



Neutral Citation Number: [2019] EWHC 2517 (Ch)

Case No: FS-2019-000004

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

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 06/09/2019

Before :

CHIEF MASTER MARSH

Between :

ANDREW JONATHAN MILNE
- and -
OPEN ACCESS FINANCE LIMITED

Claimant

Defendant

The claimant appeared in person
Iain MacDonald (instructed by **FieldFisher LLP**) for the **Defendant**

Hearing dates: 6 September 2019

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.

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CHIEF MASTER MARSH

Chief Master Marsh :

1. Today is the adjourned hearing of two applications made by the claimant, Mr Milne, who is a solicitor. He brings this claim on his own account.
2. The defendant operates a peer-to-peer lending platform and Mr Milne has, over a period of several years, taken advantage of the platform and has entered into some 42 loan arrangements with the defendant.
3. The arrangement in its broadest sense, and without going to the contractual provisions in detail, is that Mr Milne has lodged with the defendant antiques that belong to him. The antiques are stored by the defendant and are pledged as security for the lending. The defendant operates as a platform providing a facility for individual lenders who are all stated to be individuals, who are not operating in the course of a business, by which they can make loans through the defendant and obtain a reward for so doing. The nature of the arrangement overall is that, as it appears to me, the defendant undertakes the entire arrangement for individual lenders, and it is quite plain from the terms of business – and this is common ground – that the defendant operates as agent for the individual lenders. The defendant is not lending as a principal.
4. In relation to the loans that have been made to Mr Milne, some 612 individual lenders have been involved in respect of 42 loans. The identity of the individual lenders has not been provided to Mr Milne; they are identified merely by a reference code.
5. The claim was commenced on 5 March 2019 and Mr Milne seeks remedies against the defendant under a number of headings that are set out in the claim form. Particulars of claim have not yet been served, although draft particulars have been provided to the defendant and, more recently, amended draft particulars have been served.
6. The remedies that are sought include damages for misleading actions contrary to the Consumer Protection from Unfair Trading Regulations 2008; damages pursuant to section 138(d) of the Financial Services and Markets Act 2000, and relief under section 140(b) of the Consumer Credit Act 1974.
7. In the first instance, Mr Milne brought the claim in order to obtain an injunction against the defendant to prevent it disposing of property belonging to him. That application was resolved by undertakings given to Nugee J, which are recorded in an order dated 8 March 2019.
8. On 10 April 2019, Mr Milne issued an application seeking an order for specific disclosure based on the grounds set out in his third witness statement. I think it is right to say that that application was based on a series of misconceptions, the principal once being that Part 31 of the CPR applied to this claim. That is not the case in light of the disclosure pilot that is contained within Practice Direction 51U which came into effect on 1 January 2019.
9. Subsequently, Mr Milne issued a further application notice seeking an order for transfer of this claim to the County Court or, alternatively, for an order under CPR 31.16 for pre-action disclosure. Mr Milne wishes to obtain, by way of disclosure, the identity of each of the 612 lenders that are associated with the 42 loans to him.
10. I consider it is clear that, properly analysed, Mr Milne is not in fact seeking disclosure. He is not seeking the provision of documents that go to an issue in the claim he wishes to pursue. The information he seeks is much more fundamental than that. It is simply that he wishes to know the identity of the lending parties in relation to the loan agreements made through the defendant. To my mind, the principal application that is before the court is not one of disclosure in the Part 31 or PD51U sense. It follows that the question of whether the disclosure pilot applies, or Part 31

applies, has no bearing on the application. I should also say that the notion that this Court should, because of the introduction of the disclosure pilot, transfer this claim to the County Court in the hope that it could apply powers under Part 31 is not a course of action that is attractive.

11. As to the jurisdiction to make the order sought, reference has been made to the decision of Zacaroli J in *Lederer & Anor v Allsop LLP* [2018] EWHC 1425 (Ch). In that case, the Judge was considering whether an order should be made for, as he put it, disclosure concerning a similar platform called Lendy Limited. The Judge made an order for disclosure of the identity of the lenders. However, and I say this merely by way of an observation and not as a criticism, no indication is provided in his judgment about the jurisdiction he was exercising by making that order.
12. For the reasons I have given, it cannot have been an order for disclosure under Part 31. The Court, however, has very wide-ranging case management powers and it seems to me that the powers that are contained within CPR 3.1(2)(m), which enable the Court to make “any other order for the purpose of managing a case and furthering the overriding objective” certainly provide the Court with jurisdiction to require an agent to reveal the identity of the principal, that is the contracting party whom the claimant wishes to pursue.
13. Even if I am wrong on that point, it is plain that the Court, under its inherent jurisdiction, would have power to require a contracting party to make such an order, so as to prevent the unattractive spectacle of a party to a contract being unable to bring a claim, as against the corresponding contracting party, because of an inability to identify who that person is.
14. The defendant has expressed concern about the order that is sought, arising from a concern about the motives that Mr Milne appears to display. In short, they are concerned that the lenders may be caught up in what I described in the course of oral submissions as a ‘campaign’ Mr Milne wishes to pursue. The basis for describing his intended approach in that manner derives, principally, from a letter written by Mr Milne to the defendant on 19 October 2018. This was a letter of complaint sent by him under, or at least purportedly under, the defendant’s complaints procedure.
15. It is a letter which has caused me very real concern. The letter is expressed in terms which are both aggressive and hectoring. The approach in the letter clearly suggests that Mr Milne’s objective is to create as much difficulty as possible for the defendant, with a view to destroying it. He says so in terms. Furthermore, he gives clear notice it is his wish that criminal proceedings are brought against the directors and officers of the defendant. In addition, if that were not enough, he raises the spectre of individual lenders being the subject of proceedings which might lead to their bankruptcy.
16. At page 22 of this very lengthy letter, he instances a lender identified as 75be594, and says: “He is probably a retired civil servant with a nice little house somewhere, who may find an order for costs of over £100,000 being enforced against him and his home, at which moment Rito Haldar and Ashwin Parmeswaran are going to become quite famous for having completely wrecked the entire Peer-to-peer lending industry, and the Unbolted fraud, which will no doubt lead to them each being recognised as the Bernie Madoff of Peer-to-peer lending”.
17. A letter written in those terms is naturally one which gives rise to very real concern on the part of the Court, that proceedings which follow it are intended to be used for collateral purposes. Mr Milne, who appears today, has disavowed that possibility and has said in clear terms that, if the identity of the lenders is revealed, he will use that identity only for the purposes of pursuing court proceedings against the individuals concerned.

18. The defendant has made recently an offer with a view to avoiding the need for a contested hearing to take place. It is set out in the second witness statement of Mr Haldar and has two limbs. First, that in the claim brought against it, the defendant will not advance a case suggesting that it is not the proper defendant; and, secondly, that it will either pay into court £25,000 or provide a bond for that sum, which it has calculated is more than the maximum amount which Mr Milne could obtain if he were wholly successful in this claim, other than costs. Part of the relief which Mr Milne seeks is not only disallowance of the interest that has been charged against him, but release from liability to repay the loans which total a sum in the order of £170,000. That relief, however, would not involve a payment by the defendant.
19. Mr Milne's response to the offer in his sixth statement is to draw attention to the defendant's published accounts for the year ended 30 November 2018 which show it has a balance on its balance sheet of slightly in excess of £500,000, but that it has been running at a loss. He suggests that the defendant, at its current rate of business, will not survive more than another year or so. However, he has extrapolated from a very limited amount of information. The filed accounts do not include a profit and loss account and I am unable to conclude, based on Mr Milne's analysis, that he is necessarily right.
20. Neither party had given consideration, before the point was raised by the Court today, of the possibility of making a representation order under CPR 19.6. It strikes me, having heard submissions from both parties, that it is an obvious solution that will provide a proper balance between on the one hand Mr Milne's interests in wishing to bring a claim against lenders with whom he has been in contract and, on the other hand, the interests of justice, the overriding objective and also the interests of the defendant.
21. A claim that involves 612 individual lenders is plainly one which is at risk of being out of balance, particularly if those lenders are not all represented by the same legal team.
22. CPR 19.6 provides a simple solution. If it can be shown there is a common interest as between the lenders, then a claim can be brought against the representative party. This would obviate the need to provide to Mr Milne the identity of all the contracting parties and, were he to be inclined, as has appeared so far, to pursue a campaign, it would be rather more difficult for him to do so.
23. The issue, as it seems to me, is what order should be made under CPR 19.6? There are two possibilities that have been considered during the course of submissions. The first is that the defendant acts as a representative party. It would therefore be a party in its own right and also a party as a representative for the relevant lenders. This is only possible if the defendant can be shown to have the same interest in the claim as the individual lenders.
24. As the notes at 19.6(3) in Civil Procedure 2019 record, the Court has increasingly taken a broad view about what is the 'same interest' in recent years. The draft claim that is put forward in its latest iteration, that is the iteration identifying claims as against the individual lenders, makes it clear from paragraphs 24, 34 and 41, that Mr Milne wishes to bring a claim as against the defendant as agent for the lenders. That is, in reality, identical to the claim he wishes to bring against the lenders themselves.
25. The individual lenders, if they are to be liable, can only be liable by virtue of the acts or omissions of the defendant. Thus, if they are joined as individuals by virtue of a representation order, or as named individuals, plainly they will have a right over, as against the platform, for what it has done in their name. There is really very limited benefit in naming individuals and, in light of the fact that there is a common claim,

- there is a sufficiently common interest, as between the defendant and the lenders, to enable the defendant to act as a representative party.
26. Mr Milne points to one disadvantage of such an order which is that, were the defendant to become insolvent, it would be necessary to change the arrangements for representation. It seems to me he is right in that respect. However, I am not satisfied that there is any reason to believe that his concern should outweigh what appears to me to be the far more convenient approach, which is that the defendant acts as representative, which mirrors the reality of the contracting arrangements under which the platform operates.
 27. In the course of submissions, the defendant indicated that, if ordered to do so, it would provide the identity of one representative, namely a lender, but I do not consider it is appropriate to require the defendant to do so. The proper order, and the most convenient and just order, is to appoint the defendant to act in a representative capacity. There is very limited disadvantage to Mr Milne in making such an order. The individual lenders, by virtue of the representation order under CPR 19.6 will be bound by any judgment that is made in his favour. It is right that enforcement against individual lenders could only be pursued with the Court's permission, but if the circumstances require it, it is difficult to conceive that such permission would be refused.
 28. I will therefore make an order in the terms I have indicated, but otherwise dismiss the two applications.