

Barclays Bank Plc v Guy

2008 WL 1771362

Case No: A3/2008/0120

Neutral Citation Number: [2008] EWCA Civ 452

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

(MR T MOWSCHENSON QC)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Wednesday, 9th April 2008

Before:

LORD JUSTICE CARNWATH

and

LORD JUSTICE LLOYD

Between:

BARCLAYS BANK PLC

Appellant

- and -

GUY

Respondent

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

THE APPELLANT APPEARED IN PERSON.

Mr S Hartley (instructed by Linklaters LLP) appeared on behalf of the Respondent.

Judgment

(As Approved)

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Lord Justice Lloyd:

1. These proceedings, brought by Barclays Bank plc against Mr Trevor Guy, arise from, and relate to, dealings or purported dealings with a large parcel of land, of some 48 acres, with development potential in Manchester. Mr Guy acquired the land by stages, I think I am right in saying, in 2003. It is now registered in the name of a Gibraltar company called Ten Acre Limited, and it is so registered subject to a charge to Barclays.

2. Ten Acre Limited became registered as its proprietor on, I believe, 13 July 2004 or thereabouts, perhaps early in August, as a result of a TR1 form, which bears the date 22 June 2004, apparently reflecting a transfer on sale by Mr Guy at a price of £15,000,000. The status of that transfer is one of the things that is at issue in the proceedings although Ten Acre Limited is not, at present, a party to the proceedings because it is in liquidation and Mr Guy's attempt to join it as a defendant to his counterclaim met the obstacle that proceedings against a company in liquidation cannot be brought without the court's permission. That question is suspended pending the outcome of this appeal.

3. On 8 March 2005 Ten Acre Limited executed a charge by way of legal mortgage of the land in favour of Barclays and the charge was registered on 23 March 2005. The charge secures debts both of Ten Acre Limited and also of a company called Lexi Holdings plc. The overall indebtedness secured is said to exceed £100,000,000.

4. Mr Guy contends that the transfer was void, having been procured by fraud or indeed being a forgery, and that the price was not paid, although he says that he had received some £2,000,000, as it were on account of the price, but had received it before the date which the transfer bears. He claims that he is the beneficial owner of the land still and he also claims that the charge is not valid, effective or binding as against him. The bank, faced with the insolvency of Ten Acre Limited and the default of Lexi Holdings plc, which was also subject to insolvency proceedings, wished to sell the land under its powers as mortgagee, but found that that was being obstructed by Mr Guy's contentions and, I think, by some registrations which he had caused to be made at the Land Registry. So it started these proceedings to clear its title as mortgagee to sell. At the time of the hearing before the judge below, Mr Terence Mowschenson QC, sitting as a deputy judge of the Chancery Division, it asserted that it had a buyer lined up ready to proceed.

5. Mr Guy put in a draft defence and counterclaim and then an amended version, seeking, as I say, not only to resist the bank's claim but to counterclaim against Ten Acre Limited. By that he seeks to set up his right to have the property back in his own name, free from the charge to Barclays. The bank took the position that these contentions on Mr Guy's part did not demonstrate any arguable defence or reason why the case should go to trial and it applied for summary judgment. That application came before Mr Mowschenson on 16 January this year. He held in favour of the bank and declared that the claimant was entitled to sell the relevant land pursuant to its charge dated 8 March 2005, and that any purchaser purchasing the property from the claimant as mortgagee would take the property free from any interest, right or claim of the defendant in, over, or in respect of the property. There were various consequential orders including an order for costs. The judge refused permission to appeal, extended time for appealing and granted a stay of the order for an interim payment of costs until after the application for permission to appeal to the Court of Appeal had been disposed of.

6. Mr Guy put in an Appellant's Notice in due time which came for consideration on the papers by myself. On 14 February, for reasons that I stated briefly on that occasion, I considered that the judge was plainly correct and refused permission. Mr Guy was entitled to renew the application orally and that he has done and that is what is before this court today.

7. Mr Guy appears in person as he did before the judge and as he has on almost all occasions, as I understand it, in relation to a significant number of litigations that have arisen from the circumstances I have mentioned, but he has had the able assistance of Ms Victoria Gregory, who is not only working as his personal assistant but is qualified as a barrister and has been called to the Bar recently. Both Mr Guy and Ms Gregory have addressed us this afternoon.

8. We have a note of the judgment of Mr Mowschenson rather than a transcript, a note prepared by Linklaters who acted and are acting for Barclays but it has not been suggested that there is any query as to the accuracy or sufficiency of the note. According to this note, the judge rejected a first

contention that the legal charge itself was defective or suspect in itself and he went on to consider the effect on the charge of Mr Guy's attack on the transfer. He treated as assumed in Mr Guy's favour, for the purposes of that application, Mr Guy's assertion that the transfer was either, or both, procured by fraud or actually forged. It is not suggested that Mr Guy's signature was not placed on the transfer but Mr Guy says that he signed it in blank at a time when the price was not stated and he did not authorise the insertion of any price, let alone the price of £15,000,000 that appears on the transfer. The contention that the transfer was procured by fraud would be based on the allegation that although Mr Guy had signed the document, he never authorised his or any solicitor to part with it on his behalf, never delivered it and never authorised any other statement to be imposed on it, whether the consideration or the date. The judge took the view that those allegations would, at best, show that the transfer was voidable, not that it was void, but he went on to consider the position in the alternative, if the transfer was void. For my part, I am prepared to proceed on the footing that Mr Guy has shown a good arguable case for saying that the transfer was a forgery and may have also been procured by fraud, and if it was a forgery, then it would be a void document. It would be a piece of paper of no value or dispositive effect.

9. That would be all very well as between Mr Guy and Ten Acre Limited, but by virtue of Section 58 of the Land Registration Act 2002 and the other provisions of that Act the register is conclusive, subject only to its rectification pursuant to the provisions of the Act itself. Ten Acre Limited was the registered proprietor in March 2005 and it was therefore able to charge the property to Barclays Bank to secure indebtedness. Accordingly what matters for Mr Guy is not merely being able to, in effect, set aside the transfer to Ten Acre Limited, he also has to be able to set aside the effect of the charge. In legal terms that would require him to obtain the rectification of the register so as to remove the charge from it.

10. Mr Guy's amended defence does not, in terms, seek rectification of the register, but on the part of a litigant in person I would not hold that against him and, just as on the part of the deputy judge below, I look in Mr Guy's documents and his written and oral submissions, both directly and via Ms Gregory, for a case which, in substance, provides a reasonably arguable basis for saying that he would be entitled, if his allegations are made out, to have the Register rectified so as to remove the charge from it. The provisions of the 2002 Act as to rectification of the Register are in Schedule 4, which was brought into effect by section 65, but attention to Section 65 itself is unnecessary because all it says is that Schedule 4 shall have effect.

11. Schedule 4 deals with alteration of the Register and opens with a paragraph which says that references to rectification in this context are to alteration which a) involves the correction of a mistake and b) prejudicially affects the title of the registered proprietor. Plainly an alteration of the Register which involved the removal of the Barclays Bank charge from the Register, would prejudicially affect the title of the registered proprietor, namely Barclays, and therefore, in that respect, this is a case for rectification and the question is whether it involves the correction of a mistake.

12. That phrase is picked up again in paragraph 2, which provides for three different purposes for which the Register can be ordered to be altered. Two of them are of no relevance to the present case. The other one, the first, is "correcting a mistake". So under this paragraph the court has power to order that the register be altered in order to correct a mistake. Paragraph 3 is also relevant because it expressly applies to the power under paragraph 2 so far as relating to rectification. I will read sub-paragraph (2):

"If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless --

- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
- (b) it would for any other reason be unjust for the alteration not to be made."

13. That would raise issues as to who was in possession of this land, which on the evidence is vacant land, but assuming that the proprietor is in possession, the proprietor is, for this purpose, either Ten Acre Limited as the freehold owner or Barclays as mortgagee, if Barclays has gone into possession of it. Either way, thus, the structure is that the court may make an order altering the Register for the purpose of correcting a mistake but in paragraph 3(2) there are limitations on such an order being made adversely affecting the proprietor in possession.

14. If Mr Guy's allegations are made out, he would have no difficulty making good the application at paragraph 3(2) as against Ten Acre Limited because it would have caused or substantially

contributed to the mistake by its own fraud. So, it would be unnecessary to go further to sub-paragraph (b). As against Barclays Bank, if Barclays Bank is in possession he would have to show that one or other of those two paragraphs applies, but the first thing he has to show is that the order removing the charge from the Register would be an order for alteration of the Register for the purposes of correcting a mistake.

15. Mr Guy contends that the charge was not a valid document in itself because of what appeared to be irregularities on its face. The judge rejected this point, and it seems to me he was plainly correct. Leaving that aside, therefore, what Mr Guy says about the charge is in substance that it ought not to be regarded as a proper or valid charge because, he says, Barclays Bank knew or ought to have known that Ten Acre Limited and, to put it more directly, Shaid Luqman and all his corporate vehicles, including Ten Acre Ltd, were thoroughgoing fraudsters and should not be trusted and that, in effect, any dealing to which they were parties should be regarded with extreme suspicion.

16. In Mr Guy's Grounds of Appeal he does not address this point in terms, although I think his grievance against the judge's reading of Schedule 4 of the Act can be seen in his third ground of appeal, which is that the interpretation of the Schedule is unjust, unconscionable and inequitable in relation to knowledge of fraud and reliance on registration. He has addressed us orally, supplementing the full and explicit skeleton argument which was lodged in support of his appellant's notice, and with which I dare say Ms Gregory may have had some part of the drafting, to the effect that Barclays Bank, which was the lead bank or agent of a syndicate of banks which lent to Mr Luqman and his companies, must have been aware before March 2005, the date of the charge, a) that Mr Luqman was an extremely doubtful and fraudulent character and b) that there were things wrong with this very transaction, which Ms Gregory tells us was the largest of Mr Luqman's purchases in this particular instance, assuming it is properly to be regarded as a purchase.

17. It is perhaps to be seen as Mr Guy's misfortune that he became involved with Mr Luqman and his companies. Mr Guy has told us of some of the proceedings involving Mr Luqman, in one of which he was disqualified as a director for the maximum period of 15 years by Patten J and I am aware that Mr Luqman has been sentenced to prison for the maximum period of two years for a contempt of court by Henderson J. Mr Guy has, in particular, draw to our attention proceedings that Pearl Holdings Europe Limited brought against Horwath Clark Whitehill, its former auditors, to try to restrain the publication of a document dated 29 January 2004, comprising a statement by that firm of accountants explaining the circumstances connected with their ceasing to hold office as auditors. That was sent under the cover of a letter from the auditors to the directors of the company enclosing a statement and describing it as a statement which, in pursuance of section 394 of the Companies Act 1985, they considered should be brought to the attention of the members and creditors of the company. Mr Guy says, quite properly, that one of the principal creditors of the company would have been Barclays Bank and no doubt this statement came to their attention soon after the date, namely 27 October 2004, when Pearl Holdings' attempt to suppress the document came to an ignominious end before HHJ Howarth sitting as a High Court judge in Manchester.

18. Mr Guy has shown us the letter and the Statement of Circumstances. The Statement of Circumstances runs into a fourth page and is a graphic and detailed account of a number of extremely unsatisfactory attempts on Mr Luqman's part, or the company's part generally (but undoubtedly Mr Luqman was directly involved) in effect to deceive the auditors into allowing various matters to be treated in the accounts of the company in a way that was not justified by the underlying facts and documents. Anyone reading that document would become aware that Mr Luqman was an extremely slippery and untrustworthy person. They would not become aware of anything in detail other than the transactions described by the accountants in their statement, which had no direct relevance to the circumstances of the present case.

19. Coming back, however, to the question of rectification, what Mr Guy would have to show is that the order for the removal of the charge from the Register could be made for the purposes of correcting a mistake. He therefore has to show that the registration of the charge was a mistake. I can see that he could well arguably show that the registration of the original transfer was a mistake, especially if the transfer was the product of a forgery, because the registration of something that was not properly executed on the part of the registered proprietor must be a mistake. There is no question of that kind as regards the charge. It was properly executed by Ten Acre Limited. It is in proper form and there is nothing intrinsically wrong with it. What is wrong with it, according to Mr Guy, is that Ten Acre Limited did not have a good title to the land itself. Its title was subject to rectification on the part of Mr Guy. Mr Guy acknowledges that, if his solicitors had acted with sufficient diligence and promptness, he could have entered or lodged at the Registry a unilateral notice, the equivalent to

what used to be called a caution, which would have protected him. In fact he did instruct solicitors to do that but they got there only the day after the registration of the Barclays Bank charge. So he lost any priority in that respect. No doubt other proceedings may arise from that but that is not the concern of these proceedings.

20. What Mr Guy says, in support of a contention that the registration of the chargee, the mortgagee, Barclays, is a mistake, is that it must be a mistake for a charge to be registered if the mortgagee knows that the borrower, the mortgagor does not have a good title to the land. If, therefore, the chargee has actual notice of the defect in the mortgagor's title, he would say, the registration of the charge is a mistake. In support of that as at least arguable, Ms Gregory showed us, as I think she had shown Mr Mowschenson, a passage from Emmet and Farrand on Title, in which Professor Farrand and his fellow editor speak very critically of the proposition that at any rate if the transfer to the registered proprietor is voidable a subsequent transaction by that registered proprietor is not "a mistake" within the meaning of the 2002 Act. She also showed us a judgment of HHJ Langan QC, sitting as a High Court judge in Leeds in a case called Fretwell v Graves, handed down on 16 March 2005, in which Judge Langan had to consider, again at an interlocutory stage, a somewhat similar point. The sequence of transactions was somewhat different in that case but there had, as I understand it, been an arguably fraudulently procured transfer from the claimant to the first defendant and then a sale by the first defendant to the second and third defendants, who became registered as proprietors. It is fair to say that in that case it was not suggested that the ultimate purchasers knew anything about the conduct of the people directly involved in the fraud.

21. Judge Langan, at paragraph 80 of his judgment, started by having set out both the current legislation and the equivalent legislation in force under the Land Registration Act 1925, summarised the situation as being this: A (in that case Mrs Fretwell but in our case Mr Guy) apparently transfers land to Mr B (there Miss Graves, the second defendant, but here Ten Acre Limited) who becomes registered as proprietor. B then transfers or charges the land to C (in that case a transfer to the second and third defendants, in the present case a charge to Barclays Bank), and C in turns obtains registration. If the transfer from A to B is void or voidable the question which arises is whether A can obtain rectification against C. The judge then referred to some cases decided under the 1925 Land Registration Act and then came to the 2002 Act and an argument that the correction of a mistake in paragraph 2(1)(a) of Schedule 4 was to have the same scope as in the previous legislation. That he rejects and he says that rectification against the subsequent purchasers, or here against Barclays, would have to be on the footing that her case fell squarely within the words "For the purposes of correcting a mistake."

22. Then the judge quoted a passage from Ruoff and Roper on Registered Conveyancing which takes the view that the reading of "a mistake" is narrow and the concept of mistake is restricted to mistake in registration. In the next paragraph, paragraph 24, he quoted from Emmet and Farrand on Title, which expresses a different view, and he says that where opposing views are expressed by the authors of two respected text books "I cannot at an interlocutory stage rule out either as unarguable." Ms Gregory fairly says, "Well there is Judge Langan, experienced in the field, taking the view at a similar stage to the present, namely an interlocutory stage, that it is not unarguable that, even in the case where the ultimate purchaser is not alleged to have known anything about the fraudulent conduct of the intermediate owner, it is not unarguable that the original owner might get rectification as against the ultimate purchasers." By parity of reasoning, she says, it is not unarguable that Mr Guy might obtain rectification against Barclays Bank even if, contrary to his submission, Barclays were not on notice of anything wrong with Ten Acre Limited's title.

23. With the greatest of respect to what Judge Langan says there, and I understand perfectly why he took the view that he did, it seems to me that it is necessary to grasp the nettle of what is meant by "mistake". In that respect, while the scope of the phrase "correcting a mistake" is no doubt something that requires to be explored and discussed and developed in the course of future litigation, which will be decided upon the facts and upon the merits of each case, I cannot see that it is arguable that the registration of the charge can be said to have been a mistake, or the result of a mistake, unless at the least Mr Guy can go so far as to show that the bank, the mortgagee, had either actual notice, or what amounts to the same, what is referred to as "Nelsonian" or "blind eye notice", of the defect in the title of the mortgagor, Ten Acre Limited in the present case. I simply cannot see how it could be argued that if the purchaser or chargee knows nothing of the problem underlying the intermediate owner's title, that the registration of the charge or sale to the ultimate purchaser or chargee can be said to be a mistake. That seems to me inconsistent with the structure and terms of the 2002 Act. So the question is whether Mr Guy can show an arguable case, on the evidence, for saying that Barclays

Bank had actual notice or was turning a blind eye to matters that it knew, which would if it addressed them properly, have shown it that Ten Acre Limited did not have a good title to the property.

24. In this respect I find it telling that Mr Guy focused strongly on the terms of the Horwath Clark Whitehill statement. That is a powerful and detailed statement as to the lack of trustworthiness of Mr Luqman and would fairly be a warning to anyone dealing with Mr Luqman or his companies that they should look at any proposed dealing with him with great care, but he cannot get any closer than that to an allegation that Barclays actually knew, or turned a blind eye to knowledge they had, that Ten Acre Limited had procured the transfer in its favour, either by forgery or by fraud.

25. I have a great deal of sympathy for Mr Guy having become a victim of Mr Luqman's misdeeds but I cannot see that he can get home on the question of notice, which is the only way, as I see it, that he could establish a case for saying that the registration of the charge was a mistake, or was the result of a mistake, such that it could be corrected by rectification under Schedule 4 of the 2002 Act. It is in itself striking that he was aware of circumstances by December 2004, which ultimately led him to know that something had gone wrong, that Ten Acre Limited had become the owner despite what he says as to the intended transaction having been aborted before 22 June 2004. And he did take steps to instruct solicitors to protect his rights, which could have been done if those solicitors had acted more promptly. If that had been done, then, of course, Barclays would have been on notice that there was something wrong and they would not in fact have taken the charge or if they had done it would have been subject to whatever rights Mr Guy had as protected by the unilateral notice.

26. That, in my judgment, is the step that ought to have been taken on Mr Guy's behalf to protect his position and I do not see it as arguable, any more than Mr Mowschenson did, that he could obtain an order to the same effect by way of an order for rectification under Schedule 4 of the 2002 Act. For those reasons I would dismiss the application for permission to appeal and in those circumstances no question would arise of a further stay or injunction pending the appeal.

Lord Justice Carnwath:

27. I agree.

Order: Application refused.