Neutral Citation Number: [2019] EWCA Civ 2047

Case No: A3/2018/2978

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY APPEALS LIST (CHANCERY DIVISION)
Mr Justice Arnold
CH-2017-001318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE SIMON
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

MICHAEL LEON	**Appellant**
- and -	
(1) HER MAJESTY'S ATTORNEY GENERAL **(2) THE MAYOR AND BURGESSES OF THE CITY OF WESTMINSTER** **(3) KENSINGTON MORTGAGE COMPANY LIMITED**	**Respondents**

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Andrew Butler QC (instructed by **Anthony Gold Solicitors**) for the **Appellant**
Adrian Pay (instructed by **Westminster City Council Legal Services**) for the **Second Respondent**
Clifford Payton (instructed by **TLT LLP**) for the **Third Respondent**
The **First Respondent** was not represented and did not appear

Hearing dates: 10 October 2019

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Approved Judgment

Lord Justice David Richards:

1. Sections 1012 to 1023 of the Companies Act 2006 (the Act) deal with any property or rights of a registered company still owned on its dissolution under the Act. They apply to property and rights beneficially owned by a company but do not apply to property held on trust by the company, which can be dealt with under the Trustee Act 1925.

2. By section 1012, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution are deemed to be *bona vacantia* and accordingly belong to and vest in the Crown (or to the Duchy of Lancaster or the Duke of Cornwall, as appropriate). Under section 1013, the Crown may disclaim its title to any such property by a notice executed within three years after the Crown representative first has notice that property has vested in the Crown. A notice of disclaimer becomes a public document through registration by the registrar of companies. The effect of a disclaimer is that the property is deemed not to have vested in the Crown: section 1014(1).

3. Sections 1015-1019 make provision for the effect of Crown disclaimer on property in England and Wales and in Northern Ireland. The general effect is stated by section 1015:

> "(1) The Crown's disclaimer operates so as to terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed.
>
> (2) It does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."

4. The issues on this second appeal concern section 1017 which confers on the court power to make vesting orders in respect of disclaimed property. I set out this provision below.

5. The facts relevant to this appeal may be summarised as follows.

6. By a lease dated 23 December 1993 (the Lease), the second respondent, the City of Westminster (Westminster), granted a lease of a ground floor flat at 122A Westbourne Terrace London W2 (the Property) for a term of 125 years to a company called Baronfield Limited. The leasehold interest was assigned in 1997 to Kingley Properties Limited and in 2007 to Frinton Limited (Frinton). These three companies were all owned or controlled by the appellant Michael Leon or his wife. All the shares in Frinton were held by or on behalf of Mr Leon. He was a director of Frinton until 9 November 2005, when his wife became a director.

7. By a deed of substituted security dated 27 March 2007 made by Frinton, Mr Leon and GE Money Mortgages Limited (GE), the Lease was substituted as security in place of a freehold residential property under a mortgage deed dated 21 October 2002 (the Mortgage).The Mortgage was made between GE (under a previous name) as mortgagee, Frinton as mortgagor and Mr Leon as "co-mortgagor".

8. The Mortgage was granted as security for a loan of £472,500 made to Frinton and Mr Leon for a term of 25 years, with interest payable on a monthly basis.

9. The Mortgage provides that

> "A. The mortgagor charges the property by way of legal mortgage with payment of all money mentioned in condition 2.1 of the Mortgage Conditions. The mortgagor gives this charge with full title guarantee.
>
> B. The co-mortgagor charges any right or interest in the property or its proceeds of sale which he/she may have which is not charged by clause A above as further security for the payment of the money mentioned in condition 2.2 of the Mortgage Conditions."

10. Under paragraph 4.1 of the Mortgage Conditions, Frinton as mortgagor covenanted, among other things, to "keep to the terms of…any lease which the property is held under". Paragraph 11 provides that conditions 4 to 10 apply to Mr Leon as co-mortgagor in the same way as they apply to the mortgagor. Following execution of the deed of substituted security, the charged property was, of course, Frinton's leasehold interest in the Property.

11. On 17 February 2009, Frinton was dissolved as a result of its failure to comply with its statutory filing requirements. No application for the restoration of Frinton to the register of companies was made within the period of six years allowed by section 1024 of the Act. In consequence of its dissolution, Frinton's leasehold interest vested in the Crown as *bona vacantia*.

12. On 23 May 2016, GE transferred the Mortgage to the second respondent, Kensington Mortgage Company Limited (Kensington).

13. On 30 June 2016, Westminster discovered that Frinton had been dissolved and informed the Treasury Solicitor, representing the Crown. By a notice given by the Treasury Solicitor on 30 August 2016, the Crown disclaimed the Lease.

14. The open market value of the leasehold interest is between £800,000 and £1 million, which values the equity of redemption at somewhere between £370,000 and £570,000.

15. On 5 May 2017, Mr Leon commenced the present proceedings, seeking a vesting order of the Lease on three alternative grounds. Two of those grounds were that Frinton held the Lease on trust for him, entitling him to a vesting order under section 44 of the Trustee Act 1925, and that he would have been entitled to the Lease but for the dissolution of Frinton, entitling him to a vesting order under section 181 of the Law of Property Act 1925. Following a two-day trial, which included oral evidence from Mr Leon and other witnesses, the Chief Chancery Master, Master Marsh, dismissed the claim so far as based on these grounds, finding (among other matters) that the Lease had not been held by Frinton on trust for Mr Leon. Neither of these grounds was raised either before Arnold J (as he then was) (the judge) on appeal from the Chief Master or before this court. However, for the reasons given in his reserved

judgment, the Chief Master made a vesting order under section 1017 of the Act in favour of Mr Leon.

16. Section 1017 provides:

> "(1) The court may on application by a person who –
>
> (a) claims an interest in the disclaimed property, or
>
> (b) is under a liability in respect of the disclaimed property that is not discharged by the disclaimer,
>
> make an order under this section in respect of the property.
>
> (2) An order under this section is an order for the vesting of the disclaimed property in, or its delivery to –
>
> (a) a person entitled to it (or a trustee for such a person), or
>
> (b) a person subject to such a liability as is mentioned in subsection (1)(b) (or a trustee for such a person).
>
> (3) An order under subsection (2)(b) may only be made where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.
>
> (4) An order under this section may be made on such terms as the court thinks fit.
>
> (5) On a vesting order being made under this section, the property comprised in it vests in the person named in that behalf in the order without conveyance, assignment or transfer."

17. The Chief Master made the vesting order on two alternative bases. First, by virtue of his position as co-mortgagor under the Mortgage and what was said to be his entitlement to the equity of redemption, Mr Leon had an interest in the Lease. Second, by virtue of his position as a co-mortgagor, Mr Leon was under a liability in respect of the Lease which was not discharged by the disclaimer and the requirement of section 1017(3) was satisfied.

18. On an appeal by Westminster, the judge set aside the vesting order made by the Chief Master. It was common ground that, in those circumstances, a vesting order should be made in favour of Kensington on terms that it should account as mortgagee to the person next entitled in accordance with section 105 of the Law of Property Act 1925, whoever that should be. The judge made an order in those terms. This will leave the issue as to who is the person next entitled after Kensington for determination in the future

19. Mr Leon appeals against the judge's order on essentially two grounds. First, while it was and remains common ground that Mr Leon "claims an interest in the disclaimed property" within the meaning of section 1017(1)(a), the judge was wrong to hold that Mr Leon was not "a person entitled to it" for the purposes of section 1017(2)(a).

Second, while it was and remains common ground that Mr Leon is "under a liability in respect of the disclaimed property that is not discharged by the disclaimer" within section 1017(1)(b), the Chief Master was entitled to hold, for the purposes of section 1017(3) that "it would be just to [make a vesting order in Mr Leon's favour] for the purpose of compensating [Mr Leon] in respect of the disclaimer" and that the judge was wrong to interfere with that decision.

20. I will take each of those grounds in turn.

21. As regards the first ground, the Chief Master focused exclusively on whether Mr Leon had an interest in the Lease within section 1017(1)(a), without going on to ask whether, assuming he did have such an interest, he was "entitled to it" for the purpose of section 1017(2)(a). The judge held that the latter is the determining question but recognised that the meaning of "entitled to it" must be based on finding that the applicant has the interest in the disclaimed property which he claims. The judge said at [26] that one way of putting the correct question was

> "does the interest claimed by the applicant entitle him to the property? In my judgment the interest would have to be a proprietary one in order to entitle the applicant to the property, although it is clear from the fact that an order may be made for the vesting of the property in a trustee that a beneficial interest would suffice."

22. Mr Butler QC, appearing for Mr Leon on this appeal, submitted that both the Chief Master and the judge were guilty of conflating subsections (1) and (2) of section 1017, although of course he supported the Chief Master's conclusion that a vesting order should be made in Mr Leon's favour. He submitted that subsection (1) merely provides for the conditions that an applicant must satisfy. Provided that either the applicant *claims* an interest in the disclaimed property or is under a liability as specified in subsection (1)(b), the applicant will have *locus standi* and the court is not further concerned with subsection (1). Instead, the court is concerned only with determining whether the conditions of paragraphs (a) or (b) of subsection (2) and (in the case of paragraph (b)) subsection (3) are satisfied. Whether the applicant is "entitled to" the disclaimed property is unrelated to the interest claimed by the applicant for the purposes of subsection (1).

23. I do not accept this analysis. There is an express connection between paragraph (b) of each of subsections (1) and (2) and, in my judgment, a necessarily implicit connection between paragraph (a) of each subsection. The judge was, in my view, right to say that the question was "does the interest claimed by the applicant entitle him to the property". Entitlement to the property does not here mean an absolute entitlement. If it did, it would not be necessary to have subsection (2)(a). Rather, it means that the court will make a vesting order in favour of the person whose interest in the disclaimed property is such as, in the judgment of the court, to entitle the applicant to the property in the circumstances of the case. There may well be competing interests and the court will have to choose between them. Mr Butler referred to the decision of this court in *In re Finley* (1888) 21 QBD 475 and other cases which show that a vesting order may be made in favour of B on the application of A. While that is true, the court will not make a vesting order in favour of a person against that person's will. These cases illustrate only that an applicant can put a potential claimant to their

election of either accepting a vesting order in their favour or being excluded from any claim to the property. They say nothing about the usual case where the application is for a vesting order in the applicant's favour.

24. As I will later mention when referring to the decision in *Re Vedmay Ltd*, I am not sure the judge was right to say that the relevant interest must be a proprietary interest, in the strict sense of that term, but the judge was clearly right that the applicant must establish that he has such an interest in the disclaimed property as to be, in the court's view, "entitled to" the disclaimed property.

25. It was Mr Butler's case that Mr Leon had an interest in the Lease and that he was entitled to it.

26. Mr Butler submitted that Mr Leon had an interest in the Lease on two bases, his position as co-mortgagor and an entitlement to the equity of redemption in the Lease, although he suggested that they may be two sides of the same coin. The Chief Master had accepted that both these features gave Mr Leon an interest in the Lease and that a vesting order should be made "under section 1017(1)(a)". As the judge noted, it is section 1017(2)(a) that governs the making of a vesting order but I feel no doubt that the Chief Master would have decided, and may well have had in mind, that Mr Leon was "entitled to" the Lease for the purposes of section 1017(2)(a).

27. I should record that Mr Butler expressly disavowed any reliance on Mr Leon's ownership of the entire share capital of Frinton as giving him an interest in the Lease. He was plainly right to do so. The Chief Master found as a fact that Frinton did not hold the Lease on trust for Mr Leon but was beneficially owned by Frinton, a finding that was not the subject of an appeal. To attribute an interest in the Lease to Mr Leon in those circumstances would necessarily involve a piercing of the corporate veil which could not be justified, having regard to the decision of the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415. Mr Butler did, however, place some reliance on Mr Leon's ownership of Frinton and hence his "ultimate ownership" of the Lease as a factor supporting the making of a vesting order in Mr Leon's favour in the exercise of the court's discretion under section 1017.

28. Taking first Mr Leon's position as "co-mortgagor" under the terms of the Mortgage, this might suggest that he was co-owner of the Lease with Frinton and was therefore, with Frinton, mortgaging it in favour of the mortgagee. There is, however, no basis for any such co-ownership of the Lease and none is claimed by Mr Leon. The reason for describing Mr Leon as a co-mortgagor is clear from clause B of the Mortgage which I have quoted above. He charged "*any* right or interest in the property or its proceeds of sale which he/she *may* have" (emphasis added). Clause B did not pre-suppose that Mr Leon had any right or interest in the Lease but provided only that, *if* Mr Leon had any such right or interest, he charged it. But, subject to the alternative ground of an entitlement to the equity of redemption, it is not contended that he in fact had any such right or interest. His position as co-mortgagor cannot, of itself, give Mr Leon any interest in the Lease.

29. As regards his alternative ground, Mr Butler relied on the right of Mr Leon, as a co-debtor with Frinton, to pay the outstanding loan and thereby redeem the Mortgage. Mr Butler submitted that the equity of redemption is the right, on payment of the mortgage debt, to recover the property. This, however, is to confuse the right of the

mortgagor of the property, or of a co-debtor or a surety (see *Green v Wynn* (1869) 4 Ch App 204, on which Mr Butler relied), to redeem a mortgage with the equity of redemption. The equity of redemption is the interest of the *owner* of the property, subject to the mortgage. As it is put in *Megarry & Wade: The Law of Real Property* (9th ed., 2019) at 23-018, the mortgagor's equity of redemption is "an interest in the land which includes the right to redeem it, but is much more than a mere right of redemption". If a surety redeems a mortgage, the property does not thereby become the property of the surety. The most that the surety may gain by way of a proprietary interest is subrogation to the rights of the mortgagee. The surety has no interest in the mortgaged property unless and until the surety redeems the mortgage. It would in this case be open to Mr Leon to repay the Loan in accordance with its terms and thereby be subrogated to Kensington's rights, entitling him to sell the Lease, but, like the order under appeal, that would leave open the question of who should receive the surplus.

30. Mr Butler sought support for his submissions in the judgment of Mr Gavin Lightman QC (as he then was) in *Re Vedmay Ltd* (1993) 26 HLR 70. Statutory tenants of two flats forming parts of a single demise under a head lease of five flats and four shops applied for vesting orders of the flats after their landlord Vedmay Limited (and the lessee under the head lease) was dissolved following its liquidation. Sections 181-182 of the Insolvency Act 1986 contain provisions governing the making of vesting orders of property disclaimed by a liquidator, which are materially the same as sections 1017-1018 of the Companies Act. An issue of costs arose when the applicants applied to discontinue their application.

31. Mr Lightman held that, although it was well established that statutory tenants under the Rent Acts had no proprietary interest in the property they occupied but had a statutory "status of irremovability", they had an "interest in the disclaimed property" for the purposes of the equivalent of section 1017(1)(a). Normally, it would not be necessary for a statutory tenant to protect their position by a vesting order because their statutory right of occupation is good against all the world: see the judgments in this court in *Jessamine Investment Co v Schwartz* [1978] QB 264. This was not the case in *Re Vedmay* because the head lease demised business as well as residential property and was due to expire seven days after the hearing.

32. In holding that statutory tenants had a sufficient interest, Mr Lightman said at p.73 that the term "interest" was not in that context confined to a proprietary interest but extended to "any financial interest in the subsistence or otherwise of the lease and includes, in particular, any interest that would be adversely affected by the disclaimer". In my judgment, this is far too wide a reading of "an interest in the disclaimed property" for which there is no basis in the authorities or in the statutory context. Mr Lightman drew support for his suggested rationale from decisions that a lessor is a person with an "interest in the disclaimed property", particularly the decision of this court in *In re Finley*. While those decisions do not, in my judgment, provide support for the expansive test proposed by Mr Lightman, it is fair to say that the precise analysis of the position of a lessor as a person interested in disclaimed property is not straightforward. It is not clear that it can be reconciled with a requirement that a lessor should have a proprietary interest, in a strict sense, in the disclaimed property, if that is taken to mean the disclaimed leasehold interest. It is not a question that arises for decision on this appeal.

33. Whether *Re Vedmay* was wrongly decided is also not a question that needs to be decided on this appeal. It might be said that the special rights of a statutory tenant are such as to constitute an interest for the purposes of section 1017. In saying this, I have not overlooked that this court, in refusing permission to appeal in a case on very different facts, held that *Re Vedmay* could not be read as requiring any court "to take notice of any such interest as does not constitute an interest in the property"; see *Lloyds Bank SF Nominees v Aladdin Ltd* [1996] 1 BCLC 720. On any footing, it is clear that there is nothing in *Re Vedmay* that can assist Mr Leon in the present case.

34. I turn therefore to Mr Leon's reliance on section 1017(1)(b) and (2)(b). It is common ground that he is "under a liability in respect of the disclaimed property that is not discharged by the disclaimer". The liability in question was identified below as his liability as co-debtor for the loan. I am doubtful that this is right, as the loan was unconnected with the Lease and was advanced more than four years before the Lease was substituted as security in 2007. However, Mr Leon is clearly under a liability in respect of the Lease by virtue of paragraphs 4.1 and 11 of the Mortgage Conditions, which require him, as well as Frinton, to "keep to the terms" of the Lease. The dissolution of Frinton and the Crown's disclaimer of the Lease did not affect Mr Leon's liability in this respect: section 1015(2).

35. Under section 1017(2)(b), the court may make a vesting order of the Lease in favour of Mr Leon, but it may do so, by reason of section 1017(3), "only where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer".

36. Reference must also be made to section 1018 which is specifically directed at vesting orders in respect of leasehold interests and could affect both Mr Leon and Kensington. It provides:

> "(1) The court must not make an order under section 1017 vesting property of a leasehold nature in a person claiming under the company as underlessee or mortgagee except on terms making that person –
>
> (a) subject to the same liabilities and obligations as those to which the company was subject under the lease, or
>
> (b) if the court thinks fit, subject to the same liabilities and obligations as if the lease had been assigned to him.
>
> (2) Where the order relates to only part of the property comprised in the lease, subsection (1) applies as if the lease had comprised only the property comprised in the vesting order.
>
> (3) A person claiming under the company as underlessee or mortgagee who declines to accept a vesting order on such terms is excluded from all interest in the property.
>
> (4) If there is no person claiming under the company who is willing to accept an order on such terms, the court has power to vest the company's estate and interest in the property in any such person

> who is liable (whether personally or in a representative character, and whether alone or jointly with the company) to perform the lessee's covenants in the lease.
>
> (5) The court may vest that estate and interest in such a person freed and discharged from all estates, incumbrances and interests by the company."

37. The position taken by Kensington was (and remains) that it was content for a vesting order to be made in Mr Leon's favour but, if an order were not made in his favour, it was willing to accept a vesting order in its favour on terms satisfying section 1018(1). If Kensington had not been willing to accept a vesting order in its favour, a vesting order could have been made in Mr Leon's favour under section 1018(4).

38. The Chief Master decided the application on the basis that Mr Leon had an interest in the Lease. For the reasons given above, I consider that the judge was right to hold that Mr Leon had no interest in the Lease. Although saying that it was strictly unnecessary to do so, the Chief Master went on to consider the application on the alternative basis of Mr Leon's liability in respect of the Lease.

39. In considering the effect of section 1017(3), the Chief Master said at [42]:

> "Compensation in section 1017(3) seems to be used in the sense that a vesting order will counter-balance the liability. It is not necessary that the benefit of the vesting order directly matches the liability, but it seems to me there must be a reasonable relationship between the liability and the benefit to be obtained from the making of a vesting order. If there is a substantial mis-match, the court might consider it is not just to make the order. Thus, if the liability were to be very small, and the value of the asset to be vested is substantial, it might not be just to make the vesting order for the purpose of compensating the applicant."

40. I agree with the analysis in the first two sentences of this paragraph.

41. The Chief Master concluded at [49] that there were "powerful reasons why a vesting order should be made in [Mr Leon's] favour and he is amply able to meet the test contained in section 1017(3)". He summarised his reasons as follows:

> "i. Mr Leon is liable under the mortgage and he is now the only person with such a liability.
>
> ii. He is out of time for applying to restore Frinton to the register and his only option is to make this application under section 1017.
>
> iii. Mr Leon has met the liability under the mortgage since 2009 at least. He may have been paying the liability for some time prior to that date.

iv. Although Westminster has provided a great deal of evidence about Mr Leon's background, some of which cast him in a bad light, there is no evidence from Westminster about why the court should not make an order in Mr Leon's favour. There is, for example, no evidence to show that Westminster dealt with the property as a freeholder after Frinton was dissolved [or] took steps to end the lease, by service of a section 146 notice. In fact, the evidence shows that it continued to deal with Mr Leon for some time.

v. There is no application by Westminster as freeholder for a vesting order. There was only the belated suggestion that Westminster would be willing to discharge the mortgage as a preliminary step to taking back the property.

vi. The application for a vesting order made by Mr Leon is not opposed by Kensington.

vii. The evidence shows that Mr Leon has treated the lease as his own by paying the mortgage and receiving the rental income from the property.

viii. If the court is faced with a choice between Mr Leon or Westminster obtaining a windfall, the choice is readily resolved by such a windfall accruing to Mr Leon in view of his historic interest in the property and liability under the mortgage which will continue for the remainder of its term. A landlord may obtain a windfall in certain circumstances, such as where a valuable lease is forfeited. There is, however, no reason why landlord's position should be given preference over that of a co-mortgagor."

42. Mr Butler submitted, correctly in my view, that this was an evaluative judgment by the Chief Master, with which an appeal court will interfere only if satisfied that it was wrong. A conclusion by the appeal court that it would have reached a different view is not by itself sufficient. It was not, strictly speaking, the exercise of a discretion (as counsel for Mr Leon then appearing submitted and the judge accepted), but the practical effect on the approach of an appeal court in this case is much the same.

43. The judge considered that the Chief Master was wrong in his judgment on the application of section 1017(3) to the facts of the case. He said at [33] that the decision "was flawed, because he did not analyse the effect of the disclaimer upon Mr Leon or whether it would be just to compensate him in respect of the disclaimer, as required by section 1017(3)". He held that a vesting order in favour of Mr Leon would not satisfy section 1017(3). He said at [35]:

> "What would Mr Leon be being compensated for if an order was made in his favour? He would not be being compensated for the loss of the Lease, because that was not his property before the disclaimer, it was Frinton's and then the Crown's. This is unaffected by the fact that, beneficially, he was the sole owner of Frinton. Frinton was a separate

> legal person, and Mr Leon failed to establish that it held the Lease on trust for him."

44. Mr Butler submitted that the judge was wrong to say that the Chief Master had not analysed either the effect of the disclaimer or whether it would be just to make a vesting order for the purpose of compensating Mr Leon. He pointed out that the Chief Master had prefaced his reasons with an express reference to section 1017(3) and had stated that Mr Leon was "amply able" to meet the test contained in that subsection, and his reasons contained multiple references to Mr Leon's past servicing of the mortgage and his continuing liability to do so.

45. I have earlier said that the relevant liability of Mr Leon is his liability to perform the terms of the Lease, whereas the Chief Master focused on his liability in respect of the loan. But even if the Chief Master was right to treat that as a liability in respect of the Lease, the judge was in my view right to say that he did not really address the question of the compensation which a vesting order would provide to Mr Leon. Rather, he regarded a vesting order as the just outcome, having regard to the reasons he gave. The reasons listed in sub-paragraphs (ii), (iii), (iv), (v) and (vi) have little or no connection with the issue of compensation.

46. In addressing the question of a windfall in sub-paragraph (viii), the Chief Master was concerned to decide whether Mr Leon or Westminster was more deserving. With respect, he seems to have lost sight of the principle that he correctly stated in paragraph [42] of his judgment and which I have quoted above, that there must be a reasonable relationship between Mr Leon's liability and the benefit to be obtained from a vesting order. Even if his liability were taken as his liability for the loan, that stood at £392,000 and the value of the Lease was between £800,000 and £1 million. Further, the Chief Master erred in sub-paragraph (viii) in regarding Mr Leon's position as a "co-mortgagor" as relevant.

47. Having set aside the Chief Master's determination, the judge reconsidered the question and, based largely on paragraph [35] of his judgment which I have quoted above, he concluded that a vesting order in favour of Mr Leon would not satisfy section 1017(3) and could not therefore be made. In that event, it was common ground that a vesting order should be made in favour of Kensington as mortgagee. Kensington would accordingly obtain no benefit beyond its security interest.

48. Mr Butler challenged this conclusion on two principal grounds. First, it disregarded the value of Mr Leon's shareholding in Frinton and that he could have been seen as the ultimate owner of the Lease. Second, it did not take account of the fact that his liabilities and obligations in respect of the Lease were unaffected by the disclaimer, but he had lost the means of ensuring their discharge and performance.

49. Neither of these considerations, in my judgment, undermines the judge's conclusion. The loss of Mr Leon's shareholding in Frinton and the control that gave him over Frinton and its assets was the result of the dissolution of Frinton, not the disclaimer of the Lease. It was, of course, open to Mr Leon to apply within six years to restore Frinton to the register of companies but he did not do so, and no satisfactory explanation has been given for his failure to do so. As for the liabilities of Mr Leon in respect of the Lease, this is a repetition of the argument already deployed in favour of the Chief Master's conclusion and rejected. Once the position is reached that a vesting

order in Mr Leon's favour does not satisfy section 1017(3), it inevitably follows that such order cannot be made.

50. Mr Leon is not deprived of protection as regards his liabilities, which are owed exclusively to Kensington as mortgagee. The vesting order in Kensington's favour will enable it to realise its security in the event of any default and the value of the Lease is such that it will be fully recouped out of the proceeds of sale.

51. For these reasons, I would dismiss the appeal.

Lord Justice Simon:

52. I agree.

Lord Justice Lewison:

53. I also agree.