

IN THE COURT OF APPEAL

CIVIL DIVISION

LORD JUSTICE PATTEN

Appeal Number: B2/2015/2989

ON APPEAL FROM THE SOUTHEND ON SEA COUNTY COURT

HH JUDGE MOLONEY QC

Unreported

B E T W E E N:

HSBC BANK PLC

Claimant/Respondent

-and-

MRS ELILAH RAHMAN

Defendant/Appellant

**NOTE OF THE JUDGMENT REFUSING PERMISSION TO APPEAL OF
THE RIGHT HONOURABLE LORD JUSTICE PATTEN
HANDED DOWN *EX TEMPORE* ON WEDNESDAY 4th MAY 2016**

Mr Jonathan Miller (1 Essex Court, Temple, London, EC4Y 9AR) appeared for the Appellant.

Mr Tobary, instructed by Gowling LG LLP, Birmingham, appeared for the Respondent.

After reading the Appellant's Skeleton Argument, the Appellant's Advocate's Written Statement and the Respondent's Note

And after reading the Appeal Bundle and the Appellant's Authorities Bundle

And after hearing oral submissions from the Appellant (the Respondent not being called upon

to make oral submissions in reply), the following *ex tempore* judgment was delivered at 11.15am

JUDGEMENT:

1. This is a renewed application for permission to appeal.
2. This case concerns a property at Westcliffe on Sea. The property was originally owned by the Appellant together with her husband (now deceased) and a Mrs Khan. All 3 resided at the property. The property was originally charged by them to Abbey National Building Society.
3. These proceedings concern a subsequent charge in favour of HSBC dated 21st July 2005. Possession proceedings were commenced in Southend County Court. These came for hearing before HHJ Moloney QC. He made an order for possession. He decided that the other 2 parties (Mr Rahman and Miss Khan) had no interest, by virtue of a declaration of trust, that was binding on HSBC as mortgagee.
4. One issue is whether or not in taking the charge HSBC either had notice of it or had imputed notice of those 2 parties. The conveyancing history followed the standard form. All 3 were registered as joint legal owners and the mortgagee was Abbey National Building Society. There was nothing else registered in respect of beneficial interests – neither a tenancy in common or beneficial joint tenancy.
5. The judge accepted it could be assumed from the fact of joint legal ownership that there might be a corresponding joint beneficial ownership.
6. In October 1996 the property was transferred to Mrs Rahman. The transfer contained an indemnity from her in favour of the other 2 parties in respect of the Abbey National mortgage.
7. Mr Miller advanced in oral argument that this was to be treated as a transfer for no value. I do not accept that submission but nothing turns on it.
8. The judge found as significant the indemnity imposed on Mrs Rahman. It might be thought to be inconsistent to refuse a beneficial interest. You would have expected the indemnity going the other way in favour of the transferees. There was nothing noted on the Title Register at HMLR as such.
9. The judge found that during the course of discussions between her, her mortgage broker and HSBC bank that she did not disclose to the bank the existence of the Declaration of Trust which was produced for the very first time in the course of these proceedings. On the face of it, it bears the date 4th October 1996. This is

commensurate with a transfer of the property into Mrs Rahman's sole name. That declaration of trust confirms that Mrs Rahman continues to hold the property on trust for the other 2 parties. There are various restrictions on sale or maintenance of the property.

10. The issue at trial was whether that document was genuine and came into existence on the date it bore. The judge accepted evidence that it was validly executed on that date namely 4th October 1996. The issue for him whether the trust were ones when the bank paid on notice prior to the execution of the HSBC charge.
11. The judge's reasoning for finding that the bank did not have constructive notice (paragraph 13 of the judgement below). The bank knew the property had been transferred into Mrs Rahman's sole name, there was no equitable charge recorded at HMLR and she expressly agreed to indemnify the other 2 parties to the mortgage. Also the judge found (paragraph 12) that at the time of taking the HSBC loan Mrs Rahman did not disclose the existence of the Declaration of Trust. She had either forgotten about it or more probably deliberately concealed its existence knowing that the property could not stand as security for the commercial loan she was then seeking.
12. The pleadings in this case include allegations of actual knowledge based on disclosure of the declaration of trust to a manager of HSBC Bank. This was denied by HSBC. The judge accepted that evidence. The only issue was 1 of constructive notice.
13. Mr Miller on behalf of Mrs Rahman submits that the judge's reasons at paragraph 13 are an inadequate basis for constructive notice in this case.
14. The starting point in a mortgage transaction in relation to an allegation that a charge is fixed with notice of a beneficial interest is section 199¹ of the Law of Property Act 1925 which imposes restrictions on constructive notice.

¹ **199 Restrictions on constructive notice.**

(1) A purchaser shall not be prejudicially affected by notice of—

(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;

(ii) any other instrument or matter or any fact or thing unless—

(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) Paragraph (ii) of the last subsection shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if that paragraph had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act.

15. Section 199 (1)(ii)(a) provides that purchasers (including mortgagees) shall not be prejudicially affected by notice of any instrument unless *“it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.”*
16. It is necessary to answer 2 questions:
- (i) What enquiries ought reasonably to have been made by the mortgagee, and
 - (ii) Whether the existence of the Declaration of Trust would have come to the Bank’s knowledge if those enquiries had been made.
17. The judge relied on the transfer into Mrs Rahman’s sole name that HMLR did not record.
18. Mr Miller says the enquiries which the bank as a prudent mortgagee should have extended beyond Mrs Rahman including to Mr Rahman and Mrs Khan. For my own part – it is by no means certain about those ordinary enquiries – like any other property transaction: the immediate parties and the title seeking to adduce. Only if those enquiries disclosed anything adverse or unusual would it extend to 3rd parties. This is obviously the case – common form enquiries disclose the identity of someone who might have been interested in the property and be in occupation.
19. The judge had to balance the fact that Mr Rahman and Mrs Khan had previously been owners of the property. The subsequent transfer to Mrs Kham there was nothing noted on the register with HMLR in relation to a continuing trust.
20. The matters in which in my judgment the judge below was entitled to rely on – and are not likely to be any equity in favour of previous owners. Added to that, despite there having been detailed discussions at no point did she think it appropriate or necessary to disclose the declaration of trust to the bank.
21. The judge below finds the likely explanation is that she intended to conceal it. The real issue – were this to be argued fully on appeal – is the wording of LPA s199 had enquiries been made by the bank to Mrs Khan or her solicitor as to whether other parties had an interest would the declaration of trust have come to the bank’s attention. It seems to me – on the judge’s findings it would not.
22. Mr Miller says that is not an answer and it was open to the bank to pursue – it having failed to ask that question of Mrs Rahman. That submission is based on a passage in a decision of Lord Justice Stirling sitting as a judge of the Chancery Division in the

case of *Re Alms Corn Charity* [1901] 2 Ch 750. In relation to the question of the mortgage in that case – fixed with notice of adverse charge on the property that predated the charge in question – the judge refers to what Lord Romilly MR previously said in *Jones v Williams* 53 ER 274² and *Jones v Smith* 66 ER 943³. It seems to be also cases involving mortgagees bound by prior mortgages or charges.

23. Lord Romilly MR says:

“With respect to the argument that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of Jones v. Smith⁴, that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say. Certainly Kennedy v. Green⁵ (lays down no such doctrine, nor is it at all applicable to the present case. It is always the first cited in all causes depending on questions of motive, but, in truth, it rarely has any application to any one of them.”

24. That principle is said to apply without restriction notwithstanding section 199 of the LPA on the basis that a court can't assume in a mortgagee's favour. Applying those principles Mrs Rahman would without doubt have declined to have answered the question truthfully as to whether a declaration of trust existed.

25. I can see the force of the submissions. I am not persuaded that what Lord Romilly MR treated as abundantly not clear - from what Stirling LJ says in reference to the same point:

“No doubt if a reasonable, though misleading, reply be given to a requisition the purchaser is not bound to assume it is not correct and to push his inquiry further. But here it is reasonable to assume, if the question had been asked, a true reply would have been given.”

26. On a strict application of Lord Romilly MR, Mr Miller submits it would be unnecessary for Stirling LJ to have speculated in the instant case had the question been asked. All Lord Romilly MR is saying is that absent facts indicating to a court with sufficient certainty, the presumption has to be a truthful answer would have been given.

27. Those are not the facts of this case. Mrs Rahman seeks to rely on constructive notice. The judge below found it was deliberately concealed and that she should have disclosed the declaration of trust as part of her mortgage application.

² (1857) 24 Beavan 47

³ 1 Hare 43; 1 Phil 244

⁴ 1 Hare, 55

⁵ 3 Myl. & K.699)

28. It is most unlikely that had the bank asked her whether any other person had a beneficial interest that she would have disclosed its existence. The judge was entitled to come to the conclusion that the LPA s199 test was not satisfied.
29. In those circumstances the appeal has no reasonable prospect of success.
30. I refuse permission to appeal.

The court rose at 11.50.

DAVID BOWDEN
Solicitor-Advocate

5th May 2016.

David Bowden Law[®]
ideas are always in credit