Avery-Gee and others v Sibley and others

[2021] EWHC 798 (Ch), [2021] All ER (D) 24 (Apr)

Administration – Contractual interpretation. In proceedings concerning a company in administration, which managed and promoted 'peer-to-peer loans, and where the central issue concerned the order of priority between the fees to be paid to the company and investors' right to recoup a loan, the Chancery Division held that both the natural meaning of the words used in the context in which they appeared, and the commercial common sense of the situation, favoured the opposing respondents' interpretation that, on the true construction of the relevant contract, the 5% fee should be payable to the company from the proceeds of realisation of an asset only after deduction of the sums due to the investors. The court so ruled on the joint administrators' application for directions on the true construction of terms and conditions regulating the relationship between the company and third parties, some of whom claimed to be its creditors.

Catchwords

Administration – Contractual interpretation – Order of priority between fees to be paid to company and investors' right to recoup loan

Background

The company, which was authorised and regulated by the Financial Conduct Authority (FCA), promoted and managed short term 'peer-to-peer' loans funded by a large number of lenders (the investors). Prospective borrowers (the borrowers) would apply to be promoted on the company's website, stating the amount that they were seeking to borrow and proposing security for the facility. The company would undertake due diligence investigations and value the proposed security for the loan. If approved by the company, the loan opportunity would be advertised on its website, applying a loan to value ratio of no more than 75%. Prospective investors could then agree to lend money for a period of six months.

The scheme of lending established by the company involved each borrower and the company, acting as agent for the investors as unnamed principals and called the 'lender' in the agreement, entering into a master facility agreement relating to the loan, which created a series of individual loan agreements in identical terms with each investor as an unnamed principal in each loan agreement.

Section 1 of the master facility agreement provided for the payment of an arrangement fee by the borrower and for the payment, by the borrower, of a further sum referred to as an administration fee. Clause 8 of the terms and conditions of the master facility agreement provided for a 'default fee'.

The relationship between the company and individual investors was governed by contractual terms (the Terms and Conditions). Clause 6.2.4 of the Terms and Conditions provided that: 'An additional administration fee of 5% of the loan value will be deducted from the net proceeds of sale of the asset (the asset) and paid to [the company] (after deduction of all selling expenses such as commission)' (the 5% fee).

The company fell into financial difficulty and, subsequently, entered administration. A dispute arose as to the quantification of the company's entitlement to fees, in circumstances where borrowers had defaulted, as well as the order of priority between such fees and the investors' right to recoup the loan.

The joint administrators of the company applied to the court for directions on the true construction of the Terms and Conditions regulating the relationship between the company and third parties, some of whom claimed to be its creditors. The first to the third respondents were investors who were otherwise unconnected with the company and they were not members of it. The fourth respondent's initial involvement with the company had been as an investor. Subsequently, the fourth respondent had agreed to lend £1.5m to the company (secured by a debenture) in order to regularise the position. Thereafter, he had become both a director and the controlling shareholder of the company.

Issues and decisions

(1) Whether the 5% fee fell to be deducted from the proceeds of sale of the asset before repayment of investors, or only out of any surplus thereafter. Consideration was given to cl 6.2.4 of the Terms and Conditions.

The joint administrators submitted that the 5% fee was to be deducted before payment to the investors. The opposing respondents contended that it was payable from the net proceeds of realisation of the security asset, in strict conformity with the 'waterfall' created by cl 6.2.5, namely after repayment of the principal amount of the loan to the investors, the direct costs of the company in the setting up and administration of the loan and interest due to the investors. The opposing respondents contended that that interpretation was consistent with how the company stated that the proceeds of the realisation of assets would be dealt with, prior to the administration. In support of their proposed construction, the opposing respondents invoked the contra proferentem doctrine. Further, they pointed to the company's duty, as agent for the investors, not to 'place himself in a position where its interest in maximising the recovery of sums pursuant to the 5% fee might conflict with its duty to maximise the return for investors.

The principles of contractual construction were well-established. The aim of interpretation was to determine what the parties meant by the language that they used in the contract. In determining the intention of the parties, the court might have regard to the relevant factual context in which the contract was agreed. While the circumstances in which the contract was agreed might be considered by the court in determining the objective intention of the parties to that contract, it would not have regard to pre-contractual negotiations. The usual rule was that, where parties to an agreement reduced that agreement to writing and agreed or intended that the writing should be their agreement then external evidence of earlier oral discussions or written communications was excluded. The usual rule might be excluded if the court concluded that the parties agreed and intended that there should be terms additional to those contained in the written agreement but, absent that, where an agreement had been reduced to writing then the rule would apply. However, in practice, where there was a complete written contract, it was likely to be difficult to conclude that the parties also intended that there be some further or different unwritten terms applicable. In the case of commercial agreements, a relevant consideration was whether the construction was consistent with a commercially sensible outcome (see [27] of the judgment).

The conditions of a promissory estoppel were that: (i) the parties had to be in a pre-existing legal relationship; (ii) one party had to make an unequivocal representation to the other that it did not intend to rely on its strict legal rights; (iii) the party making the representation had to intend that the other party would rely on it and the other party had to so rely on it; and (iv) it had to be inequitable for the party making the representation to go back on its promise (see [30] of the judgment).

The only material distinction to be drawn between promissory estoppel and estoppel by contract was that in the latter the estoppel was a term (express or implied) of the agreement between the parties, rather than acting as an independent promise. The result of that was that the consideration for the promise was the contract itself and hence the representee did not need to show reliance on the promise. However, it was essential to that type of estoppel that it arose as a term of the contract (see [31] of the judgment).

Where a promissory estoppel arose, its usual effect was that the promisor's ability to insist on its strict legal rights was suspended; it did not ordinarily extinguish the promisor's legal rights unless the promisee's ability to perform its obligations had become impossible. A promissory estoppel was defensive in nature and did not create new causes of action (see [32] of the judgment).

In the present case, the opposing respondents' construction fitted better with the commercial reality of the situation, as reflected by the parties' respective abilities to assess the risks involved in their dealings (see [67] of the judgment).

Both the natural meaning of the words used in the context in which they appeared, and the commercial common sense of the situation, favoured the opposing respondents' interpretation that what the parties had meant by the words used in the contract had been that the 5% fee should be payable from the proceeds of realisation of an asset only after deduction of the sums due to the investors (see [68] of the judgment).

In coming to that conclusion, the court had not had to invoke the principle of construction contra proferentem, save to the limited extent that it was relevant to the point at paragraph [62]. The court was not convinced that the Consumer Rights Act 2005 (CRA 2005) applied to that dealing, but in any event that would add nothing further to the contra proferentem argument (see [69] of the judgment).

Equally, the court was not persuaded that an analysis of the relationship based on fiduciary duties would assist. The existence and nature of such duties would be established by the contract. If, on its true construction, the contract created a situation in which the company was paid the 5% fee in preference to the investors where there was a shortfall on realisation of the security, it did not seem that the court should contemplate invoking a fiduciary duty which would be inconsistent with that construction (see [70] of the judgment).

The fact that the reference to the 5% fee came before the application of the 'waterfall' (of cl 6.2.5) was not of significant assistance in the true construction of the contract. While it might have been clearer to establish the circumstances in which the 5% fee was payable within the terms of cl 6.2.5, the fact that it was set out other than in that clause was not an unusual style of contractual drafting. Further, the court saw nothing particular to be drawn from the fact that it was referred to before rather than after the 'waterfall' (see [62] of the judgment).

The most significant part of the contractual language used was the reference to 'net proceeds of sale' within both cll 6.2.4 and 6.2.5. While that could, in theory, mean something different in the two clauses, one would have expected anyone who intended the meaning to be different to have sought to change the wording in the clauses. That was most particularly so where the party who sought to argue that the phrase had two different meaning was the party who proposed the terms on which the parties contracted. That interpretation was supported by the other two points made at paragraph [61(b)]. Subject to looking at other material, that led the court to incline in favour of the opposing respondent's interpretation (see [64] of the judgment).

The administrators were officeholders. They owed duties to the court in that role, but their primary duty was to maximise the return to the company and its creditors. The fact that they were officeholders might lead to the conclusion that their position was more disinterested (in the older sense of 'neutral', rather than the more recent usage of 'uninterested'), but the other parties to the application should be reassured that that did not give them some privileged position with the court in terms of the submissions that they advanced (see [16] of the judgment).

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1982] 1 All ER 925 [1979] 1 WLR 783 applied; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945 [1997] 3 All ER 352 applied; *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 WLR 896 [1998] 1 All ER 98 [1998] 1 BCLC 493 applied; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [2009] 3 WLR 267 [2009] 4 All ER 677 [2009] All ER (D) 12 (Jul) applied; *Sigma Finance Corpn, Re* [2009] UKSC 2 [2010] 1 All ER 571 [2009] All ER (D) 297 (Oct) applied; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900 [2012] 1 All ER 1137 [2011] All ER (D) 19 (Nov) applied; *Arnold v Britton* [2015] UKSC 36 [2015] 2 WLR 1593 [2016] 1 All ER 1 [2015] All ER (D) 108 (Jun) applied; *Tam Wing Cheun v Bank of Credit and Commerce Hong Kong Ltd (in liquidation)* [1996] 2 BCLC 69 [1996] 4 LRC 669 considered; *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 [1996] 4 All ER 698 [1997] 2 WLR 436 considered.

(2) Whether the 5% fee was to be calculated by reference to the amount realised on sale of the asset, or to the 'loan value', i.e. the amount of the initial advance (issue 2).

The joint administrators submitted that the more obvious interpretation was that 'loan value' meant the amount of the loan made under cl 14.15 of the Terms and Conditions.

Once issue 1 had been determined, issue 2 lost significance, at least for some of the parties before the court. Since, on the court's findings, the opposing respondents were entitled to recover both the capital sum and any outstanding interest in preference to the 5% fee, it became of no relevance to them which figure it was applied to, be it the original amount of the loan or the amount realised on enforcing the security. The opposing respondents' complaint about issue 2 was less about which of the two alternative interpretations were to be preferred, and more that whichever was preferred should be applied consistently (see [71] of the judgment).

The clue to the correct interpretation of the phrase 'loan value' in cl 6.2.4 lay in the use of the word 'loan'. The value was not stated to be a reference to the amount realised on the security, but rather the loan. That only made sense as a reference to the amount of the loan. Since it was inherent in the scheme that the loan was not repaid by instalments, but simply as a single sum at the end of the term, no issue arose as to whether that was a reference to the amount outstanding at any particular time, rather than the original advance (see [72] of the judgment).

(3) Whether the 5% fee applied to all loans that had exceeded term, or just those that had been marked as 'defaulted', i.e. loans closed without realising the full amount of the capital (issue 3).

There was, in the event, no dispute between the parties before the court on the present issue. The 5% fee was only repayable from the sum received on realisation of the asset, once the borrower had defaulted and the assets had been sold (see [73] of the judgment).

Carla Dougan-Bacchus, Barrister.

Judgment date

31 March 2021

Judge

Judge Pearce

Representation

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Muhammed Haque QC and Sam Cheesebrough (instructed by Candey Ltd) for the First, Second and Third Respondents

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