

Chapter 29: Security Interests in Land

2. The Role and Importance of Security

We note the importance of mortgage finance to the growth in home ownership. In Chapter 5 of her important work *Conceptualising Home, Theories, Laws and Policies*,¹ Fox considers the values attached to home ownership and the role of mortgage finance in achieving this tenure of choice.

4.4 Charging Orders

There has been an increase in unsecured creditors obtaining charging orders against the debtor's homes as an effective means of obtaining repayment. Not only does the charging order turn an unsecured debt into a secured debt which may be recovered by forcing the sale of the property but it also tends to prioritise repayment of that debt by the borrower so providing an example of the 'hostage' function of security.

Unsurprisingly, the rise in the popularity of charging orders has seen a number of recent cases challenging the grant of an order for sale of the chargor's home. Two issues have been raised. First, are the matters to which the court should have regard in deciding whether or not to order sale and secondly, is the compatibility of the power to order sale with Article 1 Protocol 1 and Article 8 of the ECHR.

***Close Invoicing Financing v Pile* [2008] EWHC 1580**

Facts Close obtained a charging order and applied for an order for sale of the Pile's home in which they lived with their adult son and daughter (aged 17) and Mrs Pile's mother. Mrs Pile had also been diagnosed with cancer and was receiving treatment. The Piles applied for the sale to be delayed in the light of their personal circumstances and the hope that their financial troubles would be resolved when Mr Pile could find employment.

Purle J(QC)

At 3- 9

The application for an order for sale is made under CPR 73.10 , or, alternatively, under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (which I shall call TOLATA). CPR 73.10(1) provides that, subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order....

The only significance of relying upon CPR 73.10 to the exclusion of section 14 of TOLATA is that, under section 15 of TOLATA , where an order is sought under section 14 , then the court has a number of wide ranging factors that it is required to take into account, including, so far as material to the present case, the interests of all those living in the property; that is to say, not just the Defendants.

I was referred to the decision of David Oliver, Q.C., sitting as a deputy judge of the Chancery Division in *Pickering v Wells* [2002] 2 FLR 798Oliver, Q.C ... concluded that, when exercising its discretion whether to enforce a charging order, the court did not

¹ Hart Oxford 2007

take into effect the welfare or needs of those in occupation. ...However, I have to say that I differ from the conclusion that Mr. Oliver, Q.C. reached. It seems to me to be somewhat capricious that, if Mr. Oliver, Q.C. is correct, the court would in the present case be required to take into account the interests of the elderly mother and 2 children if the judgment debt was against only one of the parents (in which case section 15 of TOLATA would be engaged) but not where the judgment debt is against both parents. I can well understand that, when the only other occupier is the other co-owner, it is a very material factor that that other co-owner is also a judgment debtor. But here the other occupiers are the two children and their grandmother and it seems to me quite senseless that, whether or not their interests are taken into account should depend upon the accident of whether or not the debt is owed jointly by their parents, or only by one of them ... I agree that, strictly speaking, section 14 is not relevant in that situation but, to my mind, the same considerations effectively have to be taken into account in the exercise of the undoubted discretion that the court has under Part 73.10(1). Reliance was also placed on the provisions of the European Convention on Human Rights.

At 12-13

It does seem to me quite plain that, in the exercise of the discretion under CPR 73.10, the provisions of the European Convention on Human Rights have to be taken into account and the court's discretion must be applied compatibly with the Convention rights. The Convention right in question is the respect for private and family life and home and the enjoyment of possessions. It is of course in accordance with the law that a charging order has been made and, to the extent that it is now enforced, that will be in accordance with the law also. It will also be in the public interest to enforce charging orders generally because of the economic importance of ensuring that there is an efficient machinery for the enforcement of debt obligations, even though, unlike in the case of a legal mortgagee, this is not a debt obligation which was voluntarily provided as a secured obligation. In those circumstances, I am quite satisfied that the power to enforce a charging order is compatible with the Convention. Indeed, the contrary is not argued. I am also satisfied, however, that, in applying the court's discretion, it must be applied in a way which gives due respect to the right of all those living in the property, not just the debtors, to have respect for their family life and their home. Against that must be weighed the rights of the chargee under the equitable charge, that is, to say the Claimant, not to have to wait indefinitely for payment or to have no means of enforcing its security.

Thus where the charging order is taken over the whole of co-owned property the application for sale can be made under either the Civil Procedure Rules 73.10 or under s 14 TOLATA. The latter jurisdiction is available for the application can be made by any person interested in the land including the chargee. However, whatever the jurisdiction the court will have regard to similar criteria.

Where the debtor is one of co-owners of the home then the application for sale will be under s.14 of the Trusts of Land Appointment of Trustees Act 1996 and the court will take into account the criteria set out in s.15 – see Chpt 19 [5.5]. Appeals to the human rights' incompatibility of this jurisdiction has also been made and rejected,² although the observations of the Strasbourg Courts in *Zehentner v Austria* should be borne in mind – see Chpt 5 update.

² *C Putnam & Sons v Taylor* [2009] EWHC 317, *Foster Ketley & Co v Bryant* [2009] EWHC 3441 and *National Westminster Bank Plc v Rushmer* [2010] EWHC 554.