PROPRIETARY ESTOPPEL AND VENDOR PURCHASER CONSTRUCTIVE TRUSTS

THE recent Supreme Court decision in *Scott v Southern Pacific Mortgages* [2014] UKSC 52; [2014] H.L.R. 48 considered whether a promise made by the buyer of a piece of land, before completion, could give rise to a proprietary estoppel claim. *Obiter*, the court also considered the width and applicability of the rule in *Abbey National B.S. v Cann* [1991] A.C. 56, which has traditionally been seen to provide that completion and the creation of a mortgage charge are to be considered as one transaction in cases of acquisition mortgages where the purchaser could not have purchased the property without the mortgage loan.

The case concerned a sale and leaseback arrangement. Mrs. Scott was one of a number of homeowners ("the vendors") that had been persuaded to sell their properties to purchasers, on the basis of a promise that they would be given leases of their properties following sale. Unbeknownst to the vendors, the purchasers arranged for mortgages to finance the purchase of the properties. The purchasers later defaulted on the repayments, and the mortgagees sought possession of the properties. The mortgagees succeeded in both the High Court and the Court of Appeal. The vendors appealed to the Supreme Court and argued three main points. First, they contended that the promises they had been made by the purchasers had conferred upon them equitable proprietary rights. This was because, from the moment they entered into the contracts for the sale of the houses, the purchasers acquired rights under a vendor purchaser constructive trust ("VPCT"), out of which they could give proprietary equitable interests to the vendors. In other words, the assurances made by purchasers to the vendors were said to have given an equitable estoppel interest to the vendors, which was "fed", that is to say became proprietary, upon the purchasers' acquisition of rights under the VPCT. Secondly, they argued that the decision in *Cann* did not involve treating the contract of sale as part of the "one transaction" along with the mortgage and completion: consequently the agreement to sell the land was a separate and prior transaction to the transfer of legal title and mortgage, giving the vendors an interest in the property which predated the mortgage charges. Thirdly, given that the vendors had remained in actual occupation of the properties since sale they contended that their property rights would take priority over the mortgages as overriding interests under Sch. 3, para. 2 of the Land Registration Act 2002.

The Supreme Court ruled for the banks unanimously on the basis of the first point. Both Lord Collins and Lady Hale held that the vendors could not have acquired proprietary rights from the purchasers following the exchange of contracts. The rights the purchasers acquired under the VPCT before completion did not amount to a sufficient interest in the land to convey equitable proprietary rights over it to the vendors ([2014]

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UKSC 52, at [79] and [111]). Further, due to the operation of the principle in *Cann*, the purchasers never acquired legal title to the property which would have been sufficient to feed the estoppel, and confer upon the vendors a proprietary right capable of binding third parties (at para. [48]).

The judgment clarifies the law on proprietary estoppel and is best understood as follows. Lord Collins and Lady Hale determined whether or not the vendors' estoppel could bind the mortgagees by examining the nature of the purchasers' rights under a VPCT before completion, and whether or not a proprietary right of the sort promised to the vendors could be "carved out" of the purchasers' rights under the VPCT before completion. This approach is significant for three principal reasons. First, by focusing on the content of the purchasers' rights and those they had promised, the court effectively transplanted the notion of "feeding" an estoppel from the common law doctrine of tenancy by estoppel into the equitable doctrine of proprietary estoppel, thereby assimilating the doctrines. Secondly, the court made clear that the binding effect of a proprietary estoppel would be determined by reference to the content of the rights in question, rather than to the less defined test of "unconscionability" suggested in some case law (see *United Bank of Kuwait v Sahib* [1997] Ch. at 142C-E). Finally, the judgment makes clear that s. 116 of the Land Registration Act 2002, which provides that equities by estoppel and mere equities take effect as interests capable of binding third parties, does not confer proprietary effect on equities and proprietary estoppels which are merely personal rights under the general law ([2014] UKSC 52, at [58]–[59]). This approach represents a welcome development and puts the law of proprietary estoppel on a more principled basis in line with the approach advocated by recent commentators (J. McGhee (ed.), *Snell's Equity*, 32nd ed. (London 2010), para. 12–031; B. Macfarlane, *The Law of Proprietary Estoppel* (London 2013), para. 8.117).

However, there are parts of the judgment which should be treated with caution. First, although there are several passages in which both Lord Collins and Lady Hale suggest that the court's reasoning is premised on the idea that only legal, rather than equitable title, can feed an estoppel arising from the promise of a legal lease (at paras [71] and [112]), there are good reasons for resisting such an inference. Lady Hale states that the (necessarily equitable) right of a purchaser of registered land after completion but prior to registration is capable of feeding an estoppel, and therefore of creating an overriding interest, on the basis that the purchaser would have "an absolute right to the legal estate" provided that the registration requirements were later met (at paras [113]–[114]). Similarly, Lord Collins's lengthy examination of the case law governing the content of a beneficiary's right under a VPCT before completion suggests that His Lordship had the specific limited equitable rights of a purchaser before completion in mind, and did not accept that equitable rights could never

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feed an estoppel of this type. Secondly, the passages in Lord Collins's judgment in which he cites authority to the effect that VPCTs are not "true" trusts before completion should be treated with care (at paras [64]–[65]). Given that His Lordship expresses no opinion himself about the nature of such trusts, these passages are best interpreted as part of his examination of whether the rights of the vendors under a VPCT before completion could feed the estoppel arising from the promise of the lease, and not as authority for wider propositions about the nature of VPCTs in general.

It is also worth noting the court's lengthy conflicting *obiter* opinions on the operation of the principle in *Cann*. With the agreement of Lords Wilson and Reed, Lady Hale argued that whether a contract, conveyance, and mortgage were one indivisible transaction was effectively a question of fact, depending in part on the timing of the transactions (at para. [116]). Perhaps more significantly, in spite of the decision in *Cann*, she suggested that "not all conveyances and mortgages are indivisible: it depends upon the facts" (at para. [115]). In particular, Her Ladyship suggested that the transactions might not be treated as one: where the parties to each were not aware of one another; in cases of fraud; and in cases where banks had not carried out the appropriate checks (at paras [116]–[118] and [122]). Lord Collins, with whom Lord Sumption concurred, disagreed. His Lordship argued that "As a matter of principle… it is implicit in *Cann* that contract, conveyance and mortgage are indivisible" (at para. [85]).

Lady Hale's dicta are significant because they challenge the way *Cann* has been interpreted. Until now it was assumed that conveyance and mortgage would automatically be treated as occurring simultaneously in any case of an acquisition mortgage (e.g. see C. Harpum et al., *Megarry & Wade, The Law of Real Property*, 8th ed. (London 2012), 803–04). While it seems unlikely that the *Cann* rule will be frequently disapplied in practice, especially as it was applied in *Scott* itself despite the purchasers' fraud and absence of bank checks, Lady Hale's dicta suggest that judges do have discretion to set aside the rule. The uncertainty stirred by Lady Hale's opinion as to the extent of *Cann*'s applicability to acquisition mortgages is likely to cause anxiety to banks seeking protection against an acquisition mortgagor's fraudulent promises to a third party. This surmise is supported by the fact that the court was presented with evidence "on the inquiries which mortgage lenders would have to undertake and on the increased risk of fraud" should the vendors' appeal have succeeded (at para. [88]). After all, on the facts of *Scott* it was the operation of the rule in *Cann* which prevented the purchasers acquiring legal title, which would have fed the estoppel and given the vendors rights binding the banks under Sch. 3, para. 2. Had *Cann* not applied, the vendors' interests would have bound the mortgagees.

As recognised by both Lord Collins and Lady Hale, the underlying question here is the extent to which the integrity of the register should be

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protected, and thus the extent to which unregistered interests which arise under the general law should be disregarded. It is submitted that Lady Hale's approach, under which a mortgagee or other disponee might be bound if they have not made appropriate enquiries prior to the disposition has much to recommend it: it allows priority to be determined by the circumstances of each case rather than by an "all or nothing" approach as enshrined by the *Cann* rule as traditionally interpreted (see para. [122]). It seems wrong that a promisee ignorant of an acquisition mortgage should automatically lose to the bank when the bank could have discovered her interest by making a reasonably careful inspection of the land. Further, it avoids the artificiality of treating the mortgagor, mortgagee, and promisee as parties to a tripartite transaction even when the mortgagee and promisee are unaware of one another (see paras [87] and [117]–[119]), and of retrospectively treating as one transactions which might take effect at very different times (see para. [116]).

Whatever one's position, in the aftermath of *Scott* it is hard to determine the precise scope of the rule in *Cann* and the positions adopted by subsequent judges will likely turn on their own views. The conflicting decisions on rectification and mistake show how different judges' perceptions of the nature and function of the register can lead to piecemeal and inconsistent case law (compare *Fitzwilliam v Richall Holdings Ltd.* [2013] EWHC 86 (Ch.); [2013] 1 P. & C.R. 19 with *Walker v Burton* [2014] EWCA Civ 1228; [2014] 1 P. & C.R. 9). It is very much to be hoped that in the wake of *Scott* the case law on *Cann* will not become plagued by this same uncertainty.

Andreas Televantos* and Lorenzo Maniscalco**

*Address for correspondence: Faculty of Law, University of Cambridge, 10 West Road, Cambridge CB3 9DZ. Email: ait30@cam.ac.uk.

**Address for correspondence: Faculty of Law, University of Cambridge, 10 West Road, Cambridge CB3 9DZ. Email: lm632@cam.ac.uk.

RESPONSIBILITY IN GROUPS OF COMPANIES AND THE FUTURE OF INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LITIGATION

EVER since the establishment of separate legal personality of companies and their limited liability in the nineteenth century, there have been attempts by voluntary and involuntary creditors of the insolvent or dissolved subsidiary to obtain remedies from the parent company. The orthodox view is that the parent company is neither responsible for the acts and omissions of the subsidiary nor liable for its debts. The Court of Appeal in *David Thompson v The Renwick Group plc* [2014] EWCA Civ 635 confirmed that the exceptions to this orthodoxy apply only in truly

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