

JERSEY / JUDGMENT

Tygres Gg Mayger -v- Genée Anor

[2016] JCA 115A (05 July 2016)

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Court of Appeal 5 July 2016 Before : Sir Michael Birt., sitting as a Single Judge Between Tygres Investments Limited Appellant And Jersey Home Loans Limited Respondent Between GG Investments Limited Appellant And Jersey Home Loans Limited Respondent Between GG Investments Limited First Appellant And Geoffrey Robert George Mayger Second Appellant And Pierre Henry Genée and Marlene Genée (nee Jouanny) Respondents Between Tygres Investments Limited First Appellant And Geoffrey Robert George Mayger Second Appellant And Pierre Henry Genée and Marlene Genée (nee Jouanny) Respondents Between Tygres Investments Limited First Appellant And Geoffrey Robert George Mayger Second Appellant And Pierre Henry Genée and Marlene Genée (nee Jouanny) Respondents Mr G. R. G. Mayger appeared on his own behalf and for the Appellants. Advocate J. Harvey-Hills for Jersey Homes Limited. Advocate G. D. Emmanuel for Mr and Mrs Genée.

judgment

birt ja:

Introduction

1. This is an application for leave to appeal against five judgments which were entered in the Royal Court (the Bailiff together with Jurats Olsen and Ramsden) at the Friday afternoon sitting of the Samedi Court on 4 th March, 2016. Essentially, it is submitted that the Royal Court should not have given the various judgments on that occasion but should have stayed the proceedings pending consideration by the office of the Financial Services Ombudsman ("the FSO"). 2. There was a hearing on 6 th May, 2016, during which I asked for further written submissions from Jersey Home Loans Limited with an opportunity for the appellants to respond. These have since been received. Factual Background 3. There were no affidavits before the Royal Court or indeed before me at the hearing on 6 th May, 2016. However, based on what the Royal Court and I were told, coupled with various documents which were produced, the position would appear to be as follows. 4. Mr Mayger is the beneficial owner of Tygres Investments Limited ("Tygres") and GG Investments Limited ("GG"). Tygres is the owner of the Lorraine Guest House and GG is the owner of Bay View Guest House, which is also Mr Mayger's home. 5. Pursuant to a facility letter dated 12 th

January, 2004, GG borrowed £544,000 from Jersey Home Loans Limited ("JHL"). Although the facility letter stated that the loan was repayable upon demand, it was agreed in the letter that the loan would be for a period of five years, with interest only being payable during that time. The facility letter stated at paragraph 5 that, as security for the loan, JHL would require a first registered charge over Bayview Guest House. JHL duly obtained a first judicial hypothec over Bay View Guest House as security. There were additional loans in 2005 and 2007 on broadly similar terms, with JHL taking a second and third hypothec over Bay View Guest House. In each case, it was a condition of the loan set out in the facility letter that JHL would obtain a second and third hypothec respectively. 6. By facility letter dated 21st November, 2007, Tygres obtained a similar loan in the sum of £501,500 from JHL (i.e. nominally repayable upon demand but in fact for a 5 year term) secured by a first judicial hypothec on Lorraine Guest House. Again, the facility letter stated that it was a condition of the loan that JHL should obtain such a first hypothec. 7. All the facility letters included the following passage at paragraph 2:- "It is your responsibility to ensure that you have sufficient funds available to repay the outstanding capital balance at the end of the mortgage term." 8. In each case bonds were executed to secure the judicial hypothec. Each of the bonds contained a provision to the effect that the borrower (i.e. Tygres or GG) was not to further charge or hypothecate the relevant property without the previous written consent of JHL. The bonds further provided that if at any time the relevant borrower failed to observe any of the terms of the bond, JHL could demand immediate repayment of the capital and accrued interest to date. 9. Mr and Mrs Genée are private individuals. They have also lent money to GG and to Tygres. The loan to GG was made for three year period commencing 19 th January, 2011, in the sum of £150,000. It was secured on Bay View Guest House by way of a judicial hypothec, ranking behind the three judicial hypothecs in favour of JHL referred to at paragraph 5. 10. Their loan to Tygres was in the aggregate sum of £150,000, although this was paid in two tranches, one of £100,000 on 27th January, 2012 and £50,000 in March 2012 secured by second and third judicial hypothecs over Lorraine Guest House behind the first hypothec of JHL. The loans were for an initial term expiring on 18th January, 2013, and they then rolled forward indefinitely with either party being able to give three months' notice requiring repayment. This was apparently so as to be able to match up repayment with the loan from Mr and Mrs Genée to GG (referred to in the preceding paragraph) which was repayable on 18th January, 2014. 11. All the loans from Mr and Mrs Genée were guaranteed by Mr Mayger personally. Events leading to demand for repayment 12. Although the Court was not given any exact dates, there seems to be no dispute that the loans from JHL expired in late 2012 or early 2013. Mr Mayger entered into discussions regarding their renewal and asserts that in September 2013, a member of the staff at JHL said to him on the telephone that the renewals had been approved and that the facility letters would be sent to him shortly. At that time, according to Mr Mayger neither company was in arrears with the interest payments. However, any such suggestion was short lived because it appears from Mr Mayger's letter of 22nd January, 2014, to Mr Richardson of JHL that Mr Richardson had spoken to Mr Mayger in September 2013 and had informed him (Mr Mayger) that neither facility met the current lending criteria of JHL and that accordingly Mr Mayger would need

to re-finance from a new lender. Mr Mayger had apparently expressed surprise because of the earlier conversation and Mr Richardson had said he would investigate but nothing further occurred. 13. In his letter of 22nd January, 2014, Mr Mayger explained that he was sixty and therefore his borrowing ability was restricted. He felt that he had no choice but to place Lorraine Guest House on the market. In relation to Bay View Guest House, he explained that his exit strategy was to sell the property when he was ready to retire from the business, by which time he would expect to have formalised some planning permission to maximise the return on the property. He therefore asked JHL for a realistic period of grace on the loans. 14. JHL replied on 11th February, 2014, confirming that it would consider a further five year extension of the mortgage in respect of Bay View Guest House on an interest only basis. It said that, in order to consent to the extension, it would require certain matters it listed in the letter to be dealt with. By a second letter of the same date JHL also agreed to extend the loan to Tygres for six months until August 2014 so as to enable Tygres to sell Lorraine Guest House. 15. Mr Mayger replied on 8th March, 2014. I have only seen a letter in respect of Tygres, but in that letter he queried the proposed new interest rate, which he said would be almost three times that which he had recently been struggling to meet. He said that he therefore proposed to pay the old interest rate until such time as his income improved and the excess interest would therefore need to be added to the capital. JHL replied on 19th March emphasising that any extension of the loans was subject to the increased interest rate which would have to be paid in full, so that any partial payment would be a default. In relation to the extension of the GG Loan, the letter said that the documents provided by Mr Mayger would be reviewed and, if they supported an extension, a valuer would be instructed to value Bay View Guest House. 16. At about this time, when approached by Mr Mayger, Mr and Mrs Genée decided that they wished to have all their loans repaid, the term of the loans having expired. 17. I should add to that, shortly before this, Mr Mayger had invested in another hotel, which had been taken on lease. This had not worked out as well as he had hoped in the initial period and imposed a cash flow strain on his resources. Arrears on the various loans from JHL and Mr and Mrs Genée began to arise towards the end of 2013. In connection with that other hotel transaction, a company called Marina Hotel (1972) Limited ("Marina Hotel") had registered a fifth hypothec over Bay View Guest House ranking behind those of JHL and Mr and Mrs Genée. 18. As previously mentioned, the loans from JHL to Tygres and GG contained a term that the relevant company could not further hypothecate its property without the prior written consent of JHL. Mr Mayger accepted before me that neither company had obtained the prior written consent of JHL to the borrowings from Mr and Mrs Genée or to the hypothec granted to Marina Hotel in respect of Bay View Guest House. 19. On 20th June, 2014, Bedell Cristin, acting for JHL, wrote to GG pointing out that the first hypothec held by JHL over Bay View Guest House needed to be re-registered because of the expiry of ten years, but that GG had allowed subsequent hypothecs to be registered behind those of JHL without seeking the written consent of JHL. The letter stated that negotiations in relation to extending the current facility, which had expired, could not proceed until the first hypothec was re-registered. A deed of priority was then prepared so as to provide that the re-registered

hypothec of JHL would rank ahead of the hypothecs held by Mr and Mrs Genée and Marina Hotel. Discussions took place with Mr and Mrs Genée and Marina Hotel. Initially neither of these parties was willing to sign the deed but eventually in November 2015, Marina Hotel did so. However, Mr and Mrs Genée refused to agree to allow the re-registered hypothec of JHL to rank ahead of their hypothec. 20. During the course of 2014, both GG and Tygres continued to fall into areas in respect of the loans from both JHL and Mr and Mrs Genée. Eventually, all the various loans were called in. JHL instituted proceedings in January 2016 and Mr and Mrs Genée instituted proceedings in February 2016. The hearing before the Royal Court 21. All the matters came before the Royal Court on 4th March, 2016, at which time both JHL and Mr and Mrs Genée sought judgment for the various loans to GG and Tygres. JHL was represented by Advocate Cook, Mr and Mrs Genée by Advocate Emmanuel and GG, Tygres and Mr Mayger by Advocate Lawrence. The Court has had the advantage of a transcript of the proceedings that Friday afternoon. 22. On behalf of the various appellants, Advocate Lawrence accepted that the sums were due, that there were modest arrears of interest, and that there was no defence to the action. There was no application to place any of the matters on the pending list. However, he applied for a stay pending determination of two complaints to the FSO under the Financial Services Ombudsman (Jersey) Law 2014 ("the 2014 Law"), which complaints had been lodged the previous day. He explained that GG and Tygres considered that JHL had acted unreasonably in not renewing the facilities and that Mr and Mrs Genée had acted unreasonably in refusing to agree to their security continuing to take second place behind that of JHL, with the result that JHL had refused to extend its loans. 23. During the course of the hearing the Bailiff was referred to the 2014 Law and expressed doubt as to whether the FSO had the ability to direct JHL to extend its loans. Following retirement to consider the matter the Court came back and indicated that it did not consider that the FSO could reasonably require JHL to extend its loans, that they had been outstanding since the date of demand for some time and that a reference to the FSO could not cure the basic difficulty, which was that GG and Tygres had overreached themselves. In the light of the fact that it had been conceded that there was no defence to the actions, the Court declined to order a stay. 24. It therefore gave judgment on the various claims as follows (I do not include references to interest for the sake of simplicity):- (i) JHL against Tygres - £509,661.40; (ii) JHL against GG - £738,174.42; (iii) Mr and Mrs Genée against GG and Mr Mayger (as guarantor) - £150,000; (iv) Mr and Mrs Genée against Tygres and Mr Mayger (as guarantor) - £100,000; and (v) Mr and Mrs Genée against Tygres and Mr Mayger (as guarantor) - £50,000. 25. GG, Tygres and Mr Mayger now seek leave to appeal on the grounds that the Royal Court should have stayed the various proceedings pending the decision of the FSO. As the application has progressed, it has become apparent that Mr Mayger is also in effect contending that there is a defence to the actions, so that they should be placed on the pending list. Events since the hearing before the Royal Court. 26. Since the hearing, the Office of the FSO has rejected both complaints by letters dated 23rd March, 2016. In relation to the complaint against JHL, the letter stated that Article 12(3)(b)(iii) of the 2014 Law allowed the FSO to reject a complaint where the subject matter of the complaint has been the subject of legal proceedings in which a final decision has been made. The letter

stated that, in view of the judgment of the Royal Court, the FSO was unable to review the complaint further. 27. In relation to the complaint against Mr and Mrs Genée, the letter stated that the FSO was unable to consider it because the 2014 Law only applied to a 'relevant financial business' and a private loan from unlicensed individuals such as Mr and Mrs Genée was not considered 'relevant financial business'. 28. Both decisions were made by an officer of the FSO and the letters stated that there was a right to appeal to the FSO himself. The appellants have exercised that right to appeal in relation to both complaints but no decision has yet been given. It was suggested during the hearing that the FSO may be awaiting the result of this application for leave to appeal. 29. As to arrears of interest owed to JHL, GG and Tygres were between them in arrears by the sum of £29,645.51 at the end of February 2016 (i.e. just before the hearing before the Royal Court) and £28,154.47 in arrears at the end of April 2016 (i.e. just before the hearing before me). Mr Mayger is able to say therefore that GG and Tygres have continued to service their loans in the interim period and indeed reduce the arrears slightly. These figures are taken from the table produced by JHL following the hearing. Mr Mayger asserts that he will be able to clear the arrears owed to JHL in the near future. 30. As to the debts owed to Mr and Mrs Genée, Mr Mayger asserted that there were now no arrears and the companies were servicing the interest now due. In the absence of any evidence to the contrary, I accept that is the position. Test on appeal 31. A decision as to whether to stay proceedings for reference to the FSO is clearly an exercise of discretion. The test on an appeal from an exercise of discretion is well established. The Court of Appeal will only interfere with a discretionary decision of the Royal Court, if:- (i) it has misdirected itself as to the principles governing the exercise of its discretion; (ii) it has taken into account matters which it ought not to have done or has failed to take into account matters it ought to have done; or (iii) its decision is plainly wrong - (see *United Capital Corporation v Bender and Ors*

[2006] JLR 269 at paragraph 25). 32. Furthermore, for the reasons described at paragraphs 26-30 of *Acorn Finance Limited v Powell*

[2016] JCA 063, a decision not to grant a stay or to refuse to place a matter on the pending list is an interlocutory decision even though the result is that the Royal Court has granted final judgment. In order to obtain leave to appeal against an interlocutory decision, a potential appellant must show:- (i) that an appeal has a real prospect of success; (ii) that a question of general principle falls to be decided for the first time; or (iii) that 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 - (see *Crociani v Crociani*

[2014] (1) JLR 426 at paragraph 50). Judgments in favour of Mr and Mrs Genée 33. Mr Mayger does not dispute that the period of all the loans from Mr and Mrs Genée has expired, that under the terms of the loans Mr and Mrs Genée are entitled to demand re-payment of the capital, and that they have done so. On the face of it therefore, there can be no possible defence to their claims. 34. However, on behalf of himself and the other appellants, Mr Mayger submitted that the Royal Court should not have granted

judgment.

I would endeavour to summarise his contentions as extracted from his notice of appeal and oral submissions before me as follows:- (i) The Court should have stayed the proceedings pending determination of the appellants' complaints to the FSO; (ii) The reason the appellants failed to repay the loans was that JHL had failed to renew its loans, which meant that the appellants were unable to borrow funds to replace the loans from Mr and Mrs Genée. The failure of JHL to renew its loans was because of the conduct of Mr and Mrs Genée in failing to agree to the deed of priority so as to defer their hypothec to the re-registered hypothec of JHL. They had thereby committed a fundamental breach of their contract which was based upon their security coming behind that of JHL. They had therefore brought the failure to re-pay upon their own heads. (iii) Mr and Mrs Genée owed a duty of care towards the appellants as borrowers. They had breached this duty by refusing to agree to the deed of priority. (iv) If the Court felt that it had no alternative but to grant judgment, it should stay enforcement of such judgments pending resolution of the complaint to the FSO against JHL. 35. The difficulty with the first submission is that, since the hearing before the Royal Court, the FSO has determined that he has no jurisdiction to consider the complaint because Mr and Mrs Genée are not carrying on 'relevant financial business'. Mr Mayger argues that the FSO was wrong in his determination and has appealed. 36. Whether he will succeed is of course a matter for the FSO. However, I do not regard the prospects of success as high. Article 7 of the 2014 Law provides that a complaint must relate to an act by another person '...being an act that occurred in the course of relevant financial services business carried on, in or from within Jersey by that other person'. 'Relevant financial services business' is defined in Article 9 and Mr Mayger accepts that the only possible category which might include Mr and Mrs Genée is that described at Article 9(1)(i), namely 'relevant credit business within the meaning of Schedule 4'. Turning to Schedule 4, paragraph 1 provides:- "Relevant credit business is any business so far as it comprises:- (a) provision of credit under credit agreements..." Paragraph 2 goes on to provide that 'credit' includes a loan secured against immoveable property. 37. Before the Royal Court, Advocate Lawrence had asserted that Mr and Mrs Genée appeared to be quite experienced private lenders and had made a number of other loans secured on immoveable property. Mr Mayger submitted that they therefore fell within the terms of Schedule 4 and that the FSO had been wrong to hold that he had no jurisdiction to consider the complaint against them. 38. I cannot accept that argument. Schedule 4 only applies to a lender who is carrying on a credit business. The fact that, as is common in Jersey, private individuals choose to invest their cash by lending on the security of immoveable property does not mean that they are carrying on a business. There is no material before me that would enable me to conclude that there is a realistic possibility of the FSO on appeal holding that Mr and Mrs Genée are carrying on a credit business. 39. Turning to the second and third submissions, it is convenient to take them together. In essence, they involve the proposition that it was unfair, unreasonable and in breach of their contract for Mr and Mrs Genée not to agree to the deed of priority, with the consequence that JHL did not renew its loans. It is said therefore that Mr and Mrs Genée are the authors of their own misfortune and that furthermore that they have acted in breach of the duty of care which a lender owes towards a borrower. 40. Mr Mayger submits that the test as to whether a duty

of care exists is set out in the well-known case of *Caparo Industries plc v Dickman*

[1990] 1 All ER 568 . This involves the proposition that a duty of care exists where three aspects are satisfied, namely that there is reasonable foreseeability of harm, that a relationship of proximity exists between the parties and that it is fair just and reasonable to impose a duty on the proposed defendant. 41. Mr Mayger argued that Mr and Mrs Genée were in breach of this duty not only by refusing to sign the deed of priority. He submitted that it was also an established principle that where a lender provides an interest only loan facility to an elderly borrower (in this case aged 60 on maturity of the loan) who has no other means of repaying the facility apart from the sale of the property, the loan has been made on poor lending principles and the lender has an obligation to support the borrower until a fair and reasonable outcome can be achieved. 42. I do not consider that this point is arguable. A lender does not owe a duty of care to advise a borrower as to the wisdom of the loan, nor can he be prevented from calling in a loan which is due under the terms of that loan simply because this would cause hardship to the borrower. As the Royal Court said in *Toothill v HSBC Plc*

[2008] JLR 077 at paragraph 37:- "A bank and a borrower are on the opposite sides of the contract. The bank owes no duty (whether in contract or in tort) to advise the borrower (or guarantor) either on their financial position or on whether they should take independent legal advice. The bank is entitled to have regard only to its own interests. It is under no duty to advise the borrower (or guarantor) on whether the loan is sensible or appropriate from the borrower's point of view. As *Warne & Elliott, Banking Litigation*, 2nd ed. (2005) put it (para. 3-007, at 107): "The O'Brien principle is concerned with notice and not with duty. It does not place any duty on a bank either to advise the guarantor or to advise the guarantor to seek independent legal advice. The bank owes no contractual or tortious duty to the guarantor to arrange any such private meeting or to advise the guarantor to take independent legal advice. Accordingly, it does not conflict with the long line of decisions which hold that there is no such duty." See also *Barclays Bank PLC v. Khaira* [1992] 1 WLR 623." 43. As to the alleged breach of contract, there was no express term that Mr and Mrs Genée should agree to re-registration of JHL's hypothec ahead of their own. Mr Mayger must therefore rely upon there being an implied term to that effect. I do not see that this is arguable. A term may only be implied in a contract if it is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it. The need to imply the term must be so obvious that 'it goes without saying'

- see *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Limited*

[2015] 3 WLR 1843 at [18]. It is a common situation for persons agreeing to take a second hypothec at the time of a loan to find that the first hypothec subsequently disappears (whether by repayment or for other reasons) and they thereby find themselves having a first hypothec. I do not consider it arguable that, merely because a party agrees to take a second hypothec at the outset, it is necessary to give business efficacy to the contract that a term is implied that they will agree to re-registration ahead of that security. The contract

is perfectly effective without the implication of such a term. Whilst in many cases such a party, when asked, would be likely to agree to a request that an earlier hypothec be re-registered ahead of their security, that is very different from saying that a term should be implied that they must so consent. 44. Nor can I accept the fourth submission of Mr Mayger, namely that any judgment in favour of Mr and Mrs Genée should be stayed pending the outcome of any complaint to the FSO in respect of the conduct of JHL. If Mr and Mrs Genée are entitled to judgment, I do not see that it would be proper for the court to prevent them from taking steps to enforce the judgment merely because there is a complaint to the FSO against some other lender (in this case JHL). 45. In all the circumstances, I do not consider that there is any realistic prospect of the appellants showing that the Royal Court was plainly wrong in refusing the stay and giving judgment against GG and Tygres (and Mr Mayger as guarantor) in favour of Mr and Mrs Genée. The fact is that the loans from Mr and Mrs Genée were for a fixed period which had expired; that they could therefore be called in by Mr and Mrs Genée at any time; and that the borrowers were in arrears at the time they were called in and had remained in arrears for substantial periods in 2014 and 2015. Even if they had not been in arrears, Mr and Mrs Genée were entitled, under the terms of the loans, to demand repayment, which is what they did. 46. I therefore refuse leave to appeal in connection with the three judgments in favour of Mr and Mrs Genée. Judgments in favour JHL 47. The loans from JHL had also expired and had not been renewed. There were arrears of interest at the time of the proceedings and JHL had demanded repayment of the capital and interest in accordance with the terms of the loans. It follows again that, on the face of it, JHL was entitled to judgment. 48. However, Mr Mayger submits that Royal Court should have stayed the proceedings and/or placed it on the pending list. I would summarise his grounds for so submitting as follows:- (i) JHL acted unreasonably and in breach of contract in failing to renew the loans despite an initial verbal agreement to do so. (ii) The Royal Court was wrong not to stay the proceedings pending determination of the complaint made to the FSO. (iii) It was fundamentally inequitable for a subordinate lender (Mr and Mrs Genée) to be able to obtain judgment for their debt and thereby cause judgment to be given to JHL when it may not ordinarily have been granted. (iv) JHL had a duty of care towards the appellants as borrowers and was in breach of that duty of care by failing to renew the facilities and calling in the loans. 49. As to the first ground, I am willing to proceed on the basis asserted by Mr Mayger, namely that it was indicated orally on the telephone to Mr Mayger by a member of JHL's staff in September 2013 that the loans would be renewed and the facility letters forwarded to him. However, the facility letters were never sent and it is clear that Mr Mayger was informed shortly after the initial conversation that the loans would not be renewed because they were regarded as commercial facilities and JHL did not do commercial facilities. This emerges from Mr Mayger's own letter of 22nd January, 2014. It is also clear from that letter that he did not assert that there was any binding obligation because he asked for a more limited renewal so as to pursue his exit strategy by selling Lorraine Guest House. His request was agreed to in principle because on 11th February, 2014, JHL wrote saying that it would consent to a six months extension of the

Tygres loan and would consider a further five year extension of the GG loan. It went on to say that, in order to consent to the extension, it would require certain information and documents. The letter from JHL of 19th March, 2014, said that the documents supplied in respect of GG would be reviewed and, if they supported an extension of the loan, a valuer would be appointed. It is clear that these letters could not amount to a binding agreement to renew the loan to GG. In relation to Tygres, it can properly be argued that the letters constituted an agreement to renew the loan for 6 months. However, that period has long since expired so that the loan was in effect extended for that period. The real question is whether the telephone conversation of September 2013 amounted to a binding agreement on the part of JHL to renew all the loans. 50. Before the Royal Court, Mr Mayger's advocate accepted that, although the telephone conversation of September 2013 gave rise to an expectation on Mr Mayger's part that the loans would be renewed, there was no enforceable promise (i.e. contract) to that effect. Mr Mayger now seeks to depart from that position. He asserts that the telephone conversation gave rise to a binding contract on the part of JHL to renew the loans. If it is arguable that this is the case, he is of course entitled to have the matter placed on the pending list because it might amount to a defence to the actions by JHL. 51. However, I do not consider it realistically arguable that there is a defence to the claims for repayment brought by JHL. I so conclude to the following reasons:- (i) Mr Mayger is, on his own assertion, an experienced mortgage agent and would be aware that the invariable practice is that matters such as the granting and renewal of loans by financial institutions are subject to written agreement. (ii) This is confirmed in this particular case by his assertion that he was told on the telephone that the facility letters for the renewal of the loans would be sent to him. It is clear therefore that, in accordance with normal practice, it was those facility letters which would have set out JHL's position as to the term, interest rate, security etc. of any renewal of the loans. Agreement on such matters is of course necessary to provide sufficient certainty for a contract to be formed. These facility letters would have required acceptance by Mr Mayger on behalf of the companies before there was a binding contract. It is impossible to argue that there was a binding contract on the basis of an oral conversation when that very conversation envisaged the proposed terms of the contract being set out in the facility letters. (iii) All the facility letters in respect of the existing loans specified that JHL require a first hypothec over the relevant property in order to secure its loan. It is extremely unlikely that JHL would have agreed to renew the loans on different terms so that it did not have first security, and Mr Mayger has not asserted that there was any such agreement in the course of the telephone conversation. The best he can argue is that it was implicit from the telephone conversation that renewal would be on the same terms as the existing loans, which would therefore have included the requirement for JHL to have a first charge. In this respect, it is significant that, once it was discovered in June 2014 that the first hypothec needed re-registering, it was immediately made clear by JHL that there could be no renewal of the loans until a deed of priority had been entered into by the subsequent lenders agreeing to JHL maintaining its position as first secured creditor. (iv) The problem in maintaining JHL's position as first secured creditor arose because, as Mr Mayger

admitted in the hearing before me, both GG and Tygres had breached the terms of the existing loans by allowing subsequent hypothecs to be secured on both Bay View Guest House and Lorraine Guest House without obtaining the prior consent of JHL. Thus, even if, contrary to my view, the telephone conversation could somehow amount to a binding agreement on the part of JHL, it was not possible for GG and Tygres to fulfil the terms of such agreement because, in the absence of the deed of priority, they could not provide first security to JHL. The agreement would therefore have fallen away. Mr Mayger relies upon a letter of 29th October, 2012, when GG wrote seeking an extension and increase in its loan, during the course of which it disclosed in passing that there was an existing second mortgage. However, I do not see that this notification after the event of the existence of a second charge in favour of Mr and Mrs Genée could possibly constitute an agreement on JHL's part to accept that upon renewal their hypothec would rank behind that of Mr and Mrs Genée. Furthermore, the letter has does not disclose - possibly because it was not in existence at that time - the hypothec of Marina Hotel. 52. For these reasons, it is in my judgment not realistically arguable that the telephone conversation with a member of staff in September 2013 gave rise to a binding legal agreement on the part of JHL to renew the loans and the advocate for GG and Tygres was correct to concede before the Royal Court that this was so. 53. Turning to the second ground, Article 16(1) of the 2014 Law provides that the FSO's award may include an award of compensation and may also include "...a direction that the respondent take such steps in relation to the claimant as the Ombudsman considers to be fair and reasonable in all the circumstances of the case". Furthermore, Article 15(1) provides that the FSO must determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. Article 16(2)(a) states that the FSO may issue a direction which includes steps which a court could not order to be taken. 54. It would seem therefore that the FSO fulfils a different role from that of the Court. The Court must apply the law. It is there to enforce the strict legal position and the legal rights of each party under the contract. Thus, if a loan has fallen due and has not been repaid, the lender is entitled to seek judgment and the Court has little option but to grant it, however harshly it may think the lender is behaving. Conversely, the FSO appears not to be bound in the same way and may make determinations having regard to what he considers to be fair and reasonable. 55. I have been provided with further information about the practice of the Financial Ombudsman under the relevant English legislation, which was not before the Royal Court. I accept that the Royal Court was not made aware of the extent of the remedies which have been given by the English Financial Ombudsman and which may therefore be capable of being given by the FSO. 56. I was referred to Issue 130 of 'Ombudsman News' which is published by the Financial Ombudsman service in that jurisdiction. Mr Mayger drew my attention specifically to two case studies in that issue, namely 130/10 and 130/14. 57. In case 130/10, Mr A, a man in his eighties, had discovered that his mortgage had a twenty-five year term, whereas he had thought he had a lifetime mortgage. This meant he would be forced to sell his home in his late nineties. He asked the mortgage company to change the arrangement but the company refused. On complaint to the Financial Ombudsman, it was held that the

mortgage company had not given personalised advice at the time of the mortgage (when Mr A and his wife were in their early seventies) taking into account their age and circumstances. Mr A was now faced with the prospect of selling his home at nearly one hundred years old - with fifteen years of worrying in front of him. The Ombudsman did not think this was fair and told the mortgage company to convert Mr A's twenty-five year mortgage to a mortgage with no set end. His income was sufficient to cover the interest payments with the capital being paid back when his house was sold after he died. 58. Case 130/14 was not dissimilar. Mrs R, a widow in her eighties, received a letter from her mortgage company explaining that the term of her interest only mortgage was coming to an end. She asked if the mortgage term could be extended to the rest of her life, but the mortgage company would not agree. When the mortgage had been taken out, Mrs R had been seventy-five and her husband had been seventy. They had told the mortgage provider at the time that they did not have arrangements in place to repay the capital at the end of the term. The Financial Ombudsman concluded that it was not fair to say at this stage that Mrs R was too old and force her to sell her home. The mortgage company was told to extend the term of the interest only mortgage indefinitely - Mrs R was in position to fund the interest from her income - so that the capital could be repaid when the home was eventually sold. 59. I have not been referred to the terms of the English legislation for the purposes of comparison of the wording with the Jersey legislation and accordingly make no ruling as to whether the FSO could make similar orders in Jersey effectively directing a mortgage company to enter a new contract. However, even assuming for present purposes that he could, I see no reasonable prospect of such an order being made in this case even if the FSO were to reverse his decision and hold that he could investigate the complaint against JHL. That is for two main reasons:- (i) While GG and Tygres may have been up-to-date with their payments in September 2013, they fell into arrears towards the end of 2013 and have remained in arrears to date. I do not consider that the FSO would ever find it fair and reasonable to force a mortgage company to renew or extend a mortgage when the borrower is not up-to-date in servicing the payments required under the mortgage. (ii) Both Tygres and GG were also in breach of their loans by allowing subsequent hypothecs to be registered against the relevant property without the consent of JHL. Mr Mayger accepted that this was so, but said that it was his experience that JHL would agree to registration of a subsequent hypothec provided that there was sufficient equity in the property and would not insist on the subsequent lender agreeing in advance to re-registration of JHL's hypothec ahead of the security of the subsequent lender. Advocate Harvey-Hills, on the other hand, said that it was his experience that banks invariably did require such an assurance before consenting to a subsequent hypothec. I am not in a position to make any finding as to what JHL would have done but the fact remains that it was never given the opportunity to decide what was to be done because GG and Tygres breached the terms of the mortgages by taking further lending and permitting subsequent hypothecs without obtaining the prior consent of JHL. Given the difficulties this caused in terms of security, I find it highly unlikely that any FSO would direct a mortgage company to renew or extend a loan when a borrower had breached the contract and could no longer

offer a first hypothec as security. 60. The position is very different from that in the two English case studies referred to earlier, where it appears that the borrower was complying fully with all the requirements of the mortgage. As indicated earlier, this is a case where not only had the terms of the loans expired but the borrowers were not keeping up with the interest payments (arrears had been incurred and continued to exist at the time the matter was before the Royal Court), and the borrowers were also in breach of an important term of the mortgage concerning subsequent hypothecs. In the circumstances, I do not consider that there is a realistic possibility of the Court of Appeal holding that the Royal Court was plainly wrong in not staying the cases for determination by the FSO. 61. Mr Mayger also submitted that, as JHL is a subsidiary of a UK company which is regulated by the Financial Conduct Authority, it was bound to act in accordance with the standards set out on the parent company's website. It had failed to do so and this was an additional ground for the FSO to intervene. However, I do not consider that argument overcomes the difficulties referred to in the two preceding paragraphs. 62. Mr Mayger argued that, even if there was not a realistic prospect of success, this was a case where a general principle fell to be decided for the first time, namely the circumstances in which the Royal Court should stay proceedings brought by a mortgage company pending a determination by the Ombudsman. I agree that at some stage it might be useful for a court to give consideration to that issue; but this should be done where there is a realistic possibility of the FSO making an award which falls outside the powers of the Court; otherwise the appeal would in effect be purely academic. 63. I have to confess to having had some difficulty in following the argument in relation to (iii) of Mr Mayger's contentions but it appears to be based on an assertion that the Royal Court thought there were sufficient grounds to order a stay against JHL, but could find no good reason to refuse the application for judgment of Mr and Mrs Genée. That does not appear to be a correct assertion. I have read the transcript carefully and the Royal Court did not find that there were good grounds to stay the application for judgment by JHL. It follows that I do not accept Mr Mayger's contention that it is fundamentally inequitable for a subordinate lender to be able to obtain a judgment for its debt and thereby overcome the deficiencies of a higher ranking lender, and cause judgment to be given to that lender where it may not ordinarily have been granted. As indicated earlier, if a lender is entitled to demand payment under the terms of the loan and has done so, the Court has no choice but to give judgment if the borrower has failed to comply with the demand. 64. As to (iv), it is in effect the same point as was raised in relation to Mr and Mrs Genée. For the reasons given earlier, I do not think it is reasonably arguable that JHL owed a duty of care to Tygres or GG or that it was in breach of any such duty of care as alleged in the contentions.

Conclusion

65. For these reasons, I have come to the clear view that there is no realistic prospect of success in establishing either that the Royal Court should have stayed the proceedings pending reference to the FSO or that there is a discernible defence entitling the appellants to place

the matters on the pending list. Furthermore, there is no point of general importance which would be suitable for consideration by the Court of Appeal on the facts of this case. I therefore refuse leave to appeal in respect of all the judgments. Authorities Financial Services Ombudsman (Jersey) Law 2014. United Capital Corporation v Bender and Ors

[2006] JLR 269 . Acorn Finance Limited v Powell

[2016] JCA 063 . Crociani v Crociani [2014]

(1) JLR 426. Caparo Industries plc v Dickman

[1990] UKHK 2. Toothill v HSBC Plc

[2008] JLR 077. Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Limited

[2015] 3 WLR 1843 . Page Last Updated: 01 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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