[2017] UKFTT 0680 (PC)

REF/2016/0283

THE LAND REGISTRATION DIVISION OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

GUISEPPE CONTE

APPLICANT

and

NATIONAL WESTMINSTER BANK PLC

RESPONDENT

Property Address: The Coach House, Westwell, Ashford, Kent TN25 4LQ

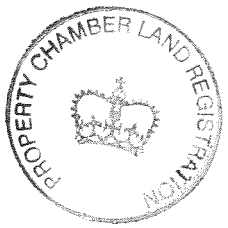
Title Number: K69109

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier Tribunal

The Chief Land Registrar is directed to cancel the Applicants' original application dated 10 July 2015 to alter the register.

Dated 15 August 2017

SIMON BRILLIANT



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST – TIER TRIBUNAL

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Title Number: K69109

Before: Judge Brilliant

Sitting at: 10 Alfred Place, London WC1E 7LR

On: 17-19 July 2017

Applicant's Representation: **Mr L Maynard of counsel**

Respondents' Representation: **Mr S Allison of counsel**

DECISION

Forgery – undue influence and/or fraud - application to remove a registered charge in favour of a lender bank on the grounds that the applicant's signature had been forged or on the grounds of non est factum - in the alternative an application for the charge to be set aside on the grounds of undue influence and/or fraud.

Barclay's Bank plc v O'Brien [1994] 1 AC 180, Royal Bank of Scotland plc v Etridge [No 2] [2010] 2 AC 773, NRAM Ltd v Evans [2017] EWCA Civ 1013; Inhenagwa v Onyeneho [2017] EWHC 1971 (Ch).

Introduction

1. These proceedings concern a first registered charge dated 16 September 2005 ("the charge"), given by the applicant in favour of the respondent bank over The Coach House, Westwell, Ashford, Kent TN25 4LQ ("the Coach House"). The charge was registered, as entries C2 and C3 in the charges register of Coach House, on 11 November 2005 [64].

2. The applicant is the registered proprietor of the Coach House, which is registered under title number K69109 [63].

3. On 10 July 2015, almost 10 years after the charge was registered, the applicant applied to Land Registry for alteration of the register under paragraph 5 of schedule 4 to the Land Registration Act 2002. He asks for the charge to be removed on the alternative grounds that:

   (1) he did not sign it ("issue 1");

(2) he did sign it, but that there was a radical difference between what he signed and what he thought he was signing (non est factum) ("issue 2");

(3) he was tricked into signing it ("issue 3").

4. If the applicant succeeds on issue 1 or 2, the charge is void. There will be a mistake in the register and I will have jurisdiction to direct Land Registry to remove the charge.

5. If the applicant succeeds on issue 3 the charge is voidable. It remains a valid charge until such time as it is set aside. Accordingly, there are at present no grounds for altering the register.

6. Since these proceedings were heard, the Court Appeal has confirmed in NRAM Ltd v Evans [2017] EWCA Civ 1013 that the registration of a voidable disposition before it is rescinded is not a mistake for the purpose of schedule 4 to the Land Registration Act 2002. Once a voidable disposition has been rescinded, the register can be altered. This is not for the purpose of correcting a mistake, but to bring the register up to date.

7. At the start of the hearing I gave the applicant permission to treat his statement of case as though it were an application made directly to the tribunal under section 108(2) of the Land Registration Act 2002.

8. This provides that the Tribunal may, on application, make any order which the High Court could make for the setting aside of a document which effects a qualifying disposition of a registered charge. A qualifying disposition is defined as including a registrable disposition. The execution of the charge was a registrable disposition.

9. If I set aside the charge, the applicant will then need to make a further application to Land Registry to bring the register up to date.

10. Since these proceedings were heard, the High Court has given guidance as to my jurisdiction. In Inhenagwa v Onyeneho [2017] EWHC 1971 (Ch) [62], Morgan J said:

The jurisdiction of the adjudicator (and now the First-tier Tribunal) is to determine the issues which go to the merits of the dispute in relation to the matter referred for determination. Prima facie, therefore, the adjudicator or the tribunal should not determine the merits of other disputes between the same parties, even disputes relating to the same registered title, if those disputes are different from the dispute in relation to the matter referred for determination. However, I would qualify that statement as follows. The adjudicator or tribunal may consider that it would be helpful to make findings on certain points where such findings would throw light on the findings which are necessary to determine the dispute in relation to the matter referred for determination. The present case is a good example of that. The adjudicator found it helpful to make findings about the arrangement in 1991 to assist with her findings as to the 2002 transfer. I consider that the adjudicator was acting within her jurisdiction when making those findings as to the 1991 arrangement. However, because her findings as to the 1991 arrangement were evidentiary findings and not ultimate findings, they do not give rise to an issue estoppel and the parties are not bound by them in any subsequent litigation.

11. In these proceedings, the applicant disputes that he signed a number of other documents concerning his dealings with the respondent. I should only make findings in relation to those documents if I believe they would throw light on the findings which are necessary to determine the dispute in relation to the charge.

The applicant's business career

12. The applicant was born in 1948. He is by training an AGA engineer. But he became involved in the buying and refurbishing of property. At one time, he owned as many as 10 "buy to let" properties.

13. The applicant has a son, Mr Francesco Conte ("Francesco"), who was born in 1974.

14. In 1997, the applicant and Francesco went into partnership, buying and refurbishing property. In 2003, they incorporated the business and became the joint shareholders in Quercus Homes Ltd ("QH"). The objects of QH were property letting and management, and property development.

15. The directors of QH were the applicant and Francesco. The company secretary was Ms Lorraine Stevens ("Ms Stevens"), who was the partner of Francesco and the mother of his children.

16. QH became the owner of 6 properties. QH did not carry out development work itself, but employed Quercus Universal Designs Ltd ("QUD") to do so. The applicant did not have any interest in QUD. Francesco owned 99% of the shareholding of QUD.

17. QUD was wound up on 6 May 2008, and dissolved on 6 June 2015. Francesco was declared bankrupt in 2009.

18. QH entered creditors' voluntary liquidation on 29 August 2013, and was dissolved on 27 April 2015.

The Coach House

19. The applicant purchased the Coach House in 1999, and was registered as the proprietor on 3 August 1999.

20. In 2002 the applicant sold off part of the Coach House, Holly House, and retained the remainder. The applicant subsequently divided the remainder into 2 new mews houses and a plot of land.

21. In 2013, the respondent appointed liquidators of the Coach House under the charge. The liquidators have sold the mews houses and the plot of land, but registration of these dispositions has been postponed to the determination of these proceedings.

The mandate, the guarantee and the waiver

22. The applicant accepts that on 17 August 2005 he signed the mandate in respect of QH's account 90638611 with the respondent. The mandate is it at [1421-1422] and at [129] in the supplemental bundle. In a letter dated 6 October 2010 from his then solicitors at [288] it was admitted that the applicant had signed the mandate. The signatories to the mandate were Francisco, the applicant, Ms Stevens and Ms Higgs. Ms Higgs is a solicitor. She was then employed as an assistant solicitor by Peter Clough & Co in Sheerness. This firm carried out conveyancing work for QH.

23. The applicant accepts that on 7 September 2005 both he and Francesco signed a guarantee in favour of the respondent in respect of the liabilities of QH to the respondent, up to a limit of £200,000 ("the guarantee"). The guarantee is at [225-228].

24. The applicant also accepts that on the same date he signed a third party security waiver, entitled "Waiver of Legal Advice – Fully Involved Director" ("the waiver"). The waiver is at [230] and includes the following:

For the Bank's protection I confirm that:-

1. I am a director of the company named above [QH] as the Borrower. I confirm that I play an active role in the running of the company and as such have a full understanding of its financial affairs, including the liabilities to the Bank covered by the Security...

7. Having considered all of this I have decided that I do NOT wish to seek

independent legal advice nor to take the Security away for further consideration.

25. The applicant's signatures to the guarantee and the waiver were witnessed by Mr Andrew Davies. He was the respondent's relationship manager at the time.

26. I found Mr Davies to be a careful and honest witness. He explained how the respondent's business relationship with the applicant came into being. It was his practice at the time to scour new planning applications with a view to approaching the applicants to offer assistance with lending requirements.

27. In 2005, QH had made an application for planning permission to develop Merindol, Dental Street, Hythe, Kent ("Merindol"). Mr Davies' note in the respondent's file at [615-616] is as follows:

As part of our strategy for acquiring new [business] we write to originators of planning applications we spotted this [company's] [application] for the Hythe site in 2/05 & wrote to the Directors, despite a [number] of chasers they did not return my call. Out of the blue I [received] a [telephone] call from GC last [Thursday] 28/7. He advised that their existing bankers HBOS had agreed terms in respect of the [purchase] of the Merindol site but had then varied the terms at the last minute. GC found this unacceptable & in order to complete the purchase on time took out a Bridging Loan with a secondary provider

28. It was put to Mr Davies in cross examination that the telephone call which came out of the blue had come, not from the applicant, but from Francesco. Mr Davies admitted that in the previous paragraph in the file he had wrongly identified the applicant as the 99% owner of QUD instead of Francesco.

29. However, Mr Davies was adamant that he was not mistaken as to who had made the first approach. Father and son have very different speaking voices. He was sure that it was the applicant who made the initial contact.

30. The applicant alleges that he only met Mr Davies for the first time on 7 September 2005. On the other hand, Mr Davies recalled meeting both the applicant and Francisco at the Merindol site before the occasion on which the guarantee and waiver were signed.

31. I unhesitatingly accept the evidence of Mr Davies where it conflicts with that of the applicant. The importance of this finding is that I am satisfied that in 2005 the applicant was an active and informed participant in QH's business relationship with the respondent.

The valuation of the Coach House

32. The respondent's file at this time at [616] shows that QH was seeking a bridging loan of £203,000 to be repaid from the proceeds of the first available property owned by QH, before any development commenced on the Merindol project. Security for the bridging loan was to include a first legal charge over the Coach House. This was described as *a property owned by GC* and as an existing residential property with planning permission to convert into two units. It was proposed to take a guarantee from the applicant of say £215,000 to link to QH.

33. I am satisfied that at this time the respondent intended to take a first legal charge over the Coach House as security for the guarantee given by the applicant in respect the liabilities of QH.

34. The respondent instructed Strutt & Parker to value the Coach House. The report is dated 24 August 2005 and is at [107-114]. The report states that it was required for secured lending purposes. It is clear from paragraph 4 of the report [109] that the author assumed the Coach House was owned by QH.

35. The applicant argues that this demonstrates the respondent did not intend to take a charge over property belonging to him. But the file note at [616] referred to above shows otherwise.

The charge and the loan agreement

36. There is a wide divergence of evidence about the charge and the loan agreement.

37. The applicant is adamant that he never executed the charge, which is dated 16 September 2005 and is at [232-236].

38. The applicant is also adamant that he never signed a loan agreement dated 1 March 2006 by which respondent agreed to loan to the applicant up to £220,000 to be utilised to assist with the development of Merindol ("the loan agreement"). The loan agreement is at [250-255]. This was called by the respondent "loan D1".

39. On 31 March 2006, the respondent opened an account for the applicant called "Merindol Dental St Loan". It was the account linked to loan D1 and the statements are at [1198-1212]. This account was closed on 3 November 2008.

40. On 31 March 2006, a loan fee of £2,100 was debited to this account. On 3 April 2006, the first tranche of the loan to QH which amounted to £94,168.23 was debited to this account. On 3 May 2006, the second tranche of the loan to QH which amounted to £111,601.77 was debited to this account. Following this, interest was rolled up on this account each quarter.

41. The respondent varied loan D1 on a number of occasions. The purpose of the variations was to extend the term of the loan and the amount borrowed. The respondent accepts that the variations dated 5 January 2007 [259-263], 28 January 2008 [1445-1447], 7 April 2008 [1448-1451], 18 April 2008 [1452-1453] and 16 October 2008 [1454-1456] were only signed by the respondent and not by the applicant.

42. The applicant's signature appears to be on the variations dated 26 February 2007 [264-270] and 21 May 2007 [503-504]. However, the applicant denies that they are his signatures and say that they have been forged.

43. In November 2008, the respondent decided that it would no longer permit interest to be rolled up on the account linked to the D1 loan. On 12 November 2008, it closed this account and transferred the outstanding balance to a new loan account, 47195088. This was called by the respondent "loan D4".

44. On 12 November 2008, interest of £2,859 was due on this account. Instead of debiting the interest to this account, the respondent transferred £2,859 to this account from the applicant's business account with the respondent, 47124245. The relevant statements are at [105] of the supplemental bundle and [1213].

45. The applicant says that he had no idea that the Coach House was charged to the respondent until 13 November 2008, when he discovered that his business account had been debited with the interest and enquired of the respondent why this had occurred.

46. The applicant has maintained consistently and robustly over the last 9 years that he did not execute the charge or sign the loan agreement. He insists that he would never have charged the Coach House as it was his personal property which was mortgage free. He described it to me as his "jewel in the crown" and as his "pension pot".

47. The applicant faces two hurdles in respect of his case on the charge and the loan agreement. The first hurdle is the evidence of Mr Peter Clough, the principal of Peter Clough & Co, the firm referred to in paragraph 22 above. The second hurdle is the expert evidence of Dr Audrey Giles, the handwriting expert.

Mr Peter Clough

48. Mr Clough was instructed by the respondent on 19 August 2005 to act on its behalf in taking the legal charge over the Coach House [862-864]. Mr Clough accepted those instructions on 31 August 2005 [864]. Mr Clough gave evidence of a meeting held at his offices in Sheerness on 1 September 2005 during which

the applicant executed the charge. Mr Clough said that Francisco was present at the meeting as well. He produced an attendance note, which is at [116-117]. According to the attendance note, Mr Clough had spent at least one hour preparing for the meeting and the meeting itself lasted one hour 30 minutes.

49. Mr Clough records in the attendance note that he advised the applicant that, if anything happened to QH or QUD, he could end up losing the Coach House, particularly as he was not a director of or shareholder in QUD. The applicant did not seem terribly happy about the situation, and Mr Clough asked him if he was sure that he wish to go ahead. The applicant confirmed that he would do so, and Mr Clough witnessed his signature on the charge.

50. The applicant denies that this meeting ever took place at all. He says in his witness statement that he has never even met Mr Clough [582]. He says that it is very suspicious that the critical attendance note was not produced until a considerable time after he had first protested about the genuineness of the charge. But Mr Clough explained that it was not his practice to disclose internal memoranda when handing over the contents of a file to a former client. I accept that evidence.

51. I found Mr Clough to be an impressive witness. He was careful and patient whilst explaining what had happened. I can see no motive for why a retired solicitor should seek to make up a meeting that never happened. I can find nothing suspicious about the attendance note. Mr Clough explained that it was not the practice at that time to keep detailed time records.

52. Mr Clough concludes his witness statement as follows [601]:

[The applicant] displayed some reluctance to sign the charge over his property, as he was experienced enough in such transactions to be familiar with the potential legal effects of the document, which I explained to him. He agreed to sign as he accepted it was necessary for his business plans. I know I advised [the applicant] about the nature, content and effect of the charge and the

practical implications of signing the charge. I certainly would not have signed the certificate confirming so otherwise.

53. The applicant attempted to run an alibi defence. He says that he was working on 1 September 2005 at a development site owned by QH in Whitstable. He called his former wife, Ms Hotchkiss, who said he was at the Whitstable site all day on 1 September 2005. He also called Mr Mairs, a fencing contractor who had been working on the Whitstable project, who confirmed that the applicant was on site that day.

54. I am not impressed by this evidence. I do not accept that it is possible accurately to recall precisely what happened on a particular day 11 years before the statements were made. Moreover, there is no reason why the applicant could not have travelled from Whitstable to Sheerness and back again.

55. I have no hesitation in accepting Mr Clough's evidence, and preferring his account to that of the applicant.

Dr Audrey Giles

56. This Tribunal has extensive experience of forgery cases. The ultimate decision as to whether or not a document is forged is that of the judge, not the expert. Nevertheless, the judge is bound to weigh up and consider any expert evidence put before the tribunal.

57. The only expert evidence in relation to the charge and the loan agreement comes from Dr Giles, who is regarded as the doyenne of her profession. Her report is at [1388-1419].

58. She concludes that there is very strong support for the view that the applicant signed the charge. She also concludes that there is strong support for the view that the signature on two copies of the loan agreement are those of the applicant.

59. I am satisfied from the totality of the evidence that the applicant executed the charge knowing what it was, that the applicant was aware of loan D1 as part of the arrangements between himself and the respondent, and that the applicant did sign the loan agreement at [251-255]. Accordingly, the respondent succeeds on issue 1.

The alternative cases

60. The applicant put forward a number of alternative cases if I were to find that he had indeed signed the charge.

Non est factum

61. I accept Mr Clough's evidence that the nature and effect of the charge was explained to the applicant on 1 September 2005. Accordingly, the plea of non est factum fails, and I find for the respondent on issue 2.

Fraud/misrepresentation/undue influence

62. The applicant may have executed the charge with some reluctance, as Mr Clough's attendance note suggests, but he did not do so as a result of any fraud perpetrated on him, or as a result of any misrepresentation made to him or any undue influence exercised on him.

63. It is possible that Francisco and/or Ms Higgs improperly withdrew funds from QH after the respondent provided monies to it through loans D1 and D4. It is equally possible that QH collapsed because of mismanagement by Francisco and/or Ms Higgs, or because of the economic crisis of 2008 which ruined so many property ventures, or because of a combination of the two. None of these questions are of direct relevance to the findings which I have to make, and I make no findings in respect of them.

64. I am quite satisfied that there is no evidence of any fraudulent or improper

behaviour by the respondent, and allegations of fraud against it should not have been made. I found Mr Davies, Mr Keeler (who took over as the applicant's relationship manager in 2007) and Mr Birchwood (a senior documentation manager) all to be careful and honest witnesses, doing their best to assist the Tribunal.

65. Even if I had found that some wrongdoing had been perpetrated on the applicant at the time that he executed the charge or signed the loan agreement, this is not a case in which the respondent would have had constructive notice of such wrongdoing. The applicant is a businessman who made the first approach to the respondent, and Mr Clough explained to him the nature of the transaction to which he was entering. The respondent was never put on enquiry as far as the applicant is concerned. This case is far removed from cases such as Barclays Bank v O'Brien [1994] 1 AC 180 and Royal Bank of Scotland plc v Etridge [No 2] [2010] 2 AC 773.

66. Accordingly, I find in favour of the respondent on issue 3.

Conclusion

67. I shall direct the registrar to cancel the original application.

68. The usual rule is for costs to follow the event, and in a case such as this which lasted three days it would be appropriate for me to direct a detailed assessment. If the applicant wishes to argue for a different costs order, he must provide written representations to the respondent and the Tribunal within 14 days.

69. I would like to thank both counsel for their considerable assistance, thoroughness and clarity.

Dated this 15th day of August 2017

Simon Brilliant

BY ORDER OF THE LAND REGISTRATION DIVISION OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL