

ENGLAND AND WALES / JUDGMENT

Mortgage Express v Lambert

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Neutral Citation Number: [2016] EWCA Civ 555 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE COUNTY COURT AT MAIDSTONE HIS HONOUR JUDGE SIMPKISS 1PA06205
Case No: B4/2015/2620 Royal Courts of Justice Strand, London, WC2A 2LL Date: 17/06/2016
Before: LORD JUSTICE LEWISON LADY JUSTICE GLOSTER and MR JUSTICE COBB

- ----- Between: MORTGAGE EXPRESS
- and - LAURA LAMBERT
- -----
- ----- Claimant/ Respondent Defendant/ Appellant Robert Denman
(instructed by Holden & Co LLP) for the Appellant Nicole Sandells and Nicholas Broomfield
(instructed by Eversheds LLP) for the Respondent Hearing dates: 25th May 2016
- -----

Judgment

Lord Justice Lewison: 1. 2. 3. In the autumn of 2007 Ms Lambert was in desperate financial straits. She was unemployed and had borrowed money on the security of her leasehold flat in Maidstone; but was unable to keep up with the repayments. She was facing the prospect of being ordered to give up possession of her home at the behest of her mortgagee, Blemain Finance Ltd. At the time she owed about £24,500 although her flat was worth about £120,000. Through the internet she made contact with a company called Annonna Ltd, which was owned and run by Mr Sinclair and Mr Clement. They visited Ms Lambert at the flat. They told her, to her surprise, that the flat was only worth £30,000 and offered to buy her lease of it for that sum. They also told her that she would be able to continue living there indefinitely, rent free during the first year and at a rent thereafter of £250 per month. It is, I think, clear on the basis of the judge's findings of fact that the agreement to sell and the promise that Ms Lambert could stay in the flat after the sale were part of a single bargain. She agreed to this proposal, and a firm of solicitors called Lovejoys acted on her behalf. The judge was very critical of the quality of the legal services that they provided. On 11 September 2007 Messrs Sinclair and Clement made an online application to Mortgage Express for a secured loan. They said in the application form that they were applying for a buy-to-let mortgage; that they were remortgaging, that the value of the flat was £120,000 and that they were applying for a loan of £102,000. On the following day Ms Lambert completed an "Overriding Interests Questionnaire" that her solicitors had sent her. The questionnaire informed

her that it was necessary for her to disclose all overriding interests of which she was aware, and then listed the kinds of interest that fell within that description. One of the matters listed was “rights of persons in occupation”. The form then said “If any of the above ARE applicable please enter details below”. Ms Lambert returned the questionnaire without disclosing any rights. On 13 September Lovejoys wrote to Ms Lambert. They told her that their own research had revealed that flats like hers were selling at £115,000 to £120,000; and pointed out the substantial difference between that and the sale price. They asked Ms Lambert to confirm that she had decided to sell at that price of her own free will and had not been pressured into selling at the price. Ms Lambert gave the confirmation by countersigning the letter. On 17 September Lovejoys wrote to Ms Lambert explaining some aspects of the contract. These included the requirement to give vacant possession. On 1 October Ms Lambert had a conversation with Lovejoys in which, according to their attendance note, she confirmed that she was happy to sell at an undervalue because her main concern was to pay off her loan. She also appears to have told Lovejoys something about an arrangement for a tenancy. The judge was rightly critical of Lovejoys’ failure to make any inquiry about the nature of the leaseback. Matters proceeded towards exchange of contracts, although as a result of Messrs Sinclair and Clement changing solicitors there was a delay in obtaining a revised offer of a mortgage from Mortgage Express. In consequence they completed the purchase with the aid of a bridging loan. The amount of that loan was £30,000. Contracts for the sale by Ms Lambert to Messrs Sinclair and Clement were exchanged on 4 October 2007 with the completion date the same day. The contract price was £30,000. Ms Lambert sold with full title guarantee; and clause 6 of the special conditions provided 4. 5. 6. that vacant possession would be given on completion. Clause 14 of the special conditions provided: “Any Occupier(s) who sign(s) this Contract gives his/her consent to the sale and agrees that vacant possession will be given on the Completion Date free from any estate rights or interest he/she may have in the Property (if any).” Ms Lambert signed her part of the contract. In fact completion took place on the following day. Immediately before completion, but after exchange of contracts, Lovejoys provided answers to requisitions on title, which answered the requisitions on the basis that vacant possession was to be given on completion. The answer to requisition 1 also confirmed that there had been no changes in the written information given by or on behalf of the seller before exchange of contracts. On completion Blemain’s secured loans were paid off out of the purchase monies with the aid of the bridging loan, and a small balance was paid to Ms Lambert. The TR1 form contained an acknowledgement by Ms Lambert that she had received the sum of £30,000 from the buyers; and a full title guarantee. Ms Lambert remained living in the flat. On 9 October 2007 Mortgage Express sent a new mortgage offer to Messrs Sinclair and Clement which they accepted. The amount of the loan was to be £102,000 plus £2,550 for fees. The offer also stated that the value of the property was £120,000. In conjunction with making the offer Mortgage Express also instructed Messrs Sinclair and Clement’s solicitors, Beetenson & Gibbon to act on their behalf. On 15 October Beetenson & Gibbon wrote to Mortgage Express. In their letter they said: “We ... write to advise you that the purchase of this property is to be completed with the aid of bridging finance and immediately after completion is to be remortgaged to yourselves. We would be obliged if you would kindly confirm that this is acceptable to yourselves. We would advise you that the purchase price of the property in this instance is £30,000 and we would appreciate your

requirements with regard to this. We can confirm that the Seller and Buyer are not related. We believe that as in the past you will simply require an indemnity insurance for an amount of the loan plus 15% complying with 5.12 of the CML Handbook.” The reference to the indemnity insurance was a reference to the risk that in the event of the seller’s bankruptcy her trustee in bankruptcy might apply to set aside the sale under the Insolvency Act 1986 as a sale at an undervalue. We were told that the indemnity insurance was provided although we have not seen it. On 22 October Beetenson & Gibbon sent a report on title to Mortgage Express. This incorporated by reference the certificate of title set out in the appendix to rule 6 (3) of the Solicitors’ Practice Rules 1990. This certified that Mortgage Express would obtain a good and marketable title free from any charges or onerous encumbrances, and that the purchase would be with vacant possession. The mortgage was completed on 26 October and the bridging loan was paid off out of the proceeds of the loan from Mortgage Express. The judge found at [48] and [50] that Mortgage Express was a bona fide purchaser for value and did not have notice of any equitable right of Ms 7. 8. 9. Lambert’s to set aside the sale to Messrs Sinclair and Lambert. On 21 January 2008 Messrs Sinclair and Clement were registered at HM Land Registry as proprietors of the lease, and the charge in favour of Mortgage Express was registered on the same day. In July 2008, with the consent of Mortgage Express, Messrs Sinclair and Clement transferred the lease into Mr Sinclair’s sole name. Mr Sinclair failed to keep up his repayments and in due course Mortgage Express appointed LPA receivers. In the meantime, Ms Lambert also fell into arrears with her rent, and the receivers began possession proceedings against her. The original Particulars of Claim asserted that the flat had been let to Ms Lambert on an assured shorthold tenancy, and that the current rent was £600 per month. The Re- amended Particulars of Claim pleaded in paragraph 6 (g) that on or about 5 October 2007 Mr Sinclair granted Ms Lambert an assured shorthold tenancy in exchange for £250 per month in rent. Paragraph 13 (g) of Ms Lambert’s Amended Defence also asserted that she had been granted an assured shorthold tenancy, and paragraph 16 of that pleading admitted paragraph 6 (g) of the Re-amended Particulars of Claim (apart from the amount of the rent). Mortgage Express were joined as party to the proceedings because Ms Lambert’s Defence and Counterclaim claimed that the transaction between her and Messrs Sinclair and Clement should be set aside on a number of different grounds. In the alternative she claimed a declaration that she was entitled to a leasehold interest in the flat “for a term of years (to be assessed) at a rent of £250 per month”. HH Judge Simpkins held that her claim to set the transaction aside on the grounds of undue influence and misrepresentation failed; but that the transaction should be set aside on the ground that it was an unconscionable bargain. The basis of his decision was that Ms Lambert was desperate, vulnerable, naïve and lacking in any business common sense or acumen; and that Mr Sinclair took unfair advantage of her by making her an offer which he knew to be dishonest. There is no challenge to that conclusion. 10. Somewhat surprisingly, in view of the agreed position on the pleadings, the judge found as a fact that there had been a written tenancy agreement, which has now been lost, for an unspecified term at a rent of £250 per month, which contained an express provision preventing the landlord from terminating it while Ms Lambert wished to live at the property. He went on to hold that that tenancy was converted into a 90 year lease as the result of the operation of section 149 (6) of the Law of Property Act 1925. There is no live challenge to that

conclusion. 11. By his order of 15 July 2015 the judge declared that: “1) as against Mr Sinclair [Ms Lambert] is entitled to have the sale of ... the property to Mr Sinclair and Mr Clement completed on 5 October 2007 set aside

- 2) such entitlement is not binding on Mortgage Express.” 12. He dismissed Ms Lambert’s counterclaim and made a possession order in favour of Mortgage Express. 13. The issues on this appeal concern the impact of the judge’s conclusions on the position of Mortgage Express. For that purpose it is necessary to consider the legal character of the right to set aside the transaction on the ground that it was an unconscionable bargain; how that fits into the scheme of land registration; and whether Ms Lambert is precluded from asserting her claim against Mortgage Express.
14. Mr Denman, who appeared for Ms Lambert, accepted in the course of his oral submissions that Ms Lambert is no longer entitled to pursue her alternative claim to a leasehold interest in the flat. Any entitlement to a leasehold interest at a rent of £250 per month, whether for life or for 90 years, must necessarily and implicitly be founded on the continuing effectiveness of the overall bargain between her and Messrs Sinclair and Clement. If that bargain is set aside as an unconscionable bargain, then her entitlement to the leasehold interest promised as part of that bargain must also perish. There is no objection in principle to a litigant pursuing alternative and inconsistent remedies; but the time must come when he or she must choose between them. As Lord Nicholls explained in *Tang v Capacious Investments Ltd* [1996] AC 514, 521: “Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies.” 15. 16. In our case the judge declared that the sale was liable to be set aside as against Mr Sinclair. The Appellant’s Notice seeks to vary that order, but only by a declaration that the charge to Mortgage Express is liable to be set aside. Accordingly Ms Lambert has elected to pursue that route, and is no longer entitled to rely on the alternative claim that she is entitled to a 90 year lease. It is, I think, clear enough that a right to set aside a transaction on the ground of misrepresentation or undue influence is classified in English law as “an equity” or a “mere equity”: *Bristol and West BS v Mothew* [1998] Ch 1, 22 (misrepresentation); *Bainbrigge v Browne* (1881) 18 Ch D 188 (undue influence); *Abigail v Lapin* [1934] AC 491, 505 (fraud). In *Mid-Glamorgan CC v Ogwr BC* (1993) 68 P & CR 1, 9 Hoffmann LJ referred in general terms to a “right to have a deed set aside” as a “mere equity”. There is no reason to suppose that the right to set aside an unconscionable bargain is any different, although we were not shown any authority directly on the point. Mr

Denman argued on Ms Lambert's behalf that that equity arose only on completion of the sale by Ms Lambert to Messrs Sinclair and Clements on 5 October

2007. I do not agree. In my judgment, as the name of the principle suggests, the right that Ms Lambert had was a right to set aside the bargain that she made with Messrs Sinclair and Clements, and she had that right on exchange of contracts. Test it this way. If Ms Lambert had refused to complete on the ground that the contract was an unconscionable bargain, and had applied for an order setting aside the contract on that ground, would the court have dismissed her claim as premature? I think not. 17. It is then necessary to consider how an equity of this kind fits into the scheme of the Land Registration Act 2002. Section 116 of that Act provides: "It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following—

- (a) an equity by estoppel, and
- (b) a mere equity, has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)." 18. It follows from this section that a mere equity (such a right to set aside an unconscionable bargain) is an interest capable of binding successors in title. That is not to say that it necessarily does: merely that it is capable of doing so. 19. Section 29 of the 2002 Act provides: "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
- (2) For the purposes of subsection (1), the priority of an interest is protected—
 - (a) in any case, if the interest— ... (ii) falls within any of the paragraphs of Schedule 3, ...
 - (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate." 20. Schedule 3 paragraph 2 describes the following interests: "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—
 - (a) ...
 - (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
 - (c) an interest—
 - (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and (ii) of which the person to whom the disposition is made does not have actual knowledge at that time..." 21. A right falling within this description is one of a number of rights traditionally referred to as overriding interests. Although that expression no longer finds a place in the legislation (except in relation to transitional provisions) it remains a convenient label. There are a

number of preliminary observations to be made about such interests: i) ii) iii) iv) v) The equitable doctrine of notice has no part to play in the system of registration of title. In the case of unregistered land, the purchaser's obligation depends upon what he has notice of - actual or constructive. In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material: *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 504 (Lord Wilberforce); *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655, [2015] 2 P & CR 15 at [46] (Sales LJ). Schedule 3 paragraph 2 does not create rights. It preserves rights that already exist. If the rights of the person in actual occupation are not under the general law such as to give any priority over the holder of the registered estate, there is nothing in Schedule 3 paragraph 2 which changes such rights into bigger and different rights: *Paddington Building Society v Mendelsohn* (1985) 50 P&CR 244, 248 (Browne-Wilkinson LJ). Unregistered rights which override registered dispositions under Schedule 3 paragraph 2 must be proprietary in character. This includes rights of the kind mentioned in section 116: *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52; [2015] 1 AC 385 at [58] – [59] (Lord Collins). It is not possible for a contracting purchaser, who has no legal estate before completion, to create proprietary rights of the character needed to qualify as overriding interests: *Southern Pacific Mortgages Ltd v Scott* at [79] (Lord Collins); [112] (Baroness Hale). In addition, if there is some rule of law which prevents the occupier from having a relevant right as against the purchaser before one comes to apply the actual occupation test, that may have the effect of preventing a finding that there is an overriding interest under the statute: *Wishart v Credit & Mercantile plc* at [47] (Sales LJ). 22. 23. 24. 25. 26. The general proposition that an interest belonging to a person in actual occupation overrides is subject to a number of exceptions. The general proposition will, therefore, be excluded if one or more of the exceptions applies. The judge thought that the exception in paragraph 2 (c) applied, but it is now common ground (rightly) that he was wrong about that. Ms Lambert's occupation would have been obvious on a reasonably careful inspection, with the consequence that exception (c) cannot apply. The judge wrongly thought that the lack of actual knowledge of Ms Lambert's right was a free-standing point, but it is common ground that that question only arises if Ms Lambert's occupation would not have been obvious on a reasonably careful inspection. An equity consisting of a right to rectification of a lease has been held to be a right capable of enduring through successive ownerships and hence of sufficient proprietary character to qualify as an overriding interest: *Nuridin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119. In *Bainbrigge v Browne* (a case of undue influence) Fry J said: "Then the next point which arises is this, against whom does this inference of undue influence operate? Clearly it operates against the person who is able to exercise the influence (in this case it was the father) and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the Court infers the equity. But, in my judgment, it would operate against no others; it would not operate against a person who is not shewn to have taken with such notice of the circumstances under which the deed was executed." There is no reason to suppose that a

right to have an unconscionable bargain set aside is any different. In principle, therefore, Ms Lambert's right to have the sale to Messrs Sinclair and Clements set aside is capable of being an overriding interest. If Ms Lambert's right was capable of being an overriding interest it must follow that it is a right that is proprietary in character. The mortgage was made by Messrs Sinclair and Clement. Since they were joint registered proprietors, it follows by reason of sections 34 and 35 of the Law of Property Act 1925 that they held the legal estate as trustees of land. As trustees of land they entered into the mortgage, and the capital monies were paid to them. As trustees they had all the powers of an absolute owner: Trusts of Land and Appointment of Trustees Act 1996 s. 6 (1). Once completion of the TR1 had taken place Messrs Sinclair and Clement were entitled to be registered as proprietors. Consequently, they were entitled to exercise owner's powers, which includes power to charge the estate at law with the payment of money: Land Registration Act 2002 s. 23 (1) (b); s. 24 (b). Section 26 of the Land Registration Act 2002 provides: "(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation—

(a) reflected by an entry in the register, or

(b) imposed by, or under, this Act.

(3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)." 27. There was no limitation in the register at the time of the mortgage; nor was there a limitation on the validity of the disposition imposed by the Act itself. If there were an overriding interest that interest would not affect the validity of the disposition consisting of the grant of the mortgage. The mortgage would take effect subject to it. But as s. 29 (3) makes clear, the purpose of the section is to prevent the disponee's title from being called into question. Miss Sandells submits on behalf of Mortgage Express that in effect this means that if a right is asserted as an overriding interest, and that right is a right to impugn the title acquired by the disponee, then section 26 defeats that right. How this section was intended to operate was illustrated by the joint Report of the Law Commission and HM Land Registry at the time of the bill which became the Land Registration Act 2002. Paragraph 4.10 of that report read: "First, the protection given to the disponee's title is complete and cannot be called into question. For example, if –

(1) W and X held land on a bare trust as nominee for Y, on terms that they could not make any disposition of the land without Y's written consent;

(2) Y, who was in actual occupation of the land held in trust did not protect her interest by the entry of a restriction; and

- (3) W and X fraudulently charged the land to Z without Y's consent in breach of trust; Z's charge would be valid and could not be called into question by Y. The fact that Y was in actual occupation at the time of the charge would not change this, because W and X's right to exercise owner's powers is taken to be free of limitation. It follows that Y could not claim that her beneficial interest under the trust as an overriding interest because her prior consent to the charge had not been obtained." 28. Paragraph 4.11 of the report also made it clear that the consequences of unlawfulness can be pursued "so long as these do not call into question the validity of the donee's title." This, in my judgment, provides strong support for Miss Sandells' submission that Ms Lambert is not able to call into question the title acquired by Mortgage Express. 29. In addition the effect of the grant of a mortgage by two (or more) trustees is given by section 2 of the Law of Property Act 1925. That provides, so far as relevant: "(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if — ... (ii) the conveyance is made by trustees of land and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of sub-section (2) of this section or independently of that sub-section, and the requirements of section 27 of this Act respecting the payment of capital money arising on such a conveyance are complied with..." 30. 31. 32. The opening words of section 2 (1) state in terms that notice of an interest is irrelevant to the question of overreaching. That these provisions can operate in the context of registered land is clear from the decision of the House of Lords in *City of London Building Society v Flegg* [1988] AC
54. What would amount to an overriding interest in the case of a sale by one trustee (as in *Boland*) is shifted from the land to the sale or mortgage proceeds if the sale or mortgage is made by two trustees and the capital monies are paid to both of them. Overreaching as a concept also features in sections 42 (1) (b) and 44 of the Land Registration Act 2002. It is clear that the conveyance was made by trustees of land; and it is also clear that the requirements of section 27 of the Act about payment of capital monies were complied with. The only remaining question, therefore, is whether Ms Lambert's interest was "capable of being overreached".
33. Mr Denman argued that section 2 (1) (ii) of the Law of Property Act 1925 did not apply because Ms Lambert's equitable right to set aside the unconscionable bargain was a "mere equity" falling short of an equitable interest. In making this submission he is on the horns of a dilemma. In order to fall within the terms of section 2 (1) the interest in question must be such as is capable of "affecting [the] estate". If it is not so capable, then section 2 (1) will not operate to overreach it. However, under section 29 of the Land Registration Act 2002 what is postponed to the disposition is "any interest affecting the estate". If the right to set aside the bargain is not an interest affecting the estate, it will not have been postponed to the mortgage. Thus Mr Denman's argument entails the proposition that for the purposes of the Law of Property Act 1925 Ms Lambert's right is not an equitable interest affecting the estate; but that for the purposes of the Land Registration Act 2002 it is. That is, perhaps, not a logically impossible submission but it would be surprising if it were right. 34. This court

considered the interplay between overreaching and overriding interests in *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256. Mrs Sabherwal was assumed to have had an interest in a house as a result of a proprietary estoppel: precisely the kind of interest contemplated by section 116 of the 2002 Act. Robert Walker LJ said: “On that basis, it would have been a remarkable result if those more precarious rights were incapable of being overreached, on a sale by trustees, under section 2(1)(ii) of the Law of Property Act 1925.” 35. He then considered a number of cases in which rights in equity were held not to have been overreached by a disposition. He concluded: “The essential distinction is, as the authors of *Megarry and Wade* note, between commercial and family interests. An equitable easement or an equitable right of entry cannot sensibly shift from the land affected by it to the proceeds of sale. An equitable interest as a tenant in common can do so, even if accompanied by the promise of a home for life, since the proceeds of sale can be used to acquire another home.” 36. 37. Likewise, as it seems to me, Ms Lambert’s claim against Mr Sinclair and Mr Clement can, at least in theory, shift to the proceeds of the mortgage which she could use to buy herself another home. That kind of right is not of the same character as an equitable easement (which was one of the rights considered by Robert Walker LJ) which makes no sense unless it is attached to the land. This authority, which is binding on us, directly contradicts Mr Denman’s submission. Nor do I accept Mr Denman’s submission that section 2 (1) of the Law of Property Act 1925 is limited to beneficial interests under trusts. It is clear from the opening words of that section that it applies to “any equitable interest” affecting the estate; and equitable interests are themselves widely defined by section 1 (8) of that Act. Moreover the express list of exclusions from overreaching in section 2 (3) (which includes such matters as easements, equitable charges protected by deposit of deeds, and estate contracts) demonstrates that the ambit of overreaching is wide, otherwise those exclusions would not have been necessary. 38. In addition the thrust of section 116 of the Land Registration Act 2002 is to assimilate mere equities of the kind that Ms Lambert claims and other more traditional equitable interests. As *Megarry & Wade* put it (*The Law of Real Property* 8th ed p188): “The effect, therefore, is that mere equities are treated in the same way as any other interest in registered land for the purposes of priority and are subject to the rules set out above.” 39. 40. If, therefore, Ms Lambert did have an interest that was potentially an overriding interest, in my judgment it was overreached by the grant of the mortgage by two trustees. Strictly speaking this makes it unnecessary to decide whether Ms Lambert’s right to have the bargain set aside fell within Schedule 3 paragraph 2 of the Land Registration Act 2002. But since we heard full argument on that question I will deal with it shortly. There is no doubt, on the facts, that inquiry was made of Ms Lambert before the disposition (i.e. before the grant of the mortgage to Mortgage Express) and that she did not disclose the right that she now asserts. Mr Denman argued that before exchange of contracts there was no right to disclose, because the bargain had not been made. In that submission I think he is right. However, after exchange of contracts and before completion of the TR1 the requisitions on title confirmed that there had been no change in the information previously provided. In addition the contract provided for vacant possession to be given on completion and Ms Lambert gave a full title

guarantee in the TR1. This title guarantee includes a presumption that she was disposing of the whole of her interest; that she had the right to dispose of the property as she purported to and that she would do all she reasonably could to give the person to whom the disposal was made the title she purported to give.

41. While I would accept that Ms Lambert could not reasonably have been expected to have attached the label “unconscionable bargain” to the right she now claims, I agree with Ms Sandells that it would have been reasonable for her to have disclosed that she was not in fact giving vacant possession; and that the lease would be encumbered in the hands of the purchasers by the tenancy that she had agreed to take. As the joint Report of the Law Commission and HM Land Registry explains at paragraph 8.60 this exception from the class of overriding interests “operates in effect as a form of estoppel.” If the occupier does not reveal her rights she cannot thereafter assert them. Mr Denman argued that Mortgage Express could not rely on Ms Lambert’s failure to disclose the true arrangement between her and Messrs Sinclair and Clement because Mortgage Express had notice of the undervalue as a result of the letter of 15 October informing them that the purchase price was only £30,000; and should have been put on inquiry that something mischievous was going on. I reject that submission. Schedule 3 paragraph 2 does not mention notice, and the philosophy underlying the Land Registration Act 2002 is that notice is irrelevant. In the context of the rights of persons in occupation of land whose title is registered, that proposition was authoritatively decided by the House of Lords in *Boland*. Moreover in *Abigail v Lapin* (which dealt with the Torrens system of land registration) Lord Wright, delivering the opinion of the Privy Council, said at p 506: “... it would be altogether inconsistent with [the policy of the Irish Register Act] to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. It is unnecessary here to add that when these questions need to be considered, it is always understood that the purchaser or mortgagee has not either express or constructive notice of the prior charge.” 42. In my judgment the same policy applies to the Land Registration Act 2002. The allegation that Mortgage Express had notice of Ms Lambert’s right was the sole reason advanced for disabling it from relying upon her failure to disclose the true arrangement. Since in my judgment that reason is not a good one, it follows that Ms Lambert did not have an overriding interest.
43. My conclusion on these two points make it unnecessary to decide whether a rule under the general law, which is or is akin to a form of estoppel, has the effect on our facts that Ms Lambert cannot assert against Mortgage Express what would otherwise be an overriding interest. I would prefer to leave that question to a case in which it matters. 44. However, for the reasons I have given I would hold that Ms Lambert did not have an overriding interest that bound Mortgage Express. Accordingly I would dismiss the appeal. Lady Justice Gloster: 45. I agree. Mr Justice Cobb: 46. I also agree.

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