

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
2008 EWHC (Ch)

Claim No HC07C02322

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 18 June 2008

Before:

MR JUSTICE NORRIS

B E T W E E N:

(1) HALIFAX PLC
(2) BANK OF SCOTLAND

Claimants

- v -

(1) CURRY POPECK (A Firm)
(2) PULVERS (A Firm)

Defendants

Tape Transcription by John Larking Verbatim Reporters
Suite 91 Temple Chambers,
3 - 7 Temple Avenue, London EC4Y OHP
Telephone 020 7404 7464

MR M WONNACUTT appeared on behalf of the Claimants
MR S AYLIFFE QC appeared on behalf of the First Defendant
MR P JONES QC appeared on behalf of the Second Defendant

J U D G M E N T
(Approved)

Words: 7,104 / Folios: 99

MR JUSTICE NORRIS:

1. This case concerns how the loss should fall on innocent victims of mortgage frauds practised by Tracy and John Whale (otherwise known as John Sinclair) with the assistance of an apparently incompetent or fraudulent conveyancing clerk employed by Messrs Curry Popeck and then later by Messrs Pulvers. The exercise is necessary so that those suffering loss may pursue professional negligence claims or enforce the respective firms' vicarious liability for the fraud of their employee, which claims have yet to be adjudicated upon.
2. The background is set out in a comprehensive judgment of Morgan J in proceedings which Pulvers brought against various participants in the fraud. I gratefully adopt, as did counsel before me, the account of events there set out, selecting only the key facts necessary for the determination of the issues before me.
3. In March 1999 Tracy Whale and John Whale were registered as proprietors of a property at 23 Nelmes Road, Hornchurch, under title number NGL113835. This consisted of a bungalow and of a garden of approximately one third of an acre, at the bottom of which were three garages. I shall refer to this plot simply as "the bungalow" There was registered against that title a charge in favour of the Cheltenham & Gloucester to secure two advances in the respective sums of £228,000 and £65,000.
4. On 3 December 1999 a bankruptcy order was made against John. The significance of this was not really considered by anyone until the day before the hearing before me.
5. On 12 June 2000 Tracy applied to the Halifax for a mortgage apparently over the bungalow. The application stated that she was buying the bungalow for £480,000 and wished to borrow £280,000. The solicitors acting for her were Curry Popeck. The Halifax duly instructed that firm to act for it in relation to the proposed mortgage. Curry Popeck's ledger relating to this describes the transaction as a "purchase". The first entry in its ledger dated 5 July 2000 shows the mortgage monies from the Halifax in the sum of £280,000 arriving in the client account. This sum was not paid to the Cheltenham & Gloucester to redeem its charge but to a third party (possibly another participant in another fraudulent transaction). (The documents include a form DS1, by which the Cheltenham and Gloucester acknowledged that its charge on the bungalow had been discharged. However, this document was only registered in October 2002). The ledger shows that, whatever the transaction was, it was not a purchase by Tracy of the bungalow for £480,000.
6. Tracy did execute a mortgage in favour of the Halifax. The mortgage bears the date 5 July 2000. However, the mortgage document has been completed not with the title number of the bungalow but with another title number EGL411650. This title did not come into existence until 1 September 2000. It is, in fact, the title to a strip of land and one garage at the foot of the garden of the bungalow.
7. On 24 August 2000, John and Tracy, as registered proprietors of the bungalow, executed a transfer of part of the registered title, that part being the strip and garage to which I have

referred. This was transferred to Tracy and she was registered as proprietor.

8. The result was that the Halifax had advanced £280,000 to Tracy for the purpose of purchasing the bungalow, but had ended up with a charge over a strip of land and a single garage ("Plot 650"). Morgan J found that Tracy Whale had deliberately deceived the Halifax as to the nature of the transaction.

9. The next transaction with which I am concerned occurred on 20 August 2002. On that day Cosec Facilities Limited, a company of which John was the sole director but Tracy the sole shareholder, wrote to the same conveyancing clerk (who had now moved to Pulvers). The letter referred to the bungalow and to Cosec's clients as being John and Tracy. The letter in effect instructed the conveyancing clerk to act for the purchaser in relation to a proposed sale of the bungalow to a "Mr Sinclair". This was John under another name.

10. "Mr Sinclair" approached a lender, Verso, which is the trading name of Mortgage Agency Services No 2 Limited, for a mortgage advance. Verso obtained a valuation dated 20 August 2002. This valued the property at £650,000. Based on that valuation, Verso made an offer of advance to John. The purchase price stated in the transaction was said to be £500,000 on the basis of which Verso offered to advance £377,000 odd. That amount was reduced to £375,000 by charges and was transferred on 2 September 2002 to Pulvers' client account. There is no sign that Pulvers arranged for a charge to be executed in favour of Verso before that mortgage advance was released to John on 3 September 2002.

11. John became the registered proprietor of the title to the bungalow. Verso obtained a registered charge over the bungalow, but this did not occur until 18 December 2002. Morgan J found that John had deceived Verso as to the nature of the transaction, which was not in any sense a transaction by way of sale and purchase for the sum of £500,000 of the bungalow.

12. On 28 October 2002, "Mr Sinclair" applied for another mortgage, this time from the Bank of Scotland. The mortgage application explained that he had an existing mortgage in favour of Verso, where the amount outstanding was £377,000, and that he wished to borrow £475,000 from the Bank of Scotland. In fact, the Bank of Scotland was only prepared to offer a mortgage advance of £377,000. The Bank of Scotland obtained a valuation of the bungalow. Again the valuer valued it at £650,000. The Bank of Scotland retained Pulvers.

13. In due course, on 18 December 2002, John executed a charge in favour of the Bank of Scotland. Once again the charge document did not refer to the title number of the bungalow, but to another strip that had been created at the bottom of the garden of the bungalow containing a garage and a strip of land ("Plot 645"). This charge was not immediately registered. Only on 14 March 2005 did Pulvers apply to the Land Registry to register the charge in favour of the Bank of Scotland. It was duly registered, but of course only in relation to Plot 645.

14. Inevitably the fraud came to light as lenders pressed for their money. In due course the Bank of Scotland obtained a money judgment in respect of the debt due to it from John. It thereafter obtained a charging order over the bungalow (of which John was the registered proprietor) to enforce that judgment debt. Pursuant to that charging order it eventually obtained an order for sale and sold the bungalow. It is in relation to the proceeds of that transaction that the present issues arise.

15. It is necessary to look first at what happened in relation to the Halifax and its charge for plot 650. The agreed legal consequence of the events have been placed before me. In reciting those consequences, I warmly commend the attitude taken by the opposing legal representative in reaching agreement upon many subsidiary issues and focusing the argument before me upon the central issue. It is agreed between counsel that:

(a) The Halifax did not on the facts become subrogated to the C&G charge because the evidence does not establish that the Halifax advance of £280,000 was applied in repayment of the C&G advance, which then totalled £293,000.

(b) The Halifax did not acquire an immediate and direct equitable charge over the bungalow, despite what it thought it was getting, because there is no contract which satisfies section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 signed by John and Tracy promising to grant such a charge.

(c) The Halifax may have acquired an equitable charge over Tracy's beneficial interest in the proceeds of sale of the bungalow and (subject to the question of John's bankruptcy) might likewise have done so over John's share. Arguments on this position have been reserved and I was only to be called upon to consider the charges which might affect the legal estate in the bungalow, not those which might affect beneficial interests.

(d) Subject to the effects of John's bankruptcy, it was agreed that a proprietary estoppel arose in favour of the Halifax, which had been led to believe that it would acquire a legal charge over the bungalow and on the faith of that belief advanced £280,000. It is implicit in this agreement that the estate in the bungalow vested in the registered proprietors, Tracy and John, is subject to the proprietary estoppel; and hence that the fraud practised on the Halifax was a joint enterprise of Tracy and John. In fact, Morgan J so found: see paragraph 375 of his judgment.

16. Secondly, it is necessary to look at the position of the Bank of Scotland. In essence, the position of the Bank of Scotland is similar to that of the Halifax. It, too, thought that it was making a mortgage advance against the security of the bungalow. It, too, ended up with a registered charge over only a strip of land and a garage being Plot 645. But it is agreed that it is unnecessary for the Bank of Scotland to rely on any interest in the bungalow arising under a proprietary estoppel because of the charging order over the

bungalow which it obtained on 24 May 2006 and which became final on 2 August 2006. The form of the charging order assumes that John is the legal and beneficial owner of the bungalow. It is not in dispute before me that this charging order created an equitable charge over the bungalow in favour of the Bank of Scotland. It is this equitable charge under the charging order that competes with the interest by proprietary estoppel arising in favour of the Halifax.

17. The order for sale provided that, on sale, the Bank of Scotland should pay the expenses of the sale and should then discharge other securities over the property which had priority to its charging order. In due course, the Bank of Scotland discharged Verso's registered legal charge and now has in its hands the sum £512,365 which falls to be dealt with under the distribution provisions to which I have referred. Does the Halifax have priority over the Bank of Scotland's interest under the charging order?

18. On 17 September 2007, all of the assets and liabilities of Halifax were transferred to the Governor and Company of the Bank of Scotland and that bank became a public limited company called Bank of Scotland Plc. Accordingly, the party now holding the funds is Bank of Scotland Plc. The funds are distributable between Halifax, whose assets are now vested in Bank of Scotland Plc, and the Bank of Scotland, whose assets are now vested in Bank of Scotland Plc.

19. It might in those circumstances be thought that how the £512,000 odd should be divided up is a matter of purely internal accounting of the Bank of Scotland Plc. But it was not to be. The sums available for distribution are less than the total combined indebtedness of Halifax and Bank of Scotland and each wishes to recover the shortfall from the solicitors' firm whose allegedly incompetent or fraudulent employee had failed to secure for her client the intended security over the bungalow. It is necessary therefore still to identify what loss is claimable from each firm.

20. Thus when Halifax advanced a claim against Curry Popeck, the solicitors acting for Curry Popeck immediately responded by letter dated 14 June 2006 to say that Halifax had not taken even the most basic steps to assert the equitable charge which that firm believed the Halifax had over the bungalow, despite having been aware of the difficulty for a number of years. Of course, if the Halifax did mitigate its loss by asserting or establishing an equitable charge by proprietary estoppel, that would in turn affect the amount of the proceeds available to the Bank of Scotland under its equitable charge, and so affect the amount that it could claim from Pulvers. As the solicitors for the Halifax neatly summarised the position in a letter dated 7 September 2006:

"BOS have obtained a charging order over the bungalow which on any view ranks behind the Verso charge. If that charging order were to take priority over our client's equitable charge, then your client's liability to Bank of Scotland would be reduced by the amount of the equity in the property that would be utilised to satisfy the BOS

charging order. However, if our client's interest takes priority over the charging order, your client will end up paying for the loss which is not mitigated by the value of the bungalow."

21. So it is that the proceedings come before me. In one sense the proceedings are a claim by a fund holder for directions as to the distribution of the fund in its hands, pursuant to the order for sale. But in substance the proceedings are about who can establish a claimable loss against the conveyancing firm.

22. It is in that context that the issue of John's bankruptcy falls to be considered. As I indicated, it was a very late thought which occurred to Mr Jones QC on behalf of Pulvers. He made an amendment to his pleaded case to plead the fact of the bankruptcy and its legal consequence. But he did not apply to amend the relief sought. The bankruptcy did not seem to me to have a significant impact on any of the arguments presented to me. Mr Jones QC did not argue positively that the fact of John's bankruptcy in December 1999 prevented a proprietary estoppel arising in favour of the Halifax. I think he was right not to do so. The legal estate in the bungalow was vested in Tracy and John as trustees in March 1999. When John became bankrupt, the legal estate that was vested in him as co-owner did not vest in the trustee in bankruptcy. All that vested was his beneficial interest under the trust for sale. It was John and Tracy, as trustees of the bungalow, who deceived the Halifax into lending money against the promise of a charge upon the legal estate of which they were registered proprietors. It is that legal estate -- something which is not vested in the trustee in bankruptcy -- upon which the estoppel bites. I have no difficulty in dealing with their legal estate in the absence of the trustee in bankruptcy.

23. Equally, Mr Ayliffe QC did not argue that the fact that John was bankrupt disabled him from granting the Bank of Scotland charge at all, so that the Bank of Scotland was unable to assert any equitable rights. Again I consider I can decide the priority of the claims to the fund as between the Halifax and the Bank of Scotland without deciding whether some other person such as the trustee in bankruptcy has a better right than either of them and without attempting to decide what, in consequence of the priority I decide, is the actual loss recoverable from each of the respective firms.

24. I turn to the argument, which was conducted on a very narrow front. The starting point of the argument is that where the equities are equal, the first in time prevails. This is a rule which is preserved by section 28 of the Land Registration Act 2002, which provides:

"Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge."

25. As is explained in Ruoff and Roper, Law and Practice of Registered Conveyancing, 2008 edition, at paragraph 15.025:

"The effect of the basic priority rule in section 28 is that the priority of competing equitable interests affecting a registered estate or charge is determined by the order in which they were created. A later disposition which creates a subsequent equitable interest will not affect the priority of a prior equitable interest which affected the registered estate or charge. Under the general law, competing equitable interests in property generally ranked in the order in which they were created provided that the equities were equal. The conduct of the holder of the prior equitable interest might disentitle him from asserting priority over the later equitable interest."

The effect of section 28 is to maintain the rule under the general law that the priority of competing equitable interests was determined by the order in which they were created. However, it removes the qualification that priorities might be changed if the holder of the prior equity was at fault.

26. Before me it is also accepted that for the purposes of that section a proprietary estoppel, including an inchoate one, is a property interest. It may be recalled that there existed a debate as to whether a proprietary estoppel upon which the court had yet to rule was a mere equity akin to the right to seek rectification or specific performance, or was a purely personal right enforceable only by the claimant against the owner. But this debate for the purposes of registered land is settled by the terms of section 116 of the Land Registration Act 2002, which states that, for the avoidance of doubt, in relation to registered land an equity by estoppel has effect from the time the equity arises as an interest capable of binding successors in title.

27. So much for the general rule, which was not in debate before me. But this general rule is subject to an exception which is provided for, as section 28 itself makes clear, in section 29. Section 29 is in these terms:

"If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration."

I briefly note that the section operates by reference to the registration, not by reference to the completion, of the transaction. However, this point was of no materiality on the facts before me.

28. It is not suggested that section 29 has any direct operation between the Halifax and Bank of Scotland in relation to the freehold of the bungalow. In that course of the

transactions Section 29 did operate directly: for example, in relation to the registration of Verso's registered charge. That was a registrable disposition of a registered estate and its registration had the effect of postponing to The Verso charge the Halifax's claim to a charge by way of proprietary estoppel over the bungalow. Likewise, when the Bank of Scotland registered its charge over Plot 645, that also was not subject to any claim that the Halifax might have had to an equitable charge over Plot 645 arising out of the proprietary estoppel.

29. But in relation to the freehold of the bungalow there is no registrable disposition of a registered estate as between the Halifax and the Bank of Scotland. The Halifax equitable estate was created by Tracy and John. Tracy and John transferred the freehold in the bungalow to John. The Bank of Scotland equitable charge was then created in respect of John's interest. The question for decision is: what is the effect of the registration of the transfer to John on the priorities; that is to say, what is the indirect effect of section 29 on the respective interests of the Halifax and of the Bank of Scotland?

30. Mr Jones QC argues that it has the effect of wiping the registered estate clean of all equities not noted on the Register as at the date of registration. This is the allegation set out in his defence. He asserts it and it is for him to prove it. The legal and evidential burden lies on the Bank of Scotland to bring itself within the terms of section 29 if it wishes to advance this argument. For that it must show that the registrable disposition in the transfer to John was "made for valuable consideration".

31. The primary facts on which this issue is to be decided are few. I heard no oral evidence. In essence, the case has been argued on the basis of what inferences may properly be drawn from the agreed documents which themselves are not free from doubt. The essential agreed fact is that Tracy and John were both fraudsters. The starting point is that they were the registered proprietors of the bungalow, subject to a charge in favour of the Cheltenham & Gloucester. It is assumed (for very sound reasons) that that charge will have included a personal covenant by both of them to repay the loan made by the C&G. It must be assumed on the present state of knowledge that the beneficial interest in the bungalow followed the registered legal estate, because no other position has been established. That is the starting point.

32. The end point is that John (in his alias of "Mr Sinclair") became the registered proprietor. The question is: did he do so by means of a transfer for valuable consideration?

33. Such material as is available is as follows. The story begins on 20 August 2002, on which date Cosec Facilities (the company of which John was sole director and Tracy sole shareholder) wrote to Messrs Pulvers enclosing certain documentation "in respect of our clients' proposed sale to Mr J Sinclair". The clients were named at the head of the letter as John Whale and Tracy Whale. The documents that were enclosed were a draft contract, office copy entries, a seller's property information form, and a fixtures and fittings list, none of which I have seen. The letter continued:

"We understand there is some urgency with this matter and that your clients are in a position to exchange and complete simultaneously, almost immediately. Assuming this to be the case, and that there are no other outstanding queries, we look forward to hearing from you with a view to completing this matter within the next seven days."

The reference to "your clients" is somewhat obscure, but seems to me to be a reference to Mr Sinclair, since the rest of the letter contemplates that Cossec itself will be acting on behalf of John Whale and Tracy Whale.

34. There are amongst the documents four signed contracts. Two of them, as between seller and buyer, say that the sale price of the property is £200,000. Two of them say that the sale price is £500,000. It is not possible to ascertain when these documents were created and none of them is dated. Nor is it possible to say with what intention these documents were created, given the widely differing purchase prices stated in the two sets of signed contracts.

35. It is apparent from a perusal of Pulvers' file and ledger that Pulvers did not treat the transaction as one of sale and purchase. The completion statement describes it as "Remortgage". The only monies which came in in respect of the transaction at all were the Verso mortgage monies. The Verso mortgage was paid into the above account of Cossec (and mixed with other funds). Out of that account the C & G Mortgage was eventually paid.

36. Following those instructions and the creation of that ledger, there came into existence a transfer signed by John and Tracy in favour of John. The transfer itself is dated 18 December 2002. This is well after the date of receipt of instructions by Pulvers to complete an urgent transaction and well after the actual completion of the transaction utilising the Verso mortgage which was drawn down on 3 September 2002. In its original form the transfer contained a stamp duty certificate placing the transaction in "category L" which, shortly stated, is a transfer by way of gift. The face of the transfer also contains a declaration that the transferor has received from the transferee for the property the sum of £200,000. But it is agreed before me that those words cannot have been on the original transfer and were only inserted at a much later date.

37. Following the signature of the transfer apparently on 18 December 2002, there was no attempt to register it until, it appears, late 2003/early 2004. There is in the documents a letter dated 1 March 2004 from the Land Registry to Pulvers indicating receipt of an application to register the transfer of the bungalow to John, but saying that the transfer cannot be completed until two steps are taken: first, the lodgment of a new cheque, since the existing cheque for the fees is more than six months out of date; and secondly, a request "Please lodge evidence that Mr John Whale has changed his name to Mr John Sinclair. If this is not the case, the enclosed transfer is not exempt from Stamp Duty". This suggests that the transfer was not originally lodged as a transfer for valuable consideration.

38. In response to that it appears that Pulvers sent the transfer to the Inland Revenue under cover of a letter dated 8 March 2004. The terms of the letter indicate that the transfer enclosed is "for no value and does not form part of a transaction for value". When the Inland Revenue Adjudication Section received this letter they endorsed it with the words "Please confirm any outstanding mortgage at date of transfer", and returned it to Pulvers.

39. Pulvers responded, returning the letter and stating:

"We confirm the mortgage outstanding was £200,000."

This cannot be right on anybody's version of events. The £200,000 does not represent the balance outstanding on any of the mortgages taken out in respect of the bungalow. A likely explanation is that the figure of £200,000 was fixed upon by reference to the chargeable bands for Stamp Duty which, up to £250,000, would have been 1% at that time.

40. It must have been the case that the Inland Revenue Adjudication Section decided that, in the light of the outstanding mortgage (said to be of £200,000) Stamp Duty was payable. On 9 May 2004 Stamp Duty in the sum of £2,200 was paid and the stamps applied to the transfer.

41. Following that, Pulvers returned the document to the Land Registry. But under cover of a letter dated 26 May 2004 the Land Registry returned it saying:

"I return the enclosed transfer to be completed by the insertion of the relevant consideration where marked in pencil in box 9 of the transfer. Such insertions must be initialled by the transferee or his representative."

It is likely to have been at this point that the consideration of £200,000 was inserted on the transfer. Once that had been done, the transfer (as so amended) was returned by Pulvers on 1 June 2004 together with the requisite fee.

42. Such is the available material. What is to be made of it? It is clear that the signed contracts do not bear any relationship to any genuine transaction. It would equally appear to be the case that the consideration ultimately stated in the transfer does not bear any relationship to any transaction in the real world. Mr Jones QC says that one must look at the transfer and accept that there are only three possibilities: either on the facts it is a transfer for a nil consideration; or on the facts it is a transfer for a nominal consideration; or on the facts it is a transfer for valuable consideration.

43. It seems to me that there is also a fourth possibility. That is that the transfer is part of a fraudulent enterprise in which the concept of consideration is entirely meaningless.

44. Mr Jones QC does not rely on the stated consideration of £200,000. It is clear that, as

such, this was never paid and it is not a figure which bears any relationship to anything that is known to have happened in the real world. It probably derives, as I have indicated, from the chargeable Stamp Duty rates. Mr Jones QC says that the transfer formed part of a transaction which led to a discharge of Tracy and John's joint personal covenant to the Cheltenham & Gloucester and that this accordingly provides the valuable consideration by John for the transfer. John funded that discharge by taking out a mortgage with Verso under which he assumed personal liability as borrower. (This analysis of course requires one to accept that Tracy gave up a half share in a bungalow worth £650,000 in order to be relieved of her obligation to pay half of a mortgage of £300,000).

45. I agree with Mr Jones QC that that is the apparent consequence of the ultimate form of this transaction. But I do not agree that it therefore must be "the consideration" for the transaction. It is certainly nowhere stated to be such.

46. In his skeleton argument Mr Ayliffe put it in this way:

"It would be stretching the concept of consideration to breaking point to characterise the repayment of the C&G mortgage even if it took place at around the same time as the transfer to John and involved the provision by John of a benefit to Tracy as "consideration" for the transfer to John. Whatever else may be the case, one thing is absolutely clear, namely that there was no genuine sale between John and Tracy as vendors and John as purchaser. Indeed, there is no evidence of any underlying deal between John and Tracy by which John agreed to give anything to Tracy in return for the transfer of the property to him. All that happened was that they carried out a re-shuffling of the legal title to the property in furtherance of their fraudulent enterprises."

In my judgment that is an accurate summary of the factual situation and it accords with the finding of Morgan J recited in paragraph 11 above. The burden lies, in my judgment, upon the Bank of Scotland to show that there was a transfer to John for valuable consideration. I do not consider that on the evidence they have discharged that burden because none of the conveyancing documents can be trusted and there is an equally, if not more, compelling analysis, namely that this is simply the execution of a fraudulent enterprise in the context of which the concept of "consideration" is meaningless. I would accordingly decide this case on the footing that the general rule set out in section 28 applies because Bank of Scotland cannot bring itself within the provisions of section 29.

47. That is sufficient to dispose of this case. It is only with some hesitation that I go on to consider the alternative arguments. But since they were carefully and thoughtfully advanced, I should at least express a view on them in case my inferences from the primary facts are subject to challenge. What follows therefore proceeds on the assumption that section 29 does indeed apply because there was valuable consideration provided by John

for the transfer.

48. Mr Jones QC's position is that one must simply apply the words of section 29 to the events which occurred. He points out that section 29 is itself the successor to section 20 of the Land Registration Act 1925. That section had provided, in short:

"A disposition of the registered land or of a legal estate therein for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple subject --

- (a) to the incumbrances and other entries (if any) appearing on the register, and
- (b) to the overriding interests (if any) affecting the estate transferred or created,

but free from all other estates and interests whatsoever."

Mr Jones QC submits that, although the language of section 29 is different, its effect is entirely the same, namely that the section was not intended to keep alive equitable estates or interests which were unprotected at the date of the registration of a disposition. He readily acknowledged that in any system of registration such a rule was capable of manipulation and of conferring benefits on the unworthy. But he said that that should not mean that the plain words of the section should be accorded a contorted construction. In support of this he referred me to the well-known decision in Midland Bank v Green. [1981] AC 513 concerning unregistered land. Very shortly put, a father granted his son a ten year option to purchase the farm. The option was not registered as an estate contract. Six years later the father, wishing to deprive the son of his option, conveyed the farm, which had a market value of £400,000, to the son's mother for £500. In the House of Lords the case was said to be a plain one. The estate contract was not registered before the completion of the purchase by the mother. It was therefore void against her. That was the appearance and, said Lord Wilberforce, it was also the reality. He said:

"The case is plain; the Act is clear and definite. Intended as it was to provide a simple and understandable system for the protection of title to land, it should not be read down or glossed. To do so would be to destroy the usefulness of the Act. Any temptation to re-mould the Act to meet the facts of the present case on the supposition that it is a hard one and that justice requires it is, for me at least, removed by the consideration that the Act provides a simple and effective protection for persons in the son's position, namely by

registration."

49. Mr Jones QC argued that the mere fact that the registration of a registrable disposition wiped the title clean of any prior unprotected equitable interests did not, of course, destroy the obligations themselves. All it did was to destroy the subsistence of those interests as interests in land, leaving them capable of enforcement as personal rights and leaving available the full range of remedies against the creators of the equitable obligations. He pointed out that this had long been the approach of the legislature. He referred to the 1989 Law Commission Report No 254, which recognised the academic debate about the extent to which transferees should take free from prior equities. He cited to me paragraph 3.4(8) of the report, which drew attention to the fact that the law provided a wide range of personal remedies against those who behave improperly. The report gave four examples of those personal remedies: a constructive trust arising from knowing receipt; a constructive trust arising from the circumstances of the actual transfer; tortious liability arising from conspiracy to defeat proprietary rights (a remedy that was actually pursued in Midland Bank v Green see [1982] Ch 529); or the ability to set aside a transaction if procured by misrepresentation or undue influence. Paragraph 3.4(9) then continued:

"In each of these cases a purchaser may acquire the registered land free from the rights of the third party, yet find himself personally liable for the loss suffered by that third party or subject to some personal equity which enables the transaction to be set aside. This accords with the principle applicable under Torrens systems that indefeasibility of title in no way denies the right of the plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity for such relief as a court acting in personam may grant."

Mr Jones QC submitted that that rule applied even if John himself had participated in the creation of the equity which the transfer to him for valuable consideration wiped clean.

50. Mr Ayliffe QC, on the other hand, whilst accepting the thrust of Mr Jones' argument, said that it was incapable of applying and that section 29 did not apply to equitable obligations which had been created by the disponent. Midland Bank v Green, of course, was not such a case for the mother was not a party to the option. In this connection he relied on the familiar case of Ljus v Prowsa Developments [1982] 1 WLR 1044 as authority for the proposition that equities which are created at the time of the disposition itself, and are created by the disponent, will continue to bind the disponent, notwithstanding the disponent's registration as proprietor of the estate. The ground of the decision in Ljus v Prowsa Developments was that it would be a fraud on the part of the disponent to renege on the stipulation which he had made and to rely upon the transfer of the land as conferring an absolute title in fee simple free from the stipulation. Mr Ayliffe QC said that if that was true in relation to equities which arose at the time of the disposition itself, it was also capable of being true in relation to equities created by the disponent prior to the disposition.

He pointed out that it was not, in fact, necessary to read any extra words into the section. The equitable interests, which are unprotected at the time of registration, are postponed "to the interest under the disposition". The interest under the disposition was not simply the freehold estate, but the freehold interest burdened by the equitable interests created by the donee. As he put it in his skeleton argument, the argument that the transfer to John wipes the slate clean ignores the fact that the circumstances which entitled the Halifax to a proprietary estoppel against Tracy and John continued to apply following the transfer to John and, he said, would have entitled Halifax to assert a proprietary estoppel against John alone because there had been no material change in circumstances which rendered it no longer equitable that John should be estopped from denying the Halifax's charge over the property.

51. Tempting as this argument is, I have concluded that Mr Jones QC's analysis is the correct one. It is consistent with the policy to which the citation from the Law Commission Report refers. It is consonant with the plain meaning of the words of s. 29 and it is consistent with the obvious meaning of section 20 of the Land Registration Act 1925. On the assumption of a transfer for valuable consideration, equitable interests binding the donor do not bind the donee as interests in land, even if the donee was a party to the creation of those interests. This will mean that if the donee then creates a subsequent equitable obligation binding the estate, there will be no question of competing equities. The obligation which the donee created will continue to bind him as a personal obligation. Take the simple example of a contract. If A, as personal representative, contracts to sell Blackacre to X and he then for valuable consideration transfers Blackacre into his own name and then contracts to sell Blackacre to Y, X will not be able to assert an equitable title to Blackacre against Y; but the contract that A had made will continue to bind him; he will be liable for damages for such breach. If he had not created a contract in favour of Y, it would have been enforceable against him by way of specific performance because he would not, as I think, be able to assert section 29 against X, being personally estopped from doing so on the grounds that he was using section 29 as an engine of fraud and the principle in Rochefoucauld v Boustead [1897] 1 Ch 196 would have prevented him from asserting the section. But absent such a consideration as that, namely an estoppel which arises, the estate in land created by the contract between A and X came to an end when the registered disposition to A took effect.

52. I am relieved to see that my construction of the section would seem to accord with the Law Commission's intention in promoting the 2002 Bill. In paragraph 5.10 of their report, Law Commission No 271, they discuss the question of priority. They discuss the particular difficulties created by an unpaid vendor's lien. They point out that an unpaid vendor's lien arises when the seller contracts to sell the land to the buyer, and not on completion when the transfer is executed. They go on:

"For that reason it will not take effect as a right created by the transferee between transfer and registration because it predates the transfer. It will not therefore be binding on the transferee when he or she is registered as proprietor unless

the seller protects the lien by the entry of a notice against his or her own title prior to the registration of the transfer. We gave this issue considerable thought. In the end, however, we have concluded that it is unnecessary to create any special regime to ensure that a buyer does not take free of an unpaid vendor's lien when the transfer to him or her is registered. Unpaid vendor's liens that are intended to survive completion are uncommon. It should be enough if practitioners are alerted to the need to enter a notice in respect of them prior to or simultaneously with the registration of the transfer."

53. Had the facts permitted it, I would therefore have found in favour of Mr Jones QC on the law. As it is, I find in favour of the Halifax on the facts.
