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Court of Appeal considers consequences of lender's error in cancelling HMLR registered mortgage

Paul & Susannah Evans v NRAM PLC
A3/2015/2002

Article by David Bowden

The Court of Appeal has granted permission for an appeal in this case on 2 points. The lender did not check its systems properly and in error cancelled its charge with HM Land Registry. When the error came to light it applied for rectification. The High Court granted this. The borrowers sought to appeal. The Court of Appeal will now consider 2 narrow points. Firstly, a novel point under the Land Registration Act 2002 as to whether the lender caused or substantially contributed to the mistake so that the register at HMLR should not be rectified. Secondly, whether the reporting of the arrears by the lender to credit reference agencies following a discharge from bankruptcy meets the data quality principle. If it does not, the amount of any damages due to the borrowers under the Data Protection Act 1998.

Paul Morgan Evans and Susannah Janes Evans v. NRAM PLC [formerly Northern Rock (Asset Management) PLC]
A3/2015/2002 29 June 2016
Court of Appeal, Civil Division (Rt Hon Sir Timothy Lloyd)

What are the facts?
In November 2004 Mr & Mrs Evans borrowed £197,000 from Northern Rock to buy their family home in Neath. This loan was secured by a legal mortgage over the property and registered at HM Land Registry. They were also given a further loan of £21,400 by the lender but this was not secured by mortgage but was regulated by the Consumer Credit Act 1974 ('CCA').

In November 2005 the borrowing was re-structured. The lender treated £213,128 as secured and £22,311 as unsecured but CCA regulated. No new mortgage deed was signed. The borrowers were allowed to have the mortgage on an interest only basis which reduced their monthly payments. The lender gave the borrowing a new account number in November 2005.

In August 2014 solicitors for the borrowers wrote to the lender saying they were advised the mortgage was still registered with HMLR even though the 2004 mortgage had been redeemed. Without checking properly (or at all), the lender issued form e-DS1 to HMLR. This then discharged its security meaning that all the outstanding borrowing was now unsecured.

Under which route did the Evans proceed for personal insolvency? What are the consequences of this?
Mr Evans entered into an IVA in March 2006. NRAM's unsecured loan was included in this (but not as is usual the secured loan). Mr Evans defaulted on his IVA, it was terminated and he was made bankrupt in October 2007. Following the changes made by the Enterprise Act 2002, Mr Evans was discharged from his bankruptcy 1 year later in October 2008.

Mrs Evans proposed an IVA which the lender rejected at a creditor's meeting. The lender obtained a county court judgment against Mrs Evans for the sum due under its unsecured loan. The lender obtained a charging order over Mrs Evans' interest in the property and protected this by registering a restriction in relation to the charging order at HMLR. Mrs Evans was declared bankrupt in early 2007. Again Mrs Evans was released from her bankruptcy a year later at the beginning of 2008.

In August 2007 Mr & Mrs Evans executed assignments of their beneficial interests in their home to their respective mothers for £1. The Official Receiver examined this, decided that due to the arrears there was no equity in the property and concluded that this was not a transaction at an undervalue under sections 339 or 423 of the Insolvency Act 1986.

In relation to the unsecured loan, following Mr Evans' release from his bankruptcy the lender was not able to recover anything else. As to Mrs Evans, even following her release from bankruptcy the lender could rely on its charging order were there any equity in the property.

In relation to the mortgage, this was not included in the IVA. On the basis that the lender retained a valid charge, then the lender could rely on its charge and seek to enforce it by obtaining possession and selling the property. The borrowers would remain liable to the lender under the terms of the mortgage for any shortfall and this would not be affected by the insolvency (be it IVA or bankruptcy).

What relief did the lender seek in the court case?
The lender then brought a court claim seeking these declarations:

- The mortgage was still subsisting as security for the 2004 loan,

- The HMLR discharge of mortgage be set aside, and
- The Register at HMLR to be rectified.

What happened when the case came before HHJ Milward Jarman QC?
In a judgment dated 29 May 2015 delivered at the end of a 2 day trial, Judge Jarman granted the lender the relief it sought. Judge Jarman was not satisfied with the answers to the questions Mr Evans gave in cross-examination as to the circumstances in which the August 2014 letter came to be written. The lender did not allege fraud but Judge Jarman said Mr Evans' evidence '*about how this came about remains unsatisfactory'*. Mrs Evans did not give evidence. The Evans had no legal representation at the trial. Judge Jarman also dismissed the Evans counterclaim against the lender for damages under the Data Protection Act 1998 ('DPA').

What grounds did the Evans advance for appealing Judge Jarman's ruling?
The Evans then sought permission for an appeal to the Court of Appeal. They obtained representation for an oral permission hearing before Sir Timothy Lloyd on 29 June 2016. The Evans' counsel sought to amend the Grounds of Appeal as follows:

- Construction of the lender's standard Mortgage Conditions and the meaning of 'offer',
- LRA Schedule 4 para 3 (2) (a) and meaning of 'substantially contributed to', and
- Damages under DPA 1998 section 13.

What ruling did Sir Timothy Lloyd give?
He granted permission to appeal on the 2nd and 3rd of these grounds. He ruled that the point about the meaning of 'offer' had no prospects of success ruling that the lender held an 'all-monies' charge.

What is the basis of the appeal in relation to the Land Registration Act 2002?
Sir Timothy Lloyd said this was a novel point that had not been considered by a court let alone an appeal court before. Schedule 4 para 3 (2) (a) of the LRA permits a court to order that the HMLR register be amended to correct a mistake. However, the LRA says that no such order can be made where a lender has by '*lack of proper care caused or substantially contributed to the mistake'*.

The LRA also says that if in any proceedings the court has power to make an order '*it must do so, unless there are exceptional circumstances which justify it not doing so*'. The Evans say Judge Jarman did not address this point properly. The Evans say that the August 2014 solicitor's letter contained all the information the lender needed. The Evans say it was the lender's mistake that it did check properly and the HMLR entry cancellation was caused by the lender's mistake and not theirs.

What is the basis of the appeal in relation to the Data Protection Act 1998?
The Evans say that the lender continues to report their account to the 3 credit reference agencies and that the arrears and payment history on both the secured and unsecured loan is shown on their credit files. In relation to the unsecured loan, the Evans say that following the release from their bankruptcy there is nothing more legally due to the lender. The Evans say that their credit file should reflect this but it does not. The Evans rely on the 4th data protection principle that '*personal data shall be accurate and, where necessary, kept up to date*'. Sir Timothy Lloyd felt that Judge Jarman did not deal with this properly because his view of Mr Evans' evidence clouded his judgment.

If there is any breach of the data quality principle (and this is not clear because full evidence on this was not before Judge Jarman and the Evans' application to adduce fresh evidence on the point was refused), then this engages s13 of the DPA which provides that an '*individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.'*

What about the lender's appointment of LPA receivers?
The lender sought to appoint receivers under the Law of Property Act 1925. The lender found out that the Evans were no longer living at the mortgaged house. The Evans had rented the house out to tenants. The Evans are now renting a house elsewhere. The lender wanted LPA receivers to collect these rents. The Evans obtained an order from Briggs LJ staying the appointment of receivers.

The lender (unusually for an oral permission hearing) was represented and it sought to have this stay lifted. The Evans claimed the rent they received was used to pay the rent on their new home. Unfortunately Sir Timothy Lloyd did not see through this submission for what it was. The effect of the stay that Briggs LJ granted was that the Evans are no longer paying anything under their mortgage,

are renting out their mortgaged home, pocketing the rent and are now effectively living rent free in another house. The Evans do not care as they are in negative equity but it is of course a concern to the lender as its losses mount and these losses are ultimately borne by all UK taxpayers.

The end result is that Sir Timothy Lloyd extended the stay. However the Evans cannot have their cake and eat it. When the consequences of this dawn on the panel hearing the appeal, it will inevitably focus their mind on where the equity should lie. The Evans may have tried to take this too far with the stay and this is likely to rebound on them when this appeal is eventually heard.

Are there any prior authorities of any relevance on these issues?
Courts have considered what '*substantially*' means in other statutory contexts before but not in relation to the phrase as it appears in the LRA. At the hearing the Court of Appeal will have to wrestle also with the unsatisfactory way that Schedule 4 of the LRA is drafted where an imperative is used to qualify a conditional. The Court of Appeal will also have to consider whether on the unusual facts here, it can dismiss the Evans' appeal in any event because of the '*exceptional circumstances*' clause. No doubt there will be argument about those seeking equity must come with clean hands and whether a party who has made the mistake can always evade the consequences of that error by pleading '*exceptional circumstances'*.

There have been a number of cases on DPA s13 and the appropriate level of compensation usually fixing it the low hundreds of £ and no more. However the hurdle the Evans face is showing there is a breach of the data quality principle in the first case. Even in the case of an unenforceable credit agreement, data can still be recorded with CRAs. The 4th data protection principle has the important qualification '*where necessary'* and the Evans will need to convince the court at the full hearing that it was 'necessary' for the CRA records to be updated in the manner they claim. The lender no doubt will want to submit the contrary. Even if a breach is made out, the Evans will need to be able to prove that any CRA reporting has been legally causative of any loss they claim. If they have other debts, then this is by no means certain that the NRAM records are the cause of any loss.

What does the respondent lender say?
As permission was only granted to amend the Grounds of Appeal at the hearing on 29 June 2016, the lender is not yet required to respond to this.

What will happen next?
As the appeal concerns only 2 short points of statutory constructions, the case has been listed for half a day before a panel of 3 judges. This appeal is likely to come on for hearing in quarter 2 of 2017.

What will be the consequences of the Evans succeeding on this appeal?
If the Evans succeed then the lender will not be able to reinstate its charge with HMLR. This will mean that the borrowing is unsecured as the lender discharged its mortgage on 28 August 2014. As the Evans have assigned their interest to their mothers, these ladies will be able to sell the property and bank the proceeds. In theory the Evans will be liable to pay the lender what is due but if they do not, then the Evans have the option of a 2nd bankruptcy which could mean the lender gets nothing back.

What will be the consequences of the lender succeeding on this appeal?
Conversely if the lender succeeds its charge will be re-registered with HMLR. The lender will then be able to have the stay lifted, obtain possession of the property, sell it and use the sale proceeds to reduce the arrears and outstanding balance. The lender will (if it has the appetite to do so) have the option of pursuing the Evans for any shortfall.

Is there anything else worth noting at this stage?
Before Judge Jarman the Evans also included in their counterclaim against the lender a claim relating to section 77A of the CCA. This was a counterclaim for overpayments based on an alleged breach of s77A. Judge Jarman dismissed the Evans' counterclaim on this. As Sir Timothy Lloyd only granted permission in relation to the narrow points under the LRA and DPA, the s77A point has now fallen by the wayside.

29th June 2016