its true analysis rent at all" (p. 1384). It therefore offended against the scheme of the Housing Act and was unenforceable.

The Court's laudable willingness to scrutinise attempted evasion of statutory protection may however prove to be of limited lasting value, at least as far as the security of residential tenants is concerned. The context in which the lease was granted to Mr. Pensfold-Dunsford and Mr. Leech has subsequently changed. The reason why the original landlord in this case chose to grant an assured tenancy, rather than the more flexible assured shorthold tenancy which could at that time have been created upon service of notice, was in order to take advantage of the tax benefits of the Business Expansion Scheme, which has since been discontinued. Moreover, any tenancy of a dwelling-house granted on or after 28 February 1997 will take the form of an assured shorthold tenancy unless the agreement stipulates otherwise; under such a tenancy the landlord has the right to obtain possession simply by giving two months' notice (Housing Act 1988, s. 21). The Court of Appeal may have shut a stable door, but Parliament has meanwhile dismantled the greater part of the stable.

ROSY THORNTON

FRAUD, TRUSTS AND EQUITIES

MR. and Mrs. Collings were the unremarkable registered proprietors of their house, until they had the misfortune to deal with Mr. Lee. Lee purported to act for them in finding a purchaser for the house, and he found a Mr. Styles. Mr. and Mrs. Collings then executed a transfer of the house to Styles in consideration of £250,000, but "Styles" was simply an alias used by Lee, and no part of the £250,000 was ever paid to them. The net result, therefore, was that Lee fraudulently procured the transfer of the house from Mr. and Mrs. Collings to himself, for no consideration. Once registered as proprietor of the house, Lee mortgaged it to the Leeds Permanent Building Society and took the mortgage proceeds. Mr. and Mrs. Collings remained in actual occupation of the house throughout. When Lee's fraud came to light, Mrs. Collings sought rectification of the register, to reinstate her as proprietor of the house free of the mortgage. (Her husband had died in the meantime, and she had acquired his rights by survivorship.) The Court of Appeal upheld her claim: *Collings* v. *Lee* [2001] 2 All E.R. 332.

https://doi.org/10.1017/S0008197301331197 Published online by Cambridge University Press

It was common ground that registration of the transfer effectively vested the legal estate in Lee, even though he had procured the transfer by fraud. That must be right. Registration itself confers the legal title (Land Registration Act 1925, s. 69(1); *Morelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379 at p. 411); indeed, registration of a forged transfer is still effective to vest the legal estate (*Argyle B.S.* v. *Hammond* (1984) 49 P. & C.R. 148). Consequently, Lee could grant a mortgage to the Leeds (Land Registration Act 1925, ss. 18, 25), and he did so.

Against this background, counsel for Halifax plc, successor to the Leeds, submitted that Mrs. Collings had no rights which bound the mortgagee, and so she could not sustain her claim for rectification. His reasons were as follows. When Lee granted the mortgage, Mr. and Mrs. Collings only had an unexercised right to set aside the transfer by which they conveyed the house to him. This was a "mere equity", not a proprietary interest capable of binding the Leeds, and hence Halifax.

Counsel for Mrs. Collings first argued that her equity to set aside the transfer bound Halifax by virtue of section 70(1)(*g*) of the Land Registration Act 1925 (protection of the rights of those in actual occupation of land etc.). There was no question that Mr. and Mrs. Collings had been in actual occupation of the house at the relevant times, and the Leeds had certainly made no enquiries of them, so their "mere equity" would bind the Leeds (and hence Halifax) if it were a proprietary right, in principle capable of affecting third parties. At a late stage, however, proceedings took a different turn. It was alleged that Mr. and Mrs. Collings had the full equitable, beneficial interest in the house when the Leeds took its mortgage; that this interest bound the Leeds (and Halifax) by reason of section 70(1)(*g*), and that Mrs. Collings was therefore entitled to reclaim the legal estate in the house, free of the mortgage. The Court of Appeal accepted this argument.

According to Nourse L.J. (at p. 336), with whom Mummery and Rix L.JJ. agreed, Mr. and Mrs. Collings retained their beneficial interest in the house because they "did not intend to transfer the property to the first defendant [Lee] and they did not intend to transfer it for no consideration. The first defendant acquired the property without their knowledge and consent and in breach of his fiduciary duty to them." The cases cited by Nourse L.J. in support of his conclusion concern the situation where equity responds to a fiduciary's wrongful transfer of his principal's property by imposing a trust over the property in favour of the principal (subject always to any applicable defences). Yet the relevant fiduciary, Lee, did not transfer the house on behalf of Mr.

https://doi.org/10.1017/S0008197301331197 Published online by Cambridge University Press

and Mrs. Collings: he duped them into causing a transfer of the house themselves. With respect, therefore, the cases cited by Nourse L.J. were not applicable to the facts of the case before him.

Nevertheless, the conclusion reached by the Court of Appeal can be supported fully. Mr. and Mrs. Collings held legal title to their house as trustees for themselves: that is the result of the imposition of a trust where the legal estate in land is vested in more than one person. Registration of the transfer they signed undoubtedly divested them of their legal estate, and vested it in Lee, notwithstanding his fraud. However, Mr. and Mrs. Collings did not overreach their beneficial interest in the trust; nor did Lee's mortgage to the Leeds. Consequently, the interest continued to subsist in relation to the house, and it bound the mortgagee by reason of Land Registration Act 1925, s. 70(1)(*g*), so entitling Mrs. Collings to her remedy. A little more detail may be useful.

Whatever the relevant documents said, Mr. and Mrs. Collings transferred their legal estate to Lee for no consideration; consequently, he was bound by their beneficial interest: Land Registration Act 1925, s. 20(4). (If clauses 28 and 29 of the Land Registration Bill, currently before Parliament, were applied to the transfer, they would produce the same result.) For different reasons, Lee did not overreach Mr. and Mrs. Collings's interest in the house when he granted the mortgage. Although he had power at law to create the mortgage, he was a sole trustee for Mr. and Mrs. Collings, and consequently did not have power to subordinate their beneficial interest to the mortgage (Law of Property Act 1925, s. 2). Their interest therefore bound the mortgagee by reason of section 70(1)(*g*).

In short, the Court's conclusion is best explained by the failure of successive trustees to overreach the beneficial interest in a trust asset, with the consequence that the interest bound a purchaser of the asset, in accordance with the relevant rules of priority. For completeness, it should be added that Mr. and Mrs. Collings never validly consented to the subordination of their rights.

The Court found it unnecessary to decide "the more general question whether a mere equity, such as a right to avoid a transfer of registered land, which, though procured by fraudulent misrepresentation, is otherwise valid and effective, does or does not fall within section 70(1)(*g*)" (*per* Nourse L.J. at p. 337). Though the Court heard powerful argument to the contrary, it is submitted that such an equity is a proprietary right capable of falling within section 70(1)(*g*). Similar rights have been held to fall within section 70(1)(*g*): see *Blacklocks* v. *J.B. Developments (Godalming) Ltd.* [1982] Ch. 183 and generally Megarry & Wade, *The Law of Real Property* (6th ed. by C. Harpum), at para. 6–052. Further, as a

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matter of general law, a vendor's right to rescind a conveyance for fraud has been held capable of affecting third parties: see generally Meagher, Gummow & Lehane, *Equity: Doctrine & Remedies* (3rd ed.), at paras. 429–435. Finally, such an equity will undoubtedly be treated as a proprietary interest for the purposes of the new land registration legislation: see clause 114 of the Land Registration Bill, which restates the present law for the avoidance of doubt, and paras. 5.32–5.36 of *Land Registration for the Twenty-First Century* (Law Com No. 271).

The arguments advanced by Halifax would also produce a startlingly unattractive distinction between cases where co-owners are defrauded of their legal title to land, and cases where a sole beneficial owner is similarly defrauded. If Mrs. Collings had originally held legal title to the house as sole beneficial owner, she would not have had a separate equitable interest in the house. If Lee had then defrauded her of her legal title, she would have acquired an equity to rescind the transaction, but no more. If the arguments advanced on behalf of Halifax were correct, that equity could not have bound it. In other words, if those arguments were correct, Mrs. Collings only succeeded because she happened to be co-owner of the house at the time of Lee's fraud: as joint owners of the legal estate in their house, Mr. and Mrs. Collings necessarily held it on trust, and as beneficiaries of that trust, they had a full equitable interest in the house, which could and did bind a mortgagee. The simple solution to this anomaly is to recognise that a mere equity can bind third parties. The Land Registration Bill adopts this solution, as noted above. A more radical solution would be to assimilate the equity to rescind and the trust raised in favour of a defrauded party, though this might be much less radical than it appears at first sight: in the circumstances where an equity to rescind has already been accorded the status of a proprietary right, there is not much to distinguish it from a beneficial interest (see "Dispositions Involving Fiduciaries: The Equity to Rescind and the Resulting Trust" in *Restitution and Equity* (LLP, 2000, eds. Birks and Rose)).

RICHARD NOLAN

FIDUCIARY LIABILITY AND CONTRIBUTION TO LOSS

HAVING made a successful takeover bid for Western United, Kia Ora found that it had paid $25.7m in cash and issued 67.9m $1 shares in return for Western United shares worth only $6.4m. Kia Ora successfully sued several former directors. The High Court of

https://doi.org/10.1017/S0008197301331197 Published online by Cambridge University Press