

***Ashe v National Westminster Bank* [2008] 1 WLR 710**

Facts:

Mr & Mrs Babai owned a long leasehold property in Stockport. There was a mortgage over the property, with Halifax plc. In 1989, they granted a second legal charge (mortgage) over the property to National Westminster Bank plc (“the Bank”), to secure Mr Babai’s debts with the Bank. In 1992, following a period of non-payment, the Bank made a formal request for payment, but took no steps to recover possession of the property. The parties negotiated payment by instalments, and some payments were made. The last was a payment of £40 in January 1993. In March 1993, Mr Babai was made bankrupt.

Correspondence continued intermittently, but no further payments were made. In 2006, a new trustee in bankruptcy, Mr Ashe, began proceedings.

He argued that the Bank’s right to take action accrued when the legal charge was granted (1989), and accrued afresh at the date of the last payment (1993). As more than 12 years had passed since that date, the Bank’s right to possession of the property was statute-barred under ss15 & 17 of the Limitation Act 1980 (“LA 1980”) and, as a result, it had lost its legal interest in the property.

The Bank argued that although their contractual right to sue Mr Babai was time-barred, their right to possession of the property had not been extinguished as Mr Babai was not “adversely possessing” the property, but was with the Bank’s consent. Their right of action had not yet accrued.

Held:

The Court decided that the Babais were indeed in adverse possession of the property, according to the meaning of that term in *J.A. Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. Mummery LJ commented:

“The focus is not on the nature of the possession but on the capacity of the person in possession. Ordinary possession of land is adverse possession so far as the person out of possession and the 1980 Act is concerned. Mr & Mrs Babai were in possession of the property. The bank was not in possession of the property nor was anyone else.” (at 92)

The Bank’s right of action accrued when the charge was made and then again at the date of the last payment. As more than 12 years had passed since that date, the interest of the Bank had been extinguished.

Comment

S.15 of the LA 1980 sets a 12 year limit to recover land. The 12 year period begins when the right of action (which includes the right to enter into possession) accrues. S.17 provides that at the end of that period, the rights of the person entitled to recover the land will be extinguished. Paragraph 8 of Schedule 1 of the LA 1980 provides that the right of

action only accrues when there is a person in adverse possession of the land. The Court held that this paragraph also applies to claims by legal mortgagees against mortgagors in possession.

Time only began running against the Bank, then, when the Babais began to be in adverse possession of the property. The most alarming part of this case for lenders is the prospect that mortgagors can be in adverse possession of their own property.

Lenders were anxious that a decision such as this would have serious consequences for them. Lenders often try to allow defaulting mortgagors to remain in possession of their property for as long as possible. This decision may well change that practice, which would cause great hardship to many ordinary people.

Mummery LJ dismissed these concerns, stating that mortgagees would only need to take “modest steps” to protect themselves, such as obtaining small payments and acknowledgments of debt from the mortgagors. This would cause time to run afresh.

For a more detailed discussion of this case, see “Watching the Clock” Greer S. N.L.J. 2008, 158(7317) 548-549