HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 44

on appeal from: [2004] EWCA Civ 1063

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

West Bromwich Building Society (Appellants)
v.
Wilkinson and another (Respondents)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell

Counsel

Appellants:
John Jarvis QC
Stephanie Tozer
(instructed by Rosling King)

Respondents:
Derek Wood QC
Nigel Meares
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[2005] UKHL 44

LORD HOFFMANN

My Lords,

1. In October 1988 Mark and Lynne Wilkinson bought a house near Diss in Norfolk. We do not know how much they paid, but £35,895 of the purchase price was provided by a loan from the West Bromwich Building Society, secured by a charge on the house. The loan with interest was repayable by monthly instalments of about £484.

2. Disaster struck almost at once. The Wilkinsons appear to have paid only two instalments, in February and July 1989. On 25 July 1989 the building society obtained an order for possession which was executed on 9 October 1989. The property market was at that time in decline and it was some time before the building society negotiated a sale. More than a year later, on 14 November 1990, it sold the house for £34,000. That left, with arrears of interest, a shortfall of £23,921.92.

3. After giving up possession, the Wilkinsons moved into other accommodation. At some time they ceased living together and now have separate addresses. For over 12 years they heard nothing from the building society. But in November 2002 they were served with a claim for £46,865.99 and costs. That represented the shortfall on the sale in 1990 with interest.

4. The Wilkinsons say that the building society's claim is barred by section 20(1) of the Limitation Act 1980:

> "No action shall be brought to recover…any principal sum of money secured by a mortgage or other charge on property (whether real or personal)…after the expiration of twelve years from the date on which the right to receive the money accrued."

They say that the right to receive the money accrued when they defaulted and the building society became entitled to take steps to recover its advance.

5. The building society says that section 20 has no application because, at the date when the action was brought, the money was not secured by a mortgage. The house had been sold long before and the building society had only a personal claim. As the mortgage was a deed, the relevant period of limitation was that prescribed by section 8:

> "An action upon a speciality shall not be brought after the expiration of twelve years from the date on which the cause of action accrued."

6. It might appear to make little difference whether the appropriate limitation period is that prescribed by section 20 or section 8, because in both cases the period is 12 years. There is however a question, which I shall briefly touch upon at the end of my speech, as to whether the "date on which the right to receive the money accrued" is necessarily the same as that upon which the "cause of action accrued". But the main point taken by the building society is that in either case, the mortgage upon its true construction did not provide that in the event of default the whole balance of the advance should become repayable. Default gave it neither a cause of action nor a right to receive the money. Such a right arose only when the property was sold and the shortfall quantified. And that was just within the 12 year period.

7. The appeal therefore gives rise to two questions. One is a general question of law. Does section 20 apply in a case in which an advance is originally secured by a mortgage but the security is realised (or released) before proceedings are commenced? The second turns upon the construction of this particular and rather unusual mortgage deed, namely whether upon default the building society had a "cause of action" (section 8) or a "right to receive the money" (section 20) in respect of the outstanding capital.

8. The Court of Appeal, following its own previous decision in *Bristol and West plc v Bartlett* [2002] EWCA Civ 1181; [2003] 1 WLR 284, decided that section 20 applied. The reasoning of Longmore LJ (who gave the judgment of the court in the latter case) was succinct. He said (at p 297, para 30):

> "Since the subsection refers to 'the date on which the right to receive the money accrued' it is much more natural to read the subsection as applying to mortgages existing on the date on which such right accrued."

9. This decision was followed by a differently constituted Court of Appeal in *Scottish Equitable plc v Thompson* [2003] EWCA Civ 225 (6 February 2003, unreported) without adding to the reasoning. In the present case counsel for the building society accepted in the Court of Appeal that the earlier decisions were binding on the court but Mr Jarvis QC submitted to your Lordships that they were wrongly decided. He said that as the Limitation Act bars the exercise of the remedy of action but does not destroy the underlying obligation, the right moment to ask whether the principal sum was "secured by a mortgage" was when the claimant wished to bring an action. That is the more natural meaning of the words. At the time when the action was brought, it was no more than a personal claim upon a specialty debt, governed by section 8. There could be no reason to apply a different provision of the Act because it had at some earlier time been secured by a mortgage. He referred to dicta by Auld LJ in *Hopkinson v Tupper* (30 January 1997, unreported) and by Mr Robert Englehart QC sitting as a deputy High Court judge in *Global Financial Recoveries Ltd v Jones* [2000] BPIR 1029 which lent some support to his submission. But these observations, although entitled to respect, were fairly casual. Auld LJ said no more than that the point was arguable and in the second case it was mentioned in passing without having to be decided.

10. I think that *Bartlett's* case [2003] 1 WLR 284 was rightly decided. Putting aside actions for the recovery of land, where questions of title are involved, English law attributes periods of limitation by reference to the cause of action which the claimant seeks to enforce. Thus there are periods of limitation for personal injury actions, defamation actions, other actions in tort, actions founded on simple contract, actions on a specialty and so on. This method of classification suggests that ordinarily time will run from the moment when the cause of action designated by the appropriate rule has arisen. It would be strange if the lender could then stop time running by his own act in

exercising the power of sale. If, therefore, the cause of action when it arose was a claim to a debt secured on a mortgage, I do not think section 20 ceases to apply when the security is subsequently realised.

11. The second question is when the right to receive the moneys secured by the mortgage accrued to the building society. That turns upon the construction of certain provisions of the mortgage deed. It contains a legal charge with a proviso for redemption in conventional form. The borrower covenants in clause 4(a) to repay the advance by "the repayments", which are defined as the monthly sums specified. But the relevant clauses are 5(c) and (d):

> "(c) The moneys hereby secured shall be deemed to become due within the meaning of section 101 of the Law of Property Act 1925 and all powers conferred on the mortgagee by the said Act or by this Legal Charge shall in favour of a purchaser be deemed to be conferred on and exercisable by the lender at the expiration of one calendar month from the date hereof.
>
> (d) After the expiration of such period of one calendar month as between the lender and the borrower the lender may exercise such powers on the happening of any of the following events:
>
> (i) on the giving to the borrower by the lender of a notice in writing requiring payment forthwith of the moneys hereby secured
>
> (ii) if default shall have been made for one calendar month in the payment of some repayment…hereby secured…
>
> (iii) if the borrower shall fail to observe or perform any of the rules and regulations of the lender or any of the covenants and conditions herein contained
>
> (iv) if the borrower shall commit any act of bankruptcy or shall abscond or being a body corporate shall have a petition for winding up whether voluntary or compulsory presented by or against it or shall have a receiver appointed
>
> (v) if the borrower shall pull down waste destroy or in any manner impair or lessen the value of the security or any part thereof
>
> (vi) if the borrower shall fail to pay any chief ground rent or other sum charged upon the security or shall

> commit or suffer any breach of any covenant affecting the security."

12. Clause 5(c) has to be read against the background of section 101 of the Law of Property Act 1925, to which it refers:

> "(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> (i) A power, when the mortgage money has become due, to sell…the mortgaged property …
>
> (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property…"

13. These powers arise when the mortgage money has become due but their exercise is restricted by section 103, which provides that the powers may not be exercised save in certain specified circumstances. But section 101(3) provides that the provisions of the Act regulating the exercise of the statutory powers may be varied by the terms of the mortgage. In the present case, the conditions in section 103 have been replaced by those in clause 5(d).

14. There is no dispute that when the Wilkinsons defaulted, the power of sale became exercisable by virtue of clause 5(d)(ii). But was the advance repayable? The building society says that it was not. Clause 5(d) says that in the event of default the mortgagee may exercise its statutory powers but neither that clause nor anything else in the mortgage says that the advance shall become repayable. Despite the default, the only claim which the building society could make against the Wilkinsons was to claim each monthly repayment as it fell due.

15. Taken to its logical conclusion, this would produce a very odd result. The building society would be entitled to sell the property, as it did in 1989. But the only debt which could be discharged out of the proceeds of sale would be the arrears of monthly instalments. The balance of the proceeds would be retained as substituted security for the remaining instalments. Presumably the building society as mortgagee in possession of the fund would have to invest the money but would be

able to charge the borrower interest at the mortgage rate until the fund ran out or all the instalments were paid off.

16. In *Twentieth Century Banking Corporation Ltd v Wilkinson* [1977] Ch 99, 105 a similar situation arose. In that case a mortgage made in 1973 provided that the principal was to be repayable in 1988. In the meanwhile, interest was payable but there was no provision by which a default made the power of sale exercisable or the advance repayable. When the borrower defaulted the mortgagee had to apply to court for an order for sale in lieu of foreclosure under section 91(2) of the Law of Property Act 1925. Templeman J made the order and then considered what should happen to the proceeds:

> "The plaintiffs will of course be entitled, having paid the expenses of the sale, to discharge all arrears of interest down to date; that will leave a principal sum outstanding, the principal sum of £19,000. There will remain in the hands of the plaintiffs, after discharging arrears of interest, and if the sale produces only the £18,000 expected, a sum of, say, £15,000. Now, in my mind, as the plaintiffs will have that sum of £15,000 in hand they will be unable to say in future as regards that £15,000 "Payment is not yet due, therefore we can invest it. Interest at the high rate secured by the mortgage will continue to accrue, and we will give credit for the interest produced by investing the money at a rate inevitably less than the mortgage rate." It seems to me that either as a necessary consequence, or as a matter of a condition which I can impose, the plaintiffs must treat any money which is in hand after payment of expenses and interest down to date as being in satisfaction pro tanto of the principal secured by the mortgage, and of all future interest on the principal so satisfied. That seems to me to be fair to both parties and to produce an equitable result."

17. Mr Jarvis QC, for the building society, says such a result can also be achieved in this case by applying section 105 of the Law of Property Act 1925, which says that the proceeds of sale, after payment of the costs of sale, shall be applied "in discharge of the mortgage money, interest and costs". It does not say that the mortgage money must have fallen due. On the other hand, if the mortgage money has not fallen due even after exercise of the power of sale, then there would be no limitation period for the shortfall as such. There would be separate

limitation periods for each instalment, with the 12 year period running from when each instalment fell due. This would also be a somewhat artificial result but Mr Jarvis said that it could be avoided if one implied a term that, upon the sale of the property, the balance of the advance would fall due. Such a term was necessary to give business efficacy to the transaction.

18. Mr Wood QC, who appeared for the Wilkinsons, said that there was a much simpler answer. Clause 5(c) says that one month after execution of the mortgage the monies secured by the mortgage shall be "deemed to become due within the meaning of section 101 of the Law of Property Act 1925". This may be regarded as no more than a deeming provision for the benefit of purchasers under the power of sale. On the other hand, it is obviously intended to mirror the traditional mortgage clause which makes the advance repayable within a short period (usually six months) in order to terminate the legal right to redeem and cause the power of sale to arise. Under such a provision, the money is actually due in law, although there is as little intention that it should actually be repaid as there is in respect of the one month period in this mortgage.

19. Be that as it may, the position as between lender and borrower is regulated by clause 5(d), which sets out a list of events after which the power of sale may be exercised. That implies that until such an event occurs, the power may not be exercised and, by inference, that as between the parties, the money is not yet repayable. That construction is supported by paragraph (i) of clause 5(d), which provides that the power of sale is exercisable when payment of the money has been demanded in writing. The natural reading of this provision is that the money does become payable, and the power of sale becomes exercisable, on the making of the demand. And by parity of reasoning, the same consequences follow from the other events of default listed in paragraph 5(d).

20. Mr Jarvis submitted that although paragraph 5(d)(i) refers to a demand for payment, the making of such a demand does not mean that the borrower is actually obliged to pay the money. The demand is no more than an event which makes the power of sale exercisable. It does not either imply or create a personal debt. On this view, the mortgage contemplates the lender making a demand for payment which he is not entitled to make. In my opinion that would be a highly unreal construction which, even in a mortgage, ought to be avoided. It is true that mortgages come to us laden with old equitable doctrines which mean that the legal effect of the document sometimes has to be

qualified. But that does not mean that they are subject to special artificial rules of construction. The document must be construed in the same way as any other conveyancing transaction.

21. That means that even if the appropriate limitation period had been the 12 years prescribed by section 8 for an action on a speciality, the cause of action would have arisen more than 12 years before the action was brought and it would have been statute barred. Mr Wood submitted that, under section 20, the moneys became "receivable" even before any cause of action arose. Clause 5(d)(i) gave the lender the right to demand payment at any time after one month from the date of the mortgage and the moneys were therefore receivable as from that date, even if a demand was necessary to complete the cause of action: see *Hornsey Local Board v. Monarch Investment Building Society* (1889) 24 QBD 1. I do not find it necessary to decide this question. It is sufficient to say that the moneys had certainly become receivable when the event of default occurred.

22. I would therefore dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

23. I agree with my noble and learned friend Lord Hoffmann that, for the reasons he gives, this appeal should be dismissed. The difficulties in the case are attributable to the inadequacy of the express repayment provisions in the Legal Charge with which the case is concerned. The Legal Charge bears all the signs of being the Building Society's standard form required to be executed by those of its members to whom advances on mortgage are to be made. But when this case was before the Court of Appeal Lord Justice Jonathan Parker commented that the Building Society should consider tearing up this particular form of mortgage (see para.5 of the Court of Appeal judgment). Mr Jarvis QC, counsel for the Building Society on the appeal to the House, told your Lordships that this form of mortgage was no longer in use by the Building Society. He did not say when it had been replaced but I expect the learned Lord Justice's comment can take some credit.

24. The inadequacy of the repayment provisions is that the only express covenant for repayment is the mortgagor's covenant in clause 4(a) of the Legal Charge to repay the £35,895 advance with interest by monthly instalments. The repayment period is not specified but arithmetic suggests that the parties must have contemplated a period of about ten years. However there is no express provision in the Legal Charge that on default in payment of one or more monthly instalments the whole of the outstanding principal sum will become repayable.

25. Clause 5(c) and (d) of the Legal Charge have been relied on for the purpose of remedying this deficiency. Clause 5(c) provides that

> "The moneys hereby secured shall be deemed to become due within the meaning of section 101 of the Law of Property Act 1925 and all powers conferred on a mortgagee by the said Act or by this Legal Charge shall in favour of a purchaser be deemed to be conferred on and exercisable by the Lender at the expiration of one calendar month from the date hereof."

Mr Wood QC submitted that this provision had the effect that the principal sum advanced became due from the borrower one month after the date of the Legal Charge. I am unable to accept that submission. The submission ignores the words "…be deemed to …". It is very common to find in mortgages some such provision as clause 5(c). The purpose is not to advance the date on which the mortgage money becomes due. It is to protect purchasers from the mortgagee and relieve them of the need to inquire whether "the mortgage money has become due" (see s.101(1)(i) and (iii) of the Law of Property Act 1925). I do not think this commonplace provision can be given an extended meaning simply because this Legal Charge has been ineptly drafted.

26. Clause 5(d), however, is more promising. The provision says that on the happening of any of six specified events the Building Society may exercise its section 101 powers, and also any special powers conferred by the Legal Charge. It is implicit in this that until the happening of one or other of the specified events the Building Society may not, as between itself and the borrower, exercise those powers. But, of course, clause 5(c) makes all this of no concern to a potential purchaser.

27. Lord Hoffmann, in paragraph 11 of his opinion, has set out the six specified events. The second of them, default by the borrower in paying a monthly instalment, is the event which entitled the Building Society to sell Mr and Mrs Wilkinson's house. Mr Wood submits that that default had the result also that the whole of the outstanding principal money became owing. Clause 5(d) does not expressly so state and so, if the submission is to be accepted, a term to that effect must be implied. That, in my opinion, is the critical question in this case. Can a term be implied into clause 5(d) that, on the happening of any of the specified events, the principal money outstanding would become due and payable by the borrowers to the Building Society?

28. The first of the specified events compels, in my opinion, an affirmative answer to the question. The event is "… the giving to the Borrower by the Lender of a notice in writing requiring payment forthwith of the moneys hereby secured." It is, in my opinion, necessarily implicit in this language that upon the giving of the notice in writing the "moneys hereby secured" would become payable "forthwith". Otherwise the notice would be a dishonest one, suggesting an entitlement to which the giver of the notice, the Society, would not be entitled. As to each of the other events, the implied term would make clear commercial sense but as to the first event it would, to my mind, be positively necessary.

29. It follows that, in my opinion, the mortgage money outstanding became due and payable by Mr and Mrs Wilkinson one month after they had made default in paying a monthly instalment. For the purposes of the Limitation Act 1980, whether section 8 (an action on a specialty) or section 20 (an action to recover a principal sum secured by a mortgage) time, therefore, had begun to run well before 9 October 1989 when the Society took possession of the house with a view to its sale. It follows, also, that the Building Society's claim in this action, which was commenced on 12 November 2002, is statute barred.

30. I need add only that I am in full agreement with Lord Hoffmann that, for the reasons he has given, the sale of the property by the Building Society in November 1990 did not interrupt for section 20 purposes the time that had already commenced to run.

LORD WALKER OF GESTINGTHORPE

My Lords,

31. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it and for the reasons which he gives I too would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

32. For the reasons given in the opinion of my noble and learned friend, Lord Hoffmann, with which I agree, I too would dismiss this appeal.

LORD CARSWELL

My Lords,

33. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hoffmann, with which I agree. For the reasons which he has given I too would dismiss the appeal.