Easement implied in favour of mortgagee over non-mortgaged land (Taurusbuild Ltd and others v McQue and another)

02/04/2019

Property analysis: Sam Laughton, barrister at Ten Old Square Chambers, points out that the decision in Taurusbuild Ltd and others v McQue appears to be the first time a court has suggested that, when an owner of two adjoining properties grants a mortgage over one of them, easements can be implied in favour of the mortgagee over the non-mortgaged land under the rule in Wheeldon v Burrows.

Taurusbuild Ltd and others v McQue and another [2019] UKUT 81 (LC), [2019] All ER (D) 117 (Mar)

What are the practical implications of this case?

This appears to be the first time a court has suggested that, when an owner of two adjoining properties grants a mortgage over one of them, easements can be implied in favour of the mortgagee over the non-mortgaged land under the rule in *Wheeldon v Burrows* [1879] 12 Ch D 31, [1874-80] All ER Rep 669. Furthermore, the judge held that upon the mortgagee later exercising its power of sale, such easements could then be transferred to a purchaser of the mortgaged land under section 62 of the Law of Property Act 1925 (LPA 1925).

Both propositions are somewhat startling and are perhaps unlikely to be followed in future (it being only an Upper Tribunal (UT) decision). The judge did not cite any specific authority in support and indeed there is no suggestion in the standard textbooks in the fields of either easements or mortgages that a mortgagee can be entitled to an easement as against a mortgagor. After all, it is hard to understand how a mortgagee can be entitled to exercise an easement over neighbouring land at a time when it has no rights of occupation in the dominant tenement, such rights of occupation remaining in the hands of the common owner of both tenements. It is equally difficult to justify such rights being transferred to a purchaser of the freehold (as opposed to a purchaser of the mortgage itself).

Nonetheless, practitioners need to be aware that attempts may be made to run similar arguments on the basis of this decision. They might consider that on similar facts to *Taurusbuild*, it might be more conventional and successful to argue that easements might have been created under LPA 1925, s 62 by the transfer to the purchaser of the mortgaged land, on the basis that quasi-easements had been exercised over the adjoining land.

What was the background?

Mr and Mrs McQue (the respondents) were the registered proprietors of a property called 2 The Hall. Taurusbuild (the first appellant) was the owner of an adjoining property, Dinsdale Hall. The respondents applied to HM Land Registry to register a right to use two parking places at Dinsdale Hall together with a right of way with or without vehicles over a private access road to the south of Dinsdale Hall necessary to gain access to the parking spaces. The application was opposed and eventually referred to the First-tier Tribunal, and then, on appeal, to the UT.

Dinsdale Hall and 2 The Hall were formerly in the common ownership of Mr and Mrs Ward. In 2005, the Wards mortgaged 2 The Hall to Kensington Mortgage Company Ltd. The mortgage was later assigned to Mortgage Agency Services Number Six Ltd (MAS). In 2011, MAS repossessed 2 The Hall pursuant to the terms of its mortgage. In 2012, MAS, as mortgagees in possession with a power of sale, sold 2 The Hall to the respondents.

What did the UT decide?

The judge held that:

- the right to use the southern driveway together with a right to park at the front of Dinsdale Hall (not necessarily in places 28 and 29) was implied into the 2005 mortgage in favour of the mortgagee under the rule in *Wheeldon v Burrows*
- these rights were transferred to the respondents in the 2012 transfer under the general words implied by LPA 1925, s 62 there being no contrary intention in the transfer

As to the first point, the judge confirmed that an easement could be implied into a conveyance where it was reasonably necessary for the enjoyment of the dominant tenement. The access to the front via the southern driveway was the only vehicular access to 2 The Hall and was the access which was being used. The Wards intended there to be a vehicular access via the southern driveway for the owners or occupiers of 2 The Hall. Vehicular access via the southern driveway together with a right of parking (not necessarily in places 28 and 29) were reasonably necessary to the enjoyment of 2 The Hall.

The judge held that the rule in *Wheeldon v Burrows* is based on non-derogation from grant. It was the intention of the Wards that 2 The Hall should enjoy vehicular access and parking to the front. The absence of an easement entitling such access and/or parking would make the mortgaged property significantly less valuable as a security. It would be a derogation from grant to deny the mortgagee the easements 'as appurtenant to the mortgaged property'.

As to the second point, the judge merely held that LPA 1925, s 62 had the effect of transferring existing easements to a purchaser in the absence of a contrary intention expressed in the transfer. No argument appears to have been addressed as to whether, instead, easements might have been created by the transfer, due to the way that LPA 1925, s 62 can convert quasi-easements into full easements. There appears to have been ample evidence that such quasi-easements had been exercised over Dinsdale Hall.

Sam Laughton's practice encompasses a broad range of Chancery litigation and advisory work, with a particular focus on both commercial and private disputes relating to property. He is particularly skilled in multidisciplinary litigation, drawing on his expertise in land contracts, restrictive covenants and easements, commercial and residential landlord and tenant, including enfranchisement, personal and corporate insolvency, commercial disputes and company law, family and corporate trusts, wills, probate and the administration of estates, and professional negligence arising out of these fields.

Interviewed by Kate Beaumont.

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