baxendale-Walker at such advantageous rates, you with your APL hat on, thought this is actually rather a good deal, this is rather a good business, I want to get a bit more of this, would be that be a fair way of putting it?*', his answer was '*I would have thought so, yes'*.

Applying *Rogers,* the judge concluded on this issue that '*it seems to me that there is ample evidence to show that by March 2013 Levack had formed and manifested an intention to lend "in the market" (i.e. not just to the Claimant) and that APL had in consequence embarked on the business of lending by that date.*' His helpful ruling on this is only *obiter* because the judge says 'my finding on the "dwelling issue" is sufficient to dispose of this part of the case but I thought it right to give an indication of my view on the "by way of business" point.'

What did the judge rule on the UTCCR issue?
Baxendale-Walker sought to challenge some of the terms in his mortgage with APL as being unfair contract terms under the Unfair Terms in Consumer Contract Regulations 1999. As a preliminary issue, the judge had to establish if Baxendale-Walker was a 'consumer' or not and he ruled that **'***I think that here it is incumbent upon the Claimant to show that he enjoys the protection of the Regulations'.*

The judge re-iterated that '*I have rejected the Claimant's assertion that Burleigh House was his dwelling from 2012. I am left without reliable evidence from the Claimant of his purpose in holding the property in March 2013*'. He went on to rule that:

> *'I have rejected Baxendale-Walker's evidence that he bought Burleigh House as a dwelling. I can only conclude that he purchased the property as an investment. He has certainly failed to satisfy me that he was a "consumer". That is why I consider that the UTCCR falls away.'*

What was the judgement in Falco Finance on flat interest rates?
In *Falco Finance Limited v. Gough* **[1999] CCLR 16**, HHJ Elystan Morgan sitting in Macclesfield County Court on 28 October 1998 had to consider a mortgage on a flat rate basis and whether the mortgage contained unfair contract terms or was an extortionate credit bargain ('ECB') or not. Judge Morgan ruled that the provisions relating to the dual rate of interest were ECBs and grossly contravened the principles of ordinary fair trading because they were not based on any attempt to calculate the loss to the company caused by late payment and the conditions upon which the borrower could maintain the concessionary

rate were so harsh as to make it most difficult to retain the concessionary rate. Judge Morgan also ruled that the dual rate of interest was an unfair contract term under the UTCCR 1994.

Finally Judge Morgan ruled that for interest to be calculated on a flat rate basis did not cause the agreement to be an ECB but it was an unfair contract term.

What did the judge rule on the 'unfair relationship' point?
The judge's gloves came on when he got to this submission made by Baxendale-Walker's counsel. He made these 3 findings of fact about Baxendale-Walker:

- He '*is a disgraced former lawyer and a convicted criminal'*,
- at the time of entering into subject mortgage with APL he was '*sufficiently astute to adopt a strategy for dealing with the financial problems then confronting him'*, and:
- He never '*lost the ability to play off others, seemingly to his own advantage'*.

The judge again criticised Baxendale-Walker for not giving evidence saying: '*The most striking thing about the Claimant is that for no satisfactory reason he has declined to give me a direct account of himself*'. As to whether the relationship was unfair or not, the judge turned this question on its head and asked: '*Why then did the Claimant sign up to this mortgage with APL, a mortgage which he now says was unfair?*' Baxendale-Walker complained about the differential interest rate but the judge noted that '*nonetheless, he chose to continue holding the property'* and more pointedly that in '*the absence of any other satisfactory explanation I can only assume that this "wealthy", "highly sophisticated", business man thought it to his advantage to do so*'.

As to *Falco Finance*, the judge ruled that:

> '*The factual background was very different – the borrower in that case was far from wealthy, he was fighting for the roof over his head and he was committed to the mortgage for a lengthy term. I do not consider that Falco lays down any principle binding on me to hold that differential mortgages are inherently unfair.*'

Concluding on the '*unfair relationship'* point, the judge ruled APL had demonstrated that Baxendale-Walker *'chose to accept APL's interest terms in preference to those offered by an established commercial lender in the market, West One'* and also that APL had *'demonstrated that the interest rate which the Claimant paid was equivalent to that charged by Omni on the same security'.* For this reason the judge concluded that *'in all the circumstances APL has satisfied me that the agreed interest terms are fair and enforceable'.*

What did the judge rule on the brokerage fee?
APL charged Baxendale-Walker an arrangement fee for his loan of £75,785. The judge noted that '*no attempt was made by the Defendant to justify before me the fee*'. The judge ruled that '*I do not see how it could have been of any advantage to the Claimant to pay that fee. I think it should be re-imbursed with interest at the rate which APL would have had to pay Hambro for the use of an equivalent sum.'*

What happened to the claims that there was misrepresentation, mistake and unjust enrichment?
As the judge found the loan agreement and mortgage to be enforceable, he ruled that he '*need not consider the issues of misrepresentation, mistake and unjust enrichment raised by APL'*.

Will there be an appeal?
The judge refused Baxendale-Walker permission to appeal. He has until 24 January 2017 to seek permission to appeal. Although this is a multi-track case, the new Destinations of Appeals Order mean that an appeal no longer lies to the Court of Appeal but to the High Court.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.