



Claim No.: CH-2019-000260

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2020] EWHC 1420 (Ch)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Wednesday, 12 March 2020

Before:

THE HON. MR JUSTICE FANCOURT

Between:

ANDREW MILNE

Appellant/Claimant

- and -

(1) OPEN ACCESS FINANCE LIMITED

(2) OPEN ACCESS FINANCE LIMITED

As representative of lenders who lent to the Claimant under the
loans listed in Annex A to the Particulars of Claim

Respondents/Defendants

THE APPELLANT/CLAIMANT appeared as a Litigant in Person.

MR IAIN MACDONALD (instructed by Field Fisher LLP) appeared on behalf of the
Respondents/Defendants

Hearing date: 11 March 2020

J U D G M E N T

MR JUSTICE FAN COURT:

- 1 The principal question raised by this appeal is whether the Court has power to make an order under rule 19.6 of the Civil Procedure Rules (which I will call a ‘representative order’) for a Consumer Credit Act claim relating to a credit agreement or a regulated agreement to continue against representatives of the defendant creditors.
- 2 On 10 September 2019, Chief Master Marsh made such an order. He appointed the First Defendant, Open Access Finance Limited, to act as second defendant as representative for all of the lenders with whom the Claimant, Mr Milne, had entered into contracts as borrower through the platform operated by the First Defendant, which are the subject of the claim in these proceedings. That is the effect of the order that the Chief Master made.
- 3 The First Defendant operates a peer-to-peer online lending platform. The Claimant pleads that the First Defendant has been authorised by the Financial Conduct Authority since 8 June 2017:

“With permission to provide regulated products and services, in particular to operate an electronic system in relation to lending under firm reference 741896”.
- 4 The Claimant pleaded that the First Defendant previously had interim permissions to conduct consumer credit business and operate an electronic system for lending. Although, during the hearing, Mr Milne suggested that the First Defendant was only authorised in relation to non-commercial lending, that was not part of his pleaded case and the allegation is denied on behalf of the First Defendant. The First Defendant has, however, advertised its platform as being a non-commercial lending platform.
- 5 It is common ground that the First Defendant does not act as lender itself, it acts as agent for lenders who subscribe to lending opportunities on the platform. The lenders and the borrowers operate blindly in the sense that neither knows who the others are. Typically, in such lending platforms, lenders can choose how much to invest and to how many different borrowers their monies are lent. The result is that each lender tends to lend quite small amounts of money to individual borrowers alongside sums lent under the same loan agreement by many other lenders.
- 6 The particulars of claim identified 42 different loans made to the Claimant between November 2016 and October 2018 of which 12 are current. The amount outstanding under the current loans is, according to the Claimant, about £148,000 plus interest.
- 7 The First Defendant’s evidence explains that there are 612 unique lenders making current loans to the Claimant. The largest amount lent by a current lender to the

Claimant is £5,343 odd. The largest amount lent by a single lender on one loan is £2,365 odd. There are a further 28 lenders in aggregate sums of between £1,008 and £4,472, then 288 lenders in aggregate amounts between £100 and £980, and 295 lenders between £4.91 and £99.31. The mean amount lent is £241.46. There are, therefore, literally hundreds of lenders involved with the Claimant's loans who have less than £100 outstanding and most of the lenders have less than £250 outstanding.

- 8 The claim form was issued by the Claimant against the First Defendant and draft particulars of claim provided by the Claimant were before the Chief Master at the hearing. These identified claims against the First Defendant as agent for the lenders, in respect of certain allegations, and claims against the First Defendant in its own right in relation to claims for the return of securities and damages for alleged breaches of FCA regulations.
- 9 The claims effectively against the lenders are for damages for misrepresentation about interest rates and security; for delivery up of wrongly retained securities and damages for consequential losses; for unjust enrichment to the extent of over-paid interest and fees and interest and charges that were not payable at all because loans were invalid; and finally for relief under section 140B of the Consumer Credit Act 1974.
- 10 The Claimant wished to join all the lenders as defendants to the claim but could not do so because the First Defendant would not divulge their names and addresses. The reason why the First Defendant would not do so is an extraordinary letter running to 29 pages that the Claimant wrote to it on 19 October 2018. This was the first letter of complaint written by the Claimant to the First Defendant in relation to this matter. In it, he threatens to destroy the First Defendant's business leaving millions of pounds of liability for its directors, and to pursue large claims against all the individual lenders. It is in remarkably aggressive and unpleasant terms and shows an apparent desire to wreak havoc on a large scale, so far as the First Defendant and its directors are concerned, and to put considerable fear into the individual lenders.
- 11 The Chief Master referred to the Claimant as being involved in a campaign. It would be a concerning letter for anyone to have written, but the Claimant is an experienced practising solicitor in the City of London. The letter caused grave concern to the Chief Master and evidently influenced his decision not to order disclosure of the names and addresses of the individual lenders and make a representative order.
- 12 In paragraphs 15 to 17 of his decision he said as follows:

“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 that 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’.

At page 22, 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 Parameswaran 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 each of them being recognised as the Bernie Madoff of peer-to-peer lending””.

Mr Haldar and Mr Paramaswaran are the directors of the First Defendant and the Unbolted fraud is a reference to the trading name of the First Defendant.

13 The Chief Master continued:

“A letter written in those terms is naturally one which gives rise to very real concern on the part of the court that proceedings that follow it are intended to be used for collateral purposes”.

The applications that were, in fact, before the Chief Master were for: an order for specific disclosure under part 31 of the Civil Procedure Rules of the names and addresses of the lenders and an order disapplying the consumer credit claim procedure in part 7 of the Civil Procedure Rules; and second, alternatively, for a transfer of the claim to the county court.

14 The alternative application appears to have been an attempt to get round an argument that the disclosure protocol in the Business and Property Courts did not allow for an order for disclosure of the kind sought to be made.

15 The Chief Master pointed out that the application for disclosure under Part 31 or under the Protocol was misconceived and that what the Claimant was seeking was information, not documents relating to trial issues. He was satisfied that the Court had inherent power, or power under rule 3.1(2)(n) of the Civil Procedure Rules, to make such an order if it was appropriate to do so, but he considered that it was not appropriate and that the obvious answer to the Claimant’s application and the First Defendant’s concerns was to make a representative order under rule 19.6 so that the First Defendant would act as representative for all current and past lenders in relation to the Claimant’s loans.

16 Neither party had asked for such an order. The First Defendant was content for it to be made a representative defendant, but volunteered that it would, if the court required, provide the identity of one lender to act as representative. The Claimant did not want any representative defendant but wanted to obtain the details of all the lenders and join them as defendants. The Chief Master considered that the better answer was for the First Defendant to be the representative. He was satisfied that the First Defendant and the lenders had the same interest since the claim was being brought by the Claimant against the First Defendant as agent for the lenders.

17 He considered that the effect was as follows:

“There is very limited disadvantage to Mr Milne in making such an order. The individual lenders, by virtue of the representation order under Part 19.6, will be bound by any judgment that is made in his favour and 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”.

- 18 Although the Chief Master identified that the lenders would have a claim over against the First Defendant for anything that had been done wrongly in their name, he considered that there was a sufficiently common interest between the First Defendant and the lenders. Accordingly, he made the order that I have already described.
- 19 He did not give any directions as to how or when the lenders would be notified of the Order that had been made. He did not address the Claimant’s arguments in his skeleton argument based on section 140B(8) and 141(5) of the Consumer Credit Act, which the Claimant contends gives him an irreducible right to have all the lenders joined as defendants. That is likely to have been because they were not relied on orally at the hearing.
- 20 I gave permission to appeal on paper on the ground that there was a reasonable argument about whether the statutory provisions enabled the court to make a representative order at all and, if they did, whether it was appropriate for the First Defendant itself rather than one or more lenders to be appointed as representatives.
- 21 I had then and still have considerable sympathy for the Chief Master’s reasons for not ordering all the names and addresses of all the individual lenders to be disclosed to the Claimant, in view of the terms of his letter of October 2018.
- 22 On this appeal, the Claimant contends that there is no discretion for the court under the relevant provisions of the Consumer Credit Act and that, since the lenders have to be joined as defendants, the First Defendant must be ordered to disclose who they are. He relies on a decision of Zacaroli J, *Lederer v Allsop LLP* [2018] EWHC 1425 (Ch) in that regard and I will come back to it. Alternatively, he argues that if there is a discretion, there is no good reason for refusing to join all the lenders in view of the decision in the *Lederer* case and given that he had offered to undertake to the court not to use the names and addresses of the lenders otherwise than for the purpose of this litigation.
- 23 The Claimant also contends that the First Defendant was an inappropriate person in any event to represent the lenders, given that there is an obvious potential conflict of interest between the many lenders of very small sums, who might be expected to want to settle the claims at the earliest available opportunity and then recover any losses from the First Defendant, and the First Defendant whose interest might be in seeking to fight off the Claimant’s claims in order to vindicate its business model or avoid any regulatory repercussions that might result from a settlement, or both.
- 24 The Claimant also raised as a reason for seeking the names and addresses of the lenders his desire to raise different claims under the Consumer Credit Act against any commercial lenders, that is to say any corporate bodies who are lending by way of business rather than individuals or small companies who are lending as investors. The Claimant contends that quite different principles, indeed a different part of the Act, apply to loans that are made by way of business, and that any such loans that did not strictly comply with statutory requirements would not be enforceable by a commercial lender without the leave of the court. No such claim has yet been raised in the particulars of claim, but as the Claimant says, that is because he does not yet know whether any of the lenders are commercial lenders.

- 25 In the course of argument I asked about the identity of the proposed alternative representative lender and was told that he was an individual who was a current lender in relation to each of the 12 current loans. The First Defendant also confirmed that there had been fewer than 10 corporate lenders to the Claimant during the period of the 42 loans, but emphasised that this was not an acceptance that the lenders in question were commercial lenders, in the sense of making loans as part of a business.
- 26 However, if any such lenders were commercial lenders, it is a reasonable assumption that they might have a different interest in terms of defending the Claimant's claims or in bringing a counterclaim for leave to enforce, as compared with the non-commercial lenders.
- 27 The first question to decide is whether the Chief Master was wrong to make an order appointing the First Defendant as representative because no such order can be made in claims for an order under section 140B of the Act or in proceedings relating to a regulated agreement under the Act. The relevant statutory provisions are the following.
- 28 Section 140A states:
“(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following--
- (a) any of the terms of the agreement or of any related agreement;
 - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
 - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
- (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)”.
- 29 Section 140B of the Act provides, so far as material, as follows:
(1) An order under this section in connection with a credit agreement may do one or more of the following—
- (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
 - (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
 - (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

- (d) direct the return to a surety of any property provided by him for the purposes of a security;
- (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
- (f) alter the terms of the agreement or any related agreement;
- (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

(2) An order under this section may be made in connection with a credit agreement only--

- (a) on an application made by the debtor or by a surety;
- (b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or
- (c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.

(8) A party to any proceedings mentioned in subsection (2) shall be entitled, in accordance with rules of court, to have any person who might be the subject of an order under this section made a party to the proceedings”.

30 Section 141 of the Act provides so far as material as follows:

(1) In England and Wales, the county court shall have jurisdiction to hear and determine—

- (a) any action by the creditor or owner to enforce a regulated agreement or any security relating to it;
- (b) any action to enforce any linked transaction against the debtor or hirer or his relative;

and such an action shall not be brought in any other court.

(5) Except as may be provided by rules of court, all the parties to a regulated agreement, and any surety, shall be made parties to any proceedings relating to the agreement”.

31 The Claimant’s claim is a claim for, among other things, an order under section 140B, albeit brought in the High Court rather than the county court. Although the relief sought under that section does not appear to be different from the relief otherwise claimed in contract or unjust enrichment, it is accepted to be a claim in relation to regulated agreements, though the First Defendant maintains that the loans were all non-commercial.

32 As regards section 141(5), the First Defendant submits that subsection (1) of that section is concerned with actions brought by creditors, and the express exceptions to subsection (5) provided in paragraphs 9.1 and 9.2 of Practice Direction 7B in the Civil Procedure Rules are cases in which the creditor is the Claimant, so subsection (5) of the section can be read as applying only to claims brought by a creditor and not to claims brought by a debtor, as is the case here.

- 33 I am unable to accept that submission. The wording of subsection (5) is perfectly general. If it was limited to claims falling within subsection (1), or to creditors' claims under regulated agreements, it would have said so. The fact that two exceptions to the subsection have been provided by the Rules and that both these are cases where the creditor is the Claimant does not mean that all cases to which subsection (5) applies are creditor claims.
- 34 The question under subsection (5) is, in my judgment, whether the words "except as provided by rules of court" can be construed as making the apparently mandatory requirement subject to the rules of court generally or only subject to specific exceptions to subsection (5) provided in the rules. If the latter, it is common ground that there is no such specific exception in the case of a claim by a debtor against large numbers of lenders. (I note here that the Act was passed and sections 140A to 140C were inserted well before the advent of online lending platforms, where hundreds or even thousands of individual investors could be involved in making a single loan.) In such circumstances, there is clearly no power for the court to disapply the requirements of section 141(5) and so it would be right in principle to order the details of the lenders to be disclosed so that the right parties could be joined.
- 35 As regards section 140B, the Claimant is a party to proceedings falling within subsection (2) and each lender is a person who might, if the claims succeed, be subject to an order for relief under that section. Subsection (8) therefore, appears to entitle the Claimant to have the lenders made a party but "in accordance with rules of court". The question is whether that otherwise unqualified right to have lenders joined is subject to the powers of the court under its rules on an application to join to direct otherwise.
- 36 The First Defendant submits that a purposive construction of the statutory provisions will enable the court to make a representative order. The purpose of the 1974 Act, it submits, is to afford protection to a debtor. A debtor who wished to claim relief but did not have all the details of all the lenders, or who had a very large number of lenders, might find it difficult to identify them and join them, or might want to avoid having to sue a large number of defendants running the risk of increasing costs, therefore it would be sensible that a representative order could be made in an appropriate case. The statutory provisions, it submits, should not be interpreted as making an inflexible requirement to join all lenders in all circumstances regardless of the content of the rules of court generally.
- 37 The Claimant, on the other hand, submits that there is no flexibility and that the words "except as may be provided by rules of court" should be interpreted narrowly as referring to specific exceptions created by the rules and that the words "in accordance with rules of court" add nothing in meaning.
- 38 In my judgment, the statutory provisions in question should not be interpreted as providing a mandatory and wholly inflexible requirement regardless of the general provisions of the rules of court and the circumstances of a particular case. It is clear from the language of section 140B(8) that the statutory requirement is not meant to override the rules, but that it is to be applied in accordance with the rules.
- 39 So, for example, where a limitation period has expired, the rules provide that

a defendant may not be joined. If a claim were sought to be made against a lender for repayment more than six years after the expiry of the creditor/debtor relationship, the rules would not permit that lender to be joined to proceedings. Section 140B(8) cannot have been intended to override that. So, equally, if it is appropriate under the rules to have one lender represent numerous lenders to further the overriding objective and deal with the case justly, proportionately and without undue expense, such an order should be able to be made.

- 40 The purpose of the statutory provisions in sections 140B and 141 of the Act is to ensure that persons against whom an order may be made are bound by the order and others whose rights may be affected by the court's decision are also bound. The making of a representative order does not derogate from those objectives or prejudice any such person, as long as they are made aware of the effect of the order and of their ability to apply to vary it if so advised; nor does it prejudice the debtor in terms of his ability to enforce, since the court will be able to facilitate enforcement if and when it arises against a represented lender.
- 41 Even though the Claimant has renewed his offer of undertakings not to use the lenders' details for collateral purposes or to act inappropriately, I am satisfied that the Chief Master was right to conclude that this is a case that justifies a representative order under rule 19.6. It would be pointless and detrimental, where the interests of more than 600 lenders on an average of £241 coincide, for there to be joinder of more than 600 defendants. Clearly, each of the lenders must be notified of a representative order and have the opportunity to seek to vary it.
- 42 It would also be appropriate, in my judgment, in order to protect the Claimant's rights should his claim against the lenders succeed, for the First Defendant now, before information is lost or before any insolvency or other misfortune overtakes it, to compile a list of lenders with their contact details and lodge that list with its solicitors to be held subject to the court's order. Having been served with notice of the representative proceedings and not raised an objection, the lenders could not later object to being joined for the purposes of an enforcement on the basis that they had not been joined earlier.
- 43 Those considerations in favour of a representative order are in addition to the real concern that the Chief Master had relating to the improper motives that the Claimant seemed to show in October 2018 for obtaining the details of the individual lenders.
- 44 Notwithstanding the undertakings offered, there remains concern about the way in which the Claimant might seek to conduct the litigation adversely to the individual lenders, or make use of his knowledge of their identity. In other circumstances, there would be no reason not to disclose the identity of lenders even if a representative order were made, but in my judgment the Chief Master was justified in refusing to order provision of the information about individual lenders and there is no justification for my interfering generally in that exercise of his discretion. I will come shortly to the position with the corporate lenders.
- 45 In *Lederer v Allsop*, Zacaroli J was not faced with any argument about whether a representative order should be made. The arguments in that case were whether the platform, rather than the individual lenders, were the counterparty or the borrower and whether the fact that, as between the lenders and the platform it was agreed that their identity was not to be disclosed, meant that the court should not order joinder.

- 46 The Judge held that the lenders were the counterparty and that the agreement not to make a voluntary disclosure did not prevent the court from ordering joinder. He recognised that as a consequence of joining possibly thousands of lenders in that case some further robust case management would be needed. While that case establishes that it may be appropriate to join large numbers of individual lenders as defendants, it says nothing about whether, on the particular facts of the Claimant's claim, a representative order is appropriate.
- 47 Having concluded that the Chief Master was entitled to and justified in making a representative order, the next question is whether he was wrong to appoint the First Defendant as the representative defendant. In my judgment, he was. As cogently articulated by the Claimant, both in writing and in oral argument, there is here a significant risk of a conflict of interests in relation to the way that the litigation is conducted, particularly as regards any settlement discussions. Although the First Defendant acted as the lender's agent in transacting and organising their business interests, the position is not the same in litigation in which the First Defendant has distinct interests of his own to protect, both in respect of the claims made against it and as regards its position in relation to the claims made against the lenders and claims that the lenders may bring against it. These interests may well conflict with the interests of the lenders. This is not a case in which settlement is unlikely to arise at an early stage, in view of the small sums at stake for very many of the lenders.
- 48 Although the choice of a representative defendant was a case management function, in my judgment, the Chief Master erred in concluding that the interests of the lenders and the First Defendant were fully aligned and that conclusion undermined the exercise of his discretion on the question. I would, therefore, vary the Chief Master's order to substitute an individual lender as representative of all the lenders who lent money to the Claimant under any of the 42 loan agreements scheduled to the particulars of claim. The First Defendant must provide details of the proposed representative lender and of his interest so that the court can be satisfied that the person proposed is suitable. Further directions can then be given as regards disclosure of the proceedings and the court's order to the other lenders.
- 49 As far as the corporate lenders are concerned, the issues may be different. It is not currently known whether any of them are, as the Claimant suspects, commercial lenders. If they are, then they are likely to have a different interest from the individual lenders such that the representative lender should not also represent them. However, the First Defendant does not accept that any of the corporate lenders is a commercial lender. If the corporate lenders are non-commercial lenders, then there is no relevant difference between their position and the position of the individual lenders and so the representative defendants can properly represent them too.
- 50 Given that the ten or fewer lenders in question are corporations, not individuals, and given that their identity and business is relevant to the claims that the Claimant may bring in these proceedings, some degree of disclosure is needed. On the basis of the undertakings offered by the Claimant, namely to use the information provided about any lender only for the purposes of conducting these proceedings and to communicate with the lenders only so far as necessary in that respect, the First Defendant should disclose to the Claimant the identity and registered office details for each of the corporate lenders. The Claimant will then be able to make proper inquiries as to the nature of each lender's business activities, if any, in order to

decide whether to bring a claim against any of them as commercial lenders.

- 51 If the Claimant wishes to do so, he can apply to have them joined as defendants in the usual way and for the representative order to be varied to exclude any such lenders. If it emerges that there are ten commercial lenders, then the court can at that stage consider whether to make a further representative order rather than joining all ten. To the extent of varying the identity of the representative defendant and ordering very limited disclosure of the identities of the corporate lenders, I therefore allow the appeal. I will also make an order that the parties request, disapplying the consumer credit claims procedure under Practice Direction 7B. It is agreed that the Practice Direction is not appropriate to a claim of this complexity.
- 52 I have also considered whether the claim should be transferred to the county court, but in view of its nature and seriousness and the working out of the representative order that is required, I consider that, for the time being at least, it is appropriate for it to remain in this court.
- 53 I am concerned with the costs of the appeal, not with the costs of the applications that were made to the Chief Master. The costs that the Chief Master ordered were not in themselves a substantive ground of appeal on the appeal that I have heard.
- 54 The principal ground of the appeal was that there could not be and should not have been a representative order made in this case, but all the lenders, all 600 and more of them including the historic lenders, should be joined and must be joined as defendants to these proceedings and therefore should be identified by the respondents. The appeal on that basis has failed and the respondents have succeeded.
- 55 The unsuitability of the First Defendant as a representative defendant was really a subsidiary point, though a well-taken point, and was a vehicle in substance for mounting the principal argument that there should not have been a representative order at all. The issue in relation to disclosure of the identities of ten corporate lenders was not a point raised by Mr Milne as a ground of appeal but a point that emerged in the course of argument before me. It is a pragmatic solution to a potentially difficult problem about representation of defendants who might have a slightly different interest.
- 56 Nevertheless, allowing for the fact that there is a modest degree of success on those subsidiary points, I consider that an adjustment should be made, the respondent should not have all their costs of the appeal. I will award them three-quarters of their costs of this appeal. That being so, there is no reason to disturb the order for costs that the Chief Master made. I will make a summary assessment of the costs.
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CERTIFICATE

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**** This transcript has been approved by the Judge ****