

Lender Protection

The Message:

A lender may be able to exercise a power of sale even if its mortgage is not registered.

The Case:

Swift 1st Limited v Colin and others [27 July 2011] is a significant decision because it casts doubt on established practices in relation to dealing with registered land.

The Rileys owned the freehold in a property registered at the Land Registry. The title contained a restriction benefiting a previous lender to the Rileys. Although the mortgage had been paid off, the restriction, for unexplained reasons, remained on the title and required the lender's consent to registrations on the title.

Swift 1st Limited lent over £348,000 to the Rileys secured by a charge against their property. The previous lender failed to provide consent to the "substantive" registration of Swift's charge at the Land Registry and Swift merely noted the charge on the register. The Rileys, subsequently, entered into another charge with a third party which was registered.

At a later point, Swift purportedly exercised the power of sale under its charge to transfer the property to the Colins (the evidence suggested that the Rileys' indebtedness substantially exceeded the sale price). However, the Land Registry declined to register the Colins as registered proprietors, because Swift's charge had not been registered. The Registry argued that as the charge was unregistered, it took effect in equity only and that, as an equitable mortgage (although made by deed), Swift's power of sale did not arise. The case was very important for Swift since it had over 1,700 similar cases within its portfolio.

Application was made by Swift to the High Court to direct the Land Registry to register the Colins as registered proprietors. The application was not opposed by the defendants in the action, nor actively opposed by the Registry.

The Rileys' property was charged in Swift's favour by way of legal mortgage and, crucially, the mortgage was by deed. The mortgage provided that, if the Rileys failed to comply with the mortgage terms, Swift had a legal right to apply to court for an order permitting it to repossess and sell the property. The key question was whether Swift's failure to register the mortgage at the Land Registry prevented it exercising its power of sale.

The High Court held that it did not and decided in Swift's favour. Since the Rileys were the registered proprietors of the freehold at the relevant time, they had power to confer on Swift full power to sell the freehold. The Law of Property Act 1925 gave a mortgagee power to sell the property and all that was required was a mortgage by deed. Swift, which had the benefit of a charge by way of legal mortgage, had full power of sale, notwithstanding that its charge was not substantively registered.

The power of sale did not derive from the niceties of Land Registration legislation and the fact the charge was unregistered was neither here nor there. The Court rejected as erroneous the Land Registry's argument that the power did not arise because the mortgage took effect in equity only. The Court declared that Swift's transfer was effective to transfer the freehold to the Colins, who would not be bound by the third party charge entered into by the Rileys after Swift's charge.

While High Court decisions have limited precedent value, this decision cannot be ignored. Conveyancers dealing with registered land have tended to focus mainly on charges registered or otherwise protected on the register at the Land Registry. The judge's comments appear to indicate that they need to look beyond "Land Registration niceties". A lender may still have a power of sale, despite the charge not being registered or even otherwise protected on the registered title. Conveyancers should consider broadening their due diligence in the light of this decision.