

The line between Court proceedings and the Financial Services Ombudsman

UPDATE

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In this case, the Court of Appeal considered applications to stay debt enforcement proceedings in light of complaints being made to the Financial Ombudsman Service. The Court refused to do so, principally on the basis it considered the claims to the ombudsman to be either without merit, or unlikely to achieve the result sought by the complainant.

Mourant Ozannes acted recently for Jersey Home Loans Limited (JHL) in which the Court considered whether to stay proceedings for a Financial Services Ombudsman (the FSO) claim to be considered (*Tygres Investments and GG Investments v Jersey Home Loans Limited* [2016]).

The proceedings were a simple debt action in relation to an outstanding mortgage. The debtors attempted to stay the proceedings on the grounds that there was a claim against the mortgage provider to the FSO. The Royal Court refused a stay and the debtors sought leave to appeal that decision. In this instance, the Court of Appeal refused to grant leave to appeal as it stated that there was no realistic prospect of successfully establishing that the Royal Court should have stayed proceedings pending reference to the FSO, there was no discernible defence which would have required the matter to be placed on the pending list nor was the case one of general importance which would be suitable for consideration by the Court of Appeal.

The Facts

The debtors were two Jersey companies that were beneficially owned by the same private individual. Both companies each owned a guest house and took out loans from JHL to purchase and develop those guest houses. The relevant facility letters specifically stated that it was the borrower's responsibility to ensure that it had sufficient funds available to repay the capital at the end of the mortgage term. In each case bonds were executed to secure the judicial hypothec. Each bond contained a provision that no further charge or hypothec could be obtained over the properties without JHL's consent. In breach of this, however, further charges were registered and this caused issues in re-registering JHL's security.

Repayment

The loans obtained expired in late 2012 and early 2013. The beneficial owner had verbal discussions with JHL regarding renewing the loans in September 2013. However, JHL later confirmed that neither facility met the current lending criteria of JHL and therefore refused to renew the loans. At around the same time, other creditors also sought repayment. In light of ongoing failures to (i) repay the capital sum, (ii) clear the arrears and (iii) resolve the security position, JHL issued proceedings to recover the debt. At a hearing on 4 March 2016, the debtors sought a stay pending determination of two complaints to the FSO which were lodged the previous day. The complaints were based on an assertion that JHL had acted unreasonably in not renewing the facilities and that other creditors (private lenders also seeking judgment) had acted unreasonably in refusing to agree to their security continuing to take second place behind that of JHL. The Bailiff expressed doubts as to whether the FSO had the ability to direct JHL to extend its loans and the Royal Court therefore declined to order a stay. Both parties obtained judgment against the debtors.

The Test for Appeal

The debtors sought leave to appeal to the Court of Appeal on the basis that the various proceedings should have been stayed pending the decision of the FSO. Since the hearing on 4 March 2016, the Office of the FSO had rejected the complaints against JHL and the private lenders.

A decision to stay proceedings pending the outcome of the FSO complaint is an exercise of discretion.

The Court of Appeal noted that it would only interfere with a discretionary decision of the Royal Court if it had misdirected itself as to the principles governing the exercise of discretion, it had taken matters into account which it ought not to have done or failed to take into account matters it ought to have done or that the decision was plainly wrong.

In order to obtain leave against an interlocutory decision, it must be possible to demonstrate that the appeal had a real prospect of success, that a question of general principle falls to be decided for the first time or there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage.

The Decision

The Court of Appeal refused to grant leave of appeal in respect of both JHL and the private lenders. The Court of Appeal refused leave to appeal in relation to the private lenders as the FSO had already determined that it had no jurisdiction to consider the complaint because the private lenders were not carrying on a 'relevant financial business'. Even though the debtors had appealed this decision to the FSO, the Court of Appeal did not regard the prospects of success as very high as it did not believe that the private lenders were carrying on a credit business. Moreover, the Court of Appeal agreed with the Royal Court's decision in terms of refusing to stay proceedings pending the outcome of the FSO. In addition, the Court of Appeal did not consider that the private lenders owed a duty of care to advise as to the wisdom of the loan or could be prevented from calling in the loan because it would cause hardship. Finally, the Court of Appeal disagreed with the beneficial owner's assertion that the private lenders had an implied duty to allow re-registration.

In terms of JHL, the Court of Appeal did not agree with the beneficial owner's contentions that a verbal discussion gave rise to a legally binding agreement nor did it agree that it was fundamentally inequitable for judgment to be obtained where a borrower failed to comply with the demand. In relation to the complaint to the FSO, the Court of Appeal was referred by the beneficial owner to various English cases whereby a mortgage company was required to extend the loan and/or terms.

The Court of Appeal stated that it could see no reasonable prospect of such an order being made in Jersey by the FSO because it could not imagine the FSO finding that it was fair and reasonable to force a mortgage company to renew or extend a mortgage when the borrower was not up to date and was in breach of the loan conditions (by allowing subsequent hypothecs to be registered on the properties without JHL's consent).

The Court of Appeal distinguished the present case with the English cases, as in the English cases both borrowers were fully compliant with all mortgage terms and requirements. The Court of Appeal therefore concluded that there was no realistic possibility of it holding that the Royal Court was plainly wrong in not staying proceedings pending the determination of the complaint to the FSO.

Whilst it did state that it might be useful for the Royal Court to give further consideration to the interaction between the FSO process and the Court, the Court of Appeal held that it should be done where there is a realistic possibility of the FSO making an award which falls outside the powers of the Royal Court.

Conclusion

The Court of Appeal therefore concluded that there was no realistic prospect of successfully establishing that the Royal Court should have stayed proceedings pending reference to the FSO, there was no discernible defence which would require the matter to be placed on the pending list and there was no point of general importance which would be suitable for consideration by the Court of Appeal.

There may need to be future consideration by the Court of where the line between the jurisdiction of the Court and the FSO precisely falls, but this is a helpful case in showing the robust approach the Court's will take in dealing with FSO complaints that lack any real merit.

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[Document Reference]