IN THE COURT OF APPEAL

CIVIL DIVISION

LORD JUSTICE TOMLINSON

Appeal Number: B2/2015/0594

ON APPEAL FROM THE OXFORD COUNTY COURT

HH JUDGE TOLSON QC

[2015] EW Misc B4 (CC)

ON APPEAL FROM THE MILTON KEYNES COUNTY COURT

DISTRICT JUDGE PERUSKO

Case Number: A28YK764

B E T W E E N:

BLUESTONE MORTGAGES LIMITED
(Former Name: BASINGHALL FINANCE PLC)
Suing as assignee of CAPMARK UK LIMITED
(Former name: GMAC COMMERCIAL MORTGAGE LENDING LIMITED)
Claimant/Respondent

-and-

FAITH MOMOH

Defendant/Appellant

NOTE OF THE JUDGMENT REFUSING PERMISSION TO APPEAL OF THE

RIGHT HONOURABLE LORD JUSTICE TOMLINSON

HANDED DOWN *EX TEMPORE* ON TUESDAY 2nd FEBRUARY 2016

Miss Faith Momoh (appeared in person) but the Appellant's Notice, Grounds of Appeal and Skeleton Argument were settled by **Mr Julian Gun Cuninghame (**Gough Square Chambers, 6-7 Gough Square, London EC4A 3DE**)**, instructed by direct access for the Appellant who appeared for the Appellant in both courts below.

The Respondent did not appear and was not represented but was represented below by **Dr Cecily Crampin (**Tanfield Chambers, 2-5 Warwick Court, Gray's Inn, London WC1R 5DJ**)** and at first instance by **Dr Sara Hunton** (Field Court Chambers, 5 Field Court, Gray's Inn, London WC1R 5EF) instructed by SGH Martineau LLP, 1 Colmore Square, Birmingham, B4 6AA.

After reading the Appellant's Skeleton Argument, the Appellant's Advocate's Written Statement and the Respondent's Note

And after reading the Appeal Bundle

And after hearing oral submissions from the Appellant the following *ex tempore* judgment was delivered at 11.05am

JUDGEMENT:

1. This is a renewed application for permission to appeal from the judgement of HHJ Tolson QC in Oxford County Court dated 16th January 2015. In reality it is an appeal from a decision of District Judge Perusko in Milton Keynes County Court dated 26th September 2014. On that occasion the District Judge gave summary judgment for the Claimant lender against Mrs Momoh for a £90,000 shortfall on a sale by the mortgagee of a "buy to let" property bought by Mrs Momoh with mortgage finance provided by the claimant's predecessor in title.
2. The claimant in this action is not the original lender. It became the assignee of the mortgage. The advance was made on 11th May 2006. The District Judge sets out the very considerable history in his judgment.

3. The Defendant did not make payments of service charges, ground rent and administration fees. Through time the arrears on her account grew. There was regular chasing of her by the managing agents and debt collectors appointed on their behalf. The statistics and the schedule show the original advance grew from 2006 to May 2012.

4. The terms of the lease made the defendant responsible for payment of the service charges, ground rent and administration fees.

5. The terms of the mortgage (as is their usual function) enabled the mortgagee to make payments to 3rd parties if required to do so. The mortgage provided that:

> "*If we have to pay any expenses to third parties we will **try** to give notice to you within a reasonable time stating the amount of the expenses, the nature of the service supplied by the third party, and the date on which we have to pay the expenses*."

6. On the 1st occasion in April 2009, there were arrears of service charges and a notice was served under section 146 of the Law of Property Act 1925[1]. Indeed the Defendant on that occasion sent a cheque for £2000 to the debt collectors. To protect its security and save the security of the lease, the mortgagee paid these. The Defendant stopped her cheque and she challenged these charges.

7. The Leasehold Valuation Tribunal in November 2011 awarded the service charges as claimed. There was then a reference to arbitration. The amount due will also include the arbitrator's fee. This remained unpaid.

8. On 7th May 2012 a further s146 notice was served in relation to arrears of service charges and unpaid arbitration fees in the total sum of £17,069.74. Of this, £14,720 related to service charges. A covering letter had been sent with that notice. The defendant denies receiving this. On 29th June 2012 the claimant paid the arrears and debited these to the Defendant's mortgage account. The next day, the claimant sent the defendant a letter advising her they had paid these charges. This attached a statement and enclosed a leaflet on "How we can help". On 2nd July 2012 there was another follow up letter from the claimant.

9. The claimant then sent the defendant a letter dated 12th July 2012 saying it would like to send out a field agent to visit the defendant. It is clear that this was received because it was sent back by the Defendant and it was received back by the Claimant on 23rd July 2012.

10. The Defendant then sent the Claimant a fax:

> "*Hi, Louis. I've just seen your letter. I've been on holiday, returned today, 23 July. Please take this as my instructions refusing the planned visit of any field agent. A copy of this letter will be forwarded to the Financial Ombudsman as Basinghall Finance have been reported to them for my mortgage*."

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[1] This provides:
"s146 Restrictions on and relief against forfeiture of leases and underleases.
(1)A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—
(a) specifying the particular breach complained of; and
(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
(c) in any case, requiring the lessee to make compensation in money for the breach;
and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

11. On 26th November 2012, the Claimant appointed LPA receivers and the property was sold. The claimant in these proceedings seeks to recover the shortfall of £89,138.52.

12. The District Judge records in his judgment that on 21st November 2012 the Financial Ombudsman Service ("FOS") rejected the claimant's complaint. FOS said:

> "*It does not seem unreasonable that Basinghall didn't inform you of this earlier. I am satisfied that a section 146 Notice was issued and that Basinghall paid the ground rent and service charges accordingly when it received a letter calling it to do so."*

13. The issue before the District Judge was the construction of the clause entitling the mortgagee to pay arrears to third parties. Where the lender had failed for 6 weeks to tell the defendant of this, whether this gave rise to an "unfair relationship" between the mortgagor and mortgagee under section 140A of the Consumer Credit Act 1974 ("CCA").

14. This provides:

> **"Section 140A Unfair relationships between creditors and debtors**
> *(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—*
> *(a) any of the terms of the agreement or of any related agreement;*
> *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
> *(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
> *(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."*

15. It is also the position pursuant to section 140B(9) that:

> "*(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary*."

16. The decision of the District Judge[2] was given before the decision of the Supreme Court in *Plevin v. Paragon Personal Finance Limited* **[2014] 1 WLR 422**. Lord Sumption JSC notes that section 140A is framed in wide terms and there is very little guidance for its application.

[2] This was handed down on 26th September 2014.

17. The District Judge was wholly unimpressed by the suggestion that the relationship was unfair. He was prepared to accept that s140A applied but held that the defence had no reasonable prospects of success at trial.

18. The District Judge dismissed the suggestion that the Defendant would have paid. There was wholly undisputed evidence that the Defendant never did come to an arrangement to discharge her arrears. She was given ample opportunity to clear these arrears but she refused to do so.

19. There was no evidence that the Defendant made any arrangement with the managing agents to clear her arrears. She had a clear history of arrears and a history of being chased for payment of these.

20. The District Judge suggested that the "unfair relationship" allegation was far removed from cases hitherto where, for example, on payment protection insurance there was a question of hidden commissions. The root of fault here was with the Defendant. The District Judge pithily observed:

> "…*she never did come to any arrangements to discharge the arrears throughout the time she had her mortgage….I cannot see in those circumstances that there is a real prospect that the defendant is going to succeed on trial on the unfair relationship argument.* "

21. Mrs Momoh has represented herself today. Her Grounds of Appeal were settled by counsel who appeared below for her both before the District Judge and the Circuit Judge on the 1st appeal.

22. In those Grounds of Appeal and Skeleton Argument, the point is made that given that the burden is on the creditor to demonstrate that the relationship is <u>not</u> unfair, it is inappropriate to proceed by way of summary judgment.

23. Mr Gun Cuninghame refers to (and he referred HHJ Tolson QC to) a decision of Peter Smith J in *Bevin v Datum Finance Limited* **[2011] EWHC 3542 (Ch).** Here at paragraph 53 he states:

> *"53. To my mind, he can only embark on that exercise if he has evidence to support the conclusion, as opposed to supposition. It is self evidenced, to my mind, that, where there is an issue as to unfairness, it is going to be very difficult at a summary stage to resolve that issue one way or the other. I might follow the instincts of the Deputy District Judge, and believe that a commercial arrangement between Mr. Bevin and Mr. Fort would inevitably lead to a rate of interest. I might also believe that 5 per cent per annum secured in 2007 looks like a low or a reasonable rate of interest. But that is not the test and that is not evidence. One has to be careful to put aside one's beliefs and speculations, and decide cases on evidence. This is especially so where the conclusion shuts out a party at a summary stage, and deprives him of an opportunity fully to deploy the issue as to unfairness*."

24. I quite accept that in many cases of an "unfair relationship" with its statutory burden of proof, there are difficulties in a summary determination. I am in full agreement with the District Judge and the Circuit Judge below here that this is not one of those cases.

25. It is quite simply a case where a clause in a mortgage in standard form provides that a mortgagee can pay service charges if the lessee fails to do so. This clause does not give rise to an "unfair relationship" of itself.

26. The Defendant failed to pay and put the lease and the mortgagee's security at risk. The mortgagee preserved the lease and gave her every opportunity to deal with the arrears. The suggestion that had she been informed earlier she would have taken steps to discharge them so that the sum is unfair rings extremely hollow. In my judgment any suggestion as to unfairness has no conceivable prospects of success.

27. Lord Justice Longmore in refusing permission to appeal on the papers said the proposed appeal raised no important point of principle or practice. I refuse permission to appeal.

The court rose at 11.30.

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3rd February 2016.