

## **Actual Occupation for the purposes of Overriding Interest**

### **Link Lending Ltd v Hussein [2010] EWCA Civ 424.**

#### **Key facts**

- Ms Bustard was the registered proprietor of a property from 2001 – 2004.
- Ms Bustard had a severe psychiatric disorder which affected her understanding and judgment and which rendered her vulnerable to undue influence.
- In 2004 Ms Bustard executed a transfer of the property to Mrs H who fraudulently took advantage of her vulnerability and who immediately charged the property to a Bank. The transfer was said to be for £100,000 although Ms Bustard did not receive any of those funds.
- Ms Bustard continued to live at the property until 2007 when she was sectioned under the Mental Health Act 1983 and was transferred to a psychiatric hospital. Ms Bustard was prevented by the medical authorities from returning to the property, however, her furniture remained in the property and she visited the property once a week and made arrangements for her necessary household bills to be paid.
- In 2008 Mrs H obtained a bridging loan from Link (which was used to repay the Bank) and granted Link a charge over the property. Mrs H subsequently defaulted on the loan and Link brought proceedings for possession of the property. Ms Bustard was joined as a defendant to those proceedings. She sought an order setting aside the transfer of the property to Mrs H on the basis of lack of capacity and/or undue influence and opposed the claim for possession on the basis that she was a person in actual occupation of the property on the relevant date.
- The Judge found that Ms Bustard lacked the mental capacity to enter into the transfer and ordered that the property be transferred back to her. He also dismissed the claim for possession on the basis that Ms B was in actual occupation of the property at the date of registration of the charge in favour of Link (29 February 2008) such that (given her equity in the property) she therefore had an overriding interest under the Land Registration Act 2002 Sch. 3 para 2. Link appealed to the Court of Appeal.

#### **Decision**

- Link argued that the Judge was wrong in law in concluding that Ms Bustard was “a person in actual occupation” of the property as at 29 February 2008. She was not physically present on that date and had not been in residence for the previous year. As such, although it was accepted that Ms Bustard could be in actual occupation of the property without being physically present, after being absent from the property for a year, her occupation ceased to have that quality of permanence and continuity required for actual occupation. It was further contended that the Judge had attached too much weight to the factors favouring Ms Bustard and too little weight to those favouring Link.
- The question of whether someone is in actual occupation is a question of fact. Whether Ms Bustard was in “actual occupation” of the property at the relevant date was an issue on which the trial judge had to make an evaluation based on his findings of primary fact. The facts were not all one way, some pointed against her actual occupation of the property; she was not personally present and had been in a residential care home since 2007. She was incapable of

living safely in the property and her visits were brief and supervised. Others pointed in her favour. The property was her furnished home and the only place she wished to return to. She visited the property because it *was* her home. She paid the bills at the property and had applied for an order allowing her to return home.

- As for the law, the Court of Appeal found that the Judge had considered the relevant authorities and that the trend of cases showed that the Courts were reluctant even to suggest a test for determining when some one is in actual occupation. The decisions had, however, identified the factors that had to be weighed by the Judge which included the degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and that person's personal circumstances.
- Having considered whether the Judge's decision was wrong as a matter of statutory construction or as a judgment of fact and degree, Sullivan LJ concluded that the Court should not disturb the decision that Ms Bustard was a person in actual occupation of the Property. The Judge had not misconstrued the 2002 Act or the authorities. Nor did he misapply the law by making an insupportable evaluation of Ms Bustard's situation regarding the property. His conclusion was supported by evidence of a sufficient degree of continuity and permanence of occupation, of involuntary residence elsewhere and of a persistent intention to return home when possible, as manifested by her regular visits to the property.
- Appeal dismissed.

## **Conclusion**

This case highlights the importance to Banks when taking legal charges over residential properties of identifying the persons in actual occupation of those properties and, where necessary, of obtaining Deeds of Postponement postponing, in favour of the Bank, any interest that that person may have in that property. Failure to do so may result in the Bank's inability to enforce any charge granted.

Given the economic climate, it is anticipated that challenges will continue to be made to the Banks' right to enforce their security, both on the basis of actual occupation and on a myriad of other potential grounds.

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