B2 Bridging LLP v NV Management (Eur) Ltd & Ors
(County Court in Central London, HHJ Johns KC, 4 May 2023)

Facts

NV Management (Eur) Ltd, the first defendant ("the Company"), entered into a bridging loan in March 2019 for a term of 6 months and a gross amount of £1.92 million with the claimant bridging lender. The loan funded the purchase of a large, six-bedroom residential property in Epsom, Surrey.

The Company had been incorporated the year previously by the second and third defendants, as its sole shareholders and directors, on the advice of their accountant, expressly for the purpose of purchasing a residential property. Contracts were exchanged by the Company with the vendor in July 2018 for the purchase, without the Defendants having at that time obtained the funds necessary to complete the purchase.

After a period of months in which the defendants tried, unsuccessfully, to obtain bridging finance from other lenders, the loan from the claimant was made in March 2019 for a period of six months expiring in October 2019, at a standard rate of interest of 5% per month compounded, and a reduced rate of interest of 2% per month during the term of the loan. The latter was, as is standard practice in the bridging sector, "rolled up" and deducted from the gross amount of the loan advance. The loan was secured against three residential properties: the property purchased and two other residential properties owned by the defendants.

The defendants had promised to repay the loan within the six-month term from a combination of the return on a speculative investment deal in Dubai and the proceeds of the surrender of a lease of the second and third defendants' restaurant premises in Epsom. Needless to say, the promised sums never materialised.

Following the expiry of an agreed six-month extension, the term expired in March 2020. Possession proceedings were commenced and then promptly stayed until late 2021 due to the Covid-19 pandemic. Interest accrued meanwhile on the unpaid sums at 5% per month compounded, and the defendants made no further repayments towards either interest or capital. As a result, by the time that the case reached trial in 2023, over £11 million was owing on the claimant's case.

Issues

The defendants adopted something of a "kitchen-sink" approach to the defence of the claim at trial, advancing no fewer than five substantive bases of defence:

(1) The loan agreement and its associated documents (which included personal guarantees of the loan executed by the second and third defendants) was a regulated mortgage contract as defined by art. 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"), and so unenforceable, the claimant not being authorised for the purposes of the Financial Services and Markets Act 2000 to enter into regulated mortgage contracts.

(2) The loan agreement was a sham transaction because the "substance" of the lending transaction was a loan by the claimant to the second and third defendants as individuals, a loan to the company having only been made so as to ensure that the loan avoided regulation under the RAO.

(3) The relationship between the claimant and the defendants was unfair for the purposes of sections 140A to 140C of the Consumer Credit Act 1974, such that the defendants were entitled to an order disallowing interest at the 5% rate and/or for various periods since the expiry of the term of the loan.

(4) The 5% rate of interest payable upon default was a contractual penalty at common law, alternatively an unfair term for the purposes of section 62 of the Consumer Rights Act 2015.

(5) The defendants were entitled to rescind the loan transaction by reason of "secret commissions" having been paid by the claimant to two mortgage brokers who had worked on the transaction, pursuant to the principle in Wood v Commercial First Business [2022] Ch 123. This defence was raised by way of amendment. It arose from an answer given in cross-examination by a director of a member company of the claimant on the first day of trial. It led to the adjournment of the trial part-heard from February to April 2023 with further directions given for disclosure and witness evidence addressing the payment of, and the defendants' knowledge (or lack thereof) of, the alleged secret commissions. The issue turned on the parties' diametrically opposed accounts as to what was said (or not said) orally by one of the brokers at a face-to-face meeting on 14 March 2019.

Judgment

A wide-range of points were advanced by the claimant in response to the defendants' arguments, not all of which needed to be dealt with by the judge. HHJ Johns KC, having remarked that the case had been "*very well argued on both sides*", gave a detailed *ex tempore* judgment rejecting the defendants' defences in their entirety, rejecting their unfair relationship counterclaim, and giving judgment for the claimant for the full amount of the sum sought.

In summary, the judge held that:

(1) The loan was incapable of being a regulated mortgage contract, or alternatively a regulated credit agreement, for the purposes of the RAO because it was not a loan either to an individual or to trustees. As such, the primary definition of a regulated mortgage contract in art. 61(3) of the RAO simply could not be met. There was no factual or legal basis on which to hold that the Company had received the loan monies as trustee for its directors.

(2) The loan was not a sham transaction. Applying the classic definition of sham in Snook v London and West Riding Investments Ltd [1967] 2 QB 786, as recently discussed by Lewison LJ in Global 100 Ltd v Laleva [2022] 1 WLR 1046, the judge held that it was plain that the claimant had no intention other than to make a loan to the Company rather than to its individual directors, and had believed in doing so that it was extending a loan for businesses purposes, the second and third defendants proposing to live elsewhere. The "strong presumption", referred to by Lewison LJ in Global 100 at [52], that parties to what appear to be perfectly proper agreements on their face intended them to be effective, was not displaced. Further, the fact that the second and third defendants had executed guarantees of the indebtedness of the Company was consistent with the substance of the transaction being a loan to the Company, not to the individuals; had the latter been the case, the guarantees would not have been necessary.

(3) The loan having been found to be a loan to the Company, the unfair relationship counterclaim fell away: an unfair relationship order under section 140B of the CCA 1974 is only available in the case of (unregulated) credit provided to individuals (see CCA 1974

s.140C(1)). Nonetheless, the court held that in any event the relationship between the parties was not unfair. Rejecting the defendants' argument that the claimant had "preyed on unsophisticated borrowers", the judge held that the parties had intentionally structured the acquisition of the property through a corporate structure, which did not attract the same safeguards as a loan to an individual, and that this was fatal to the allegations of unfairness.

(4) The 5% rate of interest payable following the defendants' default upon the terms of the loan was not a contractual penalty; nor an unfair term under the Consumer Rights Act 2015. The defendants' case simply could not survive the agreement of the parties' respective lending experts, recorded in their joint statement, that a 5% rate of interest was within the range of rates (3-5%) typically charged by lenders on default for loans of this nature and level of risk. Given that, the judge held that it could not be said that the claimant's standard rate of interest was unfair or that it imposed a detriment out of all proportion to the legitimate interests of the claimant as lender (as per El Makdessi v Cavendish Square Holding BV [2016] AC 1172).

(5) The commissions referred to by the defendants had been paid by the claimant to both brokers, but were not "secret" commissions (whether 'full' or 'half' secret in character), because the defendants were well aware of them. Following a close and detailed analysis of the credibility of the parties' witnesses, set against the backdrop of the limited documentary evidence available, the judge held that the claimant's version of events was correct: the defendants had been informed by the broker of both the fact and amount of the commissions at the face-to-face meeting in question, and had further been advised by their solicitors of the possibility that such commissions would be paid.

Orders for possession in 42 days were made in relation to each of the defendants' three properties, and judgment against each of the defendants given in the sum of £11,237,912.49, inclusive of costs.

Implications

The money judgment obtained by the Claimant is extremely large in the context of residential mortgage recovery, and is also a very large sum to be obtained at trial in the County Court. It demonstrates the possibility, given sufficient tenacity, of obtaining such relief in the County Court. At no point in the proceedings was a transfer to the High Court sought or suggested by either the parties or the Court. The judges of the County Court in Central London have considerable expertise in complex mortgage repossession matters.

The case resolved, decisively in the lender's favour, a number of points which are raised time and time again by borrowers in bridging loan possession proceedings but which have not so far been the subject of any reported decision. The agreement reached between the experts in this case that a 5% rate of compound interest was not a contractual penalty or unfair term will prove comforting to lenders operating a similar business model at the high-risk end of the market. The sham argument – clearly a bad one when subjected to scrutiny but superficially attractive in the case of a loan to a company – has now to the writer's knowledge twice been rejected by Circuit Judges in the County Court (the other occasion being at a trial for a different bridging lender before HHJ George in Croydon County Court in 2018).

Finally, the case reiterates the need for all lenders to make abundantly clear on the face of their loan documentation when broker fees (i.e. commissions) are being paid to brokers involved in the loan transaction, including the specific amount of the commission. Language which is not readily comprehensible by lay people – such as "facility fee" – should be avoided when describing such

sums. Appropriate undertakings must be obtained from solicitors acting for the borrower that the borrower's attention has been draw to the commission sum specifically.

This case was brought to trial, in the face of formidable procedural obstacles raised by those acting on behalf of the defendants, by a talented and determined team at Fahri LLP. Partner Roumiana Dimitrova had conduct of the matter throughout, assisted by the skilled input of solicitors Violena Taseva and Michael Michael.

Gavin Bennison
15 May 2023

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