

The case law behind Mortgage Express Limited v Lambert

Dispute Resolution analysis: As the Court of Appeal considers the submissions in this dispute over losses from a fraudulent 'sale & rent back' scheme, David Bowden, Solicitor-Advocate of David Bowden Law, outlines the case law behind the submissions.

Background

For further discussion of the submissions in the Court of Appeal, see 'Court of Appeal considers whether a bank should bear losses from fraudulent 'sale & rent back' scheme'. For the appeal, the lender relied on these authorities not all of which were cited below.

Is there a prior authority on these 'sale and rent back' schemes?

Yes. The matter was the subject of a considered judgement by the Supreme Court last year in *Southern Pacific Mortgages Ltd v Scott (North East Property Buyers Litigation)* [2015] 1 All ER 277.

Scott (who entered into a sale & rent back deal) relied on LRA 1925 §116 to establish that she had proprietary rights. Unregistered interests (which overrode registered dispositions) had to be proprietary in nature. The combined effect of LRA 1925 §116/132 was that s116 rights had to have a proprietary element in order to have any effect at all.

Scott also relied on authority to the effect that following the exchange of contracts, a seller held the property on trust for the purchaser. On the face of it, the arranger of the sale & rent back deal's promise bore the hallmarks of a proprietary estoppel, but the question was whether such an estoppel could be an interest in land before the promisor became the owner.

Between exchange and completion the buyer had a proprietary interest of a sort but the question was whether the conveyance and the mortgage were one indivisible transaction - or whether there was a moment between the completion of the purchase and the grant of the mortgage in which the buyer acquired legal estate before disposing of it by way of mortgage.

Cann decided that the conveyance and the mortgage were indivisible. Scott had merely personal rights against the arranger when she agreed to sell on the basis of its promise. Her rights only became proprietary and capable of taking priority over the mortgage when the arranger acquired the legal estate on completion, at which point the acquisition of the legal estate and the grant of the charge were one indivisible transaction.

Is there a prior authority about what a conveyancing solicitor is meant to do?

Royal Bank of Scotland Plc v Etridge [2001] 4 All ER 449

A lender was placed on enquiry whenever one of a cohabiting couple offered to stand surety for the debts of the other. That included married or unmarried couples if a lender knew about the relationship. Where a wife became surety for the debts of a company in which she held shares with her husband, the lender was placed on enquiry even if she was a director or company secretary.

The decision whether to proceed with a transaction or not had to rest with the wife and it was not a solicitor's role to intervene and attempt to prevent it even if he thought it not to in her best interests. Only in an exceptional case where the transaction was clearly seriously adverse to the interests of the wife, a solicitor should decline to act further. A solicitor was entitled to act for both a lender and her husband so long as such an arrangement did not give rise to a conflict of interest. A solicitor was not in the position of agent for the lender and could not be held liable to the bank for any deficiencies in the advice given.

What do the prior authorities say on overriding interests?

Williams & Glyn's Bank Ltd v Boland [1980] 2 All ER 408

The equitable interest of a spouse in actual occupation of a matrimonial home legally owned by the other spouse has an overriding interest taking priority over a legal charge created by the legal owner. A wife had an equitable interest in her matrimonial homes where her husband was the legal owner, her interest deriving from her financial contribution towards repayment of mortgage but such interest was unregistered. After the wife had acquired her interest, her husband mortgaged to a bank who made no inquiry as to her status or occupation. The House of Lords set aside the lender's possession order because the wife was a person '*in actual occupation*' within the meaning of the LRA 1925 s.70(1)(g) and the lender's charge was subject to her overriding interest.

Abbey National Building Society v Cann [1991] 1 AC 56

The relevant date for determining the existence of overriding interests affecting the estate transferred or created, within the meaning of LRA 1925 §20(1)/23(1) was the date of registration of the estate rather than the date when the estate was transferred or created. To substantiate a claim to an overriding interest against a transferee or chargee by virtue of LRA 1925 § 70(1)(g) as a person in '*actual occupation of the land*' the person claiming the overriding interest had to have been in actual occupation at the time of creation or transfer of the legal estate

Where a buyer needed on a bank loan to completion his purchase, the transactions of acquiring the legal estate and granting the lender's charge were one indivisible transaction. The buyer never acquired anything but an equity of redemption and there was no time during which the legal estate vested in him free of the charge. An estoppel affecting him could be 'fed' by the acquisition of the legal estate so as to become binding on (and take priority over) the interest of the chargee and there was overriding interest arising from actual occupation for some 35 minutes on the day of completion.

Wishart v Credit and Mercantile PLC [2015] EWCA Civ 655, [2016] BPIR 209

The facts here were analogous to those in *Cann* - the basis of which was the application of the *Brocklesby* principle. The judge below was right to hold that any beneficial interest Wishart enjoyed had to be treated as subordinate to the mortgage.

Wishart had left the acquisition of the property completely in his business partner's hands. That business partner had acted outside the limits of his authority by arranging for the grant of a mortgage over the property. The lender had not been on notice of any such restriction on his authority. Wishart did not supervise his business partner in relation to what he might do to effect the transaction to acquire the property. Wishart had furnished his business partner with the means to hold himself out as both the true beneficial buyer and the legal/beneficial owner for the purposes of borrowing from the lender.

The trial judge had correctly held that Wishart was precluded by operation of the *Brocklesby* principle from maintaining that he had a beneficial interest in relation to the property with potential to have priority over the lender's security interest.

Is there a prior authority on over reaching?

City of London Building Society v Flegg [1988] AC 54

Section 14 of the LPA 1925 did not confer on a tenant in common of land held on trust for sale who was in occupation rights different from and superior to those of tenants in common who were not in occupation at the date when the interests of all tenants in common were overreached by a sale or mortgage by trustees for sale. The purpose of LRA 1925 §70 was to effect for registered land the same limitations as LPA 1925 §14 produced for land whether it was registered or unregistered

One of the principal objects of the suite of 1925 land law legislation was to strike a compromise between the policy of ensuring that land held in trust was freely available on the market and protecting the interests of beneficiaries under the trusts.

Neither LPA 1925 §14 nor LRA 1925 §70 was intended to frustrate that compromise or to burden a purchaser with some beneficial interests but not others depending upon whether beneficiaries were in actual occupation of the land at the date of the transaction. Here the parents' right to remain in occupation ceased when their interests were overreached by the lender's legal charge. The fact that they were in occupation at the date of the legal charge did not create a new right or transfer an old right so as to make it enforceable against the lender.

Birmingham Midshires Mortgage Services Ltd v Sabherwal (2000) 80 P. & C.R. 256

The equitable interests of a mother were overreached and attached to mortgage monies that her sons had obtained from a lender. Submissions made in reliance upon *Shiloh Spinners* and *Ives v High* were baseless as these cases were concerned with equitable easements and/or equitable rights of entry which could not attach to proceeds of sale. However a family interest such as an equitable interest as a tenant in common could attach to sale proceeds. It would be an absurd result if the more tenuous equitable right arising as a result of an estoppel was not capable of being overreached whereas a resulting trust arising from a direct financial contribution could.

What do the prior authorities say where the true position has been concealed from the lender?

Rimmer v Webster [1902] 2 Ch 163

Where an owner of property gives all the indicia of title to another person with the intention that he should deal with the property - the principles of agency apply. Any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from that agent who has no notice of that limit.

If the owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property for value. The statement in a statutory transfer mortgage form that the mortgage is transferred in consideration of money paid by 1 party to another (without any express receipt clause) is sufficient to create this estoppel.

Abigail v Lapin [1934] AC 491

The registered land proprietor in Australia transferred the land to the nominee of a creditor by transfers stated to be made in consideration of money payments. It then handed the certificates of title to the transferee and the transfers were registered. The transfers (though absolute in form) were made merely as security for a debt, but no caveat to this effect was put on the land register. Subsequently the transferee mortgaged the land to secure a loan. The lender had no notice of the nominee's equitable interest but had not searched the register.

The Privy Council ruled that the registered proprietor's equity should be postponed to that of the lender because it had armed its transferee with power to deal with its lands as owner. The lender's failure to search the land register did not affect the case because its priority did not arise from any representation to it by the registered proprietor. The registered proprietor had authorized its transferee to raise money upon its lands so the case was not one of an agent exceeding his authority but rather of acting within it.

Brocklesby v Armitage & Guest (a firm) [2001] 1 All ER 172

It was not necessary for the purpose of extending the limitation period pursuant to LA 1980 s.32(1)(b) to demonstrate that the fact relevant to a claimant's right of action has been deliberately concealed. It was sufficient that the commission of the act was deliberate in the sense of being intentional and that act or omission involved a breach of duty, whether or not the legal consequence was appreciated.

What do the prior authorities say about subrogation or restitution in these circumstances?

Dunbar Bank plc v Nadeem [1998] 3 All ER 876

Where a person sought to have a transaction set aside for presumed undue influence, he had to show that the transaction was manifestly disadvantageous to him and make restitution in respect of **all** that he had obtained from the transaction. The right or advantage acquired by the wife (which she was bound to restore as a condition of rescission) was her beneficial interest in a lease and not a proportion of the debt secured by a lender's legal charge.

Cheltenham & Gloucester Plc v Appleyard [2004] EWCA Civ 291

A lender who obtained some security (but less than what it bargained for) was not precluded from claiming further security by subrogation. The lender could not be said to have obtained what it had bargained for as both sides had clearly bargained for a legal charge. The effect of non registration was to prevent the charge from being a legal charge. As a result of the lender's inability to register its mortgage, it was entitled to claim to be subrogated to its borrower's prior mortgage. The lender thereby became a legal chargee to the value of its borrower's prior mortgage at the time it was paid off.

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