Case No: B2/2011/0772

Neutral Citation Number: [2011] EWCA Civ 1314
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE COWELL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2011

Before:

LORD JUSTICE WARD
LORD JUSTICE LLOYD
and
LORD JUSTICE KITCHIN

- -

Between:

SHAMIM CHAUDHARY	**Claimant** **Respondent**
- and -	
HUSEYIN YAVUZ	**Defendant** **Appellant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

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David Brounger (instructed by **Stuart Karatas**) for the **Appellant**
Jonathan Gavaghan (instructed by **Wiseman Lee LLP**) for the **Respondent**

Hearing date: 25 October 2011

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Judgment

Lord Justice Lloyd:

1. This appeal, from an order of His Honour Judge Cowell in the Central London County Court made on 15 December 2010, poses questions as to whether and if so how an easement arising informally and not protected by any entry at the Land Registry can be effective against a purchaser of the land over which the easement would be exercised. The Land Registration Act 2002 changed the position in this respect, and this seems to be the first time that the point has arisen for consideration in the Court of Appeal on facts governed by the new legislation.

2. The Claimant, respondent to the appeal, is the owner of 37 Balaam Street, Plaistow, London E13, and the Defendant appellant is his neighbour, owning 35 Balaam Street. On each site there is a building with commercial use on the ground floor and residential use above. Between the two there lies an alleyway, which is included in the title to number 35. Before the events which gave rise to the litigation there was a metal stairway in this alleyway, leading up to a level area at first floor level, including what was described as a balcony along the side of number 37. Access was gained by way of this metal structure to the first floor premises of both number 35 and number 37. At that time there was no other access to the first floor of either building. On the instructions of the Defendant, on 9 April 2009 contractors cut the connection between the stairs and number 37 and removed the balcony along the side of number 37, thereby rendering it impossible to gain access to or from the upper floors of number 37. The Claimant started these proceedings in order to establish that these acts were unlawful, on the basis that he was entitled to a right of way over the staircase and the balcony, which was binding on the Defendant. The judge accepted this contention and granted injunctions accordingly. The Defendant appeals, with permission to appeal granted, as it happens, by myself.

3. As in the county court, the appellant was represented by Mr David Brounger and the respondent by Mr Jonathan Gavaghan. Both Counsel provided us with clear written and oral submissions and responded admirably to active questioning from all members of the court in the course of the hearing.

The facts

4. The events which gave rise to the respondent's claim to a right of way occurred early in 2006. Before that time the position on the ground, as described by the judge, was that, beyond an old wooden door at the entrance from the street to the alleyway, there was a wooden staircase against the side of number 35, leading up to the first floor of that building (and thence to the second floor). It was in a poor state, giving rise to health and safety concerns. Number 35 then belonged to a Mr Vijayan (referred to at trial, and hereafter, as Mr Vijay).

5. In 2005 there was only one upper floor at number 37. The then owner applied for planning permission to extend it, and in July 2005 he sold it to a company called Interface Properties Ltd, owned by Mr Asad Chaudhary, son of the Claimant. Planning permission was granted in August 2005. Mr Asad Chaudhary then undertook building works which involved creating a second floor at number 37. In so doing he went far beyond what was permitted by the planning permission. Until that time, access to the first floor of number 37 had been gained internally.

6. In January 2006 number 37 was transferred into the name of the respondent Mr Shamim Chaudhary. He lives in Pakistan. His son continued to be responsible for managing the property on a day to day basis.

7. Early in 2006 Mr Asad Chaudhary and Mr Vijay made an arrangement which suited them both in different ways, under which Mr Chaudhary (or his company) paid for the building of a metal staircase in the alleyway which at first floor level gave access on one side to number 35 and on the other side, over a landing, to number 37. There were to be two first floor flats in number 37 with front doors in the side wall of the building. One of them was near the top of the staircase, the other further back. Therefore the level part of the structure at first floor level continued towards to the back of the building as far as the front door of the back flat. This is the part described as the balcony.

8. This arrangement was good for Mr Vijay because the new access to the first floor of number 35 was safe and sound. It was good for Mr Chaudhary because he was then able to, and did, dispense with the internal staircase within number 37, thereby creating more space at ground floor level for commercial use in the shop. The judge saw two invoices, one for £5,100 for building the staircase and, I suppose, the first floor landing areas, and the other for £1,250 from another contractor for building a roof structure over the steel staircase and landing. The work had been done by March 2006. Mr Chaudhary was then able to let flats on the upper floors of number 37 to tenants who gained access between the street and the upper floors of number 37 by way of the metal staircase and landing. Needless to say, there was no documentation about these arrangements as between Mr Vijay and Mr Asad Chaudhary (or his father) or Interface Properties Ltd.

9. Later in 2006 Mr Asad Chaudhary heard that Mr Vijay was planning to sell number 35. Mr Chaudhary was described by the judge as an astute property developer. He realised that he had no document to record any right of access over the staircase and landing. He got solicitors to draft a deed for the grant of an easement which he hoped Mr Vijay would execute. He took it to Mr Vijay's home, and gave it to Mrs Vijay who said her husband would sign it, but he did not. What Mr Chaudhary could then have done, but did not do, was to cause to be registered a unilateral notice under section 34 of the 2002 Act. If that had been done before Mr Vijay's sale of number 35, the purchaser would have taken subject to the rights to which the notice related: see section 29(2)(a)(i), quoted below.

10. On 11 December 2006 Mr Vijay contracted to sell number 35 to the Defendant, and the sale was completed immediately, the Defendant being registered as proprietor on 23 March 2007. The contract incorporated the Standard Conditions of Sale, 4th edition, with a provision resolving any conflict in favour of the agreement. The property was sold "subject to the Incumbrances on the Property". Incumbrances were defined as "the entries in the Property and Charges registers of the title except financial charges and subject to covenants, conditions, restrictions, reservations and terms of the lease". There were no relevant entries on the register.

11. The relevant provision of the Standard Conditions of Sale is condition 3.1 as follows:

> "3. Matters affecting the property

3.1 Freedom from incumbrances

3.1.1 The seller is selling the property free from incumbrances, other than those mentioned in condition 3.1.2.

3.1.2 The incumbrances subject to which the property is sold are:

(a) those specified in the contract

(b) those discoverable by inspection of the property before the contract

(c) those the seller does not and could not reasonably know about …"

12. It is common ground that the metal structure including the staircase and the landing area in the alleyway was itself discoverable by inspection before the contract, and that it would have been apparent on inspection that the landing area led to doors in the side of number 37 at first floor level, from which it could be inferred that access to and from those parts of number 37 was gained over the metal structure.

13. The Defendant gave evidence at the trial, though the judge recorded that his English was so poor that some of the evidence was given through an interpreter. The judge also recorded that he was a very unsatisfactory witness, so that the judge found it difficult to place any great reliance on his evidence. The Defendant said that he did not notice the stairs or the balcony before completion, but the judge was far from satisfied that he knew that the alleyway was part of what he was buying. He also said he never went upstairs in number 35, which the judge seems to have been willing to accept, since he could only have got upstairs by way of the metal staircase.

14. The judge recorded that the Defendant, by solicitors, first protested about an alleged trespass on his land in a letter to Mr Asad Chaudhary in February 2007. At one point after that the Defendant locked the gate against the Claimant's tenants, but he unlocked it after intervention by the police. Eventually on 9 April 2009, at a time when, it seems, no-one was present in any of the flats at number 37, the Defendant caused contractors to cut the connection between the top of the metal staircase and number 37 and to remove the balcony against the side of number 37. That led the Claimant to bring these proceedings on 13 July 2009, seeking a declaration, damages and injunctions.

15. The judge held that the arrangement between Mr Vijay and Mr Chaudhary was not limited in time to the period of Mr Vijay's ownership, as the Defendant had contended. He held that, as between Mr Vijay and Mr Chaudhary, an equitable easement was created, effective at least by way of proprietary estoppel, so that Mr Vijay could not deny to Mr Chaudhary the use of the structure that he had put up for the benefit of number 37.

16. Part of Mr Chaudhary's case, in order to make this right effective against the Defendant, was that he was in actual occupation of part of the structure. I will refer later to what the judge said about that. He did not make any particular finding of fact in that respect. Mr Gavaghan put his case to us, in part, on the basis that Mr

Chaudhary was the owner of that part of the metal structure that adjoined and was fixed to number 37 itself. The judge did not say anything about that, and although Mr Gavaghan said that it had not, ultimately at least, been in dispute between counsel, it does not seem to me that we can base our decision on any conclusion or assumption as to the Claimant being the owner of any part of the metal structure. At least part of the structure must have become the property of the owner of number 35, by being affixed to the land.

The issues

17. Not all matters in issue below are still live on the appeal. The judge decided that the Claimant was entitled to an easement by estoppel and that this was effective as against the Defendant. He granted declarations and injunctions accordingly but refused to award any damages to the Claimant. His finding as to the position between Mr Chaudhary and Mr Vijay is not in issue on the appeal.

18. He held that the Claimant's right was binding on the Defendant on two alternative bases: first that the Claimant had been in actual occupation of part of number 35, so that the right was an overriding interest, and secondly that, even if that were not correct, the right would have been binding by way of constructive trust, because of the terms on which the Defendant acquired the property. Both of those decisions are challenged by the Defendant on the appeal. Thus there are the two separate issues on the appeal. The first turns on the application of the Land Registration Act 2002 to the facts as found. The second involves a consideration of case law outside the scope of the Act.

The Land Registration Act 2002

19. The 2002 Act was passed after extensive consultation and consideration by the Law Commission. It effected a wholesale reform of the land registration system, which not only provided for the move to an electronic system of conveyancing but took a long overdue opportunity to review and revise many aspects of the legislation which had been found less than satisfactory in practice. According to the Law Commission's report, Land Registration in the Twenty-First Century – a Conveyancing Revolution (2001) Law Com 271 (at paragraph 1.5):

> "The fundamental objective of the [Act] is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title to the land at any given time, so that it is possible to investigate title to the land on line, with the absolute minimum of additional enquiries and inspections."

20. The Act did not do away altogether with the existence of rights in relation to the land which may be binding on the registered proprietor even though not registered or noted on the register, but it did reduce the number and scope of such rights. It also allowed little scope for the relevance of notice. Thus at paragraph 5.16 the Law Commission's report, mentioned above, said this:

> "As a general principle, the doctrine of notice, which still has a residual role in relation to the priority of certain interests in

unregistered land, has no application whatever in determining the priority of interests in registered land."

21. The report proceeded to refer to a small number of cases where notice is or may be relevant, of which two are pertinent for present purposes: some cases of actual but non-obvious occupation, and some cases of easements or other rights which would not be obvious on inspection. In each of these cases the relevant right is binding if the proprietor knew of it at the time of the disposition, but not otherwise, as can be seen from Schedule 3 paragraphs 2 and 3, set out below.

22. The first point on this appeal turns on the provision as regards overriding interests, which are notably and relevantly less extensive than they had been under the 1925 Act.

23. Different provision is made by the Act as regards rights and interests binding on the registered proprietor on first registration and on a disposition of registered land. We are only concerned with the latter. I start with section 28 and part of section 29, as follows:

> "28 Basic rule
>
> (1) 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.
>
> (2) It makes no difference for the purposes of this section whether the interest or disposition is registered.
>
> 29 Effect of registered dispositions: estates
>
> (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, or
>
> (iii) appears from the register to be excepted from the effect of registration, and
>
> (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate."

24. The relevant exception is that in section 29(2)(a)(ii). Two paragraphs of Schedule 3 require attention:

> "Interests of persons in actual occupation
>
> 2. 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
>
> (a) …
>
> (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;
>
> (d) …"
>
> Easements and profits à prendre
>
> 3(1) A legal easement or profit à prendre, except for an easement, or a profit à prendre which is not registered under [the commons registration legislation], which at the time of the disposition—
>
> (a) is not within the actual knowledge of the person to whom the disposition is made, and
>
> (b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.
>
> (2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition."

25. Our attention was also drawn to one other provision, in section 116, as follows:

> "116 Proprietary estoppel and mere equities
>
> 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)."

26. There is thus no doubt that, if the Claimant's rights as against Mr Vijay were properly analysed as rights by way of proprietary estoppel, they are capable of binding the Defendant as purchaser. Whether they do bind him depends on the issues in the appeal.

Overriding interest – actual occupation

27. Under the Land Registration Act 1925 an equitable easement could be an overriding interest by virtue of rule 258 of the Land Registration Rules if enjoyed with the relevant land: see *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 W.L.R. 204, approved by the Court of Appeal in *Sommer v Sweet* [2005] EWCA Civ 227. The position is different under the 2002 Act, and deliberately so (see paragraph 8.67 of the Law Commission's report). The only provision relevant to easements as such is paragraph 3 of Schedule 3, which is specifically limited to legal easements, and indeed to only some of them.

28. Therefore if the Claimant's rights are to be binding under section 29 as being an overriding interest, it can only be by virtue of actual occupation under Schedule 3 paragraph 2. The first question is whether the Claimant was in actual occupation of any part of number 35 at the time of the transfer to the Defendant or his registration as proprietor. (The position will have been the same at both of those dates). At first sight it seems counter-intuitive, to say the least, to assert that the owner of dominant land (number 37) is in occupation of other land (number 35) over which he asserts an easement. In *Saeed v Plustrade* [2002] EWCA Civ 2011 it was said, on a concession by Counsel, that the exercise of an easement giving a right to park a car on particular land meant that the owner of the car was in actual occupation of the space, so that such rights as he had would be an overriding interest. Ruoff & Roper on Registered Conveyancing makes the comment at paragraph 10.019 that this confuses "actual occupation" with "actual use", and that the correct view is that the enjoyment of a right such an easement over burdened land does not amount to actual occupation of the land for this purpose. In *Celsteel* Scott J observed, [2005] 1 W.L.R. 204 at 219E, that the plaintiff who was in actual occupation of a garage demised to him was not in actual occupation of any part of the driveway over which he asserted his easement to get to and from the garage.

29. In the present case the judge referred to Ruoff & Roper and the conventional view, and also to *Saeed v Plustrade*. He went on to say this at paragraph 14:

"The novel point which is taken by Mr Gavaghan … is not only should there not be very definite rules about these things, but that if you look at the balcony and the landing leading to the balcony that is something within the occupation of the Claimant appurtenant to the dominant [tenement] at number 37. He puts it this way – who but the Claimant was in occupation of that? On ordinary principles of ownership I suppose the Defendant could go and walk along the balcony so long as

> he did not interfere with someone exercising a lawful right, and of course he could walk beneath the balcony and the landing leading to it. I am just persuaded – but I realise it is a very appealable point – that that would work as an argument."

30. Mr Gavaghan prayed in aid *Kling v Keston Properties Ltd* (1985) 25 P&CR 212 as a stronger case about parking than *Saeed v Plustrade.* There the use of a garage was held to amount to actual occupation, thereby protecting as an overriding interest a right of pre-emption as regards the garage. However, the use of the garage in that case was under a licence, not an easement, so that case does not assist the Claimant.

31. In my judgment there was no actual occupation of any part of the metal structure by anyone which could give the Claimant's rights the status of an overriding interest. The judge did not record any findings of fact as to how the metal structure was used at any given time, other than that it was used by the Claimant's tenants to get to and from their flats on the upper floors of number 37 as well, of course, as by the Defendant's tenants to get to and from theirs in number 35. Although referred to as a balcony, the part of the structure which ran along the side of number 37 at first floor level was no more than an access way to the front door of the flat at the rear of the property. There was no indication that it was used otherwise than for passing and repassing between the street and the relevant flat or flats. In my judgment such use does not amount to actual occupation. I dare say that no-one else was in occupation of the metal structure either, but not every piece of land is occupied by someone, let alone in someone's actual occupation (as distinct from possession). I do not need to consider the use of the servient land in the case of an easement such as a right to park, where the dominant owner may place a large object on the relevant land and leave it there for what may be a substantial time. That issue does not arise on this appeal and I say nothing about it.

32. Mr Gavaghan sought to support the judge's conclusion in two ways. The first is that the Claimant, having put the metal structure in place, was in occupation of the relevant physical space (i.e. that taken up by the structure) by virtue of the presence of the structure itself. He drew an analogy with a person present on land by chattels which had been placed and left there, such as in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 where using the land for storage was seen as relevant (see paragraph 82, [2002] Ch at 237C). He argued that if the presence of movable chattels can constitute actual occupation, so much the more would the presence of a large structure fixed to the land. I disagree. The metal structure became part of the land on any basis, regardless of whether any part of it, as a chattel, belonged (in any sense, for example as regards a right to remove it) to the owner of number 37, as opposed to his neighbour on whose land it was placed. It thus became part of what could be used or occupied. It makes no sense to say that its presence on the land of the Defendant was itself occupation of that land by the person who paid for it to be put up in the first place. Occupation must be, or be referable to, personal physical activity by some one or more individuals: see Lord Wilberforce in *Williams & Glyn's Bank v Boland* [1981] AC 487 at 505B-C - "physical presence, not some entitlement in law". The only such activity in the present case was that of the Claimant's tenants and their visitors (and of course those of the Defendant) coming to and fro on the staircase and the level area at the top of the stairs. That is use, not occupation.

33. Mr Gavaghan's alternative argument was that Mr Chaudhary had been in occupation of at least part of the alleyway by his contractors in early 2006 when the structure was put up, and that he had never given up that occupation. So far as this is concerned, the judge made no finding as to the position in early 2006. Clearly contractors went in, paid for by Mr Chaudhary or Interface, removed the former wooden structure and replaced it with the present metal structure, by arrangement between Mr Vijay and Mr Chaudhary. It does not seem to me to be at all clear that, at any point during that process, Mr Chaudhary was in occupation of any part of the alleyway by his contractors. Even if he was, that came to an end, it seems, by March 2006 and well before the sale to the Defendant in December 2006. The only basis on which Mr Chaudhary could be said to have continued in occupation (if he ever was in occupation) after that was by way of the metal structure, so it comes back to the first argument.

34. Two other points were raised, which it is not necessary to address. Such use as there was of the structure was by the tenants of number 37 rather than by Mr Chaudhary himself. For the appellant it was said that this is not enough, and that it must be use by the person claiming the right, or by someone on his behalf (Mr Asad Chaudhary on behalf of his father, for example), and that the tenants would have been using it in their own right, not on his behalf. Relevant to this is the fact that under section 70(1)(g) of the 1925 Act the rights protected were those of any person in actual occupation or in receipt of the rents and profits of the land, whereas now only actual occupation suffices.

35. The second point also arises from a change in the legislation. The 2002 Act has a new provision limiting the rights to those relating to the land of which the relevant person is in occupation. In *Ashburn Anstalt v Arnold* [1989] Ch 1 at 28F Fox LJ said "the overriding interest will relate to the land occupied but to nothing else". However, in *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355 the Court of Appeal held that it was not so limited, and that actual occupation of part of the land comprised in a registered disposition protected a right or interest in relation to any part of that land. On that basis, Mr Brounger argued that, even if there might be actual occupation of the balcony, there could not be actual occupation of the staircase, and the right protected could only be that which was exercisable over the land occupied. To the contrary Mr Gavaghan submitted that a right over the staircase and the alleyway would relate to the balcony, and would therefore not be excluded by the new statutory language. Since, in my judgment, there was no relevant actual occupation, the point does not arise. I can see force in Mr Gavaghan's argument, but I need say no more about this, nor about the relevance of the fact that the use was by tenants of the Claimant, not by the Claimant or any agent of his.

36. It seems clear from the terms of the judge's judgment as quoted above that he felt unsure about this point. In my judgment he was wrong to accept that there was any relevant actual occupation. Accordingly the first ground of appeal is well made out.

Constructive trust

37. The judge's alternative analysis involves avoiding the effect of the 2002 Act, rather than using it. He found that, regardless of the failure of the Claimant to have a unilateral notice entered on the register to put others on notice of the right he claimed,

the right was binding in conscience on the Defendant because of the terms of the contract under which he bought the property.

38. One of Mr Brounger's arguments against this was that the inclusion in the contract of the specific provision about freedom from specified incumbrances (which do not include this particular right) meant that there was a conflict with Standard Condition 3.1 and the latter was excluded. If so, the judge's premise would not have been correct. I would reject this submission. The contract identified those incumbrances to which the contract was expressly subjected. That is expected by Condition 3.1.2(a). Such an express provision, contemplated by Condition 3.1, does not conflict with the Condition.

39. The existence of the metal structure was obvious on even a casual inspection of the land to be sold to the Defendant. I agree with the judge that the rights claimed by the Claimant were, for that reason, within the terms of Standard Condition 3.1.2(b), as being discoverable by inspection of the property before the contract. Accordingly, I conclude that the Defendant could not complain to Mr Vijay under the contract about the existence of this easement, if it turns out to be binding on him, as the judge has held. The vendor did not contract on the basis that there was no such easement.

40. The judge decided this aspect of the case on the basis of, and by analogy with, the decision of Dillon J in *Lyus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044. I will come to that case shortly, and to later cases which have commented on it. First it is appropriate to set out the factual basis on which the judge held that the relevant legal principle applied. This is in his paragraph 17:

> "The great point of merit on the part of the Claimant in this case which has occasioned much thought on my part is that when the Defendant bought the property, although he says he never saw the balcony or the stairs because he never went upstairs, the structure was there and in place for all to see, and I have already indicated that I do not think the Defendant even knew that the alleyway was part of his property at the time that he bought on 11th December 2006. What he paid for was the property as it could be seen, and what he could see is the obvious arrangement in the alleyway: that there was a flight of stairs which served the property on both sides of the stairs, and the buildings on both sides of the stairs, i.e. numbers 35 and 37. It seems to me that he did not buy the property on the basis that the stairs or the structure would be removed or altered in any particular way. Mr Gavaghan points to two features, one of which is or ought to be a matter of evidence. In the answers to inquiries given by Mr Vijay or his solicitors he is asked – and this is at page 154 – under the heading *'Adverse rights affecting the property' – Unless apparent from the copy documents supplied are there any current restrictions, agreements, rights or informal arrangements of any kind to which the property is subject, whether public or private, and whether existing or in the course of acquisition (adverse rights)?'* and the manuscript answer given is *'None of which the vendor is aware save as disclosed'* but I did not hear any evidence from anybody such as the writer of that manuscript note as to what it was that was disclosed, and maybe it could have been disclosed by Mr Vijay that there was an arrangement

about the metal structure. Perhaps that is little more than a straw in the wind. The fact is that the structure was perfectly obvious."

41. The facts in *Lyus v Prowsa* were these. A building company was developing an estate, which was subject to a mortgage in favour of a bank. The company agreed to sell a plot to the plaintiffs, which was to be transferred to them once the house had been built on it. The plaintiffs had paid a deposit. The company then became insolvent. The bank as mortgagee contracted to sell land to the defendant, including that which the plaintiffs had agreed to buy. The contract was expressed in terms to be subject to and with the benefit of the contract made between the company and the plaintiffs. The bank need not have done this, because its mortgage had priority over the plaintiffs' contract, being earlier in date. Before the date of the bank's sale to the defendant, the defendant's solicitors wrote to the bank's agents giving an assurance that the defendant would take all reasonable steps in its power to make sure that the interests of contracting purchasers (such as the plaintiffs) were dealt with quickly and to their satisfaction.

42. Apart from that added assurance, therefore, there are three principal differences between this case and that. First, in that case the third party rights in question were specifically identified in the contract under which the defendant agreed to buy the property. Secondly, the bank had no need to protect itself as regards enforcement of the plaintiffs' contract, because it could not be effective against the bank whose mortgage had priority. Thirdly, and correspondingly, the plaintiffs could have done nothing by way of registration or otherwise to ensure that a purchaser from the bank was affected by their rights. A caution had been registered to protect their position as against a purchaser from the original vendor company, but that was of no avail against the bank or a purchaser from it.

43. Dillon J referred to the Court of Appeal's decision in *Binions v Evans* [1972] Ch 359, decided by Lord Denning MR (but not by the other members of the court) on the basis that the plaintiff had a licence under which she was entitled to live in the cottage for the rest of her life, and that the defendant who had bought by a contract expressly subject to her rights was to be precluded, by virtue of a constructive trust imposed by conscience, from acting inconsistently with the plaintiff's rights under her licence.

44. Dillon J pointed out that, in that case, the plaintiff had continuing rights against the vendor under her licence, such that if she had been evicted she would have had a claim for damages against the vendor. He said this at page 1051-2:

> "In the factual matrix it was necessary for the protection of the vendors to interpret the agreement between the vendors and the purchasers as conferring rights on the defendant as against the purchasers, and this was done through the medium, as Lord Denning MR put it, 'of imposing a constructive trust on the purchasers for the defendant's benefit'.
>
> By contrast, there are many cases in which land is expressly conveyed subject to possible incumbrances when there is no thought at all of conferring any fresh rights on third parties who may be entitled to the benefit of the incumbrances. The land is expressed to be sold subject to incumbrances to satisfy the vendor's duty to disclose all possible

> incumbrances known to him, and to protect the vendor against any possible claim by the purchaser if a third party establishes an overriding right to the benefit of the incumbrance against the purchaser. So, for instance, land may be contracted to be sold and may be expressed to be conveyed subject to the restrictive covenants contained in a conveyance some sixty or ninety years old. No one would suggest that by accepting such a form of contract or conveyance a purchaser is assuming a new liability in favour of third parties to observe the covenants if there was for any reason before the contract or conveyance no one who could make out a title as against the purchaser to the benefit of the covenants."

45. Later Dillon J came to his conclusion in favour of the plaintiffs with the following passage at 1054-5:

> "It seems to me that the fraud on the part of the defendants in the present case lies not just in relying on the legal rights conferred by an Act of Parliament, but in the first defendant reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land. That makes, as it seems to me, all the difference. It has long since been held, for instance in *Rochefoucauld v Boustead* [1897] 1 Ch 196, that the provisions of the Statute of Frauds 1677, now incorporated in certain sections of the Law of Property Act 1925, cannot be used as an instrument of fraud, and that it is fraud for a person to whom land is agreed to be conveyed as trustee for another to deny the trust and relying on the terms of the statute to claim the land for himself. *Rochefoucauld v Boustead* was one of the authorities on which the judgment in *Bannister v Bannister* [1948] 2 All ER 133 was founded."

46. Thus Dillon J was by no means saying that whenever a contract is expressed to be subject to some right in favour of the third party, that makes the right enforceable against the purchaser, if it would not otherwise be so. The provision for the purchaser to be subject to, but to have the benefit of, the contract with the plaintiffs was not accounted for by any need to protect the bank, and therefore it had to be read as intended to confer some right on the plaintiffs. The fact that the defendant took expressly subject to and with the benefit of that contract allowed the conclusion that it undertook an obligation towards the plaintiffs on the contract.

47. Mr Gavaghan accepted that the specific identification of the third party's rights in that case is a factual distinction from the present case, but he submitted that what really matters is that the rights should be adequately identifiable, and that they were in the present case, by inspection of the land. He relied on a passage in *Bannister v Bannister* [1948] 2 All ER 133, at 136, where Scott LJ said:

> "Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently identified beneficial interest in the property was to be taken by another."

48. In that case there had been an oral agreement by the defendant, who owned two adjacent cottages, to sell both of them to the plaintiff at a given price, on terms that the defendant was to be allowed to live in one of them rent free for the rest of her life. The conveyance to the plaintiff proceeded accordingly, with nothing to record the defendant's rights. Later the plaintiff sought to terminate what he said was the defendant's tenancy at will. His attempt failed in the county court and in the Court of Appeal. There was thus no question of a third party being subjected to the defendant's rights, though it was necessary to address the issue of a constructive trust because of the terms of section 53 of the Law of Property Act 1925. Nor was there any doubt as to the terms of the defendant's interest, once the oral evidence had been heard and assessed.

49. *Lyus v Prowsa* has been the subject of consideration in subsequent authority at first instance and in the Court of Appeal. In *Ashburn Anstalt v Arnold* [1989] Ch 1 (in which junior Counsel for the plaintiff was Mr Peter Cowell, as he then was) a leaseholder had sold its lease under an agreement made in 1973 but retained a contractual right to remain in occupation of the property as licensee, and also had a right to be granted a lease of a shop on the site by the purchaser after development of the site. The plaintiff bought the freehold of the premises where the former leaseholder was still carrying on business, subject to the terms of the 1973 agreement, and refused to accept that it was bound by the 1973 agreement. The Court of Appeal held that the agreement created a tenancy (a point on which the decision was overruled in *Prudential Assurance v London Residuary Body* [1992] 2 AC 386 because of the lack of a term certain, and on which the case has enjoyed very recent consideration in the Supreme Court of the United Kingdom in *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52), but went on to consider the position in the alternative, if there had not been a tenancy.

50. The court rejected the proposition that a contractual licence was binding by itself, and went on to consider the constructive trust approach, of which it said that "the finding on appropriate facts of a constructive trust may well be regarded as a beneficial adaptation of old rules to new situations": page 22D. They went on to formulate the point, in general terms, as follows:

> "The test, for the present purposes, is whether the owner of the property has so conducted himself that it would be inequitable to allow him to deny the claimant an interest in the property."

51. The court then reviewed cases from *Bannister v Bannister* onwards. They said this about *Lyus v Prowsa* at page 24:

> "This again seems to us to be a case where a constructive trust could justifiably be imposed. The bank were selling as mortgagees under a charge prior in date to the contract. They were therefore not bound by the contract and on any view could give a title which was free from it. There was, therefore, no point in making the conveyance subject to the contract unless the parties intended the purchaser to give effect to the contract."

52. Coming on to the case then under appeal they said this, at page 25-6:

> "It is said that when a person sells land and stipulates that the sale should be "subject to" a contractual licence, the court will impose a constructive trust upon the purchaser to give effect to the licence: see *Binions v. Evans* [1972] Ch 359, 368, *per* Lord Denning M.R. We do not feel able to accept that as a general proposition. [They then cited with approval the second of the passages from *Lyus* which I have set out at paragraph [44] above.] The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected. The mere fact that that land is expressed to be conveyed "subject to" a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the provisions of the contract. The fact that the conveyance is expressed to be subject to the contract may often, for the reasons indicated by Dillon J., be at least as consistent with an intention merely to protect the grantor against claims by the grantee as an intention to impose an obligation on the grantee. The words "subject to" will, of course, impose notice. But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter."

53. They would not have held that there was a constructive trust on the facts of that case. They made two other observations of general note, at page 26E and 27C. I do not set out the first here, as it was quoted in *IDC Group v Clark* to which I will refer next, in a passage which I set out at paragraph [54] below. The second is as follows:

> "In general, we should emphasise that it is important not to lose sight of the question: "Whose conscience are we considering?" It is the plaintiff's [i.e. the transferee of the land], and the issue is whether the plaintiff has acted in such a way that, as a matter of justice, a trust must be imposed on it. For the reasons which we have indicated, we are not satisfied that it should be."

54. Next in time the point was addressed by Sir Nicolas Browne-Wilkinson V-C in the Chancery Division in *IDC Group Ltd v Clark* [1992] 1 EGLR 187. He reviewed the cases about constructive trust claims in this area, including both *Lyus* and *Ashburn Anstalt*. He summarised the position as follows:

> "That decision [i.e. *Lyus*] was approved by the Court of Appeal in *Ashburn Anstalt v Arnold* …. The Court of Appeal put what I hope is the *quietus* to the heresy that a mere licence creates an interest in land. They also put the *quietus* to the heresy that parties to a contractual licence necessarily become constructive trustees. They also held … that the mere fact that property is sold subject to a contractual licence is not sufficient to create a constructive trust. They held … that the mere fact that somebody has purchased with notice of a claim does not give rise to a constructive trust. However, the Court of Appeal plainly considered that *Lyus v Prowsa* was rightly decided.
>
> The result, as it seems to me, is that in the normal case a conveyance of land subject to or with notice of prior incumbrances or prior interests will not operate so as to make enforceable under a constructive trust such prior incumbrances or interests which would otherwise be

unenforceable. However, in certain circumstances equity raises a constructive trust because it is unconscionable for the person having received such property not to give effect to the terms on which he received it. As the Court of Appeal said, and with respect I would agree:

> "In matters relating to the title to land certainty is of prime importance. We do not think it desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials."

It is important always to bear in mind that it is of the greatest importance that the title to land should be capable of being ascertained in accordance with well-known procedures. To raise constructive trusts which do not fit into the conveyancing machinery currently operating, thereby giving rise to liabilities of which purchasers might otherwise not be aware, is a dangerous course to pursue.

In my judgment, the decision in *Ashburn Anstalt* does not warrant the creation of a constructive trust unless there are very special circumstances showing that the transferee of the property undertook a new liability to give effect to provisions for the benefit of third parties. It is the conscience of the transferee which has to be affected and it has to be affected in a way which gives rise to an obligation to meet the legitimate expectations of the third party."

55. Lastly, before the present case, there is *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P&CR 13. In that case Mr Dugdale established rights binding by way of proprietary estoppel against the original owner of certain land, to sell the premises to him. The owner had sold to the claimant, who refused to abide by the obligation to sell. Mr Dugdale failed to establish that his rights were binding by virtue of actual occupation, because the occupation was that of his company, not his own. The claimant had bought the property on terms expressly subject to the claim that Mr Dugdale was then asserting in litigation, and, among other things, on terms that it would indemnify the vendor for any costs and for any damages awarded against it. On that basis a constructive trust was Mr Dugdale's alternative basis of claim, and this was upheld by the judge. The Court of Appeal formulated the relevant legal principles as follows, at paragraph 52:

> "(1) Even in a case where, on a sale of land, the vendor has stipulated that the sale shall be subject to stated possible incumbrances or prior interests, there is no general rule that the court will impose a constructive trust on the purchaser to give effect to them.
>
> (2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property.
>
> (3) In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important

> question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant encumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed.
>
> …
>
> (5) Proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant encumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it: see *Ashburn Anstalt v Arnold* … However, since in matters relating to the title to land certainty is of prime importance, it is not desirable that constructive trusts of land should be imposed in reliance on inferences from "slender materials"."

56. The Court of Appeal considered that there was not a sufficient basis on the facts to satisfy that test, despite the specific reference in the contract to Mr Dugdale's claim. They allowed the appeal so that Mr Dugdale's claim failed.

Discussion

57. The judge's decision in favour of the Claimant on this ground in the present case proceeded on the basis of the facts as set out in his paragraph 17, quoted at paragraph [40] above, and that the metal structure was discoverable by inspection, so as to give notice to the person inspecting that there might be rights of access from the upper floors of number 37 to the street and back, so that the rights fell within Standard Condition 3.1.2(b). The judge drew his conclusion from these facts at paragraph 18. Essentially he regarded it as equally unconscionable for the Defendant to deny a right whose existence he could have ascertained merely by inspecting the property as it was in *Lyus v Prowsa* to deny the right which was identified in the contract.

58. If this conclusion is right it would have potentially very wide ramifications. The incorporation in a contract for the sale of land of the Standard Conditions of Sale must be a very widespread practice. Thus, most, or at least many, contracts for the sale of land are, by this means, expressed to be subject to incumbrances discoverable by inspection of the property before the contract. If the relevant incumbrance is protected by actual occupation, within the terms of Schedule 3, paragraph 2, to the Act, then it will bind the purchaser in any event, as it would also if it is a legal easement or profit à prendre within Schedule 3 paragraph 3. But if it is any other form of right, such as an equitable easement or other proprietary estoppel right (as here), then the judge's reasoning would make it binding on the purchaser despite the fact that it could, and in terms of the 2002 Act should, be protected by registration or a notice on the register, and despite the fact that, unlike in *Lyus*, there is nothing in the contract to draw specific attention to it.

59. With respect to the judge, I do not consider that his conclusion is correct on this point. It does not seem to me that the fact that the contract is subject to such an incumbrance, by virtue of Standard Condition 3.1 being incorporated, satisfies the test laid down in *Lloyd v Dugdale*. There is nothing in the contract which seems to me to allow the court to conclude that by this contract the purchaser "has undertaken a new

obligation, not otherwise existing, to give effect to the relevant encumbrance or prior interest". In my judgment this criterion, laid down in *Lloyd v Dugdale*, should be applied in a case of this kind, and if applied to these facts leads to the conclusion that the Defendant's conscience is not bound to give effect to the Claimant's asserted rights.

60. It seems to me that the distinctions between the present case and *Lyus*, to which I referred at paragraph [42] above, are real and significant. In that case the judge's conclusion was justified by reference to both the express provision in the contract referring in terms to the plaintiffs' contract and the fact that that contract was not binding on the bank, so that the reference to it in the contract between the bank and the defendant could not be explained by a need to protect the bank, nor could the plaintiffs have done anything by way of registration to protect their contract against a purchaser from the bank. Here, by contrast, the reference to the asserted right was only in general terms, within the category of incumbrances discoverable on inspection, and it was binding on the vendor so that, if it had been effective against the purchaser, the vendor needed to ensure that the contract was subject to it in order that the purchaser could not complain about it to him. Conversely, the Claimant could have ensured the protection of the right by the entry of a notice on the register.

61. It may be said that, on this basis, *Lyus v Prowsa* is a very unusual case, and is not likely to be followed in more than a few others. That is a fair comment, but not a fair criticism. I know of no English case in which the precedent of *Lyus* has been used successfully to make binding on a purchaser an interest which could be but was not protected on the register as against him, other than *Lloyd v Dugdale* at first instance (overturned on appeal) and the present case, also at first instance.

62. Since the basis of *Lyus* is showing that the conscience of the purchaser is affected, it might be argued that the apparatus of registration has no relevance to the question arising. In the *Lyus* case itself it had none, because nothing which the plaintiffs could have done could have protected their rights against the defendants. In a directly comparable case that might again be the case. But in a case such as the present, where the rights asserted are capable of protection on the register and where they are not referred to in the contract in specific but only in general terms, then it seems to me that the registration system is relevant. That is for at least two reasons. One is that, absent a specific reference in the contract, the purchaser may be thought to be entitled to rely on third parties protecting themselves in the manner provided for under the legislation. The other is that the contract provision will more readily be interpreted as intended to protect the vendor against a possible claim by the purchaser than as imposing a new personal obligation on the purchaser towards the third party.

63. The court invited Mr Gavaghan to formulate a test by which a potential purchaser's solicitor could advise him whether his conscience would be bound by some potential right, not mentioned in terms in the contract, of which signs were discoverable on inspection, but which, if it existed, could be protected by registration or an entry on the register. He sought to draw a distinction placing on one side the case of an ancient restrictive covenant properly noted on the register but which might well not be enforceable by then for lack of anyone entitled to relevant land who had the benefit of the covenant (compare Dillon J in *Lyus* in the passage cited at paragraph [44] above). On the other side, as affecting the conscience of the purchaser, he would place rights actively enforceable, or in current use, as against the vendor. The third party right in

Lyus, of course, would not have satisfied that test, since it was not enforceable against the vendor, but the licence in *Binions v Evans* was so enforceable. It does not seem to me that there could be a satisfactory test along these lines, nor on any other basis, which would put the Claimant's rights over the metal structure in a clearly defined category of rights which would be binding on the purchaser's conscience by virtue of being discoverable on inspection.

64. In my judgment *Lyus* is an exceptional case, and it is right that it should be. The three features of the case that distinguish it from the present case, to which I have referred in paragraph [42] above, made it justifiable to hold both that the point of the reference to the third party right in the contract was that the purchaser should be bound by it, and therefore that the purchaser thereby undertook a new obligation to give effect to the plaintiffs' rights. On that basis the purchaser's conscience was affected by the terms of the contract.

65. No such conclusion would be justified in the present case nor, in my judgment, in any case where the third party right is only identified by way of general words in the contract, whether those of Standard Condition 3.1 or otherwise. In such a case the reference to the class of rights is accounted for by the vendor's obligation to disclose rights and by his interest in ensuring that, if there are rights not otherwise disclosed, subject to which the sale will take effect, it is not open to the purchaser to object to completion or to claim any form of compensation. In some cases there could also be an interest on the part of the vendor in avoiding a claim by the third party that the vendor had infringed the third party's rights by selling free from those rights. However, if the reason that the third party's rights are not enforceable against the purchaser is that the third party has failed to take the proper steps to protect them on the register, there would at least be problems of causation for the third party in making such a claim. Nor would the possibility of such a claim justify reading the contract as requiring the purchaser to undertake an obligation which was not otherwise enforceable against him.

66. In Gray and Gray Elements of Land Law, 5th edition (2009), paragraph 8.2.24 is as follows:

> "It is a standard feature of land registration the world over that a disponee's mere knowledge of a protectable, but unprotected, interest does not normally affect the title derived from registration. This reluctance to allow the traditional doctrine of notice to intrude upon registers of title is deeply embedded in the origins of the Land Register and has persisted to the present day. As Cross J observed in *Strand Securities Ltd v Caswell* [1965] Ch 373, at 390A-B, it is 'vital to the working of the land registration system that notice of something which is not on the register should not affect a transferee unless it is an overriding interest'. Title registration is intended to mark 'a complete break' from the equitable rules which formerly governed land law priorities. In consequence there has been a general rejection, no less so in England than elsewhere, of any temptation to qualify the system of title registration by the importation of an equitable doctrine alien to its central purpose."

67. The authors note some isolated exceptions, including the decision of Graham J in *Peffer v Rigg* [1977] 1 W.L.R. 285. In that case, concerned relevantly with the protection given by the Land Registration Act 1925 to a purchaser, defined as one taking in good faith for valuable consideration, the judge said that a purchaser "cannot in my judgment be in good faith if he has in fact notice of something which affects his title". That decision has been strongly criticised. It does not stand well with other authority, including the words of Sir Christopher Slade at paragraph 50 of *Lloyd v Dugdale*, introducing the passage about constructive trusts from which I have already quoted some passages:

> "There is no general principle which renders it unconscionable for a purchaser of land to rely on a want of registration of a claim against registered land, even though he took with express notice of it. A decision to the contrary would defeat the purpose of the legislature in introducing the system of registration embodied in the 1925 Act."

68. In my judgment that approach is even more amply justified under the 2002 Act than it was before. It does not exclude the possibility that the court may find an obligation binding on the registered proprietor personally, by way of, for example, a constructive trust, as a result of which an obligation which is not protected on the register is nevertheless effective. *Lyus v Prowsa* is an example of that, and a rare one. The present case is not.

69. Accordingly, despite the judge's view, expressed in paragraph 17 of his judgment which I have quoted above, it seems to me that, in the absence of any express reference in the contract to the rights asserted by the Claimant and an express provision requiring the purchaser to take the property subject to those rights, it is not sufficient that the metal structure was apparent on inspection of the land which was to be bought, and that it would have been apparent that it served as an access for the upper floors of both properties. The judge may well be right in saying that the Defendant did not buy the property on the basis that any change was to be made to the structure. Equally he did not buy on the basis that no change was to be made to what he was buying. The contract was silent as to that. He became the owner of everything comprised in the title to number 35, and it was then open to him to do whatever he chose with it, or any part of it, subject to (a) any third party rights that were binding on him and (b) restrictions such as those of the planning legislation. Unless there are third party rights over the metal structure which are binding on him, it is open to him to remove all or any part of the structure.

70. For the reasons expressed above, I respectfully disagree with the judge's conclusion that, the metal structure being obvious on inspection, it would be unconscionable for the Defendant to obstruct the use of the structure by the Claimant and his tenants.

71. I would therefore hold that the rights asserted by the Claimant are not binding on the Defendant, and would allow the appeal and set aside those parts of the judge's order that relate to the claim to a right of way.

Lord Justice Kitchin

72. I agree.

Lord Justice Ward

73. I also agree.