NRAM Plc v Evans and another

[2015] EWHC 1543 (Ch)

Chancery Division, Cardiff District Registry

HHJ Jarman QC

29 May 2015

Miss Nicole Sandells (instructed by Walker Morris) for the claimant

The defendants in person

Hearing dates: 28and 29 May 2015

- - - - - - - - - - - - - - - - - - - - -

Judgment

HH Judge Jarman QC :

1. At the heart of these consolidated claims and counterclaims between the parties (which for ease of reference are indentified in the title as they appear in the lead claim) is a dispute as to whether a loan advanced by the claimant’s predecessor (I shall refer to both simply as the bank) to Mr and Mrs Evans in 2005 is secured or not on their property at 22 Parc Penscynnor, Cilfrew Neath (the property). The bank says that it is so secured by virtue of a mortgage deed signed by them on 26 November 2004 (the charge). It further says that a cancellation of the registered charge in respect of the deed, known as an e-DS1, in which the bank acknowledged that the property was no longer charged as security for sums due under the charge, was made as a result of a mistake by the bank. Mr and Mr Evans say that the deed only applies to a loan advanced at that time and not to further advances, and that the e-DS1 was therefore correct.

2. The charge was signed by Mr and Mr Evans to secure a loan of £197,000 which they applied for from the bank in 2004 in order to purchase the property. A further loan of £21,400 was made as an unsecured loan under the Consumer Credit Act 1974 together with what was called a Help with Costs Benefit. The reason why that was unsecured is that the purchase price was £208,000, and so there was not sufficient equity to secure the entire loan. The entire loan (together referred to as the 2004 loan) was however given one mortgage account number, namely 52850F-56522.

3. The charge is in short form on the bank’s standard form. Clause 1 provides that the mortgage conditions apply to the charge. Those are defined as the Northern Rock Plc Mortgage Conditions 2001 (the 2001 conditions). Clause 3 provides;

“This mortgage secures further advances. We are not obliged to make further advances.”

4. Condition 1.2 provides that “mortgage debt” means:

“(a) all of the money you owe us from time to time under any offer, including any unpaid interest, costs and fees;

(b) if there is only one of you, all other money you owe us from time to time; and

(c) if there is more than one of you, all other money all of you together owe us from time to time, even if we cannot enforce our claim for any of that money against any one of more of you;

Including any costs and fees and any interest under condition 13.7 but excluding any money the mortgage is not security for because of condition 3.4;”

5. Condition 3 under a heading “What the mortgage secures” provides:

“3.1 The mortgage is security for the mortgage debt.

3.2 The mortgage is a continuing security. This means that we will not release the mortgage until the mortgage debt is paid in full, and until we owe no duty to make further advances that would form part of the mortgage debt.

3.3 Section 93 of the Law of Property Act 1925 does not apply to the mortgage. This means that we will not release any mortgage for the mortgage debt before the mortgage debt is paid in full.

3.4 The mortgage is not security for any money you owe under a regulated agreement within Part V of the Consumer Credit Act 1974, unless you agree otherwise in writing.”

6. The purchase of the property was completed and Mr and Mrs Evans were registered as proprietors at the Land Registry on 23 December 2004 and on the same date the charge was entered into the charges register.

7. By a letter to the bank dated 11 September 2005 signed by Mr and Mrs Evans, they referred to four accounts which they had with the bank, including the secured and unsecured parts of the 2004 loan and the fact that the monthly payments in respect of those accounts amounted to a total of £1,737.37 per month. They asked whether it was possible to move the borrowings to “one product to reduce our current monthly repayments.”

8. That led to a written offer of loan dated 21 November 2005 being sent by the bank to Mr and Mrs Evans in which at section 1 details of the property were given as the property, and in section 3 under mortgage requirements the following details were set out:

“You are reviewing your mortgage arrangements

Secured Loan amount: £213,128.00 which includes the £250 mortgage review fee for closure of you existing product plus £695.00 for fees that will be added to the loan- see Section 8 for details.

Repayment Method: Interest Only

Term: 25 years

You also wish to borrow £22,311.00 as an unsecured loan- see Section 12 for details”

9. Section 6 dealt with what Mr and Mrs Evans would need to pay each month “assuming that the mortgage will start on 1 January 2006” and set out 36 payments of £991.45 followed by 246 payments of £1,167.81. Section 8 referred to an arrangement fee payable “when your mortgage has been transferred to this new mortgage product.” Section 12 referred amongst other matters to the unsecured borrowing in these terms:

“An unsecured loan of up to £22,311.00 is also available with this mortgage. The interest rate for unsecured borrowing is the same as that charged for the secured mortgage.”

10. The offer was made subject to the bank’s 2005 general offer conditions, and condition 4 provided:

“The Offer Debt must be secured by a first legal mortgage or charge….over the Property described in the Offer.”

11. On the 27 November 2005 Mr and Mrs Evans signed the bank’s standard form entitled “Mortgage Review Service Offer of Loan Acceptance Form.” Immediately above their signatures there were a number of declarations set out including the following:

“You understand that the new loan amount detailed in the Offer of Loan, includes any Sum Equivalent to the Early Repayment Charge or Help with Cost clawback, applicable to the terms and conditions of your current mortgage.

You understand by returning this form we will reschedule your loan as stated in your Offer of Loan.

You have applied for a Mortgage Review transfer and have authorised [the bank] to debit your mortgage account with an Administration fee, which will reserve the deal you have chosen.”

12. On 27 November 2005 Mrs Evans signed a direct debit instruction to her bank to make the payments due in respect of the new loan, and on the same day Mr and Mrs Evans signed a regulated agreement under the 1974 act in respect of the loan for £22,311. On 15 December 2005, the entire loan (the 2005 loan) was issued from which the 2004 loan was redeemed, and given a new account number namely 54950D-09581. No further entry in this connection was made at the Land Registry. Statements were thereafter issued by the bank to Mr and Mrs Evans giving the new account number.

13. In those circumstances it is perhaps not surprising that Mr Evans accepted in cross examination that he understood at the time of the 2005 loan that it was intended to be secured on the property and thereafter proceeded for some time on the basis that it was, as may readily be seen from the events which followed and which I set out below.

14. Mr Evans had a number of creditors at this time and payments due in respect of the 2005 loan were missed. He instructed an insolvency practitioner and with his assistance drew up and signed proposals dated 21 February 2006 which included details of the property, the account number 54950D-09581 and specified the “amount of secured debt outstanding £215,127.80.” On 6 March 2006 he put these proposals to a meeting of his creditors, including the bank in respect of unsecured borrowing, which were accepted and an Individual Voluntary Arrangement was entered into. Paragraph 11 thereof provided that it did not affect the rights of creditors to pursue debtors jointly liable with Mr Evans in respect of debts included in the IVA by any means normally available.

15. By a letter to the bank dated 7 March 2006 signed by Mr and Mrs Evans, notice of the meeting was given and this paragraph was included:

“In respect of our Mortgage payments, I made a debit card payment for £1100 of the 3rd February 2006, and is the most recent payment to our mortgage account. As my husbands IVA is being concluded, your help in this matter would be appreciated. We understand the mortgage payment to be £1043.28 which includes the insurance premium.”

16. By a letter dated 28 April 2006 to the bank and signed by Mr and Mrs Evans again referring to account number 54950D-09581, they acknowledged that “our mortgage account is in arrears” and asked for an agreement to a repayment schedule. Agreement was reached and payments continued. However Mrs Evans’ financial situation deteriorated throughout 2006. On 21 December 2006 upon her application she was granted an interim order by Neath and Port Talbot County Court under section 252 of the Insolvency Act 1986 that during the period of 14 days beginning on 23 December no bankruptcy petition may be presented against her. There is no evidence or suggestion that that order was extended.

17. In January 2007 Mrs Evans proposed her own IVA and signed a proposal which dealt with the property and the 2005 loan in similar manner to that of her husband. The bank did not accept that proposal and obtained judgments against Mrs Evans for the unsecured borrowing for which she was jointly liable with her husband and obtained final charging orders in respect of such judgments on 20 February 2007 against her beneficial interest in the property. These were protected by restrictions on the registered title of the property.

18. In August 2007, Mr and Mrs Evans upon advice executed assignments of their respective beneficial interests in the property to their respective mothers for the sum of £1.

19. In the following month Mr Evans’ IVA came to an end, because of default. Shortly after that, Mr Evans filed a debtor’s petition for bankruptcy at the Neath and Port Talbot County Court. In the statement of affairs which accompanied the petition and which was signed by Mr Evans on 1 October 2007 and the list of creditors in section 4, Mr Evans included the bank as a creditor in the sum of £221,256.17 giving the account number 54950D-09581 together with the words “Secured Mortgage,” and also as a creditor in respect of the unsecured borrowing. In section 7 he list outgoings and into the box for “mortgage payments or rent on your home,” the figure of £1451.31 was inserted. On 1 October 2007 he was made bankrupt. Mrs Evans presented her own petition on the same basis, and she was made bankrupt on 31 January 2008.

20. The bank did not prove in either bankruptcy for that part of the 2005 loan which it maintains is secured on the property and the Official Receiver treated the bank as a secured creditor in this regard. Mr and Mrs Evans provided him with copies of the mortgage statements which confirmed that the amount outstanding as disclosed in the statements of affairs was accurate. The Official Receiver considered whether the August 2007 transfers were transactions at undervalue, or were made to place the property beyond the reach of creditors, so as to justify applications under section 339 or 423 of the 1986 Act. However he formed the view that the property held negative equity because the 2005 loan was secured against it and so these transfers were made for value, and by letter dated 6 February 2008 informed the bank that he had no interest in the property. Later that year Mr Evans was discharged from bankruptcy and Mrs Evans was similarly discharged early the following year.

21. Repayments in respect of the 2005 loan continued to be made for the next six years. By letter dated 18 August 2014 from solicitors Tonner Johns Ratti in Swansea to the bank, the mortgage account 52850F-56522 only was referred to. That is the 2004 loan which was redeemed on payment of the 2005 loan. The letter said that the solicitors acted on behalf of Mr and Mrs Evans who had provided them with office copy entries of the registered title to the property. The letter continued:

“We are advised that the mortgage, secured on the property, was discharged on the 13 December 2005, yet your registered charge dated 26 November 2004 is still shown as registered in the Charges Register of title number CYM90651.

The attached letter from yourselves states that in fact the loan was redeemed on the 13 December 2005, yet your registered charge dated 26 November 2004 is mistakenly still shown in the Charges Register of title number CYM90561

The paperwork you have provided our client with confirms that the loan has been redeemed, and we would therefore be grateful if you could please provide the appropriate DS1 or End Notification for the entry to be removed from our clients registered title.”

22. Mr and Mrs Evans represented themselves in these proceedings and signed joint witness statements. Mr Evans was the only witness who gave oral evidence for them. Mrs Evans was present throughout the hearing but chose not to give oral evidence, saying that she could not add anything to that of her husband. He was cross examined as to how it was this letter referred only to the 2004 loan, and gave that account number, but made no reference to the 2005 loan. His answers in my judgment were evasive and muddled. He and his wife were then interested in selling the property and that is why they instructed solicitors. At one point in his oral evidence he said that he told his solicitor about the 2005 loan and that it was unsecured. At another point he said that it was his solicitor who obtained office copies of the registered title, and could not say why his solicitor in the letter suggested it was his clients who had taken the copies to him. At other points he said he could not remember what he told him or whether he had given him the account number for the 2005 loan. He later appeared to accept that he had not given him this number. He was also unclear as to when it first was that he changed his position as to whether the 2005 loan was secured or not.

23. It was put to him that he had deliberately made no reference to the 2005 loan because he hoped that what would happen was what in the event did happen, namely that the bank would provide a DS1 to enable the charge to be removed from the registered title of the property. He flatly rejected such a suggestion. It is a serious allegation, which as Miss Sandells on behalf of the bank conceded in the course of final submissions was not pleaded. Properly, therefore, she did not invite me to make a finding to that effect and I do not do so. Nevertheless, his evidence about how this came about remains unsatisfactory.

24. The only witness called to give oral evidence for the bank was Kerry Brook, a property paralegal. Her employment with the bank began after 2005 but before 2014. She did not initially deal with the solicitors’ letter. It was processed by an individual in the administrative office, who would have checked the system then in use for the account number of the 2004 loan. The system would have showed the loan having been redeemed in 2005, but would not have shown the further loan. As a result of this case there is now a link which shows any further loan. With hindsight this deficiency in the system seems obvious, and indeed careless, but it was not realised at the time. The individual then provided the Land Registry with an e-DS1 on 28 August 2014. Ms Brook said that the way in which the mistake came to light was that the solicitors’ letter was then passed to the bank’s unsecured department. There, the two restrictions registered in 2007 were noted and a further search was carried out which revealed the 2005 loan. That is when the matter was referred to her. She contacted the solicitors to explain that the e-DS1 should not have been issued, and was told that they were not aware of the 2005 loan. On 1 October 2014 a unilateral notice was registered on the title to the property to protect the bank’s interest therein. I accept the evidence of Ms Brook in this regard.

25. Throughout these proceedings Mr and Mrs Evans have maintained that the charge does not on its terms secure the 2005 loan, and Mr Evans so maintained in cross-examination. In my judgment it is clear that it does. It says so on its face. Moreover in the 2001 conditions, which were incorporated into the charge, it was specified that the charge was to secure the mortgage debt which was defined to include all of the money which Mr and Mrs Evans owed to the bank from time to time under “any offer.” In my judgment that is sufficiently wide and clear to include the offer under which the 2005 loan was made. Mr Evans submitted that this did not amount to an “all monies” clause and referred to examples of such clauses. In my judgment, however, the wording is clear enough.

26. I am satisfied therefore that the charge was effective to secure the 2005 loan on the property. On the bankruptcy of Mr and then Mrs Evans, his and her estate vested in the Official Receiver as trustee pursuant to section 306(1) of the 1986 Act, but by reason of section 283(5), subject to the bank’s charge.

27. The next main issue is the effect of the bank sending the e-DS1 to the Land Registry in August 2014. Miss Sandells submitted that the facts of this case are materially indistinguishable from those in *Garwood v Bank of Scotland* [2013] EWHC 415 (Ch). In that case a fraudster requested redemption of a charge which contained an “all monies” clause without revealing that no security had been granted for an earlier advance and that accordingly the charge stood as security not only for a loan which was to be redeemed but also for a loan which was to remain outstanding. There are differences between the two cases. The present case is not an “all monies” case as such and is not a case of fraud. Nevertheless in my judgment the nature of the mistake on the part of the bank is similar.

28. Mr Justice Norris approached the question of whether the mistake could be corrected on the basis that the e-DS1 was a unilateral transaction. At paragraphs 63 to 66, he said this:

“To invoke the equitable jurisdiction to set aside a voluntary disposition for mistake there must be a mistake of sufficient gravity either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction (Pitt v Holt [2011] EWCA Civ 132 at [210]). In my judgment the mistake of BoS satisfied each of these three limbs.

There was a mistake: Bos did not intend to release the only security it held for the July 2004 Loan, but the e-DS1 had this effect…..

Second, it is a mistake as to the legal effect of the release. Its legal effect was to turn BoS from a secured creditor in relation to the July 2004 Loan into an unsecured creditor. That was not the intended effect…

Third, the mistake was clearly of the relevant seriousness. In one sense it was induced by the person who derived the benefit followed the voluntary disposition, namely, the Borrower himself…But in any event the mistake of the BoS was of such a serious character as to render it unjust on the part of the Borrower to retain what has been given to him i.e. the unencumbered freehold of [the property].”

29. Mr Evans submitted that this amounted to negligence and did not amount to a mistake. He relied upon a decision of the Supreme Court in *Futter & Anor v Revenue and Customs* [2013] UKSC 26, in which Lord Walker gave the judgment with which the other members of the Court agreed. That decision dealt with two appeals, one of which was in *Pitt v Holt*, referred to by Norris J in *Garwood.* That latter decision was not referred to in *Futter,* in which the circumstances in which a voluntary disposition would be set aside for mistake were also considered.

30. At paragraph105 Lord Walker said:

“Forgetfulness, inadvertence or ignorance is not, as such a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake.”

31. At paragraph 114 he continued:

“Some uncontroversial points can be noted briefly. It does not matter if the mistake is due to carelessness on the part of the person making a voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong…Nor need the mistake be known to (still less induced by) the person or persons taking a benefit under the disposition.”

32. He then went on to deal with some points of controversy emerging from the authorities, and in particular the degree of seriousness of the mistake but also about its nature, especially as to the distinction between “effect” and “consequences,” before concluding at paragraph 122

“I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which is basic to the transaction.”

33. At paragraph 128 he considered the requirement of unconscionableness, and referred to a passage in his own judgment when a judge of the Court of Appeal in *Gillet v Holt* [2001] Ch 201, 225 in which he considered that principle in the context of proprietary estoppel. He then concluded that the court must consider that issue in the round. After considering that case he said this:

“In my opinion the same is true of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations) 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. The court may and must form a judgment about the justice of the case.”

34. In my judgment the bank in issuing the e-DS1 to the Land Registry did make a distinct mistake. It thought in so doing it was obliged to do so because the 2004 loan had been redeemed and there was nothing more to secure. It was not mere inadvertence. The mistake was induced because of the terms of the solicitors’ letter which referred to the 2004 loan account number and not the 2005 loan account number, which I have found was secure on the property. It was careless of the bank not to link the two before issuing the e-DS1. That mistake however was central to that issue. Had the bank realised that the 2005 loan was still secured on the property it would not have issued the e-DS1. The consequences of so doing are serious. The bank would lose its security for the 2005 loan. Mr and Mrs Evans, having taken that loan thinking it would be secured on their property and having dealt with it as such in their respective bankruptcies would (or their respective mothers now would) be left with an unencumbered property. In my judgment it would be unconscionable to leave the mistake uncorrected.

35. In my judgment the bank is entitled to be re-registered as proprietor of the charge which secures the 2005 loan, see section 65 and schedule 4 of the Land Registration Act 2002. As Mr and Mrs Evans are in possession as registered proprietors, rectification of the register can only take place if they have contributed to the error by lack of proper care. In my judgment by referring only to the 2004 loan and not the 2005 loan in their solicitors’ letter of August 2014, they did so contribute. Miss Sandells accepts that this will not entitle the bank to pursue Mr or Mrs Evans for pre-bankruptcy debts to the extent that these are unsecured.

36. Both parties made other submissions, most of which I need not deal with in light of those conclusions. However Mr Evans in his final submissions maintained that the bank has given wrong information to credit reference agencies for the purpose of credit reports about himself and his wife and that they should be compensated under section 13 of the Data Protection Act 1998. It is accepted that there is a reference in one such report to a county court judgment against Mr Evans which should refer to that against his wife. However, as that particular report makes clear, that information was supplied not by the bank but by Registry Trust Ltd which is a company contracted by the Lord Chancellor’s department to maintain a register of county court judgments. Moreover there is a simple procedure to correct any information which Mr Evans has not used.

37. His other main complaint related to information as to unsecured debts remaining unsatisfied, which he accepts have not been paid, but which it is accepted are no longer due after discharge from bankruptcy. In his skeleton argument, he cited guidance issued by the Information Commissioner under the 1988 Act, paragraph 51 which includes the following:

“There are circumstances where the terms “satisfied” or “settled” are not appropriate because they do not adequately reflect the fact that lenders have been left with no choice but to accept significantly less than they were owed under the terms of the original agreement. Examples include the following. Where an IVA, which included the lender, has been successfully completed even if the lender did not recover all the money owed under the terms of the original agreement. Where a lender has received all the money owed under the terms of a bankruptcy order which has been discharged, even though the amount received falls short of the amount owed under the original agreement and, in some case, may not have received any payment at all.”

38. In those circumstances, I am not satisfied that there has been shown a contravention by the bank of any of the requirements of the 1998 Act so as to give rise to a right of compensation.

39. Mr Evans also maintained a claim for overpayments. Insofar as this was upon the basis that payments were made in respect of unsecured debts which have been wiped out in the bankruptcies, I am not satisfied that there was overpayment. Insofar as it is based upon a breach of section 77A of the Consumer Credit Act 1974, I am satisfied that the loan to Mr Evans under that Act was dealt with in his bankruptcy. In respect of Mrs Evans, judgment was obtained against her in 2006, and I am satisfied that no interest has been charged under that loan since the date of judgment.

40. Accordingly the bank is entitled to the relief set out above, but I am not satisfied that Mr or Mrs Evans are entitled to relief.