

All England Reporter/2019/November/Wood v Commercial First Business Ltd (in liquidation) and other companies - [2019] All ER (D) 117 (Nov)

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Wood v Commercial First Business Ltd (in liquidation) and other companies

[2019] EWHC 2205 (Ch)

Chancery Division

James Pickering (sitting as a deputy judge of the High Court)

25 October 2019

Agent – Secret commission – Duty to account

Abstract

*The claimant's claim succeeded **in part**, **in** a dispute concerning mortgages that she had taken out with the **first** defendant mortgage loan company. The Chancery Division held that the claims based on forgery, lack of due attestation, undue influence and breach of duty all failed. The claims based on secret commissions and under the unfair relationships legislation succeeded.*

Digest

The judgment is available at: [2019] EWHC 2205 (Ch)

Background

The claimant (W) was a farmer who wished to raise money. The **first** defendant company (CF) was a mortgage lender.

W took out three mortgages and a further advance with CF. They were all carried out through UKMFS, a mortgage broking company. On all three occasions, UKMFS received a commission from CF.

In the autumn of 2007, W fell into arrears with her mortgage payments and, **in** May and July 2008, possession proceedings were commenced regarding the farms. **In** February 2013, W commenced proceedings, seeking to set aside the two mortgages and the disputed further advance. She did not dispute the sums calculated as owing by the assignees, but challenged the validity and enforceability of each of the mortgage agreements on the grounds of: (i) forgery (**in** the second mortgage only); (ii) lack of attestation (**in** the **first**

mortgage only); (iii) undue influence; (iv) breach of duty; (v) secret commissions; and (vi) unfair relationship under the Consumer Credit Act 1974 (the CCA 1974).

Issues and decisions

(1) Whether W's case on forgery regarding the second mortgage was made out.

The burden of establishing that W had not signed the relevant document was squarely on W herself. However, on the evidence, little weight was to be given to the bare negative assertion made by her, to the effect that she had not signed the mortgage deed, and there was no reason to doubt the evidence that she had done. The case on forgery would be rejected (see [36] of the judgment).

(2) Whether there had been a lack of due attestation of the **first** mortgage.

On the true construction of s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 (the LP(MP)A 1989), the proper interpretation was that, while there was a requirement for the person executing the deed to sign **in** the presence of a witness, it was not a requirement for the witness to sign **in** the presence of the person executing the deed, or indeed of anyone else. That was sufficient to dispose of that part of the claim (see [48], [49] of the judgment).

(3) Whether there had been undue influence.

There were evidential problems with the case on undue influence, and W had not made out her case to the required standard. That aspect of the claim failed (see [56] of the judgment).

CIBC Mortgages plc v Pitt [1993] 4 All ER 433 considered; *Royal Bank of Scotland v Etridge (No 2) and other appeals*, *Barclays Bank plc v Coleman*, *Bank of Scotland v Bennett*, *Kenyon-Brown v Desmond Banks & Co (a firm)* [2001] 4 All ER 449 considered; *Johnson v EBS Pensioner Trustees Ltd* [2002] All ER (D) 294 (Jan) considered.

(4) Whether there had been a breach of duty. W contended that, owing to the proximity between herself and CF as lender, a duty of care had arisen.

Ultimately, no evidence of substance had been put forward by W to support her case based on proximity or assumption of responsibility. That part of the claim had to be rejected as well (see [58] of the judgment).

(5) Whether there had been secret commissions. W contended that UKMFS had been her agent and, accordingly, the payment by CF to UKMFS of a commission without her knowledge had amounted to a secret commission or bribe.

The **first** issue was whether the commissions paid by CF to UKMFS should be treated as fully secret or half secret commissions. W had received no written notice of the commission. She had been entitled to assume that no commission had been paid to UKMFS by CF. **In** the circumstances, the payments **in** question had to be treated as fully secret commissions (see [131], [136] of the judgment).

The test to determine whether a commission was a secret commission was: (i) the person making the payment had made it to the agent of the other person with whom he had been dealing; (ii) he had made it to that person knowing that the person had been acting as the agent of the other with whom he had been dealing; and (iii) he had failed to disclose to the other person with whom he had been dealing that he had made that payment to the person whom he had known to be the other person's agent (see [137] of the judgment).

The three requirements of the test were made out. It followed that the relevant payments ought to be considered as secret commissions, and that CF was liable to W accordingly (see [138]-[141] of the judgment).

Sealey and Winfield v Loans.co.uk and GE Money Ltd (Unreported), 15 August 2012 doubted; **Commercial First Business Ltd** v *Pickup and Vernon* [2017] CTLC 1 doubted; *Grant v Gold Exploration and Development Syndicate Ltd* [1895-9] All ER Rep Ext 1304 considered; *Mahesan S/O Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1978] 2 All ER 405 considered; *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 4 August considered; *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 considered; *Hurstanger Ltd v Wilson* [2007] 4 All ER 1118 considered; *Yates & Lorenzelli v Nemo Personal Finance* [2010] GCCR 10351 considered; *McWilliam v Norton Finance (UK) Ltd* [2014] EWCA Civ 818 considered; *Plevin v Paragon Personal Finance Ltd* [2015] 1 All ER 625 considered; *Nelmes v NRAM plc* [2016] All ER (D) 198 (May) considered; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] 2 All ER 959 considered.

(6) Whether the relationship between W and CF had been such to qualify her for relief under the unfair relationships legislation contained in the CCA 1974 s 140A to 140C.

The payments made by CF to UKMFS had deprived W of the disinterested advice of UKMFS as her broker. It followed that the relationship between W and CF had been unfair for the purposes of the CCA 1974 s 140A (see [148] of the judgment).

Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 considered; *Nelmes v NRAM plc* [2016] All ER (D) 198 (May) considered.

Stephen Meachem (instructed by LawTribe) for W.

Stuart Cutting (instructed by Moore Blatch) for the second and third defendants.

Toby Frost Barrister.