Case Nos: HC11C01929 and HC11C04534

Neutral Citation Number: [2013] EWHC 86 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 28/01/2013

Before :

MR JUSTICE NEWEY

- -

Between :

ARTHUR PANAYOTIS FITZWILLIAM	**Claimant**
- and -	
RICHALL HOLDINGS SERVICES LIMITED	**Defendant**

- -
- -

Mr Richard Clegg (instructed by **Colman Coyle**) for the **Claimant**
Mr Greville Healey (instructed by **Underwood & Co**) for the **Defendant**

Hearing dates: 10-13 December 2012

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Judgment

Mr Justice Newey :

1. This case concerns the ownership of a house at 100 Richmond Avenue, London N1. The claimant, Mr Arthur Fitzwilliam, was for many years registered at HM Land Registry as the proprietor of 100 Richmond Avenue, but the defendant, Richall Holdings Services Limited ("Richall"), was registered in his place after a Mr Sameer (or "Sam") George had purported to sell the property to it using a power of attorney supposedly granted to him by Mr Fitzwilliam. Mr Fitzwilliam maintains that he never authorised the sale and that the power of attorney is a forgery. On that basis, he seeks to have the register altered in his favour pursuant to schedule 4 to the Land Registration Act 2002 and/or an order for 100 Richmond Avenue to be transferred to him. Among other things, the case raises issues as to whether the decision of the Court of Appeal in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 (which related to the Land Registration Act 1925) should be followed in the context of the 2002 Act.

Factual history

2. Mr Fitzwilliam was for many years based in Dubai, where he has been involved in property development. He also owns firms engaged in providing financial advice in the United Arab Emirates. In addition, he has property interests in this country.

3. Richall was incorporated in the British Virgin Islands on 29 September 2009. It is owned by the trustee of a discretionary trust ("the Kumar Trust") of which Mr Rajinder Kumar and members of his family are possible beneficiaries. Mr Kumar has for many years worked in the travel and tourism business as well as investing in property.

4. Mr Fitzwilliam was registered as the proprietor of 100 Richmond Avenue in 1972.

5. In June 2003, 100 Richmond Avenue was let to a Mr Roderick Kentish and a Miss Teresa Rider. The initial tenancy agreement provided for the property to be let from 27 June 2003 to 25 June 2004, subject to each party having the right to terminate on two months' notice. The agreement was to "take effect subject to the provisions of Section 11 of the Landlord and Tenant Act 1985 as amended by section 116 of the Housing Act 1988 if applicable to the tenancy".

6. The tenancy of 100 Richmond Avenue was renewed on a number of occasions. The last renewal before the purported sale to Richall was effected in June 2009. A memorandum of agreement dated 9 June 2009 provided for Mr Kentish and Miss Rider to take "a renewal of the original term within the Agreement [defined as 'The original agreement dated 26th June 2008'] to commence on 26th June 2009 to end on 25th June 2010".

7. On 6 June 2008, Mr Fitzwilliam was arrested in Dubai. He was subsequently charged with aiding and abetting a bank fraud, and he remained in prison until 27 April 2011, when he was acquitted.

8. While in prison, Mr Fitzwilliam became friendly with a fellow inmate, Mr Ahmed Farhat, known as "Mikey". Mr Farhat was acquitted and released from prison in

October 2008. Not long after this, he lent Mr Fitzwilliam £20,000 to resolve a cash flow problem Mr Fitzwilliam had.

9. Mr Farhat also put Mr Fitzwilliam in touch, by telephone, with Mr George. Mr George told Mr Fitzwilliam that he was willing to intercede on his behalf with Sheikh Maktoum's sons, with whom he claimed to play poker, to try to secure his (Mr Fitzwilliam's) release from prison. He said, too, that he was seeking to raise money for a deal he wanted to do in Iraq. Mr Fitzwilliam told Mr George of someone who might be able to help him obtain funding, but ultimately agreed to lend Mr George £200,000 himself.

10. The £200,000 was provided from the proceeds of sale of one of Mr Fitzwilliam's London properties. The property in question, 43 Thornhill Square, was sold in March 2009. The sale needed to be made because the Dubai bank accounts of Mr Fitzwilliam's companies had been frozen, and the proceeds of the sale were in large part used to meet unpaid salaries and other liabilities of the companies. £20,000 was also transferred, on 26 March, to an account in the name of Mr George's mother, in repayment of the sum that Mr Fitzwilliam had borrowed from Mr Farhat. £200,000 of the balance was paid to Mr George's company, Al-Samawa Group Limited, on 30 March in respect of the loan Mr Fitzwilliam had agreed to make.

11. Mr George had agreed with Mr Fitzwilliam that the latter would receive a return of £30,000 a month until the £200,000 was repaid. In the event, Mr George made only three payments of £30,000. Some smaller sums were paid subsequently, and £25,000 in March 2010 (which Mr Fitzwilliam's wife understood to be from the sale of a car). Nothing further was paid. Mrs Fitzwilliam was constantly given excuses for non-payment by Mr George.

12. At some stage, Mr George told Mr Fitzwilliam that he could help him to raise money on the security of 100 Richmond Avenue and another property, 8 Hale House, Lindsay Square, London SW1. Mr Fitzwilliam was keen to obtain such funding to assist with the mortgage payments on a further London property, 72 Chester Square. He was prepared to lend any surplus to Mr George.

13. Mr Fitzwilliam never authorised Mr George to effect a sale of either 100 Richmond Avenue or 8 Hale House. His objective was to borrow money on the security of the properties, not to sell them.

14. Mr George met Mr Kumar for the first time at the Mayfair Hotel in London in late October or early November of 2009. Mr George alleges that the meeting was pre-planned, but I accept Mr Kumar's evidence that, so far as he was concerned, he was at the hotel merely to meet a close friend of his, Mr Taher Suterwalla. Mr Suterwalla already knew Mr George and introduced him to Mr Kumar. A number of other people were also there; Mr Kumar assumed that everyone but him and Mr Suterwalla was connected with a conference that was taking place in the hotel. Those present may well have included brothers by the name of Vaid, but Mr Kumar was not acquainted with them.

15. In the course of conversation at the Mayfair Hotel, Mr George asked Mr Kumar whether he would be interested in making a bridging loan to be secured against 100 Richmond Avenue and/or 8 Hale House. Mr Kumar was not prepared to make a loan,

but he indicated that he might be willing to buy the properties on the basis that each would be subject to an option entitling Mr Fitzwilliam to buy it back within 12 months. Mr Kumar spoke of paying 60% of the value of the properties as assessed by a valuer he would instruct. In discussions subsequent to the meeting, Mr Kumar agreed to work by reference to 65% of the valuation figure rather than 60%.

16. According to Mr Kumar, Mr George said that he had been granted a power of attorney by the owner of the properties, Mr Fitzwilliam. Mr George claims that he had been informed by the Vaid brothers in advance of the Mayfair Hotel meeting that they had told Mr Kumar that the power of attorney in Mr George's favour was a forgery. He also asserts that he told Mr Kumar during the meeting that he had forged the power of attorney. I reject this version of events. My reasons include these. First, Mr Kumar struck me as a truthful witness. Secondly, I cannot regard Mr George as a reliable witness. By his own account, he was guilty of forgery and lied to Mrs Fitzwilliam. Mr Farhat said in evidence that he had been told many things by Mr George and 99% of them were untrue. Thirdly, Mr George was maintaining to Mr Kumar as late as June 2011 that Mr Fitzwilliam was aware of the transaction. That would make little sense had Mr George known Mr Kumar to have been aware from the outset that the power of attorney authorising him to act on Mr Fitzwilliam's behalf was a forgery. Fourthly, it is inherently improbable that Mr Kumar would have been willing to proceed with the transaction had he known that the power of attorney was forged. As Mr Kumar explained, he is a director of a FTSE 100 company and runs reputable businesses with a large number of employees; he is not likely to have been unwise and dishonest enough to put his career at risk by knowingly participating in a fraudulent transfer of 100 Richmond Avenue. Nor is he likely to have risked his money (or that of the Kumar Trust) on a transaction he knew to be a sham.

17. On 9 November 2009, Mr Kumar emailed Mr Kenneth Le Claire, who has worked for successive trustees of the Kumar Trust, to say that he would like the trust to purchase 100 Richmond Avenue (and also at that stage 8 Hale House) using a new company. On 11 November, Mr Le Claire acquired Richall on behalf of the Kumar Trust with a view to its being used in the acquisition of 100 Richmond Avenue.

18. At much the same time, Lamberts, a firm of chartered surveyors, were instructed by Mr Kumar to value 100 Richmond Avenue (as well as 8 Hale House). They reported that the market value of 100 Richmond Avenue was £850,000.

19. By 27 November 2009, a firm of solicitors called Fernando & Co had been retained by Mr George. On 7 December, Underwood & Co, who were acting for Richall, pressed for a certified copy of the power of attorney under which Mr George was acting. Not having received such a copy, Underwood & Co wrote to Fernando & Co again on 9 December. Fernando & Co faxed back a copy of the power of attorney certified by them to be a true copy of the original. On the following day, Underwood & Co said that they would require confirmation of non-revocation. Underwood & Co referred to this requirement again in a letter of 15 December, and on 16 December 2009 a solicitor with Fadiga & Co made a statutory declaration confirming that he had no knowledge of a revocation of the power of attorney. On the next day, Underwood & Co asked that a copy of the statutory declaration be faxed as soon as possible, and that seems to have been done. I am satisfied at all events that Underwood & Co had been supplied with a copy of the statutory declaration by the time the transaction proceeded.

20. Contracts were exchanged on 18 December 2009, with completion following immediately. The gross purchase price was £680,000, but this was reduced to £552,500 (equating to 65% of the £850,000 valuation) by the £127,500 fee payable in respect of the option to re-purchase the property that Richall agreed to grant Mr Fitzwilliam. The option agreement, which was purportedly entered into between Richall and Mr Fitzwilliam, provided for Mr Fitzwilliam to have the right to buy 100 Richmond Avenue back at a price of £859,350 (or £731,850 after deduction of the option fee) during the period between 18 November and 17 December 2010.

21. On 15 January 2010, Richall was registered at HM Land Registry as the proprietor of 100 Richmond Avenue.

22. Mr George executed the various documents on Mr Fitzwilliam's behalf on the strength of the power of attorney he had supposedly been given. The power of attorney bears the date 6 February 2007 and purportedly empowered Mr George to sell 100 Richmond Avenue and 8 Hale House. It purports to have been executed by Mr Fitzwilliam with a Mr Orhan Mehmet as a witness.

23. It is Mr Fitzwilliam's case, and I accept, that the power of attorney was forged. The evidence to that effect is overwhelming. Mr Fitzwilliam denies signing the power of attorney, and he did not even know Mr George on the date the document bears. On 2 May 2007, Mr Fitzwilliam granted a power of attorney to Mr John Cathcart, a solicitor who has acted for him over many years; it is hard to see why he would have thought it appropriate to give a further power of attorney to Mr George. Dr Audrey Giles, an expert in the scientific examination of documents and handwriting, has concluded that "there is strong support for the view that Mr Fitzwilliam did not sign the Power of Attorney dated 6th February 2007 and that the signature on this document is an attempt to simulate his genuine signature". Last but not least, Mr George has himself admitted that the signature on the power of attorney is "my signature attempting to replicate the signature of Arthur Fitzwilliam".

24. Mr Kumar agreed to share any profit derived from Richall's acquisition of 100 Richmond Avenue equally with Mr Suterwalla, perhaps by way of an introduction fee. The two of them enter into several transactions a year together.

25. Prior to its purported sale to Richall, 100 Richmond Avenue was subject to a charge in favour of Manchester Building Society. This was redeemed from the moneys paid by Richall on completion. The amount paid to Manchester Building Society was £274,370.98. It is not clear what has become of the remainder of the moneys paid by Richall. According to Mr George, money was used by the Vaid brothers, but there is no documentary confirmation of that. What can be said is that none of the money reached Mr Fitzwilliam.

26. On 19 January 2010, Manchester Building Society returned a cheque to Mrs Fitzwilliam on the basis that "the amount due for December's payment was included in the redemption figure forward[ed] to you". This served to alert the Fitzwilliams to the transfer of 100 Richmond Avenue. They contacted Mr Cathcart about this. They also spoke to Mr George, who spoke of repaying Mr Kumar and getting the house back into Mr Fitzwilliam's name. Mr George told Mrs Fitzwilliam that he had found himself in a particularly desperate situation: he had, he said, been about to lose his own house where he lived with his children and sick parents. As Mrs Fitzwilliam

explained, Mr George said that he knew that he had acted badly and was always promising to put things right. He claimed that the fact that Mr Fitzwilliam was no longer shown as the registered proprietor (though not his receipt of money from the transaction) was in some way a mistake. At some point, Mr George supplied the Fitzwilliams with a copy of the option agreement.

27. Mr Kumar raised no objection to the Fitzwilliams continuing to receive the rent from 100 Richmond Avenue during the option period. According to Mr George, it had been agreed between him and Mr Kumar at the Mayfair Hotel meeting that rent could continue to be paid to the Fitzwilliams. However, the likelihood is, I think, that Mr Kumar believed that 100 Richmond Avenue would be untenanted at completion. That was Mr Kumar's recollection when he gave his oral evidence, and two pieces of evidence in particular tend to confirm it. First, the contract for the sale of the property stated that it was sold with vacant possession on completion. Secondly, Mr Kumar sent Mr George an email on 26 January 2010 in which he said that "[c]urrently there are tenants in the property without our knowledge". Regardless, however, of whether Mr Kumar appreciated before completion that pre-existing tenants would be remaining in the property, he came to accept that the tenants should stay and that their rent should still be paid to the Fitzwilliams. Mr Kumar summarised the position in these terms in one of his witness statements:

> "I always worked on the basis that Mr Fitzwilliam was entitled to receive the rent until the expiry of the option period and this is what happened".

28. At all events, Mr Kentish and Miss Rider paid their rent each month to Mr Fitzwilliam throughout 2010. For her part, Mrs Fitzwilliam continued to maintain insurance for 100 Richmond Avenue and arranged for substantial maintenance works to be carried out at the property.

29. The tenancy of 100 Richmond Avenue was purportedly renewed in June 2010. A memorandum of agreement dated 26 June 2010 provided for Mr Kentish and Miss Rider to take "a renewal of the original term within the Agreement [defined to mean 'The original agreement dated 26th June 2007'] to commence on 26th June 2010 to end on 25th June 2011". The "Landlord", who was identified as Mr Fitzwilliam, was to have the right to terminate the tenancy before 25 June 2011 on two months' notice. Mrs Fitzwilliam dealt with the renewal on her husband's behalf.

30. At much the same time, Mr Cathcart wrote to the Land Registry about 100 Richmond Avenue. He explained that his client had discovered that the property had been transferred to Richall without his consent or approval and that a fraud was alleged. In a further letter, Mr Cathcart told the Land Registry that his client had received information that someone he had had dealings with was attempting to sell properties of his using a fraudulent power of attorney. In response, the Registry referred to the possibility of an application to rectify the register but said that it would need evidence showing "first that the register contains a mistake owing to the registration of a fraud/forgery and secondly that the register is capable of being and should be rectified".

31. Mr Fitzwilliam rang Mr Kumar several times at this stage. At the time, Mr Fitzwilliam thought that it might be better to repay Richall than to lose 100 Richmond Avenue. As he explained in evidence, he was trying not to cry over spilt milk.

32. While Mr Fitzwilliam and Mr Kumar remember the conversations between them happening, neither of them has a good recollection of exactly what took place. The most reliable guide to what had been said by 7 October 2010 is to be found in an email that Mr Kumar sent Mr Suterwalla on that date. The email was in these terms:

> "I received a call this morning from Mr Fitzwilliam the owner of Richmond Avenue claiming that Sam sold the property without his permission and has not passed on any of the money.
>
> I explained none of this was our concern, we lent the money in good faith and ensured all the I's were dotted and T's crossed in terms of our security and that our only interest was to recover our money.
>
> He is arranging for us to be paid back and dealing with Sam as a separate issue.
>
> I personally felt he does not have the money and was looking to extend the repayment date".

33. On 14 October 2010, Mr Kumar sent Mr Suterwalla a further email in which he said that Mr Fitzwilliam was "trying to put the money together to buy back the property". Mr Kumar also referred to Mr Fitzwilliam wishing to buy back the property in an email of 21 October to Mr Neil Sabharwal of Underwood & Co.

34. It is Mr Fitzwilliam's recollection that he told Mr Kumar during their conversations that the power of attorney had been forged. I think Mr Fitzwilliam is mistaken on this point. Had Mr Fitzwilliam said that the power of attorney had been forged, Mr Kumar would probably have remembered this, but he does not. There is, moreover, no reference to such a suggestion in Mr Kumar's emails to Mr Suterwalla.

35. It is worth recording that Mr Fitzwilliam's conversations with Mr Kumar will of necessity have been short. When Mr Fitzwilliam was first imprisoned, there were mobile phones in the prison, but it was purged of these in 2009. From then on, prisoners could use only pay phones, and there were just four of these for some 200 to 300 inmates. Someone wishing to use a phone might have to queue for up to two hours, and a call could not last more than five minutes.

36. In the event, the option period expired on 17 December 2010 without Mr Fitzwilliam having attempted to exercise the option. Early the next month, Mr Kumar wrote to the tenants of 100 Richmond Avenue. On 11 January, Underwood & Co informed Mr Kentish and Ms Rider that rent should in future be paid to Richall and that the tenancy was being terminated with effect from 10 April. On 11 February, Underwood & Co wrote to the tenants again, enclosing a notice seeking possession pursuant to section 8 of the Housing Act 1988. At this juncture, Mr Kentish and Miss Rider instructed DLA Piper, and they (DLA Piper) wrote to Underwood & Co explaining that their clients wished to establish the true position so that they could obtain clear advice and leave

the property if under an obligation to do so. DLA Piper concluded their letter by saying:

> "Naturally, our clients will not make any further payments of rent until the position is clarified but, of course, the rent will be paid to the party entitled to receive it once that has been established".

37. In a letter of 29 March 2011, DLA Piper told Underwood & Co that Mr Kentish and Ms Rider would be prepared to leave 100 Richmond Avenue voluntarily on 26 June on the basis that no further rent would be payable. Underwood & Co replied on 5 April that Richall was agreeable to Mr Kentish and Miss Rider remaining in occupation until 26 June provided that "all arrears of rent are discharged and all future rent be paid to them in accordance with the current contractual tenancy arrangement".

38. At this stage, DLA Piper suggested that the "pragmatic solution is for our clients to deposit with this firm sums equal to the rent and for there to be an account taken once the property is handed back to your client in June". On 9 May, DLA Piper told Underwood & Co that they were "able to confirm that our clients will indeed vacate by 12 noon on 26 June" and that they were "being put in funds". On 24 May, DLA Piper said that Mr Kentish and Miss Rider were now able to leave the property on 2 June and that they (DLA Piper) held £7,327.50 in their client account as "the rent due from 29 January to 2 June, less the deposit (subject to inspection)". Underwood & Co responded that Richall was agreeable to the tenancy being terminated on 2 June and to the £7,327.50 figure. On 27 May, DLA Piper told Underwood & Co that their clients would have the keys to 100 Richmond Avenue couriered to Underwood & Co's offices on 2 June.

39. As agreed, Mr Kentish and Miss Rider left 100 Richmond Avenue on 2 June 2011, and the keys were delivered to the offices of Underwood & Co that evening. On the following day, DLA Piper sent Underwood & Co a cheque for £7,327.50 "in full and final settlement of our clients' rent arrears".

40. A few months earlier, Mrs Fitzwilliam had approached the police. Her first meeting with them was on 17 March 2011. Having returned to England on his release from prison, Mr Fitzwilliam also contacted the police and gave a statement to them on 10 May.

41. The Fitzwilliams had had hopes of the police obtaining a restraint order over 100 Richmond Avenue. In the morning of 2 June, however, Mrs Fitzwilliam was told by the police that they had been advised that they had insufficient evidence to secure such an order. At this point, Mrs Fitzwilliam contacted first Mr Cathcart and then Colman Coyle (Mr Fitzwilliam's solicitors in these proceedings), and a conference with counsel took place that afternoon. Mrs Fitzwilliam was present, but her husband was not.

42. During the morning of 3 June 2011 (a Friday), Mrs Fitzwilliam went to 100 Richmond Avenue and had the locks changed. As Mrs Fitzwilliam accepted in evidence, she was intending to prevent Mr Kumar from gaining access to the property, to which (she said) she regarded her husband as entitled. At about noon, Mrs

Fitzwilliam reached Colman Coyle's offices, where she met her husband, who had been riding in Windsor.

43. Later that day, Mr Fitzwilliam applied for an interim injunction on a without notice basis. The main evidence in support of the application consisted of an affidavit sworn on 3 June by Mrs Fitzwilliam. This concluded:

> "There is real urgency in this matter, because we believe that Raj Kumar will obtain keys to the Property at some point today and take back possession. We are advised that this may have a detrimental effect on my husband's claim for rectification of the title to the Property".

44. The application was heard by Morgan J during the afternoon of 3 June. Mr Richard Clegg, who was appearing for Mr Fitzwilliam (as he also did before me), explained that the bar against alteration[1] of the register in Mr Fitzwilliam's favour had come down as a result of the departure of the tenants and that he was concerned to keep the bar down. Mr Clegg replied "Exactly" when Morgan J observed:

> "So you accept that the bar was up until yesterday. Fortuitously it has come down and you want to keep it down".

In the course of the hearing, Mr Clegg said:

> "I should tell my Lord that my instructing solicitor tells me that a solicitor from the firm was sent down to the property at 3 o'clock today, or about 3 o'clock, and he saw Mr. Kumar at that time at the property, but Mr. Kumar was unable to gain entry".

Mr Clegg also informed Morgan J that he had been told that the reason no action had been taken previously was that advice had been received that Mr Fitzwilliam could not obtain alteration.

45. Morgan J eventually granted a limited injunction until 8 June 2011. The injunction was in these terms:

> "Until the return date [i.e. 8 June] or further order of the court, the Respondent [i.e. Richall] must not enter upon or otherwise physically take or remain in possession of the property known as and situate at 100 Richmond Avenue, London, N1, or grant any tenancy, mortgage, license or enter into any trust or do any other act whereby the Respondent would be or become a proprietor in possession as defined in s.131 of the Land Registration Act 2002".

The injunction was continued by orders of 8 and 22 June. On the latter date, directions were given for a further hearing in the July.

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[1] The "bar against alteration" arose under the provisions of the Land Registration Act 2002 set out in paragraphs 65 and 68 below.

46. The solicitor who saw Mr Kumar at 100 Richmond Avenue on 3 June 2011 was Mr Ignacio Morillas-Paredes. Both he and Mr Kumar gave evidence about their encounter. Their recollections differ slightly, but not in respects that matter. It is not in dispute that Mr Kumar unsuccessfully tried to gain access to the property using the keys that the tenants had left with Underwood & Co. Mr Morillas-Paredes said that he had himself rung the bell and knocked on the door without any response. He also said that he had looked through some ground floor windows and seen no one inside.

47. Mr Kumar left 100 Richmond Avenue, but he returned later in the afternoon of 3 June with a locksmith. There was by now a card in a front window reading "Squatter", and a young man stuck his head out of an upper window and said that he was claiming "squatter's rights". Mr Kumar and the locksmith withdrew.

48. The note of the hearing before Morgan J that was prepared by Colman Coyle includes the following:

> "Clegg also stated that he had taken instructions from his client and that they confirmed that they had not changed the locks of the property".

It is apparent from the transcript of the hearing that this was not in fact something that Morgan J was told, but the note was supplied to Richall and on 14 July 2011 Colman Coyle wrote to Underwood & Co about the passage. Colman Coyle said this:

> "The 'client' in that sentence is Mr Fitzwilliam. Although Mr Fitzwilliam had no basis to believe it at the time that he gave the instruction referred to in that sentence, he now believes that the locks had been changed at the behest of his wife, Janis".

49. Mr and Mrs Fitzwilliam both maintain that Mr Fitzwilliam was not told at the time that his wife had changed the locks. With a degree of hesitation, I accept this. It was explained to me that Mr Fitzwilliam was out of London until late on 2 June and went riding early the next day. Later on, the Fitzwilliams were both at Colman Coyle's offices and both attended Court, but I can understand that there may have been little opportunity for the Fitzwilliams to discuss matters.

50. Mr Fitzwilliam issued a claim form on 6 June 2011. This sought:

> "(1) an order pursuant to paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002[2] that the register be altered by the deletion of the name of the Defendant as the proprietor [of 100 Richmond Avenue] and the insertion in its place of the name of the Claimant;
>
> (2) alternatively, an order that the Defendant do execute a transfer of the freehold interest in the Property to the Claimant".

The claim has the number HC11C01929.

[2] Paragraph 2(1) of schedule 4 to the Land Registration Act 2002 is set out in paragraph 63 below.

51. Two days later, on 8 June 2011, Mr Fitzwilliam made a further application for alteration of the register in his favour, this time to the Chief Land Registrar. The application was made pursuant to paragraph 5 of schedule 4 to the Land Registration Act 2002. In due course, the matter was referred to the Adjudicator to the Land Registry.

52. By an application notice dated 12 July 2011, Richall applied for the injunction granted by Morgan J on 3 June to be set aside "on the grounds that such order would not have been made had the Court been aware of all relevant facts".

53. The case came before Morritt C on 21 July 2011. He dismissed Mr Fitzwilliam's application for an injunction. As for Richall's cross-application for Morgan J's order to be set aside, Morritt C adjourned this to the Judge hearing the trial.

54. In the course of his judgment, Morritt C "infer[red] that it was the act of Mrs. Fitzwilliam which prevented Richall, through Mr. Kumar, taking physical possession of the property on 3rd June" (paragraph 36). He continued:

> "37. The case for Mr. Fitzwilliam depends on adopting the act of his wife, of which he claims to have been unaware at the time, as his own and establishing that Richall was not a proprietor in possession for the purposes of s. 131 [of the Land Registration Act 2002][3] at that time. If that act was unlawful, he should not be allowed to profit from her wrongful act by the continuance of the injunction. Even if it was lawful, I find it hard to accept that such an act of self-help committed against a legal owner who until that moment was undoubtedly the proprietor in possession can be effective to terminate the possession of the proprietor for the purposes of s. 131. On neither basis, I should continue the injunction so as to prevent Richall, through Mr. Kumar, taking physical possession.
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> 38. There are two other reasons for not continuing the injunction. First, I am not satisfied that if Richall takes physical possession, because I do not continue the injunction, its position on the claim for rectification would be improved to the extent Mr. Fitzwilliam fears. If at the trial it is found that I should not have done so, then that may well be a circumstance on which Mr. Fitzwilliam could rely in support of a submission that paragraph 3(2)(b)[4] [of schedule 4 to the 2002 Act] should be applied, and an order made for rectification, notwithstanding the possession by Richall. *Prima facie* it would be unjust for an order for rectification not to be made if Richall was in physical possession because of an order of the court which should not have been made.

[3] Section 131 of the Land Registration Act 2002 is set out in paragraph 68 below.
[4] Paragraph 3(2) of schedule 4 to the Land Registration Act 2002 is set out in paragraph 65 below.

> 39. Second, it cannot benefit any party to these proceedings that the property should either stand empty or continue in the occupation of squatters pending the trial of the action. Richall wishes to secure it as, what it considers to be, its own property. Mr. Fitzwilliam had no suggestions for the care of the property if I granted the injunction he sought pending the trial of the action.
>
> 40. It is evident that damages would not be an adequate remedy for either party. For the reasons I have given, I consider that the balance of convenience favours withholding the injunction. In addition, it appears to me that the status quo, which should be preserved, is that which prevailed before Mrs. Fitzwilliam changed the locks. At that time Richall had been the proprietor in possession. The grant of an injunction might change that".

55. With regard to the application to set aside the injunction granted by Morgan J, Morritt C said this (in paragraph 42):

> "As it raises issues of fact which cannot be conclusively resolved in the absence of cross-examination, the appropriate course is to adjourn it to the judge hearing the action in due course".

56. On 27 July 2011, Richall took physical possession of 100 Richmond Avenue. The "squatter" had gone, as had the card that had been in a window on 3 June. The property was in good order. It was tidy, and there was no evidence of a forced entry. Moreover, the windows were neither open nor unlocked. As Mr Kumar observed in evidence, the property did not give the appearance of having had squatters in it.

57. Mrs Fitzwilliam said that she could not say how there came to be a squatter in 100 Richmond Avenue. In this respect, I am afraid that I cannot accept her evidence. The likelihood, as it seems to me, is that Mrs Fitzwilliam arranged for the "squatter" to be at the property and let him in. Her motive for doing so would of course have been the same as that for changing the locks: to keep Mr Kumar out. Further, it is difficult to see how the person Mr Kumar saw at the property can have entered and left it without help from Mrs Fitzwilliam. Even supposing that he could have gained access for both himself and any belongings through a window that had been left open when Mr Kentish and Miss Rider vacated, how could he have departed that way? On 27 July, the windows were both shut and locked. Moreover, it is inherently improbable that a true squatter would have left the property in such good order. That the property may have been burgled on a number of occasions does not seem to me to be of any real significance. On this occasion, there was no evidence of either burglary or forced entry.

58. Once Richall had obtained physical possession of 100 Richmond Avenue, various works were undertaken, at a cost of some £20,000, to prepare the property for re-letting. The property has been let to a group of young professionals since 21 November 2011.

59. On 22 December 2011, Mr Fitzwilliam issued the second claim that is before me (claim number HC11C04534). This seeks the following declarations:

> "1. As to the date on which a proprietor of a registered estate in land must be in possession of that land in order to rely upon paragraph 6(2) of Schedule 4 to the Land Registration Act 2002, so as to defend an application for alteration of the register made under paragraph 5 of that Schedule. The Claimant contends that that date is the date on which the application for alteration is made.
>
> 2. That in relation to the application for alteration of the register made by the Claimant on 8 June 2011 in respect of the land known as 100 Richmond Avenue, London, N1, the title to which is registered under title number NGL144607, that date is accordingly 8 June 2011.
>
> 3. That on that date the Defendant was not in possession of that land for the purposes of paragraph 6(2) of Schedule 4 to the Land Registration Act 2002".

60. On 16 January 2012, the Adjudicator to the Land Registry directed the proceedings before him to be adjourned pending the outcome of the claims that are before me.

61. On 1 February 2012, Deputy Master Matthews gave directions for the two claims with which I am concerned (numbers HC11C01929 and HC11C04534) to be tried on the same occasion.

Alteration of the register under the Land Registration Act 2002

62. Alteration of the register is dealt with in schedule 4 to the Land Registration Act 2002.

63. The Court is empowered to order alteration by paragraph 2 of the schedule. Paragraph 2(1) provides:

> "The court may make an order for alteration of the register for the purpose of—
>
> (a) correcting a mistake,
>
> (b) bringing the register up to date, or
>
> (c) giving effect to any estate, right or interest excepted from the effect of registration".

64. Paragraph 3 of the schedule deals with "rectification", which under the 2002 Act (unlike the Land Registration Act 1925) is a species of alteration. Paragraph 1 of the schedule explains that "rectification" refers to alteration which:

> "(a) involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor".

65. Paragraph 3(2) imposes restrictions on rectification being ordered against a registered proprietor who is in possession. It states:

> "If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
>
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
>
> (b) it would for any other reason be unjust for the alteration not to be made".

66. The position where a registered proprietor is not in possession is rather different. Paragraph 3(3) provides:

> "If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so".

67. Paragraphs 5-7 of schedule 4 confer very similar powers of alteration on the Chief Land Registrar.

68. The circumstances in which a registered proprietor is to be considered to be in possession for the purposes of the 2002 Act are explained in section 131 of the Act. That provides as follows:

> "(1) For the purposes of this Act, land is in the possession of the proprietor of a registered estate in land if it is physically in his possession, or in that of a person who is entitled to be registered as the proprietor of the registered estate.
>
> (2) In the case of the following relationships, land which is (or is treated as being) in the possession of the second-mentioned person is to be treated for the purposes of subsection (1) as in the possession of the first-mentioned person—
>
> (a) landlord and tenant;
>
> (b) mortgagor and mortgagee;
>
> (c) licensor and licensee;
>
> (d) trustee and beneficiary.
>
> … ".

Mr Fitzwilliam's case

69. Mr Fitzwilliam claims 100 Richmond Avenue on more than one basis. In very brief summary, his case is put in the following ways:

    i) Mr Fitzwilliam has retained beneficial ownership of 100 Richmond Avenue throughout. Richall's registration as the proprietor of 100 Richmond Avenue served only to give it title to the property at law; it holds the property on trust for Mr Fitzwilliam. Mr Fitzwilliam is accordingly entitled to have the register altered in his favour pursuant to paragraph 2 of schedule 4 to the Land Registration Act 2002. If necessary, Richall should be required to transfer the property to him;

    ii) The Court should make an order for alteration of the register pursuant to paragraph 2(1)(a) of schedule 4 to the 2002 Act (for the purpose of "correcting a mistake") even if, contrary to (i) above, Mr Fitzwilliam did not remain the beneficial owner of 100 Richmond Avenue. Since Mr Fitzwilliam was in receipt of rents and profits from 100 Richmond Avenue before schedule 3 to the 2002 Act came into force (in October 2003) and remained so until after Richall was registered as the property's proprietor, the right to apply for alteration took effect as an overriding interest pursuant to paragraph 8 of schedule 12 (which contains transitional provisions). In any case, paragraph 3(2) of schedule 4 (limiting the circumstances in which alteration can be ordered in relation to land in the possession of the registered proprietor) is inapplicable because Richall was not in possession of 100 Richmond Avenue on the only dates that could matter (viz. 6 June 2011, when claim number HC11C01929 was issued, and 8 June 2011, when the application to the Registrar was made). It would anyway be unjust for the alteration not to be made so that, were it relevant, paragraph 3(2)(b) of schedule 4 would apply.

Did Mr Fitzwilliam retain beneficial ownership of 100 Richmond Avenue?

70. Mr Fitzwilliam bases this part of his case on *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*.

71. That case concerned land of which the claimant in the proceedings, a British Virgin Islands company called Malory Enterprises Limited ("Malory BVI"), had been the registered proprietor. A company with the same name was incorporated in the United Kingdom ("Malory UK") and, having obtained a new land certificate from the Land Registry by deception, purported to sell the land to the defendant, Cheshire Homes (UK) Limited ("Cheshire"), which was then registered as the land's proprietor. Cheshire did not dispute that an order for rectification of the register should be made in Malory BVI's favour, but it was concerned to establish who had the better right to possession of the land between the date of registration and the date of rectification so as to avoid any liability for trespass. It also attempted to safeguard, so far as it could, its ability to claim an indemnity from the Land Registry.

72. *Malory* pre-dated the Land Registration Act 2002 and so was governed by the Land Registration Act 1925. Sections 20 and 69 of the 1925 Act are of particular importance for present purposes. Section 69(1) provided as follows:

> "The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act 1925, or this Act or otherwise which has priority to the registered estate".

Section 20(1) was in these terms:

> "In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act 1925, have been transferred if the land had not been registered, subject—
>
> (a) to the incumbrances and other entries, if any, appearing on the register and any charge for capital transfer tax subject to which the disposition takes effect under section 73 of this Act; and
>
> (b) unless the contrary is expressed on the register, to the over-riding interests, if any, affecting the estate transferred or created,
>
> but free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit".

73. In *Malory*, the Court of Appeal concluded that Malory BVI had standing to maintain a claim for trespass against Cheshire even when the latter company was the registered proprietor of the relevant land. The reasoning of Arden LJ, who gave the leading judgment, appears from paragraphs 64 and 65 of her judgment. She said there:

> "64 Although Malory UK had no title to convey to Cheshire, the position of Cheshire once it is registered as proprietor is governed by section 69 of the [Land Registration Act 1925]. Accordingly, when it became the registered proprietor of the

> rear land, Cheshire was deemed to have vested in it 'the legal estate in fee simple in possession'.
>
> 65 However, section 69 deals only with the legal estate. Unlike section 5, which deals with first registration, that registered estate is not vested in Cheshire 'together with all rights, privileges, and appurtenances'. Moreover, since the transfer to Cheshire could not in law be of any effect in itself, in my judgment it cannot constitute a 'disposition' of the rear land and accordingly section 20 cannot apply. In those circumstances, Cheshire's status as registered proprietor is subject to the rights of Malory BVI as beneficial owner. On this point I accept the submissions of [counsel for Malory BVI] and reject those of [counsel for Cheshire]. It follows that I accept that Malory BVI has sufficient standing to sue for trespass even without seeking rectification of the register because it is the true owner and has a better right to possession: see *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156, 163-164".

74. Clarke LJ agreed with Arden LJ that "Cheshire's status as registered proprietor was subject to the rights of Malory BVI as beneficial owner because section 69 of the Land Registration Act 1925 only has the effect of vesting in Cheshire 'the legal estate in fee simple in possession'" (paragraph 85). The third member of the Court, Schiemann LJ, also expressed agreement with Arden LJ's judgment in this respect (paragraph 89).

75. This aspect of the *Malory* case has been the subject of a good deal of criticism. Megarry & Wade, "The Law of Real Property", 8th edition, observes that "[t]he reasoning [in *Malory*] is unsatisfactory" (page 221). One of Megarry & Wade's editors, Mr Charles Harpum, has expressed the view that the interpretation of section 69(1) of the Land Registration Act 1925 that was adopted in *Malory* "undermines … the essential structure of land registration without any compensating gains" (see "Registered Land–A Law Unto Itself?" in Getzler (ed.), "Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burns", at page 199). Another of Megarry & Wade's editors, Dr Martin Dixon, has said in a book of which he is the sole author ("Modern Land Law", 8th edition, at page 44):

> "Acceptance of the *Malory* approach would be to import principles of unregistered conveyancing into registered land and this would wholly contradict the system of registration of title and the move to e-conveyancing that the LRA 2002 is designed to facilitate".

Professor Elizabeth Cooke has spoken of the "heresy" from *Malory* and described the proposition that a void transfer passes only the legal title to the registered estate while leaving the beneficial interest with the former proprietor as "untenable" (see [2004] Conv., at 485-486). Mr Alexander Hill-Smith has argued that "the construction put by the Court of Appeal in *Malory* on what constitutes a 'disposition' was wrong in the context of the 1925 Act and *Malory* should not be applied to the construction of s.29 of the 2002 Act" (see [2009] Conv., at 135).

76. For what it is worth, I can see considerable force in some of the arguments advanced by *Malory's* critics. Whatever merit the criticisms of *Malory* may have, however, I am bound by the decision. That means that it is not open to me to depart from the Court of Appeal's construction of the Land Registration Act 1925. More specifically, it means that I must proceed on the basis that (a) section 69 of the 1925 Act dealt only with the legal estate in the relevant land and not its beneficial ownership and (b) a fraudulent transfer that would be of no effect in the absence of the 1925 Act could not constitute a "disposition" within the meaning of section 20 of the Act. Further, it is incumbent on me, I think, to construe equivalent provisions in the Land Registration Act 2002 similarly unless there are relevant distinctions between those provisions and their predecessors in the 1925 Act.

77. The key provisions of the 2002 Act in this context are sections 58 and 29, which broadly correspond to sections 69 and 20 of the 1925 Act. Section 58 states:

> "(1) If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.
>
> (2) Subsection (1) does not apply where the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met".

Section 29 states:

> "(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.
>
> …".

78. Mr Greville Healey, who appeared for Richall, argued that the 2002 Act differs in important respects from that of 1925. Echoing Mr Harpum (see "Registered Land–A Law Unto Itself?" in Getzler (ed.), "Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burns", at pages 201-202), Mr Healey submitted, in particular, that the wording of section 58 of the 2002 Act is significantly different from that of section 69 of the 1925 Act.

79. In this connection, Mr Healey advanced essentially two arguments:

i) Section 58(2) of the 2002 Act gives effect to the principle that a registrable disposition operates only in equity until it is completed by registration (see section 27(1) of the Act). It therefore makes no sense to read section 58(1) as meaning that, once the registration requirements have been met, the disposition *ceases* to take effect in equity (having previously done so); and

ii) The *legal estates* that are the subject-matter of section 58 include all of the interests, including charges, referred to in sections 1(4) and 205(1)(x) of the Law of Property Act 1925 (see section 132(1) of the 2002 Act). In respect of a charge registered pursuant to a void instrument, it makes no sense to say that the registered proprietor of the charge is its bare legal owner (who would be its equitable owner?), so in this context "legal estate" cannot be construed consistently as meaning *bare* legal estate.

80. I am afraid that I do not find either of these arguments convincing. Like Mr Hill-Smith (see [2009] Conv., at 133), I cannot see that section 58 of the 2002 Act differs significantly from section 69 of the 1925 Act.

81. So far as argument (i) is concerned, section 27(1) of the 2002 Act provides:

> "If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met".

The purpose of section 58(2) is to ensure that section 58 does not detract from the principle enunciated in section 27(1). As the Government's Explanatory Notes for the 2002 Act explain:

> "Subsection (2) [of section 58] is designed to prevent subsection (1) overriding the rule in relation to registrable dispositions that a disposition only operates at law when *all* the relevant registration requirements have been met (i.e. entry of the disponee in the register as proprietor may not always be the only requirement). The legal estate will not vest in the transferee until all of the appropriate requirements for registration set out in Schedule 2 have been met".

Sections 27(1) and 58(2) are thus concerned with when a disposition is to take effect at law. Neither provision makes any reference to the position in equity, and I do not think it can even be said that the provisions *assume* that a disposition will have effect in equity in advance of registration. They simply do not touch on the equitable implications of a disposition. Further, I cannot see that construing section 58(1) in line

with section 69 of the 1925 Act would involve reading it as meaning that a disposition *ceases* to have effect in equity on registration. In *Malory*, the Court of Appeal took the view that section 69 of the 1925 Act dealt only with the legal estate and, hence, that Malory BVI's rights as beneficial owner endured. It was not suggested that section 69 said anything about whether a disposition ceased to have effect in equity when registered.

82. Turning to argument (ii), it is true that section 58 applies to "legal estates" generally and thus extends to charges. I cannot see, however, that that is significant for present purposes. In *Malory*, the Court of Appeal held that section 69 of the 1925 Act dealt only with the legal estate. The fact that charges are within the scope of section 58 does not require a different view to be taken of that provision. It is, as it seems to me, neither here nor there that it might be "meaningless to say that a person who had been registered as the proprietor of a registered charge under a forged deed of charge held that charge on a bare trust for the true owner" (to quote from Mr Harpum). Construing section 58 of the 2002 Act in the same way as section 69 of the 1925 Act would not imply that such a charge was subject to a trust. It would mean that section 58 did no more than render the charge effective at law.

83. Mr Healey's fall-back position was that, in the context of section 29 of the 2002 Act, the word "disposition" should be read as extending to a void transfer. In this respect, he prayed in aid arguments put forward by Mr Hill-Smith (see [2009] Conv., at pages 127-140).

84. In *Malory*, the Court of Appeal concluded that a transfer that "could not in law be of any effect in itself" could not constitute a "disposition" for the purposes of the 1925 Act. Mr Hill-Smith's arguments suggest, not merely that "disposition" should be given a wider interpretation in the context of the 2002 Act, but that it should have been so construed for the purposes of the 1925 Act. As Mr Hill-Smith states in his article, he contends that "the construction put by the Court of Appeal in *Malory* on what constitutes a 'disposition' was wrong in the context of the 1925 Act" (see [2009] Conv., at 135). As I have already noted, however, I am bound by *Malory*. In the circumstances, I do not think it is open to me to give a wider interpretation to "disposition" as regards the 2002 Act. The case for taking "disposition" to include a void transfer was at least as strong in relation to the 1925 Act.

85. In the circumstances, it seems to me that, just as the Court of Appeal concluded in *Malory* that "Cheshire's status as registered proprietor is subject to the rights of Malory BVI as beneficial owner", I must hold that Mr Fitzwilliam remained the beneficial owner of 100 Richmond Avenue notwithstanding Richall's registration as the property's proprietor.[5]

86. On the particular facts of the present case, it may be that the result would have been the same even had I felt able to approach matters on the basis that a void transfer can be a "disposition" for the purposes of section 29 of the Land Registration Act 2002.

[5] I note in this respect that, while Megarry & Wade observes that the Land Registration Act 2002 is "significantly different in its drafting" from the Land Registration Act 1925 (see paragraph 7-115), it also comments (on page 185) that the "reasoning [in *Malory*] must apply to dispositions under LRA 2002".

87. Under the Land Registration Act 1925, a person's rights could enjoy protection as overriding interests if he was either in actual occupation of the relevant land or in receipt of its rents and profits (see section 70(1)(g) of the 1925 Act). Nowadays, someone in receipt of rents and profits will not normally enjoy equivalent protection. Section 29 of the Land Registration Act 2002 provides for an interest that "falls within any of the paragraphs of Schedule 3" to have priority, and paragraph 2 of schedule 3 refers to interests "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". Interests of a person in actual occupation thus continue to attract protection. The rights of a person merely in receipt of rents and profits will, however, now have priority only if they do so under the transitional provisions contained in schedule 12. By virtue of schedule 12, schedule 3 is to be treated as including a paragraph 2A in these terms:

> "(1) An interest which, immediately before the coming into force of this Schedule, was an overriding interest under section 70(1)(g) of the Land Registration Act 1925 by virtue of a person's receipt of rents and profits, except for 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.
>
> (2) Sub-paragraph (1) does not apply to an interest if at any time since the coming into force of this Schedule it has been an interest which, had the Land Registration Act 1925 (c. 21) continued in force, would not have been an overriding interest under section 70(1)(g) of that Act by virtue of a person's receipt of rents and profits".

For an interest to enjoy protection on the strength of its holder's receipt of rents and profits, the holder must therefore have been receiving the rents and profits from the land in question at all times since October 2003 (when schedule 3 came into force).

88. Mr Clegg argued that Mr Fitzwilliam was in receipt of the rents and profits from 110 Richmond Avenue in October 2003 and that he continued to receive the rents and profits up to and beyond the date on which Richall was registered as the proprietor of the property (viz. 15 January 2010). Mr Fitzwilliam's beneficial interest in the property must thus (Mr Clegg submitted) enjoy protection under paragraph 2A of schedule 3 to the 2002 Act.

89. Mr Healey's response to this was that the interest for which protection is claimed did not exist in October 2003. Where a person owns a property outright (as Mr Fitzwilliam did until January 2010), no separate equitable interest exists, Mr Healey said. Mr Fitzwilliam cannot, accordingly, have had an equitable interest in 100 Richmond Avenue in advance of Richall becoming the property's legal owner as a result of its registration as proprietor.

90. In support of his submissions, Mr Healey referred me to Megarry & Wade, which states (in paragraph 5-028):

> "Often the legal estate in land carries with it the beneficial interest, and no separate equitable interest exists".

Mr Healey also relied on *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, where Lord Browne-Wilkinson said (at 706):

> "A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title".

91. On the other hand, *Malory* proceeds on the basis that an absolute owner has "rights … as beneficial owner" which can survive the registration of another person as proprietor. That might be thought to suggest that an absolute owner has pre-existing rights that could qualify for protection under paragraphs 2 and 2A of schedule 3 to the 2002 Act. Further, Mr Healey's submissions, if correct, could produce some unattractive consequences. Even actual occupation would not seem to afford protection to an absolute owner. On Mr Healey's case, no one can have an equitable interest unless and until someone else acquires legal ownership. An absolute owner whose property came to be registered in the name of another person would not therefore have had any equitable interest that could qualify for protection "at the time of the disposition". A person absolutely entitled to a property might therefore lack the protection afforded to lesser interests (e.g. a mere equity – see section 116 of the 2002 Act). An absolute owner would, moreover, be less well-placed than either a beneficiary under a bare trust or a co-owner. If X held land on bare trust for Y and Z was registered as proprietor as a result of a fraud, Z should be bound by Y's beneficial interest if Y was in actual occupation. A co-owner in actual occupation would also enjoy protection. It was established in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 that the rights of a co-owner could constitute overriding interests even though (at the time) they subsisted behind a trust for sale. A husband and wife who owned a property jointly would consequently, as it seems to me, be protected if they were in actual occupation. Yet actual occupation would not protect an absolute owner.

92. I do not need to arrive at a final conclusion on these matters. As I have already indicated, they do not arise if a void transfer does not constitute a "disposition" for the purposes of section 29 of the 2002 Act, and it seems to me that I must proceed on that basis.

Consequences

93. Mr Healey did not dispute that alteration of the register would be appropriate if I concluded (as I have) that Mr Fitzwilliam has remained the beneficial owner of 100 Richmond Avenue. I shall therefore order the register to be altered to show Mr Fitzwilliam as the proprietor.

94. For his part, Mr Clegg accepted in closing that Richall was entitled to be compensated for the fact that its money was used to redeem the charge in favour of Manchester Building Society (see paragraph 25 above). I shall accordingly order Mr Fitzwilliam to reimburse Richall for the £274,370.98 that was paid to the Building Society.

95. There will also have to be provision for Richall to account to Mr Fitzwilliam for the rent it has received from 100 Richmond Avenue less the cost of the works it carried out there (see paragraph 58 above).

Other matters

96. The conclusions I have already arrived at mean that it is unnecessary for me to consider Mr Fitzwilliam's alternative case (summarised in paragraph 69(ii) above). They must also, I think, render academic the issues raised in the second of Mr Fitzwilliam's claims (claim number HC11C04534). However, I shall comment briefly on two of the legal issues that were debated before me:

    i) The meaning of "landlord and tenant" in section 131(2)(a) of the Land Registration Act 2002; and

    ii) The date on which a proprietor must be in possession to benefit from the restrictions on rectification contained in paragraph 3(2) of schedule 4 to the 2002 Act.

97. As already mentioned (paragraph 68 above), section 131(2) of the 2002 Act lists a number of relationships in respect of which possession by one person is to be treated as possession by a second person. The relationships listed include "landlord and tenant". Mr Clegg argued that, in the context, the relationship of "landlord and tenant" has to have arisen contractually rather than by privity of estate. That, he said, is necessarily the case as regards another of the relationships in the list, "licensor and licensee", since a licence does not give rise to an interest in land and so there can be no question of privity of estate. The position should be the same, Mr Clegg argued, as regards "landlord and tenant". Were it otherwise, a person registered as the proprietor of tenanted property would automatically be deemed to be in possession of it, and that (so it was submitted) could not be right.

98. On this point, however, I agree with Mr Healey. It seems to me that the expression "landlord and tenant" extends to persons between whom there is only privity of estate. My reasons include these:

    i) Read naturally, the words "landlord" and "tenant" include persons between whom privity of estate exists. "[T[he owners for the time being of the reversion and the lease are generally referred to as the landlord and the tenant" (Megarry & Wade, at paragraph 17-009);

    ii) There is no indication in the terms of section 131 that Parliament was intending to use the words "landlord" and "tenant" to refer only to those between whom there is privity of contract; and

    iii) Construing the expression "landlord and tenant" as limited to the original contracting parties would have very unsatisfactory implications. Suppose, for example, that a lessor had assigned the reversion immediately after granting a 99-year lease in 1915. On Mr Clegg's case, he would still be the "landlord" today, and the registered proprietor would not be treated as in possession however long he had been receiving the rent.

99. Turning to the issue of when a proprietor must be in possession if he is to benefit from the restrictions on rectification contained in paragraph 3(2) of schedule 4 to the 2002 Act, Mr Clegg argued that the position must be judged as at the point the relevant application was made. In the case, therefore, of an application to the Court, the proprietor will need to have been in possession when the claim form was issued. With an application to the Registrar, what will matter will be whether the proprietor was in possession when the application was entered in the day list kept in accordance with rule 12 of the Land Registration Rules 2003.

100. In *Ghaus v Gateway Homes UK Ltd* (12 December 2011, unreported), Mr Colin Green, sitting as a Deputy Adjudicator to HM Land Registry, concluded that, as regards an application made to the Registrar, "the relevant time is the date of the application to alter the register" (see paragraph 23.1 of the decision). He considered that this follows from rule 20(1) of the Land Registration Rules, which provides:

> "Any entry in, removal of an entry from or alteration of the register pursuant to an application under the Act or these rules has effect from the time of the making of the application".

101. Like Mr Green, I take the view that rule 20(1) provides a compelling reason for assessing possession as at the date an application is made to the Registrar. That, after all, will also be the date on which any alteration takes effect.

102. I am inclined to think that the position is different in relation to applications to the Court. In that context, it seems to me that the relevant date may well be the date at which the issue falls to be determined. Where a Court makes an order for rectification, it is not backdated: rule 20(1) does not apply. Nor does the 2002 Act contain any clear indication that the Court should consider the application of paragraph 3(2) of schedule 4 at any date other than the date of hearing. Mr Clegg argued that, were the key date that of the hearing, there would be scope for a registered proprietor to manipulate matters so that he was in possession then, but the present case shows that comparable problems would arise if the crucial date were that on which the claim form was issued. It would then be open to the claimant both (a) to choose a date for issue that suited him and (b) to take steps to ensure that the registered proprietor was not in possession on that date. Further, were a registered proprietor to achieve possession at the date of trial in an improper or undesirable way, the Court could take that into account when applying paragraph 3(2) (compare paragraph 38 of Morritt C's judgment of 21 July 2011 in the present case, quoted in paragraph 54 above; and also *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, at 1077-1078).

The application to set aside the injunction granted by Morgan J

103. As mentioned above (paragraph 53), Richall's application to set aside the injunction granted by Morgan J on 3 June 2011 was adjourned by Morritt C to the trial judge.

104. As Morritt C's judgment records (in paragraph 27), Richall's case before him was that the injunction should be discharged for want of disclosure of, first, the fact that Mrs Fitzwilliam had changed 100 Richmond Avenue's locks; secondly, the fact that Mr Fitzwilliam had not taken advice; and, thirdly, the fact that Mr Fitzwilliam knew in late 2010 that Mr Kumar was associated with the purchase of the property and that a

re-conveyance and payment would be required to get it back but thereafter did nothing or very little.

105. Before me, Mr Healey focused on the failure to tell Morgan J that Mrs Fitzwilliam had changed the locks. Mr Healey's skeleton argument said this on the subject:

> "despite the fact that the principal evidence relied upon in support of the application for the injunction was the affidavit of the Claimant's wife, the Judge was not told that it was she who had changed the locks, and so kept the Defendant out".

106. In my view, the injunction should be set aside on this ground. In the context of the remarks quoted in paragraph 44 above, it seems to me that it was obviously appropriate to disclose the fact that the locks had been changed by Mrs Fitzwilliam. That was why the "bar" was still down: but for Mrs Fitzwilliam's actions, Mr Kumar would have gained entry to the property before any injunction was granted. Further, it would surely have been incumbent on Mr Clegg to tell Morgan J why "Mr Kumar was unable to gain entry" had he been made aware of the reason.

107. As I have said above (paragraph 49), I accept that Mr Fitzwilliam was not himself aware at the time that his wife had changed the locks. I do not think, however, that that can excuse the non-disclosure in circumstances where Mr Fitzwilliam had left his wife to deal with matters relating to the Court application on his behalf.

Conclusions

108. I can summarise my conclusions as follows:

i) Mr Fitzwilliam has remained the beneficial owner of 100 Richmond Avenue and is entitled to have the register altered to show him as the property's proprietor;

ii) Mr Fitzwilliam must reimburse Richall for the £274,370.98 that was paid to Manchester Building Society in redemption of its charge;

iii) Richall must account to Mr Fitzwilliam for the rent it has received from 100 Richmond Avenue less the cost of the works it carried out there; and

iv) the injunction Morgan J granted on 3 June 2011 should be set aside.

109. I should like to add, finally, that the case was very well argued on both sides.