Neutral Citation Number: [2023] EWCA Civ 1341

Case No: CA-2021-001880

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT**
**His Honour Judge Letham**
**Claim Number D5QZ21KC**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2023

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE NUGEE**
and
**LADY JUSTICE FALK**

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**Between :**

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| **REHANA AZHAR** | **Appellant** |
| **- and -** | |
| **ALL MONEY MATTERS T/A TFC HOME LOANS** | **Respondent** |

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**Simeon Thrower** (instructed by **Green & Olive Solicitors**) for the **Appellant**
**Mark Stephens** (instructed by **Freeths LLP**) for the **Respondent**

Hearing dates : 08/11/2023

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# Approved Judgment

This judgment was handed down remotely at 11.00am on 16/11/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Lewison:

## The issue

1. The single issue on this appeal is whether HHJ Lethem was wrong to refuse to permit what he described as a new point to be advanced on an appeal from DDJ Arnold.

## Background

2. In late 2016 Mrs Azhar wanted to buy a property interest in 46 Camden High Street in which she already had a part share. She needed a loan to enable her to do so. She approached All Money Matters (trading as TFC Home Loans) ("AMM") to enable her to do so. On 8 February 2017 Mrs Azhar signed an agreement with AMM. The contract defined "Arrangement Fee" as the fee set out in clause 2.2. It went on to define other terms:

> "Completion – the first drawdown of the Loan Amount set out in the Finance Offer by the Lender to the Client"
>
> "Lending Proposal – the proposal prepared by the Broker setting out the requirements recorded in the Confirmation of Instructions provided in accordance with paragraph 1 of the attached Terms and Conditions as varied from time to time"
>
> "Finance Offer - a written offer setting out proposed terms of finance issued by any Lender whether such offer is conditional or unconditional or any replacement thereof and which reflects the terms set out in the Confirmation of Instructions letter as varied orally or in writing"

3. Clause 2.2.1 relevantly provided:

> "If a Finance Offer is made by a Lender to whom the Broker presented the Lending Proposal, You will pay … a fee of 2% of the Loan Amount. Payment of the arrangement fee shall be made within 14 days of the date of issue of the Finance Offer or on completion, whichever is the earlier."

4. Clause 2.2.3 provided that (except in certain circumstances which do not apply here) the Arrangement Fee was payable regardless of whether Completion (i.e. drawdown of the loan) occurred.

5. Schedule 1 contained the Terms and Conditions. Paragraph 1 headed "Confirmation of Instructions" provided:

> "1.1 Before signing the Agreement the Broker will complete a Confirmation of Instructions/Application Form (Instructions) which shall be read and take effect as if they formed part of the Agreement.

> 1.2 Any change to or variation in the Instructions will not affect the liability of the Client to pay any fee pursuant to the Agreement."

6. Entry into the agreement had been preceded by the completion of a form entitled "Mortgage Fact Find" dated 28 November 2016 which recorded Mrs Azhar's instructions at that time.

7. Mrs Azhar was, at the time, negotiating with her co-owners. In order to assist in those negotiations, and at Mrs Azhar's request contained in an email of 9 February 2017, AMM arranged for a valuation to be undertaken. At that stage, of course, it suited Mrs Azhar to have a valuation on the low side. A mediation meeting took place on 28 March 2017 at which it was agreed that Mrs Azhar would pay £850,000 (plus certain monthly payments) for a half share in the property. Mr Smethurst of AMM attended for part of that meeting. In an email timed at 07.49 the following morning he wrote to Mrs Azhar (among others). He said that he would focus on the "£850k net proceeds required to finalise matters for the transfer of the property". But he went on to say that AMM could then work out the gross loan required to complete, with the maximum available on an estimated value of £1.9 million. He then said:

> ".. if that's the case you can decide whether the additional funds are useful to you (towards the planning costs perhaps) or whether to take a lower facility. Priya will obtain the maximum facility today…"

8. The facility was followed up in an email timed at 12.40 that same day. The gross loan amount was specified as £1.235 million, for a minimum of 3 months and a maximum of 9 months term. Less than an hour later Mrs Azhar responded:

> "If I wanted to pay early does the bridging charge me for the months I have it for, or do I have to pay for the full 9 months"

9. Mr Smethurst replied "no early redemption penalties". There was some further correspondence, but ultimately Mrs Azhar accepted an offer through different channels.

## The proceedings

10. In due course AMM asserted that Mrs Azhar was liable to pay a fee due under clause 2.2.1 of the agreement, based on the mortgage offer which had been made on 29 March 2017. When she did not pay, AMM issued a claim form in the county court. The Particulars of Claim endorsed on the claim form (before amendment) alleged:

> "2) On or about 9th February 2017 the Defendant entered into an agreement with the Claimant to help her obtain funding to purchase a property at 64 Camden High Street…
>
> 3) It was an express term of the contract between the Claimant and the Defendant that the Defendant would pay the Claimant an arrangement fee of 2% of the mortgage offer arranged for the Claimant

> 4) On or around 25th May 2017 the Defendant accepted an mortgage finance arranged by the Claimant in the sum of £1,235,000.
>
> 5) Accordingly, the Defendant was obliged to pay the Claimant £24,700.
>
> 6) the Claimant issued an invoice for this sum on or around 12th April 2017 which remains unpaid."

11. On 11 December 2017 Ms Azhar served a Defence. It stated:

> "1. As to paragraph 2 The defendant entered into an agreement with the claimant who was to try and arrange a mortgage on the property so that the defendant could buy out a half share
>
> 2. As to paragraph (4) the defendant did not on 25/may/2017 or at any time accept a mortgage for 1,235,000 pounds or one arranged by the claimant or both"

12. It went on to deny the remainder of the Particulars of Claim; but no positive case was advanced; and no other defence was pleaded.

13. That was the state of the pleadings when the case came to trial as a fast track case. The claim was supported by a witness statement from Mr Smethurst dated 17 January 2019; and opposed in a witness statement made by Mrs Azhar dated 25 January 2019. The thrust of Mr Smethurst's evidence was that AMM had procured a mortgage offer, and that it was not necessary for Mrs Azhar to have accepted it in order for liability to have arisen. That liability arose whether or not completion took place. Clearly, that was a case which differed from the pleaded claim.

## The trial

14. The trial took place before DDJ Arnold on 11 April 2019. We have a transcript of the whole hearing. Very shortly before the trial Mr Thrower (whom Mrs Azhar had instructed as counsel on a direct access basis) filed a skeleton argument. The document itself is undated. But the point that it makes is that the finance offer on which AMM relied as giving rise to Mrs Azhar's liability was an offer that was incapable of acceptance (a) because it was only "indicative" and not a true offer and (b) was based on a valuation that was not supported by the valuation that AMM had obtained. By that time, the discrepancy between the pleaded case and Mr Smethurst's evidence was obvious, and had been for the best part of three months.

15. Before the trial got under way Mr Stephens, appearing for AMM, applied to amend the Particulars of Claim to bring the pleaded case into line with Mr Smethurst's evidence. After some discussion, DDJ Arnold allowed the amendment, not least because Mr Thrower said that he was not wholly taken by surprise and the skeleton argument that he had filed dealt with the case on the amended basis. The effect of the amendment was that AMM now alleged that rather than *arranging* a mortgage it had *procured* a mortgage offer, and that instead of alleging that Mrs Azhar had accepted the mortgage, she had, on the contrary, accepted an alternative offer of mortgage

finance. Those two amendments might have been thought to amount to a fundamental change in AMM's pleaded case. Nevertheless, there was no application to amend the Defence and no further skeleton argument was filed. Mr Thrower told us that for pragmatic reasons it was decided to proceed with the trial. No doubt that was because the new case had already been set out in Mr Smethurst's evidence.

16. Mr Stephens began to open the case to the judge. He read out the definition of "Finance Offer" and was asked by the judge where the "confirmation of instructions" was. Mr Stephens referred to the fact finding document; but the judge expressed the view that that was not what would normally considered to be the confirmation of instructions. Although this was not a point that appeared either in the Defence or Mr Thrower's skeleton argument, the absence of a confirmation of instructions letter was a point that he put to Mr Smethurst in cross-examination and on which he relied in his closing submissions. It is not entirely clear from the transcript exactly what the point was, but it seems to have been that as there was no confirmation of instructions *letter* (as opposed to other documentation, such as the Confirmation of Instructions/Application Form referred to in paragraph 1.1 of the Terms and Conditions), there could not have been a Finance Offer as defined by the contract. The existence of such a letter was, he said, critical to AMM's case. Mr Thrower did not, in his closing address, go through the documents which had been disclosed in order to demonstrate that there was no written record of Ms Azhar's instructions at all. That, as appears from the transcript, is how Mr Stephens appears to have understood the point. He submitted to the judge that there was "no requirement for any particular formality".

17. Having heard evidence DDJ Arnold gave judgment for AMM. Mrs Azhar applied for permission to appeal, and eventually HHJ Lochrane gave her permission to appeal on one point only, namely:

> "The judge erred in giving insufficient or no weight to the fact that there was no "Confirmation of instructions letter – an essential element of the definition of Finance Offer in the Agreement."

## The first appeal

18. HHJ Lethem heard the appeal. Mr Stephens advanced two arguments before the judge. The first was that the sole ground of appeal was not a point that was taken at trial; and that it went to the heart of the factual matrix that underpinned the trial. The second was that AMM's response to the point would be to call additional and further evidence and that the court would need to consider both emails and documents passing between the parties, and also their conversations.

19. HHJ Lethem referred to the relevant authorities on the principle, culminating in *Singh v Dass* [2019] EWCA Civ 360 and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146. In the latter case Snowden J said that there was a spectrum of cases. He continued at [27]:

> "At one end of the spectrum are cases such as the *Jones* case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to

> raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight."

20. Snowden J added at [28]:

> "At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court... In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

21. HHJ Lethem examined the transcript of the trial in some detail, in order to decide whether the point was indeed a new one. At [37] he said that as far as he could ascertain there was nothing to put AMM on notice of the point; and at [39] that "before the parties walked into court" he had no doubt that there was nothing to put AMM on notice of the precise argument Mrs Azhar was running at trial. In my judgment he was correct in that assessment. To the extent that the point arose at all, it arose out of questions raised by the Deputy District Judge, and a time when evidence had already been filed and disclosure had taken place. At [40] HHJ Lethem observed that it would have been open to the defendant to apply to amend the Defence, but that was not done.

22. He acknowledged that the point was raised in closing submissions, but as the point had not previously been raised Mr Stephens had to deal with it "on the hoof". At [55] he said that the issue was "fogged" by the lack of proper pleadings; and that there was no document "to properly alert" AMM that this was a point that was taken. He considered at [56] that there was "a certain confusion" both in Mr Stephens' mind and that of the judge about the precise point that was being taken "namely whether there had to be a letter or whether other documents would suffice providing there was confirmation of instructions".

23. At [57] he said that in the circumstances he was not satisfied that the argument was "put to the court at the outset and tried properly". At [65] he said that it was a case where the issues that arose "had not been trailed in the Defence or in the witness statement". Since the definition of "Finance Offer" permitted oral or written variation, it would require consideration of the documents passing between the parties and their communications.

## Conclusions

24. It is true that Mrs Azhar had been granted permission to appeal on this very point, but where an appellant has been given permission to appeal that does not preclude the respondent from objecting on the ground that it is a new point: *Mullarkey v Broad* [2009] EWCA Civ 2 at [29]; *Brent LBC v Johnson* [2022] EWCA Civ 28 at [37]; *Gill*

*v Lees News Ltd* [2023] EWCA Civ 1178 at [63]. HHJ Lethem was thus fully entitled to consider the objection.

25. Even though this was a case allocated to the fast track, elementary fairness requires that each side knows what points the other side will take. In *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4031 in the judgment of this court (Lewison, Christopher Clarke and Sales LJJ) it was stated at [20]:

> "Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case."

26. As Lord Phillips MR also said in *Loveridge v Healey* [2004] EWCA Civ 173, [2004] CP Rep 30 at [23]:

> "It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial."

27. In *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 David Richards LJ said at [47] that:

> "… the statements of case play a critical role in civil litigation which should not be diminished."

28. Having referred to the spectrum of cases described in the *Notting Hill* case the judge decided that potential prejudice to AMM was likely to be significant; and that it was not a case in which he could simply rely on the evidence in the lower court. He concluded, therefore, that it was not a case in which he could properly permit a new point to be taken. In my judgment, just as there is a spectrum of cases in the sense described, there is also a spectrum of "newness". The overriding question in each case is whether the party against whom the point is raised has had fair warning of it and is able properly to deal with it, with the aid (if appropriate) of evidence designed to confront or neutralise the point. That question should not be answered with the benefit of hindsight.

29. The judge's decision on that question was an evaluative case management decision. Where there is an appeal against an evaluative decision, an appeal court applies the approach explained in the judgment of this court in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [76]:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was

> wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

30. Where there is an appeal against a case management decision, the principles that an appeal court applies were set out by Coulson LJ in *Jalla v Shell International Trading And Shipping Co Ltd* [2021] EWCA Civ 1559:

> "[27] The starting point is that this was a case management decision, reached after a full day's argument. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18], Lewison LJ said that it was "vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges". That point was reiterated in *Abdulle v Commissioner of Police of the Metropolis* [2015] EWCA Civ 1260; [2016] 1 WLR 898, where it was made plain that this principle applied, even if the case management decision in question had a very significant impact upon the proceedings.
>
> [28] In such a case, this court can only interfere with the decision of the lower court if the judge had regard to a factor that was irrelevant or failed to have regard to a factor that was relevant, or if the judge's discretion was "clearly wholly wrongly exercised": see *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 and *Royal and Sun Alliance Insurance PLC v T&N Ltd* [2002] EWCA Civ 1964, at [38] and [47]."

31. Whichever approach is adopted, an appeal court will not interfere merely because it would have decided differently.

32. The first question is whether the point really was a new point. Mr Thrower argues that it was not because it was raised by the judge, put to Mr Smethurst in cross-examination, and argued in the course of closing submissions. I do not consider that this is a complete answer. The underlying question is whether AMM had been given fair warning *before* trial of the points it would have to deal with. Mr Thrower asserted in his skeleton argument that no further oral evidence could assist AMM in the absence of a confirmation of instructions letter. But in the first place, as Lloyd LJ said in *Mullarkey* at [49]:

> "A party who seeks to advance a different case, in circumstances such as this, bears a heavy burden as regards showing that the case could not have been conducted differently, in any material respect, as regards the evidence."

33. Second, Mr Stephens has raised the possibility of an answer to the point based either on waiver or estoppel by convention. I find it impossible to say that if those points had been in issue there could not have been further relevant evidence called. In giving permission to appeal to this court, Andrews LJ said that if it were to have been argued that the parties agreed to dispense with a "confirmation of instructions letter" that is

something that should have been pleaded. I agree, but that only points up the difficulty. What reason was there for AMM to have pleaded estoppel or waiver when it did not appear to be in issue either on the pleadings or in the skeleton argument filed on behalf of Mrs Azhar?

34. Mr Thrower submitted that the point he wished to raise was a pure point of law. In one sense that is true because in this jurisdiction (largely for historical reasons) the interpretation of a contract is regarded as a question of law. But that is not an answer in this case in view of the potential defences that Mr Stephens has pointed to. As both Mr Thrower and Mr Stephens advanced their respective positions in this court, it became clearer and clearer that if the point were allowed to be run there would need to be a fresh evaluation of the facts; and the clear possibility that further evidence would need to be called. That is precisely the situation in which an appeal court is entitled to refuse to allow what appears to be a new point of law to be taken on appeal.

**Result**

35. I cannot see any appealable flaw in the judge's evaluative decision that this was a point that he should not allow to be advanced on the first appeal. Since it was the only ground on which permission to appeal from DDJ Arnold was granted, it follows that I would dismiss the appeal.

**Lord Justice Nugee:**

36. I agree.

**Lady Justice Falk:**

37. I also agree.