



Neutral Citation Number: [2021] EWHC 2302 (Ch)

Case No: BL-2020-000418

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 20/8/2021

Before:

MASTER CLARK

**IN THE MATTER OF 77 LENTHALL ROAD, LONDON E5 3JN
AND IN THE MATTER OF SECTION 63 OF THE TRUSTEE ACT 1925**

Between:

ADRIAN FRAINE

Claimant

- and -

RICHARD ANTHONY FOY

Defendant

Gabriel Buttimore (instructed by **Clarke Barnes Solicitors LLP**) for the **Claimant**
Simon Perhar (instructed by **Anthony Gold Solicitors LLP**) for the **Defendant**

Hearing dates: 22 & 23 July 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is my judgment on an application dated 2 March 2020 for the payment out of the sum of £426,608.40 plus accrued interest (“the Funds”) paid into court, being the net proceeds of sale of 77 Lenthall Road, London E8 2JN (“the Property”).
2. The Property was formerly owned by the respondent, Richard Anthony Foy. It was subject to a first charge dated 3 May 2017 in favour of OneSavings Bank PLC t/a Kent Reliance (“the Bank”).
3. The applicant, Adrian Fraine, claims to be entitled to the Funds as an equitable chargee pursuant to a deed of charge in Land Registry Form CH1 dated 24 January 2019 (“the Charge”). For reasons that are not material, the Charge has not been registered at the Land Registry.
4. As to the amount secured by the Charge, Mr Fraine relies upon an agreement entitled “Loan Agreement” (“the Agreement”), also dated 24 January 2019.
5. The parties to the Agreement are Mr Fraine (defined as “Lender”) and Mr Foy (defined as “Borrower”). It provides, so far as relevant:

“WHEREAS

1. The Lender and the Borrower are experienced businessmen.
2. The Borrower has requested that the Lender lends to the Borrower the sum of £7,000.
3. The Lender and the Borrower enter into this Agreement to record the existing position between them to set out the basis of the loan, the terms of its repayment and the security being provided.

DEFINITIONS

Lender: Adrian Fraine

Borrower: Richard Anthony Foy

Debt: Amount of six hundred and ninety seven thousand pounds including interest as at today’s date.

Interest rate: 18% per annum calculated at 1.5% per month and calculated monthly and added to the debt.

Loan amount: Seven Thousand Pounds.

New Debt: The sum of Seven Hundred and Five Thousand Pounds (£705,000) as at the date hereof which figure is subject to revision to include any sums repaid or the interest as calculated and herein provided for.

Property: 77 Lenthall Road, London E8 3JN

BACKGROUND

1. The Lender is indebted to the Borrower in the total of the debt.
2. The debt is repayable on demand and attracts the interest. The Interest/rate is the level of interest previously agreed in respect of the debt and shall be applied to the New Debt on the same terms.
3. The Borrower wishes to borrow the Loan Amount which shall be added to the debt to make the new debt.
4. The Borrower is providing a Charge over the Property to secure the new debt.

OPERATIVE PROVISIONS

- 1) The Lender lends and the Borrower borrows the Loan Amount.
- 2) The Lender [this must be a typographical error, and should be “Borrower”] acknowledges receipt of the Loan Amount.
- 3) The Borrower in consideration of the Loan Amount has entered into the Charge and RX1, certified copies of which are annexed to the original of this Agreement. The charges (*sic*) secure the New Debt.

FURTHER PROVISIONS

The Borrower warrants as follows:

...

2. That the New Debt figure is true and accurate and in respect of the Debt has received capital sums over time equal to the principal of the Debt less interest.”
6. The Charge provides (in panel 7) that Mr Foy charges the Property by way of legal mortgage as security for the payment of sums detailed in panel 9. Panel 9 (Additional provisions) provides, so far as relevant:

“1. BORROWER’S COVENANT TO PAY

In consideration of the sum already advanced to the First (*sic*) Borrower or such sums that he guaranteed shall be repaid to the Lender and in further consideration of the Lender forbearing to exercise its rights up to date by no further the Borrowers (*sic*) covenant with the Lender as follows:

1.1 Payment of Principal

The Borrower covenants with the Lender to pay the Lender the sums due to it (*sic*) pursuant to the Facility Agreement dated [] January 2019

or (if earlier) on completion of any sale of the Property.

1.2 The Borrower shall pay the Lender the sums available pursuant to clause 3.

...

3. The Borrower Covenants to Charge the Property and apply the proceeds of sale (subject to the rights of the First secured chargor); the Borrower do hereby charge the property as security for the indebtedness of the First (*sic*) Borrower as described in panel 1 [this appears to be a typographical error for “clause 1”, as panel 1 of the CH1 form is the title number of the Property].”

7. The factual background as set out by Mr Fraine also includes that on 24 January 2019 Mr Foy signed an application form RX1 for the entry of a Restriction preventing registration of any disposition of the Property without Mr Fraine’s consent. Mr Foy denies signing the RX1, and alleges that the signature on it is a forgery of his signature.
8. On 25 November 2019, the Bank sold the Property as mortgagees in possession, and then paid the net proceeds of sale into court pursuant to section 63 of the Trustee Act 1925.
9. The application was made on 2 March 2020 in the usual way by application notice seeking payment out of the Funds. On 20 November 2020, Deputy Master Lloyd ordered that the parties file and serve Points of Claim, Points of Defence and Points of Reply. There was a CMC before the deputy master on 18 February 2021, where further directions to trial were made. Mr Foy has largely acted in person in the application, although he was represented by direct access counsel at the CMC, and by (different) counsel at this trial.

The written evidence and parties’ cases

10. Mr Fraine’s case is set out in
 - (1) his first witness statement dated 2 March 2020;
 - (2) the witness statement dated 2 March 2020 of Timothy Michael Clarke, the solicitor who drafted, and arranged and witnessed the execution of the relevant documents;
 - (3) his Points of Claim dated 7 December 2020;
 - (4) his Reply to Points of Defence and Counterclaim dated 15 February 2020;
 - (5) Mr Fraine’s second witness statement dated 22 April 2021.
11. Mr Foy’s case is set out in
 - (1) his witness statements dated 10 July 2020 (signed) and 31 July 2020 (unsigned) which are largely though not wholly identical;
 - (2) his Points of Defence & Counterclaim.
12. In addition, the bundle included two witness statements dated 18 December 2019 and 14 February 2020 of Anthony Luke Krensel, of Brechers, solicitors for the Bank, in support of its application for payment in of the Funds.
13. Mr Fraine’s case is relatively straightforward, and is as follows. The Charge secured the sums due under the Agreement. This was agreed at £705,000 plus accruing interest. Although the Charge was not registered (so did not take effect as a legal charge), it nonetheless took effect as an equitable charge. He is therefore entitled to payment of sums due under the Agreement from the net proceeds of sale of the Property, after deduction of sums due to the Bank.

14. However, although the Points of Claim alleges that the sum due is £705,000 (and interest thereon) is outstanding, at trial Mr Fraine’s counsel presented his case on the more limited basis that he could show that the sum due to Mr Fraine exceeds the amount of the Funds.
15. Mr Foy’s defence is more difficult to follow, with internal inconsistencies. The following can be found within his documents:
 - (1) He denies that £705,000 was owed by him to Mr Fraine on 24 January 2019;
 - (2) He asserts that his intention was only to enter into a loan agreement for the sum of £7,000, with that sum being charged on the Property;
 - (3) He accepts that he has received loans from Mr Fraine totalling £248,000 and that Mr Fraine has discharged his credit card liabilities totalling £104,087, giving a total debt of £352,087 – see his schedules dated 31 July 2020 and 26 February 2021; PoD paras 44 and 45;
 - (4) He accepts that Mr Fraine’s “father in law” (his partner’s father), Thomas Milne, loaned him £220,000;
 - (5) He claims to have made repayments to Mr Fraine totalling £201,226.89 up to 16 December 2017, but does not claim to have made any repayments after that date;
 - (6) He admits signing the Agreement, but says that only the signature page was placed before him to sign;
 - (7) He does not deny signing the Charge, but relies on the fact that it was not dated on 24 January 2019, and was dated later by Mr Clarke;
 - (8) He relies on the fact that, as he alleges, his signature on the RX1 was forged;
 - (9) He seeks to set off against sums owed to Mr Fraine a sum said to be owned to him as his half share in another property, 52 and 52a Forburg Road, London N16 6HT (“Forburg Road”).
16. The Reply and Defence to Counterclaim
 - (1) pleads both the payment by Mr Fraine to Mr Milne of £220,000 and an assignment of Mr Foy’s debt by Mr Milne to Mr Fraine, both on 1 October 2018 (though the assignment itself was not in evidence);
 - (2) sets out expressly that Mr Fraine does not rely on the RX1;
 - (3) accepts that the CH1 was not dated when the £7,000 was advanced to Mr Foy, through an oversight;

Application to adduce expert evidence

17. The day before the trial, Mr Foy applied to adduce the expert evidence of Paul Craddock, a forensic handwriting examiner, as to whether Mr Foy’s signature on the RX1 was forged. I rejected that application, with reasons to be given in this judgment. These are my reasons.
18. First, and primarily, the evidence is not relevant to any pleaded issue in the claim. As noted, Mr Fraine has expressly disavowed any reliance on the RX1. Mr Foy’s counsel submitted that the evidence would assist the court in assessing the credibility of the witnesses. I agree to the extent that Mr Fraine’s and Mr Clarke’s evidence is that they saw Mr Foy execute the RX1, so that if he did not, their evidence would not only be untrue but arguably deliberately so. However, this is not sufficient in my judgment to justify its admission. The general position is that the evidence before the court is, for reasons of proportionality, restricted to evidence relevant to the contested issues in the

claim: for example, disclosure as to credit is not generally ordered. It would not in my judgment be proportionate for the time and expense of expert evidence to be incurred solely for the purpose of assessing the truthfulness of Mr Fraine and Mr Clarke.

19. Secondly, no permission was granted at the CCMC (at which Mr Foy was represented by counsel) for expert evidence. An application for permission at this stage is therefore to be determined by the three-step test in *Denton*, the prohibition on adducing the evidence being a “sanction” for the purposes of CPR 3.8(1). As to these steps, the failure to seek permission at an earlier stage is plainly serious and significant. The only excuse offered is that Mr Foy has acted in person; but he was not acting in person at the time permission should have been sought. As to the third step, the admission of the evidence would necessitate an adjournment of the trial, with the attendant wasted costs and delay in the resolution of this matter. Even if the evidence were properly admissible, which it is not, the application for permission to adduce it is far too late.

Oral evidence

The applicant’s witnesses

20. Both Mr Fraine and Mr Clarke were both cross-examined by Mr Foy’s counsel. They were both confident and articulate witnesses. They answered the questions asked in a straightforward way, and their evidence was generally consistent with their witness statements. I consider them to be reliable witnesses.

The respondent’s evidence

21. Mr Foy was a less composed and articulate witness, although this of course has no bearing on his truthfulness. He was, however, inconsistent and at times evasive in his evidence. Most significantly, he gave an entirely new account of how he came to sign the Agreement.
22. In his PoD he said:
 - “36. ...[Mr Clarke] explained that he had prepared a loan agreement to cover Mr Foy’s new borrowing (of £7,000) from Mr Fraine and placed the signature page only before Mr Foy for him to sign.
 37. No attempt whatsoever was made by [Mr Clarke] to show to Mr Foy the remaining pages of the said loan, or to explain the provisions on the first page thereof.
 38. Mr Foy accepts that he was massively naïve in signing a commercial document without carefully checking its contents.”
23. In his oral evidence, Mr Foy said that Mr Clarke had only downloaded and printed off a single page, the last page of the document, and had said that he would download the rest of the document later. As well as being inherently unlikely, this had not been said before, and was not put to Mr Fraine or Mr Clarke in cross examination. It is in my judgment a new invention and untrue.
24. Linked to this was Mr Foy’s evidence that Mr Clarke had tricked him into signing the agreement. This is a very serious allegation and also not found in his witness statement or PoD. Furthermore, the bundle includes an email of 29 January 2019 from Mr Clarke sending scans of the documents signed on 24 January 2019 to both parties. If Mr Foy

has been tricked, then one would have expected immediate vigorous protestations from him on receipt of this email.

25. Finally, as noted, Mr Foy's written evidence was unclear as to whether he had signed the CH1. When cross-examined as to whether the signature was his, his answer was "It looks like my signature". This was not a straightforward answer, but showed his desire not to admit anything unless forced to.

Facts

26. Mr Foy is a joiner by trade, and has been all his working life. In 2000 he set up a trading company called Hanover Joinery Limited ("Hanover"). He and Mr Fraine have been close friends for many years.
27. Mr Fraine, like Mr Foy, trades through a company, Edenheart Finance Limited ("Edenheart"), of which he is the sole director and shareholder. Edenheart's business is the provision of mortgage advice and financial advice.
28. In about 2010, Hanover was experiencing financial difficulties and Edenheart made a series of loans to Mr Foy totalling £50,150, on which interest at a relatively high rate (16.6% and 10% pa) was payable. These loans were apparently secured by a legal charge dated 24 August 2010 in favour of Edenheart on 48 Terrace Road London E9 7ES, Mr Foy's residence. The loans had, however, been paid back by 2015.
29. In 2015 and 2016, Mr Milne loaned a total of £220,000 to Mr Foy in two tranches of £140,000 and £80,000, again at a relatively high interest rate of 1.5% per month (18% pa). Mr Milne's loan is evidenced by a loan agreement dated 10 September 2016, and was secured by a legal charge dated 29 September 2015 on 48 Terrace Road. Mr Foy paid the interest payments to Mr Milne until May 2017.
30. Also in 2016, Mr Fraine again began lending money to Mr Foy, this time in his personal capacity. These loans are evidenced by a series of loan agreements, each signed and dated by Mr Fraine and Mr Foy in their personal capacity, and setting out the cumulative total each time. Again the interest rate is 1.5% per month, although the last 3 loan agreements do not provide for interest. The last agreement is dated 4 April 2017 and records the total loaned as £273,925. A curious feature is that this and all but the first loan agreement state that the loan is to be secured by the legal charge in favour of Edenheart on 48 Terrace Road.
31. In addition, between 15 December 2016 and 28 April 2017, Mr Fraine made 7 credit card payments to a supplier of staircases (Excel Stairs), totalling £104,087, which Mr Foy accepts discharged his liabilities, giving rise to an indebtedness in that amount on his part to Mr Fraine.
32. In December 2017, Hanover's financial position was such that Mr Foy instructed an insolvency practitioner, Richard Rones (of ThorntonRones), to prepare a CVA proposal. This was signed by Mr Foy on 20 December 2017. The list of creditors of Hanover in the proposal includes Edenheart as a secured creditor in the sum of £550,000.
33. In cross examination, Mr Foy accepted that this debt was his debt and not that of Hanover, and that it represented monies that had been advanced to him by Mr Fraine: £220,000

having been paid to Mr Milne by Mr Fraine in discharge of Mr Foy's debt to him, and £330,000 having been loaned to him by Mr Fraine. Mr Foy also accepted that his last payment to Mr Fraine was on 17 September 2017. The ineluctable conclusion is that at least this sum (totalling £550,000) was owed by Mr Foy to Mr Fraine at the date of the Agreement and the Charge.

34. The CVA proposal was accepted by the creditors. However, by January 2019, the viability of the CVA was under threat because of lack of funds. Mr Foy needed to raise £7,000 to fund the continuation of the CVA. He approached Mr Fraine for a loan, who agreed to lend him the money he needed.
35. Mr Fraine's evidence is that it was expressly agreed that Mr Foy would grant him a second charge on the Property to secure all of Mr Foy's existing indebtedness. Mr Clarke's evidence is that he was told by Mr Fraine and Mr Foy that this had been agreed between them. Mr Foy's evidence was that the only agreement reached was for a loan of £7,000 and that amount was to be secured on the Property. I reject that evidence as inherently unlikely, and in any event inconsistent with the Agreement and the Charge.
36. About a week before the various documents were signed (24 January 2019), Mr Fraine contacted Mr Clarke and instructed him to prepare documents reflecting the agreement reached between him and Mr Foy on an "execution-only" basis. Mr Clarke was also acting as Mr Foy's solicitor at this point, in an arbitration against a developer client, United House, and in a claim brought against Mr Foy personally under a guarantee in respect of Hanover's liability to a supplier, Bridge Recruitment. Mr Clarke had also acted for Mr Fraine in the past, and had prepared his will.
37. Mr Clarke then spoke to Mr Foy who confirmed what had been agreed. Mr Clarke had drafted the Charge, a letter of authority to be signed by the Bank and the RX1 to be put on the title pending the Bank's consent (which was never given). When the parties arrived at his office, he had not drafted the Agreement.
38. Mr Clarke's attendance note of the meeting on 24 January 2021 records:

"TC meeting with client and Richard Foy. They discussed various scenarios for the repayment of the money Adrian is owed from Richard. We agree that they will leave things for the time being. Richard is not interested in paying off the third party charges on the Hackney property. Richard says he agrees the debt figure in the Loan Agreement but that is subject to seeing an account and understanding how the interest is worked out. Adrian says that is fine, there are six sheets of it. Most of the money is borrowed on credit cards which he is paying off on the sale of Forburg.

Adrian says he wants to attempt to register the Charge on Lenthall Road.

Richard reads the Agreement with the documentation and says he understands it and says he does not want to see another solicitor, he wants to keep Adrian happy and that is what he owes him, subject to seeing how the figure is calculated."

39. Mr Fraine and Mr Foy told Mr Clarke that they had agreed how much was already owed, and what the interest rate was. Mr Clarke had his own views about the interest rate,

which he considered very high, but he did not involve himself in discussions about the total amount owed or the interest rate, and, as he put it “they sorted it”.

40. Mr Fraine’s and Mr Clarke’s evidence, which I accept, is that both parties signed the Agreement, the Charge, and the RX1 at that meeting, and that the documents reflected what had been agreed between the parties. I find that Mr Foy had the opportunity to read the documents. A few days later, on 29 January 2019, Mr Clarke emailed copies of all the documents to both of them. There is no suggestion by Mr Foy that he did not receive this email, or that he raised any objection at this stage to the documents he had signed.
41. The first occasion on which Mr Foy challenged the Charge was in his letter dated 28 November 2019 to Mr Fraine in which he said:

“My position (and I am fully prepared to depose to this on oath) is that I was tricked into signing a blank charge document, after many hours (outside of working time) of meetings at the offices of Clarke Barnes LLP in the City, with yourself and Tim Clarke (of that practice) in attendance; I believe that document was filled in by Mr Clarke (ostensibly on my behalf) at a later date, without any knowledge.”

42. I pause to note that Mr Foy no longer alleges that the Charge was blank when he signed it, and that in his oral evidence, there was no mention of hours of meetings at Mr Clarke’s offices. Mr Foy’s evidence was that he arrived at Mr Clarke’s offices, had a chat about the single sheet Mr Clarke had printed off, and then he (Mr Foy) signed it.

Issues

43. The issues which arise in this claim are not readily identified on the statements of case, but at the hearing they had crystallised to the following:
 - (1) whether the Agreement and the Charge are binding on Mr Foy;
 - (2) the effect of the Agreement and the Charge;
 - (3) whether the sums secured by the Charge exceed the Funds;
 - (4) whether Mr Foy is entitled to set off against the sums owed to Mr Fraine an amount in respect of a half share in Forburg Road.

Whether the Agreement and the Charge are binding on Mr Foy

44. Mr Foy’s factual case, which I have rejected, is that he was given only a single page of the Agreement to sign, without the remainder of it being available to him to read. Since I have found that Mr Foy both signed and had the opportunity to read both the Agreement and the Charge, the defence of *non est factum* is not available to him. Both are therefore binding on him.

The effect of the Agreement and the Charge

45. Neither the Agreement nor the Charge is particularly well or carefully drafted. However, Mr Foy does not, either in his Points of Defence or his witness statement, challenge that these documents have the meaning and effect which Mr Fraine says they have. His case is that he never intended to charge the Property for the full amount owed to Mr Fraine. I have rejected that factual case. In any event, his subjective intentions are irrelevant to the effect of the Agreement and the Charge.

46. The Agreement includes a warranty that the New Debt figure is true and accurate. However, the definition of the New Debt is defined as being £705,000 “subject to revision to include any sums repaid or the interest as calculated and herein provided for”.
47. In the Charge, the sums secured are stated to be the sums due to “it” (i.e. Mr Fraine) pursuant to the Facility Agreement “dated [] January 2019. This, when considered in the factual matrix known to both parties, must in my judgment refer to the Agreement.

Whether the sums secured by the Charge exceed the Funds

48. Mr Fraine’s counsel accepted that the court is not in a position to determine precisely the amount owed under the Charge. He submitted that on Mr Foy’s best case, the amount owed by him and secured exceeds the Funds, on two alternative bases.
49. First, he relied upon Mr Foy’s admission that as at 21 December 2017 (the date of his CVA proposal) he owed Mr Fraine £550,000, on which interest was accruing at 1.5% (£8,250) per month, totalling £354,756. On this basis, the total sum owed is £904,750, well in excess of the Funds. Indeed, even if no interest were payable, the principal sum admitted to be due exceeds the Funds. I am therefore satisfied that the sums secured by the Charge are greater than the Funds.
50. His second basis takes as a starting point the last of the loan agreements referred to in paragraph 30 above, which is dated 4 April 2017. In it, Mr Foy agrees that the total amount owed to Mr Fraine is £279,925. However, having noted that the last 3 of the agreements do not provide for interest, counsel’s calculations do not reflect that fact. In addition, although Mr Fraine’s counsel seeks to elect to apply payments made by Mr Foy to interest (rather than capital), it is unclear whether an election or agreement as to how payments are to be treated has been made at an earlier stage. The total amount due cannot therefore at this point be conclusively determined as exceeding the Funds on this second basis.

Set off in respect of share in Forburg Road

51. This can be dealt with quite briefly because Mr Foy’s position as to this is as follows:

“Some time in January 2019, Mr Fraine sold Forburg Road for the sum of £1,340,000; under their agreement, Mr Foy was due to receive 50% of the equity from that sale. However, Mr Fraine suggested that he should keep the moneys received from Forburg Road and Mr Foy could keep the all the moneys from the subsequently (*sic*) sale of Lenthall Road. Mr Foy agreed to this.”

52. Mr Fraine’s unchallenged evidence in his second witness statement is:

“I agreed with Mr Foy that ... he and I were in a partnership whereby we acquired Forburg Road and 77 Lenthall Road. Both properties were worth about the same amount of money and until 2017 had roughly the same mortgages on them. When Mr Foy approached me in 2017 saying he wished to draw down further sums from the Lenthall property I told that I did not want to do that but realised that he was under money pressures and he needed to. **At that point we agreed to go our separate ways.** I never received any of the additional funds from the re-mortgaging of Lenthall Road as my “share” nor was I ever thereafter involved in the property or in the rental income from it. Likewise, Mr Foy has never made,

until these proceedings, a claim against the sale of Forburg Road, even though he was well aware that it was to be sold in late 2018.”
(emphasis added)

53. In the light of this evidence, and Mr Foy’s own evidence, his claim to a share in the equity in Forburg Road is hopeless.

Conclusion

54. For the reasons set out above, therefore, I will order that the Funds are paid out to Mr Fraine.