



Mortgage Possessions and Unfair Relationships

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A standard mortgage possession?

Mr Frankish has a mortgage over a buy to let property from Falcon Mortgage plc which prohibited tenancies to a family member. It was a mortgage obtained through a broker, Mr Gaunt. The mortgage was a repayment mortgage on a fixed rate of interest 2% for 2 years, which reverted to 5% in January 2016.

Mr Frankish got into arrears with his mortgage, both because of the increase in the CMI and because he failed to pay a service charge of £2,000 to his landlord, Gaunt Properties Ltd, and FML paid the arrears and added them to the mortgage. There has been a history of service charge arrears of which this is the most recent example.

FML suspects Mr Frankish of letting his sister live in the property.



FML issued mortgage possession proceedings against Mr Frankish on the basis of arrears and letting to his sister.



At the first possession hearing, Mr Frankish complains:

1. FML never explained to him at the time he took out the mortgage about not letting his sister live there. She only lived there for 3 months when she was between jobs.
2. He has just discovered that his broker was paid a commission by FML.
3. In a phone call in February 2016, one of FML's agents suggested that the interest rate could be lowered. Mr Frankish's application to move to a lower rate was then refused because of his sister living in the property.
4. He never received the s146 notice because it was sent to the property.
5. FML did not notify him that it would pay the service charges until after it did so, and he wanted to challenge them.



An unfair relationship?



Residential mortgages

S140A(5)

An order under section 140B shall not be made in connection with a credit agreement which is an exempt for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans).



S140A of the CCA 1974

- 1) The court may make an order under s140B 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).



S140B

1) An order under this section in connection with a credit agreement may do one or more of the following:

a) require the creditor ... to repay (in whole or in part) any sum paid by the debtor ... by virtue of the agreement ... (whether paid to the creditor ...);

b) require the creditor ... to do or not to do (or to cease doing) anything specified in the order in connection with the agreement ...

c) reduce or discharge any sum payable by the debtor ... by virtue of the agreement ...

d) ...

e) otherwise set aside (in whole or in part) any duty imposed on the debtor ... by virtue of the agreement ...

f) alter the terms of the agreement ...

g) direct accounts to be taken... between any persons.



- 2) An order under this section may be made in connection with a credit agreement only:
 - a) on an application made by the debtor ...
 - b) at the instance of the debtor ... in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement ... or
 - c) at the instance of the debtor ... in any other proceedings in any court where the amount paid or payable under the agreement ... is relevant.
- 3) An order under this section may be made notwithstanding that its effect is to place on the creditor ... a burden in respect of an advantage enjoyed by another person.
- 8) A party to any proceedings mentioned in subsection (2) shall be entitled, in accordance with rules of court, to have any person who might be the subject of an order under this section made a party to the proceedings.
- 9) If, in any such proceedings, the debtor ... 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.



Procedure

CPR Practice Direction 7BPD

- Where a claimant makes a claim under s140B (paras 2.1 and 3.1(5))
- A set hearing date at which the court may dispose of the claim or give directions



Summary judgment

Is summary judgment available given that the court must take all the circumstances into account, and the burden is on the creditor?

Carey v HSBC [2009] EWHC 3417 (QB)

Para 134: “the court will need to decide on the basis of the particular facts said to create unfairness to the debtor and matters going to their particular relationship ... but no specific facts are alleged here at all. [Counsel] says that a debtor does not have to plead specific facts ... That is true. But the result in the present context is that the claim to an unfair relationship is bound to fail.”



Bevin v Datum Finance Ltd [2011] EWHC 3542 (Ch)

Para 53: 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 ... This is more so, because the legal burden is ... not on Mr Bevin ...

Axton v GE Money mortgages Ltd [2015] EWHC 1343 (QB)

Para 49: It cannot be that the burden of proof imposed by s140B(9) ... was intended to mean that, in a case where an unfair relationship is being alleged, no summary disposal should ever take place.



Where can unfairness be found?

Plevin v Paragon Personal Finance Ltd [2014]
UKSC 61

There may be unfairness even where there is no breach of a regulatory rule

Para 346 of *Deutsche Bank (Suisse) SA v Khan*
[2013] EWHC 482

Para 101 of *Thomas Nelmes v NRAM Plc* [2016]
EWCA Civ 491



Unfair terms

- Is the term commonplace?
- Are there sound commercial reasons for it?
- It is a legitimate and proportionate attempt by the creditor to protect its position?
- If solely for the creditor's benefit, does it protect against a risk the debtor does not face?
- The scale of the lending and whether commercial or quasi-commercial in nature (the court will be slower to find unfairness in high value lending between commercial parties than in consumer lending)
- Strength of debtor's bargaining position
- Are the terms individually negotiated or pro forma – take it or leave it?



Conduct at contract

- Did the creditor exert pressure to execute?
- Did the creditor have reasonable grounds to believe the debtor had prior experience of arrangements and advice of solicitors?
- Did the creditor have reason to think the debtor had not read or understood the terms?
- Had the debtor demurred about the terms?



Conduct since

- Was any demand by the creditor prompted by improper motive or arbitrary decision?
- Has the creditor shown patience and has it taken steps to reach an accommodation?
- Has the debtor resisted attempts to reach an accommodation by raising unfounded claims against the creditor?



Examples

Raymond James Graves v Capital Homes Limited [2014]
EWCA Civ 1297

Only in an exceptional case will the court conclude that a mortgagee whose power of sale had become exercisable due to arrears was to be treated as having acted unfairly in deciding to realise its security

Guidance from the OFT advising lenders to treat borrowers with consideration did not mean lenders had to ignore the history of the account and the ability of the borrower to maintain it



Commercial First Business Ltd v Atkins [2012] EWHC 4388

The implication of term that consent is not to be unreasonably withheld to letting in a mortgage of commercial investment property

No such implication in a residential mortgage

Unilaterally imposing more onerous criteria to the serviceability of a loan might be capable of giving rise to unfairness but it was not unfair to deal with the debtor's request according to the creditor's internal procedures with reference to the ability to service the loan taking into account arrears



Thomas Nelmes v NRAM Plc [2016] EWCA Civ 491

- Broker was paid a fee by the lender
- The mortgage was not purely equity release but also included a conditional credit facility
- The borrower did not know his own house had become part of the security
- The transaction was doomed because there was an overvaluation of the properties
- The lender had appointed a receiver 1 day early having given the borrower a period to pay before they would appoint
- The lender and broker were conspiring against the borrower
- The rejection of the borrower's offer to repay was unfair and the demand for repayment was for improper motive



What about Mr Frankish?



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Unfair relationships

Is the court using all of its powers?