

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2023] SC DUN 13

DUN-A71-19

NOTE BY SHERIFF JILLIAN MARTIN-BROWN

in the cause

MUHAMMED ZAHID AND FAIZA ASHRAF

Pursuers

against

RAHIM RAZAK, t/a RAZAK PROPERTY INVESTMENTS (LETTINGS AND FINANCE)

Defender

Pursuer: Logan (Adv); MML Legal

Defender: Royle; Baillie Shepherd

DUNDEE, 16 September 2020

NOTE

Introduction

[1] This is a debate in relation to section 27 of the Financial Services and Markets Act 2000 and its applicability to deposit funds which were paid in error to a fraudulent bank account. The dispute concerned whether the deposit funds constituted: (i) money paid or transferred by the pursuers under an agreement to which section 27 applied; or (ii) a loss sustained by them as a result of having parted with money under an agreement to which section 27 applied.

Procedural history

[2] A debate was assigned for 29 May 2020. Due to the coronavirus pandemic, the diet of debate was discharged and the cause was sisted. On 31 July 2020, the sist was recalled and 11 September 2020 was assigned as a diet of debate. The debate proceeded by way of teleconference and both parties lodged written submissions and authorities in advance of the teleconference hearing.

[3] At the teleconference debate on 11 September 2020, the defender's principal agent was unable to attend due to illness. I granted a joint motion allowing the diet of debate to be determined on the basis of written submissions only.

[4] Having considered the written submissions lodged in advance of the debate, I, *inter alia*, upheld the defender's first plea-in-law as it related to the pursuers' *esto* case under the Financial Services and Markets Act 2000; and excluded those averments from probation. I have been asked to provide a Note outlining my reasoning in this regard only, in order that the pursuers can consider whether to lodge an appeal.

Background facts and circumstances

[5] The pursuers required to pay the sum of £27,168 as a deposit towards the purchase price of a house. The pursuers were the victims of "push payment fraud", whereby they received an email purporting to change the bank details of their solicitors, Messrs W & A Bruce, which turned out to be fraudulent. The pursuers therefore, in error, paid the deposit to a fraudulent bank account rather than to their solicitors for onward transmission to the sellers of the house.

[6] The fraud was reported to the police but the pursuers were unable to recover the funds. Since missives had already been concluded, the pursuers required to complete their

house purchase or resale and face penalties. From leftover savings and borrowing from friends and family, they were able to raise the deposit required to complete the purchase. The pursuers in effect required to pay the deposit twice and lost the sum of £27,168.

Pursuers' submissions

[7] The pursuers averred that the defender was negligent in his actions as their independent financial advisor. The pursuer also averred that *esto* the defender did not act as an independent financial advisor, (which was denied), the defender acted at the very least as an intermediary in obtaining the pursuers' mortgage with Halifax. Obtaining a mortgage was a regulated activity in terms of section 22(1)(b) of the Financial Services and Markets Act 2000 ("the 2000 Act"). The defender was not an authorised person, in breach of the general prohibition under section 19 of the 2000 Act. In the event that the defender was found to have acted as an intermediary in contravention of the general prohibition under section 19 of the 2000 Act, by virtue of section 27(1)(d), the pursuers were entitled to the remedies set out at section 27(2) of the 2000 Act.

[8] The pursuers submitted that there was no distinction to be drawn between the facilitation of a mortgage (which was accepted to be a regulated activity) on the one hand and the payment of the deposit for the purchase on the other. Section 27(2) clearly allowed losses in respect of property transferred by a party under the agreement and "agreement" was defined in section 27(3)(b) as "the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider."

[9] The pursuer submitted that the purpose of the loan was to facilitate the purchase of the property. The purchase, with the use of the mortgage funds, was therefore the agreement. The payment of the deposit was another part of the same agreement which

involved the transfer of property to the solicitor. That transfer, which would not have occurred without the mortgage arrangements facilitated by the defender, caused loss. It was not possible to divide up the “agreements” in a manner contended by the defender.

Defender’s submissions

[10] The defender submitted that the loss that was said to have been occasioned to the pursuers was the loss of the sums due to meet the deposit and fees required for the purchase of their new home. It transpired that the pursuers had been the victims of a sophisticated fraud perpetrated by the hacking of someone’s email, though there was no averment to suggest which person’s system had been hacked.

[11] Section 27(1A) provided that the “agreement” was unenforceable. Presumably that related to the mortgage agreement as that was the only agreement to which the section could reasonably relate. Section 27(2) then indicated that any money “paid or transferred under the agreement” could be recovered and there could be compensation for any loss sustained “as a result of having parted with it”. It was important to note that only money or property paid or transferred under the mortgage agreement could be recovered and not the deposit money which formed the subject matter of the current claim. There was no suggestion that payment of a deposit for a house was a regulated activity in terms of the 2000 Act and the 2000 Act was simply not engaged.

[12] The defenders made reference to the case of *Beharie v Mortgages 1 Limited* [2019] EWHC 2783 (Ch). While the factual situation was not entirely on point, it was clear that the agreement was the mortgage agreement and the same would be true in the instant case. The pursuers’ case under section 27(2) of the 2000 Act was misconceived and the *esto* case ought to be dismissed.

Legislation

[13] The relevant legislation provides:

“19 The general prohibition.

- (1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-
 - (a) an authorised person; or
 - (b) an exempt person.
- (2) The prohibition is referred to in this Act as the general prohibition.

...

22 Regulated activities.

- (1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and-
 - (a) relates to an investment of a specified kind; or
 - (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.

...

27 Agreements made through unauthorised persons.

- (1) This section applies to an agreement that-
 - (a) is made by an authorised person (‘the provider’) in the course of carrying on a regulated activity,
 - (b) is not made in contravention of the general prohibition,
 - (c) if it relates to a credit-related regulated activity, is not made in contravention of section 20, and
 - (d) is made in consequence of something said or done by another person (‘the third party’) in the course of-
 - (i) a regulated activity carried on by the third party in contravention of the general prohibition, or
 - (ii) a credit-related regulated activity carried on by the third party in contravention of section 20.
- (1ZA) But this section does not apply to a regulated credit agreement or a regulated consumer hire agreement unless the provider knows before the agreement is made that the third party had some involvement in the making of the agreement or matters preparatory to its making.
- (1A) An agreement to which this section applies is unenforceable against the other party.
- (2) The other party is entitled to recover-
 - (a) any money or other property paid or transferred by him under the agreement; and

- (b) compensation for any loss sustained by him as a result of having parted with it.
- (3) 'Agreement' means an agreement-
 - (a) made after this section comes into force; and
 - (b) the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider.
- (4) This section does not apply if the regulated activity is accepting deposits.
- (5) For the purposes of subsection (1ZA)-
 - 'regulated consumer hire agreement' has the meaning given by article 60N of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544);
 - 'regulated credit agreement' has the meaning given by article 60B of that Order."

Decision

[14] There was no dispute that the pursuers had been the unfortunate victims of a sophisticated fraud. There was a factual dispute as to whether the defender had acted as an independent financial advisor or alternatively, as an intermediary in securing the pursuers' mortgage.

[15] In the event that the defender was found to have acted as an intermediary in securing the pursuers' mortgage, there was no dispute between the parties that the arranging of a mortgage was a regulated activity. Nor was there any dispute that an "agreement" made through unauthorised persons was unenforceable and that the other party was entitled to recover any money or other property paid or transferred by him under the agreement and compensation for any loss sustained by him as a result of having parted with it.

[16] The dispute between the parties concerned the meaning of "agreement" in section 27. The pursuers' position was that the "agreement" was the house purchase, using the mortgage funds and the deposit. By contrast, the defender's position was that the "agreement" was the mortgage only.

[17] “Agreement” is defined at section 27(3) as an agreement made after the 2000 Act came into force, the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider. The “provider” is defined in section 27(1)(a) as the authorised person carrying on the regulated activity, which in this case is the mortgage provider (Halifax). Logically, the regulated activity in this case carried on by Halifax is the provision of a mortgage. The agreement which constitutes part of that regulated activity is the mortgage agreement. It is not the agreement between the pursuers and the sellers of the property, to whom the deposit funds represented part payment of the purchase price. The mortgage provider is not a party to that contract.

[18] The first set of deposit funds were paid to a fraudulent bank account. The second set of deposit funds were paid to the sellers of the house and the purchase was completed. The agreement to purchase the house is entirely separate from the mortgage agreement. If the pursuers’ interpretation of section 27 was correct, then the agreement to purchase the house would be unenforceable.

[19] Instead, what is potentially recoverable is money paid by the pursuers to the mortgage provider under the mortgage agreement, or compensation for loss sustained by the pursuers as a result of having paid money to the mortgage provider under the mortgage agreement, in the event that the pursuers could prove that the mortgage was made in consequence of something said or done by the defender in contravention of the general prohibition.

[20] In the English case of *Beharie*, the appellant argued that the mortgage broker who introduced her to the respondent was not an authorised person and therefore the mortgage was voidable. Mr Justice Arnold rejected that argument and held that the relevant agreement was the agreement between the appellant and her mortgage provider.

[21] I am therefore of the view that the deposit funds which were paid in error to a fraudulent bank account do not constitute money transferred by the pursuers under the agreement, nor losses sustained as a result of having parted with money or property under the mortgage agreement. Consequently, the pursuers' *esto* case under the 2000 Act is irrelevant. That leaves the pursuers' common law case of negligence against the defender on the basis that he was acting as an independent financial advisor.

[22] I therefore upheld the defender's first plea-in-law as it related to the pursuers' *esto* case under the Financial Services and Markets Act 2000 and excluded those averments from probation. The principal agent for the defender being unavailable due to illness, I reserved the question of expenses in relation to the debate in order that written submissions could be lodged in advance of the pre-proof hearing in relation to expenses.