Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Security update – inaccurate notices at the Land Registry, power to sell chattels on land and extent of share charges

Three recent Court of Appeal decisions have raised a number of interesting points on security interests, being (i) whether inaccurate notices at the Land Registry still protect the underlying interest, (ii) whether a contractual power to sell chattels located on land in a mortgage is effective and (iii) whether the wording of a share charge was wide enough to capture shareholder loans

Inaccurate notices lodged with the Land Registry

The case of *Bank of Scotland plc v Renata Joseph and Others (23/01/2014)* saw the Court of Appeal look at whether inaccurate notices lodged against titles at the Land Registry could nevertheless protect the underlying interest.

Enda Lyons appealed against summary possession of a London flat obtained by Bank of Scotland. A different person (Mr Samad) was registered as proprietor of a long lease of the flat, but on the same day the lease was granted, the lease was assigned by the Seller to Renata Joseph who granted a charge to the bank. The following day, the Seller granted a charge to a company (Wingfield Financial Heritage Ltd) as security for a guarantee. As Ms Joseph had not become the registered proprietor of the lease, the bank protected its security by a unilateral notice against the title lodged in 2006. Wingfield registered its charge as against the Seller in 2010, and the Bank registered its charge against the title properly in 2011 when Ms Joseph finally became the registered proprietor.

Mr Lyons acquired the flat from a sale as mortgagee by Wingfield, but was never registered as proprietor. In 2012 the bank sought and obtained possession against Ms Joseph for failure to meet the mortgage instalments. Mr Lyons was subsequently added as a defendant, and objected to the bank's claim on the grounds that Wingfield's legal charge ranked ahead of the bank's legal charge (the bank having an equitable interest only until 2011). At trial, the High Court found that as money advanced by the bank to Ms Joseph had been used to pay Mr Samad which he had then used to pay the developer of the flat, the bank was entitled to rely on its unpaid vendor's lien to gain priority over Wingfield's claim, since all Mr Samad had ever received in terms of title was an equity of redemption.

On appeal, Mr Lyons contended that the unilateral notice only protected an equitable charge and not any other type of notice (such as an unpaid vendor's lien).

The Court of Appeal decided against Mr Lyons. Whilst Section 77 of the Land Registration Act 2002 required a notice to specify the interest it sought to protect as accurately as possible, failure to do so did not mean that protection of the underlying interest was lost. It had been open to Wingfield to challenge the bank's unilateral notice (which it had failed to do). However the result of that application would either have been the amendment of the existing notice or its replacement with a new one, which in either event would have conferred consistent priority over Wingfield to the bank.

This decision should serve as a warning to practitioners that unilateral notices must be addressed before dealings with property, however seemingly spurious or inaccurate, to avoid the risk that the applicant gains priority over subsequently registered security and other interests.

Contractual power to sell chattels located at charged property

The Court of Appeal decision in *Da Rocha-Afodu v Mortgage Express (20/03/2014)* is a useful confirmation that a contractual power (often contained in mortgages) to deal with borrower chattels left at charged premises will be effective.

In this case, Mortgage Express obtained an eviction notice against its borrower. Although the borrower vacated the premises, he left personal effects and chattels which he later attended the property on three occasions to collect. Mortgage Express later placed a notice at the property saying that any

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assets left on the property after 14 days would be disposed of (in reliance on a condition in the mortgage). When the borrower later attended the premises, he found that sub-contractors had disposed of his property and brought legal proceedings against Mortgage Express and the sub-contractors for conversion (the civil version of theft). He alleged that (i) the mortgage condition was incremental, such that it could only be relied upon once the property had been removed and stored elsewhere and (ii) that the standard of behaviour expected was higher in a case where the mortgagee could expect that the chattels would remain on the premises.

The Court of Appeal disagreed. The condition permitted Mortgage Express to store property at its own option, but the consideration of whether it was likely to be able to recover the costs of storage was a material one. The power was permissive and did not form an obligation to exhaust other options before goods were disposed of. On the standard of care, every situation depended on its circumstances, and there was no reason to disturb the High Court's decision, especially in light of the fact that several opportunities, had been given clear warning and had been afforded the borrower to remove his property.

This decision should provide reassurance to lenders and their receivers and agents that they can rely on their contractual rights to dispose of borrower property, having regard to what is reasonable in the circumstances.

Extent of charge wording in share charges – wide enough to capture shareholder loans

In *Fons Hf v Corporal Ltd (20/03/2014)*, the Court of Appeal was ased to decide whether the definition of "Shares" in a share charge was wide enough to also charge two loans granted by the shareholder.

The decision turned on the definition of "Shares" which meant "all shares (if any) specified in Schedule 1 and also all other stocks, shares, debentures, bonds, warrants, coupons or other securities".

The question was then whether "debentures" could capture the shareholder loans. The court reviewed the case law and concluded that (in this case) "debentures" had the "ordinary meaning of an acknowledgement of debt recorded in a written document" and was not to be limited by the inclusion of the words "or other securities" (the so-called "ejusdem generis" rule, under which the meaning of words is confined by reference to other words in the same sentence or definition). The court considered that the terms "securities" could equally mean a debt or claim secured by a guarantee or charge, and was not confined to investments.

This decision will be of interest to both lenders and borrowers/ guarantors alike, as its effect seems to be that those granting share security may be giving away more rights than they had intended or expected.

Contacts

For more information on this subject please contact:

Patrick Cook
Partner
+44 (0)117 307 6807
patrick.cook@burges-salmon.com

Richard Clark
Senior Associate
+44 (0)117 902 6626
richard.clark@burges-salmon.com

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