[2014] UKFTT 313 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

REC/2013/0031
REC/2013/0020

BETWEEN

(1) MCHAEL GRANT SINCLAIR
(2) CHRISTINE ANN GRANT SINCLAIR

and

Applicants

ACCORD MORTGAGES LIMITED

Respondent

Property address: 42 Dexter Close, Barton Hills, Luton, Bedfordshire LU3 4DY

(1) ALISON OVERSON
(2) VINCENT DAVID OVERSON

Applicants

and

SOUTHERN PACIFIC MORTGAGE LIMITED
T/A London Mortgage Company

Respondent

Property address: 92 Ightenhill Park Lane, Burnley, Lancashire BB12 OLL
Title number: LA956309

Before Judge McAllister
Alfred Place, London
20 January 2014

Representation: Mr Grant Sinclair appeared for the Applicants, and Nicholas Trompeter of Counsel instructed by Lightfoots LLP and by Addleshaw Goddard appeared for the Respondents

DECISION

Introduction

1. By an application dated 10 May 2013 Mr Grant Sinclair applied to the Tribunal, pursuant to the original jurisdiction conferred by section 108(2) of the Land Registration Act 2002, to set aside a mortgage deed dated 5 July 2007 in favour of Accord Mortgages ('Accord'). The application was first made against HM Land Registry: Accord was substituted as Respondent by order dated 12 August 2013. A similar application was made by Mr and Mrs Overson on 26 September 2013 in relation to a mortgage deed dated 25 June 2007 in favour of Southern Pacific Mortgage Limited ('Southern Pacific'). The properties securing the two charges, owned by Mr and Mrs Grant Sinclair and Mr and Mrs Overson, are registered respectively with titles number BD164814 and LA956309. They are 42 Dexter Close, Barton Hills, Luton ('the Luton Property') and 92 Inghtenhill Park Lane, Burnley ('the Burnley Property').

2. The grounds relied on by Mr Sinclair and Mr and Mrs Overson are substantially the same. The Tribunal has received a number of similar applications by mortgagors, and the same, or substantially the same, arguments have been run in the County Court in other cases, some of which are referred to below. At the heart of these and other applications is the primary allegation that the charges are invalid as the lenders did not execute the relevant deeds. This argument originated in a document posted on the internet. It is, however, an argument wholly without merit, and which rests on a misunderstanding of the formalities necessary to create a valid charge as security for a loan.

3. By an order dated 2 July 2013 the Tribunal, of its own motion, notified the parties of its intention to strike out the application made by Mr Grant Sinclair pursuant to Rule 9(3)(e) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules

2013 on the grounds that there was no reasonable prospect of the application succeeding. Mrs Grant Sinclair was added to the application as a party by further order dated 12 August 2013. As stated above, Accord was substituted for HM Land Registry. Directions were given to enable the strike out application to be heard.

4. Mr and Mrs Grant Sinclair's case is set out in a document headed 'Written Representations of the Applicant' dated 15 June 2013. In addition a lengthy skeleton argument was filed by them on 13 January 2014.

5. Accord and Southern Pacific have issued possession proceedings respectively against Mr and Mrs Grant Sinclair and Mr and Mrs Overson. The proceedings against Mr and Mrs Overson were stayed pending the outcome of these proceedings, as was the possession order made against Mr and Mrs Grant Sinclair.

6. On 21 November 2013 the Tribunal made an order listing the application by Mr and Mrs Overson to be heard at the same time as the application to strike out Mr and Mrs Grant Sinclair's application. This application, too, therefore, falls to be considered against the test whether it has a reasonable prospect of success. Again, Mr and Mrs Overson set out their arguments in full in their statement of case and in a skeleton argument.

7. In fairness to Mr Grant Sinclair, who represented all the Applicants, he was not in a position to add a great deal to the arguments made in writing. On the day of the hearing, he produced a Mortgage Sale Agreement dated 6 June 2011. The significance of this document, according to Mr Grant Sinclair, is that it establishes, contrary to what was said by Accord's solicitors in correspondence, that the beneficial interest in the mortgage deed dated 5 July 2007 was transferred to Brass No 1 plc. The document is incomplete and it is not possible to determine, from the material put in evidence, whether this is the case or not.

8. Following the hearting, I received further correspondence from the solicitors acting for Accord to the effect that the mortgage deed dated 5 July 2007 was not securitised.

The facts

Mr and Mrs Grant Sinclair

9. On 14 June 2007 Mr and Mrs Grant Sinclair completed a mortgage application form to assist with the purchase of the Luton Property. The purchase price was £225,000 and the loan requested was £160,000. On 3 July 2007 Accord made a mortgage offer. The offer to advance the money sought was made subject to the execution of Accord's standard form of mortgage and to their standard conditions. The repayment term was to be 15 years. Mr and Mrs Sinclair instructed solicitors to act for them in the purchase of the Luton Property. The solicitors sent them the mortgage deed to execute ('the Accord Deed'). The purchase was completed on 5 July 2007. The Accord Deed was signed as a deed by Mr and Mrs Grant Sinclair and duly witnessed. The Deed was not counter signed on or on behalf of Accord.

10. The Accord Deed contains the following provisions:

    1. *The Borrower executes the mortgage to secure a loan from the Lender and agrees to be bound by the terms upon which the loan was offered*
    2. *This mortgage incorporates the Mortgage Conditions a copy of which the Borrower and any Guarantor has received*
    3. *The Borrower with full title guarantee charges the Property by way of legal mortgage with the payment of all monies which are or may become payable to the Lender by the Borrower (except monies payable under any agreement whenever made which expressly provides that they are not to be secured by this mortgage).*
    4. *The Borrower applies to the Chief Land Registrar for the entry of a restriction on the title of the Property as follows:' no disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without a written consent signed by the proprietor*

for the time being of the charge of even date in favour of Accord Mortgages Ltd.'

11. On 30 July 2007 Mr and Mrs Grant Sinclair were registered as proprietors of the Luton Property. The Accord Deed was registered in the charges register, and the restriction set out above duly noted in the proprietorship register.

12. Accord issued proceedings against Mr and Mrs Grant Sinclair in the Luton County Court. It appears that the court suspended the possession order made in favour of Accord pending the outcome of this action.

Mr and Mrs Overson

13. On 29 March 2007 Mr and Mrs Overson applied to the London Mortgage Company for a loan of £350,000 secured on the Burnley Property. This was to be a re-mortgage. The sum then outstanding to the existing lender (Platform Homes Ltd) was £235,000. In addition further sums were owed to secured lenders. Mr and Mrs Overson and Southern Pacific were represented by solicitors, Goldsmith Williams of Liverpool.

14. A mortgage offer was made on 23 May 2007. This was made subject to the standard conditions (October 2006) edition. It is relevant to note clause 11.1 which provides (under the heading Transfer of your mortgage) as follows: *' We may assign, transfer or charge in whole or in part to any person or persons your mortgage, your debt or any of our rights under your mortgage or in respect of your debt at any time. By signing your mortgage you agree to any such assignment, transfer or charge. You may not withdraw this agreement.'*

15. Mr and Mrs Overson executed a deed dated 25 June 2007 (the Southern Pacific Deed) in respect of the Burnley Property. The deed provides, so far as relevant, as follows:

    1. *The offer and mortgage conditions form part of this mortgage. You confirm that before you signed this mortgage you received a copy of the London*

Mortgage Offer and Mortgage Conditions Booklet. You agree to be bound by the offer and mortgage conditions and the conditions of our mortgage offer.

.....

4. *You apply to the Chief Land Registrar to enter on the register of any registered land which forms part of the property, a restriction that 'No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by the proprietor for the time being of this Charge.'*

The deed also contained a further confirmation by the borrowers in these terms '*I confirm that I have been recommended to seek advice from a Solicitor or fellow of the Institute of Legal Executives as to the effect of this mortgage, the offer and mortgage conditions and the conditions of our mortgage offer. By signing this mortgage I confirm that I understand the liabilities and obligations imposed on me by these documents.'*

16. As with the Accord Mortgage, the deed, which was signed as a deed, was not countersigned by or on behalf of Southern Pacific. The charge in favour of Southern Pacific was registered on 23 July 2007, and a restriction in the terms above entered in the proprietorship register.

17. As stated above, proceedings were issued against Mr and Mrs Overson in respect of mortgage arrears.

The Applicants' case

18. Without intending any disrespect to the Applicants, the arguments advanced by them are not entirely easy to follow. Both sets of Applicants appear to rely on three main grounds in support of their contention that the Accord Deed and the Southern Pacific Deed should be set aside, and the charges removed from the registers of the properties.

19. These arguments can be summarised as follows: firstly, it is said that the Applicants have no power to create mortgages 'by demise'; secondly it is alleged that the charges

are invalid for want of compliance with statutory formalities, including the assertion that the charges were not ‘delivered’, and thirdly it is said that the effect of securitisation of their loans somehow renders the charges invalid. In addition, Mr and Mrs Overson allege that they did not understand the nature of the transaction they were entering into.

The demise point

20. Under the Law of Property Act 1925 (s 85(1)) two methods only were permitted for effecting legal mortgages of freeholds: a demise for a term of years absolute, subject to a provision for cesser of the lease on the redemption (or payment) of the amount due, and a charge by deed expressed to be by way of legal mortgage. Both methods may still be used for *unregistered* land, and both could be used until the coming into force of the Land Registration Act 2002 on 13 October 2003. For mortgages of registered title executed *after* 13 October 2003, the position is governed by section 23 and section 51. The effect of these provisions, put simply, is that it is not possible to grant a mortgage by demise (or sub-demise) in relation to registered land.

21. A mortgage by demise usually involved the grant of a long lease (3000 years) in favour of the mortgagee (the lender). The value to the mortgagor (borrower) was not the value of the reversion on the term (which of itself was effectively valueless) but the fact that by repaying the loan the lender’s technical interest would come to an end. This method had already largely fallen into disuse before the introduction of the 2002 Act.

22. Section 23 of the 2002 Act provides as follows:

(1) Owner’s powers in relation to a registered estate consist of-

> *(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and*
>
> *(b) power to charge the estate at law with the payment of money*

23. Section 51 provides that : ‘*On completion of the relevant registration requirements a charge created by means of a registrable disposition of a registered estate has effect,*

if it would not otherwise do so, as a charge by way of legal mortgage.' Section 132 further provides that a 'registered charge' means a charge the title to which is entered on the register.

24. The effect of this provision is that whether the mortgage is created by the usual method of executing a charge by deed by way of legal mortgage or by charging the estate with payment of money, on completion by registration, the charge takes effect as a charge by way of legal mortgage. The charge only becomes effective at law when registered (see section 27). The reason for making the distinction between 23 (1) (a) and (b) arises from the fact that there is no prescribed form of mortgage (although Land Registry has a standard form CH1): subsection b) is intended to bring within the owner's powers the creation of a charge to secure payment of money even where the deed does not use the words 'by way of legal charge'. (see, in relation to the provisions of section 25 of the Land Registration Act 1925, *Cityland and Property (Holdings) Ltd v Dabrah* [1968] 1 Ch 166)).

25. Both the Accord and the Southern Pacific Deeds are expressed to be charges by way of legal mortgages. They are not, and do not purport to be, mortgages by demise. It follows, therefore, that the assertion that the Deeds are invalid because they are mortgages by demise is simply unsustainable.

26. Reference is made in the skeleton argument of the Applicants to the provisions of section 23(2) and 23(3) of the 2002 Act. These provisions are concerned with the powers of the owner of the registered *charge,* not the registered *estate.* The owners of the registered charges, in these cases, are the Respondents, not the Applicants. The Respondents may create a sub-charge by charging the indebtedness secured by the primary mortgage, but this power, as I say, has no bearing on the present proceedings.

27. Further points are advanced in the skeleton arguments, but, as insofar as they rest on a fundamental misunderstanding of the distinction between the powers of the owner of the registered estate and the powers of the owner of the registered charge, they all fall by the wayside. In simple terms, the position is clear. The Applicants remain the owners of their freehold estates, both of which have been charged to secure the loans advanced by the Respondents.

28. Mr and Mrs Overson's written submissions contained the further assertion that the Southern Pacific Deed is in fact a mortgage by demise because it was signed by them alone. Again, this point is not easy to follow but it leads to the second (and in reality principal) point advanced, namely that the Deeds are invalid for want of statutory formalities.

The statutory formalities point

29. There is no prescribed form for the creation of a legal charge of a registered estate (although there is standard form prepared by Land Registry, CH1: see Land Registration Rules 2003, r 103.) It is also to be noted that a document affecting a registered title must refer to the title number: see r 212(3)). Land Registry can and does also approve mortgage lender forms (see Land Registry Practice Guide, Approval of Mortgage Documentation PG 30, para 9). Both the Accord Deed and the Southern Pacific Deed are standard forms, filed at the Land Registry.

30. Section 52(1) of the Law of Property Act 1925 provides that all conveyances of land or any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. The provisions of the Law of Property (Miscellaneous Provisions) Act 1989 (as amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005/1906) altered the constitutive elements of a deed and the formalities required.

31. Section 1 of the 1989 Act, so far as relevant, provides as follows:

…

(2) An instrument shall not be a deed unless-

(a) it makes clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed-

(i) by that person or a person authorised to execute it in the name or on behalf of that person, or

(ii) by one or more persons authorised to execute it in the name of or on behalf of one or more of those parties.

………

(3) An instrument is validly executed as a deed by an individual if, and only if-

(a) it is signed-

(i) by him in the presence of a witness who attests his signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attests his signature; and

(b) *it is delivered as a deed.*

32. These are the only relevant statutory provisions. In effect, a valid deed must be signed, attested and delivered. 'Delivery' does not mean handing over the document, but rather that rather that the transaction contained in the deed is irreversible: it is therefore any unilateral act or statement by the person making the deed which shows that he adopts the deed (see *Vincent & Another v Premo Enterprises (Voucher Sales)* [1969] 2 QB 609). In *Bibby Financial Services Ltd v Magson* [2011] EWHC 2495, personal guarantees in the form of deeds signed by individual directors of a company entering into a debt factoring agreement were, on the evidence, found to be not binding because they had not been 'delivered': the directors had made manuscript amendments to the documents and had signed them only as a gesture of intent, and had expected clean copies for re-signing and re-dating. This, of course, is not the situation in these cases.

33. Delivery is a unilateral act: it is not necessary for any other party to accept the deed. Delivery can take place by the physical handing over of the deed, or by inference from any act which shows an intention to be bound. In these, and in every other similar and unremarkable transaction, the borrowers plainly intended to be bound by their deeds. They accepted mortgage offers which were themselves conditional on the lenders being granted legal charges over the Properties. They handed the Deeds to their solicitors who in turn passed them to the Respondents. They received the loans they were seeking.

34. It is important to emphasise that the execution of a deed is the method by which a person transfers or creates a legal estate or interest in his property. It is, by its very nature, a unilateral act. There is no requirement for the mortgagee (or, for example, for the transferee in the event of a sale of land) to sign or execute the deed. The deed is itself the actual disposition. It is to be distinguished from a contract to sell or grant a charge, which, by definition, requires the agreement of two or more parties.

35. I should also add that reliance on section 74 and 74A of the Law of Property Act 1925 is entirely misconceived: these provisions are concerned with the formalities necessary for the execution of instruments *by or on behalf of* corporations. As the Deeds did not need to be executed by the lenders, the point falls away.

36. In the same way, any argument that the Deeds were somehow invalid by reason of the 'gap' between execution and registration is entirely devoid of merit. Unless and until the Deeds were registered they did not operate at law. The same point was considered and dismissed by HHJ Blunsdon in *Fergus v Matthews* (Lambeth County Court, 20 March 2013, and by HHJ Butler in *The Mortgage Business Plc v Lamb* (Preston County Court 12 July 2013). Reference should also be made to *The Queen on the Application of Palmer v Land Registry* [2013] EWHC 1531 (Admin) in which Charles George QC dismissed an application for judicial review of the decision of the Land Registry to the effect that Mrs Palmer's charge did not fall within the ambit of section 2 of the 1989 Act but within section 1, and further held that section 27 of the 2002 Act could not in any way be read as lending support to the argument that the charge was brought within section 2 of the 1989 Act.

37. It is also said, in so far as I can follow the argument, that the amendments made by the Regulatory Reform (Execution of Deeds and Documents) Order 2005/1096, and in particular the removal of the words 'by him or by a person authorised to do so on his behalf' at the end of section 1(3)(b), means that, in order for the deed to be delivered as a deed, it is necessary for the lender to sign the document. The 2005 order was intended primarily to amend the law so as to standardise the formal requirements for companies, corporations and individuals. It also removed the limitation in section 1(5) of the 1989 Act (relating to the statutory presumption of authority to deliver) so that the presumption now is no longer limited to transactions

involving the creation or disposal of an interest in land. The 1989 Act, as amended, does not alter the fundamental requirements that a deed must be in writing; must make clear on its fact that it is a deed; must be validly executed; and must be delivered. Valid execution requires the signature of the person making the deed, and no other.

38. In the present cases, the charges were properly executed as deeds by the Applicants. There is no merit whatsoever in any of the points taken by or on behalf of the Applicants to seek to impugn the validity of the two charges.

The securitisation point

39. This is a point which can be deal with shortly. The fact that Southern Pacific has transferred the equitable interest in a the loan made to Mr and Mrs Overson by a mortgage sale agreements dated and 28 November 2007 to a securitisation companies is irrelevant to the issues before me. There is no evidence that the sale have been perfected by transferring the legal title. In any event Southern Pacific remains the registered proprietors of the Southern Pacific mortgage and, as such, are entitled to bring and enforce possession proceedings.

40. It seems clear from the witness statement of Richard Driver dated 5 August 2013 and made in the Luton County Court proceedings that the Luton Property did not form part of the transaction between Accord and Brass. In any event, even if that is not the case, the same point as above applies: the transfer of the equitable interest in the Accord Deed is irrelevant to the issues before me. The legal title, on any basis, remains with Accord.

The Oversons' plea of non est factum

41. A further point taken by Mr and Mrs Overson is that the Southern Pacific Deed should be set aside on the ground that they did not understand the meaning and effect of the document they were signing. This is a difficult plea to make good: it is necessary to show that the element of consent was totally lacking, that is to say when

it can be demonstrated that the 'transaction which the document purports to effect is essentially different in substance in kind from the transaction intended' (see *Saunders v Anglia Building Society* [1971] AC 1004, per Lord Wilberforce at page 1026).

42. In the present case, as stated above, Mr and Mrs Oversons submitted a mortgage application form to Southern Pacific, seeking a loan of £350,000 to remortgage the Burnley Property and to discharge other indebtedeness. The offer of a loan was duly made and accepted by them. Solicitors acted for them in respect of this transaction. Relying on the certificate of title, Southern Pacific advanced the money secured by the Southern Pacific Deed.

43. There is no evidence in support of the assertion that Mr and Mrs Overson did not understand the nature of the transaction they were entering into. The Southern Pacific Deed, on its face, recites that they had been advised to seek legal advice and that, by executing the deed, they agreed to be bound by the terms and conditions. At the risk of repeating myself, this is an ordinary, standard transaction between a borrower and a lender. It is, in my judgment, fanciful to suggest that this deed should be set aside on the grounds of non est factum.

Other points taken by Southern Pacific and Accord Morgages

44. Southern Pacific and Accord argue that, if they are wrong on their primary case as to the validity of the Deeds, the charges granted by the Applicants would nonetheless be valid as equitable mortgages. I have no doubt that this is correct, but, in view of my findings above, the point does not need to be dealt with at any great length. The Deeds were validly executed, and there is no other basis on which the Deeds can be set aside.

Conclusion

45. The applications made by the Applicants to set aside the Deeds fail. As these cases are part of a number of other cases (most of which, no doubt, have been brought because of the financial difficulties faced by the borrowers) relying on the same

arguments, it is to be noted that other such cases will also be dealt with on the same basis, and will be dismissed.

46. The Respondents are, on the face of it, entitled to their costs. I have seen a schedule filed on behalf of Accord, but not, I believe, a schedule filed on behalf of Southern Pacific. The Applicants may raise such objections or make such representations as they deem appropriate 14 days after receipt of the schedules.

47. Subject to any points in reply, I will consider what costs order to make, without the need for a further hearing.

BY ORDER OF THE TRIBUNAL

Dated this 21st day of February 2014.