



Property litigation caselaw update

This note contains a synopsis of five recent cases impacting upon real estate and lender issues.

Incomplete execution of security

A development loan was provided to a trust and secured by a charge. The charge was signed by the individual trustees but not witnessed. Section 52 of the Law of Property Act 1925 requires charges to be completed as a deed which, under section 1(3) of the Law of Property (Miscellaneous Provisions), required that the trustees signatures were witnessed. Without the witness attestations, the document was not properly signed as a deed and therefore failed to create a legal charge.

The document did however create an equitable charge because it was in writing, contained all of the terms and was signed by all the parties (in compliance with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989). In a subsequent action (No. 2), the bank obtained an order to perfect the equitable charge into a legal charge.

However, this case is more notable for the arguments on estoppel. The bank argued that the trustees were estopped from denying the validity of the charge. This argument failed because there was no witness attestation at all, whereas the authorities on estoppel require some form of witness attestation, albeit incorrect - *Shah v Shah* [2001] EWCA Civ 527 distinguished from *Briggs v Gleeds* [2014] EWHC 1178 (Ch).

Bank of Scotland Plc v Waugh [2014] EWHC 2117 (Ch) and *No. 2* [2014] EWHC 2835 (Ch)

Enforcement for collateral purposes

The High Court has confirmed that a secured lender is permitted to enforce its security even if the lender has no real prospect of recovery. In other words, where the lender enforces its security solely to apply pressure on the borrower to extract payment. This often arises for a second chargee where there is no equity above the first chargee's interest.

However, in this case, the Court ordered that the lender could not recover its enforcement costs from the borrower, even though this is usually recoverable from the borrower under the terms of the charge. This case was fact specific because the lender withdrew

the proceedings which has automatic costs consequences.

Lenders should therefore consider costs consequences if they intend to enforce security in order to extract payment rather than realise the asset. If any payment is extracted and the lender wishes to terminate the proceedings, a consent order should be considered in order to try and avoid this costs position.

Co-operative Bank Plc v Phillips [2104] EWHC 2862 (Ch)

Borrower's counterclaim or set-off

A lender agreed to advance over £12m for a development and refinance loan. The lender went into administration before all of the funds were advanced and the borrower defaulted. The lender sought to enforce its security. The borrower argued he had a cross-claim or right of set off for damages against the lender which would exceed the debt.

It is well established that, even if a borrower has a valid claim against the lender, he cannot rely on this to prevent the lender from enforcing its security. In practice, the borrower will usually seek a stay of enforcement pending the trial of a counterclaim.

The borrower had also argued that the charge should be rescinded because it was procured by misrepresentation. However, as part of the loan had been used to discharge an existing charge, the lender was able to rely upon its subrogation rights to defeat this argument.

Day v Tiuta International Ltd [2014] EWHC 4583 (Ch)

Enforcement sale at an undervalue

A bridging lender enforced and sold its security over a substantially completed development. The development was subject to conditions under a local authority grant. The property had previously been marketed by the borrower but no sale completed. The borrower argued that the lender had been negligent and had not obtained the best price reasonably obtainable.

The Court determined that the lender's duty to obtain the best price was not synonymous with the RICS Standards (the Red

Book). The court's focus had to be on price and whether the mortgagee took reasonable care to sell for that price. It was relevant that the price would be affected by a distressed sale and the risk that the local authority grant conditions would be breached.

This case confirms the well-established principles on the lender or Receiver duty to obtain the best reasonable price. It is worth remembering that there is no requirement to improve the property, only to properly expose it to the market. These arguments tend to resurface with every market cycle, particularly when the property market is beginning to pick up again and borrower's expectations are increased.

Aodhcon Llp v Bridgeco Ltd [2014] EWHC 535 (Ch)

Subrogation

If a lender's security is set aside (e.g. for undue influence), it is important to consider if the lender's advance discharged a prior mortgage. The lender may be able to claim subrogation relief and 'step into the shoes' of the prior lender, otherwise the borrower would achieve an unfair advantage.

This case concerned an unusual set of facts. The lender released a charge over the borrower's property so that he could downsize. The borrower was to buy a new house in his daughter's name and charge that to the lender.

The charge over the daughter's house was defective but the lender was subrogated as an unpaid vendor's lien against the property purchased in borrower's daughter's name. It did not matter that the new house was in the daughter's name because

that property could not have been purchased unless its charge was released from the first property.

This case is seen as a non-traditional application of subrogation because the lender did not advance the purchase money for the daughter's house. Instead the 'value' provided by the lender was its agreement to release its existing charge. There was a sufficient connection between the lender's agreement to part with its interest in the property and the owner's enrichment to hold that there had been a transfer of value.

Menelaou v Bank of Cyprus UK Ltd [2013] EWCA Civ 1960

Contacts

Richard Bedford and Charlotte May are members of Burges Salmon's specialist Real Estate Litigation team.



Richard Bedford
Partner

+44(0)117 902 2749
richard.bedford@burges-salmon.com



Charlotte May
Associate

+44(0)117 307 6286
charlotte.may@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is authorised and regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.

© Burges Salmon LLP 2014. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.