

Case No: B5/2013/2022

Neutral Citation Number: [2014] EWCA Civ 28

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BOW COUNTY COURT
HER HONOUR JUDGE WALDEN-SMITH
1PB43436

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 23rd January 2014

Before :

LORD JUSTICE PATTEN
LADY JUSTICE SHARP
and
SIR ROBIN JACOB

Between :

BANK OF SCOTLAND PLC

**Claimant/
Respondent**

- and -

(1) Ms RENATA JOSEPH
(2) PERSONS UNKNOWN
(3) Mr ENDA LYONS

**Defendants/
Appellant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

Mark Warwick QC and Charles Harpum (instructed by **Colman Coyle Limited**) for the
Appellant
Tom Leech QC and Nicole Sandells (instructed by **Walker Morris LLP**) for the **Respondent**

Judgment

Lord Justice Patten :

1. This is a second appeal by the third defendant, Mr Enda Lyons, against an order of District Judge Dixon dated 8th February 2013 by which he gave summary judgment in favour of the Bank of Scotland plc (“the Bank”) in respect of its claim for possession of a flat in Docklands, East London: flat 23.03, 26 Hertsmere Road, London, E14 (“the Flat”). The first appeal against his order was dismissed by HH Judge Walden-Smith on 18th July 2013 and permission for a second appeal was granted by Jackson LJ.
2. Although the facts of the case are not uncomplicated, the point in issue is a relatively short one; namely whether the Bank’s subrogated claim to an unpaid vendor’s lien takes priority over a registered charge in favour of a company called Wingfield Financial Heritage Limited (“Wingfield”). If that charge took effect subject to the Bank’s prior equity then the Bank is entitled to enforce its lien against Mr Lyons because he acquired the Flat on a sale by Wingfield as mortgagee. Conversely, if Wingfield’s charge has priority over any claim based on the Bank’s lien then Mr Lyons acquired a title free from it and the Bank is effectively unsecured.
3. Before the District Judge and Judge Walden-Smith the issue of priority turned on whether a unilateral notice placed on the Charges Register of the title to the Flat on 4th July 2006 “in respect of a mortgage dated 10th March 2005 in favour of Bank of Scotland” was effective to secure the priority of the Bank’s subrogated right to rely on the unpaid vendor’s lien.
4. Both judges below held that it was so effective because the right of subrogation stemmed from the Bank’s position as a secured lender based on the charge of 10th March 2005 even though it is alleged by Mr Lyons that this charge was ineffective as a forgery. But the Bank now also relies on a new argument advanced by way of respondent’s notice that even if the unilateral notice was not effective to protect its subrogated security it still enjoyed priority over the Wingfield charge by virtue of the principles set out in the decision of the House of Lords in *Abbey National Building Society v Cann* [1991] 1 AC 56. It contends that all that the original purchaser (a Mr Samad) ever enjoyed was an equity of redemption in the Flat subject to the unpaid vendor’s lien. He was never able therefore to charge more than that interest to Wingfield. Wingfield and its successors in title never acquired more than the rights of Mr Samad to enforce the equity of redemption and consequently it was not necessary for the Bank to place a notice on the register of title in order to protect its interest.
5. Mr Lyons says that this argument runs contrary to the fundamental objective of the Land Registration Act 2002 (“the 2002 Act”) that the register should provide a complete and accurate reflection of the state of the title of the land at any given time: see Law Commission Report No. 271 para 1.5. A failure to protect the Bank’s prior interest by an entry on the register will have resulted in it being postponed to the subsequently registered Wingfield charge: see s.29(1) of the 2002 Act. The principle in *Cann* is, he submits, concerned with issues of priority between equitable interests and not with the preservation of those priorities in the context of a registered title.
6. Before going further into these arguments, it is convenient to set out the facts as far as we know them. The title to the Flat comprised a long lease dated 11th March 2005 between No. 1 West India Quay (Residential) Ltd (“the Developer”) as lessor and

Abu Ubaida Mohammad Samad (“Mr Samad”) as lessee which was granted for a term of 999 years (less 3 days) from 24th June 2004. Mr Samad was registered as proprietor of the Flat under this lease on 11th May 2005 under title number EGL487869. The price stated to have been paid on the grant of the lease according to the register was £965,000.

7. A later version of the register shows that on 9th February 2011 Ms Renata Joseph was registered as proprietor of title number EGL487869. Although none of the transactional documents are included in the evidence, it appears from the entries in the proprietorship register that she was recorded as having paid £965,000 for the assignment of the lease on 10th March 2005, although she was registered as proprietor much later. Some £820,250 of the purchase price was provided by way of mortgage loan from the Bank which took a charge from her over the Flat dated 10th March 2005. It therefore appears that the grant of the lease to Mr Samad, its purported assignment to Ms Joseph and the charge to the Bank all took place simultaneously on 10th or possibly 11th March 2005 and that at some time on 11th March 2005 Mr Samad granted to Wingfield a charge which it is said was intended to secure a guarantee.
8. The charge in favour of the Bank was protected by the unilateral notice entered on the register on 4th July 2006 because Ms Joseph had still not by then become registered as proprietor so as to enable the Bank’s charge to be substantively registered. The charge in favour of Wingfield was registered on 22nd April 2010. The Bank’s charge was eventually registered on 9th February 2011 concurrently with the registration of Ms Joseph as proprietor. Mr Lyons subsequently acquired the Flat from Wingfield, of which he is or was a director, but has not yet been registered as proprietor of the title.
9. On 31st March 2012 the Bank brought mortgage possession proceedings against Ms Joseph as the sole defendant based on her failure to pay any of the instalments due under the mortgage. In her defence she denied having executed the mortgage or any contract to purchase the Flat. She therefore denied any liability for the sums due but did not dispute the Bank’s claim to possession.
10. On 31st July 2012 Mr Lyons was added as a defendant and asserted in his defence that Wingfield’s charge of 11th March 2005 ranks in priority to the Bank’s charge registered on 9th February 2011 because, prior to its registration, the Bank had at most an equitable interest in the property which could not take priority over Wingfield’s legal charge registered on 22nd April 2010.
11. Eventually in October 2012, the Bank compromised its claim against Ms Joseph and withdrew its opposition to an application which she had made for the cancellation of the registration of the Flat in her name. Various witness statements were then served presumably dealing with the way in which title to the Flat was acquired. We have not been troubled with them on this appeal. From this evidence the District Judge ascertained that the Developer sold the Flat to Mr Samad on 11th March 2005 not for £965,000 but for £733,400; that the transfer to Ms Joseph (which was dated 10th March 2005) was executed on the same day purportedly for a consideration of £965,000; that to purchase the Flat Mr Samad used the monies provided by the Bank to Ms Joseph which were sufficient to cover the price payable to the Developer; that at some point on 10th or 11th March Mr Samad executed the charge in favour of Wingfield; and that on 18th April 2011 Wingfield obtained possession of the Flat and

sold it to Mr Lyons for £730,000 with the benefit of a mortgage from Nat West Home Loans, although it is accepted that this transaction was not necessarily at arms' length.

12. The District Judge found that the Bank's money had been used to pay the Developer and that it had accordingly become subrogated to the Developer's unpaid vendor's lien if and so far as the charge of 10th March 2005 had not been validly executed. The judge therefore accepted (applying *Abbey National v Cann*) that Mr Samad never acquired more than an equity of redemption subject to the Bank's subrogated security in the form of the lien and that the charge which he granted to Wingfield was necessarily subject to the Bank's interest in the property. There is no challenge to those findings as part of this appeal.
13. The remaining issue therefore for the District Judge was whether the unilateral notice registered on 4th July 2006 was effective to preserve the priority of the subrogated rights of the Bank over the subsequently registered Wingfield charge. The argument for Mr Lyons is simply that the notice specified the 10th March 2005 mortgage as the interest to be protected whereas the Bank now seeks, in the alternative, to rely on the notice as supporting its priority in respect of an unpaid vendor's lien.
14. The District Judge rejected that:

“The only remaining question is whether registration of the notice by the Claimant was sufficient to protect its equitable interest in priority to Wingfield's. I have dealt with the effect of sections 28 and 29 of the Land Registration Act earlier in this judgment and an analysis thereof in Frankel. However, the Third Defendant argues that the wording of the notice makes reference to a mortgage, not the unpaid vendor's lien, and thus it is incapable of protecting the latter. Ms Sandells dismisses this, saying that the notice protects not just the mortgage but all rights and interests arising thereunder. All the Claimant's rights derive in any event from the deed of mortgage. In crude terms, the Claimant is entitled to subrogate because of the mortgage. That to my mind is an obvious and correct analysis. At the time of registration of the notice, the Claimant thought it was protecting a mortgage (it may well still maintain the charge is valid). Only much later has the issue of unpaid vendor's lien arisen. It could not possibly be correct that a notice in respect of a charge is insufficient to protect any equitable interests arising therefrom. The unilateral notice affords the Claimant priority to Wingfield's interest and will continue to do so, in my judgment, even if the Claimant's charge were to be removed from the charges register.”
15. Judge Walden-Smith dismissed Mr Lyons' appeal. She accepted that the District Judge was right to give judgment for the Bank under CPR Pt 24 on the basis that if the 10th March charge was invalid, the Bank would be entitled to be subrogated by way of security to the Developer's unpaid vendor's lien and that the unilateral notice which it registered would give the Bank priority over the Wingfield charge in respect of either form of security. She rejected the submission that the unilateral notice should be construed so as to encompass only the 10th March charge. The notice had the effect,

she said, of putting Mr Lyons on notice that the Bank had or claimed to have a prior interest in the Flat and public policy dictated that such notice should be given a wide construction.

16. The question whether the unilateral notice was sufficient to preserve priority in respect of any claim which the Bank may have under an unpaid vendor's lien falls to be determined by reference to the provisions of the 2002 Act and the relevant Land Registration Rules 2003 ("the Rules"). What do they require in order for such an interest to be protected? Mr Warwick QC for Mr Lyons submitted that the starting point for any consideration of the meaning and effect of the relevant provisions of the 2002 Act and the Rules has to be the Law Commission Report (No. 271) which led to the introduction of the Land Registration Bill. The fundamental objective of the Bill was stated (in paragraph 1.5 of the Report) to be that :

“..... under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.”

17. Express dispositions and adverse interests were therefore to be registered and the number of overriding interests reduced. The intention was that the fact of registration and registration alone should confer title: see para 1.10. Consistently with this, the Report recommended the simplification and clarification of rules governing the competing priority of interests in registered land by the extension of notices and restrictions and the abolition of cautions. Under the pre-2002 system of land registration cautions did not protect the priority of the relevant interest but simply gave the cautioner prior notice of impending dealings with the registered land. Minor interests (such as rights based on an unpaid vendor's lien) could be protected by the entry of a notice or restriction on the register but only with the consent of the registered proprietor.
18. Under the proposals in the Report, cautions were recommended to be replaced by a system of notices on the register:

“6.26. Unilateral notices are intended as part of the replacement for cautions against dealings. As we have explained above, *all* notices, whether agreed or unilateral, will protect the priority of an interest, if valid, as against a subsequent registered disposition. In this respect, unilateral notices are a very considerable improvement on cautions (which, as we have explained, confer no priority). The essence of a unilateral notice is that it does not require the consent of the registered proprietor of the estate or charge to which it relates. It can be entered even though the applicant has not satisfied the registrar as to the validity of his or her claim. A unilateral notice must indicate that it is such a notice and identify who is the beneficiary of it. It is unlikely that anything else will appear on the register. This is a point of some importance. Under the present law, cautions are often lodged in respect of agreements in preference to a notice in order to

protect their confidentiality. This is because the entry of the caution on the register gives no indication as to the matter that lies behind it. A number of those who responded to the Consultative Document were concerned that it should remain possible to preserve commercial confidentiality in the same way after cautions had been abolished.

6.27 Because a unilateral notice may be entered without the consent of the registered proprietor, it is necessary to provide safeguards for that proprietor. Under the Bill there are three principal safeguards.

6.28 First, a person must not exercise his or her right to apply for a notice without reasonable cause. Any person who does apply for a notice without reasonable cause is in breach of this statutory duty and is liable in tort accordingly to any person who suffers damage in consequence of that breach.

6.29 Secondly, where a unilateral notice is entered by the registrar, he must give notice of the entry to the proprietor of the registered estate or charge to which it relates and to such other persons as rules may provide.

6.30. Thirdly, and following from this, the Bill makes provision for the cancellation of a unilateral notice. Both the registered proprietor of the estate or charge to which the notice relates and any person who is entitled to be registered as the proprietor of that estate or charge may apply to the registrar for the cancellation of a unilateral notice. When such an application is made, the registrar must serve a notice on the person who is identified on the register as the beneficiary of the unilateral notice. That notice must inform the beneficiary

- (1) of the application; and
- (2) that if he or she fails to exercise his or her right to object before the end of the period specified in the notice, the registrar will cancel the notice.

The right to object is the general right conferred by the Bill to object to an application to the registrar. If the matter cannot be disposed of by agreement, it must be referred to the Adjudicator for resolution.”

19. These recommendations have been given effect to by the 2002 Act. Section 27 requires dispositions of a registered estate or registered charge to be completed by registration. Sections 28-30 deal with the effect of registered dispositions on priority:

“28. **Basic rule**

- (1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.
- (2) It makes no difference for the purposes of this section whether the interest or disposition is registered.

29. Effect of registered dispositions: estates

- (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
- (2) For the purposes of subsection (1), the priority of an interest is protected—
 - (a) in any case, if the interest—
 - (i) is a registered charge or the subject of a notice in the register,

30. Effect of registered dispositions: charges

- (1) If a registrable disposition of a registered charge is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration.
- (2) For the purposes of subsection (1), the priority of an interest is protected—
 - (a) in any case, if the interest—
 - (i) is a registered charge or the subject of a notice in the register, ...”

20. Further provisions about the nature and effect of notices are contained in Part 4 of the 2002 Act:

“32. Nature and effect

- (1) A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge.
- (2) The entry of a notice is to be made in relation to the registered estate or charge affected by the interest concerned.

- (3) The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for the purposes of sections 29 and 30.

...

34. Entry on application

- (1) A person who claims to be entitled to the benefit of an interest affecting a registered estate or charge may, if the interest is not excluded by section 33, apply to the registrar for the entry in the register of a notice in respect of the interest.
- (2) Subject to rules, an application under this section may be for—
 - (a) an agreed notice, or
 - (b) a unilateral notice.
- (3) The registrar may only approve an application for an agreed notice if—
 - (a) the applicant is the relevant registered proprietor, or a person entitled to be registered as such proprietor,
 - (b) the relevant registered proprietor, or a person entitled to be registered as such proprietor, consents to the entry of the notice, or
 - (c) the registrar is satisfied as to the validity of the applicant's claim.
- (4) In subsection (3), references to the relevant registered proprietor are to the proprietor of the registered estate or charge affected by the interest to which the application relates.

35. Unilateral notices

- (1) If the registrar enters a notice in the register in pursuance of an application under section 34(2)(b) (“a unilateral notice”), he must give notice of the entry to—
 - (a) the proprietor of the registered estate or charge to which it relates, and
 - (b) such other persons as rules may provide.
- (2) A unilateral notice must—

- (a) indicate that it is such a notice, and
 - (b) identify who is the beneficiary of the notice.
- (3) The person shown in the register as the beneficiary of a unilateral notice, or such other person as rules may provide, may apply to the registrar for the removal of the notice from the register.

36. Cancellation of unilateral notices

- (1) A person may apply to the registrar for the cancellation of a unilateral notice if he is—
- (a) the registered proprietor of the estate or charge to which the notice relates, or
 - (b) a person entitled to be registered as the proprietor of that estate or charge.
- (2) Where an application is made under subsection (1), the registrar must give the beneficiary of the notice notice of the application and of the effect of subsection (3).
- (3) If the beneficiary of the notice does not exercise his right to object to the application before the end of such period as rules may provide, the registrar must cancel the notice.
- (4) In this section—

“beneficiary”, in relation to a unilateral notice, means the person shown in the register as the beneficiary of the notice, or such other person as rules may provide;

“unilateral notice” means a notice entered in the register in pursuance of an application under section 34(2)(b).”

21. Finally, Rules 83 and 84 prescribe the form of a unilateral notice and what it must contain:

“83. An application for the entry in the register of a unilateral notice must be in Form UN1.

84. (1) A notice under section 32 of the Act must be entered in the charges register of the registered title affected.

(2) The entry must identify the registered estate or registered charge affected and, where the interest protected by the notice only affects part of the registered estate in a registered title, it

must contain sufficient details, by reference to a plan or otherwise, to identify clearly that part.

(3) In the case of a notice (other than a unilateral notice), the entry must give details of the interest protected.

(4) In the case of a notice (other than a unilateral notice) of a variation of an interest protected by a notice, the entry must give details of the variation.

(5) In the case of a unilateral notice, the entry must give such details of the interest protected as the registrar considers appropriate.”

22. Mr Warwick submits that it is important that in a public register of title which is open to inspection the nature of the interests notified on the register should be properly and accurately recorded so that the registered proprietor or a prospective purchaser should be left in no doubt as to what is asserted adversely to the registered title. It should not, he said, be necessary to embark on extended correspondence with the person who registers the notice or even litigation in order to decide whether there is any substance in the claim. If accuracy is not required then where, he asks rhetorically, does one stop. Compliance with the 2002 Act and the Rules therefore requires a proper identification of the interests which are claimed and protection is not given to interests which are not claimed. This is implicit in s.34(1) which requires the notice to be “in respect of” the interest claimed.
23. Since an interest based on an unpaid vendor’s lien (whether by subrogation or not) is capable of being registered by way of unilateral notice as a distinct interest in the land it must follow that it is not validly protected by a notice which makes no reference to it but is based instead on a different type of interest, that of an equitable charge under the 10th March mortgage. The Law Commission Report states in para 9.36 that:

“The ability to obtain information from the registers of title and cautions is an essential feature of the system of conveyancing that the Bill seeks to create. Easy and open access to information held by the Registry are the keys to speedier conveyancing.”
24. Consistently with this and with s.66 of the 2002 Act which creates the right to inspect the register, it is necessary, he says, for the reader to know what the notice is actually intended to protect.
25. So far as counsel have been able to discover, the proper content of a unilateral notice has not been considered before in any reported case. We were referred to passages in the judgments in this court in *Franks v Bedward* [2011] EWCA Civ 772 which refer to the need for accuracy in the preparation of the register of title but these are general statements made in a different context and do not really assist in what we have to decide.
26. I accept, as I think the Bank does, that if the UN1 (unilateral notice) specifies the interest which it seeks to protect then it must do so with as much accuracy as the

person responsible for the notice can provide. This is consistent with s.77 of the 2002 Act which provides that:

“77. Duty to act reasonably

- (1) A person must not exercise any of the following rights without reasonable cause—
 - (a) the right to lodge a caution under section 15,
 - (b) the right to apply for the entry of a notice or restriction, and
 - (c) the right to object to an application to the registrar.
- (2) The duty under this section is owed to any person who suffers damage in consequence of its breach.”

27. But it is much less clear that a failure accurately to identify the interest claimed means that the notice is ineffective to preserve priority. On one view the existence of a statutory remedy in damages for misdescription suggests that the notice would be binding on the registered proprietor and subsequent transferees notwithstanding its inaccuracies. But the issue on this appeal is narrower than that. If the protection conferred by the notice depends upon the interests specified then the identification of the 10th March charge in the Bank’s unilateral notice necessarily limited the interest it obtained protection for to one which arises out of taking that particular security. Mr Warwick’s argument is that the Bank was required to go further and identify what interest it relies upon arising from the taking of the March charge if it was not the security comprised in the charge itself. A subrogated right to another form of security derived as a matter of law from its position as a secured lender under the 10th March charge would not therefore be included in the protection conferred by the notice unless expressly mentioned. This is notwithstanding the fact that in most such cases the mortgagee will have no reason to be aware of possible defects in its security when it takes and registers notice of the charge, particularly in cases of fraud or forgery which may only come to light many years later.
28. The Bank’s answer to this is that a rule of this strictness goes beyond anything which the 2002 Act was intended to achieve. Mr Leech QC submits that the starting point has to be s.35(2) which does not in fact require a unilateral notice to give any details of the interest sought to be protected but only to identify who is the beneficiary of the notice. Similarly under Rule 84(5) a unilateral notice need only give such details of the interest protected as the registrar considers appropriate.
29. These provisions, he says, are consistent with what the Law Commission contemplated in para 6.26 of its report (quoted earlier at [18]), namely that, to preserve confidentiality, in some cases the notice will contain little in the way of detail beyond the name of the beneficiary. The balance is struck by the statutory duty imposed on the beneficiary by s.77 of the 2002 Act not to apply for the entry of a notice without reasonable cause and by the obligation on the registrar to give notice of the entry to the registered proprietor. There can be no doubt in this case that Wingfield could, if it had wished, have applied to the registrar for cancellation of the

notice under s.36 on the basis that the 10th March charge was invalid and that the Bank had no other form of security which was entitled to protection under the notice. The registrar would have been able to refer any dispute between Wingfield and the Bank on this issue to the Adjudicator who has the power under rule 41 of the Adjudication to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 to make an order requiring the registrar to amend the unilateral notice or that the original notice should be replaced by an agreed notice based on the interest which he determines to exist.

30. As I have explained earlier, the provisions of s.36 and the Rules to which I have referred point strongly away in my judgment from the construction of s.34 and the Rules for which Mr Warwick contends. I find it difficult to understand how the absence of any obligation on the applicant to specify the details of his interest beyond what the registrar may require can be reconciled with a submission that a failure to spell out any alternative legal bases for protection emanating from the 10th March charge is fatal to the protection of the Bank's subrogated lien. There is nothing to suggest in this case that the registrar was not content to accept the details that were offered. If inaccurate or inadequate, they could have been corrected on an application under s.36. In the event, Wingfield took no steps at all to challenge the entry. In my view it is not now open to it or Mr Lyons as its successor in title to contend in these proceedings that the notice fails to protect the priority of the Bank in respect of any interest in the Flat which it derives from having lent the money under the 10th March charge. On an application under s.36, the most that could be achieved would be the inclusion of some reference to the alternative subrogated security. In the meantime, the notice continues to confer priority on the Bank.
31. I would therefore dismiss the appeal. It is not, in these circumstances, necessary to deal with the Bank's alternative case based on its respondent's notice. I should, however, make it clear that I am far from persuaded that the Bank would be entitled to succeed regardless of the effectiveness of its unilateral notice.

Sir Robin Jacob :

32. I agree.

Lady Justice Sharp :

33. I also agree.