

Case No: HC11C01020

Neutral Citation Number: [2011] EWHC 1251 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14 April 2011

BEFORE:

THE CHANCELLOR OF THE HIGH COURT

BETWEEN:

CLYDESDALE BANK PLC

Applicant/Claimant

- and -

WESTON PROPERTY COMPANY LIMITED

Respondent/Defendant

MR S HORAN (instructed by Eversheds LLP) appeared on behalf of the Claimant

Judgment

(As Approved by the Chancellor)

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(Official Shorthand Writers to the Court)

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THE CHANCELLOR:

1. This is the Part 8 Application of Clydesdale Bank for declarations as to the true construction, or alternatively, rectification, of a legal mortgage dated 6 February 2007 and made between the bank and the defendant, Weston Property Company Ltd, and either rectification or a declaration in respect of the Form 395 which was delivered to the Registrar of Companies for registration of the particulars of that mortgage and in relation to the certificate issued by him in respect of it.
2. The facts can be relatively briefly stated: the bank in question was trading as the Yorkshire Bank at the time in question, and providing facilities to a joint venture between Weston Property Company Ltd and Charlotte Partnership Homes Ltd for the development of two residential properties in Old Malden, Surrey.
3. The facility agreement between the bank and the joint venture was dated 18 January 2006 and was made between the bank and Charlotte Partnership Homes Ltd, not Weston, in respect of the sum of £1.616 million for one year. The purpose of the loan was to assist with the development of plots 1 and 2 of the relevant property at Old Malden, Surrey. The loan was to be secured by, amongst others, as specified, a legal mortgage over those properties given by Weston, not by Charlotte Partnership Homes Ltd.
4. There seems to have been a change of plan and on 9 February 2006, the property in question was transferred by Weston to Surrey Schools Ltd. The development was originally to be carried out under the joint venture agreement made on 14 February 2006 between Charlotte Partnership Homes Ltd and Surrey Schools Ltd. By clause 4.1 of the joint venture agreement the duties of Surrey Schools Ltd included the duty to charge the property to the bank as security for the funding of the development and, indeed, on 13 April 2006, Surrey Schools Ltd did charge the property to secure its own indebtedness to the bank.
5. But there was another change of plan and on 30 August 2006, the property was retransferred to the defendant Weston by Surrey Schools Ltd. There was quite a lot of correspondence between solicitors for the bank and the parties to the joint venture agreement as to how the position might be novated so that Weston took over the position of Surrey Schools Ltd as an active partner in the joint venture. That was to be on terms that Weston would itself charge the property as originally envisaged.
6. The bank's then solicitors advised the bank that the form of charge to be entered into by Weston was that appropriate to an owner of property securing the debts of a third party, the third party in question being Charlotte Partnership Homes Ltd. The instructions for completing the form sent by the solicitors indicated clearly that the name of the third party to be entered in box D was that of Charlotte Partnership Homes Ltd.
7. The charge itself was executed by Weston on 6 February 2007. The form used is the bank's standard form appropriate to an owner charging his own property to secure the liabilities of the third party customer, as advised by the bank's solicitors and as indicated in the instructions. Had it been completed by the solicitors, it would have shown the name of Charlotte Partnership Homes Ltd in box D; but it was not and box D on the form is a blank.

8. The form itself is the form relevant to the charge by an owner to secure a third party's account. The legal mortgage is stated to be made by Weston and they:

“... charge the Property to secure your liabilities to us of the Customer on the terms which appear in this Mortgage.”

The mortgage itself says nothing more about it but in clause 1, it provides that the charge is security for payment and discharge of the customer's obligations and all other sums of money and liabilities owing under this mortgage.

9. The mortgage incorporated the bank's current conditions relating to a legal mortgage by an owner to secure a third party customer's account. Those conditions identified the customer as the person or persons identified in box D of the mortgage, but as I have indicated, that box was left blank.
10. Under the terms of section 395 of the Companies Act 1985, that mortgage required to be registered and on 9 February 2007, the prescribed form in that respect was completed, giving particulars of a mortgage or charge for registration as required by the Act and submitted by the bank to Companies House. But this document recorded the name of the relevant company as Weston Property Company Ltd and the date the relevant charge was created as 6 February but in the space for setting out the amount secured by the mortgage, it stated:

“All sums of money which the Company may now or at any time in the future owe to Clydesdale Bank Plc ... and all liabilities which the Company may now or at any time in the future owe to the Bank”

11. The company was not a term that was defined. On the face of the particulars, it could only refer to Weston Property Company Ltd but, of course, Weston Property Company Ltd did not seemingly intend to secure its own liabilities, of which there were none, but those of Charlotte Partnership Homes Ltd as provided for by the original facility.
12. But the particulars were duly accepted for registration by the Registrar of Companies, and the error was perpetuated in the sense that the certificate of registration states;

“The Registrar of Companies for England and Wales hereby certifies that a legal mortgage dated the 6th February 2007 and created by Weston Property Company Limited for securing all monies due or to become due from the company to Clydesdale Bank Plc on any account whatsoever was registered ...”

That therefore perpetuated the error that was contained in the particulars submitted for registration.

13. On 17 June 2009, the bank put Charlotte Partnership Homes Ltd into administration and appointed two insolvency practitioners as the administrators under paragraph 14 of Schedule B1 to the Insolvency Act 1986.

14. The position now, as I understand it, is that the bank is owed some £2.3 million by Charlotte Partnership Homes Ltd, and is contemplating appointing the same administrators as receivers of the property subject to the mortgage under clause 8.1 under the conditions applicable to it. But it is concerned that the identity of the customer and therefore of the debtor to the bank, was not shown in the mortgage by putting the name of Charlotte Partnership Homes Ltd into box D, and the identity of the debtor was incorrectly shown in both the particulars submitted for registration and the Certificate of Registration which showed the debtor as being Weston Properties and not Charlotte Partnership Homes Ltd.
15. There was then a considerable amount of correspondence between Mr Winser, the sole director and shareholder of Weston Property Company Ltd, and the bank which resulted in the consent of Weston to the relief claimed being given in advance of the claim form being issued. The consent was actually given on 23 February 2011 and that was pursuant to an agreement reached on 3 March 2011 between the bank, Weston, Charlotte Partnership Homes Ltd and the joint administrators. It provided for a number of other matters, including the provision of evidence in support of this application for which Weston was to be paid £50,000.
16. The claim form now before me was issued on 25 March 2011. Paragraph 1 seeks an order that the mortgage which I have referred to be rectified by inserting in box D the words of “Charlotte Partnership Homes Ltd” and their registered address or, alternatively, a declaration that on its true construction, the customer, as such term is used in the charge, means Charlotte Partnership Homes Ltd.
17. Then in paragraph 2, it goes on to deal with the particulars of the charge submitted for registration, and I will come to that separately in due course.
18. The claim form is supported by the witness statement of Mr Winser, and a witness statement of Mr Dockerill, an employee of the bank, and Miss Haghdadi, a solicitor acting for the bank.
19. Mr Winser’s evidence is quite clear on this issue. He says in paragraphs 8 and 9:

“To put in place the arrangement agreed between the Defendant and the Claimant described above, the Claimant provided me with the Charge in early November 2006 for execution by the Defendant.”

The arrangement being that thereby Weston Property Company Ltd came back into the joint venture in place of Surrey Schools Ltd.

20. And then he goes on:

“I understood that the Claimant had drafted the Charge on the basis of its standard form of third party charge and that, among other things, the effect of the Charge would be that the Defendant charged the Property by way of legal mortgage to the Claimant as security for the liabilities owed by CPHL to the Claimant.”

21. He continues in paragraph 9:

“In or around November 2006, I executed the charge for and on behalf of the Defendant in my capacity as sole director of the Defendant. Mrs Winser [his wife] also executed the Charge at the same time for and on behalf of the Defendant in her capacity as company secretary of the Defendant. As sole shareholder and sole director of the Defendant, I can confirm that it was the Defendant’s understanding and intention that the Charge would take effect as described at paragraph 8 above and that Mrs Winser, as company secretary, was executing the Charge to give effect to that understanding and intention. Further, as far as I am aware from the Defendant’s dealings with the Claimant, the Claimant shared this intention. At the time the Charge was executed by the Defendant, and for at least the duration of the following year the Defendant was solvent and able to pay its debts as they fell due.”

22. Mr Dockerill, an employee of the bank, who makes it clear that he was not concerned at the relevant time but has been concerned since with the matter on behalf of the bank, says this, in paragraph 23 of his witness statement:

“On the basis of the documents described above and my knowledge of this matter and Clydesdale’s means of operating, I believe that Clydesdale intended when it entered into the Charge with the Defendant that the Charge would secure the liabilities of CPHL to Clydesdale, including *inter alia* those pursuant to the Facility Agreement, for reasons which include the following ...”

And he then set out five reasons for that opinion. The first was the funding structure; the second was the provision of the facility agreement; the third was the instructions which Clydesdale gave to its solicitors; the fourth was the charge and its accompanying conditions being the standard form for a charge to secure the liabilities of a third party; and fifthly, the condition imposed by Clydesdale of getting a suitable security.

23. Bar two matters, the documentary and witness statement evidence shows quite clearly that it was the common intention of both parties that box D should be completed by the insertion of the name of Charlotte Partnership Homes Ltd. That intention is demonstrated by the form used in the context of both the original facility letter and the requirements of the bank’s solicitors when advising on what documents were required for the substitution of Weston for Surrey Schools Ltd. There was no occasion for any change in intention and the evidence indicates none. Plainly, box D was left blank by mistake.
24. The two matters to which I referred, which I need to consider separately, are the mortgage, when executed by Surrey Schools Ltd in the spring of 2006, was executed to secure its own liabilities, not those of Charlotte Property Homes Ltd. Second, in some sense, the evidence from Mr Winser has been procured by the payment of £50,000 and should be regarded with some caution as a result.

25. I do not regard those matters, individually or collectively, undermine the bank's case. For all I know, when Surrey Schools Ltd took the place of Weston in February 2006, the facility was, in effect, transferred to Surrey Schools Ltd. It is equally possible that Surrey Schools Ltd made the same mistake. The fact is that the transaction involving Surrey Schools Ltd is with a different party and casts no light on the intention of the parties to the transaction with which I am concerned.
26. The second matter requires me to approach the evidence of Mr Winser with some caution, but having done so, I see no reason to reject or qualify it. Whatever the purpose or result of the payment, Mr Winser's evidence is wholly consistent with the contemporary documents.
27. It follows that each of the requirements for establishing a case for rectification summarised by Peter Gibson LJ in Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 7, page 74, paragraph 33, are properly made out and similarly, the same evidence also establishes a case for construing the mortgage in the same sense. The relevant principles are those formulated by Brightman J at East v Pantiles Plant Hire Ltd [1981] 263 EG 61 and Lord Millett in Homburg Houtimport BV v Agrosin Private Ltd (The Stars In) [2004] 1 AC 715. It is sufficient, I think, to quote the passage from Lord Millett's speech, where he said this:

“Where [the court] can see, not only that words have been omitted, but what those words are, then it is its duty to supply them. It is not necessary that the court should be certain precisely what words have been omitted; it is sufficient that it knows their gist. The process is one of construction, not of rectification ...”

That is in the context of the earlier statement by Brightman J in East v Pantiles, where he said that you can correct a mistake in a document by a process of construction if two conditions are satisfied: (1) there must be a clear mistake on the face of the instrument, and (2) it must be clear what correction ought to be made in order to cure the mistake.

28. It seems to me, on the basis of those principles, that it is quite clear that box D was left blank in error, that it was intended by both parties to the transaction that that box should have been completed with the name of Charlotte Partnership Homes Ltd. That was the bank's customer, that was the liability that Weston was intending to secure, and the evidence on that point, to my mind, is quite clear and conclusive.
29. I will accordingly make a declaration to the effect that the legal mortgage dated 6 February 2007 whereby Weston Property Company Ltd charged the property at Old Malden to secure a liability should be read by the words I have indicated being added into box D to make it clear that the liability it secured was that of Charlotte Partnership Homes Ltd. I see no reason in those circumstances, as well as that, to make any order for rectification.
30. I pass then, to the second claim which is in relation to the particulars that were registered with the Registrar of Companies. The first part of that claim seeks a declaration that the Certificate issued by the registrar is conclusive, notwithstanding the fact that it wrongly identified the debtor whose liabilities were being secured. In doing

so, the registrar perpetuated the error that was set out in the particulars sent to him for registration.

31. The proposition that the Certificate of the registrar is conclusive was established by the decision of the Court of Appeal in Re CL Nye Ltd [1971] 1 Ch, 442. That was a case decided under the comparable provisions of the 1948 Act and the error in question was the date that the charge had been created. The particulars required the date to be stated but it was mis-stated. The particulars were accepted for registration, the Registrar issued a certificate and under the terms of the Act, that certificate was conclusive evidence of the due registration of the particulars. In the Court of Appeal, Harman, Russell and Megaw LJJ concluded that the requirement of the Act that registration should be treated as conclusive meant what it said and the fact that there was an error in the particulars in relation to the date did not in any way undermine the conclusiveness of it.
32. But I have also had drawn to my attention a decision of Lightman J in Grove v Advantage Health Care (T10) Ltd [2000] 1 BCLC 661. The error in that case was that the number of the company had been incorrectly stated, the result of which was that the registration was put against a different company. The judge was concerned as to what the effect of that was. Surprisingly, he was not referred to Re CL Nye and had he been, I do not think he would have decided the matter in the way that he did. The fact is that although that is the more recent of the two positions, I am bound by Re CL Nye, and any doubt that might be cast on that by the decision of Lightman J has to give way to it.
33. But I think there is a much simpler way of dealing with this and that arises from the power to rectify particulars conferred by s.873 of the Companies Act 2006. It is headed, "Rectification of Register of Charges" and provides:
 - “(1) Subsection (2) applies if the court is satisfied --
 - (a) that the failure to register a charge before the end of the period allowed for registration, or the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction --
 - (i) was accidental or due to inadvertence or to some other sufficient cause, or
 - (ii) is not of a nature to prejudice the position of creditors or shareholders in the company, or
 - (b) that on other grounds it is just and equitable to grant relief.
 - (2) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the period allowed for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.”
34. The bank is clearly a person interested and therefore entitled to apply under subsection 2. For the reasons I have already given, I am entirely satisfied that the particulars were mistaken due to inadvertence or for some other sufficient cause. That is enough by

itself to justify an order for rectification of the particulars so as to correct that misstatement. If necessary, I will sit in the Companies Court for that purpose and if necessary, I will waive any requirement to serve the Registrar of Companies. It seems to me to be quite clear that I can make a declaration as to the proper construction of the mortgage. By the same token, the particulars which were registered by the Registrar and his registration, are in each case mistaken, due to inadvertence and insofar as it may be necessary, it is appropriate that they should be rectified.

35. Accordingly, I will make an order to that effect under section 873, and direct that that order be sent to the Registrar of Companies for him to do with it what is required.
36. In those circumstances, I will make the declaration as to the true construction of the mortgage and I will make an order for rectification of the particulars, as required by section 873.