NEW SQUARE Chambers

Thursday 8 February 2024

CASE NOTE: *VARIOUS CLAIMANTS V OCTOPUS FINANCE LIMITED* [2024]

Christopher Snell

VARIOUS CLAIMANTS V OCTOPUS FINANCE LIMITED [2024]

Court strikes out Defence as disclosing no reasonable grounds for defending a claim to rescind contractual agreements on the basis that they amount to unconscionable bargains.

UNCONSCIONABLE CONTRACTS RESCINDED BY COURT

In a judgment handed down at the end of January 2024, HHJ Bloom struck out defences filed by Octopus Finance Limited in a claim commenced by several of Octopus' former clients.

The Judge struck those defences out on the basis that they disclosed no reasonable grounds for defending the claims; and granted summary judgment on the Claimants' claims for recission of certain contractual documents, including legal charges which purported to secure the Claimants' indebtedness, as the Defendant had no reasonable prospect of defending the claims.

It is likely that there are several other consumers who will be affected by this decision.

THE AGREEMENTS

Octopus Finance Limited is a company which operates from a residential terraced house in the Selly Oak area of Birmingham. Despite having an identical logo to the well-known company "Octopus Energy", Octopus Finance is in fact unrelated to its more reputable namesake.

Octopus Finance Limited's unconscionable business practices focus on individuals facing repossession of their homes by mortgagees and other charge holders. In many cases, such consumers are desperate to stop the repossession. In the present cases, Octopus Finance Limited had contracted with a number of individuals and, by the terms of the contract, had offered to provide "repossession management" services in return for a fee. On closer inspection, the "repossession management" service on offer contained 2 elements:

I. An offer to provide bridging finance sufficient to repay the mortgagee thus halting the repossession action; or

II. An offer to purchase the property subject to the repossession at an undervalue (c. 50% of the market price in one case).

The contracts also contained a number of other unfair contract terms which the Court considered in detail by reference to the Consumer Rights Act 2015.

Where, either:

I. The client decides not to sell their home at an undervalue or take a bridging loan from Octopus Finance; or

II. The home is repossessed;

Octopus Finance claimed to be entitled to a fee equivalent to 15% of the home's value. In the case of one of the Claimant's, the sum equivalent to 15% of the value of the home was some £200,000 + VAT. That liability was then secured by Octopus Finance by way of a charge over the home and a restriction on the title preventing disposition without Octopus' consent. Where consent to remove the restriction was requested, Octopus demanded payment of the 15% fee or otherwise refused consent.

INABILITY TO PROVIDE BRIDGING FINANCE

At least one of the 2 services offered by Octopus was – on the face of it – unlawful. As the properties in question were the homes of the individuals facing repossession action, any finance provided to those persons which was secured against their homes would amount to a regulated mortgage contract as more fully defined by Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). By s19 of the Financial Services and Markets Act 2000 ("FSMA"), only those who are authorised by the Financial Conduct Authority, or who are exempt persons, can carry on regulated activities. Octopus Finance Limited is not an authorised person, nor is it an exempt person. Any lending it provided would thus have breached the provisions of s19 FSMA: amounting to a criminal offence under FSMA and rendering such contracts unenforceable under the same Act.

As such, the only *real* "service" which Octopus could provide was to offer to buy a home at a significant discount: for which it wished to charge a fee of 15% of the true market value of the property (not the discounted price at which it was purchasing).

UNCONSCIONABLE BARGAIN

The affected Claimants thus commenced claims against Octopus Finance for recission of the agreements on the basis that they amounted to unconscionable bargains in accordance with the well-known Alec Lobb criteria. Those criteria allow the Court to interfere with unconscionable contracts in order to offer a level of consumer protection from unfair contract terms. Octopus Finance defended the claim on the basis that the Claimants had signed the relevant contractual agreements and were thus bound by the terms of them.

The Court found that such a defence disclosed no reasonable basis for defending the claims; since the unconscionable bargain doctrine was specifically directed at complete agreements which were manifestly disadvantageous to one of the counterparties. A plea that the Claimants had signed the relevant contractual documents was thus not a good defence. The Claimants produced cogent evidence of their disadvantage – here "poverty" or lack of means – which Octopus Finance had taken advantage of in a morally reprehensible manner.

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As a consequence, the Court exercised the legal remedies available to it and rescinded the agreements and the charges.

OTHER CONSUMERS

It is likely that there are many other consumers who have been affected by Octopus Finance Limited's conduct.

Octopus Finance Limited is a phoenix company of "Speedy Property", whose directors have been arrested by West Midlands police in relation to allegations of financial misconduct. The solicitors' firm who acted for "Speedy Property" has also been the subject of SRA intervention:

https://www.bbc.co.uk/news/uk-wales-56759679

https://www.expressandstar.com/news/property/2021/09/03/solicitors-suspended-over-property-scheme-in-which-sellers-lost-thousands/

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