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No unfair relationship in lender's standard form property lending with guarantor

Clydesdale Bank PLC v. R Gough t/a JC Gough & Sons and Anne Michelle Gough
[2017] EWHC 2230 (Ch)

Article by David Bowden

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Executive speed read summary
The Goughs owned a 530 acre potato farm with 6 dwellings on it. They moved all their business finances over from Barclays Bank to Clydesdale Bank in 2012. Mrs Gough guaranteed the lending. A legal charge over the properties was granted to the lender. The Goughs received independent legal advice before signing the lending documentation and the solicitor providing this provided the lender with a certificate. The Goughs borrowed around £5million. The Goughs moved their banking to Lloyds Bank at the end of 2014. They failed to make payments. The lender appointed receivers and brought proceedings to obtain possession of the properties and for judgement for the sums owing. The proceedings were defended on 6 grounds. The judge dismissed the main defence that a promise had been made to the Goughs that they would have a 3 year breathing space to get their business back on track. Although this disposed of the defence, the judge went on to consider and dismiss in round terms any allegation that an 'unfair relationship' arose under section 140A of the Consumer Credit Act 1974 ('CCA'). The judge rejected Mrs Gough's evidence as '*very unsatisfactory*' and '*incredible*'. The judge found that whilst Mrs Gough was 'not a party to the finance agreements she had been 'an indirect beneficiary of them. He ruled there had been '*nothing improper*' in the way the lender had '*behaved in exercising or enforcing its rights under the credit agreement and related agreements* observing that Mr Gough *'throughout had independent advisers both business and legal*' and was '*not forced to enter into the finance agreements*'. The judge ruled that the lender had '*acted entirely properly throughout'* noting that it had '*shown great forbearance towards Mr Gough, extending him additional credit when he suffered the fire in January 2013 and on numerous occasions thereafter in order to allow him to continue his business'* and that there was '*no evidence'* of '*any impropriety'* on the lender's part.

Clydesdale Bank PLC v. R Gough t/a JC Gough & Sons and Anne Michelle Gough
[2017] EWHC 2230 (Ch) 5 September 2017
High Court, Chancery Division, Birmingham Registry (Deputy Judge Lance Ashworth QC)

What are the facts?
Mr Gough had inherited his father's potato farm and farming business. This consisted of 2 properties in Worcestershire – Hilltop Farm and Chestnuts – which extended to 530 acres. As well as the farm (JC Gough & Sons) there was a large farm house and 5 other dwellings used for holiday lets. Mrs Gough ran the holiday lets and dealt with most of the business administration. The farm had banked with Barclays. However in 2012 the farm transferred its banking to Clydesdale Bank. Mrs Gough guaranteed the lending. A legal charge over the properties was granted to the lender. The Goughs received independent legal advice before signing the lending documentation and the solicitor providing this provided the lender with a certificate. The Goughs borrowed around £5million. The 2 sons had been joined into the proceedings to ensure they were bound by the result but took no part in the proceedings.

What were the main terms of the lending documentation?
The lender arranged for 7 sets of documentation to be signed by the Gough family. This comprised:
Mr Gough only
- £2million variable rate loan dated 9 November 2012 for 2 years,
- £2.25million part variable/part fixed loan dated 9 November 2012 for 15 years,
- £650,000 overdraft and £10,000 business card,
- Legal charge over Hilltop Farm in the lender's favour.

Mr & Mrs Gough
- Legal charge over the Chestnuts in the lender's favour.

Mrs Gough only
- £4.91million personal guarantee dated 23 November 2012,

Mrs Gough and her 2 sons
- Consent and postponement of interest over Hilltop Farm in the lender's favour dated 7 December 2012.

Did the Consumer Credit Act 1974 ('CCA') apply to this loan?
The judgement does not make this clear. The Consumer Credit Act 2006 abolished any financial limit for personal credit when it came into force in April 2007. The lending here was not made to a corporate body but rather it was made either to the Goughs personally or the farm which appears to be a partnership. However as this was lending secured by a first legal charge, any mortgage should be a regulated mortgage contract covered by the FSA regime (which following the FSA's abolition will have transferred to the FCA).

What happened after the borrowers defaulted?
The lender appointed receivers. However the Goughs then obtained alternative banking from Lloyds in November 2014. The Goughs carried on running the farm and holiday lets. The Goughs made no payments to Clydesdale Bank. The lender through its LPA receiver sought to recover possession of the farm the dwellings located there.

What were the issues the judge had to resolve at trial?
The 6 issues for the judge were:

- Was there a clear and unequivocal **promise** that strict legal rights would not be insisted upon by the lender?
- If there was any such representation, agreement or common understanding, did Mr Gough **rely** on it?
- If there was reliance on any such representation, agreement or common understanding, was that reliance to Mr Gough's **detriment**?
- If there was detrimental reliance on any such representation, agreement or common understanding, has the lender in fact **resiled** from the same by exercising its strict legal rights under the charges and appointing LPA receivers?
- If there was detrimental reliance was it **unconscionable** of the lender to have resiled from this by exercising its strict legal rights under the charges and appointing LPA receivers?
- Was the relationship between the lender and Mrs Gough subject to the Consumer Credit Act 1974? If so was that **relationship unfair**?

What did the judge make of the witnesses?
Lender

- **Mr Emyr Saer.** He had specialised in agricultural banking in 1997. He joined the worked for the lender for 9 years from 2005 onwards. The judge found him to be a '*plainly truthful witness'* with *'no axe to grind'* who '*does not stand to benefit or lose anything whatever the outcome of this litigation*'. The judge accepted '*his evidence in preference to that of Mr and/or Mrs Gough'* where there was a conflict.
- **Mr Jonathan Powell.** He is the lender's Agricultural Business Development Manager who dealt with the borrowers from May 2014 onwards. He had '*very little contact with either Mr or Mrs Gough*'. The judge found that he '*gave his evidence in a considered way'* and he accepted it '*preferring it again in so far as there is any conflict with the evidence of Mr and/or Mrs Gough'*.
- **Mr Nick Britten.** He was not called to give evidence. He worked in the lender's Strategic Business Services ('SBS') team. He took over control of Mr Gough's account in April 2014. The judge declined to draw an adverse inference from the fact that the lender did not call evidence from anyone in its SBS team.
- **Mr Ian Hyett.** He is the lender's underwriter who dealt with the business review in April 2012. He was not called to give evidence. The judge accepted his contemporaneous notes as accurate.

Borrowers

- **Mr Roger Gough.** He is the 1st defendant who is a farmer trading as '*J C Gough & Son'* and has lived at Hilltop Farm since 1967 when his father bought it. Although the judge found that he '*gave his evidence in a measured way*', he also found that he '*soon began to backtrack on a number of the claims he had made in his witness statement'*. The judge found him to be '*evasive and unreliable in his evidence*' and rejected his evidence '*to the extent that it conflicts with the evidence of Mr Saer and/or the contemporaneous documents'*.
- **Mr David Smith.** He is a farm business consultant for the last 10 years has acted for Mr and Mrs Gough. The judge said he '*explained that he did not just plug numbers into spreadsheets to make them look nice*' but was '*forecasting how it might grow'* and '*assisting with business plans'*. However the judge ruled that '*in so far as it is relevant to the defence'* he would accept his evidence but only '*in general terms'*.
- **Mrs Michelle Gough.** She has been Mr Gough's wife for over 26 years. The judge found that she '*sought to play down her involvement in the farming business, saying the holiday lets business was hers, and she merely helped Mr Gough out with the administration of the farming business'*. The judge rejected this finding instead that Mrs Gough was the '*one ostensibly negotiating with the Bank for funds to be released to pay extremely pressing creditors'*. The judge rejected her evidence that she was '*merely assisting her husband'* but rather '*she was very heavily involved in the financial aspects of the business'*. Moreover the judge ruled that her evidence about signing the guarantee was '*also very unsatisfactory'* with him commenting that he found it '*incredible*' that she '*could really have no recollection of having signed the personal guarantee'*. The judge ruled

that her '*evidence on this topic is not believable'* and that it '*infects her evidence generally*' so that '*so far as her evidence is contradicted by that of Mr Saer and/or the contemporaneous documents*' he would '*reject it'*.

What expert evidence was before the court?
None.

What did the judge rule on the promise issue?
Mr Gough claimed the lender had promised him that it would give him 3 years to get the farm business back on track. However the judge accepted an email from the lender dated 27 April 2012 in which it was said '*…with progress critically reviewed at 18 months to ensure sufficient progress is being made to see that business be in a position to service that portion of debt…*' For this reason the Gough's defence based on the promise issue was rejected. The judge ruled that in the light of his 'finding on the representation issue, the other issues do not arise. Nevertheless he dealt with them all in turn but this article only considers the 6th issue in relation to the unfair relationship point.

What were the grounds the borrowers relied on to say the relationship was unfair?
Mrs Gough relied on these 3 grounds claiming that the lender:

- did not advise her to obtain separate legal advice prior to entering into the lending,
- did not point out the key onerous features of the guarantee to her, or indeed any features, and
- is seeking to enforce the agreement against her in the circumstances where it has breached the representations made to her husband and to her at the time it was entered into.

What did the judge rule on the '*unfair relationship'* point?
This was rejected.

The judge started by observing that Mrs Gough's pleaded case was that the '*relationship between the Bank and her is unfair'* not that the '*relationship between the Bank and Mr Gough'* was unfair. Because of this the judge ruled that her defence '*must fail'* even if he were satisfied that the relationship between her and the Bank is unfair.

The judge commented on the Gough's failure to make any payments at all to the lender after November 2014 despite him continuing to receive income from the farm, holiday lets and from the government's single business payment. On this the judge ruled that '*in the circumstances it cannot be said that there is anything unfair in the way in which the Bank has exercised its rights to enforce'*.

The judge went on to consider what would be the position if he was wrong on this. He ruled *obiter* that He would not make an '*unfair relationship'* finding in any event. In relation to the 3 pleaded grounds of unfairness, the judge ruled:

- it was '*clear that not only did the Bank advise her to obtain separate legal advice, she did in fact obtain such legal advice as evidenced by the Certificate of Independent Legal Advice'*,
- there was '*no obligation'* where she had received independent legal advice for the lender to have '*pointed out to her the key onerous features'* (which the judge noted she had '*not identified'* in any event) or indeed '*any features'* because this '*was the role of her solicitor'* who gave the certificate, and
- he had found the lender had '*not breached any representations made to Mr or Mrs Gough at the time the guarantee was entered into'*.

The judge also noted that whilst Mrs Gough was '*not a party to the finance agreements'* with the lender she had however been '*an indirect beneficiary of them'* because the lender provided millions of pounds of finance to her husband for his family business. For this reason the judge concluded that Mrs Gough's '*defence to the claim under the guarantee and the claim to possession must fail'*.

The judge also went on to observe (again *obiter*) that there had been '*nothing improper'* in his judgment in the way the lender had '*behaved in exercising or enforcing its rights under the credit agreement and related agreements*'. He noted that Mr Gough '*throughout had independent advisers both business and legal*' and was '*not forced to enter into the finance agreements'*. The judge found that there had been '*no representation or common assumption'* which the lender had '*failed to observe'* but rather the lender had '*acted entirely properly throughout'* noting that it had '*shown great forbearance towards Mr Gough, extending him additional credit when he suffered the fire in January 2013 and on numerous occasions thereafter in order to allow him to continue his business'*. The judge accordingly ruled that there was '*no*

evidence' of '*any impropriety'* on the lender's part in deciding to make demand and appoint LPA receivers when it did.

Concluding on this the judge ruled that there could be '*no question of making a determination that the relationship between the Bank and Mr Gough was unfair so as to trigger the powers of the Court'* under CCA 1974 section 140B. The judge clearly distinguished *Quennell v. Maltby* **[1979] 1 WLR 318** because here there was '*no evidence at all'* that the lender is '*not seeking possession* bona fide *and for the purpose of enforcing the security*'.

What was the counterclaim for? What ruling did the judge make on the counterclaim?
Mr Gough had brought a counterclaim for unspecified and unparticularised damages against the lender which was abandoned in his counsel's skeleton argument served the day before trial and not pursued at trial. As no notice of discontinuance had been served, the judge formally dismissed the counterclaim at the handing down.

Did the judge grant a possession order?
Yes. However he ruled that at the hand down he would consider any application by the borrowers for more time under section 36 of the Administration of Justice Act 1970.

Will there be an appeal?
Before trial counsel for the borrowers sought to amend their defence to include a counterclaim under the CCA 1974. The judge refused to grant permission to amend as they were made very late. He gave a short judgement on this point. However on 26 July 2017 an application **A3/2017/2026** was lodged with the Court of Appeal seeking permission to appeal this procedural determination. This was referred to a single Lord Justice to consider on the papers which was refused by Lord Justice Henderson on 31 August 2017. The borrowers have until 7 September to ask the Civil Appeals Office to renew this application for permission to appeal to an oral hearing. The judge refused to grant any stay at the handing down hearing.

Comment
Whether a guarantor can claim that an '*unfair relationship'* exists has now been considered twice at high appellate level. Oddly the judgement here makes no reference to this.

HM Court of Appeal in Northern Ireland in *Bank of Ireland (UK) PLC v. McLaughlin* **[2016] NICA 33** that under section 140A(1) of the CCA 1974 that a court might make an unfair relationship order in connection with a '*credit agreement'* if it determined that the relationship between the creditor and the debtor was unfair to the debtor in certain specified respects. However under section 140C(1), a '*credit agreement'* was any agreement between an individual (the debtor) and any other person (the creditor). A court had to start with the definition of a 'credit agreement' and where a loan agreement was made between a limited liability company and not an 'individual'. It did not involve a credit agreement. This meant that the 'unfair relationship provisions did not apply to corporate lending. On 31 January 2017 the Supreme Court of the United Kingdom (Lords Kerr, Wilson and Toulson JJSC) refused permission for a final appeal in this case **UKSC 2016/0163**.

In *Bank of Scotland PLC v. Ahmad* **[2013] EWCA Civ 1814** Lady Justice Arden sitting in the Court of Appeal had to consider this issue at an oral permission hearing on 4 December 2013. She too noted that '*credit*' is defined in section 9(1) of the CCA 1974 as including 'a cash loan and any other form of financial accommodation'. The guarantors there tried to submit that the grant of financial accommodation to their companies could be financial accommodation for the purposes of the meaning of '*credit agreement'*. However Arden LJ ruled that the point was '*not arguable because it is not financial accommodation given to the guarantors at that point in time*'. The guarantors also tried to submit that under the terms of their guarantees, their obligations were immediately due and payable and because there had to be a deferment until the monies were called in, there had to be '*financial accommodation'* for the purposes of s.9. Again this submission was also rejected by Arden LJ on her construction of the guarantees with her ruling that '*there cannot be an immediate obligation arising but from the part of the guarantors'*.

6 September 2017

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.