

NCN:[2021] EWHC 3785 (Comm)
IN THE HIGH COURT OF JUSTICE
OF ENGLAND WALES
BUSINESS AND PROPERTY COURTS

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 19 November 2021

BEFORE:

MRS JUSTICE COCKERILL DBE

BETWEEN:

SANGAMNEHERI

Claimant

- and -

THE CO-OPERATIVE BANK PLC

Defendant

MR SANGAMNEHERI appeared in person

MR G SPENCE-JONES appeared on behalf of the Defendant

JUDGMENT
(APPROVED)

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MRS JUSTICE COCKERILL:

1. This claim arises out of possession proceedings commenced by the Co-operative Bank, (“Co-op”) “the defendant”), in relation to 46B Coombe Gardens, New Malden, Surrey KT3 4AA to which I will refer as “the property.”
2. The possession proceedings were brought on the basis of a claim that there had been breach of conditions of a mortgage. Possession of the property was granted by DDJ Armstrong and after a series of litigation which I will refer to further, possession of the property was taken by the Co-op on 1 July 2021.
3. In May 2021, Mr Sangamneheri, (“the claimant”) brought this claim against the Co-op for various remedies including the setting aside of the possession order and a declaration that the Co-op’s rights under the mortgage deed had expired.
4. The matter before the court today is the defendant’s application to strike out the claim and/or for summary judgment on the basis that the Statement of Case in this claim discloses no reasonable grounds for bringing the claim, the claim has no real prospects of success and there is no other compelling reason for trial.
5. The essence of what the defendant says is that the doctrine of *res judicata* applies to this claim as the defendant had previously brought possession proceedings against the claimant and was awarded possession in relation to those proceedings against a background where that claim was contested and the claimant then sought several avenues of appeal, all of which were unsuccessful.
6. The claimant has said, and I will explain in more detail the arguments raised, essentially that it is not open to the defendant to enforce the possession order and the defendant has no entitlement to possession regardless of the background of the previous possession proceedings.
7. As to that background, I will provide only a short summary. Mr Sangamneheri entered into the mortgage agreement with the Co-op in relation to the property for a term of ten years which expired on 31 July 2018. The mortgage was not redeemed and on the face

of it under clause 13 of the Mortgage Conditions, the full remaining balance therefore became due and payable. That balance was not paid and so, on the face of it, clause 7 of the mortgage agreement was breached. That clause stated that throughout the mortgage duration the Borrowers had to keep the terms and conditions of the Mortgage offer document, the Mortgage Conditions and the mortgage security. The possession claim was therefore issued on 26 November 2019 under claim number F00KT028. It was listed for a hearing on 13 January 2020 in the County Court at Kingston upon Thames, that being the local county court for the property.

8. Mr Sangamneheri filed a defence in the possession claim in which he raised arguments in particular in relation to such matters as variation and in relation to the expiry of the mortgage.
9. At the hearing on 13 January 2020, DDJ Armstrong heard the arguments and ordered possession in 28 days and money judgment for £193,842, that being the value of the outstanding mortgage debt at that time. Mr Sangamneheri sought permission to appeal. That permission was refused.
10. He renewed his application for permission to appeal that possession order two days later. Permission was again refused by HHJ Saggerson on 12 November 2020. On 26 November 2020 the claimant brought a claim for judicial review of HHJ Saggerson's decision of 12 November 2020. That was also refused on or around 21 January 2021. The defendant has sought to enforce the possession order and, as I have said, possession was taken on 1 July 2021.
11. But the claimant has now commenced this action. It is an action which has been commenced in the Financial List where it plainly does not belong, but we are hearing it in any event. The claimant seeks
 - a. a freeze of the enforcement action,
 - b. the setting aside or dismissal of the possession and monetary orders made under claim F00KT028,

- c. a declaration that the mortgage and the Co-op's entitlement to possession under the same are invalid,
 - d. a declaration that the Co-op is estopped from enforcing or pursuing its rights under the mortgage, and
 - e. costs or other appropriate relief.
12. The essence of the claimant's claim as advanced before me is set out in a detailed skeleton argument which Mr Sangamneheri has further explained this morning. In writing, he rested on an argument in relation to section 89 of the Housing Act 1980, arguing that after the expiry date of the mortgage agreement there was no ground to act as mortgagee by virtue of section 89. That section provides for potential restrictions on the discretion of the court when making orders for possession of land, and he argued that section 89 applied to the possession order in this case as the order would place the claimant in the position of exceptional hardship and that the defendant's actions amount to unfair treatment. The claimant also states that the defendant is estopped from enforcing the expired mortgage, or any action deriving from it and makes an argument in the response to the defendant's statement that the terms of the mortgage had ended at the expiry date.
13. Orally before me, the essence of the argument, which was pursued rested on two points derived from, as Mr Sangamneheri says, his "two hats" that he wears, both as party to the mortgage deed and as freeholder of the property. In relation to the first hat, he says that the central document is a letter of 11 June 2021 which was sent in the context of the possession proceedings after the order had been granted but before formal possession was taken. The key point about that is that that letter records the balance of the mortgage as being zero. He says that this is a new point which could not have been raised in the possession action, that what one sees there is an assurance that there are no arrears, and effectively an assurance that there has been a discharge of Mr Sangamneheri from his liability by the Co-op. He has suggested to me this morning that this arose out of some correspondence, which is not currently before me, during the course of which he says he convinced the Co-op that the structure of the building was defective, and as a result of that the liabilities in respect of the building

and the lessening of the building value were more than what was owed. So, in essence he says that there was, subsequent to the previous proceedings, a clear and unequivocal assurance that there was no liability.

14. The second element of what he has said before me relates to that position that he has as a freeholder, he says. He says that after the Co-op took possession there were breaches of the lease, in particular in relation to non-payment of outgoings that the lessee would have to pay and that amounted to a surrender of the lease. He has directed my attention to *Artworld Financial Corporation v Safaryan & Ors* [2009] EWCA Civ 303 and says that particularly in circumstances where he is in a very parlous financial situation, putting him in the position of having to discharge the lessee's obligations was such that that amounted to a surrender of the lease.
15. The defendant has effectively said that none of these arguments go anywhere. The defendant says that the parties in this case are the same as they were in the possession claim. The subject matter of the present claim is the same. And therefore issue estoppel applies in respect of the two main issues, namely the validity of the mortgage and whether possession can be enforced. It submits that there is an absolute bar to the claimant's claims as these issues are fundamental to the claimant's current case. It also relies on the doctrine of merger in judgment. It says that any cause of action or challenge arising out of or in connection with the mortgage and the property merged with the possession order of DDJ Armstrong, and any other issues which have now been raised should have been raised in earlier proceedings or should have been raised in an appeal, and therefore this particular claim is an abuse of process.
16. The essential principles as regards the two forms of application brought by the defendant this morning are as follows. The strike out jurisdiction arises under CPR 3.4(2). The court may strike out a claim if it appears to the court that a statement of case discloses no reasonable grounds for bringing or defending the claim.
17. So far as the principles on which that operates, the court must be, "*certain that the claim is bound to fail,*" and "*the court should not conduct a mini trial of the issues*" though it is open to the court to conclude that there is no real substance in the evidence or indeed that it is plainly contradicted by contemporaneous documents.

18. So far as summary judgment is concerned that proceeds under a separate part of the CPR, CPR Part 24. But the test is not dissimilar. There is a lot of law on the test which applies in relation to summary judgment, and the best known summary is in the case of *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) by the then Lewison J at paragraph 15. In essence, however, the question is whether the claimant has a “*realistic’ as opposed to a ‘fanciful’ prospect of success*”. So the claim must be “*more than merely arguable*”, and it is apparent from that rehearsal of the principles that the two tests are often very similar.

19. I deal first with the substantive arguments which the claimant has raised so that the claimant may understand exactly what I would say about the merits of those claims. I deal first with the question of exceptional hardship under section 89 of the Housing Act 1980. Although that was not pursued with any vigour orally it is clear that the claimant does seek the protection afforded by section 89 of the Housing Act in relation to exceptional hardship. However, it is clear to me that that provision does not apply in the context of mortgage possession proceedings, and that is what we are essentially looking at here. Section 89(2)(a) states that the restrictions on orders of possession under Section 89(1) do not apply if: “... the order is made by the court in an action by a mortgagee for possession.” So that is the case here, and the question of whether there is particular hardship therefore would not arise. It is simply not arguable that section 89 could protect the claimant in this case.

20. I then turn to the question of limitation. That was a third point which I should have mentioned that Mr Sanganneheri did raise orally this morning. It is also set out in his further particulars of claim where he pleaded reliance on section 15 of the Limitation Act 1980. The defendant has said that this is a point that ought to have been raised as a defence to the possession proceedings, and it is not a cause of action for a separate claim. Those may well be good points but for the present purposes the important point is that the point is destined to fail. It appears to be based on a misreading of section 15(4) of the Limitation Act.

21. In any event section 15(1) of the Limitation Act states very clearly that actions to recover land are only curtailed if the actions are made after over 12 years from the date on which the right of action arises. Therefore the bank had 12 years to recover the

property from the date on which the right of action accrued. The cause of action accrual was the default under the mortgage. That occurred on 13 July 2018 when the mortgage term expired. The outstanding was due to be paid and the claimant did not pay the sums owing. Since possession proceedings were brought in November 2019, the claim for possession, claim F00KT028, was brought within the applicable 12 year period. There is no arguable limitation defence. To be fair to Mr Sangamneheri, I did receive the impression that he relied on limitation somewhat as a backup, seeing it as harmonious with the assurance which he says he received via the 11 June letter.

22. I turn then to the question of estoppel, and this links up. Mr Sangamneheri says that the defendant made express representations and implied assurances that the mortgage had expired on 31 July 2018 such that the defendant was estopped from bringing court action. To the extent that that relies on the expiry point, that is plainly hopeless. But in any event, the argument on estoppel is itself hopeless in that estoppel is not a cause of action. It is a defence. In so far as there was then an argument in relation to the mortgage expiry on 31 July 2018, that is plainly something which even were estoppel a cause of action, it could not give rise to an arguable claim. The courts are comfortably familiar with references to expiry of mortgage terms in the context of mortgage possession. It simply reflects how there was a deadline for repaying sums borrowed. To be fair to Mr Sangamneheri, as I understand the case as he has argued it before me this morning, he is not really relying on that expiry on 31 July 2018, he is relying on what he says are assurances in that letter of 11 June 2021. However, what he is effectively seeking to do is to use that phrase to unpick a determined right to possession which has already been adjudicated on by the court, and that is not something which you can do by way of estoppel. There is no even remotely arguable case that that is something which can be run as a matter of law.
23. So those are effectively the arguments which relate to the mortgage possession action. There is then the second hat argument, the breach of leasehold arguments. The claimant alleges that the defendant has breached the contract of lease. I conclude that, putting everything else aside, these would not amount to an arguable basis for pursuing the current claims. These are allegations which appear to be a matter between the Co-op and the lease counterparty. The claimant's standing, albeit that he is the freeholder, is not at all clear on that basis. But in any event, even if there is some form

of direct claim between Mr Sangamneheri and the Co-op by reason of a leasehold relationship, that is not a matter which is capable of interfering with or disrupting the enforcement of an obtained possession order. It is a matter which would have to be raised in separate proceedings. It is not something which is arguable as a facet of the claim which has been brought in this action.

24. I have therefore first dealt with the substance of the points that the claimant would wish to raise in this claim. But technically, even if there were any arguable merit in them, I would in any event conclude that the defendant is not entitled to raise them, and this is essentially because of the principle of *res judicata* which is the basis on which the defendant brings its application. The principle of *res judicata* is all about, has the claimant had his day in court? It is based in the concept of precluding abuse of process of the court. If the claimant has had his day in court the courts say you cannot simply continue to come back and try to re-argue the points over and over again once you have exhausted your avenues for appeal. You get a certain number of goes. You get to argue your claim. You get to seek to appeal. You can pursue your avenues of appeal, and once those are exhausted it is abusive to try to come back to court and have another go in another way.

25. The defendant has relied on four principles of *res judicata* in support of its application for strike out and summary judgment. They are;
 - a. doctrine of merger,

 - b. cause of action estoppel,

 - c. issue estoppel,

 - d. the rule in *Henderson v Henderson* [1843] 3 Hare 100 (“*Henderson v Henderson*”).

26. The defendant has explained all of these doctrines very carefully and clearly in Mr Spence-Jones’ admirable skeleton and has provided the authorities which support

the propositions in that skeleton. I do not need to go through them, not least because the position does not, in my view, turn on a fine consideration of those doctrines.

27. There is a short point, in that the key matters in this case were previously considered in the action which was brought and was heard before DDJ Armstrong in the Kingston County Court. Most of the matters are a necessary ingredient in the cause of action which is now sought to be litigated here. In both cases, the parties are the same. It follows that the claimant's claim would be issue estoppel barred under the doctrine as set out in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*") and what is more, the cause of action upon which the claimant relies has also merged in the judgment which has already been given in this matter and on which appeal has been sought and in relation to which judicial review has been sought and has been denied.
28. For example, a number of references have been made to variations, as to the question of whether variations interrupt possession proceedings. That was raised by way of defence in the original action. So too was the question of the expiry of the mortgage that was raised in the original possession claim. If there had been any issue with the previous determination, the remedy there was an appeal. The fact that the claimant brings forward a slightly different matter here is to no avail because the doctrine in *Henderson and Henderson* is one which says that the claimant cannot escape from the principle underlying the *res judicata* doctrine by raising a new point. If that new point is one which could and should have been raised before, the key point being could it and should it, the way the courts look at these matters, as is made very clear in the *Arnold* case and also in the leading authority of *Johnson v Gore Wood & Co* [2000] UKHL 65, is that arguments between the parties should be brought, so far as it is possible, in one set of proceedings. Therefore if a claimant could and should have brought their whole case at first instance, they cannot revivify what is in effect the same broad argument now by references to estoppel.
29. That is a matter which does apply here. I have concluded both whether one looks at it as a matter of *res judicata* or, equally, looking at the merits of the claims and in particular the merits of the points which Mr Sangamneheri would wish to raise which might arguably fall outside the doctrine of *res judicata*, those claims are ones which

are not arguable. They are bound to fail and for those reasons, I grant the application and will strike out the claim in this matter.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge