

Overriding Overriding Interests

In *Credit & Mercantile plc v Kaymuu Ltd* [2015] EWCA Civ 655 the Court of Appeal had to decide which of two innocent parties should bear the losses caused by a mortgage fraudster. Credit & Mercantile ('C&M'), a secured lender, relied on its registered charge. Mr Wishart asserted an overriding interest, taking priority over the charge. It was found that he had an equitable interest in the security property, and was in actual and obvious occupation of the same at the relevant time. One might have expected C&M to lose; but it won, both at trial and on appeal on an application of the *Brocklesby* principle, derived from *Brocklesby v Temperance Permanent Building Society* [1895] AC 173.

The property in question was known as Dalhanna. Mr Wishart had asked his business associate, Sami, to acquire it for him with profits to which they expected Mr Wishart to be entitled from their jointly owned business venture. Unfortunately, Sami was a fraudster. Sami arranged for Dalhanna to be bought by Kaymuu Ltd, a company that he controlled. Mr Wishart moved into Dalhanna. A short time later, Sami caused Kaymuu to borrow from C&M on the security of Dalhanna. Kaymuu's title and C&M's charge were subsequently registered on the same day.

At trial, the Judge accepted that Mr Wishart owned a beneficial interest in Dalhanna and also that Mr Wishart was in actual occupation of Dalhanna at the time that Kaymuu gave its charge of the same to C&M. Nevertheless, he concluded that C&M's charge entitled it to take first from the proceeds of sale in order to recover its secured debt. He did so on the grounds that, although Mr Wishart was a beneficial owner, he had abstained from any involvement in the mechanics of the purchase and thereby given Sami the means "*of representing himself (it does not matter whether directly, or through a corporate nominee) as the beneficial owner of Dalhanna, with full authority to deal with third parties as owner.*"

Mr Wishart appealed but the Court of Appeal dismissed his appeal, upholding the Judge's reasoning. The Court of Appeal explained that the assertion of an overriding interest only assists the beneficial owner if and to the extent that the interest which is said to override a subsequent registered disposition was not in any event subject to the rights deriving from that subsequent registered disposition. If, under the general law, the interest of a beneficiary under a trust is by its inherent nature subject to the rights of a third party lender or purchaser in the

property, then it would make no difference whether or not the beneficiary's interest is an overriding interest; the land registration machinery cannot transform an interest that is, by its nature, subordinate to other rights, such that it takes priority over those other rights. It is in the determination of the nature of a beneficiary's rights *vis-à-vis* those of a third party purchaser or lender that the *Brocklesby* principle comes into play.

Whilst the principle is based on long-standing and established case-law, it has historically been little analysed in the authorities, often presenting as an empirical response to the justice of the various factual situations thrown up by the authorities. Some authorities suggest that it has its origins in agency; others in estoppel or proprietary estoppel. Whilst the Court of Appeal in *Credit & Mercantile v Kaymuu* did not explain the juridical basis of the principle, it did set down the factors that are required to bring the doctrine into play:

- (a) The beneficial owner must actually authorise another, his agent, to deal with an asset on his behalf.
- (b) The beneficial owner must have furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; and
- (c) The beneficial owner must fail to do anything to make it clear to the purchase or lender his agent's authority is limited.

Mr Wishart had left the acquisition of Dalhanna completely in the hands of Sami. Although Sami had acted outside the scope of that authority, no limits on that authority had been communicated to C&M and Mr Wishart had exercised no supervisory function over Sami's arrangement of the acquisition of Dalhanna. The Judge's application of the *Brocklesby* principle was therefore correct.

This is a useful case for secured lenders. This kind of problem, where a legal owner charges a property when the beneficial owner is living there, is common especially in the context of cohabitation and family ownership of property; even outside of those contexts, it is a relatively common form of mortgage fraud. One might therefore expect banks and lenders to deploy the *Brocklesby* principle in such situations. It seems likely that future disputes about the application of the principle are likely to turn on the first of the three factors listed above, which may not be present in a standard cohabitation or family relationship context. Still, the success

of the bank in this case, and the light shone by the Court of Appeal on the *Brocklesby* principle, may well assist the banks when their security appears to have been destroyed by an occupying beneficiary.

For more information about the issues raised in this case, please contact Philip Rainey QC and/or and Tim Polli, who represented Credit & Mercantile, the successful Bank on appeal (Tim Polli also appearing for the bank at trial).