Neutral Citation Number: [2023] EWHC 2726 (Ch)

Case No: PT-2023-000875

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS & PROBATE LIST (ChD)

7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 23/10/2023
Start Time: **1500** Finish Time: **1529**

Before:

HHJ PAUL MATTHEWS
(Sitting as a Judge of the High Court)

- -

Between:

BARCLAYS BANK UK PLC	**Claimant**
- and -	
(1) SHAUN RICHARD TERRY	
(2) RACHAEL JAYNE TERRY	
(Sued in their own right and pursuant to CPR rule 19.8 as representatives of the Other Owners named on the Schedule to be provided to the Court in confidence, and anyone else interested in any of the properties owned by any of the Other Owners)	**Defendants**

- -

- -

STEPHANIE TOZER, KC (instructed by **Simmonds & Simmonds LLP**) for the **Claimant**
JAMES HALL (instructed by **Moore Barlow LLP**) for the **Defendants**

- -

JUDGMENT
(As approved)

- -

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HHJ PAUL MATTHEWS :

1. This is an application for summary judgment brought by the claimant, Barclays Bank plc ("Barclays" or "the claimant"), against two named defendants. Originally there were four, but two were removed by order of Mr. Justice Michael Green last week. The claimant is also suing those named defendants as representatives of about 5,000 or so other parties, all of whom are in more or less the same factual position. They borrowed money from Barclays Bank (or possibly another lender and Barclays Bank has acquired the lending book), and secured the lending on properties which belonged to them. In the circumstances which I shall describe shortly, those charges were discharged, Barclays says by mistake. Barclays now seeks to have the discharge of the charges rescinded, and the Land Registry titles altered to show that the charges still subsist in relation to the properties constituting the security.

2. The matter was begun by claim form under Part 8 of the Civil Procedure Rules on 12th October 2023 and, as I say, against the defendants as representatives of the other owners named on a confidential schedule (which I only saw at the beginning of the hearing today). The claim form is accompanied by a document giving details of the claim, and stating the facts in broad outline. There is also a draft order. Then there is an application notice, also dated 12th October 2023, which asks for certain procedural relief, but in substance for summary judgment on this claim. Some of the procedural relief was granted by Mr. Justice Michael Green when the matter came before him in the Interim Applications Court, on 18th October 2023. I am not now concerned with that other relief.

3. The application, and indeed (because it is a Part 8 claim) the claim itself, is supported by witness statement evidence. There is a witness statement dated 12th October 2023

from a lady called Caroline Ambrose, who is the Digital Platforms managing director at the claimant, together with an exhibit, and a witness statement dated the day before, 11th October 2023, from a lady called Caroline Turner-Inskip, who is a solicitor and partner of the claimant's solicitors' firm dealing with the matter, again with an exhibit.

4. Ms. Turner-Inskip made a second witness statement on 17th October to clarify the earlier witness statement she made, and in particular to exhibit the correct exhibit to that witness statement. This statement also gives the court an update on the position. According to that statement there are currently sone 5,141 parties affected by this claim. There is also a witness statement dated 19th October 2923 from a lady called Becky Hodgson, whose job title is Transformation Director for Life Moments. That witness statement, of course, was made in support of the application for summary judgment rather than the claim in general. It has one exhibit.

5. As I say, last week Mr. Justice Michael Green made an order on 18th October granting some of the relief sought, including dispensing with certain requirements arising under CPR Practice Direction 57AC relating to the form of witness statements for use at trial. However, he adjourned the summary judgment application to be heard by order today, and that is the matter before me now.

6. Before I go any further, I will just mention a couple of small points. First, it is not very clear to me that Practice Direction 57AC applies at all to this application, because this is not a trial. Instead, it is simply an application for summary judgment. So although I can see that Mr. Justice Michael Green has, out of an abundance of caution, made the order sought in relation to that Practice Direction, speaking purely

for myself I do not think that it matters, because in my view it probably was not engaged in the first place.

7. Secondly, as far as the question of representation orders are concerned, I have considered the powers contained in CPR rules 19.8 and 19.9. So far as rule 19.8 is concerned, we have now the authoritative guidance of the unanimous decision of the Supreme Court in *Google LLC v Lloyd* [2022] AC 1217. There, Lord Leggatt said that the phrase: "The same interest" in the rule is to be interpreted purposively in light of the overriding objective, and requires that the claims should raise a common issue or issues. Even though there may be interests which are divergent at some point, or beyond a certain point, that is acceptable. What is not acceptable is where the represented parties have *conflicting* interests. In any event, the court has a discretion in the circumstances as to whether to make the representation order.

8. Then in paragraphs 78 through to 84, Lord Leggatt goes on to consider the ways in which this rule might be used. At paragraph 81 he particularly refers to the possibility of adopting what he calls a "bifurcated process", where common issues of fact or law are decided in the representative part of the claim. Then other issues, which may raise separate matters, party by party, are to be left until later.

9. I turn to the power under rule 19.9. I should just say that rule 19.8(5) makes clear that the power under rule 19.8 cannot be used where the case falls within rule 19.9. Rule 19.9 is problematic, because in order to apply it requires that the claim be one about either property subject to a trust or property which forms part of a deceased person's estate. However, where a borrower is a sole chargor, there will usually be no trust, and, where the sole chargor is still alive, there will be no deceased's estate. So those cases could not in my view fall under rule 19.9. However, it is suggested that cases

where there has been a chargor who has since died and the property now forms part of his estate, or where the chargors were joint chargors, such that the automatic trust of land provisions in the Law of Property Act sections 34 and 36 apply, are cases where the property is part of an estate or subject to a trust within the meaning of this rule.

10. To my mind, I doubt that this is so, for two reasons. First, because it seems to me that the property forming part of an estate or subject to a trust is not the property which the claim is about. The claim here is about the *charge*, and the charge is neither subject to a trust nor falls into anyone's estate. It belongs – or belonged – to the bank, and that is the whole point of the claim. The bank wants to make sure that it has still got its charge. It seems to me that the property that is subject to a trust is, as it were, the equity of redemption in the property that had been charged, but that is not the subject matter of this claim. If that is so, then rule 19.9 has no application to this case.

11. But secondly, I doubt that rule 19.9 applies here, because none of the represented parties, *ex hypothesi*, has any interest in the *same* property as the property of the persons who have property forming part of an estate or subject to a trust. In other words, if A and B are joint chargors of their house, C and D as joint chargors of another house do not have any interest in that trust of A and B's land. So for that reason too I doubt that rule 19.9 applies. However, none of this makes any difference in the present case, because, to the extent that rule 19.9 does not apply, then it seems to me that rule 19.8 is capable of applying, subject of course to satisfying the relevant *Google v Lloyd* tests.

12. CPR rule 24.2 provides that the court may give summary judgment against a defendant on a claim or issue if it considers that the defendant has no real prospect of

successfully defending the claim or issue and there is no other compelling reason why the claim or issue should be dealt with at a trial.

13. So I turn to consider the question of the facts of this case and in particular the mistake that was made. For this purpose I have looked at the evidence which was supplied, in particular the witness statement of Ms. Ambrose of 12th October and the witness statement of Ms. Hodgson of 19th October. In summary form, what happened here was that Barclays instituted a project, a serious long-term project, to identify cases where a mortgage had been redeemed but for some reason it had not actually been discharged. It was an effort to tidy up the mortgage book and indeed tidy up the titles of those borrowers who had redeemed their mortgages.

14. So, because there would be a large number of cases, this was to be done by way of a computer programme which was devised and tested over a long period, I am told eleven months, to identify those charges. The programme originally identified some 38,313 charges. The claimant was satisfied that the list thereby produced was an accurate list of cases where the borrowers no longer owed anything to the bank, but for some reason the charge had not actually been discharged or cancelled.

15. Subsequently, therefore, there was an internal meeting known as the "Go/no-go" meeting, where the relevant persons in charge of the project met together to decide whether or not to authorise the automatic discharge of the mortgages and make an application, which I understand to be connected to the discharge itself, to the Land Registry to remove the mortgages from the registered titles.

16. At the same meeting, however, it appeared that there was a further book of mortgages which had not previously been included in the total, amounting to some 2,730 cases. It was decided by the meeting to include these in this exercise, so making a total of

some 41,213 charges. Now it is clear to me on the evidence that I have read that that meeting would not have decided, as it did, to authorise the discharge of those charges, had it not been satisfied that none of them was still security for an outstanding loan. That was, as it turns out, the mistake.

17. Because the meeting decided to go ahead, the charges began to be automatically discharged on the system, which discharges simultaneously made related applications to the Land Registry to remove the charges from the registered title. The Land Registry began to comply with that application. However, after about 25,905 charges had been discharged, both the Land Registry and the claimant itself had begun to receive enquiries from customers who had been informed or had found out in some way that their charges had been discharged, and who asked Barclays or the Land Registry whether there was some problem or some mistake because, so far as they were concerned, they thought they still owed money to the claimant.

18. Once the bank heard about this, of course, it immediately stopped the process and began to investigate what had happened. First of all, the investigation established that the Land Registry had made no mistake. The Land Registry had done exactly what it was told to do, which was to discharge mortgages from registered titles which were on that list. So the mistake, if there was one, lay elsewhere.

19. The claimant, after conducting the investigation, concluded that the list that they had used, on which they had "pressed the button", and upon which the Land Registry had acted, was not in fact after all an accurate list of mortgages which had been redeemed. So they began the checking process that was necessary to go through the 25,905 cases where the discharge had occurred before the process was stopped. As a result of that process, the claimant is satisfied that some 5,141 charges were mistakenly discharged,

that is to say, that the charges concerned were discharged although money was still owing on the original loans and for which the charges were continuing or intended to be continuing security.

20. Those charges are set out on the confidential schedule which has been seen by me. It is said that there are some further parties or properties which need to be investigated. However, the claimant's evidence to the court, which I accept, is that all the customers on this list still owe money to the claimant which is intended to be secured by the charges which have accidentally been discharged. Those discharges were obtained by a mistake, that is to say, the bank's belief that no money was outstanding on the loans, and that mistake, of course, was causative of the consequences, that is, the discharge of the mortgages.

21. Because (i) the programme was a lengthy and careful project, taking some eleven months to devise and test, (ii) the claimant reacted immediately once it realised what had happened and was alerted to the existence of the problem, and (iii) there is a complete lack of any sensible explanation as to why the bank should discharge thousands of mortgages which still had loans outstanding, in my judgment this is a case where there is a strong case for relief from the mistake made by the claimant. This is not the case of a mistake through forgetfulness, ignorance or misprediction. This is a mistake based on a positive belief in the fact that the borrowers no longer owed any money to Barclays and therefore the charge served no useful purpose. Whereas, in fact, these borrowers *did* owe money to the claimant, and the charges served a very useful purpose, not least in relation to its compliance requirements as to capital.

22. So I turn, therefore, to the question of the law on mistake. I take the law for this purpose from the summary made by Sir Terence Etherton C, as he then was, in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch). In that case, he summarised, at paragraph 36, the law as handed down by the unanimous decision of the Supreme Court in *Pitt v Holt* [2012] 2 AC 108:

> "I am satisfied that this is a case in which the claimants are entitled to rescission for equitable mistake. The principles applicable to rescission of a non-contractual voluntary disposition for mistake were comprehensively set out in the judgment of Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, with which the other members of the Supreme Court agreed. They may be summarised as follows.
>
> (1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a 'misprediction' relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
>
> (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected".

23. I was referred also to certain other cases. I will mention two in particular, which seemed to me to be of interest. One is *Garwood v The Bank of Scotland plc* [2012] EWHC 415 (Ch), a decision of Mr. Justice Norris, where the judgment was in fact handed down on 4th March *2013* (and therefore the neutral citation may be wrong, but that is the citation that is in all the books). In that case the learned judge based his decision on the decision of the Court of Appeal in *Pitt v Holt* because the Supreme Court's decision had not yet been made. In that case there was a rather more complex set of facts than the present, but the point at issue ultimately was the same. This was that the bank had been induced, as it happened, by fraud, to lend to a borrower two separate sums in relation to two flats into which a single property had been divided. The bank had taken security, in the event without realising it, over the *whole* property. But it then discharged the whole security, thinking it was discharging only part of it, in relation to the loan on one flat, not realising that there was or was intended to be security in relation to the loan on the other flat.

24. So the bank ended up with no security at all for the outstanding loan on the second flat. The judge in that case went through the requirements for mistake in *Pitt v Holt* and concluded that it was an appropriate case, subject to any particular considerations on the facts of that case, for the jurisdiction of the court to be engaged whereby a mistaken transaction could be rescinded.

25. The second case which I will mention is *NRAM Limited v Evans* [2015] EWHC 1543 (Ch), a decision of HHJ Jarman, QC (as he then was). This case subsequently went to the Court of Appeal on a question of the treatment of the register of the application to amend or alter the register. However, that does not matter for present purposes, because all I need to say about this case is that the mistake made in that case was

similar to that made in *Garwood* and in the present case, namely that a security which was not intended to be discharged was accidentally discharged. Again, the judge considered that that was a mistake such as to engage the jurisdiction of the court.

26. So I am satisfied that in the present case the law does allow for a transaction of the kind that took place here to be rescinded for mistake. The question is whether that law applies to the facts of this case. The points that need to be made here are, I think, these. The first is that the claimant did not intend to make a gift of its security to its customers. On the contrary, the claimant mistakenly believed that the customer no longer owed any money to the bank and therefore it was simply discharging an unnecessary and indeed valueless incumbrance on the title of its customers. Instead, of course, what the claimant was doing was turning itself from a secured to an unsecured creditor.

27. Secondly, the mistake in the present case was a distinct mistake. The claimant made a deliberate decision to release charges, believing, by mistake, that there was no money secured on those charges, whereas in fact there was. Thirdly, I take account of the fact that the claimant took some care to produce an accurate list. It must have been a very expensive project, over some eleven months. So whatever else one might say, one cannot say that the claimant was not being careful. Certainly the claimant did not intend to run the risk of being wrong in any of these cases.

28. Fourthly, this was a mistake of two different kinds. First of all, it was a mistake of fact which was fundamental to the transaction, namely that the customer did not owe any money to the bank, when in fact the opposite was true, and that, had the bank known that money was owed, the bank would not have made the decision that it did to cancel the mortgage. Secondly, it was a mistake as to legal effect. The bank thought

it was tidying up the title by removing an unnecessary and valueless incumbrance when in fact it was turning itself, by mistake, from a secured to an unsecured creditor.

29. In my judgment the jurisdiction of the court to reverse this mistaken transaction is engaged. However, and as set out in the extract from *Kennedy v Kennedy*, the law requires that the mistake be sufficiently serious or sufficiently grave so as to make it unconscionable for the customers to retain the benefit of it. That, of course, means that the court must consider the position of the claimant's customers.

30. In relation to the defendants who are named in this claim, Mr. and Mrs. Terry, I am entirely satisfied that there is no argument that could be made that it would be not unconscionable for Mr. and Mrs. Terry to retain the benefit of the mistake. Indeed, they do not suggest that it is not unconscionable. And I see no other reason for a trial. So in their case I am entirely satisfied that it is appropriate to give summary judgment on the claim, and to set aside the mistaken discharge of their mortgage. However, I cannot make the same decision for the represented customers, because it is necessary to look at the facts of their cases. There may be circumstances personal to them which change the equation, and therefore perhaps the decision as to whether it is unconscionable for those customers to retain the benefit of the mistake. That is something which will have to be dealt with under the second part of the so-called "bifurcated procedure" which I am being invited to order.

31. The next stage of the question relates to the altering of the Land Register. There is power under Schedule 4, paragraph 2(1) of the Land Registration Act 2002 for the court to order the alteration of the register for the purpose of bringing the register up to date. One particular authority that was cited on this was in fact the Court of Appeal's decision in the *NRAM Limited v Evans* case, which I have already

mentioned. The decision of the Court of Appeal is reported at [2018] 1 WLR 639. I refer particularly to paragraph 60:

> "The second issue is whether, in a case such as the present, the register can be brought up to date once the voidable disposition has been rescinded. In my judgment, it plainly can. Schedule 4, paragraph 2(1)(b) confers on the court a power to make an order for the alteration of the register by bringing it up to date; and paragraph 3(3) provides that if in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so, as Norris J observed in *Garwood (as trustee of the estate of Adekumbi Ebrahim Fabumni-Stone) v Bank of Scotland plc* [2012] EWHC 415 (Ch), [2013] BPIR 450. In the present case, once the judge had rescinded the e-DS1, it was necessary to alter the register by bringing it up to date in such a way as to reflect the rights of the parties as the judge had found them to be. Subject to the question of the way that *NRAM*'s case was put below, to which I next turn, there are in this case no exceptional circumstances which would justify a decision not to exercise the power to update".

32. The schedule goes on at paragraph 3.3 and also in, I think, rule 126 of the Land Registration Rules to provide that where the court has the power to make an order under paragraph 2, it must do so unless there are exceptional circumstances which justify not doing so.

33. Now in the present case, that is to say, with the named defendants, it is not suggested that there are any exceptional circumstances which would take the matter outside the general default rule. Therefore, in relation to Mr. and Mrs. Terry the court must make the order altering the register. However, I am not in the same position in relation to the other represented parties, because whether or not there are any such exceptional circumstances must depend on a consideration of the facts of those individual cases, and that must therefore be left over again to the bifurcated procedure.

34. So that, I think, concludes the judgment which I ought to give at this stage of the proceedings and leads us to the consideration now of the terms of the order to be made.
