

Dispute Resolution  
Case Law Update  
Rosling King LLP



## The Background

In or around May 2005, the Defendants, who were husband and wife, signed an offer letter as partners in Seaton Sands Investments (“**SSI**”) confirming their acceptance of a loan with Bank of Scotland plc (“**BOS**”) for the sum of £1.25 million (the “**First Loan**”).

In accepting the First Loan, the Defendants agreed to provide BOS with security over a number of properties, including the properties known as 'Keveral Mill' and 'the Courtyard'. However, the Defendants' solicitor erroneously confirmed to BOS that Flats 8 and 9 of the Courtyard were registered under the title number over which BOS had been granted security for the First Loan.

By March 2012 SSI had defaulted on the First Loan and was in breach of the terms of the First Loan. BOS sought to exercise their rights of enforcement over the Courtyard relying upon a breach of clauses 9.1 and 9.3 of the SME Charge Conditions (2004) (the “**Conditions**”). BOS demanded repayment of the sums outstanding under the First Loan and appointed Receivers who took control of the Courtyard.

On or around 20 July 2012, the Defendants obtained another loan from BOS trading as Birmingham Midshires in the sum of £97,475 (the “**Second Loan**”). The Second Loan was secured by way of a buy-to-let mortgage over the property known as Flat 8 the Courtyard. In or around August 2013, the Defendants ceased making payments towards the Second Loan.

BOS issued proceedings against the Defendants which included a claim for the balance remaining outstanding under the First Loan being £636,922.72. BOS subsequently issued a claim for possession of Flat 8 the Courtyard in respect of the Second Loan. The total sum claimed was £114,827.16. Both of BOS's claims were interlinked as the security for the First Loan was intended to also include Flats 8 and 9 of the Courtyard. However, Flat 8 and 9 of the Courtyard were registered under a different legal title to the rest of the Courtyard properties, a fact that had been missed by BOS's and Defendants' solicitors.

On or around February 2014, BOS filed applications at the Land Registry asserting that it was entitled to an equitable mortgage over Flats 8 and 9 of the Courtyard. The Land Registry approved the applications and the unilateral notices were registered. Accordingly, BOS contended that it had an equitable mortgage in respect of Flats 8 and 9 of the Courtyard that ought to be recognised.

The Defendants objected to the registration of the unilateral notices and commenced litigation in the Property Chamber, Land Registration, First Tier Tribunal. As litigation was already ongoing it was decided that the High Court would also consider the issue of the unilateral notice and equitable mortgage.

The Defendants defended the claims, arguing that the Claimant should not be granted an equitable mortgage nor be entitled to possession. In addition, they advanced counterclaims for breach of contract and duress/undue influence.

### The Judgment

In dealing with the Defendants' counterclaims, the Court held that the BOS was not in breach of contract. BOS had a contractual right to rely on its security and to receive the entire proceeds of the re-mortgage. The Court also held that BOS's actions did not amount to duress as there could not be economic duress if BOS was relying on its contractual rights. In addition, clause 9.3 of the Conditions granted BOS the right to appoint receivers.

In considering whether BOS should be granted possession, it was noted that Flat 8 had not been the Defendants' home, but rather a commercial property. Therefore, as the Defendants were in default, BOS was entitled to possession and a money judgment.

The Court held that as it was a mistake which meant BOS did not have a legal charge, and the parties had clearly intended to grant security, that BOS had a good claim to an equitable mortgage in respect of Flats 8 and 9 the Courtyard. As such BOS would be entitled to registration of the equitable mortgages.

### Commentary

The Judgment is a welcome decision for lenders as it highlights a willingness by the Courts to find a practical solution to issues which can be created in the event of no legal mortgage existing due to a mistake. However, lenders should proceed with caution as the Defendants have sought permission to appeal the decision.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.