



[2017] UKFTT 676 (PC)

REF/2016/0430

**PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Mohinder Jit Kaur Khela (a.k.a. Mohindersit Kaur Khela)

APPLICANT

and

(1) Batshoof Investment Limited (2) Jhalman Singh Khela

RESPONDENTS

**Property Address: 125 Lathom Road, East Ham, London, E6 2EA
Title Number: EGL265743**

ORDER

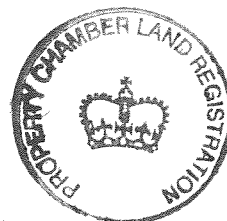
IT IS ORDERED as follows:

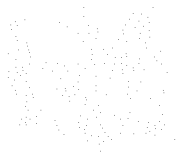
The Chief Land Registrar is to give effect to the original application dated 7 January 2016 to cancel the registration of the charge on the property dated 10 May 1993, registered on 11 May 1993, as if the First Respondent's objection had not been made.

Dated this 7 August 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL





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DECISION

1. The Applicant, Mrs Khela, and her husband the Second Respondent, are the registered proprietors of their home, 125 Lathom Road, London E6 2EA (“the Property”), which they bought in 1981. Title to the Property is registered under title number EGL265743. On 11 May 1993 a legal charge dated 10 May 1993 (“the 1993 charge”) and purportedly executed by Mr and Mrs Khela in favour of Batshoof Investment Ltd, the First Respondent, was entered on the register of title to the Property. The charge secured a debt of £40,375 together with other possible future debts which in fact never came into existence, and simple interest. It is agreed that nothing – neither capital nor

interest - has been paid to the First Respondent, by the mortgagors since that date. The Applicant has applied to HM Land Registry to remove the registered charge on the basis that it has been extinguished because the chargee's right to possession has been barred by limitation; the First Respondent has objected to the removal of the charge on the basis that there has been an acknowledgement of its title within the 12 years preceding her application so that the charge is still in existence.

2. The dispute has been referred to this Tribunal pursuant to section 73(7) of the Land Registration Act 2002 ("the LRA 2002"). Mr Khela has been joined in as Second Respondent because he remains one of the registered proprietors to the Property although he no longer has any beneficial interest in it; he has taken no part in the proceedings although I am told he supports his wife's application. I refer to him by name throughout so as to avoid confusion between the two Respondents.
3. I heard the reference on 12 July 2017 at 10 Alfred Place, London. The Applicant was represented by Mr Samuel Laughton and the First Respondent by Mr Seb Oram, both of counsel; I am most grateful to both for their very helpful arguments.
4. I have directed the registrar to respond to the application as if the First Respondent's objection had not been made, because I find that there has been no acknowledgement and that therefore the charge has been extinguished by the operation of the Limitation Act 1980 ("the 1980 Act"). In the paragraphs that follow I first explain the law, and then set out the matters of fact and law that are agreed between the parties. I then explain my conclusions on the two legal issues I have to decide.

The law: the extinguishment of a registered charge by limitation, and the effect of acknowledgement.

5. Although a registered title to land can be almost immune to adverse possession as a result of the changes in the law effected by the LRA 2002, a registered charge is not (section 96(1) of the LRA 2002 makes this clear). If no payment is made, and no acknowledgement of the mortgagee's title is made, for 12 years then the mortgagee's right to recover the debt and its right to take possession of the charged property are both statute-barred and the registered charge is extinguished; if not yet registered it cannot be registered, and if it is already registered the registration must be cancelled on the mortgagor's application so as to bring the register up to date.
6. The law relating to barring of the mortgagee's right to possession is worth spelling out in detail so as to reveal the issues in this case.

7. It is well-known that a mortgagee has a right to possession of the mortgaged land as soon as the charge is created; in the days of the fountain pen it was said that it arises before the ink is dry on the page. Most modern-day mortgages postpone that right to possession at least for a couple of months but the 1993 charge did not do so; from 10 May 1993 the First Respondent had a right to possession of the Property.
8. Having accrued in this way, the mortgagee's right to possession can be barred by limitation if it is not exercised. If the mortgagor remains in possession of the property without the express consent of the mortgagee, after 12 years the right to possession is barred. There is no implied consent to the mortgagor's possession; the mortgagor is treated as being in adverse possession unless he or she has express permission from the mortgagee to be in possession of the property: *Ashe v National Westminster Bank plc* [2008] 1 WLR 710.
9. Once the limitation period has expired, the mortgage is extinguished: that is the effect of section 15(1) of the 1980 Act which reads

“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person “,

of section 17

“at the expiration of the period prescribed by this Act for any person to bring an action to recover land ... the title of that person to the land shall be extinguished”,

and of the interpretation provisions in section 38(7):

“References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land...”
10. However, section 29(2) of the 1980 Act reads as follows:

“If the person in possession of the land ... in question acknowledges the title of the person to whom the right of action has accrued—

 - (a) the right shall be treated as having accrued on and not before the date of the acknowledgment”.
11. So an acknowledgement of the mortgagee's title can re-start the limitation period and prolong the life of the mortgage. Such an acknowledgement may be made by an agent acting for the mortgagor. Section 30 of the 1980 Act reads:

“(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 29, any acknowledgment or payment—

(a) may be made by the agent of the person by whom it is required to be made under that section; and

(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.”

12. The period can also be re-started by a payment, but that is not relevant here. It will be seen once the facts have been summarised that the question I have to decide is whether there has been an acknowledgement of the First Respondent’s title to the registered charge so as to prolong the life of that charge beyond 13 April 2015.

What is agreed between the parties

13. The Applicant and Mr Khela believe that the 1993 charge was not validly executed and that it is not binding upon the Applicant. She has not challenged its validity in these proceedings but she has reserved the right to do so in future proceedings if necessary. Accordingly I proceed on the basis that the 1993 charge was valid.

14. It is agreed, as I said above, that no payment has ever been made in satisfaction of the debt secured by the 1993 charge. The provisions of the charge as to interest are such that – for reasons I need not set out because there is no dispute – no fresh liability to interest has accrued since 1993.

15. The following facts are also agreed:

- a. On 11 May 2000 a bankruptcy order was made against Mr Khela.
- b. The effect of that order was that Mr Khela’s beneficial interest (but not the legal interest) in the Property vested in his trustee in bankruptcy (Insolvency Act 1986, section 283); if there was initially a beneficial joint tenancy between the applicant and Mr Khela it was severed.
- c. On 14 April 2003 a letter written to the First Respondent by Sukhvinder Singh Khela (“Sukhvinder”), the son of the Applicant and Mr Khela, amounted to an acknowledgement of the First Respondent’s title, and the registered charge was therefore in existence for at least 12 years from that date.
- d. On 30 May 2007 Sukhvinder purchased Mr Khela’s interest in the Property from his Trustee in Bankruptcy. That is why Mr Khela no longer has a beneficial interest in it. He remains the joint registered proprietor, so that he

and the Applicant hold the Property upon trust for the Applicant and Sukhvinder.

- e. Mr and Mrs Khela have been in possession of the Property since 1993 and, on the authority of *Ashe v National Westminster Bank plc* [2008] 1 WLR 710, have been in possession adverse to the First Respondent.
16. If the facts stopped there the registered charge would have been extinguished on 14 April 2015.
17. What is in dispute between the parties is whether three letters, written in 2006 to the First Respondent by the solicitor acting for Mr Khela's Trustee in Bankruptcy, amount to acknowledgements of the First Respondent's title to the 1993 charge for the purposes of section 29 so that the charge remains in existence.
18. It was also argued in Mr Oram's skeleton argument that a report made by the Trustee in Bankruptcy to Mr Khela's creditors, on 28 March 2017, amounted to an acknowledgement, That point was not pursued at the hearing and leave would have been required to rely upon that report because it came to light late in the day, after service of the First Respondent's Statement of Case. The legal points that determine whether or not the 2006 letters were acknowledgements apply equally to that report and so I say no more about it.
19. The 2006 letters were not written by the registered proprietors, the mortgagors. I have to decide whether they can amount to acknowledgements, and it is agreed that they can only do so if both the following conditions are satisfied:
 - a. the trustee in bankruptcy wrote (or, rather, instructed his solicitor to write) the letters as agent of Mr Khela; and
 - b. an acknowledgement made by only one of two registered proprietors will suffice for the purposes of section 29.
20. Mr Oram for the First Respondent accepts that only if he succeeds on both those points is his client entitled to a direction that the First Applicant's application be cancelled (because it is agreed that the content of the three letters would amount to an acknowledgement sufficient for section 29 of the 1980 Act).
21. So I have to decide only those two legal points, to which I now turn.

Agency

22. The trustee in Bankruptcy has never been in possession of the Property. None of the documents relied upon as acknowledgements can be such unless the Trustee in Bankruptcy wrote them, or had them written, as Mr Khela's agent, because as we have

seen an acknowledgement may be written by the agent of the person by whom it has to be made (section 30 of the 1980 Act, paragraph 11 above).

23. Mr Oram argues that a Trustee in Bankruptcy can be the bankrupt's agent on the basis that he has the power to affect the bankrupt's legal relations with third parties. He refers in particular to the Trustee's power to require a secured creditor to redeem a security at a particular value (rule 6.117(1) of the Insolvency Rules 1986), or to require any property comprised in the security to be offered for sale in certain circumstances (rule 6.118(1) of the Insolvency Rules 1986).
24. I agree that a characteristic of agency is the ability to change the principal's legal relations; but the existence of that ability is not a sufficient condition for agency. There must be either an express appointment of the agent or ostensible authority (which means that the principal makes it obvious in some way that the person concerned is his or her agent). There has been no suggestion that there is ostensible authority here, and there is no statutory provision that appoints the Trustee in Bankruptcy as the bankrupt's agent.
25. Mr Laughton argues that the Trustee in Bankruptcy did not take the legal estate in the Property (because it was held jointly with the Applicant), and that therefore the Trustee in Bankruptcy cannot make an acknowledgement because that would be a matter affecting the legal estate. That I think is not the point; an acknowledgement has to be made by "the person in possession of the land" (section 29) and so does not necessarily relate to the legal estate. But more fundamentally, and in my view convincingly, Mr Laughton cites clear authority that a trustee in bankruptcy is – absent any express appointment as such - not the agent of the bankrupt.
26. In *A Debtor v Dodwell* [1949] 1 Ch 236 at 240 Harman J set out the basic principles of bankruptcy:

“Bankruptcy has been part of our law for over a century, and in essence it has preserved the same principle throughout, namely, that the bankrupt is relieved of his debts and freed from oppression of his creditors, but at a price which is that he is stripped of all his property, that property vesting in a person who ... in recent Acts has been described as the trustee... He is not a trustee of it for the bankrupt, but for the creditors.”
27. Harman J went on to explain that the trustee in bankruptcy is not therefore accountable to the bankrupt for what he does. As Mr Oram points out Harman J did not say in so many words that the trustee in bankruptcy is not the agent of the bankrupt, but I agree

with Mr Laughton that the trustee's well-established position as described here is therefore incompatible with that of an agent. Much more recently the Court of Appeal in *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138 said – in the context of the ability to waive privilege, but in general terms, “A trustee in bankruptcy is not the agent of the bankrupt” (the Master of the Rolls at paragraph 80).

28. Mr Laughton goes further and says that it is impossible for a Trustee in Bankruptcy ever to be the agent of the bankrupt. I do not think that the authorities go that far. Certainly the bankrupt could choose to make an express appointment of the Trustee as his or her agent. But in the absence of an express appointment, or of any explicit statutory constitution of the Trustee as the bankrupt's agent, there is no basis whatever for a finding of agency. The Trustee in Bankruptcy's authority comes from the statutory provisions and the Insolvency Rules 1986, but those provisions give him standalone powers; he is not thereby made an agent. Nor can Mr Oram produce any authority for any other instance where a person has been construed to be an agent without express (for example by statute) or ostensible authority.
29. Accordingly, the documents relied upon by the First Respondent as acknowledgements were not written, or caused to be written, by the Trustee in Bankruptcy as Mr Khela's agent, and therefore cannot have been acknowledgements by Mr Khela.

Acknowledgement by one of two persons in possession

30. Equally the First Respondent's objection must fail on the other legal point I am asked to decide. If the Trustee in Bankruptcy had been the agent for Mr Khela, could an acknowledgement made by Mr Khela (through his agent) rather than by both Mr Khela and the Applicant be effective for the purposes of section 29?
31. At first sight it would be surprising if it could. Mr Khela and the Applicant are trustees and trustees are not generally able to act alone. *Astbury v Astbury* [1898] 2 Ch 111 is directly relevant; in that case a trustee of land, held on trust as part of the estate of a deceased mortgagor, purported to acknowledge the validity of a debt. Stirling J said at p. 115:
- “I assume, without deciding, that one executor may pay a statute-barred debt notwithstanding the dissent of his co-executor; and also that one executor may give a valid acknowledgement of a statute-barred debt notwithstanding such dissent. ... No such right exists in the case of trustees: all trustees must concur in the exercise of powers conferred on them with reference to the trust estate.”

32. The Applicant and Mrs Khela are of course trustees of the legal estate. It would be inconsistent with the general law for one of them alone to have power to make an acknowledgement, so as to prolong the life of the registered charge, to the detriment of the trust property.
33. However, the First Respondent relies upon the statutory provisions relating to acknowledgement.
34. Section 29 requires the acknowledgement to be given by acknowledgement is required to be given by “the person in possession of the land ... in question” (quoted above at paragraph [9]). What is the effect of that requirement where, as here, there are two persons in possession? Does “the person” refer to both? Clearly the singular can include the plural (Interpretation Act 1978 section 6(c)). Section 30 of the 1980 Act sets out explicitly what is to happen in a number of instances where acknowledgement is given by one person in cases where more than one person is involved. The section reads as follows:

30 (1) An acknowledgment of the title to any land ... by any person in possession of it shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any other person liable for the debt, or by any person in possession of the mortgaged property, shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor’s title or of his equity of redemption by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors.

(4) Where in a case within subsection (3) above the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the

mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(5) Where there are two or more mortgagors, and the title or equity of redemption of one of the mortgagors is acknowledged as mentioned above in this section, the acknowledgment shall be treated as having been made to all the mortgagors.

(6) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person.

(7) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect of the debt or claim.

(8) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest in any such estate, or a payment by one of several personal representatives in respect of any such claim, shall bind the estate of the deceased person.

(9) In this section "successor", in relation to any mortgagee or person liable in respect of any debt or claim, means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve (whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise).

35. It will be seen that a range of circumstances is provided for, with different effects.

36. Mr Oram argues, for the First Respondent, that the provisions of section 30(1) mean that an acknowledgement by one of two joint possessors binds the other. He reads the sub-section as if it said: "An acknowledgment of the title to any land by any person in possession of it (for example, Mr Khela) shall bind all other persons in possession (such as the Applicant) during the ensuing period of limitation."

37. Mr Laughton points out that that is not the meaning ascribed to the section by Stephen Jourdain and Oliver Radley-Gardner in *Adverse Possession*; they say, at 16-47:

“... if C is in adverse possession of land, and acknowledges the title of O, the true owner, and later C is dispossessed by D, O will have 12 years from the date of acknowledgement to bring an action against D.”

38. Accordingly the view of the learned authors of the meaning of the provision is that an acknowledgement by person P in possession now will bind Q who later dispossesses P and comes into possession of the land. Thus the provision is about what happens later in the limitation period and not about concurrent adverse possessors.
39. In support of that view Mr Laughton points out that if the subsection refers to concurrent adverse possessors then it is in direct contradiction to subsection (3), which relates to mortgagees in possession, yet subsection (1) is not expressed to be subject to subsection (3).
40. If subsection (1) does refer only to subsequent possessors and not to concurrent possessors then that fits both with the general law of joint ownership and with the scheme of the 1980 Act. So far as the general law of joint ownership is concerned, the point is that if two people are truly in joint possession of land (rather than possessing different parts of it) they will invariably be trustees – either, as here, because they are joint legal owners and joint mortgagees, or because they have vested in them jointly the fee simple generated by adverse possession (*Asher v Whitlock* (1865) 1 QB 1). And as we have seen trustees must act together; one cannot bind the other to dispose of land and suchlike nor, according to *Astbury* (paragraph 31 above), can one acknowledge a debt without the other’s concurrence. So if section 30(1) does not enable one joint possessor to bind the other, that is consistent with the general law.
41. It is also consistent with section 29 itself and the scheme of the 1980 Act about acknowledgements; an acknowledgement must be in writing and signed by the person giving it, and therefore it is not supposed to be something that can be done by accident. Still less, therefore, could one trustee make an acknowledgement that was effective to bind them both.
42. So I conclude that section 30(1) means what Jourdan and Radley-Gardner say it means, only; it does not mean that one joint possessor can bind the other by making an acknowledgement; rather, consistent with the general law of trusteeship, an acknowledgement signed by one will be ineffective to bind either without the other’s concurrence and signature.

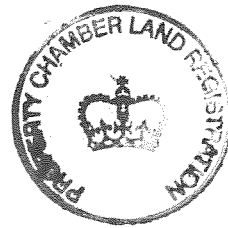
Conclusions

43. Accordingly, I conclude that the Trustee in Bankruptcy was not acting as Mr Khela's agent when he acknowledged the First Respondent's title to the mortgage; nor could one person in possession of the land jointly with another make an acknowledgement that would be effective on behalf of them both. Accordingly the registered charge has been extinguished by the 1980 Act. The register of title needs to be altered to bring it up to date (LRA 2002 Schedule 4 paragraph 2(1)(b)).
44. For each of those two reasons, I have directed the registrar to respond to the Applicant's application as if the First Respondent's objection had not been made.

Dated this 7 August 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL



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