Neutral Citation Number: [2015] EWHC 3441 (Ch)

Case No: HC-2015-000389

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2015

Before :

MASTER MATTHEWS

- -

Between :

Amarjit Singh Banwaitt	**Claimant**
- and -	
(1) Mohamed Dewji	**Defendants**
(2) Tahera Dewji	

- -
- -

Tim Calland (instructed by **Dentons UKMEA LLP**) for the **Claimant**
Christopher Boardman (instructed by **Debenhams Ottaway LLP**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing dates: 15 September 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER MATTHEWS

Master Matthews :

1. This is my judgment on a preliminary issue which has arisen in a claim begun by the Claimant by claim form under CPR Part 8 to enforce a charging order in his favour over the First Defendant's interest in a residential property known as 25 Whitworth Lane, Loughton, Milton Keynes ("the Property").

2. The Claimant is a retired pharmacist. The First Defendant is a medical practitioner. The litigation that resulted in the judgment arose out of funds paid by the former to the latter for investment purposes. This payment was held at trial to have been procured by the First Defendant's fraudulent misrepresentation. Judgment was given on 17 April 2013 in favour of the Claimant by Sir Raymond Jack, sitting as a High Court judge, in the sum of US$1,749,212.85 plus interest and the sum of £95,000 on account of costs. On 1 May 2013 the Claimant obtained interim charging orders on the First Defendant's interests in the Property and another immovable. The First Defendant was the joint registered proprietor with his wife, the Second Defendant, of both of them. The interim orders were made final by Master Cook on 26 June 2013, despite a proposal lodged in the meantime by the First Defendant for an IVA with his creditors. Appeals against the making of the charging orders were dismissed, and the IVA did not proceed. However, the judgment debt remains unsatisfied today. As at 3 February 2015 the sum owed in sterling stood at £1,575,700.06. On 11 March 2015 the First Defendant was adjudicated bankrupt on his own petition.

3. The Property was acquired jointly by the Defendants on 12 December 1995 as a building plot and the house was constructed on it for the Defendants to occupy as a family home. It is accepted by the Second Defendant that until the transaction in May 2014 referred to below the Defendants held it as legal co-owners on trust for themselves in equal shares. It is however subject to a first legal charge to secure a sum of money (now about £637,000), registered on 11 June 2010, in favour of Santander plc. When the charging order was made, it was protected by a restriction, entered on 20 May 2013, in standard form K: "No disposition of the registered estate … is to be registered without a certificate signed by the applicant for registration or their conveyancer that written notice of the disposition was given to" the Claimant.

4. In February 2014 the First Defendant agreed to sell his interest in the property to the Second Defendant for the sum of £13,750. According to the Second Defendant, the price was calculated as the mean of three up-to-date professional valuations of the Property, then deducting the outstanding mortgage debt, and finally dividing by two.

5. On 13 May 2014 a Form TR1 was executed. It identifies the subject of the transfer as the Property, and states the transferor to be "Mohamed Merali Dewji and Tahera Dewji", that is, the Defendants. The Transferee is stated to be "Tahara Dewji" (sic), that is, the Second Defendant. (The Second Defendant's first name is variously spelt "Tahera" or "Tahara" throughout the papers, sometimes, as in the TR1, in both ways in the same document.) Box 7 states, in standard form, "The transferor transfers the property to the transferee". In box 8 ("Consideration"), there are three standard statements. The one that is checked is that "The transferor has received from the transferee for the property the following sum", and then the words and figures "Thirteen Thousand Seven Hundred and Fifty Pounds £13,750.00" have been inserted. The second statement (not checked) reads "The transfer is not for money or

anything that has a monetary value". In box 9 (Title guarantee), of the two standard statements, the one that is checked is that "The transferor transfers with full title guarantee", rather than the other, which is with "limited title guarantee". In box 10 ("Declaration of trust", applicable to the case where "The transferee is more than one person") none of the three statements is checked, no doubt as the transferee is not "more than one person". Finally, the form is stated to be signed as a deed by each of the two Defendants, in the presence of a solicitor.

6. On the face of it, it is strange that, the consideration having been fixed by reference to the beneficial interest subject to the outstanding mortgage of the First Defendant alone, that sum is stated to be the consideration paid by the Second Defendant and received by *both* Defendants for dealing with *the entire property*. I deal with this further below. At all events, the sum of either £13,500 or £13,750 (it is unclear which) was paid into the client account of the conveyancing solicitors Kingsley David.

7. The TR1 was lodged at the Land Registry, and (according to the copy entries on the Register put before me) the Second Defendant was registered as sole proprietor on 13 May 2014 (that is, backdated to the day the TR1 was lodged). The position of Santander is not addressed in the evidence, but in accordance with the terms of the usual restriction entered where there is an outstanding legal charge, it must have consented in order for the transfer to the Second Defendant to be registered. I should say that no application has been made at any time for rectification of the Form TR1. I assume also that in order to satisfy the terms of the restriction in Form K, Kingsley David also supplied a certificate to the effect that they had given notice of the disposition to the Claimant. This certificate was not, however, in evidence.

8. Kingsley David gave written notice of the disposition to the Claimant's solicitors by a letter of 13 May 2014, which (in the copy which I have seen) is stamped "RECEIVED 14 MAY 2014". This states that they "give notice that by a Transfer dated 13 May 2014 the property was transferred into the sole name of Mrs Tahera Dewji". Subsequently, offers have been made on behalf of the First Defendant to pay over the sum of £13,500 to the Claimant in satisfaction of the charge. The Claimant has always refused, considering that the price paid did not represent the full value, and wishing to instruct his own valuer before reaching any decision.

9. The Second Defendant applied thereafter to the Land Registry to remove the Claimant's restriction. The Land Registry responded by letter dated 14 August 2014, refusing to do so. It said that the present was a case of the transfer of a beneficial interest from the First Defendant to the Second Defendant, and that no overreaching had occurred, because there was no sale of the legal estate by two trustees. On 28 October 2014 the Second Defendant issued an application in the Queen's Bench Division for an order discharging the charging order. The Claimant opposed this. On 5 February 2015 he issued the present proceedings in the Chancery Division for the sale of both properties. The Second Defendant opposes that. On 24 June 2015 the Queen's Bench Division application was transferred to the Chancery Division. On 26 June 2015 the Claimant applied for directions.

10. On 9 July 2015 I ordered that the question whether the First Defendant's interest in the Property remained subject to the charging order notwithstanding the transfer to the Second Defendant should be determined as a preliminary issue. The question was

argued before me on 15 September 2015 by Christopher Boardman, counsel for the Second Defendant, and Tim Calland, counsel for the Claimant. The First Defendant was not represented and did not take part. I am grateful to both counsel for their able and concise submissions, and am only sorry for the delay in producing this judgment during what has proved to be for me a very busy period.

11. Certain things are clear at the outset. One is that the Second Defendant was concerned that the Claimant's charging order threatened the making of an order for the sale of the Property. There can be no other basis for the inclusion of the material by her in her witness statement of 2 March 2015, para 8, to the effect that the Defendants bought the land and built the house now comprising the Property as a family home for them and their three children (one still a minor) and where they and the Second Defendant's elderly (and unwell) mother still live. That material, however, can have no relevance to the legal issues arising on this preliminary issue.

12. Another thing that is clear is that the transaction between the Defendants was designed to remove that threat, by (at least) transferring the effect of the charging order from the Property itself to the money paid into the solicitors' client account. The Second Defendant has informed the Claimant about the events that have taken place, and has offered the money to him. A third point is that the Claimant is not disadvantaged *in practice* by this course of action as long as (i) the sum paid is an accurate reflection of the market value of the interest to which the charging order attached, and (ii) the money is not so dealt with that the Claimant cannot get at it.

13. On the facts of the present case, situation (ii) has not occurred. The money is clearly available to the Claimant, should he choose to accept it. The Claimant is however suspicious as to whether situation (i) has taken place. There is some evidence that the Property is worth more than the value ascribed to the Property by those instructed by the Defendants (see para 15 of the witness statement of James Fairbairn of 10 November 2014), and there is also evidence that the Claimant's own house, next door to the Property, and built at about the same time, but smaller, is worth considerably more than that value too.

14. The parties are agreed that in law there is a difference between two kinds of transaction. The **first** is a sale and transfer of the First Defendant's beneficial interest to the Second Defendant, followed or accompanied by a transfer of the bare legal title from the Defendants to the Second Defendant alone (the latter aspect constituting a mere recognition of the collapse of the trust of land). The **second** is a sale and transfer of the entire legal and beneficial interest in the land from the Defendants to the Second Defendant alone. (This could not have occurred at common law, but was rendered possible by virtue of the Law of Property Act 1925, s 72(4).)

15. It is argued by the Second Defendant that the kind of transaction that has occurred in the present case is the second of these, and that it has resulted in the overreaching of the interest of the Claimant in the Property, and its attachment to the proceeds in the client account of Kingsley David. It is argued on the other hand by the Claimant that the transaction here is of the first kind (as indeed the Land Registry considered) and that therefore there can be no overreaching. It was accepted at the hearing by the Second Defendant's counsel that if the transaction was of the first kind then there would be no overreaching. It was accepted by the Claimant's counsel in his skeleton

argument that if the transaction was of the second kind then "overreaching is *likely* to have occurred" (my emphasis).

16. The relevant legal framework is contained in the Law of Property Act 1925, ss 2, 27, 205, and the Land Registration Act 2002, ss 27, 29, 132. Section 2 of the former Act, so far as material, provides:

> "(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if—
> […]
> (ii) the conveyance is made by [trustees of land] and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of subsection (2) of this section or independently of that subsection, and [the requirements of section 27 of this Act respecting the payment of capital money arising on such a conveyance] are complied with;
> […]
>
> (2) [Where the legal estate affected is subject to [a trust of land], then if at the date of a conveyance made after the commencement of this Act [by the trustees], the trustees (whether original or substituted) are either]—
> (a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed; or
> (b) a trust corporation,
> [any equitable interest or power having priority [to the trust]] shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.
>
> (3) The following equitable interests and powers are excepted from the operation of subsection (2) of this section, namely—
> (i) Any equitable interest protected by a deposit of documents relating to the legal estate affected;
> (ii) The benefit of any covenant or agreement restrictive of the user of land;
> (iii) Any easement, liberty, or privilege over or affecting land and being merely an equitable interest (in this Act referred to as an *"equitable easement"*);
> (iv) The benefit of any contract (in this Act referred to as an *"estate contract"*) to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right;
> (v) Any equitable interest protected by registration under the Land Charges Act, 1925, other than—
> (a) an annuity within the meaning of Part II of that Act;
> (b) a limited owner's charge or a general equitable charge within the meaning of that Act.
> […]"

17. Section 27 of the 1925 Act, so far as material, provides:

> "[(2) Notwithstanding anything to the contrary in the instrument (if any) creating a [trust] of land or in [any trust affecting the net proceeds of sale of the land if it is sold], the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as [trustees], except where the trustee is a trust corporation, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.]"

18. Section 205 of the 1925 Act, so far as material, provides:

> "(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—
> […]
> (ii) *"Conveyance"* includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; *"convey"* has a corresponding meaning; and *"disposition"* includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and *"dispose of"* has a corresponding meaning;
> […]
> (x) *"Legal estates"* mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates; […]
> (xxi) *"Purchaser"* means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Act and elsewhere where so expressly provided *"purchaser"* only means a person who acquires an interest in or charge on property for money or money's worth; […] and *"valuable consideration"* includes marriage [, and formation of a civil partnership,] but does not include a nominal consideration in money…"

19. Section 27 of the 2002 Act, so far as material, provides:

> (1) If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.
> (2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration –
> (a) a transfer,
> […]

20. Section 29 of the 2002 Act, so far as material, provides:

> "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration."

21. Section 132(1) of the 2002 Act, so far as material, provides:

> "'legal estate' has the same meaning as in the Law of Property Act 1925 (c. 20);
> […]
> 'registered estate' means a legal estate the title to which is entered in the register, other than a registered charge;
> […]
> 'registrable disposition' means a disposition which is required to be completed by registration under section 27;
> […]
> 'valuable consideration' does not include marriage consideration or a nominal consideration in money."

22. In brief, overreaching is a process whereby an equitable or beneficial interest in land is transferred from that land to the proceeds of sale of, or other transaction with, that land. The land ceases to be subject to the equitable or beneficial interest, so that the purchaser obtains a clear title, and that interest attaches itself instead to the money or other value paid. Henceforth the beneficiary must look to the money, and not to the thing. Section 2 of the 1925 Act sets out the cases where overreaching operates. For present purposes the critical provision is s 2(1)(ii), whereby a *conveyance* to a *purchaser* of a *legal* estate in land will overreach an equitable interest affecting it, if (i) it is made by trustees of land, (ii) the equitable interest is capable of being overreached, and (iii) the purchase money is paid in accordance with s 27 of the 1925 Act. Where there are two individual trustees of a trust of land, then by s 2(2) *any* equitable interest is capable of being overreached, *unless* it is of a kind excepted under s 2(3). But the interest of a chargee under a charging order is not excepted under the latter provision, and therefore is capable of being overreached under s 2(2).

23. For the purposes of s 2 (which is in Part I of the Act), and so far as material to this case, 'conveyance' is any kind of transfer or disposition of land except a will, 'purchaser' means a person who acquires an interest in property for money or money's worth (though, in the rest of the Act, 'purchaser' means a purchaser in good faith for valuable consideration), and 'legal estate' means any estate or interest in land authorised under the Act to exist at law, and which subsists or has been created as such. Thus, if A and B are trustees of land for A and B equally, and there is a charging order over B's interest in favour of C, a sale and transfer by A and B of the whole legal and beneficial estate in the land to A is capable of overreaching B's interest, and C's charge on that interest, in the land. But a sale and transfer by B of his own interest to A cannot overreach C's interest under the charging order, even if A then calls on A and B to transfer the legal title to A, and A and B do so. This is because, although there is a sale of a beneficial interest, and A is a purchaser of that, and there is also a *conveyance* of the legal estate to A, A is not a *purchaser* (as defined) of the *legal* estate in the land.

24. In order for a transaction *capable* of overreaching under these provisions actually to do so, it is also necessary that the provisions of s 27 of the 1925 Act be complied with. So far as material here, this would require that the price for the purchase by A be paid to, or applied by the direction of, both A *and* B. It would be sufficient that it was paid into the client account of solicitors acting for both, but not that it was paid into the client account of solicitors acting for one only, unless (perhaps) both then directed those solicitors to pay or apply them in some way. I consider this requirement further below.

25. Where the land is registered land, there are added complications. No legal estate can pass on transfer, except by registration of the transfer: see the 2002 Act, s 27(1). And transfer and subsequent registration passing a legal estate will only *take priority over* an earlier interest (as opposed to overreaching it) when it is a registered disposition of a registered estate made for valuable consideration, and the priority of the interest is not protected: see the 2002 Act, s 29(1).

26. So there is a difference between (a) reversing the priority of interests, which happens under the 2002 Act in appropriate cases, and (b) overreaching interests, which happens, if at all, under the 1925 Act. In the present case the argument was largely about overreaching rather than reversing priority.

27. As set out above, each side sought to persuade me that the transaction entered into in this case was of the kind which favoured its case (see para 15 above). I need therefore to consider how to go about deciding which kind it was. Mr Calland, for the Claimant, argued that the characterisation of the transaction to be carried out was a two-stage process. First the court must ascertain the nature of the rights and obligations which the parties intended to create. This is a question of fact. Then, armed with this information, the court can properly categorise the transaction, as a matter of law. Thus if the parties intended to create rights and obligations which are characteristic of transaction type A, but not of type B, it does not matter that they also intended to enter into a transaction of type B.

28. Mr Calland referred me to the speech of Lord Millett in *Re Brumark Investments Ltd* [2001] 2 AC 710, [32], on the question whether a particular charge created by a company was a fixed or a floating charge. But of course it regularly occurs in other contexts, for example whether the parties have created a licence or a lease of land, and whether a chattel has become a fixture in relation to land.

29. Mr Calland also argued that an element of public policy may be involved, as the court takes into account any relevant public interest in considering whether what the parties intended to create in fact was in law characteristic of any particular type of transaction. He cited a dictum of Lord Walker of Gestingthorpe to this effect in *Re Spectrum Plus Ltd* [2005] 2 AC 680, [141], where the judge specifically referred to the lease/licence distinction.

30. Mr Boardman, for the Second Defendant, whilst arguing that the features of this case led to its being characterised as a sale of the whole, did not specifically deal with this argument. I do not know if this was because he agreed with it, or not. Nevertheless, having considered Mr Calland's submission, I accept it. So in my view I must look

first at the nature of the rights and obligations which the parties intended to create, and then I must consider how to categorise the transaction, as a matter of law. I also accept that public policy may be involved.

31. Mr Calland said that the TR1 was consistent with both (i) characterisation as a sale of the First Defendant's beneficial interest plus change of trusteeship, and also (ii) characterisation as a sale of the whole. However, he argued that in context it was obvious that it was (i) rather than (ii). He invited my attention to the witness statement of the Second Defendant's solicitor, Luke Harrison, of 9 October 2014. In at least four places this referred to "the purchase" or "the transfer" of the First Defendant's "equitable interest" or "equity" in the Property. He also referred to the Second Defendant's solicitors' letter dated 30 September 2014, in which they had said that their client had instructed her conveyancers to transfer to them "the sum of £13,500" which they would hold in their client account. It also said that "our client" was the legal and beneficial owner of the Property "following a transfer of her husband's share". Finally, he pointed out that, in her own witness statement of 3 February 2015, the Second Defendant had expressly stated that she had "bought out the interest of the First Defendant" in the Property.

32. For completeness, I add that there are other references in the correspondence placed before me. These include Debenhams Ottaway's letter of 25 September 2014, which says "our client agreed with Dr Dewji that she would buy out his interest in [the Property] for the sum of £13,500", and their letter of 14 November 2014, which says "our client has purchased Dr Dewji's legal and beneficial interest in the Property…"

33. Mr Calland also argued that the consideration of £13,500 (or £13,750) for the transaction, whatever it was, had been calculated on the basis of the value of the First Defendant's half-share of the beneficial interest in the equity of redemption of the Property, rather than the value of the Property subject to (and with the benefit of an indemnity against) the mortgage in favour of Santander, which would be at least twice as much. The purchaser of the whole would be paying for the Second Defendant's own beneficial interest too, even if, in the case of a sale to the Second Defendant herself, the satisfaction of that part of the price due to the Second Defendant might be recited in the conveyance. Further, he said that, since whatever was being sold was being so sold with full title guarantee, that meant that there was a warranty that what was being sold was free from incumbrances. Accordingly, it could not be the whole legal and beneficial interest in the land (since that was subject to the Santander charge), but had to be just the equity of redemption (which was free from incumbrances). And he also said that such public policy arguments as there were should protect creditors such as the Claimant rather than debtors such as the First Defendant.

34. I agree with Mr Calland that the mere use of the TR1 itself does not make clear which type of transaction was being performed. It could be used for either (i) or (ii) above. If it were (i), such a transaction could be carried out by a written assignment of beneficial interest (satisfying s 53(1)(c) of the Law of Property Act 1925) coupled with a separate transfer of the legal title (here the TR1, since the subject matter was registered land). Or it could be carried out by a single document such as a TR1, performing both functions. In modern times, where there is a choice, the latter course is usually taken as being quicker and more efficient. If it were (ii), then of course a

TR1 form would be the usual means of achieving this. Where the transaction is with an unconnected third party, as an arms' length sale and purchase, one would also expect to see a contract setting out what was to happen. Here the transaction is between spouses, and no written contract or other documentation has been disclosed. I therefore also agree that it is necessary for me to look at the context in which the form TR1 was being entered into.

35. Mr Boardman, for the Second Defendant, submitted that the Defendants needed to sell the Property in order to get rid of the charging order. Moreover, he said, if the First Defendant's interest in the Property once sold was *still* subject to the charging order, then its value was zero, and not £13,500 or £13,750. Therefore, he argued, the Defendants *must* have intended to sell the Property and not the First Defendant's interest. Otherwise their objectives would not be achieved.

36. I agree with Mr Boardman that, unless the Defendants sold the Property itself, the charging order would still be binding on it, or at least on the First Defendant's interest in it. I also agree that, if the First Defendant's interest in the Property once sold were *still* subject to the charging order, then its value to a purchaser would be zero. But I do not agree that the conclusion posited follows, that the Defendants therefore *must have intended* to sell and buy the Property and *not* the First Defendant's interest in it. The Defendants might not have thought it through, or might have been misadvised, or not have been advised at all, or might not have understood or accepted the advice they were given. I have no evidence as to what the thinking of the Defendants or the advice to them was, or enabling me to draw inferences as to how likely it is that the Defendants would follow that advice. I do not complain about this. The Defendants are not obliged to supply such information. But I cannot assume it either.

37. As noted by Mr Calland, there are numerous references in the evidence and the correspondence emanating from or on behalf of the Second Defendant to her purchasing the First Defendant's interest or share. In most cases this is explicitly said to be his equitable or beneficial interest. In one or two – but later on – it is stated to be the legal and beneficial interest. But it is always stated as a purchase of *his interest*, and not of the whole Property. Moreover, there is at no point any attempt to state the purchase price payable as the value of (say) the whole of the Property or (more properly) of the equity of redemption in the Property. It is always stated as half of this, *ie* the *First Defendant's* share. And the value ascribed in the TR1 (£13,750) is stated in correspondence to have been calculated as the value of the First Defendant's equitable interest. The Second Defendant says that this is in effect just the netted off figure. But I am nevertheless struck by the failure even once to refer to a "full" value which is then netted off to show how part of that "full" value is being satisfied.

38. As I have said, Mr Calland had raised the question of public policy. He said there was a need to balance the interests of purchasers and the interests of others regarding so-called 'invisible' interests. In my judgment, on the whole, the public policy informing the 1925 reforms to English property law (which laid down the main framework for the modern overreaching process) was – in the broadest terms – on the one hand the simplification of the old and potentially very complex conveyancing process whilst on the other ultimately favouring purchasers over owners by enabling them to get a clear title relatively easily. It is a market-oriented policy. But I do not think it is possible to read that broad policy down to the level of detail required to deal

with this case. Added to that, the rules on land registration were completely rewritten in 2002, more than three-quarters of a century later, when social conditions were not the same. When one looks at the restriction in standard form K (see [3] above), imposed where a charging order is made, it is clear that it gives relatively little protection to the interest of a chargee in the land itself. What it does instead is to warn that chargee that his interest is about to be overreached (if it is) and that henceforward he should look to the money rather than the land. So I do not think I can derive much assistance from public policy in answering this question.

39. There were other points made for the Claimant, such as the giving of a full title guarantee in the TR1, but in context I do not see them as being of any real weight on their own.

40. In my judgment, the best points for the Second Defendant are the use of a single document, the form TR1 (rather than two separate documents), the fact that the scheme would not work in law unless the Property was sold as a whole, and – perhaps – the limited (and late) references to the purchase of the 'legal and beneficial interest' of the First Defendant, pointing away from a mere sale of an equitable interest.

41. But the first of these is inconclusive, even equivocal. The second depends on the knowledge and understanding of the Second Defendant and her lawyers, which cannot be assumed, and I have no evidence as to what it was. The third point relates to statements made once the matter had become contentious, and specific advice had no doubt been obtained, with the benefit of hindsight. So I cannot place much weight on these, wherever they might be said to lead.

42. I also find it striking that no contemporaneous material, such as a memorandum of contract, or documents containing or embodying an offer and/or an acceptance, or even a suggestion by lawyers as to what to do, has been put before the court. All I have is the statement of Luke Harrison, the Second Defendant's solicitor, in his witness statement of 9 Oct 2014, at para 10: "On or around February 2014, the [First Defendant] and Dr Dewji agreed that the [First Defendant] would purchase Dr Dewji's equitable interest in the Property for full value".

43. On consideration of the case as a whole, I am clear that the intentions of the parties, as manifested in the material placed before me, were for the Second Defendant to purchase her husband's equitable interest in the Property, so that she would become the absolute beneficial owner (subject to the Santander charge), and for the legal title then to be transferred to her, rather than for her to buy the whole Property from herself and her husband jointly. In other words, this is a transaction of the first type mentioned above, and not of the second.

44. It follows, as I understand Mr Boardman's submissions, that in those circumstances there can be no overreaching, and the Claimant must succeed on this preliminary issue. The reason is that, because the transfer of the legal estate is not paid for, but gratuitous, there is no 'purchase' of a legal estate in the land for money or money's worth, within s 2 of the 1925 Act. For similar reasons there can be no reversing of priority under s 29 of the 2002 Act either, as there is no disposition of a registered estate (*ie* the legal estate) for valuable consideration.

45. In case I am wrong about my primary conclusion, I go on to consider what would follow if I had held that the transaction was one of the second kind, that is, a sale of the whole property to the Second Defendant. The question would be whether there was compliance with s 27 of the 1925 Act in the payment of the purchase price. As already stated, this would require that the purchase price be paid to, or applied by the direction of, *both* of the trustees of land, *ie* the two Defendants.

46. The Form TR1 was executed on 13 May 2015. In his statement of 9 October 2014 Luke Harrison, the solicitor at Debenhams Ottaway with conduct of the matter for the Second Defendant, said in a witness statement (para [12]) that the Second Defendant "instructed her former solicitors Kingsley David to deal with the transfer of Dr Dewji's equitable interest to [the Second Defendant]. Accordingly [she] provided Kingsley David with a sum of £13,500 in payment towards Dr Dewji's equitable interest". (The TR1 of course refers to, and gives a receipt for, £13,750. The discrepancy is unexplained.) On 30 September 2014, Debenhams Ottaway wrote to Dentons, the Claimant's solicitors, that "We confirm that our client has instructed her conveyancing solicitors to transfer to us the sum of £13, 500 which we will hold in our client account". On 20 October 2014 Debenhams Ottaway wrote to Dentons that "Our client will hand over the £13,500 once the charging order entry is removed". On 13 August 2015 the latter firm wrote to Dentons that they "currently hold the proceeds of sale £13,500 in our client account".

47. It is clear from the various letters from Debenhams Ottaway to Dentons, including those of 30 September 2014, 3 October 2014, 20 October 2014, 14 November 2014, 30 January 2015 and 6 February 2015, that Debenhams Ottaway were instructed by the Second Defendant alone. And such indications in the documents as I have seen were that Kingsley David were similarly instructed by her alone. No evidence has been produced to me to suggest that Kingsley David were acting also for the First Defendant. Indeed, there is no evidence that the First Defendant was involved at all in the payment and dealings with the money. In these circumstances, I can only find that the payment by the Second Defendant to Kingsley David, and her instruction for the onward transmission of the funds to Debenhams Ottaway were not payments to or at the direction of two trustees of land. For this reason, even if the transaction of 13 May 2014 had been a sale and purchase of the whole legal and beneficial interest in the Property by the Defendants to the Second Defendant, it would not have overreached the Claimant's interest constituted by the charging order on First Defendant's interest in the Property.

48. My conclusions above mean that there are at least three, perhaps four, other issues with which it has not been necessary to deal in this judgment. I should record these here. The first is whether it matters whether there was a valid contract for the sale and purchase of either the First Defendant's own interest in the Property, or indeed the Property itself. Such a contract must be in writing to be valid (Law of Property (Miscellaneous Provisions) Act 1989, s 2). No such contract was in evidence before me. The evidence was simply that the Defendants "agreed" (see para [42] above). If they agreed orally, this was not a contract in law. The old, technical meaning of "purchaser" did not require a contract, just a grant (see *eg* Megarry and Wade, *The Law of Real Property*, 8th ed 2012, para 3-023). It might perhaps be argued (but of course I am not now deciding) that there could not be a "purchaser for money or money's worth" *within the meaning of the 1925 Act* unless there were a contract.

49. The second matter is that the restriction in Form K required a certificate of the conveyancers that notice of the disposition had been given to the Claimant, before a disposition could be registered. The evidence was that notice had been given by the letter of 13 May 2014, which was stamped as received by the Claimant's solicitors on 14 May. But the office copy entries showed that the disposition had in fact been registered on 13 May, *ie* before the Claimant had received notice. It follows that any certificate from the conveyancers to the Land Registry (which, as I have said, I did not see), must have been given to the Registry at a time before receipt of the notice. There is therefore a question as to, first, whether the restriction is complied with in such circumstances, and second, whether if it is not complied with, there is any effect on the registration of the Second Defendant as legal proprietor of the Property. Again, there is no need for me to decide this, and I do not do so.

50. Thirdly, there is the significance of the allegations by the Claimant of a transaction at an undervalue between the Defendants. Is the Claimant able to bring this question into the priorities issue, and if so how? Or is it irrelevant to that issue, and the Claimant is left to such remedies as he may have with regard to (for example) transactions at an undervalue and fraud on creditors under the Insolvency Act? Once more I do not need to, and therefore do not, express an opinion.

51. Lastly, there is the question of good faith, referred to in the Claimant's skeleton argument at paras 5 and 6, and in the Second Defendant's skeleton argument at para 5. This could not have been determined as part of the preliminary issue in any event, for the reason given in the Claimant's skeleton.

52. I will hand down this judgment today, and then adjourn the hearing until Thursday 3 December 2015, when I will consider what orders to make and what (if any) directions to give for the further progress of this claim.