

Leases requiring to be registered under the Land Registration Act 2002

Mortgage Express v Vermaak & Perrin (29 October 2010)

The message:

A lease requiring to be registered under the Land Registration Act 2002, being a lease of more than 7 years duration, can amount to an overriding interest under Schedule 3 paragraph 2 of the 2002 Act notwithstanding that it was not registered.

The case:

Mortgage Express brought a claim for possession of residential property on the grounds of mortgage arrears. The claim was brought against Mr Vermaak as the registered proprietor of the property and the mortgagor. Mr Vermaak had purchased the property from Ms Perrin, with the assistance of a loan from Mortgage Express secured by a first charge. Prior to the purchase of the property, Mr Vermaak had agreed with Ms Perrin that if she sold the property to him she would be able to continue to reside in the property pursuant to a 10 year tenancy. Mr Vermaak did not inform Ms Perrin that he was purchasing the property with the assistance of a mortgage, and he did not inform Mortgage Express of the agreement reached between him and Ms Perrin.

Ms Perrin signed a 10 year tenancy agreement with Mr Vermaak and transferred the property to him for an undervalue. She continued to reside in the property.

The mortgage deed was not signed by Mr Vermaak until some 2 months after the purchase of the property.

Upon Mr Vermaak's failure to pay the mortgage possession proceedings were issued. Mr Vermaak took no part in the claim. Ms Perrin applied to be joined to the claim on the grounds that she had an overriding interest, pursuant to paragraph 2 of Schedule 3 to the 2002 Act, binding the claimant mortgagee by virtue of her 10 year tenancy, coupled with her actual occupation in the property at all material times.

It was not disputed that Ms Perrin had a proprietary interest in the property, her 10 year tenancy amounting to an equitable lease. It could not be a legal lease because the lease was not registered.

It was argued by counsel on behalf of the claimant that as the 2002 Act requires all leases in excess of 7 years to be registered, pursuant to section 27(2)(b)(i) of the Act, the equitable lease could not amount to an overriding interest, notwithstanding the actual occupation of the lessee. The whole policy of the 2002 Act was to ensure that all interests, so far as possible, were on the register. Schedule 3 to the Act, in particular paragraph 2, could not be used to get round the requirements for registration and thereby subvert the policy of the Act. Ms Perrin's claim to an overriding interest was a backdoor attempt to get round the failure to register a registrable interest.

This argument was rejected by the Court. It was held that the wording of paragraph 2 to Schedule 3 is not so restrictive and that in speaking of "an interest" it does not within the paragraph or anywhere else restrict its meaning to an unregistrable interest. Moreover, paragraphs 2(a) and (d) of Schedule 3 specifically include certain interests which cannot amount to overriding interests, and an interest under an equitable lease is not one of them. The Court's attention was drawn to the judgment of Robert Walker LJ (as he then was) in *Ferrishurst Ltd v Wallcite Ltd* ([1999] Ch 355) referring to: "the proposition, by now uncontroversial, that an interest may be protected as an overriding interest even though it might have been protected by alternative means." Finally the Court noted that it is possible to protect an equity by estoppel arising from a proprietary estoppel both by registration under s.116 of the 2002 Act and as an overriding

interest. Thus failure to register a lease in excess of 7 years is not fatal to a claim to an overriding interest by virtue of that proprietary interest coupled with actual occupation.

As the claimant's mortgage was not executed until some months after the sale of the property Ms Perrin's equitable lease took priority over the mortgage as an overriding interest.