

Dispute Resolution
Case Law Update
Rosling King LLP



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In this case, the Court of Appeal upheld the High Court's decision that it was an abuse of process to seek to litigate questions arising out of the Financial Services and Markets Act 2000 ("the 2000 Act") more than two years after the making of an Order for possession.

Background

UK Acorn Finance Ltd ("Acorn") loaned £630,000 to the Claimant which was secured by way of a legal charge over a property. On maturity of the loan, the account was not redeemed by the Claimant. Following demands for repayment, Acorn issued mortgage possession proceedings. The Claimant filed a defence admitting the loan, and arrears, but asking for additional time to pay. They also confirmed that they did not want the Court to consider if the relationship with Acorn was unfair. A suspended Order for possession was made in Acorn's favour.

The Claimant subsequently sought to set aside the Order for possession on the grounds that there was a sub-charge which they said prevented Acorn from exercising its rights under the charge. This Application, and numerous others, were dismissed by the Court. A warrant of possession was later issued and an eviction date set. Shortly before the eviction date, the Claimant issued a new claim in the High Court. In this claim they pleaded that most of the land secured under the charge was used in connection with a dwelling and therefore the charge was a "regulated mortgage contract" entered into by an unauthorised person. They submitted that, as such, the charge was unenforceable under s26 of the 2000 Act. Acorn applied to have this claim struck out on three alternative grounds (1) cause of action estoppel had arisen from the County Court Judgments; (2) issue estoppel had arisen from the County Court Judgments; or (3) the new claim was an abuse of the process following the Henderson v Henderson principle (which states that the parties should bring all the claims and defences they wish to assert at the same time).

The District Judge held that neither estoppel could prevail against s26 of the 2000 Act, but that it was an abuse of power to seek to litigate the questions arising out of the 2000 Act at this late stage, more than two years after the making of the original Order for possession. The order was upheld and the Claimant subsequently appealed this decision. The High Court Judge dismissed the appeal and the Claimant appealed to the Court of Appeal.

The Court of Appeal's Decision

The issue before the Court of Appeal was whether, in circumstances in which a secured loan was prima facie unenforceable because Acorn had not been authorised to carry on the business of lending under the 2000 Act, it was considered an abuse of process for the borrower to seek to rely on that unenforceability after an Order for possession had been granted, and numerous applications to set aside that Order had been refused.

The Court of Appeal considered the facts and circumstances of this case, in addition to the 2000 Act, and agreed with the District Judge that estoppel could not prevail over a statutory provision enacted for the protection of certain vulnerable categories of persons. It stated, however, that it did not follow that Acorn could not rely on the principle of abuse of process.

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The Court held that a broader, merits-based approach was appropriate, balancing the policy of the 2000 Act against the policy of the Henderson principle. In doing so, it found that there was no reason why the Henderson principle should not apply and, in fact, there was every reason why it should. The 2000 Act could not dictate the result of an abuse of process application and, on that basis, the Court held that it must refrain from interfering with the decision of the District Judge.

Comment

This is a welcome result for lenders, which emphasises the finality of obtaining an Order for possession. Whilst each case is fact specific, the finding of the Court of Appeal in this case will hopefully deter parties from issuing subsequent claims, or raising new issues of fact, or law, after an Order has been made.

For further information, please contact [Rebecca Sharpe](#) or the Partner with whom you usually deal.