[2017] UKUT 44 (TCC)

Appeal reference UT/2016/0021

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARGARET ANN MORRIS AND BRENDA REDPATH **Appellants**

- and -

GODIVA MORTGAGES LIMITED **First Respondent**

BERNICE SMITH **Second Respondent**

TRIBUNAL: Deputy Judge Elizabeth Cooke

Sitting in public at Kings Court, Earl Grey Way, North Shields NE29 6AR
on 16 November 2016

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DECISION

Introduction

1. The Appellants, Mrs Margaret Morris and Miss Brenda Redpath, live at Toad Hall, Waren Mill, in Northumberland. It is an old timber-framed house on the coast, and it has been their home since they bought it in 2001. On 10 February 2009 a transfer of the property in form TR1 to the Second Respondent, Mrs Bernice Smith, was registered, and accordingly she is now the registered proprietor of Toad Hall. In February 2012 the Appellants applied to alter the register. They wish to be reinstated as registered proprietors and they want the registered charge in favour of the First Respondent to be altered so as to restrict the amount to £100,000, being the sum that redeemed their prior mortgage together with the £9,274 cash they say they received in 2009 as a loan. They say that either they did not sign the transfer to the Second Respondent, or if they did they signed it in the belief that it was a mortgage not a transfer.
2. This is an appeal from the decision of Judge Simon Brilliant in the Land Registration Division of the First-tier Tribunal, dated 11 January 2016. He directed the registrar to cancel the Appellants' applications to alter the register, because he came to the conclusion that they signed the transfer to the Second Respondent and knew what they were doing. I can find no fault with his decision, for the reasons that I am going to explain, and accordingly this appeal has to be refused.
3. In what follows I explain the factual background, the procedural history, the grounds for appeal and the reasons why I conclude that the appeal must fail.

The factual background

4. The Appellants bought Toad Hall in 2001 without a mortgage. However, during the period from 2003 to 2008 they borrowed just over £90,000 secured on the property in series of mortgages and re-mortgages. By the beginning of 2009 that sum was secured by a charge to Abbey National plc. Mrs Morris organised those loans through a company called Crown Financial Solutions Ltd; she dealt with its employee Mr Benjamin Smith, who is the Second Respondent's husband. I refer to him as "Ben Smith".
5. Neither of the Appellants has been in employment since 2001; Mrs Morris has a pension and each has a little investment income. By the beginning of 2009 none of the borrowed capital was left.
6. In 2008 the Appellants wanted to release some more equity. They say they were contacted by a Sarah Smith who worked for Ben Smith, who was now working for DB Housing Solutions ("DBHS"); the Second Respondent's evidence was that Mrs Morris took the initiative. Whichever way it was, it is the First and Second Respondents' case – which Judge Brilliant accepted - that DBHS offered not a loan, because of the Appellants' financial circumstances, but a sale and leaseback, and that that is the transaction that took place. The Second Respondent says that DBHS were her agents and that she paid £300,000 for the property with the aid of a loan of £195,000 from the First Respondent; the Appellants' mortgage was redeemed, £200,000 was paid to a company called PJT Finance Ltd as an arrangement fee, £9,274 was paid to the Appellants in cash, and they were granted (and executed) a

two-year assured shorthold tenancy of Toad Hall at a rent of £210 per month. Mrs Smith's evidence was that the Appellants were content with this because they were expecting a "windfall" which would enable them to buy back the property. Then in 2011, when DBHS sought to negotiate a rent increase, relations between the parties broke down.

7. On 18 October 2011 the Second Respondent gave the Appellants notice under section 21 of the Housing Act 1988 requiring possession of Toad Hall on 8 January 2012. Shortly afterwards the Appellants made their applications to alter the register. They have paid no rent since August 2011, and the Second Respondent has made no mortgage repayments since some time in the second half of 2015.
8. The Appellants say that this is not what happened. Their case at the hearing at first instance was presented in the alternative; either they did not sign the TR1 or, if they did, they did so in the belief that it was a mortgage to secure a loan of £10,000 as a result of fraud by Ben Smith to which the Second Respondent was a party. They agreed, however, that even if they succeeded in having the register altered in their favour, the First Respondent would be subrogated to the rights of Abbey National plc. In other words, because it paid off the debt to Abbey National plc it would take over that mortgagee's position, and would still have a registered charge securing the amount paid to Abbey National plc. The Appellants have not alleged any wrong-doing by the First Respondent, nor do they say that the First Respondent was aware of wrong-doing by the Second Respondent.
9. The Appellants have reported the transaction to the police and some investigations of this and other transactions have been made, but as I understand it no charges have been brought.
10. By way of post-script to the factual background, it is worth saying that sale and leaseback transactions have occupied the courts on a number of occasions. There have been notorious instances where the seller promised a long lease but granted a short one, or where the seller disappeared leaving the house to be re-possessed by the mortgagee. This was not such a case, although what has happened here has been just as disastrous for the Appellants. That much is clear from contemplation of the figures I have just set out and of the insecure nature of an assured shorthold tenancy.
11. In 2009 sale and leaseback transactions became a regulated activity under section 19 of the Financial Services and Markets Act 2000 and as a result the market for such transactions has all but disappeared.

The procedural history

12. I need to explain something of what happened in the First-tier Tribunal. I am keenly aware that the Appellants feel that they did not have a fair hearing; I take the view that they did, despite the great difficulties that Judge Brilliant faced as a result of the conduct both of the Appellants and of the Second Respondent.
13. The First and Second Respondents objected to the applications to alter the register, and the matter was referred to the Land Registration Division of the First-tier Tribunal in accordance with section 73 of the Land Registration Act 2002. Once it became clear that the Appellants (they were the applicants in the First-tier Tribunal, but I refer to them as the Appellants throughout) were presenting their case in the alternative, directions were given for them to apply for the rectification of the 2009 transfer, on the grounds of Ben Smith's alleged fraud; the Land Registration Division has the same jurisdiction as the High Court to set aside or rectify documents in these

circumstances, under section 108 of the Land Registration Act 2002. They made that application as directed.

14. The hearing was listed for two days in January 2015. At that hearing the First and Second Defendants were represented by counsel; the Appellants were unrepresented. They had had legal representation until shortly beforehand, but their solicitor had ceased to act because of evidence of a conflict of interest between the two Appellants – understandably, in the light of the evidence that I discuss at paragraphs 31 to 36 below.
15. By the end of two days the Appellants had not finished giving their evidence. Moreover, the Second Respondent had changed her instructions to her representatives as a result of a change in Ben Smith's evidence. He intervened in the hearing when Miss Redpath was giving evidence to say that he had not seen her sign the transfer to the Second Respondent, but that he had signed the document as a witness after Miss Redpath – who was ill at the time – had signed the TR1 in her bedroom.
16. So an adjournment was needed, not only because the hearing was going to be longer than anticipated but also because at least one fresh witness statement had to be taken.
17. Because of the adjournment a transcript was made of the hearing on the two days in January; the transcript was available to everyone when the hearing resumed. It is part of the appeal bundle and I have read it.
18. The hearing was listed to resume in March 2015, but the Second Respondent's solicitors did not receive notice of the hearing and so it was adjourned again. By that time Ben Smith was being treated for prostate cancer. The hearing was listed to resume in October 2015. Six days before the hearing The Second Respondent's solicitors wrote to the Tribunal to say that they were no longer instructed. On the day before the hearing the Second Respondent's son Simon contacted the Tribunal to say that Ben was not well enough to attend. Judge Brilliant proceeded in the absence of the Second Respondent and of Ben Smith, taking the view that no medical evidence had been produced to justify Ben's absence and that there was in any event no reason why Mrs Smith could not have attended. He took the view that the absence was tactical.
19. So the hearing proceeded, but without the Second Respondent or Ben Smith giving evidence in person and therefore without Mrs Morris and Miss Redpath having the opportunity to cross-examine them.
20. After Judge Brilliant made his decision the Appellants sought leave to appeal, and it was granted – I say more about this in paragraphs 22 to 25 below. I heard their appeal at the North Shields Tribunal Centre on 16 November 2016; the Appellants appeared in person, Mr David Mitchell of counsel appeared for the First Respondent, and the Second Respondent did not attend and was not represented. I am most grateful to the Appellants for explaining their grounds of appeal to me, and to Mr Mitchell for his helpful argument and for filling me in on some of the detail of what had happened at first instance.
21. At the appeal hearing the Appellants made it very clear that their case was now simply that they did not sign the transfer to the Second Respondent; they no longer pursued the allegation of fraud.

The grounds for appeal

22. The Appellants sought permission to appeal from Judge Brilliant, who refused; they renewed their application in the Upper Tribunal, and Judge Cousins granted

permission. Their grounds for appeal were that they had not been able to cross-examine the Second Respondent and her witness Ben Smith.

23. In granting leave to appeal Judge Cousins gave a number of other reasons which the Appellants had not raised, as follows:

    i He took the view that the transfer to the Second Respondent might not be a valid transfer, on the basis that it had not been properly witnessed because Ben Smith did not see Miss Redpath sign it.

    ii He expressed concern about the fact that the Judge proceeded on the basis that witness statements by The Second Respondent and Ben Smith were admissible, while recognising that there was an issue as to what weight to attach to them. Judge Cousins thought that Mrs Smith might have failed to attend in an effort to avoid incriminating herself.

    iii Judge Brilliant did not consider whether the evidence of the carpark conversation (see below), recorded covertly, might have been inadmissible.

    iv Judge Cousins felt that the findings of the handwriting expert, Dr Giles, must raise some doubt as to whether the Judge's findings were supportable.

24. I asked the Appellants at the hearing whether they wished to adopt these points as additional grounds of appeal. Had they wished to do so I would then have given careful consideration to the extent that it might be fair for them to do so, very much at the last minute. They made it very clear that they only wanted to pursue one of these additional points, namely the status of the carpark conversation. I say more about this at paragraphs 35 and 36 below. As to the other points raised by Judge Cousins I can take them no further, save to comment that I do not understand the criticism made of Judge Brilliant at point ii above, and that I comment on the strength of Dr Giles' findings at paragraph 40 below.

25. Accordingly I proceed on the basis that the appeal was brought on the ground that the hearing was defective because the Appellants were not able to cross-examine Mrs Smith and Ben Smith.

Why the appeal must fail

The significance of cross-examination

26. I understand that from the Appellants' point of view the hearing in the LRD felt terribly unfair. They were assured during the first two days of the hearing, while giving their evidence, that they would have the opportunity to ask questions they wanted to ask of the Smiths, because at that stage both were present and were apparently going to be cross-examined. In October 2015 Judge Brilliant, faced with their non-appearance for a second time and without adequate explanation, chose to proceed in their absence. He gave a careful explanation of his reasons for doing so. That was to the disadvantage of the Smiths because it meant, as Judge Brilliant noted in his decision, that far less weight could be attached to their evidence.

27. The Appellants feel that it worked to their disadvantage because it meant that they could not challenge that evidence; but that disadvantage is countered by the fact that Judge Brilliant accepted what the Smiths said in their witness statements only where it was corroborated by other evidence.

28. The fact remains that the Smiths were under no obligation to give evidence at all. They did not have to prove that the TR1 was genuine. It was for the Appellants to prove that it was a forgery. They failed to do so. Judge Brilliant made a clear finding that they were lying on the basis of the Appellants' own evidence and of the other

evidence before him. In the following section I go through that evidence and explain why I take the view that the conclusion that Judge Brilliant reached was inescapable, and I then return to the question whether cross-examination would have made a difference.

The evidence before Judge Brilliant

29. In his decision Judge Brilliant went through the evidence given by the Appellants and by the Second Respondent, and said as follows:

> "72. I regret to say that I am unable to accept the evidence of the applicants. They have come nowhere near showing that any one of the signatures challenged was forged or that they were misled by Ben as to the nature of the transaction they were entering into.
>
> 73. I say this for four reasons, First, because of the inherent improbability of the applicants' case. Secondly, because of the sheer volume of contemporaneous documents – many of which are unchallenged and come from the files of Berkson Wallace – which undermine the applicants case. Thirdly, because of the expert evidence of Dr Giles. Fourthly, because of the contents of the 2011 transcript."

30. I take those four reasons, and the evidence associated with them, in turn although not in the same order.

31. The one to which Judge Brilliant appears to have attached by far the greatest weight is the last, the transcript of the carpark conversation. On 18 July 2011 Mrs Morris met Ben Smith and his business associate Daniel Lowerson in her car in the car park of the Morpeth Golf Club. She did so at their request, made by telephone by Ben's assistant. Mr Lowerson secretly recorded that conversation; the transcript was part of the hearing bundle and the recording was played at the hearing. The conversation was about payments for the house, to put it neutrally; it is clear at the start of the conversation that Mrs Morris is already aware that she has been asked to pay £400 per month. Early on Mrs Morris said:

> I understand that obviously I'm lucky to be able to still be in my house and pay that sort of money because, oh I'll have to open the window a bit, because you know I know people are paying a lot more rent and everything.

32. That was the first instance of the word "rent" in the conversation. A little later in the conversation this was said:

> Ben: I'm more concerned about the actual thing that's happened because like Brenda not knowing.
>
> Mrs Morris: Oh Christ well what's happened and I have only got myself to blame for this, totally. We jumped into this and she leaves everything up to me and I feel as though I betrayed her in a way and that's awful.
>
> Ben: Yes. I mean but the thing is it is big. It's serious
>
> Mrs Morris: I know it's serious.
>
> Ben: Because it's actually, it's like, it's like, my wife owns that house.
>
> Mrs Morris: Yes I know.
>
> Ben: and if anything happened to you, what's Brenda going to say, do you know what I mean?

Mrs Morris: Yes I do know.
Ben: Does she not know anything about it?
Mrs Morris: Oh no, I mean she knows obviously everything has gone through and we're paying you and everything. Brenda thinks that, and as I say I can't blame anybody but me, she thinks that we're just paying like, because you hadn't got a licence to loan money, we've loaned the money off you, and it's carrying on like a mortgage type of thing,.
Ben: Right.
Mrs Morris: That's what she believes.
Ben: Well what did she sign when she signed, did she not know she was signing to sell her house?
Mrs Morris: I don't know.
Ben: Did you not tell her that?
Mrs Morris: No, we just signed the papers and that's it. I know."

33. Mrs Morris' reaction to the words "my wife owns that house" was not the reaction of someone to whom the news came as a surprise.
34. Mrs Morris' explanation was that she was in total shock and had no idea before this conversation that the house had been sold. She also said that she was unhappy at having to meet two men in her car, that she felt vulnerable, and that what she said and what she knows she ought to have said were two different things. She said that her mention of rent early on in the conversation was a "slip of the tongue".
35. Although it was not one of their formal grounds of appeal, the Appellants at the hearing before me did wish to adopt what Judge Cousins said about the admissibility of the recording and transcript of the carpark conversation. Mrs Morris said that it was a very stressful occasion and that she felt she had been duped.
36. I understand Mrs Morris' indignation at the conversation being recorded without her knowledge. But that does not make it inadmissible as evidence. Nor does it change the fact that the conversation tells a very clear story and leaves the reader in no doubt as to Mrs Morris' own state of knowledge. What she said about the conversation later – that it was the first time she knew that the house had been sold – is wholly implausible in the light of what she said at the time.
37. Judge Brilliant's second reason was the weight of contemporaneous documents. He had sight of the conveyancing file of Berkson Wallace, who acted for the Appellants on the sale. The file contains all the copies of letters out that one would expect to find, and a number of items sent back in to Berkson Wallace bearing the Appellants' signatures – in particular the transfer, the assured shorthold tenancy, the authority to act on the sale, the authority for the payment out of the proceeds of sale, and so on. All these the Appellants denied having received. Their case was that they had not heard of Berkson Wallace until 2012 when their then solicitors, acting for them on the applications to HM Land Registry, looked into what had happened. Some of those documents Mrs Morris admitted to having signed. To most, when faced with them in cross-examination, she simply said she had never seen it before, and Miss Redpath said the same.
38. In the bundle were also copies of numerous letters from DBHS addressed to the Appellants, all clearly referring to the sale of their property.
39. This was a persuasive body of evidence.

40. Judge Brilliant referred to the evidence of Dr Giles, the handwriting expert. Without going into it in detail I can summarise by saying that Dr Giles found that it was very likely that the signatures of Miss Redpath on the TR1 and the tenancy agreement were genuine. As to Mrs Morris' signature she was unable to give conclusive findings. Dr Giles was hampered by the lack of comparable signatures for Mrs Morris, who was able to produce a number of copied signatures but only one original. It seems to me that Dr Giles' evidence was not central to Judge Brilliant's findings but was consistent with them and certainly does not do anything to cast doubt on his conclusions.

41. Finally there is the "the inherent improbability of the applicants' case". Judge Brilliant did not go into details about this and I take it as his summary of the overall picture. It seems to me to be absolutely right. To demonstrate this one has only to consider what would have to be believed if the Appellants' case were true.

42. First, they say that they did not sign the TR1 or the tenancy agreement. But on their case they received £9,274 which they thought was a loan. They must therefore have signed a mortgage or – less likely – an unsecured loan agreement, but they have no documentation to show for that. In particular if this was a secured loan they have no record of having any legal advice or that anyone acted for them in the grant of the mortgage, and no completion statement.

43. Second, on the Appellants' case the copy letters on Berkson Wallace's file are all forgeries, fabricated to look like the solicitor's file copies of conveyancing letters to the client and to the purchaser, including several documents apparently signed by the Appellants and on which, if their case is true, their signature was forged. Berkson Wallace is or was a real firm, the file is a real file; neither the second Respondent nor Ben Smith nor indeed any other person could have fabricated its contents without taking part in an elaborate charade and with the co-operation of someone within the firm. It is true that legal professionals are sometimes careless and occasionally crooked, but fabrication on this level in this case is implausible.

44. Third, on the Appellants' case Mrs Morris' apparent calmness on the recorded carpark conversation was an act. When Ben Smith pointed out that she had lost the house, her reaction "I know", which sounds so much like awareness and even resignation, concealed total shock at news which came to her as a complete surprise. And when she said "rent", the first person to use that word in the conversation, that was a "slip of the tongue" (her words in evidence) and she meant "mortgage payments".

45. There is no escape from the conclusion that the Appellants' case is wholly implausible. They have the burden of proof of showing that the TR1 is a forgery and, as Judge Brilliant concluded, they have come nowhere near to doing so.

Would cross-examination have made a difference?

46. In the light of the evidence discussed above, what difference would cross-examination have made? I asked the Appellants, at the hearing of their appeal, what they would have asked the Second Defendant and Ben Smith, and they very helpfully produced a schedule of questions that they would have liked to ask.

47. First, they say they would have asked why the Second Respondent did not execute the form TR1. This would have made no difference; in a sale where the purchaser is not giving any covenants to the seller there is no need for the purchaser to execute the

transfer and the absence of such execution makes no difference to the validity of the transfer.

48. The remainder of their questions related to the statements made by the Second Respondent to the mortgagee on their mortgage application and the property information form. Many of these were inaccurate, for example the number of bedrooms at the property, the statement that vacant possession was going to be given when in fact it was not, and suchlike. I accept that the shoddy completion of these forms is the work of someone who is not interested in the property or in getting the information right, since she was not going to live there. This is perfectly consistent with the rest of the Second Respondent's evidence. Even if Mrs Smith had been cross-examined on all the answers given on those forms and had admitted that her answer was wrong, I do not see that that would have told Judge Brilliant anything about whether the Appellants signed the TR1 or were tricked into doing so.
49. What the Appellants, being litigants in person, did not say is that they would no doubt have put their own version of events to the Second Respondent and to Ben Smith. Clearly that version would have been denied. It is not clear that that would have taken matters any further in the light of the mass of evidence that convinced Judge Brilliant that the Second Respondent was telling the truth, however unattractive that truth might be.

Conclusion

50. Accordingly this appeal must fail.
51. That outcome is disturbing. Two specific legal issues remain unresolved.
52. The first is the transaction between the Appellants and the Second Respondent. The Appellants have sold their home, and have apparently received around £100,000 for it – on any reckoning a long way short of its value – because of the diversion of sale proceeds to PJT Finance Ltd, for which no explanation has been given. At the close of the hearing in October 2015 Judge Brilliant invited the parties to make written submissions as to whether it was open to him to find that the transfer to the Second Respondent could be set aside as an unconscionable bargain.
53. In response to that invitation the Second Respondent's representative drew Judge Brilliant's attention to *Hayer v Hayer* [2012] EWCA Civ 257, in which it was held that a judge should not have allowed an amendment to pleadings on the last day of a trial at the judge's own suggestion. But in any event the Appellants responded to the effect that they did not wish to say that this was an unconscionable bargain. Why they decided to say that is not known, but they left Judge Brilliant without any ability to consider the possibility of setting aside the transfer as an unconscionable bargain, quite apart from the authority of *Hayer*. For the same reason it is not open to me to make any findings of that nature, and indeed I have not been asked to do so. The Appellants have been offered a potential way out but have declined to take it.
54. The second is the dealings, for want of a better word, between the Appellants. The evidence of the carpark conversation points to the conclusion that Mrs Morris knew that the house had been sold to Mrs Smith, but that Miss Redpath did not, and that Mrs Morris knew that she did not. The Appellants' solicitor declined to act for them because of this obvious conflict of interest. Miss Redpath insisted at the first instance hearing and at the hearing of the appeal that she did not wish to say that she had been deceived by Mrs Morris. She has been offered a way out that is not open to Mrs Morris, but she has declined to take it.

Costs

55. The Second Respondent has not taken part in the appeal proceedings and so there can be no question of a costs order in her favour. The First Respondent appears to be entitled to an order for its costs; if it wishes to make an application for an order for costs it may do so within 28 days of the date of this decision, and I will then give directions.

DEPUTY TRIBUNAL JUDGE
ELIZABERH COOKE

RELEASE DATE: 21 December 2016