



Michaelmas Term
[2014] UKSC 52
On appeal from [2012] EWCA Civ 17

JUDGMENT

Rosemary Scott (Appellant/Second Defendant)
v
**Southern Pacific Mortgages Limited (Claimant/
First Respondent)**
and
Mortgage Express (Second Respondent)
and
Amea Lydia Wilkinson (First Defendant)
and
The Mortgage Business Plc (Intervener)

before

Lady Hale
Lord Wilson
Lord Sumption
Lord Reed
Lord Collins

JUDGMENT GIVEN ON

22 October 2014

Heard on 3 and 4 March 2014

Appellant
Bryan McGuire QC
James Stark

(Instructed by Paula
Harris, David Gray
Solicitors LLP)

First Respondent
Justin Fenwick QC
Nicole Sandells
Nicholas Broomfield
(Instructed by Paul
Heeley, TLT LLP)

Second Respondent
Justin Fenwick QC
Nicole Sandells
Nicholas Broomfield
(Instructed by Ian Drew,
Walker Morris LLP)

Intervener
Lesley Anderson QC
Daniel Gatty
(Instructed by Richard Pitt,
Eversheds LLP)

LORD COLLINS (with whom Lord Sumption agrees)

1. The transactions with which this appeal is concerned arose during a period when sale and rent back transactions were common. They were what was described by the Office of Fair Trading in 2008 (*Sale and rent back: An OFT market study*) as a relatively new type of property transaction whereby firms bought homes from individuals, usually at a discount, and allowed the former home owners to stay on in the property as tenants. The deals were often sold to home owners in financial difficulties and the firms selling them often told the home owners that they would be able to stay in their homes for years, when in fact the tenancies were rarely granted for more than six or twelve months. Many firms financed the purchase of the properties through secured borrowing, and former owners were being evicted following proceedings for possession by mortgage lenders after the purchasers defaulted on their loans. The home owners did not fully understand the risks involved, and the OFT's research found that solicitors provided by the sale and rent back companies to provide advice to the seller were sometimes suspected to be acting for the companies as well. By the time of the study the OFT estimated that there were 1,000 firms involved in selling the schemes and about 50,000 transactions.
2. In 2009 the Financial Services Authority recommended that consumer detriment occurring in this market warranted a fast regulatory response, and in the same year sale and rent back transactions became a regulated activity under section 19 of the Financial Services and Markets Act 2000. As a result, in February 2012 the FSA reported that most sale and rent back transactions were unaffordable or unsuitable and should never have been sold, but that in practice the entire market had shut down. They are now very rare.
3. This is an appeal in one of what were originally ten test cases in which the defendant home owners were persuaded to sell their properties to purchasers who promised the vendors the right to remain in their homes after the sale. The purchasers bought the homes with the assistance of mortgages from lenders, who were not given notice of the promises to the home owners. Criminal charges are pending and the original owners and the lenders may have been the victims of a fraud. Some of the solicitors involved in the transactions were subsequently the subject of disciplinary proceedings. Ultimately this appeal will determine which of the innocent parties will bear the consequences.
4. The purchasers/mortgagors were nominees for an entity called North East Property Buyers ("NEPB"). In each case the purchaser/mortgagor has taken no part in the proceedings. There are another 90 or so cases in the Newcastle

area involving NEPB and some 20 different lenders, but also many other cases in other parts of England involving similar schemes.

5. In each case the purchaser applied for a loan from one of the lenders. The application form disclosed that the property was being purchased on a "buy to let" basis and that the tenancies granted would be assured shorthold tenancies of six months' duration. The mortgage terms generally permitted only assured shorthold tenancies for a fixed term of not more than 12 months. As a result the purchasers were able to obtain loans on the basis that they were purchasing properties at full value with vacant possession.
6. Exchange of contracts between the relevant vendor and the purchaser, and the completion of the contract by the execution of the transfer, and the execution of the mortgage, all took place on the same day. Neither the rights of occupation promised by the purchasers to the vendors nor the tenancies granted by the purchasers were permitted by the lenders' mortgages.
7. The purchasers defaulted on the loans, and the lenders sought possession of the homes in proceedings, which the original owners resisted, without success, before Judge Behrens sitting as a High Court judge in the Chancery Division at Leeds District Registry (sub nom *Various Mortgagors v Various Mortgagees* [2010] EWHC 2991 (Ch)) and on appeal before Lord Neuberger MR, and Rix and Etherton LJJ, with Etherton LJ giving the only reasoned judgment: sub nom *Cook v Mortgage Business* [2012] EWCA Civ 17, [2012] 1 WLR 1521.
8. The essence of the issue before this court is whether the home owners had interests whose priority was protected by virtue of section 29(2)(a)(ii) of, and Schedule 3, paragraph 2, to the Land Registration Act 2002 ("the 2002 Act").
9. There are two main questions on this appeal which divide the parties, and each of them concerns the effect of the contract of sale and purchase.
10. One question is whether the purchasers were in a position at the date of exchange of contracts to confer equitable proprietary rights on the vendors, as opposed to personal rights only. The second question is whether, even if the equitable rights of the vendors were more than merely personal rights, the rationale of the decision of the House of Lords on the Land Registration Act 1925 ("the 1925 Act") in *Abbey National Building Society v Cann* [1991] 1 AC 56 applies in this case. At the risk of oversimplification, that case decided that where a purchaser relies on a bank or building society loan for the

completion of a purchase, the transactions of acquiring the legal estate and granting the charge are one indivisible transaction, and an occupier cannot assert against the mortgagee an equitable interest arising only on completion.

Mrs Scott's case

11. The only appeal before this court is that by Mrs Scott, but because this is a test case I shall for convenience refer to the arguments on her behalf as those of “the vendors”. In order to put some flesh on the scheme, I propose to illustrate it by reference to some of the facts of Mrs Scott’s case, although it should be emphasised that there have been no findings of fact and that the lenders have not agreed the statement of facts from which this account is taken.
12. Mrs Scott and her former husband Mr Scott were originally secure tenants of a house in Longbenton, Newcastle upon Tyne. They bought the house from North Tyneside Borough Council in 1999 on a mortgage from Cheltenham and Gloucester, and became the registered proprietors with absolute title. Five years later Mr Scott left Mrs Scott and she fell into financial difficulties. In 2005 she decided to put the house on the market at £156,000 but only received an offer significantly below the asking price.
13. Mrs Scott was subsequently approached by a man who told Mrs Scott that he had heard she was trying to sell her house, and said that a friend of his worked for a Mr Michael Foster who was looking to buy properties in the area and that Mr Foster would pay the asking price and rent it back to Mrs Scott.
14. Mr Foster, who was in some way connected with NEPB, then met Mrs Scott and told her that he would purchase the property for £135,000 and that she could stay as a tenant at a discounted rent of £250 a calendar month. If she stayed for ten years she would receive a lump sum of £15,000, which would make up some of the deficit in the sale price, and she would receive £24,000 from the net proceeds of sale. The outstanding mortgage to Cheltenham and Gloucester was in the region of £70,000, and so the equity would have been about £65,000. A deduction of £40,000 would be paid to NEPB.
15. Mrs Scott told Mr Foster that she wished to live in the property indefinitely and he assured her that she could stay as long as she liked, and that if she were to die the tenancy would be automatically transferred into her son’s name and he would receive the lump sum at the end of the ten-year period.

16. Mr Foster said that he would arrange solicitors for her and be responsible for the legal fees so long as those solicitors were used. Those solicitors were Hall & Co, who also acted for the vendors in most of the other cases. The solicitors for the purchaser were Adamsons, who, in the usual way, also acted for the lenders (and also acted in other transactions of this type).
17. Ms Ameer Wilkinson was the nominee purchaser for NEPB. Ms Wilkinson was made a buy to let interest only mortgage offer by Southern Pacific Mortgages Ltd on June 15, 2005. The loan amount was £114,750 and £1,751.50 fees. The mortgage offer stated that the purchaser was not bound by the terms of the offer until the purchaser had executed the legal charge, the funds had been released, and the legal transaction had been completed.
18. In the course of the conveyancing process, the answers to the requisitions on title in respect of vacant possession were that arrangements might be made direct with the seller “as to both the handover of keys and the time that vacant possession would be given.”
19. The agreement for sale, dated August 12, 2005, was expressed to be with Full Title Guarantee and subject to the Standard Conditions of Sale (4th Edition). The Special Conditions attached at Clause 4 were left by both firms of solicitors without either of the alternatives being deleted so that it read, “The property is sold with vacant possession (or) The property is sold subject to the following Leases or Tenancies”. No leases or tenancies were listed.
20. Completion of the transfer (TR1) from Mrs Scott and Mr Scott to Ms Wilkinson and the legal charge by Ms Wilkinson to SPML also took place on August 12, 2005. The transfer and the charge were registered on September 16, 2005.
21. Four days later, on August 16, 2005 UK Property Buyers acting as agents for Ms Wilkinson, contrary to the terms of Ms Wilkinson’s mortgage, granted Mrs Scott a two-year assured shorthold tenancy at the reduced rent. On expiry of the fixed term, the tenancy was stated to become a monthly periodic tenancy terminable on not less than two months’ notice in writing. Mrs Scott also received, dated August 16, 2005, a document promising that she could remain in the property as the tenant and that a loyalty payment of £15,000 would be paid after ten years.
22. Three years later, in August 2008, Mrs Scott became aware that there might be a mortgage on the property. A letter was sent to Mrs Scott by North East

Property Lettings suggesting that there had been teething problems following an office move and that some tenants had been receiving letters from mortgage companies stating that the account was in arrears, which, the letter assured Mrs Scott, was incorrect. A few months later, Mrs Scott discovered, through accidentally opening a letter addressed to Ms Wilkinson at the house, that a possession order had been made on March 17, 2009 without her knowledge, pursuant to proceedings commenced in February 2009. Subsequently, she received a warrant of possession due to be executed on May 20, 2009.

23. The warrant of possession was suspended and Mrs Scott was joined as a defendant in the possession proceedings so that she could argue that she had an overriding interest under the 2002 Act.
24. It is impossible not to feel great sympathy with Mrs Scott and the former home owners in her position, who may have been not only the victims of a fraud which tricked them out of their homes, but also of unprofessional and dishonest behaviour by the solicitors appointed to act for them. They may have claims against the Solicitors' Compensation Fund, but the fact remains that they may lose their homes if they do not succeed on this appeal.
25. But there is also an important public interest in the security of registered transactions. There are more than 23 million registered titles in England and Wales, and each month the Land Registry may handle up to 75,000 house sales, of which the vast majority will be financed by secured loans.

The judgments of Judge Behrens and the Court of Appeal

26. Ultimately, Mrs Scott's case was selected as one of the ten test cases to be tried before Judge Behrens. At a case management conference, he ordered that three preliminary issues should be tried, of which only the first remains live, namely:

“With reference to section 29 of the [2002 Act] are any of the interests alleged by the defendants capable of being interests affecting the estates immediately before and/or at the time of the disposition, namely the transfer and/or charge of the property in question, sufficient to be an overriding interest under paragraph 1 and/or 2 of Schedule 3 to the 2002 Act? ...”

27. The vendors' argument throughout these proceedings has been, with some variations, that they had rights which took priority to the lenders' charges essentially because: (1) from the moment of exchange of contracts the vendors each had, by virtue of the assurances by the purchasers as to the vendors' right of occupation after completion, an equity in their property beyond and in addition to their registered freehold interest; (2) the equity was a proprietary right and not a mere personal equity, because the purchasers had proprietary rights as from exchange of contracts, out of which they could carve the obligation to lease back the properties to the vendors, and it did not matter that the contract of sale did not reflect that obligation; (3) there was a sale subject to a reservation of the leaseback to the vendors (and not a separate sale and leaseback or one indivisible transaction of contract, transfer and mortgage), and the purchasers never had more than a title to the property subject to the vendors' rights; (4) the vendors' rights had effect from the time they arose: the 2002 Act, section 116; and (5) the equity took priority under Schedule 3, paragraph 2, to the 2002 Act and was therefore binding on the lenders by virtue of section 29(2)(a)(ii).
28. Although there was some suggestion in the appeal to this court that the property was held on resulting trust (on the basis that the sale was in reality a sale of the reversionary interest), Mrs Scott's primary case is that, because of the representations made to her by or on behalf of the purchaser, the purchaser is a constructive trustee or bound by a proprietary estoppel. In *Bannister v Bannister* [1948] 2 All ER 133, a claim that the owner had agreed to let the occupier live in a cottage rent free for as long as she wished was treated as a claim based on constructive trust, on the basis that the purchaser fraudulently set up "the absolute character of the conveyance ... for the purpose of defeating the beneficial interest" (at p 136). The relationship between constructive trust and proprietary estoppel has been the subject of much discussion: see especially *Yaxley v Gotts* [2000] Ch 162, 176-177. It is likely that the difference would only be crucial in terms of remedies, but nothing turns on the distinction in this appeal.
29. The essence of Judge Behrens' judgment was as follows: (1) even if the promises to the vendors gave rise to a proprietary right on completion, there was no moment in time in which such an interest could bind the lender: *Abbey National Building Society v Cann* [1991] 1 AC 56; (2) the vendors did not obtain an interest on exchange of contracts, because contract, conveyance and mortgage were one indivisible transaction: *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381; (3) in any event, prior to completion the vendors' equitable rights were at best personal rights and not proprietary rights; (4) the transfers executed by the vendors on completion would have transferred any interest which they had in the properties to the purchaser under the Law of Property Act 1925, section 63.

30. The Court of Appeal decided that: (1) there was a separate sale of the freehold and a leaseback to the vendor on completion, and not a sale subject to a reservation; (2) the clear impression created by the contracts was that the vendors would be selling without reserving any beneficial interest or other rights in the property; (3) a mortgagee lending money to finance the purchase would be entitled to view the matter in the same way; (4) in those circumstances no equitable interest or equivalent equity could have arisen in favour of the vendors prior to completion; (5) even if an equity arose in favour of the vendors on exchange of contracts in consequence of the assurances given by the purchasers, there was no moment of time when the freehold acquired by the purchaser was free from the mortgage but subject to the equity, and it was unrealistic to separate out the contract, on the one hand, and the transfer and mortgage, on the other hand, as separate transactions: *Abbey National Building Society v Cann* [1991] 1 AC 56, as applied in *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381; (5) if the equitable interest arose on completion, then *Abbey National Building Society v Cann* [1991] 1 AC 56 was not distinguishable and the equitable interest could not take priority.

Land Registration legislation

31. Because the earlier authorities are concerned with the predecessor of the provisions in the 2002 Act relating to priority of unregistered interests which are the subject of this appeal, it is necessary to start with the relevant provisions of the 1925 Act.

32. Section 20(1)(b) of the 1925 Act provided:

“In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein ... shall, when registered, confer on the transferee or grantee an estate in fee simple ... or other legal estate expressed to be created in the land dealt with ... subject ... (b) ... to the overriding interests, if any, affecting the estate transferred or created ...”

33. Section 70(1) contained a list of miscellaneous overriding interests to which registered land was subject, and section 70(1)(g) provided:

“All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being

subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say) . . .

(g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed; . . .”

34. The object of section 70(1)(g) was “to protect a person in actual occupation of land from having his rights lost in the welter of registration . . . No one can buy the land over his head and thereby take away or diminish his rights”: Lord Denning MR in *Strand Securities Ltd v Caswell* [1965] Ch 958, 979.
35. The rights which were overriding rights related primarily to rights which in unregistered conveyancing were not normally included in title deeds or revealed in abstracts of title. Overriding interests in general were an impediment to one of the main objectives of land registration, that the land register should be as complete a record of title as it could be: see, eg Gray and Gray, *Elements of Land Law* (5th ed. 2008), para 8.2.44. Reform of the law of land registration was on the agenda of the Law Commission from its inception. Overriding interests were considered in the Third Report on Land Registration (Law Com No 158, paras 2.54-2.70, 1987) and the Fourth Report (Law Com No 173, 1988), and in a joint consultation by the Law Commission and HM Land Registry in 1998. The Law Commission ultimately produced a draft Bill which led to the 2002 Act: *Land Registration for the 21st Century: A Conveyancing Revolution* (2001), Law Com No 271, in which it referred to section 70(1)(g) of the 1925 Act as “notorious and much-litigated” (para 8.15).
36. One of the principal objectives of what became the 2002 Act was to create a simplified conveyancing system, electronically based, under which it would be possible to investigate title to land almost entirely on-line with the bare minimum of additional inquiries: Law Com No 271, paras 8.1 et seq. A major obstacle to that goal was the existence of overriding interests. Although the 2002 Act was intended to minimise the circumstances in which new overriding interests arose, the Law Commission recommended the retention of the overriding status of occupiers' rights.
37. The reason which had been given in the joint consultation was that:

“it is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally, under (say) a

constructive trust or by estoppel. The law pragmatically recognises that some rights can be created informally, and to require their registration would defeat the sound policy that underlies their recognition. Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection. The retention of this category of overriding interest is justified...because this is a very clear case where protection against purchasers is needed but where it is ‘not reasonable to expect or not sensible to require any entry on the register’.” (Law Com No 254, para 5.61).

38. The expression “overriding interests” is not found in the 2002 Act, except in relation to transitional matters. The heading to Schedule 3 is “Unregistered interests which override registered dispositions.”
39. So far as is relevant the scheme of the 2002 Act (leaving aside the special provisions for leases of seven years or less, which do not now arise on this appeal) is as follows:
 - (1) a registered owner has the power to make a disposition of any kind permitted by the general law in relation to an interest of that description: section 23(1)(a);
 - (2) a person is entitled to exercise owner's powers in relation to a registered estate or charge if he is (a) the registered proprietor, or (b) entitled to be registered as the proprietor: section 24;
 - (3) by section 27 certain dispositions, including transfers of land and legal mortgages, are required to be registered and do not operate at law until the relevant registration requirements are met;
 - (4) the basic rule is that the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge: section 28;
 - (5) section 29 deals with the effect of registered dispositions and 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.

(2) For the purposes of subsection (1), the priority of an interest is protected -

(a) in any case, if the interest -

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3 ...”;

(6) Schedule 3 is headed “UNREGISTERED INTERESTS WHICH OVERRIDE REGISTERED DISPOSITIONS,” and paragraph 2 includes:

“An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for -

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest -

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time ...”;

(7) section 72 grants priority protection to those who apply for an entry in the register during the priority period;

(8) section 116 is headed “Proprietary estoppel and mere equities” and provides:

“It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following -

(a) an equity by estoppel, and

(b) a mere equity,

has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)”;

- (9) section 132 is an interpretation section and provides (i) in section 132(1) that (a) “legal estate” has the same meaning as in the Law of Property Act 1925 and (b) “registered estate” means “a legal estate the title to which is entered in the register, other than a registered charge”; and (ii) in section 132(3)(b) that “references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge ...”;
- (10) the effect of section 1 of the Law of Property Act 1925 for present purposes is:
- (a) that “legal estates” means “[t]he estates ... and charges which under this section are authorised to subsist or to be conveyed or created at law ... (when subsisting or conveyed or created at law)” (section 1(4));
 - (b) “The only estates in land which are capable of subsisting or of being conveyed or created at law are – (a) An estate in fee simple absolute in possession; (b) A term of years absolute” (section 1(1));
 - (c) “The only ...charges in or over land which are capable of subsisting or of being conveyed or created at law are(c) A charge by way of legal mortgage ...” (section 1(2));
 - (d) “All other estates, interests, and charges in or over land take effect as equitable interests” (section 1(3)).

40. The effect of sections 27 and 29 of the 2002 Act is that, although a registrable disposition takes place when it is executed, neither a conveyance nor a charge takes effect at law until registration, and the consequence is that a purchaser and a mortgagee acquire equitable interests on completion: Megarry and Wade, *The Law of Real Property*, 8th ed, 2012, para 7-053; *Mortgage Corpn Ltd v Nationwide Credit Corpn Ltd* [1994] Ch 49, 54, per Dillon LJ (a case on the 1925 Act).

Abbey National Building Society v Cann [1991] 1 AC 56

41. The principal issue in the courts below was whether the decision in *Abbey National Building Society v Cann* [1991] 1 AC 56 (“*Cann*”) is controlling (as the lenders say) or distinguishable (as the vendors say), and the decision also has some bearing on the other issue on this appeal, namely whether proprietary rights can be granted to a third party by a purchaser prior to completion. Consequently it is necessary to go beyond summarising the

principles for which it stands by setting out the essential facts (particularly those facts which the vendors say distinguish the present case) and some of the reasoning. The decision in *Cann* predates the reform of land registration law in the 2002 Act, and the relevant sections of the 1925 Act have been set out above.

The facts

42. Three properties in Mitcham, Surrey, were involved in *Cann*: 48 Warren Road, Mitcham (“48 Warren Road”); 30 Island Road, Mitcham (“30 Island Road”), and 7 Hillview, Mitcham (“7 Hillview”). Mrs Cann lived with her first husband in a house at 48 Warren Road. Her husband, who was the tenant of the property under a protected tenancy, died in 1962 and Mrs Cann succeeded to the tenancy as his widow and was entitled to the protection afforded by the Rent Acts. In 1977 the landlord's agents approached Mrs Cann as the sitting tenant with an offer to sell the freehold of 48 Warren Road to her for £5,000. Because neither she, nor her late husband's brother, Abraham Cann, who was by then living with her, could afford to purchase the property, her son George Cann (“George”) offered to raise a mortgage and purchase it; and in 1977 it was conveyed into the joint names of Mrs Cann and George with the aid of an endowment mortgage covering the whole of the price. George assured his mother that she would not need to pay any rent and that she would always have a roof over her head. Later they came across a more attractive house, 30 Island Road. 48 Warren Road was sold for £20,500, and 30 Island Road was purchased in the name of George alone for £26,500 of which £15,000 was, with Mrs Cann's knowledge and acquiescence, raised on mortgage from the Nationwide Building Society.

43. By 1984 George was in financial difficulties and told Mrs Cann that he could no longer afford to pay for two homes. He arranged to sell 30 Island Road for £45,000 and to purchase instead a smaller leasehold property, 7 Hillview, at a price of £34,000. George applied to Abbey National for a loan of £25,000 to be secured on a mortgage of 7 Hillview stating that that property was being purchased for his own sole occupation. Abbey National inspected and approved the property, and made a formal offer of an advance, which was accepted. Contracts for the sale of 30 Island Road, and the purchase of 7 Hillview, were exchanged in July 1984 with the completion date for both transactions fixed for August 13, 1984. Prior to the completion date, in the normal way George's solicitors received a cheque from Abbey National and George executed a legal charge on the property in favour of Abbey National to secure the sum advanced. The solicitors were in a position to complete the purchase on the completion date subject only to completion of the sale of 30 Island Road, from which the balance of the purchase price was to come.

44. The sale of 30 Island Road and purchase of 7 Hillview by George were completed on August 13, 1984. George subsequently defaulted in his payments to Abbey National, and Abbey National commenced proceedings for possession against George, Mrs Cann and Abraham Cann. George took no part in the proceedings.

The decision

45. The defence of Mrs Cann and Abraham Cann was that, because of a contribution made by Mrs Cann to the purchase of 48 Warren Road (represented by her status as a sitting tenant) and by reason of the assurance given by George that she would always have a roof over her head, she had an equitable interest in 7 Hillview, which, by virtue of her actual occupation, had taken priority over Abbey National's charge as an overriding interest.
46. The first two main holdings of the House of Lords present no difficulty on the present appeal. First, it was held that the relevant date for determining the existence of overriding interests affecting the estate transferred or created was the date of registration of the estate rather than the date of completion: at pp 87, 106. The 2002 Act lays down the general principle in section 29(1) that completion of a 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 (including overriding interests: section 29(2)(a)(ii)).
47. Second, it was held that to substantiate a claim to an overriding interest against a transferee or chargee by virtue of section 70(1)(g) of the 1925 Act, as a person in actual occupation of the land, the person claiming the overriding interest had to have been in actual occupation at the time of completion: at pp 88, 106. Schedule 3, paragraph 2 of the 2002 Act now expressly confirms that the relevant interest must belong "at the time of the disposition to a person in actual occupation."
48. The other holdings are the crucial ones on this appeal, which are these: (1) where a purchaser relies on a bank or building society loan for the completion of a purchase, the transactions of acquiring the legal estate and granting the charge are one indivisible transaction; (2) George never acquired anything but an equity of redemption and there was no scintilla temporis during which the legal estate vested in him free of the charge and an estoppel affecting him could be "fed" by the acquisition of the legal estate so as to become binding on, and take priority over the interest of, the chargee; and (3) consequently Mrs Cann could have no overriding interest arising from actual occupation

on the day of completion. The vendor remained the proprietor until registration, but the charge was created on its execution: at p 80.

49. On the facts it was held in any event that Mrs Cann was not in actual occupation at the time of completion (since all that happened prior to completion was that removers were unloading her carpets and furniture for about 35 minutes) and that she was precluded from relying on any interest as prevailing over Abbey National because she had impliedly authorised George to obtain the mortgage.

50. Lord Oliver gave the leading opinion, with which Lords Bridge, Griffiths and Ackner expressly agreed. Lord Jauncey concurred in a full opinion, but there is no substantial difference between his reasoning and that of Lord Oliver. The following points emerge from Lord Oliver's opinion. First, prior to completion Mrs Cann had no interest in 7 Hillview, because she was not a party to the contract for the purchase of that property and if she had been led to believe that she would have an interest in and the right to occupy that property when George acquired it, at the stage prior to its acquisition she had no more than a personal right against him. Second, Abbey National, as an equitable chargee for money actually advanced prior to completion, had an interest ranking in priority to what was merely Mrs Cann's expectation of an interest under a trust for sale to be created if and when the new property was acquired. Third, there was no notional point of time at which the estate vested in George free from the charge and in which the estoppel affecting him could be "fed" by the acquisition of the legal estate so as to become binding on and take priority over the interest of the mortgagee, approving the analysis of Mustill LJ in *Lloyds Bank plc v Rosset* [1989] Ch 350, 388-393, and disapproving *Church of England Building Society v Piskor* [1954] Ch 553.

51. Lord Oliver said (at pp 92-93):

“The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them. Indeed, in many, if not most, cases of building society mortgages, there will have been, as there was in this case, a formal offer and acceptance of an advance which will ripen into a specifically enforceable agreement immediately the funds are advanced which will normally be a day or more before

completion. In many, if not most, cases, the charge itself will have been executed before the execution, let alone the exchange, of the conveyance or transfer of the property. This is given particular point in the case of registered land where the vesting of the estate is made to depend upon registration, for it may well be that the transfer and the charge will be lodged for registration on different days so that the charge, when registered, may actually take effect from a date prior in time to the date from which the registration of the transfer takes effect ... The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred at all and it was never intended that it should be otherwise. The ‘scintilla temporis’ is no more than a legal artifice ...”

52. Lord Jauncey said that, on completion of the purchase of 7 Hillview, Mrs Cann acquired an equitable interest in that house. Since that interest derived from George it followed that she could acquire no equitable interest in the house prior to his acquisition of an interest therein on completion, nor could she acquire an interest greater than he acquired. He went on (at pp 101-103):

“It is of course correct as a matter of strict legal analysis that a purchaser of property cannot grant a mortgage over it until the legal estate has vested in him. The question however is whether having borrowed money in order to complete the purchase against an undertaking to grant security for the loan over the property the purchaser is, for a moment of time, in a position to deal with the legal estate as though the mortgagee had no interest therein. ... In my view a purchaser who can only complete the transaction by borrowing money for the security of which he is contractually bound to grant a mortgage to the lender eo instante with the execution of the conveyance in his favour cannot in reality ever be said to have acquired even for a scintilla temporis the unencumbered fee simple or leasehold interest in land whereby he could grant interests having priority over the mortgage or the estoppel in favour of prior grantees could be fed with similar results. Since no one can grant what he does not have it follows that such a purchaser could never grant an interest which was not subject to the limitations on his own interest. ...”

In the present case George Cann borrowed money from the society in order to complete the purchase of 7 Hillview and in return granted to them a mortgage. The mortgage was executed by George Cann prior to 13 August 1984 when the purchase was completed. It follows that as a matter of reality George Cann was never vested in the unencumbered leasehold and was therefore never in a position to grant to Mrs Cann an interest in 7 Hillview which prevailed over that of the society. The interests that Mrs Cann took in 7 Hillview could only be carved out of George Cann's equity of redemption. In reaching this conclusion it is unnecessary to consider whether or not Mrs Cann was aware that George Cann would require to borrow money in order to finance the purchase of 7 Hillview.”

Contract/conveyance

53. Logically the first question on this appeal is whether the purchasers were in a position at the date of exchange of contracts to confer equitable proprietary rights on the vendors, as opposed to personal rights only. The question whether the analysis in *Cann* applies where the equitable interest of the occupier arises on exchange of contracts only comes into play if the vendors acquired proprietary rights at that time.
54. It was the second question which exercised the courts below, and they decided that the analysis in *Cann* did apply where the equitable interest of the occupier arises on exchange of contracts.

Effect of contract

55. But I propose to deal with the logically prior question first, namely whether the vendors acquired proprietary rights on exchange of contracts. The lenders argued that, even if the decision in *Cann* did not have the result that the contract was part of the indivisible transaction, the vendors' claims against the purchasers were purely personal, and not proprietary, until the purchasers obtained the legal estate on completion and the estoppel was then “fed” which, on the basis of *Cann*, would have been too late to give the vendors priority over the charges.
56. The vendors relied on the 2002 Act, section 116, which is headed “Proprietary estoppel and mere equities” and declares “for the avoidance of doubt that, in relation to registered land, ... an equity by estoppel ... has effect

from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).” Their argument was that the 2002 Act expressly provided that their proprietary estoppel claims gave them proprietary rights, and that it is not necessary that the person who is estopped has a legal title.

57. They also supported their claim to proprietary rights by reliance on the long line of authority that following exchange of contracts the seller holds the property on trust for the purchaser. The argument was that (a) a person who has contracted to purchase has a proprietary interest and not a mere contractual right: *Lysaght v Edwards* (1876) 2 Ch D 499; (b) consequently, on exchange of contracts, the vendors became trustees for the purchasers; and (c) the purchasers were as a result able to confer on the vendors equitable interests in the properties carved out of their rights as purchasers.
58. The purpose of section 116 of the 2002 Act was to make it clear that the rights which arose after detrimental reliance were proprietary even before they were given effect by the court: Explanatory Notes, paras 183-185; Law Com No 271 (2001), paras 5.29-5.31. Cf. *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (1999) 80 P & CR 256, paras 24-31 per Robert Walker LJ. But section 116 is expressly subject to the priority rules in the 2002 Act, and takes the matter no further. It also begs the question as to when “the equity arises as an interest capable of binding successors in title” and probably assumes that it first arises (as it usually does) as against the legal owner who is estopped or who is bound by the equity.
59. I accept the argument for the lenders that the unregistered interests which override registered dispositions under the 2002 Act, Schedule 3, paragraph 2, by virtue of section 29(2) of the 2002 Act, must be proprietary in nature, because: (1) the interest which is postponed to a registered disposition of a registered estate under section 29(1) is “any interest affecting the estate”; (2) by section 132(1) “legal estate” has the same meaning as in the Law of Property Act 1925, and a “registered estate” means “a legal estate the title to which is entered in the register, other than a registered charge”; (3) the effect of the Law of Property Act 1925, section 1 is that the only estates which can exist at law are an estate in fee simple and a term of years absolute and a limited range of other interests including a charge by way of legal mortgage; (4) by section 132(3)(b) references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge; (5) the effect of sections 23 and 24 is that only someone with owner’s powers, i.e. the registered proprietor or a person entitled to be registered as proprietor, can make a disposition, such as granting a lease. Consequently, the combined effect of sections 116 and 132 is that section 116 rights require a proprietary element to have any effect.

60. The question therefore arises whether a purchaser, prior to acquisition of the legal estate, can grant equitable rights of a proprietary character, as opposed to personal rights against the purchaser. Many of the cases on the nature of the purchaser's interest after exchange of contracts, but before completion, were cited on this appeal, and I endeavoured at first instance in *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961, paras 40-43 to deal with their effect. See also Turner, *Understanding the Constructive Trust between Vendor and Purchaser* (2012) 128 LQR 582.
61. The position of the vendor as trustee has been variously described as: (1) "something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate" and "a constructive trustee": *Lysaght v Edwards* 2 Ch D 499, 506, 510, Sir George Jessel MR; or (2) "constructively a trustee": *Shaw v Foster* (1872) LR 5 HL 321, 349, per Lord O'Hagan; (3) "a trustee ... with peculiar duties and liabilities": *Earl of Egmont v Smith* (1877) 6 Ch D 469, 475, per Sir George Jessel MR; (4) "a trustee in a qualified sense only": *Rayner v Preston* (1881) 18 Ch D 1, 6, per Cotton LJ; and (5) "a quasi-trustee": *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264, 269, per Lord Greene MR.
62. It has frequently been said that a purchaser of land obtains rights which are akin to ownership: by Lord Cairns in *Shaw v Foster* (1872) LR 5 HL 321, 338, "the purchaser was the real beneficial owner in the eye of a court of equity of the property"; by Lord O'Hagan in the same case (at p 349), the ownership is transferred in equity to the purchaser, and the vendor is "in progress towards" being a trustee. In more modern times it has been recognised that the purchaser's interest is a "proprietary interest of a sort": *Oughtred v IRC* [1960] AC 206, 240, per Lord Jenkins. In *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, para 32, Lord Walker made the point that "beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed..."
63. In *Shaw v Foster* (at p 338) Lord Cairns said that a purchaser had not only the right to devise the property (under the equitable doctrine of conversion) but also the right to alienate it or charge it, and Lord O'Hagan said (at p 350) that the purchaser's interest could be the subject of a charge or assignment, and that the sub-assignee or encumbrancer could enforce his rights against the original vendor.

64. But in the same case Lord Hatherley LC referred (at p 357) to the “fiction of Equity which supposes the money to be paid away with one hand and the estate to be conveyed away with the other,” and in the High Court of Australia Deane J said: “it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser ... the ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a ‘trustee sub modo’ unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription”: *Kern Corpn Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 192. The High Court of Australia has said that the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the parties: *Chang v Registrar of Titles* (1976) 137 CLR 177, 190; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57, (2003) 217 CLR 315, para 53.
65. But these are not cases dealing with the question whether a contract of sale can have a proprietary effect on parties other than the parties to the contract. It is true that the purchaser is given statutory rights to enforce the interests against third parties under a contract of sale by registration: the 2002 Act, sections 15(1)(b), 32, 34(1); Land Charges Act 1972, section 2(1), (4). But it does not follow that the purchaser has proprietary rights for all purposes. Thus in *Inland Revenue Commissioners v G Angus & Co* (1889) 23 QBD 579, 595, Lindley LJ quoted Lord Cottenham LC in *Tasker v Small* (1837) 3 My & C 63, 70, who said that the rule by which a purchaser becomes in equity the owner of the property sold “applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others.”
66. In *Berkley v Poulett* [1976] EWCA Civ 1, [1977] 1 EGLR 86, 93 Stamp LJ said (at para 36) that the vendor “is said to be a trustee because of the duties which he has, and the duties do not arise because he is a trustee but because he has agreed to sell the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed according to its terms. Nor does the relationship in the meantime have all the incidents of the relationship of trustee and cestui que trust.” In that case Lord Poulett sold the Hinton St George Estate to X, and X sub-sold the house and grounds to Y. Both transactions were subsequently completed. In an action by Y against the executors of Lord Poulett, the main question which subsequently arose was whether certain objets d’art were fixtures or chattels. It was held that none of them was a fixture, but also by a majority (Goff LJ dissenting) that, even though Lord Poulett had notice of the sub-contract between X and Y, Lord Poulett was not under a duty to Y to take reasonable care of the house because Lord Poulett did not hold the house as trustee for the sub-purchaser Y. In my view it is implicit in this analysis, which I consider to be correct,

that X did not obtain proprietary rights against Lord Poulett which he could pass to Y.

67. There are some cases in the Court of Appeal and at first instance (all decided in the early 1950s) which considered the effect on a mortgagee of a grant of tenancies by a purchaser after exchange of contracts but before completion of the sale and a mortgage of the property. *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 901 was a pre-cursor of *Cann*, and was approved in that decision. Harman J decided that the conveyance and mortgage were one transaction, and there was no scintilla temporis between the time of the conveyance and the mortgage during which the purchaser had acquired sufficient estate to be able to perfect the purported grant of the tenancies. Prior to the conveyance, the purchaser only had an equitable interest in the property and the tenants only had personal rights against the purchaser: at p 903.
68. That decision was distinguished by the Court of Appeal in *Universal Permanent Building Society v Cooke* [1952] Ch 95 on the ground that the building society's charge in that case was executed a day later than the conveyance and there was nothing in the building society's "short statement" that "the conveyance and the mortgage were part of a single transaction" (at p 101). That is a surprising (and very formalistic) ground of distinction, since it is apparent from the statement of the facts (at p 96) that the mortgagor had applied for the mortgage two weeks before the contract of sale. But it was recognised that prior to completion the purchaser was only "able to make a contract, a promise" to the intended tenant: at p 103. In *Woolwich Equitable Building Society v Marshall* [1952] Ch 1 Danckwerts J distinguished *Coventry Permanent Economic Building Society v Jones* on the equally surprising ground that the charge to the Woolwich Building Society recited that the mortgagor was the estate owner in respect of the property.
69. In *Church of England Building Society v Piskor* [1954] Ch 553 purchasers of leasehold premises were given possession before completion and purported to grant tenancies of part of the premises. The purchase was completed on the same day as the purchasers granted a legal charge to the building society. The Court of Appeal disapproved *Coventry Permanent Economic Building Society v Jones* and held that the assignment of the lease to the purchasers and the legal charge to the building society could not be regarded as one indivisible transaction. Consequently the tenancies by estoppel were fed on the acquisition of the legal estate by the purchasers and prior to the grant of the charge: at p 558, per Sir Raymond Evershed MR, and p 566, per Romer LJ.

70. In *Cann* the decision in *Church of England Building Society v Piskor* was disapproved and, as I have said, *Coventry Permanent Economic Building Society v Jones* was approved: at p 93, per Lord Oliver and p 102, per Lord Jauncey. The decision in the *Woolwich Equitable* case was doubted by Lord Jauncey in *Cann* (at p 102), and I do not think that it or *Universal Permanent Building Society v Cooke* can stand with *Cann*.

71. But in each of these cases it was decided, or assumed, that, even if the tenant had equitable rights as against the purchaser, those rights would only become proprietary and capable of taking priority over a mortgage when they were “fed” by the purchaser’s acquisition of the legal estate. That is because where the proprietary right is claimed to be derived from the rights of a person who does not have the legal estate, then the right needs to be “fed” by the acquisition of the legal estate before it can be asserted otherwise than personally. In *Cuthbertson v Irving* (1859) 4 H & N 742 Martin B said, at pp 754-755:

“There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord’s title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel . . .”

72. In *Bell v General Accident Fire and Life Assurance Corp Ltd* [1998] L & TR 1, Mummery LJ said (at p 12):

“the juristic basis and the legal effect of the estoppel doctrine were authoritatively expounded in the Court of Exchequer by Martin B in *Cuthbertson v Irving* ... in terms applicable to this case. ... The result is also consistent with the legal effect of the satellite doctrine of ‘feeding the estoppel’ ... which applies when an interest in the land is acquired by the person deficient in title at the time of the grant from which the estoppel arose: ‘so that, as Hale put it, ‘by purchase of the land, that is turned into a lease in interest, which before was purely an estoppel’’: see Holdsworth's *History of English Law*, vol VII, p 246.”

73. Thus in *Watson v Goldsbrough* [1986] 1 EGLR 265 licensees of land owned by the wife's parents agreed that an angling club could have fishing rights if they improved the ponds: the estoppel was fed when the licensees acquired the legal estate. It is true that in *Lloyds Bank plc v Rosset* [1989] Ch 350, 386, Nicholls LJ said (in the case of a common intention constructive trust) that prior to completion of the purchase "the wife had some equitable interest in the property before completion, carved out of the husband's interest. ..." But the decision of the Court of Appeal was reversed on the facts ([1991] 1 AC 107), although Lord Bridge seems to have contemplated (at p 134) that Mrs Rosset might have had a beneficial interest before completion. But the question whether a purchaser could grant proprietary equitable rights was not argued or decided.
74. The decision in *Cann* did not directly deal with this point but the conclusion that a purchaser of property cannot grant a proprietary right is strongly supported by the approach of Lord Oliver and Lord Jauncey. Lord Oliver said (at p 89) that prior to completion Mrs Cann had no interest in 7 Hillview, because she was not a party to the contract for the purchase of that property and if she had been led to believe that she would have an interest in and the right to occupy that property when George acquired it, at the stage prior to its acquisition she had no more than a personal right against him. Lord Jauncey said (at p 95) that Mrs Cann could not have acquired an equitable interest in 7 Hillview prior to completion because her rights derived from George and she was not a party to the contract of sale.
75. Nor are the vendors assisted by two further arguments. First, they say that they can justify the existence of an equitable right in the property of which they were legal owners by analogy to the position of an unpaid vendor, who has a proprietary right in property of which he is the legal owner, namely a lien for the unpaid purchase price.
76. In the rare case in which the legal estate is transferred before the purchase price is paid, it was accepted or assumed that the vendor's lien could be an overriding interest for the purposes of section 70(1)(g) of the 1925 Act: *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499; *UCB Bank plc v Beasley* [1995] NPC 144; *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415; *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381. It is not necessary to address the point on this appeal, but the position is probably the same under the 2002 Act; cf Law Com No 271, para 5.10. But I accept the lenders' answer that there is no analogy in the present case with the vendor's lien, which arises by operation of law and is the corollary of the purchaser's equitable interest in the property: *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261, 279; *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415, 420.

77. Secondly, the vendors say that the substance of the matter is that they did not sell their homes outright to the purchasers, but simply sold them subject to the rights to the leases which they had been promised, and that *Cann* should be distinguished on the basis that in a sale and leaseback transaction the purchaser in reality has no more than a reversionary interest subject to that leaseback. They rely on a decision of Megarry J at first instance, *Sargaison v Roberts* [1969] 1 WLR 951, in which the question was whether, for the purposes of the tax legislation then in force, a transfer by the taxpayer into a settlement of a farm and the simultaneous grant by the trustees to him of a lease resulted in the whole of the taxpayer's interest in the land being transferred to another person (which would have disentitled him to a tax allowance) or operated to reduce his interest from ownership of a freehold to ownership of a lease. Megarry J held that the effect of the transaction was that the taxpayer's interest had been reduced from ownership of the freehold to ownership of a lease.
78. I agree with Etherton LJ that the true nature of the transaction was that of a sale and lease back. *Sargaison v Roberts* is of no assistance since Megarry J made it clear (at p 958) that he was considering the interpretation of a United Kingdom taxing statute and not "the technicalities of English conveyancing and land law." In the case of Mrs Scott, for example, the contract provided that the property was to be transferred with "full title guarantee" and "vacant possession" and a transfer in the normal form was executed.
79. Consequently, in my judgment, the appeal should be dismissed on the principal ground that the vendors acquired no more than personal rights against the purchasers when they agreed to sell their properties on the basis of the purchasers' promises that they would be entitled to remain in occupation. Those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the purchasers' acquisition of the legal estate on completion, and then *Cann* would apply, with the effect that the acquisition of the legal estate and the grant of the charge would be one indivisible transaction, and the vendors would not be able to assert against the lenders their interests arising only on completion.

An indivisible transaction?

80. It follows that the question whether the decision in *Cann* that conveyance and mortgage are one transaction also extends to include a case where the equitable interest is said to arise at the time of the contract of sale does not arise. If I am right on the main point, it is not easy to see how this question could arise in any future case, but I propose to express my view on it because it was the main question canvassed in the courts below and on this appeal.

81. The vendors say that *Cann* did not decide whether the indivisible transaction analysis applies where the equitable interest of the occupier arises on exchange of contracts, and that the answer is that the analysis does not apply. The lenders say that, even if an equitable interest arose on exchange of contracts, in any event the House of Lords has already decided that not only were the conveyance and the charge part of one indivisible transaction, but also that the contract (which had been exchanged some weeks before), conveyance and charge were indivisible. It is therefore necessary to consider whether (and if so, how) this point was dealt with in *Cann*.
82. The argument for Mrs Cann was that she had an interest from the time of exchange of contracts for the acquisition of 7 Hillview: her “equitable interest must have commenced not later than 20 July 1984, when a specifically enforceable contract for the purchase of 7 Hillview was entered into” (at p 66). Lord Oliver assumed (at p 89) that prior to completion George was estopped by his promise to keep a roof over her head from denying her right as against him to terminate her occupation of the property without her consent, but that is a reference to the estoppel which arose on the acquisition of 30 Island Road (as the reference to it not binding the Nationwide Building Society shows). He then goes on to say that Mrs Cann had acquired no rights in 7 Hillview prior to completion because she had not been a party to the contract for its purchase, and at the stage prior to its acquisition “she had no more than a personal right against him.” Later on he gives a hypothetical example which may suggest that he thought that the relevant reliance by Mrs Cann would have been vacating 30 Island Road rather than merely agreeing that it be sold. It is possible that Lord Jauncey (at p 95) looked at the matter in the same way.
83. There are two inter-linked questions involved in this analysis. The first question was whether Mrs Cann had any rights at all against George in relation to 7 Hillview (as distinct from her rights in 30 Island Road) at the time of the contract. The second question was whether the contract, conveyance and legal charge were one indivisible transaction. I have already said that Lord Oliver and Lord Jauncey expressed the view that if Mrs Cann had rights against George in relation to 7 Hillview from the time of the contract, they were only personal rights. On the facts of that case it seems to me that the relevant reliance would have been agreement to the sale of 30 Island Road rather than ceasing occupation of the house on completion of the purchase of 7 Hillview.
84. In *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381 A agreed to purchase a business, including some premises in Bradford, from B for £160,000. B was to retain the use of the property until the whole of the principal money and interest due under the agreement had been paid. A raised

£80,000 by way of a secured loan from Nationwide and this was paid to B. The balance of £80,000 was left outstanding and secured by a second charge in favour of B against the property. The agreement, the transfer of the property, and the charges were all executed on the same day. A failed to pay B the balance of the purchase price and fell into arrears on the mortgage repayments. In possession proceedings by Nationwide, B sought to defend on the basis that he had an overriding interest in priority to Nationwide's charge, namely (1) his vendor's lien; and/or (2) the right to occupy given by the purchase agreement until payment of the price in full. The Court of Appeal decided that there was no vendor's lien, primarily because it was given up in consideration of the rights to a second charge and occupation of the property until payment. It also decided that the right to occupy was purely contractual and gave rise to no interest in the land. But it was also decided that B did not have an overriding interest in any event, because, applying *Cann* (per Aldous LJ at p 389):

“the charges, the agreement and the transfer were all signed on the same day ... Thus, [B's] right to occupation under clause 6, did not accrue prior to the creation of [Nationwide's] charge. In *Abbey National Building Society v Cann* the House of Lords ... concluded that when a purchaser relied on a building society, such as [Nationwide], to enable completion, the transactions involved were one indivisible transaction and, therefore, there was no scintilla temporis during which the right to occupation vested free of [the] charge. The same reasoning is applicable to the facts of this case. On June 1, the contract, the transfer and the legal charges were completed. They formed an indivisible transaction and there was no scintilla temporis during which any right to occupation under clause 6 of the agreement vested in [B] which was free of [Nationwide's] charge. Thus, the right given by clause 6 did not provide an overriding interest under section 70(1)(g) of the 1925 Act, even if the right was a proprietary right. [Counsel for B] submitted that that conclusion ignored the reality of the position and that at all times [B] was in occupation. However that submission ignores the reality of the legal position. [B] gave up his right to occupy as an unpaid vendor by signing the agreement and thereby obtained permission to occupy, which permission did not take effect prior to [Nationwide's] charge.”

85. In my judgment the decision of the Court of Appeal in *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381 was correct. As a matter of principle, Aldous LJ was right to take the view that it is implicit in *Cann* that contract, conveyance and mortgage are indivisible. In the present case, as in

Nationwide Anglia Building Society v Ahmed, the contract and conveyance were executed on the same day, but the analysis is not dependant on that.

86. There are some 900,000 domestic conveyancing transactions per year in England and Wales. In almost every case, the Law Society's Conveyancing Protocol is used. The current version is the 2011 edition, but it is not different in substance from that current (5th ed, 2005) when the transactions in this appeal were carried out. The current edition sets out all the steps from instructions (Stage A) (which include the provision of the seller's Property Information Form which will give details of who is occupying the property and indicate whether vacant possession will be given), submission of contract (Stage B), steps prior to exchange, including confirmation of completion date and ensuring the seller is aware of the obligation to give vacant possession (Stage C), exchange of contracts (Stage D), completion (Stage E), and post-completion matters, including registration (Stage F). Prior to contract the buyer's solicitor should check whether the buyer requires a mortgage, whether an application has been made and whether a mortgage offer has been made, and whether any mortgage conditions remain to be performed. On exchange of contracts the buyer's solicitor sends the certificate of title and/or requisition of funds to the lender so that funds are available for completion. Prior to exchange of contracts the seller's solicitor submits to the buyer's solicitor a contract bundle, including (inter alia) the draft contract incorporating the latest edition of the Standard Conditions of Sale, official copies of the Register and title plan, replies to inquiries with supporting documentation, searches and inquiries, and (for consideration) a draft transfer.
87. The contract of sale does, of course, have separate legal effects, but it would be wholly unrealistic to treat the contract for present purposes as a divisible element in this process. That is why in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 this court adopted the reasoning in *Cann* to hold that where the same solicitor acts for a borrower and a mortgage lender, and the mortgage advance is paid to the solicitor to be held in the solicitor's client account, until completion, to the order of the mortgage lender; and on completion the solicitor transfers the advance to the vendor's solicitor against an executed transfer: "In the eyes of the law all these events occurred simultaneously" (per Lord Walker and Hughes LJ, at para 50). The purchaser never acquired more than an equity of redemption (at para 53) and "under the tripartite contractual arrangements between vendor, purchaser and mortgage lender, [the purchaser] obtained property in the form of a thing in action which was an indivisible bundle of rights and liabilities" (at para 54).
88. On this appeal the court was provided with notes from the parties on the effect on conveyancing practice, and particularly on the inquiries which mortgage

lenders would have to undertake and on the increased risk from fraud, should the appeal succeed. I agree with the point made by Lady Hale in the course of argument that the court's duty is to apply the law irrespective of an unexpected impact on conveyancing practice and an adverse effect on the risks of secured lending. It is also important to emphasise that the scheme in the present case could not have worked if the solicitors for the vendors and the solicitors for the purchasers/lenders had complied with their professional obligations and proper and normal conveyancing practice. It is also to be noted that where a person, who might otherwise have rights which could be asserted against a mortgagee, agrees to funds being raised on the property by way of mortgage, the mortgagee will have priority: *Cann* (at p 94); *Bristol & West Building Society v Henning* [1985] 1 WLR 778; *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244.

89. It would follow that, even if (contrary to my view) the vendors had had equitable rights of a proprietary nature against the purchasers arising on exchange of contracts, the mortgages would have taken priority.
90. Accordingly I would dismiss the appeal on the preliminary issue.

Possession order

91. The final question is whether the remainder of Mrs Scott's undated Re-Amended Defence and Counterclaim should have been struck out without it being tried on the facts. The point arises because it is said on behalf of Mrs Scott that her pleadings raise specifically the point that, by virtue of the lenders' actual, constructive or imputed notice of the leases granted or intended to be granted to the purchasers, the lenders are estopped from denying that Mrs Scott was promised a lease and from relying on the provisions of the mortgage restricting the grant of leases. For the purposes of this appeal, Mrs Scott relies particularly on a letter (which was also written in some of the other cases) written by "her" solicitors to the solicitors for the purchaser/lenders, requiring them to inform the lenders that a sum of £40,000.00 was to be paid to UK Property Buyers (rather than NEPB) upon completion of the transaction from the proceeds of sale of the property, which is said to show that the sale was not an outright sale.
92. But Judge Behrens decided the third preliminary question against the vendors, namely, whether it was possible for the lenders' priority to be adversely affected by notice of such promises as were made and the circumstances of the transaction by virtue of their agent's knowledge: (a) if passed on, or (b) if not passed on to the lenders.

93. I agree with the Court of Appeal that the judge was entitled to take the view that any argument about the relevance of the lenders' knowledge of the promises made by the purchasers as to the right of the vendors to remain in occupation after completion fell within the third preliminary issue, on which there has been no appeal.
94. I would therefore dismiss the appeal. I would only add that I express the hope that the lenders will, before finally enforcing their security, consider whether they are able to mitigate any hardship which may be caused to the vendors.

LADY HALE

95. I am reluctantly driven to agree that this appeal must fail for the reason-given by Lord Collins: the purchaser was not in a position either at the date of exchange of contracts or at any time up until completion of the purchase to confer equitable proprietary, as opposed to merely personal, rights on the vendor. But this produces such a harsh result that I would like to add a few additional words of explanation. Given that conclusion, the second question discussed by Lord Collins, which is whether the contract should be seen as an indivisible transaction with the conveyance and the mortgage, does not arise and is unlikely ever to arise. However, I must also explain why, with great respect, I take a different view from Lord Collins on that question.

Overriding interests: some preliminary remarks

96. It is important to bear in mind that the system of land registration is merely conveyancing machinery. The underlying law relating to the creation of estates and interests in land remains the same. It is therefore logical to start with what proprietary interests are recognised by the law and then to ask whether the conveyancing machinery has given effect to them and what the consequences are if it has not. Otherwise we are in danger of letting the land registration tail wag the land ownership dog.
97. It is also important to bear in mind that we are here concerned with events which took place before title to the land was registered in the name of the nominee purchaser. There is, of course, as Lord Collins says at para 25, an important public policy interest in the "security of registered transactions". But that does not mean that the fact that a transaction is registered should automatically give it priority over all other interests. The land registration scheme accepts, as did the system of unregistered conveyancing, that there are some interests in land which deserve protection from later dispositions

even if they are not protected by registration. There is also an important public policy interest in the accuracy of the register, so as to justify the reliance which later purchasers and mortgagees place upon it.

98. Thus the basic rule in section 28(1) of the Land Registration Act 2002 is that “Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge”. By section 28(2), it makes no difference whether either the interest or the disposition is registered. Section 29(1) goes on to state:

“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.”

Section 29(2)(a)(ii) provides that among the interests protected for the purpose of subsection (1) is an interest which “falls within any of the paragraphs of Schedule 3”. Falling within paragraph 2 of Schedule 3 is “An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation”. This is subject to a number of exceptions; the only relevant one for our purpose is “(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so”.

99. It has never been in dispute that Mrs Scott was in actual occupation of the property at the time of the disposition to the nominee purchaser (and the contemporaneous mortgage to the lenders). Nor is it disputed that no inquiries were made of her personally before the disposition. So the only question in this case is, and has always been, whether she had an “interest” which belonged to her at the time of the disposition.
100. Of course, the whole idea of overriding interests is unpopular with those who would like the register to be a complete record of everything which will affect the estate or charge that they are acquiring. But it has always been recognised that the register cannot be a complete record and that there are some unregistered interests which require and deserve protection. The 2002 Act did reduce the list of overriding interests from that contained in section 70(1) of the Land Registration Act 1925. But the rights of those in actual

occupation of the land remained on the list. Pejorative adjectives such as “notorious and much-litigated” do not assist the argument in this case.

101. Perhaps the most “notorious” example of litigation about the rights of those in actual occupation was *Williams and Glyn’s Bank v Boland* [1981] AC 487. In that case it was held that the beneficial interest of a wife who had contributed to the purchase of the matrimonial home in which she lived when her husband mortgaged it to the bank was an overriding interest within the meaning of section 70(1)(g) of the 1925 Act. As Lord Wilberforce (with whom Viscount Dilhorne, Lord Salmon and Lord Roskill agreed) pointed out, in registered conveyancing, the fact of occupation takes the place which actual or constructive notice occupied in unregistered conveyancing: “In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them” (p 504E-F). Later on, he repeated that “the doctrine of notice has no application to registered conveyancing” (p 508E).
102. It follows from that, and is clear from the wording of paragraph 2(b) of Schedule 3 to the 2002 Act (para 98 above), that the question of whether or not it was reasonable to expect the purchaser or lender to make inquiries of the person in actual occupation is irrelevant. The only question is whether they did so and what the answer was. It is worth emphasising this point, because it is to be expected that the vendor of residential property will be in occupation of it at the time of the disposition, and so there is nothing to give the purchaser or lender constructive notice of any other interest that she might have. But that is not the point. If the vendor does have an interest in the land, other than the one of which she is disposing, and a tenancy by estoppel could be an example, then the fact of her occupation at that time makes it an overriding interest.
103. *Williams and Glyn’s Bank v Boland* did cause some consternation in some quarters at the time. The Law Commission devoted a whole report to the implications (1982, Law Com No 115), but their recommendations were not enacted. It was discussed in their third report on Land Registration (1987, Law Com No 158), where a constructive way of balancing the competing interests involved was proposed. That solution too did not find favour with the legislators. Nevertheless, the overriding interests of those in actual occupation survived into the 2002 Act. The lending world had meanwhile learned to live with *Boland*, mainly by insisting that matrimonial homes were conveyed into the joint names of husband and wife. There is no warrant at all for seeking to cut down the scope of overriding interests by giving them a narrower interpretation than they would otherwise have under the underlying law of property.

Can a prospective purchaser grant proprietary rights before completion?

104. The question, therefore, is whether a promise of the kind said to have been made here, made to the vendor by or on behalf of a prospective purchaser of land, is capable of giving the vendor a proprietary interest in the land, as opposed to a merely personal right against the purchaser, before the purchase is completed. On the face of it, the promises which were made here and on which Mrs Scott acted in giving up the ownership of her home, bore all the hallmarks of a proprietary estoppel. But is such an estoppel capable of being an interest in land before the person making the promise has become its owner?
105. The best case which can be cited in favour of the vendor's argument that it is so capable is the decision of the Court of Appeal in *Lloyd's Bank v Rosset* [1989] Ch 350. Mrs Rosset had done work on the house before it was conveyed to her husband and contemporaneously charged to the Bank. Nicholls LJ was "unable to accept that the wife had no beneficial interest in the property before completion" (p 385F). The husband had a specifically enforceable contract to purchase the property and hence he had an equitable interest in it. The wife had "some equitable interest in the property before completion, carved out of the husband's interest just described" (p 386A). Both Mustill and Purchas LJ agreed with him on this point.
106. When *Rosset* reached the House of Lords, it was held that the judge's factual findings did not justify a finding that she had any beneficial interest in the property. Lord Bridge remarked that, had she become entitled to a beneficial interest prior to completion "it might have been necessary to examine a variant of the question regarding priorities which your Lordships have just considered in *Abbey National Building Society v Cann*": see [1991] 1 AC 107, 134B. Thus it can well be said that their Lordships did not allow the appeal on the basis that the Court of Appeal were wrong on this point; they seem to have proceeded on the basis that the Court of Appeal were right, because otherwise no question of priorities would have arisen.
107. But that would indeed be odd, as the same appellate committee gave judgment in *Abbey National Building Society v Cann* on the very same day on which they gave judgment in *Rosset*. And in *Cann* they were well aware of the series of cases, beginning with *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 951 ("Coventry"), *Woolwich Equitable Building Society v Marshall* [1952] Ch 1 ("Woolwich"), *Universal Permanent Building Society v Cooke* [1952] Ch 95 ("Cooke"), and ending with *Church of England Building Society v Piskor* [1954] Ch 553 ("Piskor"). These were all cases in which a person who had contracted to buy residential

property granted a tenancy of all or part of the premises to another person who moved in before the contract was completed. The purchasers having mortgaged the property at or shortly after completion, the question was whether the mortgagees were bound by the tenancies.

108. All of them depended upon what Harman J in *Coventry*, at p 903, described as

“an old doctrine (none the worse for being old) that if A purports to create a lease in B’s favour, A having no estate sufficient to support the lease, then, if A afterwards acquires a sufficient estate, he will be bound not to deny that he always had a good right to create the tenancy and the lease is said to take effect by estoppel.”

This is the doctrine described as among the “clear” points about estoppel at first instance in *Cuthbertson v Irving* (1859) 4 Hurl & N 742, 157 ER 1034 (affirmed on appeal at (1860) 6 Hurl & N 135, 158 ER 56): neither the lessee nor the lessor can dispute one another’s title and if the lessor without a legal estate later acquires one, the estoppel is “fed”.

109. In each of these four cases, the interest of the purchaser between contract and completion was considered not “sufficient to support the lease”. Hence the question was whether there was a moment in time between the completion of the purchase and the grant of the mortgage – the so-called *scintilla temporis* – in which the purchaser acquired the unencumbered legal estate and so the estoppel was “fed” before the purchaser disposed of it by way of mortgage. In *Coventry*, Harman J held that there was no such *scintilla*, the conveyance and the mortgage being (for this purpose at least) indivisible. In *Woolwich*, Dankwerts J held that there was such a *scintilla* and hence the tenancy took priority over the mortgage. In *Cooke and Piskor*, the Court of Appeal, led by Evershed MR, adopted the *Woolwich* approach. In *Cann*, of course, the House of Lords held that *Piskor* was wrongly decided and that Harman J had adopted the correct approach in *Coventry*. It follows that *Woolwich* was also wrongly decided as in all these three cases the conveyance and the mortgage were virtually contemporaneous and the mortgage loan was required to complete the transaction.
110. It does not necessarily follow that *Cooke* was wrongly decided. As Lord Oliver explained in *Cann*, at p 92:

“Of course, as a matter of legal theory, a person cannot charge a legal estate that he does not have, so that there is an attractive

legal logic in the ratio in *Piskor's* case. Nevertheless, I cannot help feeling that it flies in the face of reality. The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them.”

In *Cooke*, the mortgage was the day after the conveyance and there was no evidence that they were one and the same transaction, or that the advance had been handed over to the vendor rather than the purchase being initially funded in some other way, although the mortgage was applied for before completion. It may be that the conveyance and the mortgage were in fact indivisible. It may be that they were not. *Cooke* was not cited to their Lordships in *Cann*, but it must have been known to them, because it features prominently in *Piskor*, and it was not overruled or even mentioned in their opinions.

111. But that is by the way. None of this scintilla temporis debate would have been necessary if the purchaser of land had been capable of creating a proprietary interest in that land before completion, which would be binding upon a lender whose mortgage could only be granted on or after completion. And if a tenancy cannot be carved out of the equitable interest which the purchaser has before completion, it is hard to see how the sort of beneficial interest which Mrs Rosset was claiming could be so carved out. So it is odd, to say the least, that the House of Lords appears to have assumed that it could. In any event, we are here dealing with a promise which is much closer to a tenancy by estoppel than to the sort of beneficial interest claimed by Mrs Rosset. My provisional conclusion, therefore, is that under the ordinary law of property the nominee purchaser in this case could not give Mrs Scott a tenancy which would bind the lenders in this case before her purchase of the land was completed.

112. How does this provisional conclusion sit with the scheme of the Land Registration Act 2002? Sections 28 and 29, dealing with priority, refer to interests “affecting the estate” (see para 98 above). The interests which are “protected” for the purpose of section 29(1) are interests affecting the estate immediately before the disposition in question, in this case the mortgage. Section 132(3)(b) makes it clear that “references to an interest affecting an estate are to an adverse right affecting the title to the estate ...”. In other words, there has to be an estate before there can be an interest which affects it. The 2002 Act does not define “estate” but “legal estate” has the same

meaning as in the Law of Property Act 1925, section 1(1) of which contains the most basic rule of English land law:

“The only estates in land which are capable of subsisting or of being conveyed or created at law are – (a) An estate in fee simple absolute in possession; (b) A term of years absolute.”

The interest of the purchaser before completion, however it may be characterised, is not a legal estate. Hence the nominee purchaser could not create an interest which was capable of being a protected interest for the purpose of the 2002 Act until she had acquired the legal estate. This is entirely consistent with and confirms the provisional conclusion reached earlier.

113. There is a further complication. There is a gap between any transaction and its registration. The 2002 Act, confirming *Cann* on this point, makes it clear that the relevant date, when the person must be in actual occupation and have a proprietary interest in the land, is the time of the disposition over which priority is claimed: see Schedule 3, paragraph 2. Any unprotected interest affecting the estate immediately before the disposition is postponed to the interest under the disposition: see section 29(1). The relevant disposition for this purpose is the mortgage. But neither the mortgage nor the transfer to the purchaser can “operate at law” until they are registered: see section 27(1). Until registration, the purchaser (and indeed the mortgagee) have only equitable interests. This might suggest that rights granted by the purchaser to an occupier could not be “fed” until registration. However, this is machinery, not substance. Assuming that all relevant registration requirements are met, the purchaser has now acquired an absolute right to the legal estate (and the mortgagee an absolute right to the charge). Her interest is of a different order from that of a purchaser before completion, who has the contractual right to have the property conveyed to her but may never in fact get it.

114. Were there to be a *scintilla temporis* between the conveyance and the grant of the mortgage, the vendor’s tenancy by estoppel would indeed become an overriding interest. But it has not been argued in this case that *Abbey National Building Society v Cann* was wrongly decided. It has been accepted that, at least in the standard case where completion and mortgage take place virtually simultaneously and the mortgage is granted to secure borrowings without which the purchase would not have taken place, completion and mortgage are one indivisible transaction and there is no *scintilla temporis* between them. We have been invited to distinguish *Cann* but not to bury it.

Are contract, transfer and mortgage indivisible?

115. That simple analysis is sufficient to determine this case, without any resort to the much more controversial proposition that, not only are the conveyance and the mortgage one indivisible transaction for this purpose, but they are now to be joined by the contract as well. Whatever one's view of the decision in *Cann* (and Lord Oliver acknowledged, at p 92, that the contrary view had "an attractive ... logic" to it) it does make sense. The conveyance vests the legal estate in the purchaser who instantly mortgages it to the lender. All the purchaser ever acquires is the equity of redemption. But that may not be true if the mortgage takes place sometime after the conveyance: there may be a period during which the purchaser owns the land without encumbrances. Not all conveyances and mortgages are indivisible: it depends upon the facts, which is why *Cooke* may not have been wrongly decided.
116. The lender is not a party to the contract to sell the land to the purchaser. This is an entirely separate matter between vendor and purchaser in which the lender is not involved. These days it may well take place on the same day as the conveyance and mortgage but it often takes place days, weeks or even months beforehand. In the olden days, it was common for vendor and purchaser to instruct the same solicitor. But that is no longer permitted, as it is recognised that they may well have a conflict of interest. The vendor may not know, and certainly has no right to know, how the purchaser proposes to fund the purchase and whether or not it is planned to mortgage the property immediately on completion. Indeed, the purchaser, perhaps particularly a corporate purchaser, may not know precisely where the money is coming from at the time when the contract is made. There may be a variety of options available and the choice between them not yet made.
117. Under the Law Society's Conveyancing Protocol (the current edition was published in 2011), the purchaser's solicitor should check whether the purchaser requires a mortgage, whether a mortgage application and offer have been made and whether any conditions remain to be performed. It is only sensible to do so before the purchaser client is legally committed to the purchase. The vendor obviously also has an interest in knowing whether the purchaser will be good for the money. The Protocol advises the vendor's solicitor to request details of the purchaser's funding arrangements before exchange of contracts, but the purchaser's solicitor cannot disclose the information without the client's consent. The Protocol simply advises him to consider recommending disclosure. Even if the vendor does know that the purchaser proposes to borrow money to fund the purchase, she will not know the precise terms of any proposed mortgage. Indeed the purchaser may not know them at the time of the contract. Mrs Scott did not know that the nominee purchaser proposed to mortgage her home to the Bank, nor did she

know that the mortgage would prohibit the granting of the tenancy which she had been promised.

118. Nor will the mortgagee necessarily know the precise terms of the contract of sale. The seller will of course do so. Nowadays it is common for purchaser and lender to be represented by the same solicitor or conveyancer, but it is not obligatory, and there is obviously a potential conflict in a situation such as this. The Council of Mortgage Lenders' Handbook provides that "Unless otherwise stated in your instructions, it is a term of the loan that vacant possession is obtained. The contract must provide for this. If you doubt that vacant possession will be given, you must not part with the advance and should report the position to us" (para 6.5.1). Existing and proposed lettings should be disclosed to the lender (paras 6.6.1 and 6.6.2). Under the Protocol, on exchange of contracts the purchaser's solicitor sends the certificate of title and/or requisition of funds to the lender, or to the lender's solicitor if they are separately represented, in order that the funds will be available to complete the purchase. The certificate of title set out in Appendix F to the 2011 Protocol confirms that the contract of sale provides for vacant possession on completion. It also undertakes not to part with the funds if it comes to the conveyancer's notice that the property will be occupied at completion otherwise than in accordance with the lender's instructions. All of this would not be necessary if the lender were a party to the contract of sale or otherwise automatically aware of its terms.
119. Thus in no sense is this a "tripartite" transaction, to which vendor, purchaser and lender are all party. Lord Walker and Hughes LJ cannot have meant that it was when they referred to the "tripartite contractual arrangements between vendor, purchaser and mortgage lender" in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294, para 53. *Waya* was in any event concerned with the true construction of the arrangements between the purchasing borrower and the lender for the purpose of defining the benefit which the borrower had obtained from the lender having made a false statement in his mortgage application form. The contract between vendor and purchaser did not come into it.
120. I am afraid that I cannot see how it is implicit in the rejection of *Piskor* by the House of Lords in *Cann* that the contract of sale was part of the indivisible transaction. I understand, of course, that the ratio of *Cann* is limited to those cases where the purchaser requires the loan in order to complete his purchase. In that sense, the contract of sale is a necessary pre-cursor to the conveyance and mortgage. But that does not explain why they are indivisible, nor does it explain what is meant by indivisibility in this context. If what is meant is that the purchaser only ever acquires an equity of redemption, out of which she is not able at completion to carve proprietary interests which are inconsistent

with the terms of the mortgage, then to talk of the indivisibility of the contract adds nothing to the *Cann* analysis. It is still necessary to decide whether the purchaser can confer proprietary rights before completion. If what is meant is that the purchaser cannot do so, then it adds nothing to the analysis of the first question rehearsed earlier. The risk is that to talk of an indivisible transaction will not only fly in the face of the facts but also create confusion. Will it be taken, for example, to prevent a *vendor* from creating overriding interests between contract and conveyance?

121. In *Nationwide Anglia Building Society v Ahmed and Balakrishnan* (1995) 70 P & CR 381, the vendor agreed to sell his business, including its freehold premises, machinery, fixtures, fittings and vehicles, to the purchaser for £160,000. The vendor was prepared to leave up to £80,000 of the purchase price unpaid on completion. Hence the contract of sale provided that the vendor should have a first charge over the machinery, fixtures, fittings and vehicles and a second charge over the premises after the creation of a first charge to secure the intended mortgage loan. The contract also provided that the vendor should have a full set of keys and the use of an office at the property. All this duly happened. The Building Society provided a loan of £80,000 and was granted a first charge over the property. £80,000 remained owing to the vendor, who was granted a second charge over the property and a first charge over the chattels. He was also given the keys and allowed to use the office and therefore remained in actual occupation of the premises. The purchaser defaulted on the loan and the Building Society sought possession. The vendor argued, first, that his unpaid vendor's lien was an overriding interest; the Court of Appeal held that the lien had been given up in return for the rights obtained under the agreement. The vendor argued, second, that the licence to occupy the room was an overriding interest; the Court of Appeal held that this was a mere contractual right and not a proprietary interest. The Court of Appeal did go on to say that, because the contract, the transfer and the legal charges were all completed on the same day, they "formed an indivisible transaction and there was no scintilla temporis during which any right to occupation ... vested in the [vendor] which was free of the [lender's] charge" (p 389). That observation was clearly not necessary for the decision, because the Court had already rejected the claimed overriding interests. It may have made factual sense in that particular case, as the transactions all took place on the same day and each of the participants knew what the terms of the arrangement were. It cannot, in my view, be extrapolated into a general proposition applicable to all ordinary domestic conveyancing transactions.

Conclusion

122. This case has been decided on the simple basis that the purchaser of land cannot create a proprietary interest in the land, which is capable of being an

overriding interest, until his contract has been completed. If all the purchaser ever acquires is an equity of redemption, he cannot create an interest which is inconsistent with the terms of his mortgage. I confess to some uneasiness about even that conclusion, for two reasons. First, *Cann* was not a case in which the vendor had been deceived in any way or been made promises which the purchaser could not keep. Should there not come a point when a vendor who has been tricked out of her property can assert her rights even against a subsequent purchaser or mortgagee? Second, *Cann* was not a case in which the lenders could be accused of acting irresponsibly in any way. Should there not come a point when the claims of lenders who have failed to heed the obvious warning signs that would have told them that this borrower was not a good risk are postponed to those of vendors who have been made promises that the borrowers cannot keep? Innocence is a comparative concept. There ought to be some middle way between the “all or nothing” approach of the present law. I am glad, therefore, that the Law Commission have included a wide-ranging review of the 2002 Act in their recently announced Twelfth Programme of Law Reform (2014, Law Com No 354), which is to include the impact of fraud.

LORD WILSON AND LORD REED

123. We agree that this appeal should be dismissed for the reasons given by Lord Collins and Lady Hale. On the point on which they disagree, the indivisibility of the contract from the conveyance and the mortgage, which is not part of the reasons for the decision, we agree with Lady Hale.