

Competing claims

The Message:

A lender may have priority over another lender even though its charge was registered later in time.

The Case:

Anfield (UK) Limited v. Bank of Scotland plc and others [24 September 2010] considered the topical issue of competing claims for priority of security over the property of a bankrupt.

Halifax Building Society lent money to Mr Siddiqui, which was secured by a charge over Siddiqui's property registered at the Land Registry in 2000. Bank of Scotland plc (BoS) lent Siddiqui money to redeem the Halifax charge and in 2006 received an executed charge. However, BoS failed to register this charge at the Land Registry. In 2007 a unilateral notice was registered relating to a charging order in favour of Anfield (UK) Limited and an equitable charge in its favour was registered in 2008. BoS did not protect its loan to Siddiqui at the Land Registry until 2009.

The issue was whether Anfield's charge had priority over BoS's interests in the property. While Anfield protected its interests prior to BoS, BoS argued that it had priority based on the remedy of "subrogation". The County Court held that BoS was entitled to be subrogated to and registered as proprietor of the Halifax charge to the extent of the money advanced to discharge it. Anfield appealed to the High Court.

Subrogation may entitle a lender who has made advances, which have been used to discharge a secured debt owed to another lender, to step into the shoes of the other lender as far as the security is concerned, thereby gaining priority over intermediate lenders also holding security over the same property. This is primarily aimed at preventing unjust enrichment. Intermediate lenders (in this case, Anfield) are necessarily enriched by the discharge of a prior security. It will, basically, be unjust if BoS did not receive the security it bargained for when it advanced the money to Siddiqui which effected an improvement for Anfield, and if that improvement is properly seen as a windfall.

However, would Anfield's enrichment be unjust where BoS's expectation of receiving a first legal charge over the property was not fulfilled solely because of its failure to register the charge at the Land Registry? Essentially, did BoS lose its subrogation rights because it failed to register its charge in time?

Anfield contended that BoS had no subrogation rights, because it had all the security it bargained for when Siddiqui entered into the charge, since registration was a matter solely for BoS, not for the borrower and the fact that the failure to register may have been negligent was irrelevant in considering whether Anfield was unjustly enriched.

The Court, having considered earlier case authorities, disagreed. BoS would not lose its right to resist an unjust enrichment gained at its expense, simply because it had been careless in relation to the security. The factor making Anfield's enrichment unjust was the non-fulfilment of BoS's expectation that it would have a first legal charge, which expectation formed the basis of its

lending decision. It was irrelevant that Siddiqui had performed his bargain with BoS and that the non-fulfilment of the expectation was due to BoS's failure to register.

The Court addressed the concern that allowing BoS to subrogate subverts the legal importance of registration at the Land Registry, undermining lenders' reliance on the position on the face of the register. The Court considered that the statutory registration principles do not encroach on the principle of unjust enrichment and any unfair consequences of subrogation can be dealt with by way of a defence founded on change of position (where a party acted in the reasonable but false belief that a particular state of affairs existed).

The Court held that BoS was entitled to be subrogated to the Halifax charge and, therefore, had priority over Anfield.

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