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Neutral Citation Number: [2020] EWHC 1711 (Ch)

Case No: PT-2020-000380

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch. D)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 2 July 2020

Before:

MR JUSTICE MORGAN

- -

Between:

N3 LIVING LIMITED	**Claimant**
- and -	
(1) BURGESS PROPERTY INVESTMENTS LIMITED **(2) BELINDA JAYNE BENNETT (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH MAY O'NEILL)**	**Defendants**

- -
- -

Paul de la Piquerie (instructed by **Freeths LLP**) for the **Claimant**
Maurice Rifat (instructed by **MHHP Law LLP**) for the **First Defendant**
Samuel Laughton (instructed on the Bar Public Access Scheme) for the **Second Defendant**

Hearing date: 29 May 2020

- -

Approved Judgment

MR JUSTICE MORGAN:

Introduction

1. This is a vendor and purchaser summons under section 49 of the Law of Property Act 1925 ("LPA 1925"). The Claimant is the purchaser and the First Defendant is the vendor under a contract for the sale of 44-46 Victoria Road, New Barnet, EN4 9PF, which is registered at the Land Registry under Title Number NGL216785. I will refer to the Claimant as "the Purchaser", to the First Defendant as "the Vendor" and to the property as "the Property".

2. The Second Defendant, Ms Bennett, has made a claim to have an interest in the Property and has applied to the Land Registry for the registration of a restriction in Form A. The application for the registration of a restriction has caused a difficulty between the Vendor and the Purchaser as to what should be done, if anything, to deal with the fact of the application for a restriction and to achieve completion of the sale.

3. Mr de la Piquerie appeared on behalf of the Purchaser, Mr Rifat appeared on behalf of the Vendor and Mr Laughton appeared on behalf of Ms Bennett. The principal argument was between the Vendor and the Purchaser and Mr Laughton did not take sides in relation to that argument but provided the court with information as to the background to the claim made by Ms Bennett.

The facts

4. At all material times, the Vendor has been the registered proprietor of the Property.

5. On 26 July 2019, the Vendor and the Purchaser entered into a contract of sale of the Property and an adjoining property, 48 Victoria Road. The Vendor agreed to sell the Property and 48 Victoria Road with full title guarantee and also agreed to sell the Property and 48 Victoria Road with vacant possession and free from incumbrances other than certain matters which included matters which were unregistered interests which override registered dispositions under schedule 3 to the Land Registration Act 2002 ("the 2002 Act"). The contract provided for completion on 27 January 2020.

6. On or about 22 November 2019, Ms Bennett applied to HM Land Registry for the entry of a restriction against the registered title of the Property. I have not seen the full application but I have seen paragraph 12 of it which set out what Ms Bennett said was the nature of her interest in the Property. I will explain the basis of the application, relying on paragraph 12 of the application and supplemented by certain matters described to me by Mr Laughton. I emphasise that, at this stage, these matters or alleged matters are disputed by the Vendor.

7. Prior to his death on 21 September 1996, Daniel O'Neill was the registered proprietor of the Property. He died testate, leaving a will dated 21 May 1984. Pursuant to the terms of his will, Mr O'Neill left the Property to his widow, Elizabeth O'Neill. I was not shown the will but, as I understand it, the Property formed part of the residue of the estate which was left to the widow and was not the subject of a specific devise. The will named Daniel O'Neill's son, Sean O'Neill, as the executor of the will. Sean O'Neill obtained probate of the will on 28 October 1999 and on 10 April 2002, he transferred the Property to the Vendor. The transfer was for no monetary value. The

Vendor was, and is, a company in which Susan Burgess, the daughter of Daniel O'Neill and Elizabeth O'Neill, has an interest.

8. Elizabeth O'Neill died on 2 November 2006. She died intestate. The persons entitled to take on her intestacy were her three children, Sean O'Neill, Susan Burgess and Patricia Bennett. Patricia Bennett has since died leaving two children, Ms Bennett and her brother. In 2018, Ms Bennett obtained letters of administration in relation to the estate of Elizabeth O'Neill.

9. Ms Bennett's case is that the Vendor holds the Property on trust for the estate of Daniel O'Neill and that the estate of Elizabeth O'Neill, now represented by its administrator, Ms Bennett, is entitled to have the estate of Daniel O'Neill duly administered. That right to have the estate of Daniel O'Neill duly administered is a chose in action and a proprietary right: see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 707-708 and *Marshall v Kerr* [1995] 1 AC 148 at 165-166. The administration of the estate of Daniel O'Neill and the administration of the estate of Elizabeth O'Neill would lead to the Property being realised for the benefit of Sean O'Neill, Susan Burgess and Ms Bennett and her brother.

10. Ms Bennett says that Sean O'Neill acted in breach of his duty as an executor by failing to vest the Property in Elizabeth O'Neill. Ms Bennett asserted in her application that the Vendor knew that the transfer to it on 10 April 2002 involved a breach of trust or fiduciary duty by Sean O'Neill. Ms Bennett also asserted that the Vendor held the Property on trust for Elizabeth O'Neill during her lifetime and now held the Property on trust for Ms Bennett as the representative of the estate of Elizabeth O'Neill. As I have explained, that is not exactly the legal position but it was not suggested that anything in this case turned on that distinction.

11. The nature of the restriction for which Ms Bennett applied appears from the notice, dated 16 January 2020, given to the Vendor by the Land Registry. This notice stated that the restriction applied for was that:

> "No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court."

12. This shows that the form of the restriction applied for by Ms Bennett was one of the standard forms in Schedule 4 to the Land Registration Rules 2003, namely, Form A. The Land Registry's notice dated 26 January 2020 contained a detailed explanation of the effect of the registration of a restriction in this form. The notice stated that the restriction made it clear that there must generally be at least two people to share the responsibility of making sure that the money received on a sale or other dealing with the Property is correctly dealt with. The notice also explained that if a sole registered proprietor wished to sell the Property, it would have to arrange for a second person to become a joint proprietor to act as a joint trustee and then:

> "… a purchaser could safely complete a purchase because a transfer would be by two or more proprietors so that the restriction would not prevent registration."

13. Before 20 January 2020, the Purchaser was taking steps to prepare for completion of the purchase of the Property and 48 Victoria Road on 27 January 2020. In particular, a proposed lender to the Purchaser carried out a priority search of the registered title of the Property. On 20 January 2020, the lender received a search certificate which revealed the existence of Ms Bennett's application for the registration of a restriction. The certificate stated that the Land Registry was not yet in a position to approve the application and complete the registration of a restriction but, nonetheless, the pending application had priority over the disposition which would be protected by the search certificate. The obtaining of this search certificate appears to have been the first time that the Purchaser became aware of the application for a restriction in relation to the Property.

14. The immediate reaction of the parties to the Purchaser's discovery of the pending application for a restriction was that, on 24 January 2020, they entered into a Deed of Variation of the contract. This provided for separate transfers of the Property and of 48 Victoria Road. The completion date for the latter property was to remain as 27 January 2020 (and the transfer of that property was completed on that date). The completion date for the Property was re-fixed as 18 May 2020. The combined purchase price of £980,000 for the Property and 48 Victoria Road was re-apportioned so that the price for the Property was increased from £430,000 to £500,000 and the price for 48 Victoria Road was reduced from £550,000 to £480,000.

15. On 31 January 2020, the solicitors for the Vendor wrote to the Land Registry stating that the application for the registration of a restriction should be dismissed and taking issue with some of the matters relied upon by Ms Bennett in her application. I am told that the application for a restriction remains a pending application and has been neither acceded to nor dismissed.

The solicitors' correspondence

16. I was shown email correspondence from April 2020 between the solicitors for the Vendor and the Purchaser. Although that correspondence dealt with a large number of suggestions and although I have had regard to everything which was stated, I will attempt to summarise the main points which were made.

17. On 21 April 2020, an email from the solicitor for the Vendor stated:

    i) he had attempted to resolve the matter with Ms Bennett but she was "fairly belligerent";

    ii) there were various difficulties about a suggestion that the proceeds of sale be held in an account pending determination of the dispute between the Vendor and Ms Bennett;

    iii) an application should be made to the High Court under section 49 of the LPA 1925 seeking orders removing the restriction, providing for the proceeds of sale to be paid into court and held subject to later review;

    iv) the Purchaser should be a party to the proceedings and the Purchaser was asked if it would agree to split the costs of the proceedings.

18. On 24 April 2020, the Purchaser's solicitors replied, stating:

    i) the effect of the restriction applied for would prevent the Vendor disposing of the legal title to the Purchaser;

    ii) the Purchaser wished to complete but if the Vendor was unable to complete the Purchaser's options included a claim to rescission and damages which would be substantial;

    iii) it was for the Vendor to resolve the problem with Ms Bennett;

    iv) the Purchaser had spoken to Ms Bennett who had no issue with the price for the Property and "did not wish to interfere with the transaction or prevent completion occurring on 18 May 2020" but wished to see the proceeds of sale form part of the estate of which she was the representative and she was willing for the proceeds of sale to be held in a neutral account;

    v) an application to the court as proposed by the Vendor's solicitors would be futile and pointless as all that was needed was for the Vendor to hold the proceeds of sale in a suitable deposit account by agreement with Ms Bennett.

19. On 27 April 2020, the Vendor's solicitors stated:

    i) there were various problems with the suggestion of placing the proceeds of sale in an agreed deposit account;

    ii) the Vendor would like to work with the Purchaser to resolve the problems and was willing to consider using an escrow agent to hold the proceeds of sale.

20. On 28 April 2020, the Vendor's solicitors sent to the Purchaser's solicitors a draft agreement providing for the proceeds of sale to be held in a deposit account.

21. On 28 April 2020, the Purchaser's solicitors replied, stating that the terms of the escrow account were a matter between the Vendor and Ms Bennett as Ms Bennett had intimated no claim against the Purchaser.

22. On 2 May 2020, the Vendor's solicitors wrote to the Purchaser's solicitors stating:

    i) they had not heard further from Ms Bennett about the suggested escrow account;

    ii) the time had come for an application to the court under section 49 of the LPA 1925 seeking orders that the restriction be withdrawn and that the proceeds of sale be paid into court on certain terms as to the claim being made by Ms Bennett; the Vendor's solicitors asked if the Purchaser was prepared to share equally the costs of the proceedings.

23. On 4 May 2020, the Purchaser's solicitors stated that the proposed proceedings were premature and that the Purchaser was not prepared to pay a part of the costs of such proceedings.

24. On 8 May 2020, the Vendor's solicitors proposed steps intended to overreach the interest of Ms Bennett upon which she relied when applying for a restriction in the terms of Form A. The solicitors explained what was involved in overreaching and referred to sections 2 and 27 of the LPA 1925. Specifically, the proposal was that the Vendor would execute a TR1 in favour of two directors of the Vendor as trustees and the trustees would execute a TR1 in favour of the Purchaser. The solicitors referred to paragraph 6 of the Land Registry Practice Guide 21 and invited comments from the Purchaser's solicitors.

25. On 12 May 2020, the solicitors for the Vendor and the Purchaser had a conversation following which the Vendor's solicitors wrote to say that they were instructed to proceed with the overreaching process previously discussed.

26. On 13 May 2020, the Purchaser's solicitors wrote to say that the proposed overreaching would not work. The solicitors supported this statement with a number of contentions which were not well founded but some of which were repeated in the Purchaser's solicitor's witness statement to which I refer below. The solicitors added that they understood that the only concern that Ms Bennett had with a draft escrow agreement that had been sent to her was that she did not want the costs of that arrangement to fall on the estate which she represented. They said that Ms Bennett was cooperating with the Purchaser and with the Vendor also and the only difficulty was the modest issue of costs of the escrow arrangements. Nonetheless, they stated that they were left to assume that the Vendor was seeking to avoid Ms Bennett tracing into the proceeds of the sale of the Property.

27. On 13 May 2020, the Vendor's solicitors replied and explained again their proposal to overreach the interest of Ms Bennett. They stated that they were shocked at the suggestion that the Vendor was seeking to avoid Ms Bennett tracing into the proceeds of sale of the Property. They also stated that the interest of the Purchaser was to receive good title in return for the purchase price. Later that day, the Vendor's solicitors wrote again with a revised proposal as to overreaching which involved the use of a single TR1. They referred to section 36(6) of the Trustee Act 1925. They stated that they expected the Purchaser to complete on 18 May 2020. They enclosed a draft TR1 which named the transferor as the Vendor and Mr Burgess (the husband of Susan Burgess and a director of the Vendor). The draft TR1 stated:

> "For the purpose of giving a valid receipt for the purchase price BURGESS PROPERTY INVESTMENTS LIMITED in exercise of its statutory powers appoints VINCENT JAMES BURGESS to be a trustee of the Property with the BURGESS INVESTMENTS LIMITED (*sic*)"

28. On 14 May 2020, the Purchaser's solicitors wrote what they described as a pre-application letter in connection with an application that the Purchaser intended to make. They stated that there were four reasons why what they called the overreaching "scheme" would not work. The first reason was that the interest claimed by Ms Bennett was not "capable of being overreached" within section 2 of the LPA 1925. The second reason was that it was not possible for the Vendor to create a trust of the Property because it already held the Property on trust for the Purchaser. The third reason was that a transfer by the Vendor and a second trustee would be a breach of the trust which was asserted by Ms Bennett. In particular, it was said that a transfer

without consulting Ms Bennett would be a breach of section 11 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA 1996"). It was said that that fact could well defeat the overreaching process in itself and they cited paragraph 44-016 of Lewin on Trusts (20th ed.) which concerned transfers which were outside the powers of the trustees. The fourth reason put forward was that a purchaser who lent his name to a scheme to deprive the beneficiaries of the trust property in breach of trust would not be acting in good faith and would not be a "purchaser" as defined in the LPA 1925. They stated that Ms Bennett had not been told about the "proposed scheme" and that it might be said that the scheme had been devised to deprive the estate which she represented of its beneficial interest in the Property or to prevent the estate being able to acquire the Property itself rather than simply receive the proceeds of sale. The Purchaser was said to be anxious not to be accused of having assisted such an enterprise. The solicitors stated that there was no good reason why the Vendor could not set up a suitable escrow arrangement to hold the proceeds of sale on completion. They then said that the Purchaser would apply to the court for an order that the Property be sold to the Purchaser, for Ms Bennett's application to be withdrawn or dismissed and for the proceeds of sale to be placed in an escrow account.

29. On 14 May 2020, the Vendor's solicitors replied to the pre-application letter. They again proposed that there be completion in accordance with the draft TR1 which had been provided to the Purchaser's solicitors. They strongly rejected any suggestion that the Vendor was not acting in good faith. They stated that their instructions were that the Vendor would abide by any claim made by Ms Bennett as administrator of the estate of Elizabeth O'Neill. They also replied to the reasons put forward in the pre-application letter. They stated that the interest of Ms Bennett was capable of being overreached. They pointed out that her application had been for a restriction in Form A. They referred to section 27 of the LPA 1925 with the result that the detail of Ms Bennett's application should not be a matter of concern to the Purchaser. They referred to difficulties in arranging an escrow account by agreement with Ms Bennett particularly in the time remaining before completion on 18 May 2020.

30. On 18 May 2020, the Vendor's solicitors wrote to the Purchaser's solicitors to confirm that they held an executed TR1 and enclosed a copy of the same. The executed TR1 was in the same terms as the draft TR1 previously provided to the Purchaser's solicitors. On the same day at 16.42, the Vendor's solicitors stated that the time for completion had passed and that they were instructed to serve notice to complete the transaction.

31. On 19 May 2020, the Purchaser's solicitors stated that the Purchaser was in funds and ready, able and willing to complete but that the Vendor was not and that the Purchaser would issue proceedings in accordance with its pre-application letter.

The proceedings

32. On 19 May 2020, the Purchaser issued a Part 8 Claim Form and an application notice, both of which claimed the same relief. The Defendants were the Vendor and Ms Bennett. The claim was made under section 49 of the LPA 1925 and various rules of the CPR. The Purchaser claimed an order that the Vendor complete the sale of the Property by 26 May 2020 and that the net proceeds of sale be paid into court or into an escrow account in accordance with specific arrangements proposed by the Purchaser.

It was proposed that the proceeds of sale be held to the order of the Vendor and Ms Bennett on specified terms with the costs involved being borne by the Vendor.

33. The claim was supported by a witness statement from the Purchaser's solicitor. The solicitor made five points in relation to "the proposed scheme" which he referred to as a "peculiar" scheme. For some reason, the solicitor referred to the original proposal to transfer the Property to two directors of the Vendor rather than to the executed TR1 which involved one director and a single transfer. In summary, the solicitor's points were:

    i) he said that he did not understand the scheme and he asked who the trustees would hold the Property for;

    ii) it was not obvious that a transfer by the Vendor to two directors would be registered by reason of the application for a restriction;

    iii) if it was being said that Property would be held on trust by the two directors for the Vendor, that could not be reconciled with the fact that the contract of sale meant that the Vendor held the Property on trust for the Purchaser;

    iv) if it was being said that the Property was held on trust for Ms Bennett then any transfer of the Property without her agreement would be likely to be a breach of trust and be contrary to section 11 of TOLATA 1996;

    v) overreaching only took place if the Purchaser and all the parties were acting in good faith; the Purchaser was worried that the Vendor's proposal showed that it was a scheme to put the proceeds of sale beyond the reach of Ms Bennett and the Purchaser did not want to be a party to such a scheme; if the Purchaser were a party to such a scheme, there would be no overreaching in the first place and the register might later be altered or rectified following an allegation of fraud by Ms Bennett.

34. The Vendor's solicitor filed a witness statement in response to the claim. He dealt with the points raised by the Purchaser in relation to the proposal to overreach any interest of Ms Bennett. In response to the allegation that the Purchaser intended to put the proceeds of sale beyond the reach of Ms Bennett, he stated that the Vendor and Mr Burgess fully understood their obligations to hold the sale proceeds on trust in relation to the alleged interest of Ms Bennett in order to abide by the outcome of any claim she might make. He stated that he had been instructed that they intended to hold the proceeds for one year to allow her to bring such claim as she considered appropriate.

35. These proceedings were listed for hearing on an urgent basis in the Vacation Court on 29 May 2020. When the case was called on, I indicated that it seemed to me that there was a practical way of dealing with completion of the sale, which both the Vendor and the Purchaser wanted to occur without delay. In particular, in the light of the statement by the Vendor's solicitor as to his instructions, a possible course would be for the Vendor and Mr Burgess to undertake to the court that they would act, in relation to the proceeds of sale, in the way in which they had instructed their solicitor they intended to act. I indicated that if that undertaking were given, then there should be no difficulty about completion in accordance with the executed TR1 and that completion could take place immediately.

36. I indicated to the parties that I was not deciding at that stage that the Purchaser had been entitled to insist on such an undertaking or that the Vendor had been obliged to provide it. I also indicated that if there were no undertaking, it might be necessary to reserve my judgment because some of the submissions made on behalf of the Purchaser could have wider implications for the conveyancing process and ought to be dealt with after proper consideration with carefully expressed reasoning. I could see that it might take some time to prepare a reserved judgment. I wanted to avoid a delay in completion, when both parties wanted completion and where the proposed undertaking to the court did not require the Vendor and Mr Burgess to act in any way differently from the way they said they intended to act in any event.

37. After a short adjournment to enable counsel to take instructions, I was told that the Vendor and Mr Burgess would give the undertaking referred to above. In the light of that undertaking, Ms Bennett agreed to withdraw her application for a restriction. In those circumstances, the Purchaser indicated that completion could take place in accordance with the executed TR1.

Discussion

38. Following the arrangements made at the beginning of the hearing, it is only necessary to resolve the earlier dispute between the parties in order to deal with the question of the costs of these proceedings. I indicated that I would not decline to hear submissions on the underlying dispute on the basis that the submissions were only relevant as to costs. The submissions for the Purchaser and for the Vendor were made by reference to the positions taken by those parties prior to the arrangements made at the beginning of the hearing.

39. The submissions for the Purchaser were that the proposal of the Vendor to complete in accordance with the executed TR1 would not work in the sense that the transfer to the Purchaser would not overreach the interest claimed by Ms Bennett so that that interest would continue to bind the Property. In the alternative, it was said that the Purchaser, having acquired the Property, would be subject to claims in equity by Ms Bennett for assisting a breach of trust by the Vendor. It was also said that any registered title taken by the Purchaser would be subject to alteration or rectification pursuant to schedule 4 to the 2002 Act on the application of Ms Bennett. Mr de la Piquerie focussed his submissions on what was required to achieve overreaching. However, as the Property is a registered title, I consider that the right place to start the analysis of the position is with the provisions of the 2002 Act, to which I now turn.

40. Section 29(1) of the 2002 Act provides that 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. In the present case, this subsection has the effect that if the transfer to the Purchaser were registered, then the interest acquired by the Purchaser would prevail over any interest asserted by the estate of Daniel O'Neill or the estate of Elizabeth O'Neill unless the priority of that interest was protected at the time of registration.

41. Section 29(2) provides, so far as relevant, that the priority of an interest is protected by registration if is the subject of a notice in the register or falls within any of the

paragraphs of schedule 3 to the 2002 Act. The interest asserted by Ms Bennett was not protected by a notice in the register and, indeed, it could not be so protected by reason of section 33(a). Further, that interest was not protected as an overriding interest under schedule 3 to the 2002 Act and, in particular, there was no relevant person in actual occupation of the Property so as to protect that interest under paragraph 2 of schedule 3. The contrary of these propositions was not suggested.

42. This means that the Purchaser will take free of any interest asserted by Ms Bennett if the transfer to the Purchaser is registered. The only thing which might prevent registration of the transfer is the restriction applied for by Ms Bennett. It is therefore important to identify what needs to be done to comply with that restriction and to allow the transfer to the Purchaser to be registered.

43. The restriction for which Ms Bennett applied was in standard Form A and related to a disposition by a sole proprietor of the registered estate. Form A is in these terms:

> "No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court."

44. As explained earlier, the Land Registry's notice to the Vendor dated 26 January 2020 contained a detailed explanation of the effect of the registration of a restriction in this form. The notice referred to the need for there to be at least two people to share the responsibility of making sure that the money received on a sale or other dealing with the Property was correctly dealt with. The notice also explained that if a sole registered proprietor wished to sell the Property, it would have to arrange for a second person to become a joint proprietor to act as a joint trustee and then:

> "… a purchaser could safely complete a purchase because a transfer would be by two or more proprietors so that the restriction would not prevent registration."

45. If the Vendor as the sole proprietor had transferred the Property to the Vendor and Mr Burgess for no consideration, a Form A restriction would not have prevented the Vendor and Mr Burgess becoming registered as proprietors of the Property, because the transfer to them was not a transfer under which capital money arose. If the Vendor and Mr Burgess, as registered proprietors, had transferred the Property to the Purchaser, the restriction would not have prevented the Purchaser becoming registered as proprietor because the transfer to the Purchaser was not a transfer by a sole proprietor.

46. The Land Registry Practice Guide 21 is headed: "using our forms for complex and more unusual transactions". Paragraph 6 of the Guide specifically deals with a case like the present. It states:

> "**6.1 How to deal with a sale when there is a Form A restriction on dispositions by a sole proprietor on the register and only one proprietor**
>
> The sole proprietor can transfer direct to the purchaser if either:

- the trust of land protected by the restriction has come to an end (for which you will need to provide evidence of the equitable title, normally in a statutory declaration or statement of truth. …

- the proprietor is a trust corporation

Otherwise a new trustee will have to be appointed. You can use either a single transfer or 2 separate transfers for this purpose, as appropriate to your circumstances.

6.2 One transfer used

Complete a single transfer as follows.

- enter sole proprietor A and new trustee B in the 'transferor' panel

- set out B's appointment as new trustee in the 'additional provisions' panel. Suitable words of appointment are: 'So that the transferor can give a good receipt for the purchase price, [A] in exercise of [his or her] statutory power appoints [B] to be a trustee of the property with [A] in place of [the previous trustee]'

- enter buyer C in the 'transferee' panel

6.3 Two transfers used

Complete separate transfers by appointing the new trustee in the first and then completing the sale to the buyer in the second as follows.

The first transfer

- enter sole proprietor A in the 'transferor' panel

- enter proprietor A and trustee B in the 'transferee' panel

- in the 'consideration' panel, choose the second option

- in the 'declaration of trust' panel, complete the third option by adding 'on the existing trusts' or similar words

The second transfer

A and B should execute the transfer on sale to buyer C in the usual way. In both instances, when the transfer on sale is registered the existing Form A restriction will be cancelled. … "

47. In this case, the Vendor's solicitors had initially proposed using two transfers as referred to in Practice Guide 21 but then opted to use one transfer as therein described. The TR1 which was executed by the Vendor and Mr Burgess was in accordance with the Practice Guide in that respect.

48. It is therefore clear that if the Purchaser had completed the Purchase of the Property by taking the TR1 as executed, and paying the purchase price to the Vendor and Mr Burgess, the Purchaser would have been registered as the proprietor of the Property. Further, if the interest asserted by Ms Bennett existed then that interest would have transferred from the Property to the proceeds of sale. Ms Bennett could not thereafter have asserted against the Purchaser that any pre-existing interest as claimed by her continued to bind the Property. In this way, all of the provisions of the 2002 Act would have been complied with resulting in the Purchaser becoming the registered proprietor of the Property free from the interest asserted by Ms Bennett.

49. Although the submissions for the Purchaser did not focus on the operation of the 2002 Act but instead considered what was involved in the concept of overreaching, there is strictly speaking no need in this case separately to consider the law as to overreaching. The way in which the 2002 Act operates as described above is against the background of the general law as to overreaching but if the parties complied with the 2002 Act and the Purchaser acquired a registered title under the 2002 Act, free from any interest asserted by Ms Bennett, then it would not be open to anyone to say that the Purchaser had not acquired a registered title free from any such interest because of some alleged failure to comply with the general law as to overreaching. Nonetheless, I will comment on what is involved in overreaching.

50. In unregistered conveyancing, the provisions of the LPA 1925 produce the result described by Lord Oliver in *City of London BS v Flegg* [1988] AC 54 at 78-79:

> " … the scheme of the Act is to enable a purchaser or mortgagee, so long as he pays the proceeds of sale or other capital moneys to not less than two trustees or to a trust corporation, to accept a conveyance or mortgage without reference at all to the beneficial interests of co-owners interested only in the proceeds of sale and rents and profits until sale, which are kept behind the curtain and do not require to be investigated."

51. Although *City of London BS v Flegg* involved registered land, it was relevant to consider overreaching in that case because the interest under the trust was an overriding interest under section 70(1)(g) of the Land Registration Act 1925 and, unless overreached, would bind the mortgagee in that case. Similarly, in *Mortgage Express v Lambert* [2017] Ch 93, another case involving registered land, it was relevant to consider overreaching because the interest asserted was an overriding interest under the 2002 Act, which unless overreached would bind the mortgagee in that case. Those cases are to be distinguished from the present case where, applying the provisions of the 2002 Act themselves, the result is that the Purchaser would become the registered proprietor of the Property free from the interest asserted by Ms Bennett.

52. If it were necessary to consider the statutory provisions as to overreaching, I consider they would be complied with in this case. Section 2(1)(ii) and (2) and section 27 of the

LPA 1925 provide for overreaching where the equitable interest is capable of being overreached and the requirements of section 27 are complied with. Section 2 applies to a purchaser whether or not the purchaser has notice of the equitable interest. Section 27(1) provides:

> "A purchaser of a legal estate from trustees of land shall not be concerned with the trusts affecting the land, the net income of the land or the proceeds of sale of the land whether or not those trusts are declared by the same instrument as that by which the trust of land is created."

53. These provisions refer to a "purchaser" which term is defined by section 205(1)(xxi) of the LPA 1925 as meaning a purchaser in good faith for valuable consideration.

54. It is also relevant to refer to section 17 of the Trustee Act 1925 which provides:

> "No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof."

55. As to the requirement of "good faith" in section 205(1)(xxi) of the LPA 1925, it should be noted that the statutory provisions themselves make it clear that:

    i) overreaching can take place even where the purchaser knows of the existence of the equitable interest: section 2(1) LPA 1925;

    ii) the purchaser is not concerned with the trusts affecting the property: section 27(1) LPA 1925;

    iii) the purchaser is not concerned with the proceeds of sale (after they are received by the trustees): section 27(1) LPA 1925; and

    iv) the purchaser is not concerned with the application of the proceeds of sale (after they are received by the trustees): section 17 Trustee Act 1925.

56. I referred earlier to the witness statement of the Purchaser's solicitor in support of this claim. The solicitor referred to the Vendor's proposal to complete in accordance with the executed TR1 as involving a "peculiar scheme". Mr de la Piquerie for the Purchaser repeatedly referred to the Vendor's "scheme" intending that word to have the pejorative connotation of an underhand or inappropriate device. He submitted that the scheme was "peculiar and concerning".

57. The Purchaser's solicitor said in this witness statement that he did not understand the Vendor's proposal. It is plain that the Purchaser's solicitor did not understand the proposal even though it was explained to him by the Vendor's solicitor. The Purchaser's solicitor ought to have understood the proposal and ought to have regarded it as a conventional conveyancing solution to deal with the application for a restriction in Form A. The Vendor's proposal was in accordance with the clear guidance given in the Land Registry Practice Guide 21.

58. There was nothing in the suggested difficulties raised by the Purchaser's solicitor as to the identity of the trustees or the nature of the trusts and whether the appointment of a trustee was consistent with the prior contract of sale to the Purchaser. Those points were not persisted in at the hearing.

59. The Purchaser's solicitor submitted that the Vendor's intention or "scheme" was to put the proceeds of sale beyond the reach of Ms Bennett. The Purchaser's solicitor had also asserted in correspondence that the Vendor was trying to deny Ms Bennett a right to claim the Property itself as distinct from the proceeds of sale. I do not see any basis at any time for those contentions. Ms Bennett had made it clear that she did not oppose the sale of the Property to the Purchaser. Instead, she was interested in the proceeds of sale. A restriction in Form A is not designed to prevent a sale but to assist in safeguarding the proceeds of sale. There does not appear to have been any basis for the Purchaser to suspect that the Vendor would dissipate the proceeds of sale to prevent Ms Bennett claiming them. Ms Bennett knew the details of the intended sale and could protect herself against any dissipation. The Vendor had itself proposed an escrow account in relation to the proceeds of sale but stated that it had encountered practical problems with setting up an escrow account and paying for it. I can see that the practical problems might have been overcome but I do not see that the Vendor's decision not to pursue an escrow account and instead to follow Land Registry Practice Guide 21 in a conventional way carried with it the inference that the Vendor was doing so in order to dissipate the proceeds of sale to defeat Ms Bennett's claim. In any case, what happened to the proceeds of sale was a matter between the Vendor, Mr Burgess and Ms Bennett and was not the concern of the Purchaser as the statutory provisions referred to above made clear.

60. Mr de la Piquerie argued that there was a risk that the Purchaser would not be a "purchaser" within the definition in section 205(1)(xxi) of the LPA 1925 and so could not take advantage of the overreaching provisions in sections 2 and 27 of the LPA 1925 because it could be argued that the Purchaser was not acting in good faith. Of course, the Purchaser was not contending that it was acting in bad faith but the suggested concern was that if the Purchaser completed the purchase in accordance with the Vendor's proposal, Ms Bennett could argue that the Purchaser was not acting in good faith but instead was going along with the Vendor's "scheme". There are two answers to this suggestion. The first is that the Purchaser's position is governed by the 2002 Act. Under the 2002 Act, if the vendor acted in accordance with Land Registry Practice Guide 21, the Purchaser would become the registered proprietor free from any interest asserted by Ms Bennett, whose interest would transfer to the proceeds of sale and would be a matter between Ms Bennett and the Vendor alone. The second is that there was no basis for saying that the Purchaser was not acting in good faith. The Vendor and the Purchaser had entered into an arms-length contract at a time when the Purchaser had no awareness of any dispute with Ms Bennett. When Ms Bennett applied to register a restriction, she did not in any way object to the Purchaser completing the purchase and paying the price to the Vendor. If she had a good claim against the Vendor that claim would be exclusively against the Vendor. The statutory provisions, for the protection of the Purchaser, expressly provided that the Purchaser could complete the purchase and was not concerned with the trusts asserted by Ms Bennett nor as to the application of the proceeds of sale.

61. Mr de la Piquerie relied on two passages from Lewin on Trusts, 20th ed., at 44-016. In that paragraph, it is suggested that overreaching might not occur where the transfer of the trust property is outside the powers of the trustee. That cannot apply in this case. There was no relevant limitation on the powers of the Vendor as the owner of the Property conferred by sections 23 to 26 of the LRA 2002. Indeed, section 26 of that Act protected the position of the Purchaser in that respect provided that the Vendor complied with the restriction applied for by Ms Bennett, which the Vendor proposed to do. In so far as Mr de la Piquerie submitted that Ms Bennett's interest was not capable of being overreached within section 2 of the LPA 1925, her interest was of a kind which has conventionally been held to be capable of being overreached.

62. Then Mr de la Piquerie referred to the discussion in Lewin to the effect that if a Purchaser dishonestly assisted a breach of trust by the Vendor, the Purchaser would be liable in equity to the beneficiary. Lewin makes the point, with which I agree, that merely wanting to take advantage of the overreaching effect of section 2 of the LPA 1925 would not amount to a lack of good faith. In the present case, there can be no question of the Purchaser dishonestly assisting a breach of trust by the Vendor. The transfer to the Purchaser would not be a breach of trust by the Vendor. It was submitted that the transfer would be a breach of trust because it would involve a breach of section 11 of TOLATA 1996. That refers to the trustee consulting the beneficiaries and so far as consistent with the general interest of the trust, giving effect to the wishes of those beneficiaries. However, Ms Bennett was aware of the sale and did not oppose completion of the sale.

63. If, following the transfer, the Vendor dissipated the proceeds of sale then that would be a breach of any trust binding the Vendor but it is hard to see how the Purchaser would assist that breach of trust merely by providing the proceeds of sale in the first place. It was also said that it was a breach of trust for the Vendor to fail to place the proceeds of sale into an escrow account because when Ms Bennett was consulted in a way which would trigger section 11 of TOLATA 1996, she had required the Vendor to set up an escrow account at its expense and the trustee had failed to comply with her wishes. However, it is not a breach of trust for the Vendor to retain the proceeds of sale as trustee without putting them into an escrow account at its expense. Further, I do not see any arguable case of dishonesty in the Purchaser completing a contract of sale entered into in good faith when it was contractually obliged to do so under the terms of that contract.

64. It follows that when the Vendor and Mr Burgess offered to complete the contract in accordance with the executed TR1, the Vendor was thereby complying with its obligations under the contract and was offering a good title to the Purchaser. The Purchaser was obliged under the contract to complete in accordance with the executed TR1.

Costs

65. This has been an unfortunate and unnecessary dispute where the parties appear to have been over-influenced by considerations as to costs. The proposal to open an escrow account did not proceed for various reasons including a disagreement as to the costs involved, which would have been modest compared with the costs of this litigation. The Vendor and Purchaser could not agree on who should bear the costs of consensual proceedings under section 49 of the LPA 1925 to clear up what was to happen in

relation to Ms Bennett. Further, in view of the undertaking given at the beginning of the hearing in this case, which allowed completion to take place irrespective of the outcome of this case, the hearing only continued in order to deal with the costs of the claim.

66. At the hearing, I invited counsel for the Vendor and the Purchaser to address me in full on the question of costs so that I could deal with that question in this judgment. They both did so. Counsel for Ms Bennett did not ask for her costs and there was no application for costs against her.

67. Mr de la Piquerie submitted that the Vendor should pay the Purchaser's costs because the Purchaser had been right to bring, alternatively justified in bringing, this claim. Mr Rifat submitted that the Purchaser should pay the Vendor's costs because the Purchaser's attitude had been wrong throughout and its claim was unjustified.

68. I have now held that the Purchaser ought to have completed the purchase in accordance with the executed TR1 and I have rejected all of the Purchaser's arguments to the contrary. The only consideration which has caused me to pause is that the whole dispute could very easily have been dealt with in a practical way in accordance with the proposal I made to the parties at the outset of the hearing, with which they were prepared to agree and which enabled completion to take place.

69. Nonetheless, I consider that the right order to make is that the Purchaser should pay the Vendor's costs of this claim essentially for the reasons put forward on behalf of the Vendor. The Vendor's proposal was an entirely proper and indeed conventional way of dealing with the application for the restriction. The Purchaser's solicitor did not understand the proposal but should have done so. The Purchaser's solicitors raised a serious of objections which were unfounded and they went to the lengths of submitting that an acceptance of the Vendor's proposal would result in the Purchaser acting in bad faith or dishonestly assisting a breach of trust. I have held that there was nothing in those suggestions. I consider that the right order for costs is that the costs should follow the event and the Purchaser should pay the Vendor's costs of this claim.

70. Following the release of a draft of this judgment, Mr Rifat applied for an order that the Vendor's costs be assessed on the indemnity basis. I decline to make that order. There is insufficient in the conduct of the Purchaser and its solicitors to take this case out of the norm or to justify such an order. The costs will be assessed on the standard basis.