

Link Lending Limited v Ms Susan Bustard (by her litigation friend Peter Walker)

Case No: B5/2009/2270

High Court of Justice Court of Appeal (Civil Division)

23 April 2010

[2010] EWCA Civ 424

2010 WL 1608444

Before : Lord Justice Mummery Lord Justice Jacob and Lord Justice Sullivan

Date: 23/04/2010

On Appeal from the Newcastle-Upon-Tyne County Court

HHJ WALTON

8PB30170

Hearing date : 29th March 2010

Representation

Mr Antoine Tinnion (instructed by Lightfoots LLP) for the Appellant.

Miss Iris Ferber (instructed by Punch Robson) for the Respondent.

Judgment

Lord Justice Mummery :

The issue

1 In legal terms this appeal is about a claim to be “a person in actual occupation” of registered land and thus enjoy the priority protection of an overriding interest: Land Registration Act 2002 (the 2002 Act) s29, schedule 3, paragraph 2 , replacing the Land Registration Act 1925 s70(1)(g) . In human terms the appeal is about which of two innocent parties duped by a dishonest third party will lose out. Does the defendant, who was taken into psychiatric care under s3 of the Mental Health Act 1983 (the 1983 Act), lose her home to the claimant lending institution? The question arises in possession proceedings. They are based on a legal charge which was acquired by the lender, without the defendant's knowledge, from the fraudulent third party.

2 By an order dated 25 September 2009 HHJ Walton dismissed the claim by Link Lending Limited (Link) for possession of a detached dwelling house at 12 Cradley Drive, Brookfield, Middlesbrough (the Property). The judge refused Link's application for permission to appeal, but it was granted by Carnwath LJ on the ground that the appeal raises an issue of some general importance affecting those who are “prevented for psychiatric reasons from living at home.”

3 The issue before the judge was whether Ms Susan Bustard, who had been swindled into parting with her registered title to the Property in November 2004, was, as at 29 February 2008, “a person in actual occupation” of it for the purpose of entitlement to an overriding interest within the meaning of the 2002 Act. The key date is 29 February 2008 as that was when Link registered its charge over the Property. Ms Bustard had been detained for the previous year in a residential care unit as a result of being sectioned under the 1983 Act. If Ms Bustard was a person in actual occupation of the Property at that time, Link concedes that she had an equity in the Property, that her equity takes priority over its legal charge and that its claim for possession of the Property was rightly dismissed by HHJ Walton.

4 The issue in this court is whether the decision of the judge was wrong. His findings of primary fact have not been appealed. Authorities binding on this court have construed the equivalent "actual occupation" provisions in the earlier Land Registration legislation. Link's contention is that the judge misapplied the statutory provisions to the facts and arrived at a legally insupportable conclusion in Ms Bustard's favour.

5 Mr Antoine Tinnion for Link, and Miss Iris Ferber for Ms Bustard are both making their first appearance in this court. They have impressed us with the excellence of their advocacy.

Background facts

6 The Property is the only place that Ms Bustard could possibly call "home." From 17 August 2001 until December 2004 she was the registered proprietor with freehold title. For some years she has suffered from Korsakoff's Psychosis, a severe medical condition which affected her understanding, memory, insight, cognitive faculties and judgment. Those effects have been compounded by alcohol abuse. Over the years she has received in-patient hospital treatment. Advantage was taken of her vulnerability when, on 26 November 2004, Ms Bustard executed a transfer of the Property to Mrs Noreen Hussain, who was acting as a nominee for her husband, Mr Muhammed Hussain. The stated consideration was £100,000. On the same date Mrs Hussain raised from HSBC a loan secured by a legal charge over the Property. On 15 December 2004 Mrs Hussain was registered as proprietor of a freehold interest in the Property with absolute title.

7 Ms Bustard received not a penny for the transfer of the Property or from the loan secured on it. She continued to live there, though on numerous occasions during the period to December 2006 she was admitted to hospital for care and treatment. In January 2007 she was sectioned under the 1983 Act and admitted to St Luke's psychiatric hospital in Middlesbrough. She was later transferred to The Courtyard residential care home in the same hospital complex. She was not allowed by the medical authorities to return to live at the Property while she was being cared for at the Courtyard. No-one else was living in the Property during her involuntary absence.

8 In late 2007 Mrs Hussain approached Link to re-finance the HSBC loan. On 29 February 2008 Link, which specialises in short-term interest-only loans, made an interest-only secured bridging loan of £107,250 to Mrs Hussain for 9 months with monthly instalments of £1,608.75. Mrs Hussain granted Link a legal charge over the Property, the HSBC mortgage having been discharged. She made no interest payments to Link. Ms Bustard received no consideration or other financial benefit under the Link charge. Link accepts that, if it wins this appeal and its charge has priority over her equity, Ms Bustard will have been completely cleaned out, since the amount secured by the charge will exceed the value of her interest in the Property reclaimed and recovered from Mrs Hussain.

9 The judge found that Ms Bustard was not personally present at the Property on 29 February 2008. Her furniture and personal effects were still there; she made relatively brief, supervised visits about once a week to check out the Property and collect post; but she was incapable of living safely in the Property and at the relevant date the powers exercised under the terms of the 1983 Act prevented her from leaving The Courtyard.

10 On 19 June 2008 Link began proceedings for possession of the Property and for judgment for the total amount outstanding under the charge. The loan arrears had reached £4,826.25. Ms Bustard only found out about the possession proceedings when she visited the Property in June 2008 and found a letter about them from Link's solicitors addressed to Mrs Hussain. On 9 September 2008 Ms Bustard, acting by her solicitor and litigation friend, was joined as a defendant to the proceedings. She asserted a Part 20 counterclaim to set aside the transfer on the grounds of lack of legal capacity and/or undue influence and requiring Mrs Hussain to transfer the Property back to her. As against Link she claimed that she was in actual occupation of the Property on the relevant date. Link denied that she was a person in actual occupation. It did not, however, rely on the exception to an overriding interest available in the case of a person whose occupation would not have been obvious on a reasonably careful inspection of the Property at the relevant date: 2002 Act schedule 3 paragraph 2 (c) (i) . The only inspection of the Property by Link prior to taking the charge on it was a "drive-by" inspection by a surveyor, who noted signs of occupation.

11 The report of a joint expert (Professor Turkington, a consultant psychiatrist) confirmed the

diagnosis of Korsakoff's Syndrome and stated that, at the time of the transfer, Ms Bustard would not have had the capacity to make decisions in relation to the Property.

Judgment

12 The judge held that Link was entitled to judgment against Mrs Hussain for the outstanding loan balance and interest; that Ms Bustard lacked the mental capacity to enter into the transfer; that Mrs Hussain and her husband were in possession of facts from which her incapacity should have been apparent; and that Ms Bustard had an equity in the Property in the form of a right to have the 2004 transfer set aside.

13 On the question whether she was “a person in actual occupation” of the Property on 29 February 2008 within the meaning of the 2002 Act the judge concluded that she was. He said-

“45. ...She genuinely wanted to return home even though prevented from doing so by an order under the Mental Health Act . Her furniture remained there. Arrangements had been made by those who had taken over responsibility for her finances to pay the regular bills such as the community charge from her funds. She was visiting the property, admittedly supervised, but precisely because she still considered it her home. She was trying to return there when she made her applications to the Mental Health Tribunals. No-one ever, that I can see, took a final and irrevocable decision that she would not eventually be permitted to return there to live. In my judgment she still occupied the house even though she was for the time being resident elsewhere. Of the various cases cited, most of which were examples of the working out of the basic principle in various factual contexts, I find *Thompson v. Foy* the most helpful. I accept, in terms of what is said at [127] of the judgment in that case, that while Mrs Bustard was not physically present on the land her occupation was manifested and accompanied by a continuing intention to occupy.”

14 In short, what mattered, in the view of the judge, was the combined manifestation of her occupation, her continuing intention to occupy and the reason that prevented her from living at home. The judge's approach was that whether someone is in actual occupation is a question of fact depending on all the circumstances.

15 The order of 25 September 2009 dismissed the claim for possession, directed Mrs Hussain to transfer the Property to Ms Bustard and Link to discharge its charge over the Property. Link and Mrs Hussain were ordered to pay Ms Bustard's costs of the Part 20 claim.

Appellant's submissions

16 The grounds of appeal are, in essence, that, as Ms Bustard was not physically present in the Property on 29 February 2008 and had not been in residence there for the previous year, the judge was wrong in law in his conclusion that Ms Bustard was “a person in actual occupation” of the Property on 29 February 2008.

17 The recurrent theme of the grounds of appeal and the submissions is that the judge attached too much weight to factors favouring Ms Bustard and too little weight to factors favouring Link. The result was a decision misapplying the relevant law as stated in the authorities cited by the judge: *Williams & Glyn's Bank v. Boland* [1981] 1 AC 487 at p 505C; *Abbey National BS v. Cann* [1991] 1 AC 56 at 93D-94B; *Strand Securities v. Caswell* [1965] Ch 958 ; and *Stockholm Finance Ltd v. Garden Holdings Inc* [1995] LTL (26 October 1995) . In particular the judge is criticised for the importance he attached to what Mr Tinnion described as the “double” obiter of *Lewis J* in *Thompson v. Foy* [2009] EWHC 1076 at paragraph 127.

18 Two particular passages in the authorities cited by Mr Tinnion stand out.

19 The first is the passage in the opinion of Lord Oliver in *Cann* at p 93-94. He said-

“This [i.e. actual occupation of property at the material time] is, of course, essentially a question of fact, but there is the serious question of what, in law, can amount to “actual

occupation” for the purposes of section 70(1)(g). In *Williams & Glyn's Bank v. Boland* [1981] A.C. 487 , 504, Lord Wilberforce observed that these words should be interpreted for what they are, that is to say, ordinary words of plain English. But even plain English may contain a variety of shades of meaning. At the date of completion Mrs Cann was not personally even in England, leave alone in personal occupation of the property, and the trial judge held that the acts done by Mr Abraham Cann and Mr George Cann amounted to

“no more than the taking of preparatory steps leading to the assumption of actual residential occupation on or after completion, whatever the moment of the day when completion took place...”

For my part I am content to accept this as a finding of fact which was amply justified by the evidence before him...It is perhaps dangerous suggest any test for what is essentially a question of fact, for “occupation” is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied. It does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought, on behalf of his employer. On the other hand, it does, in my judgment, involve some degree of permanence and continuity which would rule out mere fleeting presence. A prospective tenant or purchaser who is allowed, as a matter of indulgence, to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time. Of course, in the instant case, there was, no doubt, on the part of the persons involved in moving Mrs Cann's belongings, an intention that they would remain there and would render the premises suitable for her ultimate use as a residential occupier. Like the trial judge, however, I am unable to accept that acts of this preparatory character carried out by courtesy of the vendor prior to completion can constitute “actual occupation” for the purposes of section 70(1)(g). Accordingly, all other considerations apart, Mrs Cann fails, in my judgment, to establish the necessary condition for the assertion of an overriding interest.”

20 Mr Tinnion contends that, although Ms Bustard could be in actual occupation of the Property without being personally present in it, her occupation ceased to have that quality of permanence and continuity required for actual occupation after a year of residence at The Courtyard. After such an extended period of absence it could not be said that her connection with the Property was any longer one of actual occupation.

21 The second passage is in the unreported decision of Robert Walker J in *Stockholm Finance* at p 18 of the transcript. He said-

“Whether a person's intermittent presence at a house which is fully furnished, and ready for almost immediate use, should be seen as continuous occupation marked (but not interrupted) by occasional absences, or whether it should be seen as a pattern of alternating periods of presence and absence, is a matter of perception which defies deep analysis. Not only the length of any absence, but also the reason for it, may be material (a holiday or a business trip may be easier to reconcile with continuing and unbroken occupation than a move to a second home, even though the duration is the same in each case). But there must come a point at which a person's absence from his house is so prolonged that the notion of his continuing to be in actual occupation of it becomes insupportable; and in my judgment that point must have been reached in this case, long before Mr Dawkins visited the house on 4 January 1990 (and still more so, long before 20 February 1990). By then Princess Madawi had not set foot in the property for over a year: she had for over a year been living with her mother in the Islamic household at Riyadh.”

22 Mr Tinnion contends that in this case also Ms Bustard's absence from the Property had been so prolonged (a year, as in *Stockholm*) that “the notion of her continuing to be in actual occupation of it becomes insupportable.”

23 A brief reference to *Thompson v. Foy* is necessary, as Mr Tinnion criticised the judge for placing strong reliance on the passage in which Lewison J listed a number of legal propositions derived by him from the authorities:

“127. Before addressing the question of Mrs Thompson's actual occupation directly, it is necessary to say a little more about “actual occupation”:

(i) The words “actual occupation” are ordinary words of plain English and should be interpreted as such. The word “actual” emphasises that physical presence is required: *Williams & Glyn's Bank v. Boland* [1984] 1 AC 487 per Lord Wilberforce at 504;

(ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer: *Abbey National BS v. Cann* [1991] 1 AC per Lord Oliver at 93 ;

(iii) However, actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor: *Strand Securities Ltd v. Caswell* [1985] Ch 958 per Lord Denning MR at 981;

(iv) The mere presence of some of the claimant's furniture will not usually count as actual occupation: *Strand Securities Ltd v. Caswell* [1985] Ch 958 per Russell LJ at 984;

(v) If the person said to be in actual occupation at any particular time is not physically present on the land at that time, it will usually be necessary to show that his occupation was manifested and accompanied by a continuing intention to occupy: compare *Hoggett v. Hoggett* (1980) 39 P & CR 121 , per Sir David Cairns at 127.”

24 Mr Tinnion pointed out that the entire passage was obiter, as Lewison J had decided that the party claiming to be in actual occupation did not have an equitable interest in the property capable of protection as an overriding interest. He added that the judge had, in any event, misapplied sub-paragraph (v) of the summary, which was derived from a landlord and tenant case and not from a land registration case, by treating proof of manifestation of occupation and continuing intention to occupy as sufficient, of themselves, to establish actual occupation. That is not, he submitted, the law applicable to actual occupation of registered land.

Discussion and conclusion

25 The facts are not all one way. Some of the primary facts point against Ms Bustard's actual occupation of the Property at the relevant date: she was not personally present in the Property on 29 February 2008; she had been in a residential care home since January 2007; she was incapable of living safely in the Property; and her visits to the Property were brief and supervised.

26 Some of the primary facts point to Ms Bustard's continuing actual occupation of the Property: it was her furnished home and the only place to which she genuinely wanted to return; she continued to visit the Property because she still considered it her home; those who had taken responsibility for her finances regularly paid the bills, such as the community charge, from her funds; she was in the process of making an application to the Mental Health Review Tribunal in order to be allowed to return home; and no-one took a final and irrevocable decision that she would not eventually be permitted to return home.

27 Whether Ms Bustard was in “actual occupation” of the Property at the relevant date was an issue on which the trial judge had to make an evaluation based on his findings of primary fact. As for the law he considered the relevant authorities on the concept of a “person in actual occupation” of land in the earlier Land Registration legislation and now found in the 2002 Act. The construction of the earlier equivalent provisions by the House of Lords is binding on this court. The trend of the cases shows that the courts are reluctant to lay down, or even suggest, a single legal test for determining whether a person is in actual occupation. The decisions on statutory construction identify the factors that have to be weighed by the judge on this issue. The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors.

28 This court can only interfere with the judge's decision on that issue if it is satisfied that, in the light of the law, it was wrong as a matter of statutory construction, or if it was wrong as a judgment of fact and degree. As for construction, the judge considered the relevant provisions and cited the relevant authorities as to what, in law, is capable of constituting actual occupation of property. As for his application of that law to the facts, the question for this court is whether the judge could properly and reasonably conclude that Ms Bustard was in actual occupation of the Property at the relevant date.

29 In my judgment, this court should not disturb the decision that Ms Bustard was a person in actual occupation of the Property. The judge did not misconstrue the 2002 Act or the authorities. Nor did he misapply the law by making an insupportable evaluation of Ms Bustard's situation regarding the Property. The decisions of the courts on the different facts of other cases have been cited against his conclusion, but they do not demonstrate that he was wrong.

30 The assistance given in the authorities is in clarifying the legal principles, exploring the range of decisions available to the court and identifying the factors to which weight should be given. It is clear from the citations that Ms Bustard's is not a case of a "mere fleeting presence", or a case, like *Cann*, of acts preparatory to the assumption of actual occupation. It is also distinguishable from *Stockholm*, which involved the domestic living arrangements of a Saudi princess living with her mother in Saudi Arabia and owning a house in London, where there was furniture and clothing and caretaking arrangements in place, but where she had not lived for more than a year. In this case the new and special feature is in the psychiatric problems of the person claiming actual occupation. The judge was, in my view, justified in ruling, at the conclusion of a careful and detailed judgment, that Ms Bustard was a person in actual occupation of the Property. His conclusion was supported by evidence of a sufficient degree of continuity and permanence of occupation, of involuntary residence elsewhere, which was satisfactorily explained by objective reasons, and of a persistent intention to return home when possible, as manifested by her regular visits to the Property.

31 Finally, I agree with the accurate and helpful summary of the authorities by Lewison J in *Thompson v. Foy*. The judge did not mis-apply that summary of the law. His decision is supportable in law and in fact.

Result

32 I would dismiss the appeal. Link has not established that the judge's evaluative judgment on the "actual occupation" issue was wrong. The evidence of Ms Bustard's absences from the Property did not mean that there was an absence of evidence of actual occupation of it by her.

Lord Justice Sullivan:

33 I agree.

Lord Justice Jacob:

34 I also agree.

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