Case No: 2011/1107
Neutral Citation Number: [2012] EWHC 415 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 04/03/2013

Before:

MR JUSTICE NORRIS

- -

Between:

Christopher Charles Garwood

(As Trustee of the estate in bankruptcy of Adekunbi Ibrahim Fabumni-Stone) **App**

- and -

Bank of Scotland Plc **Respo**

- -

- -

Mr Tom Weekes (instructed by **Carrick Read Insolvency**) for the **Appellant**

Miss Nicole Sandells (instructed by **Cobbetts LLP and Walker Morris LLP**) for the **Respondent**

Hearing date: 28 November 2012

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JUDGMENT

Mr Justice Norris :

1.
This is a contest between the unsecured creditors of a bankrupt fraudster (or possibly the fraudster's trustee in bankruptcy in respect of his fees), and a lender whom the fraudster duped, as to who should suffer most. The lender says that despite the fraudster's machinations and its own carelessness it should have first call on what can be salvaged from the sale of a property: and the fraudster's trustee in bankruptcy (who stands in the fraudster's shoes) says that what is salvaged should fall into the general pot and (after payment of the costs of the bankruptcy) be shared by all unsecured creditors (including the lender). The battleground was originally an application before the Adjudicator to HM Land Registry by the trustee in bankruptcy for the cancellation of a unilateral notice entered against the title to the property by the lender: and is now an appeal by the trustee in bankruptcy against the Adjudicator's decision that the unilateral notice should not be cancelled.

2.

In 2003 Mr Adekundi Ibrahim Fabumni-Stone (“the Borrower”) purchased and became the registered proprietor of 173 Portland Road London SE25 (“No.173”) under Title No. SGL55301. He did so with the aid of an advance from Mortgage Express whose legal charge was entered on the register on 4 September 2003. No.173 was then (or was subsequently) divided into 2 flats. That on the ground floor was variously described as “Flat A” or “Flat 1”: I shall refer to it as “Flat A”. That on the first floor is sometimes called “Flat B” and sometimes “Flat 2”: I shall refer to it as “Flat B”. What part of the curtilage of No.173 belongs to Flat A has from time to time varied. The division of No.173 in this way does not seem to have complied with the Planning Acts or the Building Regulations.

3.
On the 30 June 2004 the Borrower obtained an advance of £96,725.00 from a predecessor of the Bank of Scotland (“BoS”), the transaction reference number ending “891” (“the June 2004 Loan”): this was apparently in connection with the purchase of Flat B. In July 2004 the Borrower obtained another advance of £97,701.00 from BoS (“the July 2004 Loan”), the transaction reference number this time ending “181”: this was apparently in connection with the purchase of Flat A. In the present proceedings it has been accepted that the Borrower induced BoS to make those loans by misrepresenting that he was buying long leases of Flat A and Flat B (and by suppressing the fact that he was already the freeholder of No.173 and that there were no long leases in existence).

4.
The application for the June 2004 Loan was to support the purchase of Flat B. The conveyancers retained by the Borrower and by BoS were Chiltons (Mr Okpoko acting). Chiltons completed a certificate of title on the 25 June 2004: it referred to Flat B but gave the title number of No.173 itself (that relating to the freehold interest in the entire property, because there was no separate leasehold interest). On receipt of the certificate of title BoS sent £96,725.00 to Chiltons. Chiltons did not apply that money in the completion of any transaction: but nor did they return it. It is not clear whether any legal charge was executed by the Borrower in June 2004: none has survived. BoS does not appear to have chased up the missing mortgage.

5.
Meanwhile in March 2004 the Borrower had applied to BoS for an advance to purchase another flat at No.173. The application form simply described it as “converted flat” with leasehold tenure. The valuation report submitted to BoS described the intended security as a one bedroomed ground floor flat with garage. So far as the accommodation is concerned, this would describe Flat A. On the 14 July 2004 Mr Okpoko of Chiltons sent a certificate of title relating simply to No.173 and again giving its title number. There was no reference to any flat. On receipt of the certificate of title BoS sent £97,750.00 to Chiltons. On the available material that money was not applied in the completion of any transaction; but again it was not returned and remained in Chiltons’ client account. BoS does not appear to have chased up the missing mortgage.

6.
However, on 16 July 2004 the Borrower did execute a BoS form of charge (“the 2004 Charge”). It was said (in handwriting) to refer to the account ending “181” (the transaction reference for the supposed advance on the security of Flat A). Its operative part said:-

“The Borrower charges by way of legal mortgage and with full title guarantee the Property with the payment of all monies payable by the Borrower to the Lender under the mortgage conditions”.

7.

The “Property” was defined as “Flat B 173 Portland Road”, that being typed into the standard form. The title number given related to the freehold interest in No.173. The legal charge secured “all monies payable…under the mortgage conditions”. Clause 3.1 of those conditions provides:-

“The mortgage secures the payment of (a) the mortgage debt and (b) any other money which the Borrower owes to the Lender on any other account…”.

The principal element of “the mortgage debt” was “the… amount outstanding ….under the loan….”. That was “the amount…. set out in the offer letter”: and by that term was meant “the written offer by the Lender to lend money to the borrower which is to be secured by a mortgage on the property”. By the term “property” was meant the property specified in the mortgage viz the legal charge that was executed. This was “Flat B 173 Portland Road”.

8.
This legal charge was not immediately registered. Instead at some stage between the 16 July 2004 and the 27 September 2004 Chiltons used part of the aggregate funds produced by the June 2004 Loan and the July 2004 Loan to redeem the Mortgage Express charge in the sum of £134,049.60 (and the entry relating to it was removed from the Register). (If a letter from Chiltons dated 27 September 2004 is right then the bulk of the money was sent on 16 July 2004 and a small shortfall on 27 September 2004). The 2004 Charge was then registered against Title No.SGL55301 (i.e. that relating to the entire freehold interest in No.173) on the 20 January 2005.

9.
The BoS Mortgage Conditions (in clause 8.2(b)) disapply section 99 of the Law of Property Act 1925: the Borrower could not therefore create any leases of anything that was subject to the 2004 Charge. Nonetheless on 13 November 2009 the Borrower granted to “Mr Akeem Fabunmi” (“Akeem”) a 99 year lease of “Ground Floor Flat 1, 173 Portland Road” (“the 2009 Lease”). This would be Flat A: but it excluded the garage (that had been included in the valuation report for the July 2004 Loan). The 2009 Lease was registered under newly-created Title No. SGL712468, and therefore created a legal estate. Unless steps were taken, upon that registration the 2009 Lease would have been subject to the 2004 Charge registered against the freehold title out of which it was granted.

10.
But on 27 November 2009 BoS made an electronic application to cancel the entries relating to the 2004 Charge. BoS acknowledged that the property (described on Form e-DS1 simply as “173 Portland Road” and given the title number SGL55301) was no longer charged as security for the payment of sums due under the registered charge. This application was consequent upon a letter dated 18 November 2009 from solicitors acting for the Borrower which was headed:-

“Re Flat 1 173 Portland Road…….

Account Number 20002810891”

and which referred to “the redemption of your charge in the above matter” and requested alteration of the register of title. The reference to “Flat 1” was a reference to Flat A (on the ground floor) in respect of which the 2009 Lease had been granted. The reference to the transaction number ending “891” was a reference to the June 2004 Loan which BoS thought had been used to buy Flat B (on the first floor) and in respect of which no separate legal charge was registered. The only charge on the register (and which needed removing) was the 2004 Charge which was apparently tied into transaction “181” but did indeed affect the freehold.

11.
Neither the request for redemption, nor the redemption statement itself, is available. But the internal records of BoS indicate that it received £91,117.99 from the Borrower's solicitors on the 24 November 2009, and that that was the sum required to redeem the June 2004 Loan (with the transaction reference ending "891"). The redemption of that account married up with the request from the Borrower's solicitors in their letter of 18 November 2009.

12.
Akeem became the registered proprietor of the leasehold title to Flat A on 15 December 2009. At that point the Borrower still owed BoS the balance due on the July 2004 Loan with the transaction number "181" which had been created to fund the Borrower's supposed purchase of Flat A. Although the Borrower owned the freehold of No.173 (consisting of vacant possession of Flat B and the curtilage of No.173 together with the reversion expectant on Akeem's lease of Flat A) BoS had no security registered against any of those property interests. It had become an unsecured lender in relation to the July 2004 Loan with the transaction reference "181".

13.
In September 2010 the Borrower became bankrupt. The claims in the bankruptcy total £1.94m (and may increase). The Borrower's other property assets are in negative equity. The property interests described in paragraph 12 are a key asset in the bankruptcy. The trustee in bankruptcy plans (a) to create a leasehold interest in Flat B on the same terms as the existing lease of Flat A; (b) to sell the freehold of the garage in the curtilage; and (c) to sell the freehold of the remainder of No.173 subject to the leases of Flat A and Flat B. BoS says that it is entitled to a security interest in the property the trustee in bankruptcy intends to sell. The trustee in bankruptcy says that by reason of what the fraudster and BoS have done the lender has lost that interest.

14.
BoS discovered that although they had money due from the Borrower they had no registered charge over any property belonging to the Borrower. After investigating the position BoS lodged an application to enter a unilateral notice against the title to No.173. The ground for doing so was set out in these terms:-

"We have been advised that an erroneous discharge dated the 27 November 2009 was submitted by [BoS] upon submission of an application for first registration of a new leasehold interest on behalf of [Akeem] now registered under title number SGL712468. [BoS] has confirmed that their loan is still outstanding and further investigations are needed in order to obtain sufficient documentation to submit an application for re-registration of [BoS's] legal charge dated 16 July 2004".

15.
The form UN1 identified "the property" as "173 Portland Road" and it sought protection of "the whole of the registered estate", being that comprised in title number SGL55301. The notice explained that

"There is in existence an executed mortgage deed dated 16 July 2004 between the Borrower and [BoS] over this title that has been erroneously removed from the title".

It asserted that:-

"The Borrower has agreed to grant [BoS] a legal charge over the property and has agreed to the registration of the same".

It then explained that the money was outstanding and that BoS required urgent protection “for their equitable and legal interest in the property” until such time as an application for re-registration could be submitted.

16.
As initiated, the BoS claim also asserted that the Borrower had agreed to charge the freehold interest in the whole of No.173 and had done so by the 2004 Charge, which had been erroneously removed from the register. The Borrower’s trustee in bankruptcy (who had become the registered proprietor of No.173) challenged that this was so, and applied for the removal of the unilateral notice. The matter came before Professor Robert Abbey as a Deputy Adjudicator to HM Land Registry upon a reference under s.73(7) of the Land Registration Act 2002. Such a reference confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes determination of the underlying merits of the claim that had provoked the making of the application: see Silkstone v Tatnall[2011] EWCA Civ 801 at paragraphs [37] and [48].

17.
The Adjudicator may be taken to have found the facts which I have recited: they were in evidence that was not challenged. On those facts BoS argued that the removal of the 2004 Charge was a mistake, because it was an “all monies” charge and not all monies due to BoS were paid before discharge. Indeed, what had been paid was the June 2004 Loan (not the July 2004 Loan to which the 2004 Charge was apparently related by transaction number). BoS then argued that that mistake founded a cause of action founded upon unjust enrichment: and linked to this assertion was a claim to a charge over the freehold by way of subrogation to the Mortgage Express charge which was redeemed with BoS money.

18.
On the other side, the trustee in bankruptcy appears to have argued that on its true construction the 2004 Charge created a legal charge over the freehold of Flat B, that this was released by the unilateral act of BoS, and that if BoS was to recover the benefit of a legal charge over the freehold in Flat B then it had to rely upon equity’s jurisdiction to set aside that type of unilateral transaction: and that the Land Registry Adjudicator did not have jurisdiction so to do. In further written submissions counsel for the trustee in bankruptcy submitted that until the discharge was set aside the register was accurate, and, further, that there was no subsisting equitable charge (by subrogation or otherwise) capable of registration.

19.
In his decision the Adjudicator first addressed what interest was charged by the 2004 Charge. He held:-

“I am unable to accept that this was a freehold interest as it seems to me from the paperwork that the applications were for flats and that they were to be leasehold. I take this view as being consistent with business common sense…”

It is not clear what bearing this determination had on the ultimate outcome of the case in the light of the way the Adjudicator decided it.

20.
The Adjudicator then decided that he was

“…simply required to consider whether a unilateral notice can be on the title to the disputed property”’;

and on the evidence he took the view that it could.

21.
He reached that conclusion on alternative grounds. First, he held (in paragraph [21]):-

“I am persuaded that the removal of the charge in relation to [the July 2004 Loan] was indeed a mistake and one that should be corrected by an application for re-registration of the charge. I am satisfied that [BoS] must be entitled to claim an equitable interest as a result of the monies advanced in 2004… it was the case that at the time of the mistaken discharge that monies were outstanding and so [the 2004 Charge] should really have remained on the register. [BoS] must therefore be in the position of an equitable lender so far as [the July 2004 Loan] is concerned (because there is no subsisting registration protecting the loan)…”.

22.
As an alternative ground the Adjudicator held (in paragraph [22]):-

“I am also persuaded of the argument in relation to subrogation. [BoS] should be entitled to call for the substitution of one claim for another, especially the transfer of the right to receive payment of the debt in regards to the original mortgage with Mortgage Express which was redeemed with the money advanced by [BoS]… therefore I am of the view that the Respondent (and the estate of the bankrupt) would unquestionably be unjustly enriched at the expense of [BoS] if there was not subrogation… I see this argument of unjust enrichment as being the strongest one in support of [BoS] and the retention of the unilateral notice”.

23.
The Grounds of Appeal against the Adjudicator’s Decision were that he erred in holding that:-

a)
The cancellation of the 2004 Charge was a mistake that should be corrected by reinstatement on the register:

b)
That BoS has an equitable charge as a result of the monies advanced in 2004:

c)
That BoS has a charge by way of subrogation: and

d)
That the 2004 Charge is (properly interpreted) over the leasehold interest.

24.
The Appellant trustee’s first submission is that the Adjudicator misunderstood his jurisdiction. He was not required simply to decide whether on the evidence the unilateral notice should be left on the register whilst the substantive dispute was sorted out: his job was to decide the substantive dispute.

25.
I agree that the Adjudicator’s jurisdiction required him to decide the underlying substance of the dispute on its merits i.e. to determine the underlying merits of the claim that had provoked the making of the application: see Silkstone v Tatnall[2011] EWCA Civ 801 at paragraphs [37] and [48].

26.
The Appellant trustee's second submission was that if the Adjudicator was bound to determine the underlying merits of the claim, then the Adjudicator's treatment of the issues was "woefully inadequate" and his legal analysis "extremely superficial" so that there had been "no (even remotely satisfactory) adjudication of the dispute". This is extravagant language which I do not consider warranted. But I would accept:

a)
That the legal reasoning needs to be more fully expressed.

b)
That the legal conclusion is not sufficiently clear: is BoS entitled to re-register the 2004 Charge? Or is BoS instead entitled to re-register the Mortgage Express charge? If there is to be a re-registration of the 2004 Charge, how is that to be effected if the charge is against a leasehold interest that does not exist?

I must therefore consider the Grounds of Appeal.

27.
The arguments on appeal ranged widely and did not always directly engage with one and other. The position of each of the parties has constantly shifted. In fairness to both of them it is, as the Adjudicator said, difficult to conceive of a greater conveyancing muddle, and the resulting chaos is capable of analysis using a number of different tools. The parties have understandably seized whatever was at hand.

28.
When BoS advanced the June 2004 Loan for the purpose of funding the purchase of Flat B, that money was not used in any transaction at all: it should have remained in Chilton's client account held on trust for BoS.

29.
When BoS advanced the July 2004 Loan this was not used in the completion of the acquisition of the property (a leasehold interest in Flat A) for which it had been advanced. But the July 2004 Charge was executed, referring to Flat B. The 2004 Charge would (when registered) create a legal charge over the property identified within it. Until then, it took effect as an equitable charge of the property so identified. The advance that was secured by that charge would (given that no money was then actually used to complete any transaction) have to be identified from the terms of the charge itself by reference to its internal definition of "mortgage debt".

30.
Whatever the mortgage debt so identified was, the remainder of the money advanced by BoS would also have been secured by the 2004 Charge under the "all monies" provision.

31.
So the first task is to identify upon what property a charge was imposed by the 2004 Charge.

32.
In my judgment the Adjudicator erred in law in holding that the 2004 Charge affected a leasehold interest. No such interest existed in any part of No.173, nor had any such interest been defined (term? extent of demise? rent? covenants? etc). BoS could not have taken possession of or sold any such interest if it wished to enforce the security created by the 2004 Charge. Indeed, as the title then stood

no leasehold interest could have been created under which the Borrower was the leaseholder able to offer a lease as security: Rye v Rye[1962] AC 496.

33.
So the Borrower must have charged whatever estate he had. Since that was the freehold interest, one must go on to ask: the freehold interest in what? Flat A? Flat B? The whole of No.173? Counsel for the trustee submits that it was a charge of the freehold interest in Flat B. Counsel for BoS submits that it was a charge over the whole of No.173 itself.

34.
The answer is to be found by a process of construction i.e. the ascertainment of the meaning the 2004 Charge would convey to a reasonable person having all of the background knowledge reasonably available to the parties to the instrument in the situation in which they were. This single task of interpretation will encompass what is sometimes called “the correction of mistakes by construction”.

35.
BoS says that if the document is properly construed in this way then the bank obtained a charge over the freehold of No. 173 to secure the June 2004 Loan and the July 2004 Loan. The trustee says that properly construed it was a charge over the freehold of Flat B to secure the July 2004 advance (which had in fact been made in relation to Flat A).

36.
The relevant elements are:-

a)
The Borrower had promised to grant a charge over a leasehold interest in Flat B in return for the June 2004 Loan of £96,725 made under reference “891”.

b)
The Borrower had also promised to grant a charge over a leasehold interest in Flat A in return for the July 2004 Loan of £97,701 made under reference “181”.

c)
The June 2004 Loan had been advanced, but not used and no security had been granted:

d)
The July 2004 Loan had been advanced, but not used;

e)
At about the time when the July 2004 Loan was advanced the Borrower signed the 2004 Charge:

f)
The face of that Charge bore a reference to transaction “181” completed in handwriting:

g)
The Charge defined “the property” as “Flat B” (which was typed on to the standard form):

h)
The title number referred to the freehold title SGL55301:

i)
There is a contradiction between the transaction reference and the property charged:

The context is not illuminating: although the timing might hint at a connection with the July 2004 Loan, there was outstanding the obligation to give security for the June 2004 Loan (and the 2004 Charge might be a late performance of that obligation).

37.
In my judgment the effect of the 2004 Charge (when signed) was to give BoS an equitable charge (capable of completion by registration) over the freehold of Flat B to secure the June 2004 Loan. These are my reasons:-

a)
One can rule out as a matter of construction a charge over the freehold of No.173 to secure the aggregate of the June 2004 Loan and the July 2004 Loan since such an arrangement had never been bargained for: the objective observer would know that two separate deals had been negotiated.

b)
The Borrower sought and BoS advanced two separate loans on two separate securities (albeit that each charge would contain an “all monies” clause).

c)
One can rule out a charge over Flat B to secure the July 2004 Loan. This arrangement was not bargained for and had never been suggested. Although the document might on its face literally suggest this, it is obvious that there has been a mistake either in the identification of the property (“Flat B”) or in relation to the associated transaction (“181”).

d)
The choice lies between reading the 2004 Charge as securing transaction 181 (the July 2004 Loan) on Flat A or as securing transaction 891 (the June 2004 Loan) on Flat B.

e)
The choice cannot be informed by how the money was actually used, for neither advance was separately used in July 2004.

f)
The reference to “Flat B” forms part of the operative part of the deed itself, whereas the reference to the transaction number is clearly for administrative purposes only (the transaction number not being referred to in any of the operative provisions of the deed). So the parties intended the reference to the property to have legal effect, but not the reference to the transaction.

g)
The system of definitions used in the mortgage conditions (which are incorporated by reference into the 2004 Charge) identifies the relevant advance by reference to the loan made on the property subject to the charge (not by reference to the transaction number). The mortgage debt is the sum offered in the offer letter referring to Flat B.

h)
The reasonable person (informed as to the circumstances to the same extent as the parties themselves) would understand that a mistake had been made by the person who was noting the administrative reference and that the mortgagor understood that this was a mortgage of Flat B to secure the monies advanced for the purpose of acquiring an interest in Flat B.

38.

One then comes to the actual use of the money. This occurred at the end of September 2004 and led to the registration of the 2004 Charge. Although these two events are separated by more than a month, for the purposes of analysis it is sensible to take them together.

39.
The Mortgage Express charge was paid off in September 2004. The trustee in bankruptcy (whilst making the formal submission that there is no evidence as to what money was used to discharge the Mortgage Express charge) in reality accepts (as he is bound to do) that it is likely that the BoS advance was the source of the repayment. This means that £139,049.00 out of the aggregate advance of £194,426.00 was so used. But how does one determine what part of the June 2004 Loan and what part of the July 2004 Loan was so used? Counsel for BoS submitted that it must be assumed that the Borrower used first the money he had had the longest. Counsel for the trustee submitted that the task was, on the evidence, quite impossible: and that impossibility put an end to any potential arguments about subrogation.

40.
On the way I analyse the case the determination of this dispute does not ultimately matter. My inclination is to hold that, given that none of either advance was returned unused to BoS and that all of it was used in one way or another by the Borrower, the correct approach is to allocate to each individual use of the money a rateable proportion of the two loans. This means that the Borrower took £96,725.00 from the aggregate fund and secured it by the 2004 Charge, using part of it to pay off the Mortgage Express charge, and part of it for unknown purposes. The Borrower took £97,701.00 (from the July 2004 Loan) and used £67,370 to pay off Mortgage Express and the balance for unknown purposes (for which he did not give the promised security). I will use those figures for the purposes of argument.

41.
It was argued that because of the use of the BoS money in this way BoS became subrogated to the Mortgage Express Charge. This, of course, can only be to the extent to which the BoS money was used to repay the Mortgage Express Loan (and not to the full extent of the BoS advances). So the question is: is BoS subrogated to the Mortgage Express Charge, and if so to what extent?

42.
It was common ground that an equitable charge by way of subrogation can arise if, as a result of a mistake that gives rise to a claim for unjust enrichment, a lender has failed to obtain the intended security. When BoS advanced the June 2004 Loan it was intended that in return it would get a legal first charge over a leasehold interest in Flat B. BoS did not get that security. When BoS advanced the July 2004 Loan it was intended that in return it would get a legal first charge over a leasehold interest in Flat A and the garage: that is what the valuer was evidently told to value. BoS did not get that security. But the trustee says that there is no question of subrogation.

43.
First, it is said that there is no evidence of what money was used to redeem the Mortgage Express Charge. I have already dealt with that argument.

44.
Second, it is said that since Chiltons acted for both the Borrower and BoS the bank is presumed to be aware that it was not getting the intended security in return for the use of its money. I reject this submission. The knowledge of Mr Okpoko is not to be attributed to BoS because the underlying transaction in which he was acting on the instructions of the Borrower was in fraud of BoS and

depended upon his not reporting that BoS's money was being used but the security it anticipated receiving was not being granted. So the basis for imputing knowledge to BoS is missing: see Cave v Cave(1880) 15 Ch.D 639.

45.
Third, the trustee argues that BoS cannot be subrogated to the extent that it acquired security as part of the transaction. This involves a decision about what security BoS actually obtained.

46.
I have held that the 2004 Charge upon its true construction charged Flat B with the payment of the mortgage debt created by the June 2004 Loan and "all monies" (including the July 2004 Loan). But it was in fact registered against the title number to No. 173. The trustee says that the registration effected a charge of part of the registered title. BoS says that it effected a charge against the whole of No.173.

47.
An edition of the Office Copy Entries dated 20 January 2005 simply records against the whole title "registered charge dated 16th July 2004". This is not very informative: but of itself suggests that the registered charge affects all of the land in the title. The trustee submits that this approach is unsound because of the terms of rule 72 of the Land Registration Rules 2003. This plainly recognises the possibility of a registered charge affecting only part of the land in the title and does not require any special entry. The argument was conducted by reference to the rule in its present form: but that form came into being as the result of an amendment made in 2008. In its original form LRR 72 (1) provided:-

"… on a … charge of part of the registered estate in a registered title the following entries must be made in the individual register of that registered title: (a) an entry in the property register referring to the removal of the estate comprised in the … charge: (b) entries relating to any… matters created by the … charge which the registrar considers affect the… uncharged registered estate".

One would therefore expect something on the register to that effect: but LRR 72(4) provides

"This rule only applies to a charge of part of a registered estate in a registered title if the registrar decides that the charged part will be comprised in a separate registered title from the uncharged part".

So Counsel for the trustee is right to submit that the form of the registration does not necessarily preclude registration of the 2004 Charge only against part of the land included in No.173.

48.
But in my view the registration of the 2004 Charge did affect the whole of the land in the registered title. First, the trustee has not produced the form AP1 showing that the application was for registration of the 2004 Charge against only part of the title. By rule 213 of the LRR 2003 any document lodged at the Land Registry dealing with part of the land in a registered title must have attached to it a plan identifying clearly the land dealt with. No such document forms part of the 2004 Charge. So in the absence of an AP1 with a plan attached the Registrar would have registered the 2004 Charge as affecting the whole title. If the AP1 had attached a plan I am confident that the Registrar would have produced an entry which said that "the land edged red is subject to a charge dated 16 July 2004". Second, where a particular interest or estate does not affect the whole of the land in a registered title the relevant part of the register will normally indicate (by reference to a

coloured plan) the part of the land in the title affected by the relevant interest or estate. Otherwise the Register would not be a definitive record and one would have to go back to the transactional documents. The Office Copy Entries show that the Registrar did not identify Flat B by any such marking on the title, as good practice would require. Third, everybody has behaved as if their understanding was that the 2004 Charge affected all of the land in the title. That is why the Borrower sought the release of the charge when granting a lease of Flat A (which would be unaffected by any charge that existed only over Flat B): and why the Land Registry accepted a discharge of the 2004 Charge on form E-DS1 (which it would not have done if it had thought that the discharge related to part only of the land in the title). Paragraph 28.014 of Ruoff & Roper "Registered Conveyancing" says that "it is not possible at the current time to utilise the END system for discharge of a registered charge falling [within] DS3, that is, in respect of part of land within a registered title… For those cases, paper discharges are currently mandatory".

49.
In my judgment, therefore, whatever the 2004 Charge was intended to achieve, it in fact achieved a charge registered against the whole of the land in the title i.e. against the whole of the freehold in No. 173.

50.
It is now necessary to assess the impact of this upon the application of the principles of subrogation. Insofar as the June 2004 Loan was obtained in anticipation of the grant of the first legal charge over the leasehold interest in Flat B, the use of the June 2004 Loan in part to discharge the Mortgage Express charge cannot give rise to any question of subrogation. BoS did not get what it bargained for: but it got something better - a charge over the whole of the land in No.173 to secure its mortgage debt.

51.
The more difficult question is whether BoS can be subrogated to the Mortgage Express charge in respect of the £67,370 that was used out of the July Loan. It was intended to get a first registered charge over the leasehold interest in Flat A and in the garage. In the event (because the actual registration enlarged the intended effect of the 2004 Charge) the whole of its advance was secured under the "all monies" provision in the 2004 Charge, and was so secured over the whole of No.173. That was not exactly what BoS bargained for: but it was in my judgment every bit as good in the circumstances. It fully secured the full loan. The Borrower could not deal with any part of No.173 without BoS receiving (or obtaining alternative security for) the July 2004 Loan. BoS did not need an equitable remedy to reverse or prevent unjust enrichment. The bank's position at law (albeit not exactly the position for which it had bargained) fully prevented any unjust enrichment occurring: see Cheltenham & Gloucester Plc v Appleyard[2004] EWCA Civ 291 at paragraph 42.

52.
I therefore disagree with the Adjudicator on his principal ground. I do not consider that in the events which happened BoS was subrogated to the Mortgage Express charge.

53.
One then comes to the events of the 27 November 2009 when BoS submitted the e-DS1 which contained the bank's acknowledgement that No.173 was no longer charged as security for the payment of the sums due under the charge (even though those sums comprised the June 2004 Loan and the July 2004 Loan, and BoS had only received payment of the June 2004 Loan).

54.

Counsel for BoS argued that the submission of the e-DS1 (and the subsequent removal of an entry relating to the 2004 Charge) simply altered the register: it did not operate as any form of statutory receipt within section 115 of the Law of Property Act 1925. It therefore left the charge existing in equity and capable of re-registration under section 27 of the Land Registration Act 2002. I do not accept this argument. Section 115 of the Law of Property Act 1925 does not apply to registered land (see s.115(10)): so it is dangerous to import its conceptual framework into the 2002 Act. The e-DS1 acts as both evidence of discharge and as an application to alter the register: see rules 114 & 115 LRR 2003 and the terms of form DS1. As Counsel for the trustee put it "the discharge and cancellation caused the charge to cease to exist at law and in equity". He cited (by way of illustration from another jurisdiction) State Bank of New South Wales v Berowa Holdings Pty Ltd (1986) 4NSWLR 398.

55.
Counsel for BoS next argued that if that was its effect, then the discharge and alteration of the register had been a mistake.

56.
Counsel for the trustee submitted (a) that there was no evidence of any mistake: and (b) a mistake cannot be assumed because banks sometimes do release "all monies" charges for commercial reasons even though there is a balance outstanding.

57.
In my judgment these arguments are not open to Counsel for the trustee. In paragraph 21 of his decision the Adjudicator said that he was "persuaded that the removal of the charge in relation to [the July 2004 Loan] was indeed a mistake". Although he did not set out his reasons for that view they are, I think, readily apparent. When the Borrower called on BoS to discharge the 2004 Charge he did not tell BoS that the 2004 Charge was its only security for the July 2004 Loan and that, accordingly, it would be releasing its security without redemption of account "181": and in its Statement of Case BoS had explained that "the charge was removed in error when a separate account was redeemed". The departure point for the analysis on this appeal is that there was a mistake.

58.
Counsel for the trustee then argued that if there was a "mistake" then it was not of any relevance because:-

a)
There was no "mistake" on the register which accorded exactly with what BoS had asked the registrar to do:

b)
The discharge was a unilateral act and BoS had to demonstrate that it made a "mistake" such type was to justify the setting aside of a unilateral transaction (as recently considered in Pitt v Holt [2011] EWCA Civ 197);

c)
That an Adjudicator did not have jurisdiction to set aside a discharge brought about by a qualifying mistake because section 108 of the Land Registration Act 2002 relates only to "a qualifying disposition of a registered estate or charge" which a discharge was not;

d)

There is no reason why this sort of mistake should engage the compensation provisions in Schedule 8 to the 2002 Act.

It is necessary, in addressing these arguments, to start with a consideration of what may be done to the register. Under paragraph 5 of schedule 4 to the Land Registration Act 2002 the registrar may alter the register "for the purpose of…(a) correcting a mistake [or] (b) bringing the register up to date…". An alteration which consists of the correction of a mistake and which prejudicially affects the title of a registered proprietor is a particular category of alteration labelled "rectification".

59.
In this case there was a mistake. BoS knew that it was discharging the 2004 Charge as security for the June 2004 Loan: but BoS did not know it was releasing its only security for the July 2004 Loan. The situation is the same as that which arose in Fender v National Westminster Bank Plc [2008] EWHC 2242.

60.
In that case a company was liable to a bank both on its own account and as guarantor, and both of those liabilities were secured by a charge. But liability under the guarantee came to an end and the bank was asked to cancel the guarantee and release the charge, which it did (overlooking the company's own indebtedness that was also secured). HHJ Purle QC summarised the position thus:-

"What the bank, through its employees, thought it was doing was giving effect to the discharge of the company's liabilities when, unbeknown to them, a substantial liability remained. The bank did not intend to make a gift of its interest in the property as mortgagee. It proceeded on the basis that it no longer had any interest because nothing remained due following the discharge of the [guaranteed indebtedness]. In this, the relevant bank employees were mistaken".

61.
I take the same view in the instant case: and so did the Adjudicator who was "persuaded that the removal of the charge in relation to [the July 2004 Loan] was indeed a mistake".

62.
The discharge of a mortgage is not normally a unilateral or voluntary act: it is something which the mortgagee is bound in equity to do when the mortgage is redeemed (and can be compelled to do). But counsel for the trustee was correct to describe the e-DS1 in this case as "a unilateral act" precisely because by it BoS made an (unintended) gift of its security interest in No.173 when the July 2004 Loan remained outstanding.

63.
Can this mistake be corrected? I will address this question on the basis which Counsel for the trustee invited, namely, that the e-DS1 was a unilateral transaction. To invoke the equitable jurisdiction to set aside a voluntary disposition for mistake there must be mistake of sufficient gravity either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction (Pitt v Holt[2011] EWCA Civ 132 at [210]). In my judgment the mistake of BoS satisfied each of these three limbs.

64.
There was a mistake: BoS did not intend to release the only security it held for the July 2004 Loan, but the e-DS1 had this effect. This was because the Borrower had used the July 2004 Loan, but (a) had not granted the agreed security over Flat A in respect of it; (b) had thrown BoS entirely upon the "all

monies" provision in the July 2004 Charge; and (c) had requested redemption of the July 2004 Charge without revealing that no security had been granted for the earlier advance and that accordingly the July 2004 Charge stood as security not only for transaction "891" (which was to be redeemed) but also for transaction "181" (where the loan was to remain outstanding).

65.
Second, it is a mistake as to the legal effect of the release. Its legal effect was to turn BoS from a secured creditor in relation to the July 2004 Loan into an unsecured creditor. That was not its intended effect. It was correctly described in the form UN1 as "an erroneous discharge".

66.
Third, the mistake was clearly of the relevant seriousness. In one sense it was induced by the person who derived the benefit followed the voluntary disposition, namely, the Borrower himself: see paragraph [64] above. The Borrower (and those claiming through him) should not benefit from his concealment of the true position. But in any event the mistake of BoS was of such a serious character as to render it unjust on the part of the Borrower to retain what has been given to him i.e. the unencumbered freehold of No.173.

67.
So the e-DS1 is liable to be rescinded on the grounds of mistake. The trustee then argued (in his Skeleton Argument on the appeal) that the Adjudicator had no jurisdiction to do such a thing. Section 108(2) of the Land Registration Act 2002 provides that:

"(2) … the adjudicator may, on application, make any order which the High Court could make for the rectification or setting aside of a document which

(a) effects a qualifying disposition of a registered estate or charge…

(3) For the purposes of subsection (2)(a) a qualifying disposition is

(a) a registrable disposition, or

(b) a disposition which creates an interest which may be the subject of a notice in the register"

The short submission of the trustee originally was that an e-DS1 does not appear to fall within any of the categories of documents there set out: so the Adjudicator lacked jurisdiction.

68.
This argument was not pressed at the hearing. It was accepted that the term "disposition" could include a transaction which put an end to an interest: and IRC v Buchanan [1958] 1 Ch 289 at 296 and Newlon Housing Trust v Aluslaiman[1999] 1 AC 313 at 316H were cited. I am not sure that this is an answer to the original argument because the term "registrable disposition" is defined in s.132 of the 2002 Act to mean a disposition which is required to be completed by registration under s.27 of the Act. By s.27(3) in the case of a registered charge the only dispositions required to be completed by registration are "a transfer" and "the grant of a sub-charge". But it is unnecessary to rest my decision on this concession.

69.
I do not accept that there is any jurisdictional inhibition. The jurisdiction of the Adjudicator was founded by the reference under s.73(7) of the 2002 Act: and that reference required him to decide the underlying substance of the objection on its merits. He was required to decide whether BoS was entitled in the events which had happened to have the July 2004 Charge re-registered, and to do so by

reference to the whole law (not simply some parts of it). Section 108(2) confers a separate and free-standing jurisdiction that may be invoked by following the procedures set out in Rule 16 of the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003. That is why the sub-section begins with the word "Also, the adjudicator may, on application.....".

70.
The next question is whether the register can be altered to reflect the correction of the mistake. Counsel for the trustee argues that it cannot. He relies on a passage in Ruoff & Roper "Registered Conveyancing" at paragraph 46.009 which says:-

"... it is suggested that there will be a "mistake" whenever the Registrar (i) makes an entry in the register that he would not have made: (ii) makes an entry in the register that would not have been made in the form in which it was made; or (iii) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration. So the entry of an estate or interest purportedly arising under a void disposition is a mistake. The entry made in the register does not reflect the true effect of the purported disposition when the entry was made. However the entry of a person as having acquired an estate or interest under what proves to be a voidable disposition is not a mistake. Unless it had been rescinded at the time of registration, the disposition would be valid and it would not be a mistake to enter the disponee as the proprietor of the estate or interest under it. An entry cannot retroactively become a mistake. It cannot be argued therefore that the rescission of a voidable transaction retroactively makes the entry which recorded the disposition – at the time whilst it was still effective – a mistake".

In Baxter v Mannion[2011] EWCA Civ 120 this passage fell for consideration in the context of an argument about adverse possession. Giving the judgment of the court Jacob LJ said that he would reserve his position as to whether the authors were right in drawing a distinction between void and voidable transactions because

"It is difficult to see why... a transaction induced by a fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim had elected to treat it as void".

71.
I do not have to decide this issue for the purpose of disposing of this appeal. I will assume that Counsel for the trustee is right in his submission that the register cannot be "rectified" upon the grounds of mistake where the mistake is that of a party to the transaction and not a mistake of the Registrar. It does not follow that the register must remain in its existing condition. "Rectification" is a sub-set of "alteration". If Counsel for the trustee is right in his submission that "rectification" is not available it does not follow that a different type of "alteration" is not available (that might loosely be called "rectification" but in the technical language of the 2002 Act strictly is not).

72.
In my judgment if the e-DS1 is to be set aside (at least insofar as it constituted an unintended gift of BoS's security interest in No.173) then the register will have to be brought up to date under paragraph 5(b) of Schedule 4: see rule 126 of the Land Registration Rules 2003. This is explained in Ruoff & Roper (supra) at paragraph 46.037. Notwithstanding all his argument about the nature of the mistake that was required for the Register to be "rectified" I think Counsel for the trustee accepted this.

73.
There are no exceptional circumstances which would justify not exercising the power to alter the register to bring it up to date to reflect BoS' property rights as now determined. The Borrower (and the trustee who stands in his shoes) cannot complain of this alteration since he had by his fraud substantially contributed to the mistake (and it would in any event be unjust for the alteration not to be made since the necessity to rely on the July 2004 Charge in respect of the July 2004 Loan arose out of the wrongful failure of the Borrower to grant the intended security for that loan). Accordingly the Register should be altered to re-register the July 2004 Charge against the freehold title to No.173. This will not affect Akeem's registered title to the 2009 Lease.

74.
I therefore agree with the Adjudicator that BoS is entitled to be re-registered as proprietor of the 2004 Charge which now secures the July 2004 Loan. The Borrower has not managed to turn his mortgage advance into unsecured lending.

75.
I dismiss the appeal.