



23 October 2013

PRESS SUMMARY

Szepietowski (nee Seery) (Appellant) v The National Crime Agency (formerly the Serious Organised Crime Agency) (Respondent) [2013] UKSC 65
On appeal from [2011] EWCA Civ 856

JUSTICES: Lord Neuberger (President), Lord Sumption, Lord Reed, Lord Carnwath and Lord Hughes

FACTUAL BACKGROUND

In 2005, the Assets Recovery Agency (“ARA”) obtained an interim receiving order over certain properties acquired by Mrs Szepietowski’s husband with money allegedly obtained through drug trafficking, mortgage fraud and concealment from the Revenue. In November 2006, the ARA began civil proceedings against Mr and Mrs Szepietowski (“the Szepietowskis”), seeking to confiscate 20 properties on the basis that they constituted recoverable property within section 266 of the Proceeds of Crime Act 2002 (“the 2002 Act”). These properties included Ashford House (the Szepietowskis’ home), two properties known as “Thames Street”, two properties known as “Church Street”, and two properties known as “Claygate”. These properties were all registered in the name of Mrs Szepietowski and had been charged to RBS for a debt of about £3.225m (“the RBS debt”).

On 16 January 2008, the Szepietowskis and the ARA settled the proceedings on terms contained in documents attached to a consent order (including a “Settlement Deed”). Pursuant to the terms of the Settlement Deed, (a) Thames Street and Church Street were sold and the proceeds paid over in part satisfaction of the RBS debt, and (b) in September 2009, Mrs Szepietowski granted a charge over Claygate (“the 2009 Charge”) to the Serious Organised Crime Agency (“SOCA, as the ARA had by this point become) entitling SOCA to recover a sum of up to £1.24m from the proceeds of sale of Claygate. The 2009 Charge (a) was a second charge over Claygate as it was subject to the RBS debt, and (b) contained various provisions including a statement that Mrs Szepietowski had no personal liability to pay any money to SOCA. In late 2009, Mrs Szepietowski sold Claygate for £2.44m and, once the net proceeds of sale of Claygate had been used to pay off the RBS debt, all that was left to satisfy SOCA’s rights under the 2009 Charge was £1,324.16. SOCA then sought to invoke the right to marshal against Ashford House.

The right to marshal classically applies when there are two or more creditors, each of whom is owed a debt by the same debtor, but one of whom has security in the form of a charge on more than one property (“the first mortgagee”), whilst the other has security in the form of an inferior charge on only one of those properties (“the second mortgagee”). If the first mortgagee chooses to enforce his charge against the property which secures both debts (“the common property”), the second mortgagee is able to enforce his charge against the property which only secured the first mortgagee’s debt (“the other property”).

THE ISSUES

SOCA argued that, as the proceeds of sale of Claygate (the common property, which was subject to the charge in favour of RBS and the 2009 Charge in favour of SOCA) were used to pay off what was due to RBS, it was entitled under the marshalling principle to look to Ashford House (the other property, which was only subject to the charge in favour of RBS), in order to obtain payment of the sum which it would have obtained on the sale of Claygate if RBS had sold Ashford House and used the proceeds of sale to clear the RBS debt. Mrs Szepietowski argued that SOCA should not be allowed to marshal because (a) the 2009 Charge did not secure a debt from her to SOCA and/or (b) the provisions of the Settlement Deed

and the 2009 Charge, coupled with the circumstances in which they were executed, demonstrated that marshalling was precluded.

Henderson J held that SOCA's marshalling claim was well-founded ([2010] EWHC 2570 (Ch)) and the Court of Appeal agreed ([2011] EWCA Civ 856).

THE SUPREME COURT'S JUDGMENT

The Supreme Court unanimously allows the appeal by Mrs Szepietowski.

Lord Neuberger, with whom Lord Sumption and Lord Reed agree, holds that the 2009 Charge did not create, or acknowledge the existence of, any debt from Mrs Szepietowski, or anyone else, to SOCA, save that under its terms, she was bound to pay SOCA an amount of up to £1.24m out of such sum if any, as remained from the proceeds of sale of Claygate after any prior claim had been met [40-43]. As a matter of principle, marshalling is not available to a second mortgagee where the common property does not secure a debt due from the mortgagor, but is merely available as security for whatever amount the second mortgagee can extract from that property. In such a case, there is nothing from which the right to marshal against the other property can arise [46-50].

Not least because marshalling is an equitable remedy, whether it is available in any particular case may depend on the circumstances. However, where there is no surviving debt due from the mortgagor to the second mortgagee after the sale and distribution of proceeds of sale of the common property, in the absence of express words which permit or envisage marshalling, it is hard to conceive how marshalling would be available [56-58].

If, contrary to this conclusion, marshalling is in principle available to a second mortgagee where there is no underlying debt, Mrs Szepietowski's appeal would still have been allowed. Where facts arise which potentially give rise to the right to marshal, the correct approach is to ask whether, in the perception of an objective reasonable bystander at the date of the grant of the second mortgage, taking into account (i) the terms of the second mortgage, (ii) any contract or other arrangement which gave rise to it, (iii) what passed between the parties prior to its execution, and (iv) all the admissible surrounding facts, it is reasonable to conclude that the second mortgagee was nonetheless not intended to be able to marshal [60-62].

The statutory background to, and the terms of, the 2009 Charge and of the Settlement Deed, coupled with all the surrounding circumstances demonstrate that the parties did not intend SOCA to have the right to marshal [64-72]. The fact that Ashford House was Mrs Szepietowski's home is one of the relevant background facts for that purpose, but it was insufficient on its own to prevent a right to marshal if such a right otherwise existed. Where the requirements of the right to marshal are otherwise present, it would require a contractually enforceable obligation, or something close thereto, on the first mortgagee to enforce against the common property in priority to the other property, for the second mortgagee to lose the right to marshal [73-77].

Lord Carnwath and Lord Hughes would allow the appeal on the narrower basis, namely that, read against the statutory background provided by the 2002 Act, and the fact that the 2009 Charge excluded any personal liability on the part of Mrs Szepietowski, that Charge impliedly excluded recourse to any source for payment other than those identified, and in particular excluded the right to marshal.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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www.supremecourt.gov.uk/decided-cases/index.html