Case No: HC-2015-000615

Neutral Citation Number: [2015] EWHC 2830 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 08/10/2015

Before :

MR JUSTICE NEWEY

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Between :

(1) SKELWITH (LEISURE) LIMITED	**Claimants**
(2) PAUL ELLIS	
(3) DARREN BROADBENT	
- and -	
(1) ALAN ARMSTRONG	**Defendants**
(2) MARGARET ARMSTRONG	
(3) BRIAN MATTOCKS	
(4) SIMON ARMSTRONG	
(5) RICHARD ARMSTRONG	
(6) POLAR HOLDINGS LIMITED	
(a company incorporated in the Isle of Man)	
(7) FLAXBY PARK LIMITED	
(a company incorporated in the British Virgin Islands)	

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Ms Brie Stevens-Hoare QC and Mr Thomas Bell (instructed by **Lewis Silkin LLP**) for the **Claimants**
Mr Mark Warwick QC (instructed by **PCB Litigation LLP**) for the **First, Second and Fourth to Sixth Defendants**
Mr Thomas Fletcher (instructed by **Newtons Solicitors Limited, Knaresborough**) for the **Third Defendant**
Mr Thomas Grant QC and Mr Duncan McCombe (instructed by **Barker Gillette LLP**) for the **Seventh Defendant**

Hearing dates: 29-31 July 2015
Further written submissions: 28 August and 15-16 September 2015

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Judgment

Mr Justice Newey :

1. In February of this year, the sixth defendant, Polar Holdings Limited ("Polar"), entered into contracts for the sale of a property now known as the Flaxby Golf Club ("the Club") to the seventh defendant, Flaxby Park Limited ("Flaxby Park"). The first claimant, Skelwith (Leisure) Limited ("Skelwith"), is the registered proprietor of the Club, but it has charged the property in favour of the first defendant, Mr Alan Armstrong ("Mr Armstrong"), and he has executed a deed assigning his rights to Polar.

2. In the present proceedings, the claimants challenge the validity of the contracts that Polar has made with Flaxby Park. The applications before me, by which the claimants and Flaxby Park each seek to have matters disposed of summarily in their favour, raise issues as to, among other things, the interpretation of the Land Registration Act 2002 ("the LRA 2002") and the remedies available to mortgagees.

Basic facts

3. By an agreement dated 4 April 2008, the first to fifth defendants (to whom I shall refer as "the Flaxby Partnership") contracted to sell the Club to Skelwith, whose shareholders and directors are the second and third claimants, Mr Paul Ellis and Mr Darren Broadbent. The price was given as £7 million, but completion was not to take place immediately.

4. The sale agreement was varied in relatively minor respects in July 2008 and much more significantly by a deed of variation dated 31 July 2009. It was agreed that completion should happen at once, without Skelwith having paid the full purchase price. The remaining £3.525 million was to be paid by instalments between August 2009 and the end of 2012. The payments were to be secured both by a debenture and, more importantly for present purposes, by a charge over the Club.

5. Completion took place that same day. The Club was transferred to Skelwith, but charged by a deed made between Skelwith and Mr Armstrong as "the Security Agent" ("the Charge"). By the Charge, Skelwith charged the Club "by way of legal mortgage" to "the Security Agent" as security for its obligations to the "Secured Parties", who were the members of the Flaxby Partnership. Mr Armstrong, as "the Security Agent", declared that he held as trustee for the "Secured Parties".

6. The Charge included the following provisions:

   i) Clause 1.2 stated:

      > "The expressions 'Security Agent', 'Secured Parties' and 'Company' include, where the context admits, their respective successors, and, in the case of the Security Agent and the Secured Parties, their respective transferees and assignees, whether immediate or derivative";

   ii) Clause 7 provided for the Security Agent to be entitled to demand payment and, if the demand was not met in full, to enforce the security in certain events (including non-payment by Skelwith);

iii) Clause 7.2 was in these terms:

> "At any time on or after the Enforcement Date [an expression which referred to, among other things, the date of a demand] the Security Agent may, without further notice, without the restrictions contained in section 103 Law of Property Act 1925 and whether or not an Administrator or a Receiver shall have been appointed, exercise all the powers conferred upon mortgagees by the Law of Property Act 1925 as varied or extended by this deed and all the powers and discretions conferred by this deed on a Receiver expressly, by law or by reference";

iv) Clause 8.3 provided:

> "A Receiver shall have power to do or omit to do on behalf of the Company [i.e. Skelwith] anything which the Company itself could do or omit to do if the Receiver had not been appointed, notwithstanding the liquidation of the Company. In particular (but without limitation) a Receiver shall have power to:
>
> …
>
> (b) sell or otherwise dispose of the Receivership Assets by … private contract …";

v) Clause 9.3 explained:

> "No purchaser or other person shall be bound to see or enquire whether the right of the Security Agent or any Administrator or Receiver to exercise any of the powers conferred by this deed has arisen or be concerned with notice to the contrary or with the propriety of the exercise or purported exercise of such powers";

vi) Clause 11.1 stated:

> "The Company [i.e. Skelwith] by way of security hereby irrevocably appoints the Security Agent and any Receiver severally to be its attorney in its name and on its behalf:
>
> (a) to do all things which the Company may be required to do under this deed;
>
> …
>
> (d) otherwise generally to sign, seal, execute and deliver all deeds, assurances, agreements and documents and to do all acts and things which may be required for the full exercise of all or any of the powers conferred on the Security Agent or a Receiver under this deed or which may be deemed expedient by the Security Agent

> or a Receiver in connection with any disposition, realisation or getting in by the Security Agent or such Receiver of the Receivership Assets or in connection with any other exercise of any power under this deed and including, but not limited to a power in favour of any Receiver to dispose for value of any of the assets of the Company over which such Receiver may not have been appointed and which are located at Property over which he has been appointed, without being liable for any losses suffered by the Company, or any part thereof"; and

vii) Clause 15.5 stipulated:

> "Any appointment or removal of a Receiver under clause 8 and any consents under this deed may be made or given in writing signed or sealed by any successors or assigns of the Security Agent and accordingly the Company [i.e. Skelwith] hereby irrevocably appoints each successor and assignee of the Security Agent to be its attorney in the terms and for the purposes set out in clause 11".

7. On 4 September 2009, Skelwith was registered at the Land Registry as the proprietor of the Club and Mr Armstrong was registered as the proprietor of the Charge.

8. On 21 January 2015, Skelwith having failed to fulfil payment (and, perhaps, other) obligations under the Charge, Mr Armstrong formally demanded £4,010,037 from Skelwith, citing clause 7 of the Charge.

9. On 5 February 2015, a deed of assignment ("the Deed of Assignment") was executed in favour of Polar. The parties were the members of the Flaxby Partnership (as "Creditor"), Mr Armstrong (as "Security Trustee") and Polar (as "Assignee"). The Deed of Assignment recited that the "Creditor" had agreed to assign to Polar its right, title and interest in, among other things, the debt owing by Skelwith and the Charge and that the "Security Trustee" had agreed to assign to Polar his right, title and interest in, among other things, the Charge. Clause 2 of the Deed of Assignment was in these terms:

> "1. The Creditor hereby as beneficial owner assigns absolutely to the Assignee all the right, title benefit, and interest of the Creditor in and to the Debt [i.e. the debt owing by Skelwith] and the underlying contracts under which the Debt arose ….
>
> 2. The Creditor hereby as beneficial owner assigns absolutely to the Assignee all the right, title benefit, and interest of the Creditor in the Security [including the Charge] with immediate effect.

3. The Security Trustee hereby as trustee assigns absolutely to the Assignee all the right, title benefit, and interest of the Security Trustee in the Security with immediate effect.

4. Both the Creditor and the Security Trustee hereby assign to the Assignee all rights already vested in them under the Security which shall include without limitation the right to rely upon the Demand Letter [i.e. the letter of demand of 21 January 2015] and the Events of Default as listed in that Demand Letter.

5. For the avoidance of doubt and without limitation there shall not be included in this assignment any other asset of the Creditor nor covered by the terms of this deed."

10. A TR4 transfer form ("the Transfer") was also executed. This provided for the transfer of the Charge by Mr Armstrong to Polar. The transfer has not, however, been registered at the Land Registry.

11. Polar had been incorporated in the Isle of Man on 27 January 2015. Mr Armstrong and the fourth defendant, Mr Simon Armstrong (one of Mr Armstrong's sons), have been the company's directors since 26 February. It was, it seems, always intended that the company should be owned and controlled by the Armstrong family. Mr Simon Armstrong has given this explanation of the assignment to Polar:

> "The reason for taking this latter step was that the dispute was (and still is) taking an increasingly heavy toll on both my mother and father (who are 78 and 80 respectively). We hoped that by transferring our interests to [Polar], this would remove at least some of the stress in having to directly deal with Mr Ellis and Mr Broadbent, in whose promises we can no longer trust."

12. The defendants allege that Mr Ellis was handed a form of notice of assignment at about 3pm on 11 February 2015. The claimants maintain that no notice of assignment was served until 16 February. It is common ground that I am in no position to resolve the dispute. It is, however, relevant to refer to the terms of the notice ("the Notice"). It stated:

> "We Alan Armstrong ('Security Trustee') …, Margaret Armstrong …, Brian Mattocks …, Simon Armstrong … and Richard Armstrong … ('Creditors') hereby give you notice that on 5th February 2015 all our legal and beneficial interest in:
>
> (i) the debt due from you to us in the sum of [add definition of Debt from deed of assignment] ('the Debt') and all rights relating to the contract under which the Debt arose and all associated rights and
>
> (ii) The [add definition of charge, debenture and the deed of priority] ('the Security')

was assigned absolutely to Polar … ('the Assignee').

I Alan Armstrong hereby give you notice that on 5th February 2015 all the legal interest in the Security was assigned absolutely to the Assignee."

The square brackets and words within them were to be found in the original Notice.

13. At 5.50pm on 11 February 2015, Polar entered into two agreements for the sale of the Club to Flaxby Park. One of the contracts related to a one-metre cordon around the perimeter of the property and the other encompassed the balance of the Club. Clause 3 of each of the agreements ("the Sale Agreements") stated:

> "3.1 By the Legal Charge [i.e. the Charge] the Company [i.e. Skelwith] charged the Property to the Security Trustee of the Assignors [i.e. the members of the Flaxby Partnership]
>
> 3.2 The Company [i.e. Skelwith] is the registered proprietor of the Property
>
> 3.3 By virtue of the Assignment [i.e. the Deed of Assignment] the Assignors acting by their security trustee assigned the benefit of the Legal Charge (along with other security) to the Seller [i.e. Polar] and by a Transfer (TR4) executed shortly before the date of this Agreement the title to the Legal Charge has been transferred to the Seller.
>
> 3.4 The Seller is selling the Property under its power of sale in Section 101 of the Law of Property Act 1925 and all the powers and remedies available to the Seller under the Legal Charge".

Clause 7.1, headed "Title Guarantee", stated:

> "The Seller will transfer the Property as mortgagee in possession with no title guarantee and no covenants for title whether express or implied save that the Seller sells the property free and clear of all security of any kind and any subsequent charges and notices which affect the Titles".

The total price payable under the Sale Agreements is £3.7 million.

14. One of the Sale Agreements gave a completion date of 12 February 2015 and the other specified 17 September as the completion date. Neither agreement had, however, proceeded to completion when, on 19 February, the claimants applied without notice for, and were granted, an injunction restraining the members of the Flaxby Partnership and Polar from disposing of the Club. The claim form initiating the proceedings before me was issued later that day. Once the claimants had been told of the Sale Agreements, Flaxby Park was added as the seventh defendant.

15. On 24 March 2015, Flaxby Park issued the first of the applications with which I am concerned. This seeks an order for the claim against it to be struck out and/or summary judgment in its favour. The other application before me was issued by the claimants on 5 June. This asks that the defences of each of the defendants be struck out and/or that the claimants be awarded summary judgment.

16. I should, I think, mention two more matters at this stage. First, on 27 February 2015 Skelwith entered into a contract to sell the Club to a company called Harrogate and York Developments Limited for, on the face of it, a price of £27.5 million. The first, second and fourth to seventh defendants have, however, sought to pour scorn on that contract. Secondly, on 16 July 2015 Mr Gabriel Moss QC, sitting as a Deputy High Court Judge, acceded to an application by HM Revenue and Customs for provisional liquidators to be appointed in respect of Skelwith.

The claimants' pleaded claims

17. The most important paragraph of the particulars of claim for present purposes is paragraph 31. This alleges that the transactions described in paragraphs 24 to 26 (which refer to, among other things, the Deed of Assignment, Transfer and Sale Agreements):

> "are not valid and/or effective transactions and/or have not taken effect at law because Polar:-
>
> (i) failed to serve a valid notice of assignment;
>
> (ii) is not the registered proprietor of the Charge and as such is not entitled to exercise the statutory powers to sell or grant a lease; and/or
>
> (iii) is not in possession of the Property as mortgagee or otherwise."

18. The particulars of claim go on to make allegations of breach of duty against the first to sixth defendants. The transactions described in paragraphs 24 to 26 of the particulars of claim are said to have involved breaches of obligations that the members of the Flaxby Partnership owed to Firstpoint Security Trustee Limited, in whose favour Skelwith granted a second legal charge in 2012. More importantly for present purposes, the first, second and fourth to sixth defendants are said to have breached "their duties under the Charge to take reasonable steps to obtain the best obtainable price for the Property and/or their fiduciary duties".

19. Unsurprisingly, no one suggests that I can determine at this stage, without a trial, whether these allegations, which are hotly contested, are well-founded. What is also of importance in the current context is that the allegations of breach of duty are not directed at Flaxby Park. As they stand, the particulars do not allege either that Flaxby Park has itself committed any breach of duty or that it was complicit in, or aware of, any breach of duty by another defendant. Mr Mario Betts of Lewis Silkin LLP, the claimants' solicitors, stated in a witness statement that he made in response to Flaxby Park's application that it is the claimants' case that Polar "sold the property at a gross undervalue and without taking any steps at all, let alone any proper steps to obtain the

best price reasonably available" and that Flaxby Park "was aware of the circumstances surrounding the sale and must have known that the ostensible sale price did not reflect the Property's true value". No such allegations are, however, advanced against Flaxby Park in the existing particulars of claim. Ms Brie Stevens-Hoare QC, who appeared with Mr Thomas Bell for the claimants, pointed out that the particulars of claim assert that Flaxby Park's directors own land adjoining the Club and that the current market value of the Club is far in excess of the price which Flaxby Park would pay for the property under the Sale Agreements, but there can be no question of taking such passages as constituting allegations that Flaxby Park was complicit in, or knew of, any impropriety. The claimants cannot, as it seems to me, be entitled to pursue any such case against Flaxby Park without spelling it out in clear terms in its pleadings. That is especially so given the serious nature of Mr Betts' allegations (compare e.g. *Armitage v Nurse* [1998] Ch 241, at 256-257, and *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, at 407). At present, therefore, the claimants' case against Flaxby Park must stand or fall on the points put forward in paragraph 31 of the particulars of claim.

20. Ms Stevens-Hoare indicated that, were the case advanced in paragraph 31 of the particulars of claim to be held to be unsustainable, the claimants would wish to amend their particulars of claim. To that end, draft amended particulars of claim have been prepared which contain explicit allegations to the effect that Flaxby Park was knowingly involved in misconduct. At this stage, however, I must proceed on the basis of the particulars of claim in their present form.

The issues

21. The rival applications with which I am dealing give rise to much the same issues. Mr Thomas Grant QC, who appeared with Mr Duncan McCombe for Flaxby Park, argued that none of the matters pleaded in paragraph 31 of the particulars of claim could provide an adequate basis for impugning the Sale Agreements. In contrast, Ms Stevens-Hoare maintained that I should decide that the claimants' attacks on the Sale Agreements (and other documents) are well-founded and, accordingly, should strike out the various defences and enter judgment in the claimants' favour. The response of the first to sixth defendants is essentially to support Flaxby Park's case.

22. Mr Grant claimed that Polar was entitled to enter into the Sale Agreements both under the power of sale given to mortgagees by the Law of Property Act 1925 ("the LPA") and pursuant to the particular terms of the Charge. He relied on authorities dealing with the rights of equitable mortgagees; on the fact that the LRA 2002 allows a person entitled to be registered as the proprietor of a charge to exercise "owner's powers"; on the proposition that Polar had become "entitled to receive and give a discharge for the mortgage moneys"; and on the powers of attorney granted by the Charge. Ms Stevens-Hoare, however, stressed that Polar has not been registered as the proprietor of the Charge. This fact, Ms Stevens-Hoare argued, means that Polar had (and has) no relevant power of sale.

23. The issues can, I think, be conveniently considered under the following headings:

    i) The approach to be adopted;

    ii) The significance of possession;

iii) Sale as an equitable mortgagee;

iv) Sale as a person entitled to be registered;

v) Sale as a person entitled to receive and give a discharge for the mortgage money; and

vi) Powers of attorney.

The approach to be adopted

24. As Lord Woolf MR pointed out in *Swain v Hillman* [2001] 1 All ER 91 (at 95), CPR Part 24 (which deals with summary judgment) "is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial". On the other hand, judges hearing strike out or summary judgment applications should sometimes be prepared to decide issues of law. In *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725, Moore-Bick LJ, with whom Ward and Buxton LJJ expressed agreement, said (at paragraph 12):

> "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

In a similar vein, Lord Hope said this in *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 (at paragraph 95):

> "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible."

25. The applications with which I am now concerned raise points of law on which no more evidence is necessary and which the parties have had an adequate opportunity to address in argument. In the circumstances, it seems to me that I should "grasp the nettle" and attempt to resolve them.

The significance of possession

26. As already mentioned, paragraph 31(iii) of the particulars of claim alleges that the Sale Agreements (among other transactions) are not valid or effective because Polar "is not in possession of the Property as mortgagee or otherwise".

27. Mr Grant argued that the fact that Polar was not in possession is of no importance and could not afford a ground for impugning the sale to Flaxby Park. In that connection, he referred me to passages from Megarry & Wade, "The Law of Real Property", 8th ed., and *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255. Megarry & Wade observes (in paragraph 25-017) that, in general, "the statutory power of sale is exercisable without any order of the court and without taking possession". In the *Horsham Properties* case, Briggs J noted (at paragraph 37) the "undoubted fact that the exercise by a mortgagee of a power of sale under section 101 [of the LPA], without first obtaining possession, will probably be a necessary and sufficient preliminary to the easy obtaining of possession by the purchaser".

28. On this aspect of the case, there has proved to be no real dispute between the parties. Mr Betts explained in one of his witness statements that it is not suggested that possession is a pre-requisite to a mortgagee's ability to exercise the statutory power of sale. As I understand it, paragraph 31(iii) was inserted into the particulars of claim in case the defendants sought to found an argument on Polar being in possession, not because it was thought that the absence of possession provides an independent basis for attacking the sale to Flaxby Park.

Sale as an equitable mortgagee

29. The "statutory power of sale" to which Megarry & Wade refers is conferred by section 101 of the LPA. That provides, so far as relevant, as follows:

> "(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> (i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby ….
>
> …
>
> (3) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act."

The LPA goes on to provide, by section 104(1), that a mortgagee exercising the power of sale conferred by the Act has "power, by deed, to convey the property sold, for

such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage".

30. In *Swift 1st Ltd v Colin* [2011] EWHC 2410 (Ch), [2012] Ch 206, HH Judge Purle QC, sitting as a Judge of the High Court, held that a mortgagee whose charge had not been registered at the Land Registry was entitled to take advantage of section 101 of the LPA. The freehold proprietors of the relevant property had executed a deed charging it by way of legal mortgage in favour of the claimant, but the charge had not been substantively registered because a prior mortgagee had not consented to this. Judge Purle concluded that the claimant was nevertheless entitled to sell the freehold legal estate in the property. He took the view (in paragraph 14) that the "power of sale … arises under section 101 of the 1925 Act, and that merely requires that a mortgage be made by deed, which this one was". He considered, moreover, that section 88 of the LPA (dealing with the realisation of freehold mortgages) was engaged because the charge was expressed to be by way of legal mortgage (see paragraph 13). Mr Grant prayed Judge Purle's decision in aid of his submissions in the present case.

31. Judge Purle found support for his conclusion in the decisions of Wilberforce J and the Court of Appeal in *In re White Rose Cottage* [1964] Ch 483 and [1965] Ch 940. That case concerned an equitable mortgage arising from a memorandum under seal accompanied by deposit of the land certificate. At first instance, Wilberforce J concluded that the mortgagee could sell the mortgaged property (and not merely an equitable interest in it) under section 101 of the LPA. He said (at 495-496):

> "This latter section [i.e. section 104 of the LPA], based on section 21 of the Conveyancing Act, 1881, does not confer the power which was given by section 15 of the statute 23 & 24 Vict., c. 145 (Lord Cranworth's Act) to convey all the estate vested in the mortgagor. In section 101 (1) of the Act of 1925, 'the mortgaged property' in my judgment means the property over which the mortgage deed purports to extend and operate and is not limited, as has been suggested, to an equitable interest in that property. The section does not profess to deal with the nature of the interest which a mortgagee can convey, and though it would not authorise a mere equitable mortgagee to convey the legal estate, equally it does not prevent him from conveying the legal estate if he has power under the mortgage to do so. The mortgagee's right to convey, so as to override the estate and interest, depends on section 104 and, in particular, on the words 'for such estate and interest therein as may be the subject of the mortgage.' In a case such as this, where the charge extends to all estates, both legal and equitable, in the property and where the mortgage deed expressly confers the right to vest the legal estate in a purchaser free from any right of redemption, it seems to me clear that the subject of the mortgage is the property itself and not an equitable interest in it. That there is this distinction between a mere equitable charge by a deed, where the mortgagee has a power of sale, but no

> power to convey the legal estate (see *In re Hodson and Howes' Contract*, where the deed in no respect extended to the legal estate and *per* Cotton L.J.) and a case such as this where the legal estate can be conveyed when the mortgagee sells under his statutory power, seems to be suggested, or at any rate confirmed, by Scrutton L.J. in *London County and Westminster Bank Ltd. v. Tompkins.*"

32. An appeal to the Court of Appeal was successful on the basis of a different point. In the course, however, of their judgments, Lord Denning MR and Harman LJ expressed (obiter) views on the powers of an equitable mortgagee. Lord Denning MR said (at 951):

> "The subject of the mortgage here was the property itself, both the legal and equitable estate in it: and I see no reason why an equitable mortgagee, exercising his power of sale, should not be able to convey the legal estate. We were referred to *In re Hodson and Howes' Contract*, but that was a case under section 21 of the Conveyancing Act, 1881. The wording of section 104 (1) of the Law of Property Act, 1925, is different. I do not regard *In re Hodson and Howes' Contract* as authority under the Act of 1925."

Harman LJ said (at 955-956):

> "The judge has construed this document as being a sale by the bank as mortgagee in exercise of the powers conferred upon it by the memorandum of deposit of March 31, 1962, and the Law of Property Act, 1925. I say at once that if that be the true construction of the instrument, then I think the judge was justified in his conclusion. In other words I think that an equitable mortgagee under a deed in the terms of the memorandum of March 31, 1962, can by virtue of the power of attorney contained in it convey to a purchaser the legal estate in the mortgaged property without first going through the form of calling for the execution by the mortgagor of a legal mortgage. I come to this conclusion for the reasons so lucidly stated by the judge and which I do not think I need restate. If, therefore, his premise be right, his conclusion prevails, but I have been unable to bring myself to agree with the premise."

33. *In re Hodson and Howes' Contract* (1887) 35 Ch D 668, to which Wilberforce J and Lord Denning both referred, concerned the Conveyancing Act 1881. The Court of Appeal held that that Act did not enable an equitable mortgagee to convey the legal estate vested in the mortgagor. Cotton LJ said (at 672-673):

> "What is there in the Act to enable a mere equitable mortgagee to convey the legal estate? Sect. 19 provides that the mortgagee shall have the powers therein mentioned, one of which is a power of sale, 'to the like extent as if they had been in terms conferred by the mortgage deed, but not further.' Now if this

> mortgage deed, which does not deal with the legal estate, had in terms conferred a power of sale, that power would only have enabled the mortgagee to dispose of the equitable estate. Sect. 21 enacts that a mortgagee exercising the power of sale conferred by the Act shall have power by deed to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority. The power to convey 'the property sold' does not enable him to convey the legal estate when a power in the deed would only have enabled him to sell the equitable estate. The expression 'property sold' only refers to identification of the property, and the expression 'for such estate and interest therein as is the subject of the mortgage' cannot be held to give the mortgagee power to convey all the legal estate which was in the mortgagor at the time of the mortgage. If the mortgage was for a term it would be a strong thing to hold that the mortgagee could sell the fee.
>
> … When we find in an earlier Act [i.e. Lord Cranworth's Act] language which has been judicially construed in a particular way, and then find that in a later enactment on the same subject the Legislature uses different language, not so favourable to the construction of the Appellant, it is to be supposed that the intention was not to give to mortgagees the power which they had been held to have under the earlier Act. The great difficulties which would arise from holding that a mortgagee could sell and convey all the estate which the mortgagor had in him at the time of the mortgage would make us hesitate before adopting that view, even if the words of the Act had been much more favourable to it than they are."

34. Certain commentators have expressed reservations about the *White Rose Cottage* case and, in consequence, *Swift 1st Ltd v Colin* (where only one party was represented before Judge Purle). Emmet & Farrand on Title (at paragraph 25.224) says of Lord Denning's comments in *White Rose Cottage*:

> "It is doubted whether s.104(1) [of the LPA] can properly have such an extended effect having regard to the express provision in ss.88 and 89 of the LPA 1925, which must be read with s.104, that conveyances by *legal* mortgagees vest in the purchaser the legal estate of the mortgagor."

Megarry & Wade notes (at paragraph 25-043) that, although Lord Denning said that the wording of section 104(1) of the LPA differs from that of section 21 of the Conveyancing Act 1881, "the phrase relied on ('the subject of the mortgage') is the same in each subsection". In a recent article in the Conveyancer and Property Lawyer ([2015] 79 Conv 123, at 124), Mr Steve Evans argues that "there are dangers in giving the decision in *Swift 1st* a significance greater than its own singular facts merit".

35. As, however, was pointed out by Mr Grant, the decision in the *Swift 1st* case is now reflected in Land Registry guidance. The Registry's "Practice guide 75: transfer under a chargee's power of sale" states:

> "If the charge of the registered estate is by deed expressed to be by way of legal mortgage but is not completed by registration …, the chargee still has a statutory power of sale; the sale will override all rights over which the charge has priority; and the transfer will be of the registered estate (Swift 1st Limited v Colin …)."

36. Whatever the merits of *White Rose Cottage* and *Swift 1st Ltd v Colin*, it seems to me that they can be of no real assistance to Mr Grant in the present case. The mortgages at issue in the *White Rose Cottage* and *Swift 1st* cases never took effect at law. The Courts were therefore concerned with whether an equitable mortgage could entitle the mortgagee to sell the legal estate. In contrast, the Charge having been registered at the Land Registry, there is no doubt but that it is effective at law. It is, accordingly, accepted by the claimants that Mr Armstrong "would have been entitled to take possession of the [Club], or to sell it under the statutory power of sale provided by section 101(1)(i) of the Law of Property Act 1925" (to quote from one of Mr Betts' witness statements). The question in the present case is not whether the Charge conferred a right to sell the legal estate in the Club (it plainly did), but whether that right was exercisable by Polar. In other words, was Polar, as the beneficial owner of the Charge, entitled to exercise the power that Mr Armstrong had enjoyed (and possibly continued to enjoy) as its legal owner? That is a rather different issue from those debated in the *White Rose Cottage* and *Swift 1st* cases, and the reasoning of Wilberforce J, Lord Denning MR, Harman LJ and Judge Purle in those cases does not seem to me to be directly applicable in the present case.

Sale as a person entitled to be registered

37. Section 27(1) of the LRA 2002 states that, 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". By virtue of section 27(4), the dispositions that are required to be completed by registration include a transfer of a registered charge. That means that, for such a transfer to be effective at law, "the transferee, or his successor in title, must be entered in the register as the proprietor": see paragraph 10 of schedule 2.

38. In the present case, Polar has not been entered in the register as the proprietor of the Charge. It follows that the assignment to it of the Charge cannot operate at law. Ms Stevens-Hoare argued that this fact is crucial to the determination of the case. On her submissions, Polar could not acquire power to sell the Club until it became the registered proprietor of the Charge. Since it has not done so, it can have had no power to sell the Club to Flaxby Park.

39. The authorities to which Ms Stevens-Hoare referred me included *Lever Finance Ltd v Needlemans' Trustee* [1956] Ch 375. In that case, the claimant took a transfer of a legal charge and then, before it was registered as the proprietor of the charge, purported to appoint a receiver who demanded and received rent from someone to whom the mortgagors had leased part of the property. Harman J held that the claimant

could not recover possession of that part of the property. In the course of his judgment, he said:

> "This case contains another complication, in that the appointment of the receiver was made on April 21, 1955, two days after the transfer of the charge to the plaintiff. The plaintiff did not, however, become the registered proprietor of the charge until July; and it is said, therefore, that it could not exercise statutory powers to appoint a receiver until the latter date. For that proposition section 33 (1) and (2) and section 34 (1) of the Land Registration Act, 1925, were relied upon…. I think that justifies the proposition for which it was cited, namely, that, until the transfer is completed by registration, the statutory powers remain in the person whose name is on the register; and therefore until July, when the plaintiff was registered, it was not in a position to exercise statutory powers. That being so, it appointed a receiver not under the Act, but merely like any other person who appoints an agent to do something for him, and the receiver was its agent, and if as its agent he demanded, as he did, and collected, as he did, two quarters' rent, that is an unequivocal recognition of the existence of a tenancy. So on that ground, also, I think that the second defendant would be entitled to resist this claim."

Harman J thus considered that the claimant was not in a position to exercise statutory powers until it was registered.

40. The *Lever Finance* case was cited in other authorities on which Ms Stevens-Hoare relied: *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733, *East Lindsey DC v Thompson* [2001] EWHC Admin 81 and *Paragon Finance plc v Pender* [2005] EWCA Civ 760, [2005] 1 WLR 3412. In the last of these, the claimant mortgagee had transferred a portfolio of mortgages to a special purpose vehicle (or "SPV") under securitisation arrangements but the transfers had not been registered at the Land Registry. One of the arguments that the defendant mortgagors put forward in response to possession proceedings brought by the claimant was that the right to take proceedings had become vested in the SPV. The argument was rejected by both Peter Smith J and the Court of Appeal. In the course of his judgment, Jonathan Parker LJ (with whom Ward and Carnwath LJJ agreed) said (in paragraph 109):

> "It is common ground that Paragon [i.e. the claimant], as registered proprietor of the legal charge, retains legal ownership of it. One incident of its legal ownership - and an essential one at that - is the right to possession of the mortgaged property. I can see no basis upon which it can be contended that an uncompleted agreement to transfer the legal charge to the SPV (that is to say an agreement under which, pending completion, the SPV has no more than an equitable interest in the mortgage) can operate in law to divest Paragon of an essential incident of its legal ownership. In my judgment as a matter of principle the right to possession conferred by the legal

> charge remains exercisable by Paragon as the legal owner of the legal charge (i e as the registered proprietor of it), notwithstanding that Paragon may have transferred the beneficial ownership of the legal charge to the SPV."

The claimant therefore retained the right to possession of the mortgaged property even if it had transferred beneficial ownership of the charge to the SPV.

41. Mr Grant pointed out that the various cases cited by Ms Stevens-Hoare concerned the Land Registration Act 1925 ("the LRA 1925"), which (he argued) differed in important respects from the LRA 2002. In this context, the key provisions of the LRA 1925 are sections 33 and 34. Section 33 provided:

> "(1) The proprietor of any registered charge may, in the prescribed manner, transfer the charge to another person as proprietor.
>
> (2) The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred, but the transferor shall be deemed to remain proprietor of the charge until the name of the transferee is entered on the register in respect thereof…."

Section 34(1) stated:

> "Subject to any entry on the register to the contrary, the proprietor of a charge shall have and may exercise all the powers conferred by law on the owner of a legal mortgage."

42. The LRA 2002 includes these provisions:

> "23 Owner's powers
>
> (1) Owner's powers in relation to a registered estate consist of—
>
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and
>
> (b) power to charge the estate at law with the payment of money.
>
> (2) Owner's powers in relation to a registered charge consist of—
>
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage, and
>
> (b) power to charge at law with the payment of money indebtedness secured by the registered charge….

> 24 Right to exercise owner's powers
>
> A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is—
>
> (a) the registered proprietor, or
>
> (b) entitled to be registered as the proprietor."

43. It is common ground that, following the execution of the Deed of Assignment and Transfer, Polar became entitled to be registered as the proprietor of the Charge and, hence, that Polar became "entitled to exercise owner's powers in relation to" the Charge pursuant to section 24(b) of the LRA 2002. As a result, Polar must have had power, in accordance with section 23(2)(a) of the Act, "to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage". Confirmation that section 24(b) was intended to allow a "disponee who has not yet been registered as proprietor" to exercise "owner's powers" is to be found in the Law Commission report on which the LRA 2002 is based ("Land Registration for the Twenty-First Century", Law Com No 271). This said this (in paragraph 114) about what became section 24 of the LRA 2002:

> "Clause 24 sets out who may exercise owner's powers of disposition under Clause 23, namely either the registered proprietor or a person who is entitled to be registered as proprietor (such as the executor of a deceased registered proprietor, or a disponee who has not yet been registered as proprietor)."

44. According to Mr Grant, it follows that, by the time the Sale Agreements were entered into, Polar had acquired the right to sell the Club under either or both of the power of sale conferred by section 101 of the LPA and the express powers contained in the Charge.

45. Ms Stevens-Hoare countered that sections 23 and 24 of the LRA 2002 gave Polar no more than powers to dispose of or encumber the Charge. The "owner's powers" identified in section 23 are, Ms Stevens-Hoare submitted, powers to deal with the *owner's* interest, not that of anyone else. Polar could, therefore, have disposed of the benefit of the Charge, but was not entitled to dispose of the mortgaged property (viz. the Club).

46. Ms Stevens-Hoare contended that her interpretation of section 23 is consistent with both case law on the LRA 1925 and the wording of section 23(2)(a) of the LRA 2002. The proviso ("other than a legal sub-mortgage") clearly relates, Ms Stevens-Hoare said, to what a proprietor of a charge, or a person entitled to be registered as such, can do with *his* interest rather than the charged property. Powers to deal with the charged property arise, Ms Stevens-Hoare submitted, pursuant to section 51 of the LRA 2002 (headed "Effect of completion by registration"), which provides:

> "On completion of the relevant registration requirements, a charge created by means of a registrable disposition of a registered estate has effect, if it would not otherwise do so, as a charge by deed by way of legal mortgage."

That provision, though, cannot (Ms Stevens-Hoare said) avail Polar since it has not been registered as the proprietor of the Charge.

47. On balance, however, I agree with Mr Grant that the "owner's powers" to which section 23(2) of the LRA 2002 refers are more extensive than Ms Stevens-Hoare suggested. My reasons include these:

i) Section 23(2) of the LRA 2002 does not expressly limit the "owner's powers" to powers to deal with the *owner's* interest. The final words of section 23(2)(a) are *consistent* with Ms Stevens-Hoare's construction of the subsection, but they can also be reconciled with a wider interpretation of "owner's powers". Further, there is force in Mr Grant's observation that section 23(2) refers to "power to make a disposition of any kind … *in relation to* an interest of that description", not "power to make a disposition *of* an interest of that description" (emphasis added in each case);

ii) The expression "owner's powers" was introduced for the first time in the LRA 2002: sections 23 and 24 of the Act did not have precise counterparts in the LRA 1925. Parallels can be drawn with section 37 of the LRA 1925 (headed "Powers of persons entitled to be registered"), but the wording of that section differed significantly from that found in sections 23 and 24 of the LRA 2002. In particular, whereas section 37 of the LRA 1925 referred to a person with the right to be registered as proprietor of a charge being able "to deal with the charge", section 23(2) of the LRA 2002 speaks more expansively of "owner's powers" in relation to a charge comprising (subject to one exception) "power to make a disposition of any kind permitted by the general law in relation to an interest of that description";

iii) Section 34(1) of the LRA 1925 stated that "the proprietor of a charge" was to have the powers conferred by law on the owner of a legal mortgage. In contrast, section 51 of the LRA 2002 merely provides for a charge to have effect "as a charge by deed by way of legal mortgage" and says nothing in terms about who can exercise mortgagees' powers. While, therefore, section 51 may cast light on what powers arise when a charge is registered, it is not, on the face of it, meant to deal with who can exercise them. That function is, it would seem, intended to be performed by section 24 of the LRA 2002;

iv) Given the differences between the LRA 1925 and LRA 2002, cases dealing with the LRA 1925 cannot be assumed to provide a reliable guide to the scope of "owner's powers" in the context of the 2002 Act (though that is not to say that all or any of the cases to which Ms Stevens-Hoare referred would be decided differently under current law);

v) Section 23(2) of the LRA 2002 applies to the registered proprietors of charges as well as those entitled to be registered as such. It would seem odd if the "owner's powers" of a registered proprietor were confined in the way that Ms

Stevens-Hoare argues that those of someone entitled to be registered as proprietor are;

vi) Passages in both Megarry & Wade (whose authors include Mr Charles Harpum, who when a Law Commissioner had particular responsibility for the project that culminated in the LRA 2002) and Ruoff and Roper on Registered Conveyancing suggest that a chargee's "owner's powers" encompass powers exercisable in relation to the land charged;

vii) Thus, Megarry & Wade notes (in paragraph 7-150) that during the "registration gap" between the execution of a transfer and its registration:

> "In many cases, because the disponee will be entitled to the particular estate or interest in equity pending registration, he will have the same rights as if he had been registered."

When explaining (in paragraph 7-050) that the dispositions "permitted by the general law" (in the context of section 23 of the LRA 2002) are "necessarily subject to the limitations or pre-conditions that are imposed on such dispositions by the general law", Megarry & Wade gives as an example "the inability of a legal chargee to exercise his power of sale unless that power has arisen". The authors are therefore proceeding on the basis that exercise of a power of sale can be an aspect of a chargee's "owner's powers";

viii) Turning to Ruoff and Roper, that states (in paragraph 28.001):

> "By virtue of sections 23(2) and 24 of the 2002 Act, the registered proprietor of a charge, or the person entitled to be registered as proprietor, has the power to make a disposition of any kind permitted by the general law as is appropriate to such a charge, save only that there is no power to effect a legal sub-mortgage because this has been replaced by the power to charge the indebtedness of the primary charge with the payment of money….
>
> In general terms, the powers confirmed by section 23(2) comprise all the powers of a mortgagee under a charge by deed by way of legal mortgage, save only that the power to grant a sub-charge must be exercised in the manner indicated above. In fact, the 'powers of a chargee' denotes a bundle of powers, some concerned with dispositions of the charge per se and similar dealings with it, and some exercisable in relation to the land over which the charge is secured in virtue of the substantive rights granted to a legal mortgagee under deed….
>
> Examples of the second group of powers—those enjoyed by a chargee because he has the equivalent of a legal mortgage by deed—include the power of sale, of leasing and of appointing a receiver, as well as the remedial actions of foreclosure and the taking of possession following serious default."

Ruoff and Roper goes on to say (in paragraph 28.002):

> "[S]ection 24(b) of the 2002 Act stipulates that a person entitled to be registered as proprietor may exercise owners' powers in relation to the registered charge: that is, he may transfer, sub-charge *and exercise the rights of a mortgagee under the charge* before its actual registration" (emphasis added).

Ruoff and Roper also notes (in paragraph 28.008):

> "[A] sale by the proprietor of the charge under his power of sale can only be made if there is no contrary entry on the register and, of course, only if the chargee is the registered proprietor *or is entitled to be so registered*" (emphasis added).

It is perfectly plain, accordingly, that the authors consider that the "owner's powers" referred to in section 23(2) of the LRA 2002 can include powers "exercisable in relation to the land over which the charge is secured in virtue of the substantive rights granted to a legal mortgagee under deed".

48. In the circumstances, it seems to me that the "owner's powers" of the registered proprietor of a charge (who will be entitled to exercise such powers pursuant to section 24(a) of the LRA 2002) must be capable of extending to powers to deal with the charged property. In determining quite what those powers comprise, the starting point must, I think (and as appears to be implicit in the passages I have quoted from Ruoff and Roper), be section 51 of the LRA 2002. As I have already noted, that section stipulates that a registered charge is to have effect "as a charge by deed by way of legal mortgage". That tends to confirm that the "owner's powers" that the registered proprietor of a charge can exercise include the power of sale which section 101 of the LPA confers on a mortgagee in the case of a mortgage by deed.

49. The "owner's powers" enjoyed by the personal representatives or trustee in bankruptcy of the registered proprietor of a charge will, I think, likewise encompass powers to deal with the mortgaged property. It is to be noted that, since "a transfer on the death or bankruptcy of an individual proprietor" need not be registered (see section 27(5) of the LRA 2002), legal title to a charge will pass automatically where its registered proprietor dies or becomes bankrupt. The personal representatives or trustee in bankruptcy will thus acquire legal ownership of the charge as well as the right to be registered as its proprietor(s) (thus falling within section 24(b) of the LRA 2002).

50. Is the position different where (as in the present case) a person entitled to be registered as the proprietor of a charge is not its owner at law? While the assignment of the Charge may have served to make Polar its beneficial owner, it will not take effect at law unless and until Polar is registered as the Charge's proprietor. Does that matter?

51. The decision of Morgan J in *Bank of Scotland plc v King* [2007] EWHC 2747 (Ch) would tend to suggest not. In that case, the beneficial owner of a property was held to

have been able to grant a charge capable of taking effect at law. Morgan J said (in paragraph 68):

> "I have held that the Second and Third Defendants effectively transferred their interest in the property to the First Defendant. The First Defendant thereupon became entitled to be registered as proprietor of the registered title. The First Defendant was then able, under Section 24(b) of the Land Registration Act 2002, to execute a charge in favour of the Claimant so that the Claimant was then entitled, as against whoever happens to be the registered proprietor of the title, to have the charge duly registered against that title. Thus, even if the Second and Third Defendants remain the registered proprietors, the Claimant is entitled to have his charge registered against the title. Although the Second and Third Defendants say that they did not grant any charge to the Claimant, on my findings, they transferred the property to the First Defendant who was able even before he became the registered proprietor to grant an effective charge in favour of the Claimant. The operation of Section 24 of the 2002 Act is explained in Ruoff & Roper, Registered Conveyancing, at para 13.003.04. Thus, in my judgment, the Claimant is now entitled to have its charge registered against the registered title, even if the registered title remains vested in the Second and Third Defendants."

52. In *Mortgage Business plc v O'Shaughnessy* [2012] EWCA Civ 17, [2012] 1 WLR 1521, however, the Court of Appeal considered it a "matter of basic land law" that "an equitable owner of land cannot grant a legal interest". The case concerned equity release schemes where the purchasers of the relevant properties had in the intervals between completion and the registration of the transfers purported to grant tenancies to the vendors. It was argued on the vendors' behalf that the tenancies had priority over charges registered subsequently on the footing that "[b]etween completion of the sale of registered land and the registration of the transfer the purchaser is, by virtue of section 24(b) of the 2002 Act, entitled to exercise the owner's powers in relation to a registered estate" (paragraph 57). However, Etherton LJ (with whom Lord Neuberger MR and Rix LJ agreed), rejected the argument on, among others, the ground that "prior to registration of the transfer, the grant of any lease by the purchaser takes effect only in equity" (paragraph 58). Etherton LJ explained as follows:

> "59 … Prior to the registration of the purchaser as the proprietor, the purchaser's interest in the property can subsist only in equity. As a matter of basic land law an equitable owner of land cannot grant a legal interest. A person cannot grant a greater interest than he or she possesses. No doubt for good policy reasons the legislature could provide in sufficiently clear and precise language for a different position. I do not regard section 29 or indeed any other provision in the [LRA 2002] as providing for so remarkable a position in clear and precise terms, and I cannot see any good policy reason for Parliament to do so.

> 60 We have not been shown any statement in or outside Parliament indicating that Parliament intended to change the position in this respect from that under the Land Registration Act 1925. On the contrary, the joint Law Commission and HM Land Registry report, Land Registration for the Twenty-First Century: A Conveyancing Revolution, Land Registration Bill and Commentary (Law Com No 271) (2001) which gave rise to the 2002 Act positively indicates no change in that respect (eg at para 5.15). It seems almost inconceivable that the framers of the great 1925 corpus of land and trust legislation contemplated that the owner of an equitable estate could grant or could be deemed to have granted a legal interest.
>
> 61 The provisions of the 2002 Act can perfectly well be read in an entirely conventional way as providing for the registration and deemed registration of legal interests only, and for leaving untouched the basic principle that the owner of an equitable interest cannot grant anything larger than an equitable interest. As I have said, I am not aware of any good policy reason why Parliament should have intended the grant of an equitable lease for seven years or less to be treated differently from the grant of any other equitable interest, whether for the purposes of priority or otherwise. Nor was any policy reason suggested by [counsel for the vendors]."

53. Although the Court of Appeal's decision in *Mortgage Business* case was the subject of an appeal (see *Mortgage Business plc v O'Shaughnessy* [2014] UKSC 52, [2015] AC 385), the argument based on section 24(b) of the LRA 2002 was not pursued and, therefore, was not addressed by the Supreme Court.

54. The Court of Appeal decision in *Mortgage Business plc v O'Shaughnessy* indicates that the extent of the "owner's powers" of a "person entitled to be registered as the proprietor" of an estate or charge (within section 24(b) of the LRA 2002) depends on whether the person in question has acquired ownership at law of the estate or charge. If he has not done so, the principle that "[a] person cannot grant a greater interest than he or she possesses" (i.e. the principle expressed in the old maxim "nemo dat quod non habet") will apply in the absence of statutory provision otherwise. Although the Court of Appeal did not spell matters out in quite this way, it presumably took the view that the kinds of disposition "permitted by the general law" for the purposes of section 23(1)(a) and section 23(2)(a) of the LRA 2002 were limited in the case of an equitable owner by the "nemo dat" principle.

55. The Court of Appeal's approach in the *Mortgage Business* case is in keeping with that adopted by the Courts in relation to the LRA 1925. As I have indicated, an equitable owner was not considered to be entitled to exercise all the powers of a registered proprietor in the context of the 1925 Act. It is noteworthy, moreover, that the Law Commission's "Land Registration for the Twenty-First Century" does not appear to have signalled any intention to change in the law in this respect.

56. Mr Grant and Mr Thomas Fletcher, who appeared for the third defendant, each argued that the *Mortgage Business* case is of no relevance to the present one. Mr Grant

pointed out that in *Mortgage Business* the Court of Appeal was concerned with "Owner's powers in relation to a registered estate" (the subject of section 23(1) of the LRA 2002) rather than "Owner's power's in relation to a registered charge" (the subject of section 23(2) of the LRA 2002). According to Mr Grant, the differences between a mortgage and an estate are fundamental. While the owner of an estate in land plainly cannot (Mr Grant said) transfer more than he owns, a mortgage allows its owner to transfer the freehold even though it does not belong to him. In a similar vein, Mr Fletcher submitted that, conceptually speaking, the exercise of a power of sale is not synonymous with the grant of a legal interest, especially because the availability of the former does not depend on the ownership of the land.

57. On balance, however, I consider that the *Mortgage Business* case is of significance for the case before me. It is apparent from it that a person who is entitled to be registered as a proprietor, but who has not been, will not necessarily enjoy all the powers that he would have had if registration had been effected. It follows that section 24 of the LRA 2002 cannot mean that the powers of a person entitled to be registered as a proprietor are automatically to be equated with those of a registered proprietor. The distinction between legal and beneficial ownership evidently continues to matter. In *Mortgage Business*, an equitable owner was held to have been unable to grant a legal lease notwithstanding sections 23 and 24 of the LRA 2002. The fact that a person entitled to be registered as a proprietor of a charge lacks legal ownership must similarly, to my mind, be capable of affecting the powers that he can exercise pursuant to sections 23 and 24. It has, as it seems to me, to be asked whether an equitable owner would be "permitted under the general law" to make dispositions of the relevant kinds. That implies, in my view, that a person who has no more than equitable ownership of a charge will not be entitled to exercise a power unless the terms of the particular statute or other instrument conferring the power allow for its exercise by someone lacking legal ownership.

58. In other words, it is not enough for a person entitled to be registered as a charge's proprietor and with equitable ownership of it to demonstrate that he could have exercised a power had he been registered as the proprietor. He must also show that the power is exercisable by an equitable owner under "the general law".

59. In short, the better view is, I think, that Polar will not have been able to exercise the power of sale conferred by section 101 of the LPA (or indeed the express powers contained in the Charge) merely because it was "entitled to be registered as the proprietor" of the Charge and, hence, section 24(b) was applicable. To the contrary, it seems to me that Polar will have had no power to sell the Club to Flaxby Park unless enabled to do so by section 106 of the LPA and/or the powers of attorney granted by the Charge. These possibilities are addressed in turn below.

Sale as a person entitled to receive and give a discharge for the mortgage money

60. Section 106(1) of the LPA is in these terms:

> "The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money."

61. Ms Stevens-Hoare submitted that, for an assignee to be "entitled to receive and give a good discharge for the mortgage money" within the meaning of section 106(1) of the LPA, the debt must have been assigned at law and not merely in equity. As Ms Stevens-Hoare observed, the assignment of a debt will not take effect at law unless the debtor is given notice of it. The relevant statutory provision is section 136(1) of the LPA. This provides:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, *of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action*, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—
>
> (a) the legal right to such debt or thing in action;
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor…" (emphasis added).

62. Ms Stevens-Hoare confirmed during her submissions that paragraph 31(i) of the particulars of claim had been framed with sections 106 and 136 of the LPA in mind. As I have mentioned, paragraph 31(i) puts forward as one reason for the invalidity of the Sale Agreements that Polar "failed to serve a notice of assignment".

63. Ms Stevens-Hoare and Mr Mark Warwick QC, who appeared for the first, second and fourth to sixth defendants, each addressed me on whether the Notice (whenever it was served) constituted "express notice in writing" of the assignment to Polar of Skelwith's indebtedness to Mr Armstrong for the purposes of section 136(1) of the LPA. On the view I take of the case, however, I do not need to resolve that issue to determine the applications before me.

64. Mr Grant took issue with the proposition that the debt must have been assigned at law for an assignee to be "entitled to receive and give a discharge for the mortgage money" for the purposes of section 106(1) of the LPA. He argued that an equitable assignment is sufficient and, hence, that Polar was "entitled to receive and give a good discharge for the mortgage money" by the date it entered into the Sale Agreements irrespective of whether Skelwith had by then been given notice of Mr Armstrong's assignment to Polar.

65. Mr Grant pointed out that an assignment can take effect in equity without satisfying the requirements of section 136(1) of the LPA (see e.g. *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, at 461) and that the Deed of Assignment provided for Mr Armstrong's rights as regards the Charge and related debt to be assigned to Polar on a compendious basis. Mr Grant also sought support for his submissions in *Kapoor v National Westminster Bank plc* [2011] EWCA Civ 1083, [2012] 1 All ER 1201. In that case, the Court of Appeal held that an equitable assignee of part of a debt had been entitled to vote at a creditors' meeting called to

consider whether to approve an individual voluntary arrangement (or "IVA") in respect of the debtor. Etherton LJ, with whom Pill LJ and Sir Mark Potter expressed agreement, said (at paragraph 30):

> "The current state of the authorities, binding on this court, is that an equitable assignee of debt is entitled in its own right and name to bring proceedings for the debt. The equitable assignee will usually be required to join the assignor to the proceedings in order to ensure that the debtor is not exposed to double recovery, but that is a purely procedural requirement and can be dispensed with by the court. By contrast, the assignor cannot bring proceedings to recover the assigned debt in the assignor's own name for the assignor's own account. The assignor can sue as trustee for the assignee if the assignee agrees, and, in that event the claim must disclose the assignor's representative capacity. In any other case, the assignor must join the assignee, not because of a mere procedural rule but as a matter of substantive law in view of the insufficiency of the assignor's title."

Later in his judgment, Etherton LJ said (at paragraph 43):

> "As the authorities I have cited clearly show, the consistent line of authority, binding on this court, is that the equitable assignee of a debt, and not the equitable assignor, has the substantive legal right to sue for the assigned debt. Although there is a procedural requirement that the assignee should join the assignor in order to protect the debtor from successive actions and to prevent conflicting decisions, even that procedural requirement will not apply or may be dispensed with by the court in appropriate circumstances, most particularly where those concerns do not apply."

66. With a degree of hesitation, I accept Mr Grant's submissions. While older authority would suggest that an equitable assignee cannot give a valid discharge for the debt unless expressly empowered to do so (see *Durham Brothers v Robertson* [1898] 1 QB 765, at 770), the *Kapoor* case shows that it is nowadays the equitable assignee who is considered to have the "substantive legal right to sue for the assigned debt". In those circumstances, Polar is, as it seems to me, to be recognised as having been "entitled to receive and give a discharge for the mortgage money" by the date of the Sale Agreements regardless of whether the Notice (a) had yet been served or (b) satisfied the requirements of section 136(1) of the LPA.

67. It follows, as it seems to me, that any deficiencies in the Notice will not have affected the validity of the Sale Agreements. By the time it entered into the Sale Agreements, the mortgage debt had been assigned to Polar in equity if not at law. That means that it was "entitled to receive and give a good discharge for the mortgage money" within the meaning of section 106(1) of the LPA and so that it could exercise the power of sale conferred by section 101 of the Act.

Powers of attorney

68. Mr Grant argued that Polar was entitled to enter into the Sale Agreements, not only on the grounds discussed above, but because it was able to exercise powers of attorney that Skelwith had conferred on Mr Armstrong. As Mr Grant pointed out, the Charge provided, by clause 11.1, for the appointment by Skelwith of the "Security Agent" as its attorney "in its name and on its behalf" to do a range of things (including sign agreements) where required for the "full exercise" of powers conferred on the "Security Agent" or deemed expedient by the "Security Agent" in connection with any disposition by the "Security Agent" of the charged assets. The expression "Security Agent" was defined in clause 1.2 of the Charge to include transferees and assignees and so (Mr Grant said) encompassed Polar, to which Mr Armstrong had by the Deed of Assignment assigned absolutely all his rights and interests under the Charge. In any event, clause 15.5 of the Charge expressly provided for the appointment of "each successor and assignee of the Security Agent" as Skelwith's attorney in the terms and for the purposes set out in clause 11. Polar was thus, Mr Grant submitted, able to take advantage of the powers of attorney that Skelwith had granted to the "Security Agent" and was to be taken to have done so. The Sale Agreements provided for Polar to sell "under its power of sale in Section 101 of the Law of Property Act 1925 *and all the powers and remedies available to [Polar] under the [Charge]*" (emphasis added). The latter words were, according to Mr Grant, apt to refer to the powers of attorney that Polar enjoyed.

69. As Mr Grant pointed out, powers of attorney are recognised to have a role in augmenting mortgagees' powers. A power of attorney may, in particular, be conferred on an equitable mortgagee to enable him to sell the legal estate: see Megarry & Wade, at paragraphs 25-043 and 25-044, and Fisher and Lightwood's Law of Mortgage, 14th ed., at paragraph 30.44.

70. One of Ms Stevens-Hoare's answers to Mr Grant's submissions on this part of the case was that, for there to be any question of Polar having exercised a power of attorney granted by Skelwith, the Sale Agreements would have had to indicate that Polar was acting for Skelwith. In that connection, she observed (a) that the Charge provided for the "Security Agent" to be Skelwith's attorney "in its name and on its behalf" and (b) that the Sale Agreements did not name Skelwith as a party or otherwise refer to Polar acting as Skelwith's attorney.

71. In response, Mr Grant relied on section 7(1) of the Powers of Attorney Act 1971, which largely reflects section 123 of the LPA. Section 7(1) states that, if the donee of a power of attorney is an individual, he may "execute any instrument with his own signature" and "do any other thing in his own name" "by the authority of the donor of the power" and "any instrument executed or thing done in that manner shall … be as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in the name of the donor". The implications of this section are, to an extent, controversial (see Bowstead and Reynolds on Agency, 20th ed., at paragraph 8-087). Whatever the section's correct construction, however, I cannot see that it can be applicable as such in the present case since the instruments at issue (viz. the Sale Agreements) were not executed by an individual but by Polar.

72. Mr Grant also took me to section 74 of the LPA, dealing with the execution of instruments by or on behalf of corporations. Subsections (3) and (4) refer to powers of attorney. They state:

> "(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness who attests the signature, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.
>
> (4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the instrument by signing it in the name of such other person or, if the instrument is to be a deed, by so signing it in the presence of a witness who attests the signature; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised."

73. To my mind, these provisions do not help Mr Grant. Section 73(3) allows someone authorised to convey property "in the name or on behalf of a corporation sole or aggregate" to execute the conveyance "by signing the name of the corporation" in the presence of a witness. Since no one signed either Sale Agreement in Skelwith's name, the subsection cannot be in point. Section 73(4) explains that a corporation with a power of attorney can appoint an officer to execute documents in the name of the donor of the power. In the present case, there is no suggestion that any officer of Polar was so appointed, and the Sale Agreements were not in fact signed in the name of the donor of the relevant powers (viz. Skelwith).

74. Finally, Mr Grant referred to section 47 of the Companies Act 2006. This empowers a company to authorise a person to act as its attorney to execute deeds and other documents on its behalf. It does not touch on whether (and, if so, when) an attorney can exercise his powers as such in his own name and without identifying the donor.

75. In all the circumstances, it seems to me that Ms Steven-Hoare must be right that the powers of attorney granted by the Charge could not validate the Sale Agreements. As I have explained, however, I have concluded that Polar was entitled to enter into those agreements on a different basis.

Conclusions

76. In my view, the Sale Agreements cannot be impugned on any of the grounds outlined in paragraph 31 of the particulars of claim. I shall, accordingly, both strike out that paragraph and dismiss the claimants' application for the defences to be struck out

and/or summary judgment in their favour. Unless, moreover, the claimants make and succeed in the proposed application to amend their particulars of claim. I shall dismiss the proceedings as against Flaxby Park.