Real Estate
Real Estate Case Law Update
Rosling King LLP

Background

Greenlands Trading Ltd (the "**Claimant**") brought a claim for possession in the County Court against Ms Ponteraso (the "**Defendant**") on the basis of a second mortgage which the Claimant held over the Defendant's property. The County Court found in favour of the Claimant and granted them possession of the property together with a money judgment against the Defendant. The Defendant appealed against the decision to the High Court alleging the County Court judge was wrong in certain respects to characterise the Claimant's mortgage as giving rise to an unfair relationship under the powers contained in section 140A of the CCA.

Facts

The Defendant wished to raise funds for an investment and subsequently took out a 6-month bridging loan. The Defendant intended to re-mortgage one of her 3 properties in order to pay off the first bridging loan at the end of the 6-month term, unfortunately she was unable to do so. She asked for a month's extension of time but was refused. Instead she was offered a further 6 month bridging loan to refinance the first bridging loan.

The first bridging loan provided for an interest rate of 1.35% per month with a default rate of 3% per month and the second bridging loan offered a rate of 1.45% per month rising to 3% per month in the event of default. Following legal advice, the Defendant entered into the second bridging loan, unfortunately the Defendant was unable to pay the second bridging loan on maturity and the Claimant sought possession.

The Appeal

The Defendant argued the County Court was wrong to hold the 3% default interest rate per month followed the industry standard and the judge was wrong to find that the Defendant had a workable exist strategy from the second bridging loan which gave rise to an unfair relationship under section 140A of the CCA. Section 140A of the CCA, reads as follows:

(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).

1. Was the default interest rate industry standard?

It was suggested that the County Court had attached too much weight to *Chubb and Bruce v Dean and another [2013] EWHC 1282 (Ch)* which had determined the issue of an unfair relationship wrongly by reference to the Unfair Terms in Consumer Contracts Regulations 1999 (*SI 1999/2083*) (the "**UTCCR**").

The High Court agreed that the exercise of determining whether a relationship is unfair under section 140A of the CCA was not identical to that of determining whether a term is unfair under the UTCCR. The question to consider as found in *Plevin v Paragon Personal Finance [2014] UKSC 61* is whether the relationship is unfair rather than whether any particular term is. However, the High Court did not agree with the Defendant that the County Court had placed any particular reliance on *Chubb v Dean* but even if the County Court did rely upon *Chubb v Dean* for some support that the rate of interest was not penal or unfair, it did not seem to the High Court to be an impermissible part of the County Court's judicial thinking.

It was held by the High Court that the factors taken into account by the County Court were precisely the sort of considerations which were likely to be relevant to the assessment of whether the relationship is unfair by virtue of a particular term. For example, the County Court judge drew attention to the fact that the Defendant had taken out legal advice, knew her own mind, regarded herself as a business woman and had experience in mortgaging properties – in short, she was "*certainly not naïve or unsophisticated*".

The High Court was reluctant to interfere with the County Court's conclusion that the 3% default interest rate was unfair or penal.

2. Should the Claimant have assessed the exit strategy that the Defendant was proposing to rely upon?

The Defendant argued that because she defaulted on the first bridging loan there was no real possibility of satisfying the second bridging loan, which was for a greater amount. The Claimant, it was argued, should have taken into account the Defendant's exit strategy and by not doing so they were caught under s140(A)(1)(c).

The County Court's findings of fact demonstrated that the Defendant had the possibility of re-mortgaging or taking out a further loan and on the face of it there was an exit strategy for the Defendant. As a result, the High Court judge held:

"*I do not think that I can properly say that the [County Court] judge was wrong to conclude that the possibility of either re-financing or taking a further loan on her residential property or her commercial property in September 2015 was so remote and so impossible that the claimant should be regarded as at fault or as acting unfairly in not pointing that out to her. There was no particular reason for them to conclude that the*

exit strategy was doomed."

The High Court also drew attention to the fact that the Defendant's 3 properties were worth more than £1 million and therefore it was not *"surprising that the [Claimant] took [the Defendant] at face value when she said that she wanted time to organise her re-financing in such a way as to be able to pay off the bridging loan. And, when she had asked for a month, to give her six months does not seem to me…to be taking unfair advantage of the relationship between them."*

It was held that the Claimant's proposed exit routes were matters that were realistic possibilities, and that it was not inevitable that the Defendant would default. She did have a strategy for repaying the second bridging loan.

The High Court dismissed the appeal.

Commentary

In an obiter comment by the High Court judge, the judge explained the question as to whether a relationship is unfair is not restricted to the borrower's perception although it is a relevant factor. In the present appeal, it had been relevant as the Defendant had not complained about the rates of interest either at the time of taking out the loan or on hindsight.

This decision is particularly helpful in confirming the test in *Plevin v Paragon Personal Finance* is the test to be applied to determine whether a relationship is unfair. It further serves as a reminder of the factors the court will take into account when assessing the relationship between creditor and debtor.

For further information, please contact Alexander Edwards or the Partner with whom you usually deal.