

[2017] UKFTT 0640 (PC)

REF/ 2016/ 0361

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

MUHAMMAD WAQAS

APPLICANT

and

BIKRAM JOSHI

RESPONDENT

Property Address: 163-167 Accrington Road, Burnley BB11 5AL

Title Number: LA483981

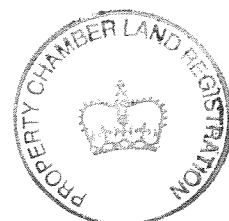
ORDER

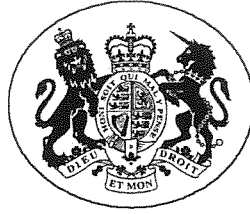
The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicant for cancellation of the Unilateral Notice registered on the charges register of title number LA483981 on 31st January 2011.

Dated this 18th July 2017

Michael Michell

BY ORDER OF THE TRIBUNAL





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Title Number: LA483981

Before: Judge Michell

Sitting at: Alexandra House, St Mary Parsonage, Manchester

On: 15th May 2017

Applicant Representation: Mr Philip Byrne, counsel, instructed by Bukhari Solicitors Ltd.
Respondent Representation: Ms Emily Duckworth, counsel, instructed by Evans Dodd solicitors

DECISION

Cases referred to

Bank of Scotland v. Joseph [2014] EWCA Civ 28

1. The Respondent, Mr Joshi is the beneficiary of a Unilateral Notice entered on the title to 163-167 Accrington Road, Burnley (“the Property”). The Applicant, Mr Waqas is the current registered proprietor of the Property. He has applied for the removal of the notice. Mr Joshi objected to the application and the matter was referred to the Tribunal for determination.

2. Solicitors, Verma & Co., acting on the instructions of Mr Joshi, applied for the entry of the unilateral notice by a form UN1 dated 28th January 2011. The unilateral notice was registered on 31st January 2011. The notice reads “UNILATERAL NOTICE in respect of a Charge dated 10 December 2007”. At the date of registration of the notice, the registered proprietors of the property were Kamleshbai Chandhubai Patel and Priti Kamleshbhai Patel (“Mr and Mrs Patel”). Mr and Mrs Patel were first registered as proprietors of the Property on 10th October 2007. On the same date a charge in favour of National Westminster Bank Plc was registered.

3. Box 12 of the UN1 form as completed by Parveen Verma of Verma & Co., read
“I certify that the applicant is interested in the property described in panel 3 as;
As a Lender pursuant to Legal Charge of a registered estate as per CH1 and the terms thereof contained in the loan letter dated 10 December 2007”.

The property described in panel 3 is the Property and also another property, 94 & 94A Lytham Road, Marshside, Southport.

4. The “Legal Charge” referred to is a form CH1 dated 10th December 2007 relating to the Property and to 94 & 94A Lytham Road. It appears on its face to have been executed by Mr Joshi as lender and Mr and Mrs Patel as borrower. It is said in box 8 to secure

“all monies undertaken by [Mr and Mrs Patel] to be paid to [Mr Joshi] as referred to and contained in a Loan letter dated 10th day of December 2007 addressed by [Mr Joshi] to [Mr and Mrs Patel]”.

The charge was never registered because the first chargee, National Westminster Bank plc objected. The charge therefore has effect only in equity.

5. The Loan letter is signed by Mr Joshi and what appear to be the signatures of Mr and Mrs Patel appear at the foot of the letter beneath the words “Agreed and accepted”. Mr Joshi is and was at the date of the letter a Chartered Certified Accountant. The letter was drafted by his father-in-law, Mr Mahendra Amin, who was then in practice as a Chartered Accountant.

The letter reads (so far as is material) as follows

“We are pleased to confirm that the terms upon which we advanced to you the sum of £80,000 (“the Loan”) to assist in your acquisition of 163, 165 and 167 Accrington Road, Burnley, Lancashire BB11 5AL, Title No. LA483981 (“the Property”).

1. You may repay the Loan by one lump sum payment of £80,000 at any time PROVIDED HOWEVER it is not paid later than 2 years from the date hereof.
2. We will charge you interest at the rate of 7% above the base rate from time to time of National Westminster Bank Plc. on the Loan.
3. Interest to be paid monthly and in the event of default in payment of interest, interest shall be charged at a penalty rate of 9% per annum above the base rate of National Westminster Bank from time to time calculated from the date the interest becomes due to the date of actual payment.
4.
6. Notwithstanding the above provisions of this letter, the Loan , all interest on it and other expenses, costs and other monies payable by you will become due and payable or repayable forthwith on demand by us if (i) you fail to pay any sum under this letter when due or you are in breach of any other provision of this letter or the security referred to above; (ii) you are in default under any other financial obligation to any person; or (iii) you become bankrupt or you make or seek, an arrangement with your creditors or an interim order is made under section 252(1) of the Insolvency Act 1986 in relation to you; or
11. To confirm your acceptance of the terms and conditions of this letter, please sign and return the enclosed copy within 14 days from today’s date, failing which this letter will lapse and any monies that we have advanced will become immediately repayable”.

6. Mr and Mrs Patel did not give evidence. Mr Waqas has no personal knowledge of the dealings between Mr Joshi and Mr and Mrs Patel. The evidence of what was agreed and what happened between Mr Joshi and Mr and Mrs Patel in 2007 and subsequently was given by Mr Joshi and to some extent by Mr Amin.

7. Mr Amin was Mr and Mrs Patel's accountant. In 2007 Mr and Mrs Patel wanted to buy the Property. The Property consists of a ground floor retail shop, first floor residential accommodation, a garden and a garage. The ground floor was being used as a confectioner, tobacconist and newsagent with off-licence. Mr and Mrs Patel obtained mortgage finance from National Westminster Bank plc towards the purchase of the Property but required further funding to complete the purchase and to provide working capital. Mr Amin knew that Mr Joshi had funds available to lend and so he introduced Mr and Mrs Patel to Mr Joshi. Mr Amin said that he suggested to Mr Joshi that he lend Mr and Mrs Patel "up to" £80,000. Mr Joshi said that Mr Amin estimated that Mr and Mrs Patel would need "up to" £80,000 to fund the purchase and working capital requirements. Mr Joshi said that Mr Amin told him Mr and Mrs Patel did not need £80,000 in one sum but that he would be called upon to lend them money in instalments up to a total of £80,000.

8. Mr Joshi said that he advanced an initial tranche of £30,000. The money was paid by means of a draft funded out of the account of Preeti Manandhar ("Preeti"). Mr Joshi had a beneficial interest in a property registered in the name of Preeti being 50 Cornwell Avenue, Southwell, Middlesex. Preeti in her witness statement said that property was sold on 8th April 2008, i.e. after the date of the advance of the £30,000. Preeti did not attend to give oral evidence. Preeti said in her witness statement that Mr Joshi had advanced funds for the purchase and development of 50 Cornwell Avenue and that he asked that some of this money be returned to him prior to the sale of 50 Cornwell Avenue. Preeti said that Mr Joshi asked her to arrange a bankers draft for £30,000 in favour of Evans Dodd and that she did so on 15 August 2007. The draft was payable to Evans Dodd, solicitors then acting for Mr and Mrs Patel on the purchase of the Property. A draft for £30,000 dated 15th August 2007, payable to Evans Dodd and drawn on Allied Irish Bank was produced in evidence by Mr Joshi. He also produced a draft Statement of Account produced by Evans Dodd in respect of the purchase of the Property and other transactions. It records the receipt on 17th August 2007 of £30,000.

9. Mr Joshi said that he made further advances to Mr and Mrs Patel in cash totalling £17,250 between August and December 2007.

10. Mr Amin said that he settled the loan terms for Mr Joshi with Mr and Mrs Patel and that he drafted the Loan letter. He copied a loan agreement prepared for another transaction and "made the error of stating in the document that [Mr Joshi] had advanced £80,000" instead

of saying that Mr Joshi had agreed to lend up to £80,000. Mr Amin also instructed Verma & Co, solicitors of Wembley, to draw up and register a charge of the Property in favour of Mr Joshi to secure the monies advanced or to be advanced to Mr and Mrs Patel

11. Mr Joshi produced a letter dated 10th December 2007 from a Mr S Gurusinghe of Gurusinghe & Co., solicitors in Wembley to Verma & Co.. The letter stated

“I write to confirm that I have attended on [Mr and Mrs Patel] at our office today. I further confirm I read and explained the terms and conditions stated in the letter dated 10 December 2017 written by Mr Bikram Joshi to [Mr and Mrs Patel].

I also explained the contents of the form CH1 and informed them that by signing the letter they agreed to give a charge on their property.

They both confirmed that they understood the documents and signed the same in my presence”.

12. Mr Joshi applied to register the unilateral notice on 28th January 2011. It seems likely that by this time Mr and Mrs Patel had run into financial difficulties. A meeting of creditors to consider a proposal for an Individual Voluntary Arrangement in respect of the affairs of Mr Patel was held on 18th May 2011. Mr Patel’s proposals were not accepted at the meeting. Mr Joshi voted against the proposals. In his Statement of Claim in respect of the IVA, Mr Joshi stated the total amount of his claim to be £77,250, to include £20,000 estimated interest.

13. Both Mr and Mrs Patel were made bankrupt in August 2012. The trustee in bankruptcy made an application dated 1st May 2013 for cancellation of Mr Joshi’s unilateral notice but then withdrew his application in July 2013. National Westminster Bank appointed Law of Property Act 1925 receivers of the Property under its charge on 1st May 2014. The receivers sold the Property to Mr Waqas for £160,000 on 15th June 2015. Mr Waqas was registered as proprietor of the Property on 29th October 2015. He made an application dated 21st December 2015 to cancel the unilateral notice. The application was referred to the Tribunal for determination on 18th May 2016.

Grounds for the Application

14. Mr Waqas in his Amended Statement of Claim raised a number of arguments as to why the Tribunal should find that Mr and Mrs Patel did not owe money to Mr Joshi and therefore that the Unilateral Notice should be cancelled. These were

- (1) that the loan was unenforceable by reason of provisions of the Consumer Credit Act 1974 as amended by the Consumer Credit Act 2006;
- (2) that the loan “might” be unenforceable under provisions of the Financial Services and Markets Act 2000; and
- (3) that there was some clog on the equity of redemption; and
- (4) that the agreement between Mr Joshi and Mr and Mrs Patel should be set aside as an unconscionable bargain.

In his skeleton argument, counsel for Mr Waqas raised an additional argument, namely that the agreement between Mr Joshi and Mr and Mrs Patel was liable to be set aside for having been obtained by undue influence. However, at the hearing Counsel did not argue any of these points. Instead, he argued that the loan agreement would be unenforceable unless rectified and that as it has not been rectified, the Unilateral Notice should be cancelled. He also argued that the Unilateral Notice should be cancelled on the basis that the information supplied in the UN1 was inaccurate or misleading. Further, he argued that recovery of the loan was barred by limitation. As these points had not been raised at all prior to the hearing, I directed that the parties should file written submissions, addressing any relevant authority.

15. In his written submissions counsel for Mr Waqas submitted that the loan agreement was unenforceable without rectification and that rectification was not possible without Mr Waqas’s consent. He further submitted that the loan agreement was a simple contract and that Mr Joshi had under section 5 of the Limitation Act 1980 only 6 years to bring a claim to enforce the loan agreement. He further submitted that Mr Joshi had knowingly misrepresented his rights when applying to register the Unilateral Notice and so the notice should be cancelled for that reason.

16. Counsel for Mr Joshi argued that the errors in the wording of the loan agreement could be corrected as a matter of construction and in the alternative, the loan agreement could be rectified in an action for rectification and judgment on the agreement as rectified. As to limitation, counsel for Mr Joshi submitted that the loan agreement remained binding unless and until a limitation defence was raised in an action to enforce the loan and that a consideration of whether a limitation defence would succeed was not necessary on the present application. Counsel further submitted that the notice was binding on Mr Waqas notwithstanding any errors in the application for its registration.

Unilateral Notices

17. Land Registration Act 2002 s. 32 provides

“(1) A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge.

(2) The entry of a notice is to be made in relation to the registered estate or charge affected by the interest concerned.

(3) The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid but does mean that the priority of the interest if valid is protected for the purposes of sections 29 and 30”.

S. 34 provides

“(1) A person who claims to be entitled to the benefit of an interest affecting a registered estate or charge may if the interest is not excluded by section 33 apply to the registrar for the entry of a notice in respect of the interest.

(2) Subject to rules, an application under this section may be for

(a) an agreed notice or

(b) a unilateral notice.

S. 35 provides

(1) If the registrar enters a notice in the register in pursuance of an application under section 34(2) (b) (“a unilateral notice”) he must give notice of the entry to-

(a) the proprietor of the registered estate or charge to which it relates and

(b) such other persons as the rules may provide.

(2) A unilateral notice must –

(a) indicate that it is such a notice, and

(b) identify who is the beneficiary of the notice.

(3) The person shown in the register as the beneficiary of a unilateral notice or such other person as rules may provide may apply to the registrar for the removal of the notice from the register.

s. 36 provides

(1) A person may apply to the registrar for the cancellation of a unilateral notice if he is –

(a) the registered proprietor of the estate or charge to which the notice relates or

(b) a person entitled to be registered as the proprietor of that estate or charge.

18. Land Registration Rules rule 83 provides

An application for the entry in the register of a unilateral notice must be in Form UN1.

Land Registration Rules rule 84 provides

(1) A notice under section 32 of the Act must be entered in the charges register of the registered title affected.

(2) The entry must identify the registered estate or registered charge affected and where the interest protected by the notice only affects part of the registered estate in a registered title, it must contain sufficient details by reference to a plan or otherwise to identify clearly that part.

(5) In the case of a unilateral notice, the entry must give such details of the interest protected as the registrar considers appropriate.

Discussion

19. Mr Joshi has an interest capable of being protected by unilateral notice. He has an equitable charge. Mr and Mrs Patel executed a legal charge. That charge was not registered and so takes effect only in equity. The charge was made in order to secure monies owed to Mr Joshi by Mr and Mrs Patel “as referred to and contained in the loan letter”. Mr Joshi accepts that the loan letter does not on its face accurately record the agreement made between him and Mr and Mrs Patel. However, that fact does not mean that there was no enforceable agreement between Mr Joshi and Mr and Mrs Patel. On the evidence before the Tribunal, there was an agreement between Mr Joshi and Mr and Mrs Patel for the loan and repayment of monies. The terms of that agreement are to be determined as a matter of construction. The terms so construed will indicate what sum is due under the equitable charge. The fact that there may be some difference between the words of the loan agreement on their face and the true agreement between the parties determined as a matter of construction does not mean that the charge is ineffective to secure the repayment of any monies. The evidence before the Tribunal is that Mr Joshi advanced monies to Mr and Mrs Patel and that Mr and Mrs Patel agreed to repay those monies. Mr Joshi’s evidence is that the monies have not been repaid and there is no evidence to contradict that.

20. The loan agreement could be rectified on the application to the court of either Mr Joshi or Mr and Mrs Patel to record accurately the oral agreement between Mr Joshi and Mr and Mrs Patel. However, such an application would be necessary only if there was any dispute between Mr Joshi and Mr and Mrs Patel about what the terms of their agreement were. There is no evidence before me that there is any disagreement. Further, if there were an application for rectification, the application would be to alter the terms of the loan agreement to provide for a lesser principal sum than £80,000 to be repayable (because Mr Joshi would be saying he agreed to provide a facility of up to £80,000 and advanced less than £80,000). Such an application would not be refused on the grounds that it would be prejudicial to Mr Waqas. The rectification would be to his benefit; it would result in a lesser sum being payable according to the terms of the written loan agreement.

21. The argument that the debt due under the loan agreement is statute-barred does not assist Mr Waqas. The limitation period for bringing a claim to recover any principal sum secured by a mortgage or “other charge on property” is 12 years from the date when the right to receive the money accrued – Limitation Act 1980 s. 20(1). Mr Joshi has 12 years from the date when the right to receive repayment of the loan money accrued to bring a claim to enforce his charge. The evidence is that Mr Joshi made advances to Mr and Mrs Patel between August and December 2007. The earliest date on which money advanced and secured by the charge can have been repayable is December 2007. Thus the limitation period under section 20(1) to bring a claim to recover any money secured by the charge will not expire at the earliest until December 2019.

22. The Unilateral Notice is effective notwithstanding that it does not expressly refer to an equitable charge. It refers to a “Charge dated 10th December 2007”. That is a sufficient description to alert anyone reading the register to the fact that Mr Joshi claims to be entitled to a right binding the Property arising out of the Charge document executed on 10th December 2007 but not (as is apparent from a reading of the register) registered.

23. In *Bank of Scotland v. Joseph* [2014] EWCA Civ 28, a unilateral notice had been entered on the register of a long leasehold flat on 4th July 2006 on the application of Bank of Scotland. Ms Joseph had borrowed £820,250 from the Bank and executed a charge over the flat dated 10 March 2005. Ms Joseph was not the registered proprietor of the flat at the date

of the charge and did not become registered as proprietor until 9 February 2011. In the meantime a charge in favour of Wingfield Financial Heritage Ltd. granted by the then registered proprietor, Mr Samad was registered. The money advanced by the Bank had been used by Mr Samad to pay the original developer who had sold to him. The court found that the Bank was subrogated to the developer's unpaid vendor's lien if and in so far as its charge of 10 March 2015 had not been validly executed. The issue for the Court of Appeal was whether the unilateral notice registered by the Bank on 4th July 2006 was effective to preserve the priority of the subrogated rights of the Bank over the subsequently registered charge to Wingfield. The Court of Appeal held that it was. The notice was effective to preserve the priority of the Bank in respect of any interest in the flat which it derived from having lent the money under the charge. The Court of Appeal pointed to the limited requirement in rule 84 that the entry need only "must give such details of the interest protected as the registrar considers appropriate".

24. In this case, I can see no reason why it should be held that the unilateral notice does not comply with the rules or is otherwise invalid. The notice gives the details of the interest that the registrar considered appropriate. The details are sufficient to alert anyone reading the register to Mr Joshi's interest, namely an interest under an unregistered charge.

Conclusions

25. There are no good grounds for cancelling the unilateral notice. I shall direct the Chief Land Registrar to cancel the application of the Applicant to cancel the unilateral notice.

Costs

26. Mr Waqas has been unsuccessful in his application. The Tribunal has power to make an order as to costs in a land registration case – Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 Rule 13(1) (c). If the Tribunal decided to make an order about costs in a land registration case, ordinarily the unsuccessful party will be ordered to pay the costs of the successful party – Practice Directions, Property Chamber, First-tier Tribunal, Land Registration 9.1. I can see no reason why Mr Waqas should not be ordered to pay the costs of Mr Joshi. Any party who wishes to submit that some different order should be made

as to costs, should serve written submissions on the Tribunal and on the other party by 5pm on 2nd August 2017.

BY ORDER OF THE TRIBUNAL

Michael Michell

DATED THIS 18th JULY 2017

