

IN THE COUNTY COURT SITTING AT LEEDS

Date:

Before:

HHJ MALEK

Between:

PURE RETIREMENT LIMITED

Claimant

- and -

**THE ESTATE OF MR REGINALD LESLIE
BURDETT (REPRESENTED BY LOUISE KENCH)**

Defendant

Mr. Charles Sinclair (instructed by **Aberdein Considine**) for the **Claimant**
Mrs. Louise Kench for the **Defendant** pursuant to CPR 19.8(2)(b)(ii)

Hearing dates: 23-25 April 2024

APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek:

Introduction

1. In this case the Claimant brings a claim for possession of the property known as 62 Southgate, Scarborough, YO12 4BN (“the Property”) pursuant to a lifetime mortgage granted by Mr Reginald Leslie Burdett (“Mr Burdett”) on 25 November 2005 (“the Mortgage”).
2. Mr Burdett died on 13 April 2015 and pursuant to the terms of the mortgage the Claimant seeks possession together with a money judgement against the Defendant.
3. Mrs. Louise Kench (“Mrs. Kench”) represents the Defendant in these proceedings pursuant to CPR 19.8(2)(b)(ii) and seeks to raise the following defences on behalf of Defendant:
 - a) the mortgage was mis-sold to Mr Burdett,
 - b) that she (Mrs. Kench) has an interest in the Property that overrides that of the Claimant;
 - c) By reason of representation made to her (Mrs. Kench) in 2017 by Mortgage Express (“ME”), whom originally granted the Mortgage, she (Mrs. Kench) is entitle to remain in the Property indefinitely.
4. Mrs. Kench also raises various counterclaims including a claim for adverse possession, damages against Mr Burdett’s financial advisor and solicitors,

damages against ME, stress caused to her (Mrs. Kench), damages in respect of funeral expenses and the cost of maintenance of the Property.

Relevant background and findings of fact

5. In my judgment there can be little doubt as to the following:
- i) On or around 21 January 2004 Mr Burdett entered into a mortgage with Southern Pacific Mortgages Limited (“SPML”).
 - ii) Mr Burdett failed to maintain the monthly payments pursuant to the terms of that mortgage, leading SPML to bring possession proceedings in respect of the Property.
 - iii) On 15 July 2005 the Court granted a possession order in favour of SPML suspended on payment terms.
 - iv) Mr Burdett was unable to meet the terms of the suspended possession order and sought advice from AS Green & Co (Financial Advisers) Ltd (“AS Green”) who on 17 August 2005 recommended that he apply for a lifetime mortgage with ME.
 - v) On 18 August 2005 Mr Burdett applied to the ME for a lifetime mortgage (“the Mortgage Application”).
 - vi) Mr Burdett also instructed solicitors, Thorpe & Co Solicitors (“Thorpe & Co”), in relation to the equity release of the Property.

- vii) On or around 6 October 2005 ME offered Mr Burdett a lifetime mortgage (“the Mortgage Offer”) for a loan amount of £37,800 plus £634 fees.
- viii) On 25 October 2005 Jessica Mary Cliffe of Thorpe & Co provided a certificate to ME confirming that she had explained the terms and effects of the Mortgage to Mr Burdett.
- ix) On 25 October 2005 Mr Burdett completed and signed the Borrower(s) Confirmation of Acceptance of Offer, in which Mr Burdett confirmed, inter alia, the advice that he had received from AS Green and Thorpe & Co.
- x) On or around 25 August 2005 Mike Hagan FRICS, an independent valuer instructed by ME, attended the Property to conduct a valuation for mortgage purposes. Within his report it was recorded that visitors were asleep in the main bedroom. There was no indication, on the face of the report, that anyone other than Mr Burdett was living in the Property.
- xi) On 25 November 2005 Mr Burdett and ME entered into the Mortgage.
- xii) The Mortgage is subject to Mortgage Express Mortgage Conditions 2004 together with the terms set out within the Mortgage Offer.
- xiii) Pursuant to the terms of the Mortgage the loan, interest, and charges were due to be repaid from the sale of the Property when Mr Burdett died or moved home.

- xiv) On or around 13 April 2015 Mr Burdett died.
 - xv) On or around 21 September 2016 ME was informed of the death of Mr Burdett when they were contacted by Mr Burdett's niece, Lorraine Backhouse.
 - xvi) On or around 8 August 2017 ME were informed that there was an individual not related to Mr Burdett residing in the Property.
 - xvii) ME issued the subject proceedings on 21 October 2019.
 - xviii) By order dated 20 December 2019 Mrs. Kench was appointed to represent the Defendant.
 - xix) On 23 March 2020 the Mortgage was transferred from ME to the Claimant.
 - xx) On 23 March 2020 notice of assignment was sent to the Property addressed to the Personal Representatives of Mr Burdett.
 - xxi) On 5 January 2021 the Claimant was substituted as claimant in these proceedings.
6. To the extent that it was suggested by Mrs. Kench that the signatures on any of the documents that purport to bear the signature of Mr. Burdett are not actually his signatures and that he had, therefore, not entered into a mortgage with either SPML or ME (if indeed that is what was being suggested) I reject such a suggestion entirely. There is not a scintilla of evidence in support and any purported argument in reliance on such an assertion is, accordingly, baseless.

Discussion

Mrs. Kench's capacity in these proceedings

7. Mrs. Kench was appointed as the Defendant's representative in these proceedings pursuant to CPR 19.12(20(b)(ii) and the order of DJ Neaves dated 20 December 2019. She is, therefore, not a party in these proceedings in her own capacity and is limited to making submissions/representations on behalf of the Defendant. This was a point entirely lost on her as demonstrated not only by the defence she caused to be filed on behalf of the Defendant, but also in the way that she conducted the case before me.
8. The defence is both prolix and, at times, difficult to decipher. Making allowance for the fact that Mrs. Kench is a Litigant in Person ("LIP") and doing the best that I can (with assistance from Mr. Sinclair), I can only see one defence that has been raised on behalf of the Defendant – namely that the Mortgage was mis-sold by ME to Mr. Burdett. The remainder of the points raised are raised on Mrs. Kench's own behalf and are of no relevance to the disposal of this claim as between the Claimant and Defendant.

Mis-selling

9. The rules that governed equity release mortgages as at the time the Mortgage was entered into were 8 and 9 of Mortgages: Conduct of Business ("MCOB") as per 21 April 2005.
10. Neither Mrs. Kench's oral submission, despite my sign-posting and prodding, nor her skeleton argument (running to some 187 pages) grappled with the real issue. The focus of Mrs. Kench's submissions appeared to be two-fold: (a) that

Mr. Burdett had sought and obtained a repayment loan and (b) that there was a discrepancy in the date of birth of Mr. Burdett noted on some of the forms and that some of the account numbers do not marry up.

11. In so far as the latter is concerned the account numbers assigned to the mortgage post-date the sale of the mortgage and would have absolutely no bearing on the sale. The same must be true where potentially Mr. Burdett's date of birth is out by one day- all the while noting that the erroneous date of birth was provided to ME on Mr. Burdett's behalf.
12. In so far as the suggestion that Mr. Burdett had sought and agreed to a repayment loan is concerned this is entirely contradicted by the contemporaneous documentary evidence which clearly shows that:
 - a) Mr Burdett was in arrears in respect of his mortgage with SPML, whom had the benefit of a suspended possession order of 15 July 2005. Further, Mr Burdett was in breach of the terms suspending that order, which meant that SPML were entitled to enforce the same.
 - b) Mr Burdett sought independent financial advice from Alison Piercy of AS Green.
 - c) Mr Burdett further sought advice from and instructed his solicitors, Thorpe & Co, who certified the advice provided to Mr Burdett.
 - d) Mr Burdett in turn confirmed the advice he had received in respect of the Mortgage.

13. Whilst I accept that Mr. Burdett may not have liked the idea of a “life-time” mortgage or the position that he found himself in (in particular facing possession proceedings and the potential loss of his home) there is absolutely no evidence to suggest that he was looking for or had agreed a repayment loan, as opposed to the life-time mortgage that he actually received.
14. In these circumstances any argument that the Mortgage had been mis-sold to Mr. Bernett is unsustainable.
15. If I am wrong about my initial assessment of Mrs. Kench’s standing (and therefore ability to bring claims in her personal capacity in this action) then I need to consider the other arguments that she raises, which I do below.

Interest in the Property

16. Mrs. Kench appears to contend that she has an interest in the Property by reason of adverse possession or Mr. Burdett’s will and that such an interest overrides the interest of the Claimant. Both points can be dealt with briefly.

Adverse possession

17. Mrs. Kench appears to aver that she has been in continuous occupation of the Property for over 25 years (as at the date of the defence) by reason of which she has acquired an interest by way of adverse possession.
18. Not only is the evidence of her occupation of over 25 years (a handful of photos – none of which appear to show her inside the Property) entirely lacking, but her submission is misconceived in any event. Mrs. Kench’s evidence, at it’s highest, was that she occupied the Property with Mr Burdett, and with his

express permission. Accordingly, any such possession by Mrs. Kench was not to the exclusion of the legal owner, nor adverse.

The Will

19. Mrs. Kench appears to argue that she acquired an interest in the Property by reason of Mr Burdett indicating his intention to bequeath the Property to her in his will.
20. In a will dated 23 January 1997 (“the Will”) Mr Burdett names Mrs. Kench as his sole beneficiary. However, the Will does not specifically leave the Property to her. Mr Burdett merely bequeaths the residue of his estate after the payment of “*funeral and testamentary expenses and debts and the inheritance tax on all real estate...*”. Accordingly, the Will is not evidence of an intention to create an interest in the Property, but merely in the residue of Mr Burdett’s property after the payments of his debts which would, of course, include the Mortgage.
21. Mrs. Kench’s evidence was that Mr. Burdett had told her that he intended to leave the Property to her and her son. This, in my judgment, is not inconsistent with the Will or what subsequently happened. It is clear that the Property was subject to a mortgage since at least 25 November 2005 and it is, of course, likely then that Mr. Burdett intended the Property, which was subject to a mortgage when he made the Will, to go to Mrs. Kench subject to the mortgage (along with everything else comprised in his residuary estate – again subject to any debt) on his death. That is exactly what happened. The difficulty for Mrs. Kench is that the value of the Mortgage increased substantially over Mr. Burdett’s lifetime.

Overriding interest

22. Even if I am wrong about the above and Mrs. Kench had an interest in the Property, because she became entitled to adverse possession or by reason of Mr. Burdett's will, it would not override the Claimant's interest.
23. In order for any interest that Mrs. Kench had to override the Claimant's interest Mrs. Kench would have to, essentially, show that either the Claimant had actual knowledge of her actual occupation and interest or that (a) she was in actual occupation, (b) her interest would have been obvious to the Claimant on a careful inspection (see paragraph 2(c) to Schedule 3 of the Land Registration Act 2002).
24. As I have said elsewhere in this judgment Mrs. Kench's evidence of actual occupation of the Property is, put simply, lacking such that I cannot be satisfied that she was in occupation as of the date of the Mortgage. This conclusion is fortified by reason of the following:
- i) Mr Burdett indicated in the Mortgage Application that no one was to reside in the Property over the age of 17 other than him and he further signed a declaration that the information contained within the application was true and complete.
 - ii) The valuation report on the Property was undertaken prior to the disposition. Whilst that report noted that there were visitors asleep in the main bedroom the report did not indicate that Mrs. Kench and/or her son were in occupation of the Property.

Representations by ME

25. Mrs. Kench alleges that in July/August 2017 a “senior member” of ME promised “I would remain in my property”. Later within the Defence the representation is said to be “We will ensure you remain in the home”. In Mrs. Kench’s witness statement the representation is stated to be “will ensure your occupancy in accordance with Will”.
26. Mrs. Kench then alleges that she has acted in reliance on this representation to her detriment by reason of her son carrying out maintenance work to the Property.
27. Under the doctrine of promissory estoppel, a person may be precluded from pursuing a particular course of conduct if he has made an unambiguous representation as to his future conduct with the intention that the representation should be relied on. The person who made the representation will usually be allowed to resile from it provided that he gives the representee reasonable notice of his intention of doing so (see *Kim v Chasewood Park Residents Ltd [2013] EWCA Civ 23961*). Further, whilst promissory estoppel prevents the enforcement of existing rights it does not create new causes of action where none existed before (see *Combe v Combe [1951] 2 K.B. 215*).
28. The principal position of the Claimant is that no such representations were made by ME to Mrs. Kench, and the suggestion of a representation of the type alleged by a senior employee of ME lacks credibility. I tend to agree. Firstly, Mrs. Kench has been unable to evidence the alleged conversation by the production, for example, of a recording or transcript. Secondly, when asked if she could provide the name or even position of the individual with whom she had had the conversation with she was unable to do so. Thirdly, it seems to me inherently

unlikely that a senior employee of ME would, in these circumstances, make such a representation.

29. Furthermore, even if I am wrong and a representation of the type alleged was made by ME it is clear that ME has, in any event, resiled from any such representation by reason of its letter to Mrs. Kench dated 2 November 2017 which included, inter alia, the statement “*we cannot consent to your occupation of the property...*”.

30. The difficulties with this line of argument for Mrs. Kench do not end there. It was Mrs. Kench’s own evidence and/ or submission that different people at ME were telling her different things. Further, she says, in her statement at least, that she was told that her occupancy would remain “in accordance with the will”. Mr. Burdett’s will, of course, did not even attempt to give any rights of occupation to Mrs. Kench. In these circumstances I cannot see how it can be maintained that any promise allegedly made was unambiguous.

Counterclaims

31. In the counterclaim the Defendant repeats Mrs. Kench’s claim for adverse possession and Mrs. Kench claims damages for stress, funeral expenses and the cost of maintenance of the Property.

32. I have already dealt with the Mrs. Kench’s claim for adverse possession and concluded that it is misconceived. The remainder of her claims for damages disclose no basis in law upon which they may be founded.

33. Mrs. Kench further seeks damages against AS Green, Thorpe & Co and ME. None of these entities are parties to these proceedings and, accordingly, any claim against them is equally misconceived.

Conclusions on the defence and counterclaim

34. As, I hope, will be clear from what I have said above the defence advanced in this trial on behalf of the estate of Mr. Burdett was hopeless at best. Whilst I fully understand that Mrs. Kench is a LIP (and of course she has every right to both represent herself and have the opportunity to fully put her case) and her desire to leave no stone unturned in these proceedings, I cannot help but wonder if some early objective advice and/or robust interim intervention in this case might not have saved Mrs. Kench considerable time, energy and, ultimately, disappointment.

Conclusion

35. For all of the reasons given the Claimant is entitled to possession of the Property and a money judgment, if the latter is still sought.
36. Before asking for brief submissions on the orders consequent upon my judgment I should like to publicly thank Mr. Sinclair for the fairness with which he has sought to put his client's case and the help that he has provided during the course of this hearing by, in particular, providing me with a very helpful skeleton argument which has done much to expedite the handing down of this judgment.