Neutral Citation Number: [2024] EWCA Civ 298

Case No: CA 2023 001449

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BUSINESS AND PROPERTY COURTS APPEALS (ChD)
MR JUSTICE JONATHAN RICHARDS
BL-2020-002144

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between:

JOSEPH DONOVAN	**Appellant**
- and -	
PRESCOTT PLACE FREEHOLDER LIMITED & OTHERS	**Respondents**

-and-

TOGETHER COMMERCIAL FINANCE LTD	**Interested Party**

- -
- -

Nathaniel Duckworth (instructed by **Thursfields Legal Limited**) for the **Appellant**
Michael Walsh and **Annie Higgo** (instructed by **Judge & Priestley LLP**) for the **1st - 8th Respondents**
Jamal Demachkie (instructed by **Priority Law Limited**) for the **Interested Party**
The **9th Respondent** did not appear and was not represented

Hearing dates: 12 & 13 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin and Lord Justice Arnold:

1. This appeal is concerned with the process by which tenants may purchase the freehold of premises pursuant to the Landlord and Tenant Act 1987 (the "1987 Act"). It is concerned, in particular, with: whether there was an abuse of process in the *Henderson v Henderson* sense because the Appellant, Mr Joseph Donovan ("Mr Donovan"), did not raise the issue of his alleged beneficial interest under a trust in proceedings in the County Court or in proceedings before the First Tier Tribunal (Property Chamber) (the "FTT"); the nature and effect of an order made under section 19 of the 1987 Act; and the effect of the creation of equitable leases in relation to part of the premises in question after a section 19 order was made.

Background and parties

2. The factual background to this matter is complex. Richards J sets it out at [24] to [52] of his first judgment in this matter, the neutral citation of which is [2023] EWHC 435 (Ch) (the "First Judgment"). Reference should be made to those paragraphs. What appears below is a summary only. The references in this judgment to the judge's decision, are to the paragraph numbers in his First Judgment unless otherwise stated.

3. On 5 July 2004, Mr Stephen Donovan, Mr Donovan's brother, acquired the freehold of the property known as 34-36 Prescott Place, Clapham, London (the "Property") and executed a deed declaring it to be held on trust for Mr Donovan ("the 2004 Trust Deed").

4. The Property was redeveloped in or around 2006. Those works resulted in the creation of four residential flats which were let on assured shorthold tenancies, and in 2013 long leases of those flats were granted to the Second to Eighth Respondents. I will refer to them together as the "Tenants". In 2014-2015, the ground floor of the Property was converted into two further flats which became known as Flats 36C and 36E (the "Flats").

5. On 7 May 2014, Stephen Donovan executed a transfer of the freehold title to Mr Constantin Batin, the Ninth Respondent (the "2014 Transfer"). He did so without having first served offer notices under section 5 of the 1987 Act. The transfer of the freehold title to the Property was registered at HM Land Registry with a deemed date of registration of 29 May 2014.

6. It was Mr Donovan's pleaded case that on or around 29 May 2014, he and Mr Batin executed a trust deed, referred to as the 2014 Trust Deed, under which Mr Batin declared that he held the Property as a bare nominee for Mr Donovan. The judge found that, in fact, the 2014 Trust Deed was executed at some stage between 4 April 2019 and 7 June 2019, but it was backdated to 29 May 2014 to give it the appearance of having been executed on that earlier date [116]. The judge stated that it was backdated to seek to bolster, after the event, the argument that the 2014 Trust Deed was effected pursuant to an agreement or understanding in 2014 that Mr Batin was to take the Property on trust and that backdating can only have been intended to deceive [138]. Those findings are not challenged on this appeal.

7. It was also alleged that on 30 May 2014, Mr Batin had granted Mr Donovan 999 year leases of the Flats (the "Leases"). The judge held that, in fact, the Leases were executed

at some point after an order under section 19(1) of the 1987 Act had been made in the County Court on 25 October 2019 and before 14 January 2021 [33] and [135] – [136]. The Leases took effect in equity because they were not registered at the Land Registry.

8. In 2017, the Interested Party, Together Commercial Finance Limited ("Together") advanced £950,000 to Mr Batin and Mr Donovan which was secured on the Property. It is the registered proprietor of a first legal charge dated 29 August 2017. The charge was registered at the Land Registry on 11 September 2017 (the "Charge").

9. On 9 November 2018, the Tenants served notice on Mr Batin under section 12B(2) of the 1987 Act requiring him to transfer the estate or interest which was the subject matter of the original disposal to him to the First Respondent, Prescott Place Freeholders Limited ("the Nominee") "on the same terms as he had acquired the Property or, alternatively, on such terms as might be provided for by the First-tier Tribunal (Property Chamber)" (the "Section 12B Notice").

10. Mr Batin failed to comply. Accordingly, on 25 February 2019, the Tenants issued proceedings in the County Court for an order under section 19(1) of the 1987 Act compelling Mr Batin to comply with his duty under section 12B(2) ("the County Court Proceedings").

11. On 29 May 2019, Mr Donovan's solicitors wrote to the Tenants' solicitors (the "29 May Letter"). Amongst other things, they stated that: their client was the beneficial owner of the Property; he intended to intervene in the County Court Proceedings; he intended to defend the claim in the County Court for an order under section 19(1) of the 1987 Act on the basis of section 4(2)(g) of the 1987 Act; an application by the Tenants to debar Mr Batin from taking further part in the County Court Proceedings should be stayed pending representations in relation to Mr Donovan's defence to the claim; and that the Tenants' solicitors should reply by return to avoid the need for them to apply for a stay. The representations were not made, however, and despite chasing the matter, the Tenants' solicitors were not provided with documentation to support the alleged beneficial interest.

12. In the meantime, Mr Batin did not participate in the County Court Proceedings, and on 17 June 2019 an order was made debarring him from taking any further part in them. The Tenants did not apply to join Mr Donovan as a defendant to the County Court Proceedings.

13. The trial in the County Court was listed for 25 October 2019. The Tenants' solicitors sent a copy of the notice of hearing to Mr Donovan and explained that, in view of the fact that he had not provided any further information substantiating his claim to be the beneficial owner of the Property, they would oppose any belated application he might make to join the County Court Proceedings.

14. At the trial of the County Court Proceedings, on 25 October 2019, counsel on behalf of Mr Donovan did apply to be made a party to the proceedings, and for an adjournment. That application was made on the basis that the transfer to Mr Batin had not been a "relevant disposal" for the purposes of the 1987 Act because it had been a gratuitous change of trustee to which the exemption in section 4(2)(g) of the 1987 Act applies, as evidenced by the 2004 Trust Deed, the 2014 Trust Deed and the 2014 Transfer. Counsel for the Tenants opposed this application.

15. HHJ Lethem dismissed Mr Donovan's application to be joined as a party to the County Court Proceedings and refused to grant a stay. He made no findings as to the effect, if any, of the two declarations of trust. His refusal was based largely on his finding that Mr Donovan had known of the County Court Proceedings since at least 29 May 2019 but, despite being given all reasonable opportunity to make his case, he had not provided the alleged declarations of trust to the Tenants' solicitors or otherwise done anything to advance his arguments based on section 4(2)(g) of the 1987 Act. Thus his application was made too late.

16. HHJ Lethem proceeded to deal with the application for a section 19(1) order. In his oral judgment he noted that the task of the County Court was "to simply require the transfer, and to leave it to the First-tier Property Tribunal to set out the necessary terms of that acquisition." He made the section 19(1) order which had been sought by the Tenants. It provided, so far as material, that:

> "2. By no later than 4:00pm on 22 November 2019, the Defendant shall comply with the purchase notice pursuant to section 12B of the Landlord and Tenant Act 1987 dated 12 December 2018 in the following manner:
>
> (i) The Defendant shall transfer to the First Claimant the freehold interest of [the Property]; and
>
> (ii) On the same terms as the Defendant acquired the freehold of the Property, alternatively on terms as may be determined by the Appropriate Tribunal." (the "Section 19 Order")

17. On 27 February 2020, the Nominee issued proceedings in the First-tier Tribunal pursuant to section 13 of the 1987 Act to determine the consideration for the transfer of the freehold of the Property ("the FTT Proceedings"). The Tenants did not join Mr Donovan as a party to those proceedings and Mr Donovan did not apply to be joined.

18. On 7 November 2020, Mr Donovan began marketing the Flats for sale on long leases and erected "for sale" signs at the Property. As a result, on 8 December 2020, the Tenants issued Part 8 proceedings in the High Court against Mr Batin seeking: a permanent injunction against Mr Batin preventing him from granting any estate or interest out of the freehold of the Property; and a permanent injunction prohibiting Mr Donovan from registering the Leases or any other leases or interests Mr Batin may have granted him. Further, or alternatively, the Tenants sought declarations that: the Leases were void and could not be registered; after the making of the Section 19 Order, Mr Batin could not grant any estate or interest out of the freehold estate of the Property which would be capable of binding the Nominee's right to be registered as the proprietor free of charges and incumbrances not ordered to bind the estate under section 12B(5) of the 1987 Act; and that the effect of the 1987 Act is that upon registration of the Nominee as proprietor of the freehold estate of the Property it would take free of any estate or interest granted by Mr Batin after the date of the order and of the Charge, pursuant to section 12B(5)(a) of the 1987 Act. The Tenants also sought an interim injunction restraining marketing or disposal of the Flats ("the High Court Proceedings"). It was these proceedings which ultimately came before the judge.

19. The Nominee and the Tenants were granted interim injunctions at hearings on 16 December 2020, 15 and 18 January and 8 February 2021 and Mr Donovan was joined to the High Court Proceedings. At the hearing on 8 February 2021, interim orders were made which restrained Mr Batin and Mr Donovan from registering the Leases or granting or creating any other interest in respect of the Property until further order upon the Nominee's undertaking not to attempt to register any transfer of the freehold until the final disposal of the High Court Proceedings. Directions were then made in relation to pleadings.

20. In the meantime, on 3 March 2021, Mr Donovan applied for the FTT Proceedings to be adjourned in light of the High Court Proceedings. The FTT did not grant an adjournment and made a direction that, if Mr Donovan wished to participate in the FTT Proceedings, he needed to apply by 8 March 2021. He did not do so, and instead attended the hearing on 10 March 2021 by his solicitor, who explained that Mr Donovan agreed with the Tenants and the Nominee that the 2014 Transfer was for nil consideration, not the release of a £125,000 debt and that he did not propose, therefore, to take any formal part in the FTT Proceedings. In fact, in its Decision dated 12 April 2021, the FTT decided that the consideration paid under the transfer from Stephen Donovan to Mr Batin was £125,000.

21. As a result of arrears in relation to the loan to Mr Batin and Mr Donovan, on 14 October 2022, Together appointed receivers pursuant to the Law of Property Act 1925.

22. In January 2023, the High Court Proceedings came before the judge sitting in the Business and Property Courts. Mr Batin played no active part in those proceedings. Mr Donovan, on the other hand, filed a Defence and Counterclaim asserting that Mr Batin held the freehold title to the Property on trust for him and that he was entitled to the Leases and that those leases take effect in equity pursuant to s7(2)(b) of the Land Registration Act 2002 (the "LRA"). It was pleaded that the 2014 Transfer had not been a "relevant disposal" for the purposes of section 4 of the 1987 Act because it was excluded by section 4(2)(g) and therefore, that the Tenants were not entitled to have served a purchase notice under section 12B(2). It was nevertheless stated that it was accepted by Mr Donovan that it was no longer open to Mr Batin, who was bound by the Section 19 Order, to contest the Nominee's right to have the interest that was the subject matter of the 2014 Transfer transferred to it.

23. In summary, in the First Judgment, the judge held, amongst other things, that:

    i) it was an abuse of process for Mr Donovan to make the argument in the High Court Proceedings that he has a beneficial interest in the Property whether by means of a constructive trust to which Mr Batin took subject at the time of the transfer of the freehold interest in 2014 or the 2014 Trust Deed. The assertion that Mr Batin held the freehold interest in the Property in trust for Mr Donovan should have been raised in the County Court [58] – [60], [62] [71], [72] – [75], [78] – [80] and [143ii)];

    ii) the 2004 Trust Deed was executed on the date it bears [91] and [143i)];

    iii) the 2014 Transfer was in consideration for the release of some liability owed to Mr Batin [97];

iv) the 2014 Trust Deed was executed at some time between 4 April 2019 and 7 June 2019 [116] and [143i)] and had legal effect from the date of its actual execution [140];

v) Mr Batin did not hold the Property on trust for Mr Donovan when the section 12B Notice was served. He only came to do so when the 2014 Trust Deed was executed [143iii)];

vi) Mr Donovan was not in actual occupation of the Property on 29 May 2014 [126];

vii) The Leases were executed after the Section 19 Order was made and at some point between 25 October 2019 (the date of the Section 19 Order) and 14 January 2021 [135] and [136];

viii) The purpose of the Leases was to devalue the freehold interest that the Nominee was entitled to acquire pursuant to the Section 19 Order [139]; and

ix) The Nominee will take free of charges referred to in section 12B(5)(a) of the 1987 Act unless the County Court makes an order to the contrary and in the absence of an order pursuant to section 12B(5)(b), the ordinary principles of land law apply to determine what incumbrances the Nominee takes subject to when Mr Batin complies with the Section 19 Order [143iv)].

24. After the First Judgment had been handed down, Together applied to be joined as a party to the High Court Proceedings pursuant to CPR 19.2. The judge dealt with that application in his second judgment in relation to consequential matters, the neutral citation of which is [2023] EWHC 1445 (Ch) (the "Second Judgment"). He allowed the application [6] – [17] of the Second Judgment.

25. In summary, in his Second Judgment, the judge held that:

i) *Jones v Mahmut* [2018] 1 WLR 6051 is not authority for the proposition that an order under section 19 of the 1987 Act is to be treated as creating an equitable interest in land [28]- [30];

ii) The Section 19 Order, nevertheless, constituted an interest in land from the moment it was made [36] – [42];

iii) The Section 19 Order takes priority over the Leases as a result of section 28 Land Registration Act 2002, and therefore the freehold would not be encumbered by them when transferred to the Nominee [43] – [61];

iv) The Tenants had standing to seek injunctions restraining Mr Donovan's ability to protect the Leases [65] – [71]; and

v) The Court has a discretion whether to grant such injunctions and should do so [72] – [82].

Grounds of Appeal

26. The Appellant seeks to appeal the judge's order dated 7 July 2023, on the basis that the Judge: (1) erred in concluding that Mr Donovan's reliance upon his alleged beneficial

interest in the Property before the judge was an abuse of process in the *Henderson v Henderson* sense; (2(i)) erred in holding that the Section 19 Order created an immediate equitable interest in land; (2(ii)) even if he was correct to hold that the Section 19 Order created an immediate equitable interest in land, he erred in law in holding that the registered transfer of the legal estate would result in Mr Donovan's equitable leases ceasing to bind the legal estate; and (2(iii)) erred in law in holding that Mr Donovan should be restrained by injunction from protecting his equitable leases by notices in the register and from occupying the Flats in the period leading up to the transfer of the freehold to the Nominee.

27. By a Respondent's Notice dated 16 October 2023, the Nominee and the Tenants seek to uphold the judge's order on the additional or alternative grounds that: the decision in *Jones v Mahmut* [2018] 1 WLR 6051 applies; and that an injunction ought to have been granted pursuant to the principle in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] AC 304.

Relevant legislation

28. Before turning to the detail of this matter, it is helpful to have the general scheme of the 1987 Act in mind. The 1987 Act gives "qualifying tenants" a right of first refusal when their landlord proposes to dispose of the reversionary interest. Accordingly, section 1 provides that a landlord cannot make a "relevant disposal" affecting premises to which the 1987 Act applies unless the landlord first gives qualifying tenants a notice under section 5 offering to dispose of the reversionary interest to them on the same terms. In this case, there has never been any dispute that the Property is within the scope of 1987 Act and that the Tenants are "qualifying tenants" for the purposes of the 1987 Act.

29. A "relevant disposal" is defined in section 4. As already mentioned, section 4(2) contains exceptions, the relevant one for these purposes being section 4(2)(g). It provides that "a disposal consisting of the transfer of an estate or interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee or in connection with the discharge of any trustee" is not a relevant disposal. It was this provision which Mr Donovan wished to pray in aid if he had been joined as a party in the County Court Proceedings.

30. Section 10A contains criminal sanctions if a landlord, in breach of its obligations, makes a relevant disposal without making a requisite offer to qualifying tenants.

31. Under sections 12A – 12D, the requisite majority of tenants have the right to compel the landlord, or, where the landlord has disposed of the interest, the purchaser, to transfer the interest that was the subject matter of the original disposal to a nominated person, on the same terms as the original disposal was made. That right is exercised by the service of a purchase notice under section 12B(2). It provides as follows:

> "(2) The requisite majority of qualifying tenants of the constituent flats may serve a notice (a "purchase notice") on the purchaser requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable), to a person or persons nominated for the purposes of

> this section by any such majority of qualifying tenants of those flats."

Section 12B(5) is also relevant both in relation to Mr Donovan's arguments and those on behalf of Together. It is in the following terms:

> "(5) Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal become subject to any charge or other incumbrance, then, unless the court by order directs otherwise—
>
> (a) in the case of a charge to secure the payment of money or the performance of any other obligation by the purchaser or any other person, the instrument by virtue of which the property is disposed of by the purchaser to the person or persons nominated for the purposes of this section shall (subject to the provisions of Part I of Schedule 1) operate to discharge the property from that charge; and
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> (b) in the case of any other incumbrance, the property shall be so disposed of subject to the incumbrance but with a reduction in the consideration payable to the purchaser corresponding to the amount by which the existence of the incumbrance reduces the value of the property.

In this case, the Court has not directed otherwise. It is common ground, therefore, that the transfer as a result of the Section 19 Order would have the effect of discharging the Property from Together's charge pursuant to section 12B(5)(a). In those circumstances, paragraph 2 of Schedule 1 of the 1987 Act provides that the tenants' nominee must pay over the relevant part of the consideration direct to the charge holder. In the case of incumbrances under section 12B(5)(b), such as the Leases, unless the court directs otherwise, the property is transferred subject to the incumbrance but subject to a reduced price reflecting the value of the incumbrance.

32. As in this case, if the "purchaser" being the person who acquired the property from the landlord without it first having been offered to qualifying tenants under section 1, fails to comply with a notice served under section 12B, the tenants' nominee can serve a 14-day warning notice under section 19(2) and thereafter can apply for an order under section 19(1) which provides as follows:

> "(1) The court may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision of this Part to make good the default within such time as is specified in the order."

If a party subject to a section 19(1) order proposes to transfer the property to someone other than the tenants' nominee, that transfer could be restrained by an injunction granted pursuant to section 19(3).

33. The 1987 Act also contains provisions about jurisdiction. Section 13(1) provides that the appropriate tribunal (the FTT) has jurisdiction to hear and determine any question arising in relation to any matters specified in a notice under section 12A, 12B or 12C, amongst other things. It is for that reason that the FTT determined the question of the consideration in this case. Further, by section 52 of the 1987 Act, the County Court has jurisdiction to hear and determine any question arising from Part I of the 1987 Act other than a question falling within the jurisdiction of the appropriate tribunal.

Ground 1 - Henderson v Henderson - Abuse of process

34. The judge's central reasoning in relation to abuse of process is at [71] – [75] of the First Judgment. He accepted that Mr Donovan's argument that the fact the Nominee would take the freehold interest in the Property subject to Mr Donovan's rights under the 2014 Trust Deed, if Mr Donovan was in actual occupation at the time of the transfer, was not inconsistent with the making of the Section 19 Order [71]. As he described it, it was an argument about the effect of a Form TR1 executed in compliance with the Section 19 Order.

35. He concluded, nevertheless, that having regard to the history of the proceedings, it represented an abuse of process for Mr Donovan to make the argument in the High Court Proceedings. He went on at [72] – [75] as follows:

> "72. . . . As I have explained above, the county court and FTT are not required by the Act to produce a "report on title" to determine all property interests that will bind C1. For example, interests could be overlooked in those proceedings but nevertheless bind C1 as a consequence of ordinary principles of land law applying to the transfer by which C1 acquires that interest. However, that is not this case. The only people with knowledge of the 2014 Trust Deed and its terms were D1 and D2 since no hint of D2's averred beneficial interest could be found at HM Land Registry. D1 and D2 would have been aware that, if C1 truly would take the Property subject to D2's equitable interest, that would have had a material effect on the value of C1's interest. In that case, the county court would need to consider the exercise of its power under s12B(5) to direct that C1 should take free of D2's interest and also what, if any, direction the county court would make under s12B(5) as to the effect that the existence of D2's interest should have on the consideration payable. In these circumstances, D2's assertion that he held rights under the 2014 Trust should have been raised in the County Court Proceedings.
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> 73. That conclusion is only fortified by considering the consequences of D2 not raising the issue in the County Court Proceedings. The Claimants have, in the words of Lord Bingham in *Barrow v Bankside Agency Limited*, been oppressed by successive suits when one (proceedings in the county court and the FTT under the 1987 Act) would do. It is fortified further still by my finding, explained in paragraph 135 below, that the 2014 Trust Deed has been backdated to make it appear to have been

> executed in May 2014, even though it was actually executed in 2019. Put shortly, D1 and D2 have between them created a backdated document and, instead of ensuring that this document (or the fact that it was backdated) was properly drawn to the attention of the county court they have waited until after the 1987 Act proceedings have concluded before relying on that document to seek to deprive the Section 19 Order of much of the benefits that the Claimants could have expected to obtain from it.
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> 74. Nor do I accept that fine debates about the extent of the FTT's jurisdiction as compared with that of the county court can paper over the abusiveness of D2's conduct. As I have explained, the 2014 Trust Deed needed to be mentioned in the county court so that it could, among other matters, consider orders under s12B(5). If the 2014 Trust Deed had been mentioned in the County Court Proceedings there might well have been an effect on the FTT Proceedings. Without deciding the point, the FTT might, for example, have been the proper forum to determine whether the 2014 Trust Deed set out a trust arrangement and, if so, from when. The FTT was probably the appropriate forum to decide what, if any, effect the 2014 Trust Deed would have on the consideration C1 should have to pay D1. That does not alter the conclusion that the 2014 Trust Deed needed to be mentioned in the County Court Proceedings.
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> 75. Finally, I do not accept that the existence of the High Court proceedings excused D2 of the consequences of failing to raise relevant matters relating to the 2014 Trust Deed in the FTT Proceedings. The 1987 Act gives the FTT, rather than the High Court, power to determine questions relevant to matters specified in a notice under s12B. The FTT refused to stay the FTT Proceedings pending conclusion of the High Court proceedings so it is no answer for D2 to say that he chose to raise those matters in the High Court instead of the FTT. In any event, D2's Defence and Counterclaim in the High Court proceedings was served on 22 March 2021, after the hearing in the FTT and after the point at which D1's entitlement to participate in the FTT Proceedings had been significantly constrained because of his failure to comply with directions. Moreover, the High Court proceedings only came about because D1 was seeking to circumvent the effect of the Section 19 Order by offering Flats 36C and 36E for sale. I do not accept that the High Court, rather than the FTT or the county court is the proper venue for the arguments that D2 now seeks to make about the 2014 Trust Deed."

Relevant principles

36. There is no dispute about the principles to be applied in relation to abuse of the court process. The principle was explained by Wigram V-C in *Henderson v Henderson* 1843 3 Hare 100. Put shortly, it precludes a party from raising in subsequent proceedings

matters which were not, but could and should have been raised in earlier ones. The rule applies not only to subsequent litigation between the same parties and their privies but also to parties in the subsequent proceedings who were not joined as parties to the earlier proceedings. Lord Bingham explained the principles applicable to an application to strike out a claim on the basis that it is an abuse of process to bring a claim that could or should have been brought in previous proceedings in his speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1. He summarised the main principles at p 31, in the following terms:

> "But in *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified

> by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

37. Clarke LJ helpfully summarised the principles to be derived from the *Gore- Wood* case in *Dexter v Vlieland Boddy* [2003] EWCA Civ 14 at [49] – [53] in the following way:

> "49. …(i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse or process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits-based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.
>
> 50. Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.
>
> 51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.
>
> 52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.

> 53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits-based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

38. His summary and approach was quoted with approval by Thomas LJ (as he then was) in *Aldi Stores v WSP Group Plc* [2008] 1 WLR 748 with whom Longmore LJ concurred and Wall LJ agreed. Thomas LJ made clear at [16] that the decision to be made is not one of discretion. He explained that instead, the decision involves "the assessment of a large number of factors, to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process." This was emphasised by Longmore LJ. He added at [38] that "it would be troubling if two different judges could come to different conclusions on whether the same facts constituted an abuse of process and yet both be right."

39. Thomas LJ also pointed out that the appellate court will be reluctant to interfere with the decision of the judge where the decision rests on the balancing of the relevant factors. He added that:

> ". . . it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

Appellant's submissions in outline

40. Mr Duckworth argues on behalf of Mr Donovan that it is important to distinguish between Mr Donovan's failure to join the County Court Proceedings from his decision not to join the FTT Proceedings rather to elide the two, which is what he says that the judge did. In summary, in relation to the County Court proceedings, he says that:

(i) the fact that Mr Donovan was not a party to the County Court proceedings weighs heavily in the balance against a finding of *Henderson v Henderson* abuse of process;

(ii) given that it was executed in 2019, the existence or otherwise of Mr Donovan's beneficial interest under the 2014 Trust Deed was not an issue within the County Court Proceedings. The question for the County Court was whether there had been a "relevant disposal" in 2014 and whether Mr Batin should be required to transfer his interest in the Property to the Tenants. The question of whether the freehold estate had become subject to a beneficial interest under a trust in 2019 was not relevant to the County Court's decision about whether to make an order under section 19 of the 1987 Act;

(iii) the Tenants were given notice of Mr Donovan's contention that the freehold of the Property was held on trust for him in the 29 May 2019 Letter, some four months before the trial in the County Court. As a result, the Tenants could have applied to have him

joined as a party in those proceedings and could have invited the County Court to make an order, pursuant to section 12B(5)(b) of the 1987 Act, that the Nominee take free of his interest. They did not do so, but chose instead to have the issues in relation to beneficial interests determined in the High Court Proceedings. Accordingly, there can have been no oppression or harassment of the Tenants by Mr Donovan;

(iv) it was the FTT and not the County Court which had jurisdiction to determine whether Mr Donovan's beneficial interest in the freehold existed, and if so, what effect it had on the price payable by the Nominee. Accordingly, it was quite wrong of the judge to decide that Mr Donovan's failure to join the County Court proceedings was abusive; and furthermore

(v) the judge extended the *Henderson v Henderson* principle beyond its limits. Mr Donovan did not require an order of the County Court in order to continue to rely upon his beneficial interest after the transfer of the legal estate to the Nominee. He could do so by going into actual occupation (see schedule 3 of the 2002 Act). The judge criticised Mr Donovan for not joining the County Court Proceedings on the basis that the Tenants would have benefited from a determination as to whether the interest that they were entitled to acquire under the 1987 Act was the legal estate or absolute ownership of the Property and because it would have been a prompt for the County Court to consider the exercise of the powers under section 12B(5)(b) to eliminate in his interest. This Mr Duckworth argues is beyond the scope of *Henderson v Henderson*. The principle does not require a stranger to intervene in proceedings between other parties in order to a confer a benefit on those parties.

41. In relation to the FTT Proceedings, Mr Duckworth says that it was not an abuse to elect not to intervene and to allow the dispute about the beneficial interest to be determined in the High Court Proceedings (which were running in parallel). Further, in summary:

(i) Mr Donovan was not a party to the FTT Proceedings. He had not been joined by the Tenants who were on notice of his contention in relation to his beneficial interest;

(ii) the issue was the price payable under the transfer to Mr Batin in 2014 and the consideration to be paid by the Nominee. Mr Donovan did not disagree with the approach taken by the Tenants in that regard;

(iii) Mr Donovan had no need for an order from the FTT in order to protect his beneficial interest in the Property. The only purpose of being joined as a party would have been to enable the Tenants to argue that the Trust Deed dated in 2014 but executed in 2019 was void, and therefore not an incumbrance affecting the legal estate. The *Henderson v Henderson* principle does not extend that far;

(iv) the judge's conclusion on this was based erroneously upon the assumption that the High Court became seised of the issue of whether the Trust Deed dated in 2014 was valid on service of the Defence and Counterclaim on 22 March 2021, after the trial of the FTT Proceedings on 10 March 2021 had taken place;

(v) the FTT does not have jurisdiction to grant the injunctive relief sought by the Tenants and therefore, this aspect of the dispute could not have been resolved in the FTT Proceedings. Accordingly, Mr Donovan was right to conclude that the dispute

about the beneficial interest should be determined in the High Court Proceedings instead of the FTT Proceedings;

(vi) the Tenants did not suggest that the issue in relation to the beneficial interest needed to be determined in the FTT Proceedings rather than in the High Court;

(vii) the judge's suggestion that the 1987 Act gives the FTT rather than the High Court, power to determine questions relevant to matters specified in a notice under section 12B is a misreading of the 1987 Act. The High Court jurisdiction is not called into question in the 1987 Act, nor is it stated that the High Court is not appropriate for determining questions relating to section 12B; and

(viii) at its highest, the criticism to be made is that faced with two sets of parallel proceedings in which Mr Donovan could have brought his claim, he opted for the wrong one.

Discussion and conclusions

42. We acknowledge that the judge was faced with a most unusual situation, but it seems to us that he took a wrong turn at the outset. Normally, a *Henderson v Henderson* objection is raised by way of an application prior to trial to strike out a claim as an abuse of process. Mr Donovan was not, of course, a claimant in these proceedings, but he had brought a counterclaim. Nevertheless the Nominee and the Tenants made no application to strike out his counterclaim. Furthermore, the list of issues agreed between the parties for trial listed the issues of fact as to when the documents relied upon by Mr Donovan had been executed before the legal issues for determination. This involved an acceptance by the Nominee and the Tenants that the judge should determine those factual issues in any event. Had the judge followed the sequence in the list of issues, he would have found that the 2014 Trust Deed was executed in 2019 and should have considered the *Henderson v Henderson* objection on that basis. Instead, the judge considered *Henderson v Henderson* first, and seems to have done so primarily on the basis of Mr Donovan's pleaded case.

43. Furthermore, having decided correctly that the argument based upon Mr Donovan's alleged beneficial interest in the Property was not inconsistent with making the Section 2019 Order, he nevertheless concluded that the assertion of that beneficial interest under the 2014 Trust Deed should have been raised in the County Court Proceedings and might have affected the FTT Proceedings. He did so on the basis that the equitable interest needed to be mentioned in the County Court Proceedings so that it could consider the exercise of its powers under section 12B(5) of the 1987 Act and, had that occurred, it might well have had a material effect on the FTT Proceedings, probably including the consideration to be paid by the Nominee.

44. It seems that the judge was influenced in this regard by Mr Donovan and Mr Batin's disgraceful conduct in backdating the 2014 Trust Deed and by the creation and backdating of the Leases, by Mr Batin's failure to engage with the proceedings as a whole, and by Mr Donovan's conduct in only revealing the existence of the 2004 and 2014 Trust Deeds and the Leases very late in the day. We do not condone that conduct. The effect of the judge's decision, however, is that because Mr Donovan lied about the date upon which the 2014 Trust Deed was executed, he is unable to rely on the fact as found by the judge, that the 2014 Trust Deed was executed in 2019, and the judge's

further conclusion that the 2014 Trust Deed was not void as a matter of law. That cannot be correct.

45. It seems to us that the existence of Mr. Donovan's alleged beneficial interest was strictly irrelevant to the issues in the County Court Proceedings as they stood between the parties to those proceedings. The County Court was required to consider whether to make an order under section 19(1) of the 1987 Act. The question of whether the 2014 Transfer was not a "relevant disposal" by reason of section 4(2)(g) of the 1987 Act had not been raised by Mr Batin in those proceedings. In the absence of an issue having been raised under section 4(2)(g), the existence and effect of Mr Donovan's alleged beneficial interest was thus irrelevant. It was also accepted in Mr Donovan's Defence and Counterclaim in the High Court Proceedings that it was no longer open to Mr Batin to seek to rely upon section 4(2)(g) in order to dispute the Section 19 Order and that he was bound by it.

46. As the judge pointed out, the existence of the beneficial interest was relevant to the value of the interest to be transferred to the Nominee and would have been relevant for the purposes of section 12B(5). The County Court was, however, not concerned with the question of valuation (which was for the FTT) or whether to make an order under section 12B(5), because the Nominee/Tenants had not made an application for such an order. Despite having been aware of Mr Donovan's alleged beneficial interest in the Property since the receipt of the 29 May Letter, the Tenants did not seek to join Mr Donovan to the County Court Proceedings. They could have done so to seek to bind him by any Section 19 Order which was made and/or to seek an order pursuant to section 12B(5) that the Nominee take free of his alleged equitable interest. Instead, they stated that they would oppose his joinder and did not make a section 12B(5) application.

47. If Mr Donovan had been joined, the question of the existence of the beneficial interest would have been considered by the County Court and, no doubt, an application would have been made under section 12B(5) that the Nominee should take free of that interest if it were found to exist. Alternatively, if it had been decided that Mr Donovan's beneficial interest did exist and the County Court declined to make a direction under section 12B(5), its existence would have been considered by the FTT in relation to the amount of consideration to be paid for the interest to be transferred to the Nominee. However, neither matter was within the ambit of the County Court Proceedings as constituted. In these circumstances, it seems to us that it was for the Tenants to seek to join Mr Donovan as a party to the County Court Proceedings in order to protect their position. They did not do so. As Mr Duckworth puts it, it was not for Mr Donovan to offer himself up as a target for a potential section 12B(5) order which was not even sought. Nor, in the circumstances was it for him to seek to join the subsequent proceedings in the FTT. The onus in these respects was on the Tenants. Accordingly, the fact that an application to join the County Court Proceedings was made on Mr Donovan's behalf, but was (quite properly) refused because it was made late in the day without any relevant supporting evidence, is irrelevant. The onus was not on Mr. Donovan to make that application in the first place. It is for the party seeking the transfer to seek to bind all interests in the property to be transferred and, if appropriate, to seek section 12B(5) directions in relation to any alleged interest. As such, although the existence and effect of Mr Donovan's beneficial interest could have been raised before the County Court, it was not raised and it cannot be said that it was Mr Donovan who "should" have raised it.

48. It follows that the judge erred in holding that pursuing the point in relation to the equitable interest in the Property in the High Court was an abuse of process in the *Henderson v Henderson* sense. He seems to have confused the section 4(2)(g) point with the existence of the beneficial interest and to have been influenced by the course of conduct adopted by Mr Donovan. He also relied heavily upon the fact that the County Court would need to decide whether to make a direction under section 12B(5), despite the fact no application had been made under that section.

49. Furthermore, although Mr Donovan's conduct in seeking to run a primary, untruthful argument on the basis that the 2014 Trust Deed was executed in 2014 is not to be condoned, it cannot be an abuse of process in the *Henderson v Henderson* sense to run a secondary argument on the basis that it was executed in 2019 and had legal effect from that date, particularly when the judge found that the alternative argument was factually and legally correct. Before us, it was not suggested that the judge was not entitled to do so. Although a party may be penalised in costs for running a false argument, that cannot be the basis for preventing them from relying on the facts as found.

50. For all the reasons set out above, we would allow the appeal on this ground. It seems to us that Mr Donovan is entitled to declarations reflecting the judge's finding of fact in relation to the 2014 Trust Deed and his decision to treat it as having legal effect from the date of its actual execution.

Ground 2(i) – Section 19 Order – Equitable interest in land?

51. Next, Mr Donovan contends that the judge erred in law in holding that the Section 19 Order created an immediate equitable interest in the Property. There are two limbs to the argument. The first limb is that section 19(1) orders never give rise to an equitable interest in land. The second limb is that, even if section 19(1) orders are capable of giving rise to an equitable interest in land in some cases, the Section 19 Order in this case did not so because Mr Batin only held the legal estate in the Property.

52. The Nominee and the Tenants contended before the Judge that he was bound by the decision of this Court in *Jones v Mahmut* [2017] EWCA Civ 2362, [2018] 1 WLR 6051 to hold that a section 19(1) order gives rise to an equitable interest in land. The judge rejected this contention. The Nominee and Tenants contend by their Respondents' notice that he was wrong to do so.

53. They rely upon what Lewison LJ, with whom Beatson and Arden LJJ agreed, said at [13]:

> "I accept … that an application under section 19 [of the 1987 Act] is an application on the kind contemplated by section 17. But the main thrust of these provisions is, in my judgment, that the [1987 Act] contemplates two ways in which the tenants' rights might be vindicated: either by the parties voluntarily entering into a contract following the establishment of the tenants' rights or by the court making an order. Thus, the scheme of the [1987 Act] is that the court's order requiring the reversioner to comply with his obligations is the equivalent of a contract voluntarily made."

54. They argue that this passage sets out a binding statement of the effect of an order under section 19(1). It is, they submit, to be treated in all respects as the equivalent of "a contract voluntarily made". Since such a contract would confer on the purchaser an equitable interest in the land in question, a section 19(1) order does likewise.

55. As the judge said, it is important to read what Lewison LJ said in this paragraph in context. The defendants were, by an order of 29 October 2013, ordered to dispose of a freehold interest in a property to the claimants. The claimants were ordered to provide the defendants with a form of transfer by 5 December 2013, and did so. The defendants were ordered to provide an executed transfer in favour of the claimants by 19 December 2013, but failed to do so. On 2 January 2014 the defendants' solicitors said that they held an executed transfer, but they did not send it to the claimants or their solicitors. On 2 April 2014 the defendants purported to terminate all obligation to transfer the freehold in the property pursuant to section 17(4) of the 1987 Act. Section 17(4) would be engaged only if the defendants could establish that "no binding contract ha[d] been entered into" for the transfer of the property in question.

56. Lewison LJ gave three reasons for holding that the defendants could not rely upon section 17(4). The passage relied upon by the Nominee and the Tenants was Lewison LJ's starting point for his first reason. As Lewison LJ explained at [14], a contract for the sale of land is usually enforced by an order for specific performance. As he noted at [16], an order under section 19 is not an order for specific performance because it is "enforcing non-consensual statutory rights". Nevertheless, Lewison LJ went on at [17]:

> "It would in my judgment be surprising if a reversioner had different entitlements to serve notice under section 17(4) following a court order requiring compliance with the obligations arising under the Landlord and Tenant Act 1987 depending on whether the court order was enforcing a contractual obligation or a statutory one. To hold otherwise would mean that a recalcitrant landlord who refused to enter into a contract was in a better position than a compliant one. In addition, section 19(1) allows the court to specify such period as it thinks fit; which must mean that the court is in control of the timetable."

57. In other words, as the judge held, Lewison LJ was saying that a purposive interpretation of the relevant provisions of the 1987 Act led to the conclusion that an order under section 19(1) should be treated for the purposes of section 17(4) as if it were a binding contract. Lewison LJ was not concerned with the question of whether a section 19(1) order creates an equitable interest in land, still less did he decide that issue.

58. It is necessary, therefore, to address the first limb of Mr Donovan's appeal. As the judge recorded, the following propositions of law are common ground between the parties:

    i) An interest in land can only be created by someone who has sufficient title to create proprietary rights: see *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52, [2015] AC 385 at [79] (Lord Collins of Mapesbury).

    ii) Rights which are purely personal in nature are not capable of constituting interests in land: again see *Southern v Scott* at [79].

iii) An interest in land must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability": see *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1261F-G (Lord Wilberforce). It must be a "right in reference to land which is capable of transmission through different ownerships of the land": see *Ainsworth* at 1228D-E (Lord Cohen).

iv) Where a contract is made for the sale of land, and the purchaser is potentially entitled to the equitable remedy of specific performance, the purchaser obtains an immediate equitable interest in the property contracted to be sold. The basis for that outcome is the maxim that equity "looks upon things agreed to be done as actually performed": see *Re Cary-Elwes' Contract* [1906] 2 Ch 143 at 149 (Swinfen Eady J).

59. Mr Donovan contends that, applying these principles, a section 19(1) order does not create an immediate interest in land. We agree with this, and respectfully disagree with the judge's contrary conclusion. Our reasons are as follows.

60. As Mr Duckworth submitted, the starting point is section 4(1) of the Law of Property Act 1925, which provides:

> "Interests in land validly created or arising after the commencement of this Act, which are not capable of subsisting as legal estates, shall take effect as equitable interests, and, save as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as legal interests, shall be capable of being created as equitable interests:
>
> Provided that, after the commencement of this Act (and save as hereinafter expressly enacted), an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement."

61. As Mr Duckworth acknowledged, although the general rule under the proviso is that no new types of equitable interest in land may be created after 1925, statute may do so and a number of subsequent statues have done. Thus it would have been perfectly possible for the 1987 Act to have created a new type of equitable interest in land. On its face, however, section 19(1) does no such thing. On the contrary, it empowers the court to make a purely *in personam* order to enforce any duty imposed by Part I of the 1987 Act, i.e. a species of mandatory injunction enforceable by contempt proceedings. An order under section 19(1) is not assignable by the party who obtained it to another party, nor can it run with the land. Moreover, section 19(1) is part of an enforcement code in the 1987 Act which includes other powers. If a party subject to a section 19(1) order proposes to transfer the property to someone other than the tenants' nominee, that transfer could be restrained by an injunction granted pursuant to section 19(3). If the party subject to the section 19(1) order transferred the property either before a section 19(3) order could be obtained or in defiance of such order, section 16 gives the tenants a right to compel the transferee to transfer the property to their nominee.

62. The Nominee and the Tenants argue that a section 19(1) order is "equivalent" to an equitable interest in land of a kind recognised prior to 1925, namely the interest arising under a contract for the sale of land. As noted above, it is common ground that a contract for the sale of land was recognised before 1925 as giving rise to an immediate equitable interest in the land because it could be enforced by an order for specific performance. As Mr Donovan submits, however, a section 19 order is not equivalent to a contract of sale. On the contrary, as Lewison LJ pointed out in *Jones v Mahmut*, it is an order enforcing non-consensual statutory rights. Furthermore, a section 19(1) order in a case such as the present will typically not determine the consideration payable by the tenants' nominee.

63. As Snowden LJ pointed out during the course of argument, a better analogy from the Nominee and the Tenants' perspective would be with a contractual option to purchase land. Although we were not referred to any of the cases on the point, it is well established that, at least in some circumstances, an option gives rise to an immediate equitable interest in land: see Megarry and Wade, *The Law of Real Property* (9th edition) at 14-061. Furthermore, an option may be valid even if it does not specify the price to be paid, but does specify a mechanism for determination of the price: see Megarry and Wade at 14-031. In the present context sections 12(4) and 13 of the 1987 Act give the FTT jurisdiction to determine the consideration payable in respect of the purchase of the estate or interest in question, and it is common for a section 19(1) order to provide for this, as the Section 19 Order did in the present case.

64. As Mr Duckworth submitted, however, even if a section 19(1) order is to some extent analogous in its effect to an option to purchase, the question remains one of interpretation of the 1987 Act: was it intended that a section 19(1) order would give rise to an equitable interest in the land? In answering that question, section 14(1) of the 1987 Act is important. This provides:

> "Where notice has been duly served on the landlord under—
>
> section 12B (right of qualifying tenants to compel sale, &c. by purchaser), or
>
> section 12C (right of qualifying tenants to compel grant of new tenancy by superior landlord),
>
> the nominated person may at any time before a binding contract is entered into in pursuance of the notice, serve notice under this section on the purchaser (a 'notice of withdrawal') indicating an intention no longer to proceed with the disposal."

65. It is clear from section 14(1) that the tenants, acting through their nominee, have an absolute statutory right to withdraw from the acquisition at any time before a binding contract is entered into. As is common ground, this right may be exercised even after the FTT has determined the consideration payable. Thus if tenants decide that the price is too high, they can withdraw. This emphasises the entirely non-consensual and unilateral nature of the rights conferred on tenants by the 1987 Act. Given that the tenants have an absolute right to withdraw even after the consideration has been determined, we accept Mr Duckworth's submission that it cannot have been intended that a section 19(1) order would give rise to an immediate equitable interest in the land.

Even if one applies the broader equitable maxim that "equity treats as done that which ought to be done", it cannot be known for certain at any point prior to a binding contract being entered whether the tenants are to acquire the property or not. Until that point is reached, there is nothing that the landlord "ought" to have done.

66. Mr Walsh, on behalf of the Tenants, relied upon the fact that it is apparently the practice of the Land Registry to register notices of section 19(1) orders, as it did in the present case. This does not assist them, however, because registration of a notice does not establish that the interest in question is a valid one: see section 32(3) of the Land Registration Act 2002.

67. In case we are wrong about the first limb of Mr Donovan's argument, we turn to consider the second limb. It will be recalled that, on the judge's findings of fact, as at the date of the Section 19 Order, Mr Batin held the Property as trustee pursuant to the 2014 Trust Deed, which had been executed earlier that year. Thus Mr Batin only owned the legal title to the Property. The beneficial interest was owned by Mr Donovan. In those circumstances, Mr Duckworth submitted, the Section 19 Order could not have conferred any equitable interest on the Nominee because Mr Batin had no equitable interest to convey. By a contrast, an absolute owner of property who enters into a contract of sale is in a position to confer beneficial ownership on the purchaser pending conveyance of the legal title upon completion (and the same goes for an absolute owner who enters into an option contract).

68. Mr Walsh had no coherent answer to this argument, and we accept it. Thus, even if section 19(1) orders are, in principle, capable of giving rise to an immediate equitable interest in the property, in this case the Section 19 Order did not do so. The position would, of course, have been different if Mr Donovan had been made party to the Section 19 Order as well as Mr Batin or if the Tenants had obtained an order under section 12B(5) that the Nominee should take the Property free of Mr Donovan's beneficial interest. It might also have been different if the Property had been held on trust by two trustees at the time of the Section 19 Order, but since Mr Batin was a sole trustee it is not necessary to explore that question.

Ground 2(ii) – priority of equitable interests

69. Given that Mr Donovan has succeeded on ground 2(i), it is not necessary to consider ground 2(ii).

Ground 2(iii) – grant of injunction

70. Mr Donovan contends that the judge was wrong to grant an injunction restraining him from protecting the Leases by notices in the register and/or by occupying the Flats in the period leading up to the transfer of the freehold of the Property to the Nominee.

71. There was a dispute before the judge as to whether the High Court had jurisdiction to grant an injunction against Mr Donovan at the suit of the Tenants. In this Court Mr Duckworth accepted that, following the decisions of the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389 and of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 45, [2024] 2 WLR 45, the High Court has jurisdiction to grant an injunction even if Mr Donovan has not infringed, or threatened to infringe, the Tenants'

legal or equitable rights. As he submitted, however, it remains necessary for the Tenants to establish a principled basis for the exercise of the Court's discretion in their favour. In the absence of any infringement, or threatened infringement, of the Tenants' rights, there must be some other principle which justifies the grant of an injunction.

72. Given our conclusion on ground 2(i), the judge's exercise of his discretion cannot stand because it was premised on his conclusions (i) that the Tenants had acquired an immediate equitable interest in the Property by virtue of the Section 19 Order, (ii) that equitable interest took priority over the Leases and (iii) it followed that Mr Batin and Mr Donovan were "seeking to 'invade' [the Nominee's] rights" (see the Second Judgment at [67]). It is therefore necessary for this Court to consider the matter afresh.

73. As Mr Duckworth submitted, the correct starting point here is the judge's unchallenged conclusion in the First Judgment at [21] that nothing in the 1987 Act precluded Mr Batin from granting interests over the Property after the Section 19 Order was made. As the judge said, the Act prescribes the consequences that may flow from the granting of such interests. Thus the court might exercise its power under section 12B(5) to direct that the Nominee is to take free of particular incumbrances. Alternatively, the price payable by the Nominee might be reduced under section 12B(5)(b). Thus the scheme of the Act is that the Nominee will take Mr Batin's interest in the Property subject to the incumbrances he has granted unless and until the Tenants apply for and obtain such an order.

74. As it is, however, the Tenants did not apply for any order under section 12B(5) whether in the County Court, the FTT or the High Court. The nearest they came to making such application was to ventilate the possibility in a skeleton argument filed for the consequential hearing before the judge. Mr Donovan objected to such an application being entertained at that late stage, and the Tenants did not in the end pursue it. Nor have the Tenants filed any cross-appeal or Respondents' notice seeking an order under section 12B(5) from this Court.

75. In those circumstances we accept Mr Duckworth's submission that it would be wrong for the Court to circumvent the statutory scheme by granting an injunction to prevent Mr Donovan from doing things that he is entitled to do under the 1987 Act. It should be borne in mind that, on the judge's findings of fact, Mr Donovan is, at present, the beneficial owner of the Property and Mr Batin has validly granted the Leases. The 1987 Act enables those property rights to be interfered with, but it would be contrary to principle for the Court to grant an injunction interfering with the protection of those property rights in circumstances not authorised by the statute. The fact that Mr Donovan backdated the 2014 Trust Deed and the Leases and gave false evidence about these matters, while disgraceful and not to be condoned, does not justify taking such a course.

76. Mr Duckworth argued that the economic effect of the judge's order was to give the Tenants a windfall of at least £1-1.5 million and to cause Mr Donovan a corresponding loss, while if no injunction were granted the Tenants would still get a windfall of £200,000 to £400,000 if they were belatedly to apply for and obtain an order under section 12B(5)(b) adjusting the purchase price for the Property to zero, and a windfall of £75,000 to £375,000 even if they did not. The purpose of the 1987 Act is to enable tenants of a block of flats to acquire the reversion to their flats and any common parts so as to enable them to manage the block themselves. Although the 1987 Act could enable tenants to obtain a windfall in some circumstances, it was not intended to confer

a windfall on tenants by enabling them to acquire flats with vacant possession at a discounted price. This is not a distinct reason for refusing the injunction, but it supports the analysis in paragraphs 73-75 above.

77. This is not to say that there can never be a case in which the grant of an injunction against a recalcitrant reversioner might be appropriate. The Tenants relied by way of their Respondents' notice upon the principle recognised in *Welwyn Hatfield Borough Council v Secretary of State for Communities* [2011] UKSC 15, [2011] 2 AC 304 that a person may be prevented from relying upon an unlawful act to claim a statutory benefit even if the statute is expressed in apparently unqualified terms. We do not consider that this principle assists the Tenants on the facts of the present case, but we can envisage circumstances in which it might arguably come into play.

78. It follows that it is not necessary to consider either Together's contention that the judge's exercise of his discretion was flawed because he failed to take Together's interest in the Property into account or Mr Donovan's argument that the injunction restraining him from occupying the Flats (as distinct from the injunction restraining him from registering notices of the Leases) was in any event a step too far.

Conclusion

79. For the reasons given above, we would allow the appeal on grounds 1, 2(i) and (iii) and set aside the injunctions granted by the judge.

Lord Justice Snowden:

80. I agree.