

ENGLAND AND WALES / JUDGMENT

Jeffrey Orchard & Anor v Daljit Dhillon

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Neutral Citation Number: [2025] EWHC 834 (Ch) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES CHANCERY APPEALS LIST Case No: CH-2024-000193 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 08/04/2025 Before : MR JUSTICE MILES

- ----- Between :

(1) JEFFREY ORCHARD

(2) ANN ORCHARD

- and - Ms DALJIT DHILLON

- -----

- ----- Appellants/ Defendants Respondent/ Claimant Simon Howarth KC and Andrew Morrell (instructed by Sternberg Reed) for the Appellants/Defendants Christopher Snell (instructed on a Direct Access basis) for the Respondent/Claimant Hearing date: 7 March 2025

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 8 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. MR JUSTICE MILES MR JUSTICE MILES Approved Judgment Mr Justice Miles : Orchard v Dhillon 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. This is an appeal by Mr and Mrs Orchard against the order of His Honour Judge Duddridge (“the judge”) dated 25 July 2024. The order required the Orchards to give up possession of 56a Claudian Way, Grays, RM16 4QD (the “Property”) to Ms Dhillon and pay her £97,000 in respect of unpaid rent. The reasons for the order were given in an oral judgment of 25 July 2024 which followed the trial. I shall refer to the appellants as “the defendants” and the respondent as “the claimant” to reflect their positions in the court below. For the purposes of this appeal the facts may be taken from the full and clear judgment of the judge. The defendants were the registered freehold owners of the Property until 26 November 2010. By that date the defendants owed sums to creditors of between £74,000 and £78,000 secured against the Property. These sums included £64,000 owed to the Halifax under a mortgage taken out on 22 November 1995 and various judgment debts secured by charging orders. In 2010 the defendants entered into a sale and rent back agreement (the “SRB agreement”) with a company called Red 2 Black Ltd (“R2BL”). R2BL was founded in 2010 by Mr Gurpreet Chadda, the claimant’s then husband. Mr Chadda and the

claimant were the only and equal shareholders. As part of the SRB agreement, on 26 November 2010 the defendants signed a TR1 form to transfer the Property to R2BL. The purchase price stated on the form was £112,000. It was common ground that this price was 70% of a desktop valuation of the Property carried out by R2BL. The defendants also entered an assured shorthold tenancy with a rent of £700 a month. The application to register the transfer was made on 10 February 2011. R2BL was not authorised by the FCA to conduct sale and rent back business for the purposes of the Financial Services and Markets Act 2000 ("FSMA"), although Mr Chadda himself was authorised. On 29 November 2010 R2BL executed a deed of trust recording that it held the Property for Mr Chadda. It was common ground at the trial that this trust did not operate so as to make R2BL an authorised person to conduct sale and rent back business. In the event the defendants paid rent directly to Mr Chadda. The first payment was made on 29 December 2010. From the purchase price of £112,000 there should have been a surplus sum of about £32,000 to £36,000 payable to the defendants. The defendants denied that they received this sum. They gave evidence at the trial that they did not have bank MR JUSTICE MILES Approved Judgment Orchard v Dhillon 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. statements from 2010 and that their bank was unable to provide statements evidencing this. On 24 January 2011 the claimant became a director of R2BL. On 16 March 2011 the claimant became the sole shareholder and director of R2BL. She and Mr Chadda divorced in November 2011 and the judge accepted that the transfer of the R2BL shares to her was part of the divorce settlement. The judge held that the claimant and Mr Chadda believed that the transfer of Mr Chadda's shares to the claimant was sufficient to transfer the beneficial interest in the Property to the claimant. The defendants made their final payment to Mr Chadda on 28 February 2011. The judge found that there must have been a subsequent arrangement for the defendants to pay rent into an account in the name of R2BL. On 15 March 2013 the claimant purchased the Property from R2BL for about £115,000. This was less than the value of the Property. The judge held that the Property was worth about £170,000 in 2010 and there was no evidence of any fall in its value between then and 2013. The claimant owned and rented out several other properties. The Property was the only one that was subject to a sale and rent back agreement. From June 2013 the defendants paid rent to the claimant herself. On 5 February 2015 the claimant granted a charge over the Property to her father. He entered a unilateral notice in respect of that charge on 28 August 2015 and registered the charge as a legal charge on 22 April 2016. On 29 September 2015 an agency called Quick Property Move Lettings, acting on behalf of the claimant, wrote to the defendants enclosing a new Assured Shorthold Tenancy Agreement. The agreement increased the rent payable to £1,000. From October 2015 to June 2016 the defendants paid rent of £1,000 monthly to the claimant. R2BL was dissolved on 17 May 2016. On 7 June 2016 the claimant was made bankrupt. At the time of that order she was trading using the trading name Quick Property Move. On 22 August 2016 the Official Receiver's office emailed the defendants. They instructed the defendants to make no further payments to the claimant, in light of an apparent request from the claimant that the defendants should pay rent into an account in a different name. The judge held that it was possible that the defendants had made a payment to that different account in July 2016.

Subject to that, it is common ground that the defendants made no payments since June or July 2016. On 9 January 2019 the solicitors for the trustee in bankruptcy wrote to the defendants asking whether they continued to hold the rental amounts. They also requested that they make future payments and pay any outstanding balance to the trustee in bankruptcy. MR JUSTICE MILES Approved Judgment Orchard v Dhillon 26. 27. 28. 29. The defendants did not respond to that letter, or to chasing letters sent to them on 19 February 2020, 23 March 2020 and 26 October 2020. In about December 2020 Walker Morris, acting on behalf of the trustee in bankruptcy, wrote to the defendants. They stated that the Property had been owned by the claimant and had vested in the trustee in bankruptcy, to whom outstanding rent arrears of £49,000 were owed. They said that enforcement action would be brought if the sum was not paid. In February 2021 a representative from Walker Morris spoke to Mrs Orchard. According to a letter dated 6 October 2021 sent to the claimant's solicitors, in that conversation Mrs Orchard explained that she believed that the claimant was her landlord, that she and her husband had not heard from the claimant in a long time, and that they had not paid rent for several years. In March 2022 the trustee in bankruptcy removed a bankruptcy restriction which had been imposed over the Property. This was part of a settlement between the claimant and her trustee in bankruptcy. On 18 May 2022 the claimant served a notice on the defendants seeking possession under section 8 of the Housing Act 1988. This relied on the ground that there were arrears of rent more than two months overdue arrears at the time the notice was served. On 4 June 2022 the claimant began possession proceedings based on the same rent arrears. The proceedings in the County Court 30. 31. The claimant claimed possession of the Property on the grounds of unpaid rent, and payment of the unpaid rent. The defendants claimed (by way of defence and counterclaim) that the original SRB agreement ought to be set aside and claimed rescission. Their first ground was that there was a fraudulent misrepresentation by R2BL which had induced them to enter into the SRB agreement. Their second ground was that the effect of various provisions of FSMA, taken together with Article 63J of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "2001 Order"), was to render the SRB agreement unenforceable by the claimant and that they were entitled to recover the Property from her. They also raised other defences which do not matter for present purposes. 32. The statutory provisions relied on by the defendants are set out in more detail below, but in summary: i) ii) iii) Section 19 of FSMA defines "the general prohibition". It provides that no person may carry on a regulated activity unless they are an authorised person. Section 22 of FSMA provides that an activity is a regulated activity if it is carried on by way of business and is an activity of a specified kind. Section 26 of FSMA provides that an agreement made by a person carrying on a regulated activity contrary to the general prohibition is unenforceable against the other party and that property transferred under such an agreement is recoverable. MR JUSTICE MILES Approved Judgment Orchard v Dhillon iv) v) Section 28 of FSMA provides that a court may allow an agreement to be enforced which is otherwise unenforceable under section 26 and for property transferred under it to be retained, provided that it is just and equitable to do so in the circumstances of the case. Article 63J is a part of a statutory instrument which lists a

number of “specified kinds of activity” for the purposes of section 22 FSMA. It provides that a “sale and rent back agreement” (as defined) is such an activity. The judge was not satisfied on the balance of probabilities that there had been a fraudulent misrepresentation to the defendants in respect of the SRB agreement. As to the claims under FSMA the argument at the trial focused on the contention that the claimant had herself conducted activities contrary to the general prohibition and had done so by way of business. The judge concluded that the claimant herself did not carry out any activities subsequent to 2013 “by way of business” for the purposes of section 22 of FSMA. The claimant’s relevant activities were collecting rent, notifying the defendants of changes in the amount of the rent, notifying the defendants of changes in their landlord, and notifying the defendants of changes to the bank account to which payment should be made. The judge held that the activity of managing the tenancy as a landlord pursuant to a historic sale and rent back agreement did not constitute the carrying on by the claimant of the business of a sale and lease back agreement. He held that section 22 of FSMA was therefore not engaged and the SRB agreement could not be set aside under section 26 of FSMA. The other defences also failed. Accordingly the claimant’s claim was successful. The judge said this at [118]: 33. 34. 35. 36. 37. “For those reasons, I come to the conclusion that the Claimant was not carrying out the activities in question by way of business for the purposes of section 22, and therefore, even if Article 63J does go as far as [counsel for the Defendants] submitted, section 22 is not engaged. I come to that conclusion, I am bound to say, with something of a heavy heart, because it means that, sadly, neither of the Defendants’ main defences to the claim can succeed, in a case where, undoubtedly, there are reasons to be very critical, and perhaps even suspicious of the activities of [R2BL]. On the other hand, I have come to that conclusion on the basis of the evidence and the law as presented to me, even if it is one that I would perhaps have preferred not to have to come to.” 38. The order provided that the defendants were to give up possession of the Property on or before 22 August 2024 and pay £97,000 as outstanding rent. Grounds of appeal MR JUSTICE MILES Approved Judgment Orchard v Dhillon 39. 40. 41. 42. 43. 44. The defendants sought permission to appeal. The judge granted permission to appeal on one ground (now ground 1) and stayed the other provisions of the order pending the determination of that appeal. Ground 1 is that the Court erred in law in its interpretation of the phrase “carried on by way of business” in section 22 of FSMA. Permission to appeal on two further grounds was granted by the order of Richard Smith J dated 21 November 2024. Ground 2 is (to summarise) that the judge erred in holding that the initial SRB agreement between R2BL and the defendants was not relevant to the availability as against the claimant of a remedy under section 26 of FSMA and/or could be divorced from the activities conducted by the claimant herself. The judge should have found that the SRB agreement was unenforceable and that the claimant “cannot rely on the purchase by her of the property from [R2BL], because [R2BL] did not have title to the property owing to its breach of section 26 and was therefore not able to pass good title to her and/or because of her knowledge of and/or complicity in the wrongdoing of [R2BL]”. As explained below at the hearing the argument was advanced on the basis of arguments about the ability of R2BL to give good title rather than on the basis that claimant knew of or was

complicit in R2BL's breach. Ground 3 is (to paraphrase) that the judge failed, in consequence of the errors identified in ground 1 and/or ground 2 above, to consider what order ought to be made on the claim, having regard to the matters contained in grounds 1 and/or 2 above, and the provisions of sections 26 and 28 of FSMA. The FSMA provisions 45. Before turning to the arguments in greater detail, the relevant parts of FSMA should be set out more fully. 46. Section 19 provides: "19.— The general prohibition.

- (1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—
 - (a) an authorised person; or
 - (b) an exempt person.
- (2) The prohibition is referred to in this Act as the general prohibition." 47. Section 22 provides materially: "22.— Regulated activities MR JUSTICE MILES Approved Judgment Orchard v Dhillon
- (1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and—
 - (a) relates to an investment of a specified kind; or
 - (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind. [...]" 48. Section 26 provides: "26.— Agreements made by unauthorised persons.
 - (1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
 - (2) The other party is entitled to recover—
 - (a) any money or other property paid or transferred by him under the agreement; and
 - (b) compensation for any loss sustained by him as a result of having parted with it.
 - (3) "Agreement" means an agreement—
 - (a) made after this section comes into force; and
 - (b) the making or performance of which constitutes, or is part of, the regulated activity in question.
 - (4) This section does not apply if the regulated activity is accepting deposits." 49. Section 28 provides: "28.— Agreements made unenforceable by section 26 or 27. (1) This section applies to an agreement which is unenforceable because of section 26 or 27, other than an agreement entered into in the course of carrying on a credit- related regulated activity.
 - (2) The amount of compensation recoverable as a result of that section is—

- (a) the amount agreed by the parties; or
- (b) on the application of either party, the amount determined by the court. MR JUSTICE MILES Approved Judgment Orchard v Dhillon
- (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–
 - (a) the agreement to be enforced; or
 - (b) money and property paid or transferred under the agreement to be retained.
- (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must–
 - (a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or
 - (b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).
- (5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.
- (6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition. If the person against whom the agreement is (7) unenforceable–
 - (a) elects not to perform the agreement, or
 - (b) as a result of this section, recovers money paid or other property transferred by him under the agreement, he must repay any money and return any other property received by him under the agreement.
- (8) If property transferred under the agreement has passed to a third party, a reference in section 26 or 27 or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.
- (9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27.” 50. The 2001 Order specifies kinds of activity for the purposes of section 22 of FSMA “and accordingly any activity of one of those kinds, which is carried on by way of business, and relates to an investment of a kind specified by any provision of Part III and applicable to that activity, is a regulated activity for the purposes of the Act” (see article 4(1)). MR JUSTICE MILES Approved Judgment Orchard v Dhillon 51. Art 63J of the 2001 Order headed “Entering into and administering regulated sale and rent back agreements” provides materially: “(1) Entering into a regulated sale and rent back agreement as an agreement provider is a specified kind of activity.

- (2) Administering a regulated sale and rent back agreement is also a specified kind of activity when the agreement was entered into on or after 1st July 2009.
- (3) In this Chapter—
 - (a) a “regulated sale and rent back agreement” is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into—
 - (i) the arrangement is one under which a person (the “agreement provider”) buys all or part of the qualifying interest in land (other than timeshare accommodation) in the United Kingdom from an individual or trustees (the “agreement seller ”); and (ii) the agreement seller (if the agreement seller is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so; but such an arrangement is not a regulated sale and rent back agreement if it is a regulated home reversion plan;
 - (b) “administering” a regulated sale and rent back agreement means any of—
 - (i) notifying the agreement seller of changes in payments due under the agreement, or of other matters of which the agreement requires the agreement seller to be notified; (ii) taking any necessary steps for the purpose of making payments to the agreement seller under the agreement; and (iii) taking any necessary steps for the purposes of collecting or recovering payments due under the agreement from the agreement seller, but a person is not to be treated as administering a regulated sale and rent back agreement because that person has, or exercises, a right to take action for the purposes of enforcing the agreement (or to require that such action is or is not taken). MR JUSTICE MILES Approved Judgment Orchard v Dhillon
- (4) For the purposes of paragraph (3)—
 - (a) the reference to a “qualifying interest” in land—
 - (i) in relation to land in England and Wales, is to an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity; [...]
 - (c) “related person” in relation to the agreement seller or, where the agreement seller is a trustee, a beneficiary of the trust, means—
 - (i) that person's spouse or civil partner; (ii) a person (whether or not of the opposite sex) whose relationship with that person has the characteristic of the relationship between husband and wife; that person's parent, brother, sister, child, (iii) grandparent or grandchild.
- (5) For the purposes of paragraph (3)(a)(ii), the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.

- (6) In this Order—
- (a) references to entering into a regulated sale and rent back agreement as agreement provider include acquiring any obligations or rights of the agreement provider, including the agreement provider's interest in land or interests under one or more of the instruments or agreements referred to in paragraph (3)(a); but
 - (b) in relation to a person who acquires any such obligations or rights, an activity is a specified kind of activity for the purposes of articles 25E(1)(b) and 53D(b)(ii) and paragraph
- (2) only if the agreement was entered into by the agreement provider (rather than the obligations or rights acquired) on or after 1st July 2009.
- (7) Accordingly, references in this Order to an agreement provider, other than in paragraph (6), include a person who acquires any such obligations or rights.” Ground 1 52. Ground 1 concerns the judge’s finding that the claimant did not undertake any relevant activities by way of business. The judge found that even if the claimant had MR JUSTICE MILES Approved Judgment Orchard v Dhillon undertaken some regulated activities in relation to the Property (by giving instructions for the payment of rent etc.) she had not done so “by way of business”. 53. There are many decisions of the higher courts setting out the approach of the appellate court to findings of fact. Lewison LJ recently gave a helpful summary in McCarthy v Jones [2023] EWCA Civ 589 at [18] to [19]: I summarised the principles applicable to such appeals “18. in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5,
- [2014] FSR 29 and Volpi v Volpi [2022] EWCA Civ 464,
- [2022] 4 WLR 48. In the first of these cases I said at [114] (omitting citations of authority):
- "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include:
- (1) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
 - (2) The trial is not a dress rehearsal. It is the first and last night of the show.
 - (3) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
 - (4) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
 - (5) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

- (6) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done." 19. In the second, I said at [2]: "... the following principles are well-settled:
- (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. MR JUSTICE MILES Approved Judgment Orchard v Dhillon (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached. (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
- (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable. (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract." "
54. 55. 56. 57. These principles apply as much to conclusory or secondary findings as they do to primary facts. Counsel for the defendants contended that the judge had misdirected himself in law about the legal test. He relied on the decision of Newey J in *Helden v Strathmore*
- [2010] EWHC 2012 (Ch) at [85] and [86]. In those paragraphs Newey J said that the test could be satisfied by an activity of a specified kind which is carried on in the course of a wider business, not limited to undertaking that activity. The judge in the present case referred to these passages from *Helden v Strathmore*. He said that the court must consider the precise activities that were carried out within their wider context, to determine whether they are caught by section 22. The judge identified the relevant activities in paragraph 111. He said that the relevant activities after she became the owner of the Property were, first, collecting the rent, secondly, notifying the defendants of the changes in the amount of the rent, and, thirdly, notifying the defendants of changes in their landlord, and, fourthly, arguably, notifying the defendants of changes to the bank account to which payment should be made. MR JUSTICE MILES Approved Judgment Orchard v Dhillon 58. 59. 60. 61. The judge then said that these were activities which might be carried on by any landlord or letting agent. He held that they are inherent in a tenancy agreement. At paragraph 114 he concluded that the shares in R2BL were transferred to the claimant as part of a divorce settlement, rather than a commercial arrangement. He also accepted the claimant's

evidence that the arrangement in respect of the Property was the only sale and rent back arrangement that R2BL had. He noted that the claimant owned other rental properties but again he accepted that there were no other sale and rent back arrangements. He concluded at paragraph 116 that she was merely a landlord using the rents as part of her income and that this was not sufficient to amount to her carrying on business within section 22. Counsel for the defendants contended that the fact that the claimant had no other sale and rent back properties was irrelevant and that her dealings with her property were part of her business. I do not agree. The judge had to decide whether her conduct in relation to the Property was by way of business. He essentially found that she had acquired the Property (through two steps) as a result of her divorce settlement and that she then held the Property as an investment from which she derived a personal income. In my judgment it was relevant when assessing the probabilities of her case to consider whether she had other similar properties. If it had been the case that she had engaged in other sale and rent back transactions it would have been more likely that she had done so by way of business (rather than merely as a personal investment). It would not have been determinative, but it would have been relevant. Counsel for the defendants contended that the judge wrongly divided the arrangements into a sale element and a rent back element and that he thereby erred in principle. I do not agree. The judge recognised the connection between the sale and the rent back. Indeed he found that there had been a SRB agreement at the outset. In the relevant part of the judgment he properly analysed the relevant parts of the conduct alleged to have been by way of business and addressed them in turn. There was no error in his approach in this regard. That leaves the question whether the judge's factual finding was available. While the meaning of a statute is a matter of law, the phrase "by way of business" is one of ordinary language. The question whether a given case falls on one or other side of the relevant concept is an issue of fact. I do not think that the judge followed the wrong principles or reached a conclusion that was not available to him on the evidence. 62. For these reasons, ground 1 fails. Ground 2 63. In support of this ground, Counsel for the defendants argued as follows. i) ii) By entering the SRB agreement with the defendants, R2BL was conducting an activity specified by Art 63J and did so by way of business. This was a regulated activity under section 22 of FSMA. Since R2BL was not authorised, the case fell within the general prohibition in section 19. It follows that, by reason of section 26 of FSMA, the SRB agreement was unenforceable against the defendants and prima facie are entitled to recover property transferred under it. MR JUSTICE MILES Approved Judgment Orchard v Dhillon iii) iv) v) This statutory right of recovery (which extends to the Property) binds the claimant as a successor in title to R2BL unless, under general principles of law, she takes it free of that right. This issue is one of title and priorities. Since the Property is registered the issue is governed by the Land Registration Act 2002 ("the LRA"). The entitlement of the defendants to recover their property (by reversing the transfer of title to R2BL) constitutes a mere equity for the purposes of section 116 of the LRA. Under that section it therefore "has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effects of dispositions on property)." The equity arose when

the property was transferred pursuant to the SRB agreement. The rules on priority did not require the defendants to protect their interest by notice on the land register since they were in actual occupation of the Property: see section 29 and Sch. 3, paragraph 2 of the LRA. 64. Counsel for the defendants also advanced the argument that the effect of Art 63J(6) of the 2001 Order is that a person who acquires any obligations or rights of the original offending party to a sale and rent back agreement (known as “the agreement provider”) steps into the shoes of the agreement provider and becomes subject to the statutory obligations of an agreement provider to restore property transferred under the sale and rent back agreement. This argument was not advanced in the grounds of appeal or the skeleton argument in support. 65. Counsel for the claimant argued in outline as follows. i) ii) iii) iv) v) The priorities point now being advanced by the defendants was not argued by them in the court below and they should not be allowed to take it now. R2BL has never been a party to the proceedings and no claim has been advanced against it. This is another objection to the defendants’ counterclaim. Assuming they are allowed to advance the point, it is wrong in law. First, any claim under section 26 of FSMA (read together with section 28) is restricted to claims for recovery against R2BL. There is no claim against successors in title: see the decision of Hamblen J in *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm). If this is wrong, any entitlement of the defendants under section 26 only arises under statute and this cannot be regarded as an equity (or a mere equity). The concept of a mere equity is restricted to cases where a right to rescind or rectify a contract arises in equity. Accordingly there is no question of the defendants having an interest for the purposes of section 116 of the LRA. The argument based on Art 63J was not made in the grounds of appeal or at the trial and it cannot be advanced. In any case it is wrong as a matter of construction of the provision. 66. Logically the first question is whether the points now advanced by the defendants are open to them. I shall then address the substance of the arguments. MR JUSTICE MILES Approved Judgment Can ground 2 be advanced on appeal? Orchard v Dhillon 67. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ summarised the guidance which the appeal court applies in deciding whether a new point may be advanced on appeal: “16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial ...
18. Third, even where the point might be considered a “pure point of law”, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs.” 68. 69. 70. 71. Counsel for the claimant submitted that the point now run was not raised below and would require new evidence and that, had it been run, the trial

would have been different. He also argued that even if the point can be considered a pure point of law it should not be entertained as the claimant cannot be adequately protected in costs. I start with the pleadings. In the Amended Defence and Counterclaim (“ADC”) the defendants advanced a number of defences and counterclaims. As already explained, these included rescission for fraudulent misrepresentation and breaches of FSMA. The defendants also contended that the claimant held the property on trust for them. The case in misrepresentation was that R2BL had given the defendants the impression that the product being sold to them was an equity release scheme and that they would not lose the property. At paragraph 33 the defendants alleged that the transfer of the property to the claimant in May 2013 was not an arm’s length transfer and was not done in good faith. The particulars included the allegation that the claimant was fully aware of the nature of the prior dealings between R2BL and the defendants. Paragraph 34 alleged that “any findings made in respect of the transactions in or around 2010 are binding upon the Claimant as successor in title to [R2BL].” It also alleged that the claimant was not a bona fide purchaser for value without notice. 72. Paragraph 41 alleged that by reason of R2BL’s misrepresentations the defendants were and are entitled to rescind the agreement with R2BL and the transfer of the property to R2BL. MR JUSTICE MILES Approved Judgment Orchard v Dhillon 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. Paragraph 42 alleged that the general prohibition with respect to “regulated activities” under section 19 of FSMA “applies to the claimant’s practices so as to make the Agreements unenforceable pursuant to section 26 FSMA”. Paragraph 43 alleged that the Agreement reached in November 2010 was on its true construction a sale and rent back agreement. Paragraph 45 alleged that the arrangement between R2BL and the defendants was a sale and rent back agreement pursuant to paragraph 63J of 2001 Order. Paragraph 46 alleged that R2BL was carrying on a regulated activity under FSMA by way of business and that R2BL was not an authorised person for the purposes of section 19 of FSMA. Paragraph 46 alleged that “the claimant adopted the agreement by being fully aware of its contents and effects.” Paragraph 47 alleged that “as [R2BL] reached the Agreement in contravention of section 19 FSMA, and further the claimant adopted the Agreement, the Agreement is accordingly unenforceable pursuant to section 26 FSMA.” Paragraph 48 alleged that to the extent that section 28(3) FSMA is relied on, it would not be just and equitable to enforce the agreements or allow the claimant to retain funds under them. Paragraph 64 pleaded that the defendants sought rescission of the agreement and the avoidance of the transfer of the property on the basis of (inter alia) fraudulent misrepresentation or non-compliance with FSMA. Paragraph 65 alleged that if there was either fraudulent misrepresentation or a breach of FSMA and the claimant was not a bona fide purchaser without notice of the claimant’s causes of action as set out in paragraph 64, then from the time of the original transfer R2BL held the property on trust for the defendants and, on the transfer to the claimant in 2013, it was held by her on trust for the defendants. In the Amended Reply and Defence to Counterclaim (“ARDC”) the claimant raised a number of responses to the defendants’ case. These included the following. The claimant denied that R2BL had made any misrepresentations. By paragraph 28 (iii) the claimant contended that any claim in rescission against the claimant would have to be equitable (and not at common

law) since the claimant was registered as the proprietor of the Property. Paragraphs 3 and 28 alleged that the claim for rescission for misrepresentation was barred by analogy with section 3 of the Limitation Act 1980. As to the FSMA claims, the claimant denied that she was in breach of any of the provisions of FSMA. Paragraph 33 alleged that insofar as the court found that the agreements between R2BL and the defendants were unenforceable pursuant to FSMA, then it was just and equitable in all the circumstances to allow the agreement to be enforced by operation of section 28(3) of FSMA: “[a]ll the objectives of the sale and rent back legislation have been achieved in this case”. Paragraph 33 (iii) alleged that any claim to recover money under section 26 of FSMA was time barred. MR JUSTICE MILES Approved Judgment Orchard v Dhillon 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. Paragraph 45 stated that in so far as the defendants sought to invoke the Court’s equitable jurisdiction to claim rescission or that a trust existed by operation of law, the claimant would aver: (i) that rescission is excluded because the defendants had waived their right to rescission; restitution in integrum was impossible; and rescission would be inequitable in all the circumstances; and (ii) that the doctrine of laches applies in circumstances where the defendants have failed to exercise their putative equitable rights for over 12 years. The pleadings did not contain any reference to the LRA or the concepts of a mere equity or an overriding interest. Nonetheless, the following points were in issue on the pleadings. First, the defendants relied on an alleged breach of FSMA by R2BL and, separately, on an alleged breach of FSMA by the claimant. Second, the defendants sought rescission of the 2010 agreements and the setting aside of the transfer of the property made in 2010. This was based on misrepresentation and breach of FSMA. Third, the defendants alleged that the claimant as a successor in title was bound by their claims in respect of the property. They put this in various ways, saying that the claimant had “adopted” the 2010 arrangements, was on notice of the facts giving rise to the claims against R2BL, and that the property was originally held on trust for the defendants and that this trust bound the claimant. Fourth, the claimant raised various defences to the rescission or recovery of property claims including reliance on section 28(3) of FSMA, the impossibility of counter- restitution and laches. It therefore appears to me that the essential factual elements of the argument now being advanced were in issue on the pleadings. Counsel for the defendants accepted that the argument now made on appeal was not the way the case was advanced before the judge at the trial. The defendants’ primary focus at trial was that the claimant had herself conducted a regulated activity by way of business. This argument is indeed recorded in the judgment. The judge rejected this contention, holding that the claimant’s conduct in acquiring the property, notifying the changes to the account for rent payments to be made, collecting the rent, and entering the second assured tenancy agreement was not conduct on her part by way of business. The appeal on this point is the subject of ground 1 (see above). The case now advanced on appeal is that the agreements between the defendants and R2BL were liable to be set aside or rescinded under section 26 of FSMA; that the right of the defendants constituted a mere equity; and that it was binding on the claimant under the LRA as an overriding interest protected by actual occupation of the property. As already noted, counsel for the claimant submitted that the trial would have taken a different course and different evidence would

have been adduced. In particular he submitted that (a) the claimant would have explored the issues of delay and MR JUSTICE MILES Approved Judgment Orchard v Dhillon 96. 97. 98. 99. 100. acquiescence in greater detail; (b) questions of third party intervention, including concerning the charge in favour of the claimant's father, would have been explored. As to (a), in my judgment the issues of delay and acquiescence were in any event in play at the trial. Laches was specifically pleaded by the claimant. The defendants were seeking rescission by reason of fraud, and any issues of delay were therefore in play. As noted by counsel for the claimant, the primary time-related defence of the claimant in response to the deceit counter-claim was limitation (a point on which the claimant succeeded). It followed that the judge did not need to consider delay in relation to that part of the claim. But I do not think that the evidence at trial would have taken a different course. As to (b), counsel for the defendants accepted that if they succeeded on ground 2 there would have to be a further hearing to determine the consequential questions about the claim to rescind. To that extent a further hearing will be needed if the argument succeeds. This however appears to me to be a hybrid case where the essential factual building blocks of the case were pleaded but the principal way the case was argued at the trial by counsel for the defendants (i.e. that the claimant herself had entered agreements in breach of the general prohibition in the course of business) resulted in the judge not considering that findings were needed on some further points. This was because of the rather diffuse and confused pleading of the ADC and the presentation of the argument at the trial. It appears to me in these circumstances that the fact that a further hearing may be required to address some matters which the judge did not cover in his judgment is not a determinative reason for preventing the defendants from running ground 2 on appeal. Overall I am satisfied that the argument advanced by the defendants on this appeal would not have required further evidence on the matters now advanced or have led to the trial following a different course had counsel for the defendants fully explained the defendants' pleaded case to the judge. The way the case was argued at the trial had the result that the judge, entirely understandably, did not make findings on some points raised by the pleadings. In my judgment the whole field of factual disputes relevant to ground 2 was raised by the pleadings, albeit if the appeal is allowed on this ground a further hearing will be required to determine the issues which the judge considered he did not need to address (given the way the case was argued before him). I emphasise that it is entirely understandable that the judge proceeded as he did. The defendants did not run the argument that they had the right to have the transfer of the property set aside as a mere equity or that this was an overriding interest under the LRA. At the trial the defendants emphasised the case that the claimant had herself conducted a regulated activity by way of business. The judge rejected this contention, holding that the claimant's conduct in acquiring the property, notifying the changes to the account for rent payments to be made, collecting the rent, and entering the second assured tenancy agreement was not conduct on her part by way of business. It does not appear from the materials available to me that counsel for the defendants pressed the more straightforward argument that the defendants were entitled to the return of the property as against R2BL and that the claimant, as the purchaser of the property, was bound by their rights. On the

other hand, as explained above, it appears to me that MR JUSTICE MILES Approved Judgment Orchard v Dhillon the essential elements of the defendants' claim were pleaded (even if the legal consequences were not spelt out).

101. Ground 2 does of course advance a legal analysis not run below. Counsel for the claimant did not suggest that he had had insufficient time to address them for the purposes of the appeal or that the claimant had been led into thinking that they would not be taken. As to the potential for costs orders reflecting the manner in which the point has been run, there is sufficient equity in the Property to cover any such orders.
102. Counsel for the claimant advanced a separate reason why the point cannot be advanced on appeal, namely that the defendants have never joined or brought a claim against R2BL. I do not think that this argument is determinative. R2BL has been dissolved and therefore does not exist. Since the defendants are only seeking relief against the claimant (by way of counterclaim) it is not evident that they were required to take steps to restore R2BL. There have been cases where an innocent party has been able to rescind a transaction for fraud and reclaim property from a third party transferee even where the original party to the transaction has disappeared and cannot be traced. The position of a party which no longer exists may be considered analogous. It appears to me that this is not a determinative issue but that, if the appeal succeeds on ground 2, the issue should be remitted to the judge for determination. 103. In all the circumstances I have decided that in accordance with the requirements of the overriding objective I should allow ground 2 to be advanced on this appeal. Ground 2: analysis and conclusions 104. 105. The judge found that, when it entered into the SRB with the defendants, R2BL was conducting a regulated activity by way of business and that it was not authorised to do so. It follows that as between R2BL and the defendants section 26 was engaged. The issue between the parties concerned the consequences of the transfer of the Property by R2BL to the claimant. Section 26(2) of FSMA provides that property transferred under an agreement made by a person in contravention of the general prohibition (who I shall call "the offending party") is recoverable by the other party. The other party (who I shall call "the innocent party") has a statutory entitlement to recover the property automatically.
106. On a natural reading of section 26(2), the entitlement to recover the property has proprietary consequences. The innocent party is able to say, "that is my property, restore it to me". 107. Section 26 has of course to be read together with section 28. Section 28(3) empowers the court, if satisfied that it is just and equitable in the circumstances, to allow property transferred under the agreement to be retained. Subsection (7) provides for a duty of counter-restitution by the innocent party. Subsection (8) provides that if property transferred under the agreement has passed to a third party a reference in section 26 to that property is to be read as a reference to its value at the time of its transfer under the agreement.

108. Read together, sections 26 and 28 render an offending contract voidable but not void. Property is treated as passing under the contract, subject to the court's power to grant MR JUSTICE MILES Approved Judgment Orchard v Dhillon 109. 110. 111. relief under section 28. This is supported by section 28(3)(b) which provides that the court may allow "... property ... transferred under the agreement to be retained". It appears to me that, reading sections 26 and 28 together, the proprietary entitlements of the innocent party are intended to be analogous to those of a party to a contract which is liable to be set aside for fraud, undue influence, or other grounds. Where such grounds exist the original owner of the property, who has transferred it under a contract, has the right to call for the return of the property by rescinding the transfer. This is a personal right. It does not, until it has been effectually exercised, give the original owner any continuing proprietary interest in the property. Once effectually exercised it has the effect of revesting the property in the original owner. Until then the title of the transferee is complete but is defeasible. It appears to me that sections 26 and 28, while not spelling all of this out, are to be read against the background of this established legal framework. The question raised by this appeal is whether the rights of the innocent party under section 26 of FSMA are capable of binding third party transferees (subject to defences of bona fide purchase and so forth). In *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm) Hamblen J (as he then was) held that the combined effect of sections 26 and 28 was that a claim by the innocent party under section 26 could only be brought against the offending party. In that case the claimants had invested in tax reduction schemes by becoming members of partnerships. The tax schemes failed and the investors brought various claims against a number of defendants, including the promoters and marketers of the schemes, and the lawyers who had assisted in setting up and administering the schemes. The claims were brought in contract, deceit, breach of fiduciary duty, dishonest assistance and pursuant to FSMA. The FSMA claims included claims under section 26 against the defendants as direct counterparties to the contracts entered into as part of the scheme "and/or as recipients of money paid under those contracts".
112. Hamblen J decided that section 26 did not allow a claim against persons other than the original parties to the agreements covered by the provision. He decided that, as a matter of statutory construction, section 26 did not allow a claimant to claim against a third party recipient of money paid under such a contract.
113. Hamblen J based this conclusion on a number of textual indications. He noted that section 26 itself referred to the position of the party in contravention of the general prohibition and the "other party". He read section 26(2) as giving the "other party" rights against the contravening party. Section 28(5) provided that, when considering relief under section 28(3), the Court should have regard to whether the offending party reasonably believed he was not contravening the general prohibition by making the agreement. He considered it would be absurd if the offending party could rely on that provision but a third party recipient could not. He also read section 28(8) as supporting the view that where the relevant property has been sold the rights of the innocent party is restricted to its value rather than the property itself. At [1236] he observed that the consequence of the claimants' argument was

remarkably far reaching as it would allow recovery against a third party purchaser for value of the property who had acted in good faith. He concluded at [1237] that the claim under section 26 could not be made against anyone other than the offending party. MR JUSTICE MILES Approved Judgment Orchard v Dhillon 114. I am unable to agree with the observation at [1236] that the entitlement to recover property given by section 26(2) would be defeated by the mere transfer of the property to a third party. It appears to me that the entitlement of the innocent party under section 26(2) is intended to be an enforceable right to recover specific property. It is subject to defeasance under the power of the court in section 28 to decide that it is just and equitable for the transfer to be left undisturbed. I see no reason to conclude that the right of recovery given by section 26 should automatically be defeated by a transfer of that property by the offending party to a third party. It appears to me that sections 26 and 28 should be read against the background of general principles of law governing title to property (which includes the ability of a party under a contract to seek to set aside the contract and reclaim property passing under it). It appears to me that sections 26 and 28 fall to be read against the background of the law of rescission and they make greater sense (and promote legal coherence) if the right given by section 26(3) is capable of binding third parties (subject to defences of bona fide purchaser etc.). Indeed, that the power of the court under section 28 to determine that transfers of the property should be left undisturbed where this is just and equitable, can be seen to place the third party defence on a statutory footing.

115. As to this, one of the key aims of FSMA is consumer protection: see, e.g., *Adams v Options Sipp UK LLP* [2021] EWCA 474 at [115]. FSMA is to be construed in a way which enhances consumer protection. In my view, this supports the conclusion that the right to recover property under section 26 is capable in principle of binding third parties. The contrary view, that recovery can only be claimed against the original counterparty/transferee, would dilute the protection given to consumers. 116. There is a close analogy with the case of an executed contract under which B has transferred property to A, where B then seeks to impugn the contract on the grounds of fraud. Assume that A has transferred the property to C. If B seeks to recover the property from C, there will be two broad sets of issues. First there is the ability of B to impugn the contract for fraud and whether there would be any bars to rescission as between them (ignoring at this stage the transfer to C). Then, second, there is the question whether B's claims are defeated by the transfer of the property to C. The first group of issues will potentially include such matters as delay and affirmation, and the ability of B to make counter-restitution. The second group of issues will be concerned with priority issues, which turn on such matters as value, good faith and notice (or, in the case of registered land, protection on the register or by actual occupation).
117. Using this schema and returning to the construction of sections 26 and 28, it appears to me that the issues of construction identified by Hamblen J are concerned with the position as between A and B, and not with those arising from the transfer to C. Hence, section 28(5) requires the court to consider whether A reasonably believed he was not contravening the general prohibition (and the court does not consider the position of C). There is no absurdity

in that; it makes sense that the focus should be on the state of mind of A. It also makes sense that if relief would have been granted to A, the claim against C will also fall away. In any case section 28(3) does not limit the court to the matters set out in section 28(5): it requires the court to consider what is just and equitable. It appears to me that this would allow the court to consider the position of C.

118. As to section 28(8) I would construe that as identifying the date of the value of the property as between A and B where A has transferred it to C. If the property has been MR JUSTICE MILES Approved Judgment Orchard v Dhillon transferred to C it follows that as between A and B, B's claims fall to be assessed by reference to the value of the property at the date identified in the subsection. I do not read the subsection as providing that the entitlement of B to recover his property is extinguished simply by reason of the transfer of the property to C. Moreover that reading would appear to me to go against the grain of the broad wording of section 26 which gives B the entitlement to recover property passing under a relevant contract.
119. Nor do I consider that there is a problem about a bona fide purchaser for value without notice. As I read it, section 26 gives the innocent party a right to recover property transferred under an offending agreement. This may enable the innocent party to repossess property or may require him to take proceedings (such as where title to land or a chose in action has passed). It appears to me that the rights of the innocent party will be governed by general principles of law governing the priority of interests in the relevant property where an agreement under which it initially passed falls to be set aside. This is to my mind the better reading of the words in section 26, "the other party is entitled to recover ... property ... transferred by that party under the agreement". The innocent party is given the usual rights or claims of an owner of the property on the footing that the agreement under which it has passed is capable of being set aside. 120. In short, in my judgment it would run against the grain of the legislative scheme if B's rights under section 26 were to be defeated simply because of the transfer of the property to C, irrespective of C's position and the general rules of law concerning title and priorities where a contract is impugnable. Indeed if sections 26 and 28 were to be read as having such a consequence it would enable the offending party, a party in breach of the general prohibition, to extinguish the rights of the innocent party simply by transferring the property to any third party, even one who was fully aware of that breach. It seems to me that if section 28 was intended to extinguish the entitlement given by section 26 it would have been expressed in far clearer words.
121. Returning to InnovatorOne, it is not entirely clear from the report whether the claimants in that case advanced proprietary claims to the money they had paid under the relevant contracts or whether they were seeking to bring personal claims against the relevant defendants on the basis that they had received money under those agreements. The judgment suggests that the argument turned on whether the relevant defendants could be brought within the ambit of section 26. In any event, while I consider that Hamblen J was correct in analysing the personal claims available to parties under section 26 of FSMA, I am

unable to conclude that section 28 means that the mere transfer of relevant property to a third party extinguishes the statutory right of the claimant under section 26 to seek its recovery. If that is what InnovatorOne decided, I consider it is wrong and I decline to follow it for all the reasons given above. (In reaching this decision have followed the principles concerning decisions of coordinate jurisdiction.) 122. The next question is whether the right to have the transfer of the Property set aside constitutes a mere equity for the purposes of the LRA. 123. In *Mortgage Express v Lambert* [2016] EWCA Civ 555, Lewison LJ said this at [16]: “It is, I think, clear enough that a right to set aside a transaction on the ground of misrepresentation or undue influence is MR JUSTICE MILES Approved Judgment *Orchard v Dhillon* classified in English law as “an equity” or a “mere equity”: *Bristol and West Building Society v Mothew* [1998] Ch 1, 22 (misrepresentation); *Bainbrigge v Browne* (1881) 18 Ch D 188 (undue influence) and *Abigail v Lapin* [1934] AC 491, 505 (fraud). In *Mid-Glamorgan County Council v Ogwr Borough Council* (1993) 68 P & CR 1, 9 Hoffmann LJ referred in general terms to a “right to have the deed set aside” as a “mere equity”.” 124. The *Mid-Glamorgan* case concerned compulsory acquisition of land, pursuant to statute. In the relevant part of his judgment, Hoffmann LJ was addressing the situation where an authority which had acquired land under statutory compulsion did not have the necessary intention to develop it at the relevant date and was therefore acting outside the ambit of the relevant statutory power. Hoffmann LJ referred to earlier authority showing that in such cases the court has the power, under its inherent jurisdiction, to require the reversal of the transfer of the land; he described this as the right to have the deed set aside. He said this was a “mere equity”.

125. Counsel for the claimant submitted that a claim under section 26(2) FSMA cannot be classified as a mere equity. Claims which are “mere equities” are claims to equitable remedies. This is not a claim to an equitable remedy.
126. He expanded on this argument in a number of stages. 127. First, he said, decided case law recognises three circumstances in which claims giving rise to equitable remedies have been classified as ‘mere equities’ which are capable of amounting to overriding interests. These are: i) ii) iii) Claims which seek to have a transaction rescinded in equity: see *Phillips v Phillips* (1861) 4 De G&J 208, 218; 45 ER 1164, 1167; *Abigail v Lapin* (1934) AC 491 (PC) 505; *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch. 530 at [44]. Claims which seek to invoke the equitable remedy of rectification: see *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305 [113]: “a right to rectify is traditionally classified as a “mere equity”. Claims based on the equitable remedy of proprietary estoppel: see for instance *Stack v Dowden* [2007] UKHL 17, [2007] 2 A. C. 432 at [37]: “Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the “true” owner. The claim is a “mere equity”.
128. He submitted, second, that what sets these claim to an equitable remedy apart is the inchoate nature of the mere equity; explained in *Snell’s Equity* (34th ed.) at 2-006: “...a mere equity is an inchoate right binding on specific property. In functional terms, to say that a

person has a “mere equity” in relation to property means that the property is susceptible to an equitable proprietary claim if and when the claimant elects to enforce it. The claimant must perform some MR JUSTICE MILES Approved Judgment Orchard v Dhillon further legal act to cause his claim to crystallise as an equitable interest.” (Cited with approval in Equity Trust (Jersey) v Halibi [2022] UKPC 36; [2023] AC 877 at [104].)

129. By contrast, under section 26, the right is not inchoate in nature. It matures at the time when the unauthorised agreement is entered into. 130. Third, he argued that in all of the recognised cases of rescission in equity, the intention of the transferor must have been vitiated in some way.
131. He argued, fourth, that sections 26 and 28 of FSMA created a code, which left no room for the kinds of defences one would normally associate with rescission in equity such as laches, acquiescence or third party rights.
132. As to the first argument, the existing cases do not provide a conclusive answer to the proper characterisation of a mere equity for the purposes of the LRA. I accept that the existing cases do not include the current claim. But I note that in the Mid-Glamorgan case Hoffmann LJ considered that a landowners’ entitlement to apply to the court to reverse a transfer to a purchasing authority who wrongly exercised compulsory rights of purchase is to be regarded as a mere equity. This category of case does not fit neatly into the classifications given in textbooks on equity, no doubt because it is far from being a central case. In Mid-Glamorgan (cited in Lambert) Hoffmann LJ described the right to apply to set aside a deed as a mere equity. It appears to me that that case shows that a right to set aside a transfer may count as a mere equity even though the right does not originate from one of the three heads of intervention contended for by counsel for the claimant (see [126] above). I also note that the statute expressly incorporates a test of equitable factors in the court’s power to give relief under section 28.
133. As to the argument that the right under section 26 is not inchoate, there seem to me to be two principal responses. 134. First, even if not inchoate the right is subject to defeasance where the transferee applies for relief under section 28. In practical terms, in any case where the innocent party seeks recovery of his property and this is opposed, the court will have to decide whether to allow the transfer to stand. The claimant will have to perform some legal act (through legal proceedings) to cause his claim to be determined (or crystallised). 135. Second, this appears to me if anything to be a point against the claimant’s argument. If a merely inchoate right is protected as a mere equity, it would be surprising if a choate one was not.
136. Nor do I derive any real assistance in the fact that equitable rescission is normally concerned with an event which vitiates consent. I consider that section 26 creates rights closely analogous in a number of respects with rescission in equity, but the basis on which the right comes into existence is a relevant breach of the general prohibition. Questions of the intentions of the parties are not relevant to the creation of the statutory right; but the

right to recover property transferred under an offending contract shares many of the characteristics of rescission in equity. As explained above MR JUSTICE MILES Approved Judgment Orchard v Dhillon it appears to me that sections 26 and 28 fall to be construed against the background of the general law of rescission.

137. Nor am I able to agree with the suggestion that FSMA sections 26 and 28 cannot accommodate such issues as laches, acquiescence and affirmation. The court is given an equitable jurisdiction under section 28 to decide that property passed under a contract should remain with the transferee. In my judgment this would allow laches, affirmation etc. to be addressed. 138. In short, despite the forceful arguments on behalf of the claimant, I do not think that the existing case law provides an answer to the proper classification of the rights arising under section 26.
139. As already stated, FSMA does not expressly classify the nature of the entitlement under section 26 to recover property or how any application to the court for this purpose should be characterised. It appears to me that this must be determined in accordance with principles derived from the general law. The following considerations (which have largely been covered above) are relevant: i) ii) iii) An agreement falling with section 26 is to be regarded as voidable rather than void. The innocent party may decide to perform. Property passes under it (subject to the ability of the innocent party to recover it). The court may decide under section 28 that the property should remain with the offending party. By reason of section 28 the court may refuse to permit the innocent party to recover relevant property where it considers it “just and equitable” to deny this. The application for recovery of the property under section 26 engages the court’s consideration of the equity of the case. As noted above, FSMA should be construed in a way which promotes consumer protection and this is enhanced by recognising that the right under section 26 has proprietary consequences (see above). 140. 141. 142. In light of these considerations, at least in a case (such as this one) where the relevant transaction has transferred legal title to land and the intervention of the court is sought to reverse the transfer, it seems to me that the application to recover the property is an appeal to the equitable jurisdiction of the court. This is analogous to the appeal to the equitable jurisdiction made in the compulsory purchase cases referred to above. By analogy with the approach of Hoffmann LJ in the Mid-Glamorgan case, where legal title to land has been transferred, the claimant’s right to apply to the court under section 26 to have the property reconveyed is best classified as a “mere equity”. It was common ground that if the defendants’ rights under section 26 constituted a mere equity, those rights were protected as an overriding interest by their actual occupation of the Property. For these reasons, I conclude that the defendants’ rights under section 26 (which remain subject to possible relief under section 28) are binding on the claimant and that she did not take free of them when she became registered as the proprietor of the Property. Ground 2 of the appeal is therefore allowed. The consequences of this MR JUSTICE MILES Approved Judgment Orchard v Dhillon decision will need to be determined at a further hearing. This is mentioned under ground 3 below.

143. At the hearing counsel for the defendants advanced an argument based on Art 63J of the 2001 Order. The argument was as follows. The party who buys a qualifying interest in land is called the “agreement provider”. Art 63J(6) provides that “references to entering into a regulated sale and rent back agreement as agreement provider include acquiring any obligations or rights of the agreement provider, including the agreement provider's interest in land or interests under one or more of the instruments or agreements referred to in paragraph (3)(a)”.
144. Counsel for the defendants submitted that this provision is to be read as putting a person who acquires land from an original agreement provider under a regulated sale and rent back agreement into the shoes of the original agreement provider (using the labels given above, C steps into the shoes of A). One of “the obligations” acquired by C is that arising under section 26 of FSMA to return property transferred by B to A under the original agreement. 145. This argument was not contained in the grounds of appeal or the defendants’ skeleton argument. There was no application to amend the grounds of appeal to make the argument. It would not be fair to allow the defendants to rely on it.
146. But, in any event, I do not think that Art 63J is to be construed as suggested by the defendants. The purpose of the 2001 Order is to designate “regulated activities” for the purposes of FSMA. Art 63J designates certain activities concerning sale and rent back agreements. Sub-paragraph (3) defines relevant sale and rent back arrangements and the parties to them. The designated activities under the article are “entering into a regulated sale and rent back agreement as an agreement provider” and “administering a regulated sale and rent back agreement”. One of the effects of sub-paragraph (6) is that a person who assumes the rights and obligations of an agreement provider is to be treated as entering into a regulated sale and rent back agreement. The conduct of that person in doing so therefore becomes a regulated activity. It does not however follow from the terms of sub-paragraph (6) that that person also automatically becomes subject to an obligation owed by an earlier agreement provider to return property. The Article read as a whole is designating regulated activities for the purposes of FSMA, no more and no less. 147. To determine the consequences of this designation one has to return to FSMA itself. There is more than one possible consequence of the relevant conduct being designated a relevant activity. As set out above, section 22 defines regulated activities (to paraphrase) as activities of a specified kind which are carried on by way of business. By section 19 no person may carry on a regulated activity in the United Kingdom unless he is an authorised person or an exempt person (“the general prohibition”). By section 23 a person who contravenes the general prohibition is guilty of an offence.
148. Another consequence is the regime for dealing with contracts under sections 26 and 28, which has been addressed above. 149. I am unable to accept the argument of counsel for the defendants that Art 63J has the effect of putting the claimant into the shoes of R2BL so that the claimant automatically assumes the obligations of R2BL to return the Property to the MR JUSTICE MILES Approved Judgment Orchard v Dhillon defendants. Section 26 is concerned

with an agreement entered into by a person in the course of carrying on a regulated activity in contravention of the general prohibition. It is unenforceable against the other party and the other party is entitled to recover property transferred by him under the agreement. One must therefore identify a relevant agreement entered between the offending party and the innocent party. Here the relevant agreement sought to be undone is the original sale and rent back agreement of 2010. The defendants seek to recover the Property as having been transferred under that agreement. The claimant has not entered into any agreements with the defendants (and they have not transferred property to her under any agreements). While Art 63J may have had the effect of rendering the claimant an agreement provider, she was not a party to the original agreement and does not, by virtue of Art 63J(6), owe any obligations under section 26 of FSMA. Any liability she may owe arises not by reason of that provision (which as explained above, merely specifies certain activities as regulated). Rather any such liability arises by reason of the statutory entitlements of the defendants to recover their property and the fact that she is a successor in title to the property in question. This has been addressed earlier. Ground 3

150. Ground 3 is consequential on ground 2 and does not on analysis raise a separate basis for the appeal. It was however common ground that if ground 2 succeeded the case should be remitted to the judge for a further hearing to consider consequential issues, including whether the claimant could raise a possible defence under section 28, issues of counter-restitution, the absence of R2BL from the proceedings, and the possible impact of the third party charge. It is best to say no more about these issues. Conclusions 151. 152. The appeal is allowed for the reasons explained above. There will have to be a further hearing to determine the consequences of this decision. The legal arguments advanced on this appeal were far removed from those made below. The judge carefully addressed the arguments that were advanced to him and gave an impressively clear and comprehensive judgment. 153. The parties are urged to seek to settle their remaining disputes and to that end make use of ADR tools and techniques. This is a case which cries out for settlement.

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