

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

AIB GROUP (UK) PLC

Plaintiff

-v-

1. SIMON ROSS,
2. STEPHANIE ANNE ROSS,
3. JOHN HOLLAND,
4. JAN HOLLAND,
5. RODNEY JAMES HAYLEY
6. JEAN ADAIR HAYLEY

Defendants

WEATHERUP I

[1] The plaintiff seeks possession of premises that are charged as security for loans advanced by the plaintiff to the first defendant. The claim proceeded against the second defendant Stephanie Anne Ross and the fifth and sixth defendants Rodney James Hayley and Jean Adair Hayley who are Ms Ross's parents. Ms Ross's estranged husband Simon Ross is the first defendant and for the purposes of this story he is the rogue. Mr and Ms Holland the third and fourth defendants were, at the commencement of the proceedings, in possession of the property that was the subject matter of the proceedings. Mr Horner QC and Mr Gowdy appeared for the plaintiff, Mr Kennedy QC and Mr Girvan for the second defendant and Mr Girvan for the fifth and sixth defendants.

[2] The claim concerns 35 Castlewood Avenue, Coleraine, being Folio LY7654 County Londonderry. The fifth and sixth defendants were the registered owners of the premises until they transferred their interest to the first defendant, which

transfer was registered on 9 February 2007. By a charge dated 18 May 2006 and registered in the Land Registry on 9 February 2007 the first defendant charged the premises in favour of the plaintiff as security for the payment to the plaintiff of monies advanced. The amount of the debt claimed against the first defendant is £488,000 and the security which the plaintiff held involved charges over properties owned by the first defendant in Ballymoney and Dunloy and Coleraine, including the Castlewood property.

[3] The second, fifth and sixth defendants filed defences and counterclaims against the plaintiff. The second defendant alleged fraud against the first defendant in having the premises transferred into his name rather than her name and that the plaintiff had constructive knowledge of the same. The second defendant counterclaimed for a declaration that she had unencumbered legal title to the premises. The fifth and sixth defendants relied on the plea of non est factum in respect of the transfer document of 15 May 2005 of their property to the first defendant, pleaded that the purported witnesses to that transfer, a Lawrence and Grainne McGarry, were not present when the transfer was signed and further alleged deceit and fraud by the first defendant. Their counterclaim pleaded that the first defendant prevailed on them to transfer Castlewood to their daughter the second defendant, supposedly for advantageous tax reasons, but that in the event the first defendant procured their signatures to a transfer of Castlewood to the first defendant who then relied on the property as security for loans from the plaintiff bank.

[4] The first defendant is now living in England and second defendant is living in Northern Ireland. The plaintiff claims that the fifth and sixth defendants signed the transfer and are bound by that document. The defendants admit that they signed the document but not in the presence of the purported witnesses. The defendants do agree that they signed the transfer in the presence of the first defendant but without sight of the first page of the document. They signed the page that provided for their signatures and those of the witnesses. The first page indicates that the document relates to the transfer of registered land and concerns the Castlewood property. In the section on the front page which refers to the transferee there was at one time an entry that read 'S Ross' and stated the address of the first and second defendants but subsequently, when that document was presented to the Land Registry, the S Ross had been converted to 'Simon Ross', the name of the first defendant.

[5] Jonathan Logue of Ferguson Logue, solicitors, acted for some of the defendants from time to time. James L Russell, solicitors, acted for the plaintiff bank and from time to time for some of the defendants. On 16 May 2006 a letter from James L Russell to Ferguson Logue referred to the Castlewood premises and to Ferguson Logue having the title documents to the premises which it was stated was assumed to be in the name of the Hayleys. The letter referred to "our above mutual client in his private name", this being a reference to the first defendant, "has arranged a facility with the above bank", this being the plaintiff, "of in or around £124,000 or so which is subject to the relevant transfer being completed. The said

loan to be secured by way of a first charge over the title for the said premises. You should immediately direct so we can proceed on behalf of our mutual client and the said Bank, but only once proper Undertakings and certifications are in place.”

[6] The letter drew a response from Ferguson Logue of 17 May 2006 that stated -

“Our clients Simon and Stephanie Ross have returned to us an executed transfer.

The transferee is named as S Ross but our clear instructions were that this was to be Stephanie Ross. Stephanie Ross contacted us this morning and requested that we send a document in its current form to you together with the vacated Abbey mortgage. She will then give you instructions as to whether she is happy for registration to proceed in the name of Simon Ross.

We are despatching documents today and we suggest you contact Stephanie Ross....”

[7] In the course of these proceedings Mr Logue filed an affidavit in which he set out the circumstances relating to this exchange of correspondence. He referred to the letter from James L Russell indicating that Simon Ross was intending to mortgage the property and stated “I then realised that Simon Ross was attempting to alter a relationship based on offering help and advice to a friend to one involving me in certification of a matter in which I had no instructions”. On 17 May 2006 Mr Logue contacted the second defendant and explained to her the content of the letter that had been received and that Simon Ross had left in a transfer document for her parents’ property transferring it to S Ross and that he, the first defendant, clearly intended to try to mortgage the property for his own purposes. Mr Logue continued that the second defendant instructed him to forward any papers to James L Russell the family solicitors and she would discuss the situation with her husband and she informed Mr Logue that she did not feel her husband would try to do anything to harm her interests. Mr Logue concluded by stating that he had had sight of the transfer document that was registered by James L Russell on 9 February 2007 and that this was an altered version of the document that Simon Ross had left in the office and which Ferguson Logue had sent to James L Russell. The transferee stated to be ‘S Ross’ had been altered to ‘Simon Ross’. Mr Logue gave evidence confirming his affidavit and that he had alerted James L Russell and the second defendant to the circumstances where it appeared that the first defendant was seeking to have the property transferred into his own name.

[8] The second defendant gave evidence that after Mr Logue’s call she spoke to the first defendant and he told her that what was being suggested was not right. Ms Ross stated that her husband showed her a draft document which reassured her. She stated that it was a shock to her when she later found out that her parents property had not been transferred to her. She believed her husband was a wealthy man and

she did not contact James L Russell when the matter was brought to her attention because after speaking to her husband she did not feel the need to speak to the solicitors. She felt reassured. She stated "I wouldn't have phoned Russell's, I wouldn't go behind my husband's back, I trusted my husband to contact Russell's." Nor did Ms Ross contact Mr Logue as she stated that she was too embarrassed to do so.

[9] James L Russell, as solicitors for the bank, received the document signed by the fifth and sixth defendants in May 2006 to transfer Castlewood to S Ross. They received the letter from Ferguson Logue indicating that the transferee was named as S Ross and was to be Stephanie Ross. On 9 February 2007 James L Russell registered a transfer in the Land Registry in the name of Simon Ross, the name of the transferee having by that stage been altered. This change occurred when the transfer document was in the custody of the plaintiff's solicitors and occurred in circumstances that have not been explained.

[10] The plaintiff contends that the registration of the title and of the burden on 9 February 2007 were not relevant to the advance made by the plaintiff to the first defendant as the plaintiff relied on the Certificate of Title from their solicitor James L Russell to make the advance to the first defendant. The plaintiff's instructions to James L Russell were by letter of 21 April 2006, the borrower being the first defendant, the solicitors were instructed to act for the bank in connection with facilities granted to the borrower, a copy of the facility letter to the first defendant was attached with a copy of the plaintiff's standard form report on title and the instructions were that "Generally we would wish you to obtain on our behalf legal mortgage charge over Castlewood and to ensure that our position will be such that our security will be enforceable in accordance with its terms".

[11] The attached facility letter from the plaintiff to the first defendant was dated 18 April 2006 and it set out various loans that were to be made and stated that the security would extend to cover present and future obligations to the plaintiff and included a first legal charge over Castlewood registered in the name of Simon Ross. No draw down was to be permitted until the security requirements had been fulfilled to the plaintiff's satisfaction.

[12] The completed standard form report on title was dated 18 May 2006, was signed James L Russell and Son, solicitors for the plaintiff bank and stated -

"I/we have investigated the legal title to the property comprised in paragraph 1 below [Castlewood] and made all appropriate searches and enquiries and we certify that subject to the matters referred to in this certificate the title of the borrower [the first defendant] to the property is good and marketable and of proper security for the liabilities of the borrower"

[13] In relation to the fifth and sixth defendants plea of non est factum it is agreed that they signed the document on the signature page. Their evidence was that part of the document was missing and they only saw the signature page. However that omission must fall on the signatories to the document who, if they chose to sign when part of the document was missing, carry the risk of doing so. In Norwich and Peterborough BS v Steed [1993] Ch 116 Scott LJ referred to authorities on non est factum that included consideration of the topic by the House of Lords in Gallie v Lee [1971] AC 1004 and stated –

“In each of these cases the victim of a fraud had signed a document not understanding what he or she was doing. In each case an innocent third party had for value acquired rights under the document. In each of these cases the existence of the doctrine of non est factum was affirmed, in each the acceptable limits of the plea was discussed, in none was the plea allowed to prevail. It is easy to understand why the plea is likely to be unsuccessful. A person who signs a document at the request of another puts into circulation a document on which, depending on its contents, others may rely. Where a fraudster has tricked, first, the signer of the document, in order to induce the signature, and then some third party, who is induced to rely on the signed document, which of the two victims is the law to prefer? The authorities indicate that the answer is, almost invariably, the latter. The signer of the document has, by signing, enabled the fraud to be carried out, enabled the false document to go into circulation.”

[14] Nor does the absence of witnesses at the time of the signatures avail the fifth and sixth defendants. They signed a document which purported to be signed in the presence of witnesses and cannot later be heard to say that the witnesses were not present.

[15] In any event I do not accept that the presence of the whole of the document would have affected the signing by the fifth and sixth defendants. The belief of the fifth and sixth defendants was that they were agreeing to a transfer of Castlewood to their daughter. Had they had the first page as it was originally completed they would have seen that the transfer purported to be a transfer to S Ross. I am satisfied that they would have signed the transfer in the belief that they were transferring their property to their daughter, described as S Ross. Whether the Land Registry would have accepted a transfer that did not fully describe the transferee is not a matter that would have borne on the preparedness of the Hayleys to sign a transfer document to effect a transfer of the property to their daughter.

[16] After the signing by the fifth and sixth defendants the transfer reached the plaintiff's solicitors with the transferee named as 'S Ross'. Later the name of the transferee was altered to 'Simon Ross'. The rule in Piggott's case [1614] 11 Co Rep

26B, 77 ER 1177 was that a material alteration to a document by a stranger rendered the deed void. This rule was abolished by section 8 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 which provides that a material alteration does not by itself invalidate the document or render it voidable or otherwise affect any obligation under the document. Thus the altered document might otherwise be valid or invalid.

[17] Under the Forgery and Counterfeiting Act 1981 a person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. A false instrument purports to have been made in the form in which it is made or on the authority of a person or in the terms in which it is made by a person who did not in fact make it in that form or authorise it or make it in those terms. The transfer document which purported to be the foundation of the registration of a transfer to the first defendant was a forgery. It was prepared in furtherance of a fraud for the benefit of the first defendant whose name was inserted into the document after it had been signed by the transferors.

[18] When the transfer was forwarded to the plaintiff's solicitors it bore the transferee name S Ross. In the correspondence with the plaintiff's solicitors it was pointed out that the transferee was S Ross and was to be Stephanie Ross. In some manner the transfer document was altered to specify the transferee as Simon Ross. Here is the feature that distinguishes the present case from the other cases referred to by the parties. A report on title was produced by the bank's solicitors stating that the first defendant was the owner of the property and therefore that the bank could secure a legal charge against the first defendant's property, this despite the solicitors having been informed that the owner was to be the second defendant and not the first defendant and despite the plaintiff's solicitors having received the document in one form and then relying on the document in an altered form.

[19] I have no evidence as to how the name Simon was entered on the transfer document. I have no evidence of any enquiries made by James L Russell about the transferee. They had a transfer in the name of S Ross which became Simon Ross in unexplained circumstances. There was reference by Mr Logue to the need for further enquiries with the second defendant but there is no evidence that any enquiries were undertaken by the plaintiff's solicitors. The solicitors proceeded to certify title in the first defendant and to register the transfer in the name of Simon Ross and to effect a charge on that registered property in favour of the plaintiff.

[20] I accept the contention on behalf of the plaintiff that the plaintiff advanced the loans to the first defendant, not on foot of the registration of the title or the charge, but upon confirmation of the first defendant's title by the plaintiff's solicitors. However the advance was made by the plaintiff on the basis that the first defendant had title to Castlewood and that the property would provide security for the loan.

[21] The Conveyancing Act 1882 section 3 provides -

“A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless

(ii) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of its solicitor, or other agent, as such, if such enquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.”

[22] This provision applies to the transfer of the property and the charge on the property, both of which occurred in February 2007. In May 2006 the plaintiff's solicitor had notice that the proposed transfer was to be to the second defendant and not the first defendant or at least were put on notice of an issue that demanded further enquiries. Reasonable enquiries that ought to have been made by the plaintiff's solicitors would have established that the second defendant was the intended transferee. Such reasonable enquiries would have involved contact with the second defendant, which I am satisfied did not occur. They could have involved contact with Mr Logue, which I am satisfied did not occur. The plaintiff's solicitor may have discussed the issue of the transferee with the first defendant, about which there is no evidence, but that would have compounded the lack of reasonable enquiries as the warning was issued about the proposed transfer to the first defendant. Section 3 requires that the notice must be to the solicitor “as such”, that is, it must be received in the capacity of solicitor for the plaintiff and further the notice must come to the plaintiff's solicitors “in the same transaction”. The plaintiff contended that neither requirement could be satisfied.

[23] The plaintiff instructed the solicitors in April 2006. Notice of the issue surrounding the transferee was received in May 2006 as the solicitors sought documents relating to the title and the transfer prior to certifying title to the plaintiff in accordance with their instructions. I am satisfied that notice was received by the solicitors as solicitors for the plaintiff.

[24] The plaintiff sought to distinguish between the transfer document from the fifth and sixth defendants to the first defendant on one hand and the charge for the benefit of the plaintiff against the first defendant's interest in the property on the other hand. These, according to the plaintiff, were separate transactions for present purposes. I do not accept this distinction that sought to establish two separate transactions. The letter of instruction indicated the character of the transaction the plaintiff's solicitors were engaged to undertake. The transaction related to the advance being made by the plaintiff to be secured by a charge on the property. The certification of the borrower's title which the banks solicitors were required to

provide and the security which that title purported to provide for the repayment of the loan and the registration of the charge on that title were all part of the same transaction.

[25] The case was not made that James L Russell solicitors were complicit in the fraud. However the plaintiff's solicitor ought to have known of the first defendant's fraud. They ought to have made further enquiries when they were put on notice that the intended transferee was the first defendant's wife; they ought not to have certified the title in the first defendant as they had no basis for doing so unless they were acting on an altered transfer to Simon Ross that could only have occurred after the document came into their possession; they ought not to have dealt with the document in a manner that permitted that alteration to be made after the document came into their custody; they ought not have used that altered transfer as solicitors for the plaintiff for any purpose; they ought not have registered the charge against the property in favour of the plaintiff and would not and should not have done so had they been informed what was actually going on.

[26] The plaintiff relied on the conclusiveness of the register. Section 11 of the Land Registration (Northern Ireland) Act 1970 provides -

"Save as is otherwise provided by or under this Act, the register shall be conclusive evidence of the titles shown in the register and of any right, privilege or appurtenance or burden are shown thereon, and the title of any person shown thereon shall not, *in the absence of actual fraud*, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

[27] Section 11 refers to registration of title and registration of burden. The conclusiveness of the register is subject to the absence of actual fraud. As far as the title is concerned that title was registered to the first defendant. This was a case of actual fraud and the first defendant was the fraudster and the register is not conclusive to provide him with a good title. As far as the burden is concerned there is no suspicion of fraud having been perpetrated by the employees of the plaintiff. The plaintiff's solicitors had notice of the potential fraud in that the first defendant was seeking to become the transferee when it was intended that the second defendant would be the transferee. However the actual fraud was not the knowledge which the plaintiff's solicitors had or ought to have had but rather involved the unexplained alteration of the transfer document after the same came into the possession of the solicitors for the plaintiff. This was actual fraud after the document had been forwarded to the plaintiff by being placed in the custody of the solicitors for the plaintiff.

[28] Rectification of the register is provided for by section 69 of the Land Registration Act (Northern Ireland) 1970 as follows -

69. - (1) Subject to subsection (3), where any error (whether of misstatement, misdescription, omission or otherwise) occurs in the register, the court, upon such application and in such manner as may be prescribed by rules of the appropriate court and after such notices, if any, as it may direct, may order such error to be rectified upon such terms as to costs or otherwise as it may think fit.

(3) The register shall not be rectified under subsection (1) so as to affect the title of a registered owner, unless such rectification can be made without loss or damage to any person claiming for valuable consideration and in good faith through such registered owner and unless-

(a) the registered owner or, as the case may be, a person claiming as aforesaid through the registered owner or anyone acting on behalf of either has, by his act, neglect or default, been in any way responsible for, or has contributed to, the error; or

(b) in the case of an error made before such registered owner was so registered, he was, in fact, aware of such error at the time of his registration as owner; or

(c) in the case of an error made after such registered owner was so registered, he or a solicitor acting on his behalf became aware of such error at a time when such error was capable of being rectified without causing loss or damage to any person except the expense of such rectification; or

(d) the immediate disposition to such registered owner, or the disposition to any person through whom he claims otherwise than for valuable consideration, was void; or

(e) such registered owner acquired the land otherwise than for valuable consideration and rectification of the error could have been made against the person through whom he claims if such person had been the registered owner; or

(f) such registered owner consents to rectification;

but so that this subsection shall-

(i) limit the power of the court to rectify the register only where the registered owner of the land is in possession thereof; and

(ii) not limit the power of the court to rectify the register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner.

(4) The provisions of subsections (1) and (3) shall extend, with any necessary modifications, to the rectification of the register by order of a court of competent jurisdiction, exercising any jurisdiction based on the ground of fraud or mistake, in like manner as those subsections apply to the rectification of errors by order of the court."

[29] Rectification may arise from error or fraud or mistake. The limits imposed by subsection (3) do not apply where the words in italics apply. The limits on rectification affecting the title of the registered owner do not apply in the present case as the registered owner is not in possession of the premises. Nor would the limits apply if it was unjust not to rectify. In relation to the transfer to the first defendant it was in furtherance of a fraud and is void. The plaintiff contended that rectification would occasion loss or damage to the plaintiff claiming for valuable consideration and in good faith through such registered owner and even if subsection (3) does not apply the Court should take this into account. The defendants point to subsection 3(a) and the role of those acting for the plaintiff in contributing to the registration of the title in the name of the first defendant. In the circumstances I am satisfied that it would not be unjust to rectify the register against the registered owner. I consider that there should be rectification to substitute the intended transferee, the second defendant.

[30] In relation to the charge, where it is established that an error or fraud or mistake occurred, the Court has a discretion to rectify the register. The plaintiff relied on Barclays Bank v Guy [2008] EWCA Civ 452 where under the English legislation there was rectification of the title as the transfer document was a forgery but a refusal to order rectification of the charge in favour of the bank. It was held that there was no "mistake" for the purposes of the legislation. The Court of Appeal stated -

"I cannot see that it is arguable that the registration of the charge can be said to have been a mistake, or the result of a mistake, unless at the least Mr Guy can go so far as to show that the bank, the mortgagee, had either actual notice, or what amounts to the same, what is referred to as "Nelsonian" or "blind eye notice", of the defect in the title of the mortgagor, Ten Acre Limited in the present case. I simply cannot see how it could be argued that if the purchaser or chargee knows nothing of the problem underlying the intermediate owner's title, that the registration of the charge or sale to the ultimate purchaser or chargee can be said to be a mistake."

[31] While the plaintiff acted in good faith those acting on behalf of the plaintiff, namely the plaintiff's solicitors, provided the occasion for the fraud. What marks out this case is that after the transfer document came into the possession of the plaintiff through their solicitors the document was altered so as to provide title to a fraudster

and the plaintiff's solicitors then registered that title and a charge in favour of the plaintiff. The plaintiff's solicitors failed to make reasonable enquiries about the transferee and in some unexplained manner provided the occasion for the transfer document to be altered. The plaintiff's solicitors were the occasion for a mistake being made when they registered the title and the charge, having received the transfer document in a different form. The plaintiff contended that the failings of the solicitors should not be visited on the plaintiff. Rather the plaintiff emphasised the failings of the defendants in the execution of the transfer document and the lack of early intervention as the fraud unfolded. In the circumstances referred to above I am satisfied that the registration of the charge was a "mistake" for the purposes of the Act. I am also satisfied that, in all the circumstances surrounding the mistake that was made, the charge in favour of the plaintiff should not affect the title of the second defendant. I propose rectification of the register to vacate the charge against the title of the second defendant. The remedy for such loss as will be occasioned to the plaintiff lies against the plaintiff's solicitors who owed the plaintiff a duty of care.

[32] The plaintiff's claim for possession of Castlewood is refused. The third and fourth defendants were in possession of Castlewood at the commencement of proceedings and were added as defendants in that capacity. They are no longer in possession. There will be judgment for the second, third, fourth, fifth and sixth defendants against the plaintiff. The claim against the first defendant is for the debt due and has not been pursued in the present hearing. There will be a stay of proceedings against the first defendant. In relation to the counterclaims there will be a declaration that the second defendant is entitled to the full and unencumbered legal and equitable title to Castlewood. Further there will be a declaration that there be rectification of the register to confirm title to Castlewood in the name of the second defendant and to vacate the charge against Castlewood in favour of the plaintiff.