Case No: OBM40030/OBM40019

IN THE BIRMINGHAM MERCANTILE COURT

Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Tuesday, 25th October 2011

BEFORE:

HIS HONOUR JUDGE SIMON BROWN QC

BETWEEN:

MORTGAGE AGENCY SERVICES NUMBER FOUR LIMITED

Claimant

- and –

ALOMO SOLICITORS (a firm)

Defendant

MR HUGH SIMS (instructed by Bevan Brittan LLP) appeared on behalf of the Claimant
MR ALAN TUNKEL (instructed by Kennedys) appeared on behalf of the Defendant

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Approved Judgment

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JUDGE SIMON BROWN QC:

1. This has been the trial of two consolidated actions (0BM40030 and 0BM40019) arising out of four mortgage advances (for flats 180 and 189 of £263,359 and for flats 180 and 189 of £262,564) made by GMAC-RFC Limited ("GMAC") on or about 10 June 2005 to enable the borrower, Mr Bernard Edwards ("the Borrower"), to buy for let (leasehold interests in) four apartments (No.s 180, 187, 188 and 189) in a new building known as Building 50, Argyll Road London SE18 6PL (collectively referred to as "the Properties") on 13 June 2005. Each Apartment was ostensibly to be bought by the Borrower from the developer Berkeley Homes (West London) Limited ("Berkeley Homes") for £309,000, though it has subsequently transpired that the purchases were not arms length purchases from Berkeley Homes. Each loan was secured by a first charge over each of the Properties. The Claimant acquired its interest by way of assignment from GMAC on 30 September 2005. In each case the Borrower was unable to maintain the mortgage payments beyond a few months, and following a period of default, the Claimants repossessed the Properties on or about 28 August 2008 and then sold them. The price realised on the sales (£200,000) fell far short of what was needed to discharge the borrowing. The losses alleged by the Claimants were stated to be £351,065.27 (£177,769.26 and £173,296.01).

2. All of the transactions exhibited one or more of the following unusual features that the Claimants have alleged were classic warning signs of mortgage fraud:
    i. The existence of a back to back or sub-sale arrangement under which the sale (or sub-sale) to the Borrower was on the same day as the grant of the lease to the intermediate vendor;

    ii. The sale to the Borrower was at a price (£309,000) which was very substantially in excess of the price by which the property had just changed hands (£215,000 for no.s 180, 188 and 189 and £223,750 for no. 187; an inflation of 43% or 38%);

    iii. The interposition of an intermediate vendor, namely Ellison Carter Limited ("ECL"), a company in the 50% ownership of the Borrower (and Dennis Edwards, possibly another family member;

    iv. The effect of the price inflation and ownership structure of ECL was that the mortgage advance (£262,494 plus fees) exceeded the price paid by ECL to the developer, Berkeley Homes, such that in economic terms no deposit had to be found for the purchase. Instead substantial cheap finance (in the sum of approximately £188,000) was obtained;

    v. The purchases formed part of a series of similar transactions for 15 properties involving the Borrower (in relation to 8 of the transactions) and, possibly, two family members, which involved them purchasing several properties using the same solicitors, the Defendant, from the same person, ECL, which used the same solicitors ("First Solicitors");

vi. On at least two of the purchase files there is evidence of the Borrower being paid cash backs by ECL (Apartments 187 and 189 - £47,000 each);

vii. The Defendant was not provided with sufficient funds to cover SDLT, such that there were long delays in registration, which did not occur for many months.

3. The Particulars of Claim dated 19th March (and 17th May 2010) in each case consisted of 35 concise clear paragraphs over just over 7 pages. The claim against the Defendant was that, in essence, this was a sub-sale (or back to back) mortgage borrower fraud, which was facilitated or enabled by the Defendant's dishonesty and/or breach of fiduciary and other duties, and which hid a fraudulent uplift in price. The claim was, quite simply, that the Defendant:

   i. Hid, or failed to disclose, the sub-sale;

   ii. Hid, or failed to disclose, the price uplift/differential;

   iii. Hid, or failed to disclose, the cash backs; and/or

   iv. Failed more generally to discharge its well known duties of care under the CML Handbook, and the Law Society 'Green Card' warning on property fraud.

4. The Defences dated 16th June 2010 in each case consisted of 75 lengthy convoluted paragraphs (and sub-paragraphs) over 68 pages. By direction of the court at a telephone CMC on 22nd November 2010, these were reduced to a Summary of Defences dated 29th November 2010 consisting of 12 paragraphs over 5 pages, albeit closely typed and with numerous sub-paragraphs.

5. None of the summarised facts in paragraph 2 (i) – (vii) were apparently in dispute by in the Defences (or the Summary or the skeleton argument subsequently exchanged and filed).

6. On 13th December 2010, pursuant to court order, the parties filed an agreed List of 8 Issues. These were helpfully identified and dealt with in Outline Opening submissions of the Claimant as follows:

   i. Duties owed to GMAC

   ii. The assignment issue

   iii. Breaches and/or misrepresentations

   iv. Causation

   v. The Valuer (Jack Goulde) issue

   vi. Contributory negligence

   vii. Mitigation

viii. The settlement issue.

7. Costs Budgets of £175,000 and £120, 000 were eventually approved by the court under the Costs Management Pilot Scheme and the matter proceeded to a 4 day trial commencing Monday 24th October 2011.

8. The Claimants case and the Defendants evidence was heard over Monday 24th and Tuesday 25th October. At the conclusion of the Defendant's evidence and after a short adjournment, the parties informed the court that the Defendant had come to an agreement following a Part 36 offer, which was made on 11th August 2011 by the Claimants, on a without prejudice basis save as to costs. The letter is a comprehensive letter where they explain their offer and their contention that their claims were undefendable on the undisputable bases summarised in paragraph 3 (i) – (iv) above.

9. The Part 36 offer was stated to be open for 28 days and subject to payment of 'standard costs'. However, if accepted after that the expiry date, the Claimant reserved the right to seek indemnity costs. The letter also deals with the situation under CPR 36.14 where the matter goes to trial and judgment is secured: indemnity costs from the date of offer expiry together with 10% interest on damages and those indemnity costs.

10. The only remaining issue unresolved between the partiers to be decided by the court is whether the Defendants should pay the costs on an indemnity basis and, if so, from what date: throughout or from the date of expiry of the Part 36 offer.

11. Mr Tunkel for the Defendant submits that this is a case where the standard basis is appropriate pursuant to CPR 36.10 but accepts that indemnity costs ought to be awarded after the expiry date because that is the tenor of CPR 36.14, albeit it is only applicable to issues of Part 36 offers (unlike here) post judgment.

12. Mr Sims for the Claimant submits that this is not a 'post judgment' situation and the offer letter clearly states "*Should you accept this offer outside of the relevant period, our client will draw this to the attention of the Court when the issue of costs is to be decided and we will seek our client's offer on an indemnity basis"*. He relies upon CPR 44.3 and refers the court to the 'conduct' of the Defence and to the court's discretion to award indemnity costs throughout on the basis of the Defendant 'conduct' of the case:

    a. CPR 44.3 (5) (b) '*whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue'*; and
    b. CPR 44 (5) (c) '*the manner in which a party has pursued or defended his case or a particular allegation or issue*.'

13. As to (b) above, Mr Sims identifies two particular pleaded allegations, referred to in the Part 36 offer letter, that were undeniable and needed to be pleaded to: First, Paragraph 20 of the Particulars of Claim:

"The prices paid by Ellison Carter were substantially lower than the £309,000 which had been stated in the mortgage application forms in that Apartments 180 and 188 were sold for £215,000.'

Secondly, Paragraph 21:

"Ellison Carter is or was a company of which the Borrower was a 50% shareholder ..."

The Defendant, as he conceded in the witness box, knew of these important facts but did not notify, his client, the Lender, of them. Nevertheless, his Defence made no admissions to these key paragraphs.

14. First, the contemporaneous and voluminous disclosed evidence clearly showed that the transactions were of a sub-sale involving Mr Edwards purchasing properties from Ellis Carter Limited, who owned the properties for six months. Mr Alomo failed to notify his client, the lender, G-MAC, of the sub-sales and in particular, to identify the involvement of Ellis Carter Limited, of which Mr Edwards and another Mr Edwards, were whole owners of. Those matters were clearly identifiable from a companies' search which the Defendant failed to do - and admitted so in the witness box despite it being obviously very important.

15. Secondly, it was also clear from all the documents that in both transactions uplifts were applied on all four properties of approximately 44 per cent and, that that was a matter which the Defendant, Mr Alomo, was again fully aware of them but failed to inform G-MAC that this was the case. In the witness box today he accepted that he did know of the uplift and that he did not inform G-MAC that that was the case and, that was really simply what the case was all about.

16. In my judgment, this is unreasonable, and indeed deplorable, 'conduct' on the part of the Defendant that has led to an unnecessary trial and costs having to be expended by the Claimants.

17. As to (c) above, Mr Sims criticises the pleaded Defences for their prolixity and obscuring of the true determinative issues in the case. The Claimants had had to expend a great deal of time and cost on dealing with all the issues thrown up by the Defendant in what Mr Sims described as "a scattergun approach to litigation". Even the List of 8 Issues agreed upon did not reflect the fact there were only really 4, as identified in paragraph 3 above and of those all were admittedly factually indefensible.

18. The criticised Defence was drafted by counsel and the statement of truth by Fugglers, solicitors then acting for the Defendant but it was not signed by an individual as it should have been under CPR 32. In the witness box today, Mr Alomo has confirmed from the outset of his cross-examination that he verified the truth of his witness statements. It would have been better in a case such as this with allegations of fraud that he had signed the statement of truth and been liable for the consequences of doing so if false and in contempt of court: CPR 32.14.

19. The case has proceeded on the basis of the very lengthy defence, which has raised every single issue possible, including the identity of the Claimant as much as everything else, when in fact, the position really ought to have been clearly identified by some rigorous treatment by the solicitors and counsel in tackling the Defendant about them. There were insurers are involved, and I am surprised they too were not more rigorous with the Defendant.

20. This form of pleading is to be deprecated and in many instances it would attract an order for wasted costs against the drafter and the person who approved it, namely counsel and the solicitors. No application has been made for that in this case, but the courts are extremely concerned generally with the state of pleadings (as they were called, now statements of case) which are prolix and confused, obscuring the issues and also the lack of a case genuinely to be tried.

21. Indeed, despite the courts attempts to rigorously case manage these claims, this situation continued through the conduct of this case to the skeleton argument that was served by the Defendant; it too made little sense. It did not appear to address whether there was an issue on liability, when it became abundantly apparent that there was no real issue on liability at all. It was conceded that there was a duty of care at least owed, although that was vigorously contested during the trial. It was also accepted at trial that there was at least a serious breach by the Defendant of failing to notify of an unexplained uplift of price and a failure to enquire of the title of the previous seller involved. Those matters were in reality impossible to defend.

22. The result is that in this particular case despite active judicial case and costs management to try and control the case and the costs of each party by Costs Budgeting and Costs Management (not cap them), so that the case could be heard for a proportionate cost. The Claimants originally submitted a costs budget of £120,000 that was closely scrutinised by the court because of its size. Eventually this budget had to be approved at £175,000 because of the amount of work the Claimant said they were having to do to deal with the blizzard of issues raised by the Defendant. I have no doubt that is the case as they were having to deal with all sorts of spurious defences, or ideas, or irrelevant purported facts, put forward by the Defendants in the conduct of these proceedings. There was no attempt to narrow the issues by the Defendant, quite the reverse, and in the end I have enquired of counsel for the Claimants what the costs bill will be probably be when it goes to detailed assessment. I am told that the budget figure of £174,000 will be exceeded and that the bill is likely to be more in the region of £200,000+. That is an enormous sum of money to spend on having to proceed with a claim for what was quite a straightforward solicitor's mortgage fraud case; quite disproportionate and off putting for any Claimant requiring access to justice. I should add it that the current solicitors recently on the record for the Defendant, Kennedys Law LLP, are utterly absolved from these criticisms.

23. It is also worth remembering that the Overriding Objective refers to dealing with cases justly, saving expense and dealing with the case in a way which is proportionate. It is the Court's duty under CPR 1.4 to manage the case actively to

encourage the parties to cooperate with each other in the conduct of proceedings identifying the issues at an early stage, so helping the court pursuant to CPR 1.3. Active case management is something that the Court has had to do to a great degree in this particular case, but it has not been helped by the fact that one of the parties has failed under CPR 1.3 to help the Court to further the overriding objective. That too is conduct to be deplored.

24. CPR 16 requires Statements of Case to be 'concise' – even in the Commercial Court, permission needs to be granted to permit any statement of case exceeding 25 pages- and for Defence to be a comprehensive response to it; not more, not less. Here, the Defence did not so much as respond but went on a lengthy undisciplined ramble of irrelevancies of its own volition.

25. In a recent speech made to a conference in South Africa Stephen Rares, a Judge of the Federal Court of Australia, eloquently pleaded for better pleadings and the reasons for requiring them – a plea that has sadly fallen on deaf ears amongst lawyers from at least the 16th Century:

> 'Experience in writing judgments suggests that, frequently, the parties have lost sight of the real dispute between them. It is buried in a morass of complex, long pleadings or, worse still, additionally, a great deal of evidentiary material. Very often, the most apparently complex cases distil down to one or a few critical documents or conversations, despite the mountain of other material that the parties tender or adduce into evidence by witnesses.
>
> One early remedy that had an effect was used by the Lord Keeper in England in 1596 in the case of *Mylward v Weldon*: Bailii citation number: [1595] EWHC Ch 1]. He ordered that a pleading 120 pages long be removed from the file because it was about eight times longer than it need have been. He ordered that the pleader be taken to the Fleet prison. His Lordship then ordered that on the next Saturday the Warden of the Fleet bring the pleader into Westminster Hall at 10 a.m. and then and there cut a hole in the midst of the pleading and place it over the pleader's head so that it would hang over his shoulders with the written side outwards. The Warden had to lead the pleader around Westminster Hall while the three courts were sitting and display him "bare headed and bare faced" and then be returned to the Fleet prison until he had paid a £10 fine – a huge sum in those days.
>
> Early identification of the real issues can streamline the conduct of a case. By making each party identify what must be proved to succeed, the judge can then begin to craft orders to focus the preparation of the case on those issues. Of course, this does not always result in a narrowing of the dispute. And, in any event, the judge may have to spend considerable time before and during an initial directions hearing to elucidate the issues.'

26. Well before CPR but a long time after the lessons of the dangers of legal "fog" in memorable described by Dickens in the mid nineteenth century in the semi fact

based fictional case of Jarndyce v. Jarndyce in Bleak House, the House of Lords reminded parties representatives that they were *"under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case ... and to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner"* per Lord Templeman in Ashmore v. Corporation of Lloyds [1992] 1 W.L.R. 446.

27. Foreshadowing CPR 1.3 and 1.4, Lord Roskill placed the burden of ensuring that this is done upon the judge in his case management role. The judge is under a duty to *"to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty"* per Lord Roskill in Ashmore v. Corporation of Lloyds [1992] 1 W.L.R. 446.

28. These two passages are both cited in the current version of the Mercantile Court website for all users to access.

29. The purpose of the statements of case is to define the issues to be tried. In case management terms they form the agenda of what documents need to be disclosed and what the witness statements need to cover: no more no less. This not only enable the judge to see the wood from the trees but it ought to enable the parties to deal with the case proportionately for the benefit of their clients – the court's customers - and their access to justice.

30. Post CPR the Court of Appeal in Lownds v. Home Office [2002] EWCA Civ 365 at paragraph 23 cited with approval the approach about this of my predecessor as Mercantile at the Birmingham Civil Justice Centre, HH Judge Alton in Jefferson v. National Freight Carriers Ltd [2001] 12 Costs 313, 321-322. She explains the vital importance of project managing and budgeting cases from the outset based on the issues raised between the parties in the statements of case: and how it approached.

> "In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate [to] spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality." [emphasis added].

31. The instant case is one where the Defences were, frankly, lamentable: prolix, obscure and irrelevant with the consequences of substantial unnecessary disproportionate costs being spent by both parties. I am told that at least 11 large conveyancing files and other material were the subject of paper disposure based on the issues raised by the Defence and the witness statements becoming very lengthy.

The responsibility for that squarely lies with the Defendants, the pleader and those who signed the statement of truth.

32. In those circumstances I am satisfied that this is a case where the conduct of the Defence is one which requires an order to indicate the Court's displeasure: indemnity costs. Furthermore, I am satisfied that it is only fair on the Claimants that that should be the case, putting the burden of proof on a detailed assessment on the Defendants to show, if they dare to do so, that the Claimants costs – apparently disproportionately high and in excess of approved budget as they are - are 'unreasonable', rather than vice versa i.e. having to prove that their own costs are 'reasonable'.

33. This is a case also where I take into account that there were no offers made by the Defendants to settle until last week, notwithstanding that the Part 36 offer was made back in August of 2011. It therefore meant that the case then had to be fully prepared and come to trial for a putative 4 day hearing and use of the court's precious resources, to the state where it collapsed when the Defendant gave evidence under cross-examination.

34. This was a clear sensible Part 36 offer, which identified what the consequences were. I am satisfied that this is a case which falls squarely within the Rules which appertain to indemnity costs and therefore, I order that the costs be assessed throughout on an indemnity basis.
