Neutral Citation Number: [2011] EWHC 3101 (Ch)

Case No: HC10C01470

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2011

Before :

HHJ DAVID COOKE

- -

Between :

The Funding Corporation Block Discounting Limited	**Claimant**
- and -	
Lexi Holdings Plc (in Administration) (1)	**Defendant**
Barclays Bank Plc (2)	

- -
- -

Martin Hutchings QC (instructed by **Seymours**) for the **Claimant**
Richard Handyside QC (instructed by **DLA Piper UK LLP**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing dates: 10- 12 October 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ David Cooke :

Introduction

1. This claim is a dispute between two financiers each asserting proprietary claims to a fund of about £3.2m, being the proceeds of sale of certain properties by the administrators of Lexi Holdings Plc ("Lexi") and presently held by the administrators awaiting the outcome of these proceedings. Lexi provided short term finance for the purchase, improvement and resale of properties. The second defendant ("Barclays") appointed administrators to Lexi on 5 October 2006. It is now apparent that Lexi was used as a vehicle for massive frauds perpetrated by its controlling director Mr Shaid Luqman and others. In separate proceedings brought by the administrators, Lexi has obtained (among other relief) a freezing injunction against Mr Luqman and default judgment against him for sums exceeding £75m including interest. As a result of repeated failure to comply with his disclosure obligations under the freezing order, Mr Luqman was sentenced to the maximum 2 years imprisonment for contempt of court in October 2007.

2. The present claimant ("TFC") obtained its own freezing injunction against Mr Luqman and others in October 2006 and was granted permission to bring this claim against the company in administration by Briggs J in 2008. The application for permission was opposed by the administrators, but Barclays played no part at that stage. Since then Barclays has been joined as a party and the litigation has been effectively between it and TFC.

3. Briggs J's judgment holding that TFC had a reasonable prospect of establishing a proprietary claim to the fund is reported at [2008] EWHC 985 (Ch). The following outline of the business and funding arrangements is taken from that judgment:

> "8. Lexi's business, prior to administration, was the making of bridging loans, usually secured on real property. By 2004 its source of funds for that purpose consisted mainly, if not entirely, of a syndicated credit facility provided by Barclays Bank, the Bank of Scotland and Lloyds TSB, for which Barclays was both the Agent and Security Trustee. It was originally granted in November 2001, and subsequently amended and restated in October 2002, July 2003 and April 2004, before a final amendment and restatement dated 27th July 2005. During the material time the syndicate's lending was secured by a Deed of Charge dated 2nd April 2004 ("the Deed of Charge") made between (1) Barclays as Security Trustee and (2) Lexi (then called Pearl Holdings (Europe) Ltd) particulars of which were duly registered at Companies House, in terms which … gave due notice that Lexi's book debts, including its bridging loans and any collateral security given in respect of them, were charged by a first fixed charge in favour of Barclays as Security Trustee. The Credit Facility Agreement, at least in its form as amended on 27th July 2005 contained, at clauses 21.3 and 21.4, comprehensive provisions prohibiting Lexi from selling, transferring or otherwise disposing of any of its receivables on recourse terms, and from selling or otherwise

disposing of any asset worth more than £10,000, without the lending syndicate's consent, for which purpose, Barclays as Agent had authority pursuant to clause 24.1.2 to give the required consents.

9. By a facility letter dated 3rd November 2004… countersigned and agreed by Lexi, TFC agreed to offer Lexi a facility in the maximum amount of £5 million by means of the purchase at a discount of Lexi's interest in loan agreements and associated security rights with its customers, pursuant to a Master Receivables Discounting Agreement ("the Master Agreement") which was in due course entered into between TFC and Lexi on 1st December 2004. In bare outline, the effect of the Receivables Facility Letter and the Master Agreement taken together was that Lexi would, from time to time, offer to sell to TFC "Contract Rights" (consisting of its rights under loan agreements with its customers, together with any associated security), and TFC was to be at liberty to purchase such Contract Rights for a maximum of 90% of their face value, payable up front in exchange for an assignment by Lexi of the Contract Rights to TFC.

10. Clause 7 of the Master Agreement contained an indemnity by Lexi in favour of TFC in relation to any Loss (as defined) incurred in connection with the purchase of the Contract Rights, and clause 8 contained a guarantee by Lexi of payment to TFC by its customers of the Minimum Sum (being 90% of the face value of the rights assigned). The Master Agreement was, notwithstanding those provisions, structured as an outright sale by Lexi to TFC of the relevant rights, rather than the conferring merely of a security interest, subject to an equity of redemption…

14. … it is evident that TFC recognised the need to obtain Barclays' consent before making any purchases pursuant to the Master Agreement of Lexi's rights as secured lender under bridging loans with its customers.

15. After a brief negotiation, in which both sides appear to have taken separate legal advice, Barclays executed a Deed of Release on 18th March 2005. It was expressed to be supplemental to the Deed of Charge, and to be made by Barclays as Security Trustee thereunder. It recited that Lexi (referred to as "the Mortgagor") had charged the property described in the schedule and referred to as "the Released Property", and continued as follows:

> "1. The Security Trustee as Mortgagee hereby surrenders and releases the Released Property to the Mortgagor or (if the

> Mortgagor should have conveyed the Released Property to a third party on or before the date hereof) to the person to whom the estate or interest of the Mortgagor in the Released Property which was charged by the Charges is now vested freed and discharged from the Charges and all claims and demands thereunder.
>
> 2. If such conveyance by the Mortgagor shall have been completed on the date hereof the Deed shall take effect immediately after the completion of such conveyance.
>
> 3. Nothing herein contained shall prejudice or affect the security of the Security Trustee under the Charges in respect of the remaining property comprised therein or the obligations of the Mortgagor or the rights of the Security Trustee thereunder.
>
> **The Schedule Above Referred To**
>
> Any bridging loans made after the date hereof by the Mortgagor to third parties which have been financed in full by The Funding Corporation Block Discounting Ltd pursuant to a facility agreement dated on or about the date of this deed of release."

> 16. Beginning in October 2005, TFC then proceeded to purchase Lexi's purported rights under six purported bridging loans to purported customers, using the procedure set forth in the Master Agreement, for an aggregate purchase price of approximately £4.794 million. I have used the word purported in that description to reflect the fact that, unknown to TFC at the time, it was thereby drawn into a small part of a massive fraud then being perpetrated by the Managing Director of Lexi, one Shaid Luqman, with the assistance of members of his family... It is common ground before me that both the Barclays led syndicate and TFC are innocent victims of that fraud."

4. The last point remains common ground, although TFC allege that Barclays had knowledge of other matters amounting to fraud on Lexi's part and were under a duty in contract (as bankers to TFC) or a fiduciary duty to warn TFC before it lent. At a late stage TFC were refused permission to amend their claim to allege breaches of those duties. The allegations are strongly denied, are not relevant to the issues before me and may be the subject of separate proceedings, so I stress that nothing I say should be taken as making any finding about them. In the course of the hearing Mr Handyside withdrew Barclays' alternative claim for rectification of the Deed of Release (should I be against him on its construction) in order that it could not be said that these allegations were relevant to the exercise of discretion to grant relief by way of rectification.

5. It is convenient at this stage to describe the facts surrounding the purported bridging loans and the properties they were said to relate to. I should say at the start that ascertaining those facts has been made difficult because when the administrators were appointed they found that Shaid Luqman and his family had taken systematic steps to remove or destroy all Lexi's records in documentary and electronic form. Some

information was recovered from a computer server located when executing a search order, but most or all the documents now available have been obtained from official sources or third parties such as solicitors or banks. The administrators have conducted a forensic investigation into aspects of these transactions, and among the witnesses called by Barclays was Mr Jason Pate, who headed that investigation. Still, it is highly likely that the picture available is incomplete.

6. There are many common features to the transactions, so I will describe them in general terms. The details relating to the individual properties and loans are set out in a schedule to this judgment. There were originally 10 properties, but the claim in respect of one of them (23 Whitehart Gardens) is no longer before the court, the claimant having obtained summary judgment on an application to Master Bragge on 13 June of this year.

   i) At some point prior to 2005 in all cases it appears that Lexi made a loan to a borrower (the "original borrower") secured against the property, entering into a written loan agreement with the borrower and obtaining a registered legal charge as security. The bundle contains copies of each of these loan agreements and historic Land Charges Register entries showing the title of the original borrower and Lexi's security. There is no evidence to suggest that these transactions were other than wholly genuine commercial loans to unconnected borrowers who were advanced the amounts shown in the relevant documents.

   ii) Further, it appears that each of the original borrowers must have defaulted on its obligations, because on various dates from June 2005 the properties were transferred by way of transfers executed on behalf of the original borrowers either by Lexi in exercise of its power of sale, or by LPA receivers appointed by Lexi, to one of three companies. It is common ground that all three were effectively controlled by Shaid Luqman and I will refer to them as "the connected companies". They were:

      a) Serton International Corporation ("Serton"), a Panama corporation whose address was given in various documents as "care of Howard & Howard", a firm of solicitors. I heard no evidence on behalf of that firm and can make no findings binding on it, but the documentary and witness evidence before me suggests very strongly that Mr Barry Howard, the principal of the firm, acted at all material times under the direction of Shaid Luqman or Lexi.

      b) Charyn International SA, a BVI company whose address was likewise given as "care of Howard & Howard"

      c) Halfway Limited, a company incorporated in England with a Registered office in Feltham but giving its address on the Land Registry as "care of 43 Wimpole St", that being the address of Howard & Howard.

   iii) For each of these transfers, a consideration was stated. Mr Howard acted for the connected company as purchaser and various firms were instructed on behalf of Lexi or the LPA receiver. In the case of 6 properties, the solicitor

acting was Ms Dempsey of Pearson Lowe, who has provided a witness statement for the claimant. In two others it was Halliwells and in one Berrymans. As far as the evidence goes, in each case funds were received from Howard & Howard to complete the purchase and applied by the solicitor acting to discharge any prior charges, the balance being paid to Lexi's order. The source of these funds is not in all cases clear to me from the evidence, but the assumption of both parties before me is that it was from monies of Lexi. It is accepted that although they took place after the TFC facility was in place, and in some cases after funds had been drawn under it, the purchases by the connected companies (with one possible exception) were not funded by way of the purported loans subsequently assigned to TFC.

iv) That exception was also the only case in which any security was ever given to Lexi. It was in respect of a property called The Dawnay Arms, a public house in Yorkshire. The facts in relation to this transaction do not follow the same course as the other 8, and I will refer to it separately and in more detail later.

v) In respect of the transfers of the other 8 properties, there is no documentary evidence of any loan arrangement between the connected company purchaser and Lexi, though if Lexi provided the purchase funds an inter company obligation must presumably have arisen. Although the transfers were registered, there is no evidence that any security for that obligation was ever created, let alone registered.

vi) At some time after the transfer to the connected company, Lexi approached TFC to purchase what it said was a bridging loan advanced or to be advanced by it to a named borrower. The mechanism provided by the Master Agreement was for a formal written offer to assign a specified loan, brief details of which were to be set out in a "listing schedule" to the offer. The offer was to be accompanied by a form of executed Certificate of Assignment which would become effective when countersigned by TFC, which TFC would do if satisfied that the supporting documentation complied with the conditions set out in the Master Agreement.

vii) In each case, the supporting documentation provided with the offer did not disclose that the purported borrower was connected to Lexi, or that Lexi had already funded the purchase. It included a copy of a loan agreement purporting to show an advance which in all cases can now be seen to have been greatly in excess of the price recently paid to acquire the property, though TFC would not of course have been able to ascertain this at the time. It appears that valuations were produced to TFC which purported to show that the properties were worth more than the advance, although these are not in evidence before me. A Report on Title in brief form from Howard & Howard was also provided, in all cases addressed to Lexi and not TFC.

viii) Having seen these documents, TFC signed the Certificate of Acceptance and paid to Howard & Howard the purchase price for assignment of the purported loan. It appears that payment to a solicitor gave comfort to TFC that all was in order, and that TFC expected future repayments by the purported borrowers to be made to Howard & Howard and forwarded by them to TFC. In fact the review of the documents cannot have been more than cursory (failing to

identify or query obvious inadequacies in the drafting of the loan agreements such as not deleting any of the multiple and inconsistent options for the purpose of the loan contained in what was obviously a standard form) and the arrangements made were plainly inadequate to ensure that the transaction was completed and funds used as expected.

ix) For instance, although TFC's witness Mr Holloway, who was in charge of the relevant department at the time, said that he 'understood' that the borrower would be granting security over the property referred to, in no case were TFC even given a copy of any intended security document, let alone the original as the Master Agreement required. It does not appear from any of the documents in evidence before me that Mr Howard gave, or was asked to give, any undertaking to TFC in relation to the disbursement of the funds advanced- such as that they would not be released until security had been given, or even that they would be paid to the named borrower by way of advance under the purported loan agreement. There does not appear to have been any direction to the borrower to make repayments to Howard & Howard, either in the purported loan agreement or any other document, nor any undertaking by Howard & Howard to remit to TFC any monies they did receive.

x) Further, one of the named borrowers was a company called Tinsett Asset Management Ltd ("Tinsett"), to which an amount of £1.125m was to be lent in connection with five named properties, all of which were owned not by Tinsett but by Serton. This should have been apparent from the report on title given by Mr Howard (which referred to Serton as the Owner/Borrower, see T2 p273), but no query was made about the discrepancy.

xi) None of the funds paid by TFC was ever paid to the borrowers named in the purported loan agreements. Instead Howard & Howard paid all the money they received to an account at United National Bank (which I infer was in the name of Lexi), from which it was paid to other accounts in this country and in Pakistan in the names of Shaid Luqman and his father Mohammed; see the evidence of Mr Pate at W2 p16 and table at p23.

7. Having discovered the fraud in October 2006, TFC submitted Unilateral Notices to the Land Registry in respect of each of the properties, asserting an equitable charge arising from the obligation of each borrower named in the purported loan agreements to grant security, the benefit of which had been assigned to it. Those were duly recorded in the respective Charges Registers, dated (mostly) 25 October 2006. No interest claimed by Barclays in respect of any of the properties has at any stage been registered.

8. The course of events in relation to the Dawney Arms property was as follows:

i) Lexi appears to have advanced a loan of £545,000 to the original borrower, Three M's Pub Ltd, pursuant to a facility letter dated 19 February 2003 (T1/114). Although the stated purpose was "financing part of the consideration payable by the Borrower for the Property" the loan exceeded the price paid (£376,500, see T1/129), but nothing presently turns on that.

ii) Lexi's security was a first legal charge on the property, which was duly registered on 2 April 2003 (T1/129). At some point, Lexi in one of its periodic returns to Barclays reported that the security had been redeemed by the original borrower on 27 October 2003 by a payment of £564,000 (W2/109), but it seems clear that this cannot have been true; no entry of satisfaction of the charge was made on the Land Register, and Mr Pate found no evidence of any receipt of £564,000 (w2/18).

iii) By a facility letter dated 9 November 2005 (t1/131) Lexi purported to offer a loan of £1,125,000 to Halfway Ltd to purchase the property. That letter was signed by way of acceptance on behalf of Halfway, giving a date of 10 November 2005.

iv) Lexi made an offer to sell the "Contract Rights" arising from this purported loan to TFC, by Offer Letter dated 27 November 2005 (T1/142). It appears (see the witness statement of Mr Holloway at W1/69) that the offer letter was sent to TFC on 28 November, together with a report on title prepared by Mr Howard and addressed to Halfway dated 28 November (t1/145) and a valuation by Dunlop Haywards at £1.5m (not in the bundle). That offer was accepted and TFC paid the purchase price of 80% of the purported loan, £1,012,500, to Howard & Howard on the following day, 29 November 2005.

v) There is no evidence in the bundle of any undertaking or assurance given by Howard & Howard to TFC in connection with this payment. At the date it was received, it appears that Halfway had not acquired the property. According to the Land Registry entries, it was transferred on 21 December 2005 for a price of £415,000 (T1/147.2). An undated form of transfer at that price is in the bundle (T1/125) executed by Lexi as mortgagee. It is not clear from the evidence whether any payment corresponding to this price was ever made; Mr Pate did not identify one (W2/22).

vi) It appears that Halfway must have executed a form of charge in favour of Lexi. No copy appears in the bundle, but the Land Register records (T1/147.2) such a charge, apparently dated 29 November 2005 (before the stated date of transfer) but not registered until 28 June 2006, seven months later and five months after the date of registration of the transfer. Normally one would expect a charge to fund a purchase to bear the same date as the transfer and to be lodged for registration at the same time, so there must be a suspicion that in this case the charge was created after the transfer and backdated, with whoever did so selecting the date of the assignment to TFC rather than the date given on the land transfer. I do not think however that the evidence is sufficient for me to make a finding to that effect, and I was not asked to do so.

9. Briggs J summarised events since the administration as follows:

> "28 It is sufficient for me to describe what has since occurred in bare outline. In proceedings against Shaid Luqman, his brother Waheed, his father Mohammed, his sisters Monuza and Zaurian, and against a large number of companies associated with the Luqman family, the Administrators have achieved the following outcomes:

> (a) Default judgment against Shaid Luqman for £59 million plus interest.
>
> (b) Summary judgment against Waheed Luqman for £41 million plus interest.
>
> (c) Judgment for an account for breach of fiduciary duty as directors of Lexi against Monuza and Zaurian Luqman.
>
> (d) Judgment in default against all Lexi's purported customers in the bridging loan transactions in issue, save for Beverley Holden.
>
> (e) The setting aside pursuant to section 320 of the sales by Lexi to the purported customers (Serton, Halfway Ltd and Charyn International SA) of all the properties purportedly offered as security for the bridging loans, save for 23 Whitehart Gardens, and the registration of Lexi as proprietors of those properties.
>
> (f) The sale of all the security properties relevant to this application for the aggregate sum … which now constitutes the fund in issue.
>
> 29 In relation to the setting aside of the Lexi property sales to Serton, Halfway and Charyn, the Administrators did not make TFC a party to the proceedings in which those orders were obtained, or otherwise (so far as I am aware) notify TFC of the applications under section 320, so that TFC remained unaware that the purported customers' title to the security properties was either voidable, or had been avoided, until after the relevant orders were made. Furthermore, it was probably incorrect for the Administrators to seek, and for the court to make, orders vesting ownership of those properties in Lexi, merely because of the setting aside of the relevant sales under section 320. Since most (if not all) of those sales appear to have been made by Lexi as mortgagee in possession, the consequence of setting aside the transactions should have been the restoration of the original mortgagor as proprietor subject to a first charge in favour of Lexi. That additional complication is not material to the matters which I have to decide and, to date, it does not appear that any of the original mortgagors of those properties to Lexi have made any complaint about what happened. It appears likely that as first mortgagee Lexi would have been entitled to the whole of the proceeds of the sales which were subsequently arranged by the Administrators..."

10. In order that the properties could be sold, TFC agreed with the administrator that its Notices be removed from the Register on the basis, effectively, that any interest they held in the properties should be converted into an interest in the proceeds of sale. Barclays was not a party to that agreement. Barclays' position is that TFC had in any

event no proprietary interest in the properties. If it did, Barclays contends that such interest ranked behind Barclays' own security interest.

11. In relation to the 8 properties other than the Dawnay Arms, TFC's case is that although no legal charge was executed by any of the connected companies in favour of Lexi, the covenant to grant security in the loan documentation creates an equitable charge in Lexi's favour, the benefit of which has been assigned to TFC along with the debt it secures. Barclays' primary case is that the purported loan agreements are entirely void, being instruments of fraud never intended to create legal relations between Lexi and the connected companies. The "Contract Rights" supposedly assigned to TFC were non- existent. Alternatively, if there was an obligation to create security in favour of Lexi, it was waived by Lexi in completing the loans without execution of such a charge at the time. A subsidiary point is that no contractual promise by Tinsett could be effective in any event to create equitable charges over properties owned by Serton, there being no evidence that Tinsett had any capacity to bind Serton to such a promise. I consider these issues first.

TFC's proprietary claims

12. On the evidence before me, at the time the purported loan agreements were entered into (with the exception of the Dawnay Arms transaction and the transfer of 32 Devoke Rd) no funds were advanced by Lexi to the purported borrower, directly or indirectly and no transfer of any of the properties took place (the connected companies already owning them). Briggs J accepted that it could be sufficient to constitute a loan if the funds provided by TFC had the effect of swelling the cash available to Lexi at or about the time at which other funds were utilised to pay the price of the properties, but (save in the case of those two properties) it is now clear that this did not happen. The purported loan agreements cannot in my view be considered to be restatements or replacements of inter- company obligations that had arisen at the time of the previous purchases- they were not expressed to be, but framed as funding for purchases said to be taking place at the time. The amount of those purported loans bore no relation to the price previously paid, and there was obviously no genuine sale at any time at the price recorded in the loan agreements. The conclusion is in my view irresistible that as between the companies purportedly entering into them, the loan agreements were not intended to create the legal obligations they described. The documents were produced for the sole purpose of presentation to TFC in order to defraud it into parting with money to purchase the contract rights purportedly created. The signatories on behalf of both parties to those agreements must have known that this was so. It would be unrealistic, for instance, to think either that the fraud was only on the part of Lexi and the signatory on behalf of Serton might have been deceived into believing that Lexi was genuinely offering it a loan, or that the fraud was on the part of Serton and Lexi was a victim of it.

13. Prima facie then the position as between Lexi and the connected companies is, as Mr Handyside submits, that the agreements are void and of no legal effect whatever. In my judgment, neither party would be able to enforce the purported obligations against the other, nor could either rely on an estoppel against the other because both were party to the intended fraud. They were not voidable, as distinct from being void, for the same reason. It was suggested that it would be odd for a third party such as Barclays to be able to take this point when Lexi itself had not done so (the administrators not having taken this approach when objecting to the grant of

permission before Briggs J), but Mr Hutchings accepted there could be no question of an acceptance of validity by the administrators giving rise to an issue estoppel against Barclays.

14. The matter does not end there however, as Mr Hutchings' further submission, which I accept, is that as against TFC both Lexi and Serton (or other relevant purported borrower) would be estopped from denying the enforceability of the obligations they represented had been undertaken. By offering the benefit of the purported loan agreements for sale to TFC pursuant to the Master Agreement, Lexi must be taken to have been representing to TFC that they represented genuine and enforceable agreements between it and the relevant connected company, and that the amount of the stated loan either had been advanced or would be when the purchase price was paid. The former is among the representations set out in clause 6 of the Master Agreement expressed to be given on the making of each offer. The latter is not (perhaps because the representations are drafted as if the rights sold are to the benefit of debts for sale of goods) but is a necessary implication where the purpose of the offer is to sell the benefit of a debt at 80% of its value.

15. Further, in the circumstances in which both Lexi and the connected company were acting together to create a document for the purpose of defrauding TFC, the connected company as the purported borrower must in my view be taken to know that these representations are being made, and to join in them. If TFC relied on those representations to its detriment, both companies are estopped from denying the truth of the representations made. As between TFC and the connected company then, TFC would be entitled to enforce the rights expressed to be assigned to it in accordance with their terms, and on the footing that the stated loan has been advanced.

16. Questions were asked of TFC's witnesses as to the extent to which they had in fact relied on the availability of security (it was clear that notwithstanding the formal structure, TFC referred to its transactions as if they were loans granted for security) given their evident keenness to have Lexi as a customer. In particular there was an email sent by Mr Buckley (at the time, finance director of TFC's parent company) on 21 October 2005 in which he said to one of the employees dealing with the Lexi account "think we agreed at the meeting that we should consider the deal as if the loans were unsecured as this is the worst case scenario". This however was in response to legal advice that the availability to TFC of security over a property owned by Lexi's customer might be compromised if TFC did not register an assignment of the security created by the customer in favour of Lexi, since Lexi might release or transfer the security without TFC's knowledge. It was decided to proceed without requiring such an assignment. To that extent, TFC was prepared to rely on Lexi's covenant if Lexi allowed its own borrower's security to be compromised in the future, but this does not in my view indicate that TFC was not acting in reliance on the assurance that the purported transaction with the customer (and the customer's security) existed in the first place.

17. Further, TFC was undoubtedly slapdash to put it mildly in the precautions it took at the time of each purchase of contract rights and the reviews it subsequently performed to verify that the transactions it had financed were as described. Had it considered the documents properly it might have realised that it had no confirmation at the time of purchase (other than from Lexi) that the purported borrower was in fact acquiring the property or creating security over it, or that Lexi's purported loan was actually being

advanced. In January 2006 an employee (Mr Pickup) visited Lexi's premises for an "audit" of the transaction records, and reported that he had been unable to see any original documentation for any of the loans, nor any evidence of charges in favour of Lexi or their registration, being told that "all this is dealt with by solicitors". He asked the question "how can we be sure the loan exists and has been paid out. How do we know whether/when a loan has been redeemed?" noting that he "never even got to see bank statements as they said Howard & Howard pay out". His colleagues noted this and replied that they would need to amend procedures to "give us the comfort I think [the risk department] will expect." No such steps were however put in place and TFC thereafter paid out further amounts exceeding £2m.

18. The question that must be asked is, if TFC had known that there was in truth no underlying transaction at all between Lexi and the purported borrowers, would it still have parted with funds? Plainly not, in my view. Careless as these procedures were, in my judgment they simply show that TFC relied implicitly on the transactions being as they were presented by Mr Luqman and the other individuals involved, including Mr Howard. This reliance completes the ingredients necessary to found the estoppel.

19. I reject therefore the primary case that none of the loan agreements created any rights capable of enforcement by TFC. I reject also the argument that insofar as the agreements create an obligation to grant security to Lexi, Lexi has waived that obligation by making the loan without obtaining such security. That argument would have to be one capable of acting as a defence by the connected company (say Serton) against a claim by Lexi to enforce the loan contract by requiring that security be executed. It presupposes that Lexi has in fact made an advance to Serton in circumstances in which Lexi has led Serton to believe that it has given up the right to obtain the security it contracted for. All this is completely artificial in circumstances where the position as between the two companies is that there was no loan and it was never intended that there would be. The question of waiver could never arise as between the contracting parties, and so could never be available against an assignee.

20. I do however accept the submission that a contractual promise by Tinsett in its loan agreement is not sufficient to create an equitable mortgage over property owned by Serton, in the absence of evidence that Tinsett had some sufficient authority to bind Serton to that promise. This is not affected by the estoppel I have found, because Serton was not a party to that loan agreement or to its sale to TFC and it is Tinsett and not Serton that is affected by the estoppel it gives rise to. There is no evidence that Serton made any representation to TFC in relation to the Tinsett loan agreement, or that Tinsett had, or was held out by Serton as having, any authority to act on behalf of Serton. No doubt Mr Luqman could if he had chosen have procured that Serton participated in the setting up of that loan, but he did not do so. The general circumstances of the fraud are not themselves a basis for finding that a representation made by Tinsett as to the enforceability of its purported obligations is also made on behalf of another company.

21. It was said in the administrators' evidence, and that of Mr Pate, that Tinsett was assumed to have entered into the loan agreement as agent of Serton, but this was no more than an attempt to rationalise the situation after the event. That evidence cannot be said to be an admission on behalf of Lexi, let alone Serton. If the transaction had been genuine, such an agency relationship would be one basis on which it could have been explicable, but the fact that this was a possible explanation is not evidence that

the explanation was true. It was not even the only possible explanation; another (and perhaps more likely if the transaction had been genuine) might have been that Serton was willing to create third party security over its assets for borrowings of Tinsett.

22. Mr Hutchings suggested that TFC might be entitled to a proprietary estoppel, but this in my view takes him no further where there is no evidence of a promise or other assurance by Serton that security would be given.

23. I find therefore that no equitable charge was created in favour of TFC over the five properties the subject of the Tinsett loan. It follows that no question of priority as between Barclays and Tinsett arises in relation to those properties (which I will refer to as the Tinsett properties).

24. In relation to the Dawnay Arms, the factual situation does not follow the pattern of the others. The property was transferred to Halfway at or about the time of the purported loan by Lexi to Halfway, rather than at an earlier date as was the case with the other properties. It does appear that there was a movement of funds to pay the price; I infer this from Ms Dempsey's evidence which records a telegraphic transfer fee (W1/54), although Mr Pate could not identify the source (W2/22). The amount of the price stated (£415,000) was very much less than the stated amount of the loan (£1.125m). With the transfer at one price occurring at or about the same time as the execution of a loan agreement purporting to record a loan for the purchase of almost three times as much, the inference that the latter was created for fraudulent purposes is if anything even stronger. Halfway did execute a form of legal charge in favour of Lexi, which I assume purports to secure all monies due to Lexi (and not to be limited to £415,000).

25. The price appears to have been paid on or about 20 December 2005. By that date, Lexi had received funds from TFC on sale of the related loan agreement and so could in principle have used them to pay on behalf of Halfway. Given my conclusions as to the fraudulent nature of the purported loan agreements, it seems unlikely that as between Halfway and Lexi any inter company obligation arising from the transfer of the property was genuinely intended to be incurred as a drawdown of the purported loan. However, it seems to me that so far as TFC is concerned the position is ultimately the same as with the other loan agreements in that Halfway must be estopped from denying that the agreement represented its binding obligation and that a loan of £1.125m had been or would on payment by TFC be made to it pursuant to that agreement. Nor could Halfway deny that the charge was binding on it to secure the amount of the purported loan, whenever it was executed.

26. The position is similar, it seems to me, in relation to 32 Devoke Rd, where the transfer also took place after the related loan agreement was assigned. The dates are set out in the schedule to this judgment.

27. I conclude that TFC acquired no security interest in the properties the subject of the purported loan to Tinsett, but otherwise, as against the connected companies, TFC is entitled by virtue of estoppel to be considered as equitable assignee of the benefit of the legal charge over the Dawnay Arms and of the equitable mortgages over the other properties, in each case as security for the amounts purportedly advanced to those companies.

Barclays' proprietary claims

28. I turn then to Barclays' competing claims to proprietary interests in the same properties. Mr Handyside helpfully presented his case by reference to a number of stages in the various transactions, to which Mr Hutchings responded. I have taken the stages relating to the rights claimed by TFC out of Mr Handyside's chronological order but as they have not disposed of the case I must go back to the beginning.

29. First, when Lexi made its loan to the original borrower, secured on a legal charge over the property, Lexi's rights under that loan and the related charge were caught by Barclays' debenture. In relation to the properties, Barclays was thus equitable assignee or chargee of Lexi's security interest. Mr Hutchings contended that notwithstanding the terms of the debenture, Barclays' security interests were of a floating nature rather than fixed. Ultimately, he accepted that the point was probably irrelevant. I agree, because Barclays' interests in this respect were extinguished on transfer of the properties to the connected companies, see below. Had it been necessary, I would have held that in this respect Barclays held fixed security, the documentation providing for a comprehensive system of payment of realisations and receipts into a blocked account controlled by Barclays. Although there was evidence that Lexi did not always comply with its obligations, and that Barclays was for a period lax about enforcing them, there was no evidence that the blocked account arrangements were a sham, or intended in reality from the start not to be operated such that the true arrangement was that receipts would be freely available to Lexi (see *Re Brumark Investments Ltd* [2001] UKPC 28).

30. Second, when Lexi provided funds to the connected companies to enable them to purchase the properties and procured the transfers to them, it acted in breach of Companies Act 1985 ss 320/330, giving rise to a right in Lexi to have the transfers set aside. It is accepted that this right was also caught by Barclays' debenture. There was debate about whether Barclays' interest over this right was of a fixed nature or whether it took effect as a floating charge; in my view that is not a point I have to resolve as it is not suggested that the distinction between fixed and floating security made any difference to the priority issues between Barclays and TFC, or that Lexi (in contrast to Barclays) dealt with its right in such a way as would extinguish a floating security interest.

31. Third, when the properties in question were transferred to the relevant connected companies, on their registration as transferees the charges created by the original borrowers in favour of Lexi were discharged. In some cases the transfer was made by Lexi as mortgagee and would have been effective to overreach the mortgagee's own interest. In others the transfer was made by a receiver acting under a power of sale given in the charge instrument; it must be assumed that a form of release of the charge in Lexi's favour was provided to the Land Registry since that charge was removed on registration of the transfer. Mr Hutchings submits, and I accept, that this had the effect that Barclays' interest as equitable assignee or chargee of those security interests was extinguished. He accepts that this does not affect Lexi's right to set the transfers aside, or Barclays' security interest in that right.

32. Next, chronologically, comes the entering into of the purported loan agreements and their assignment to Lexi, giving TFC the rights I have found above. Mr Handyside

submits (and Mr Hutchings did not suggest otherwise) that the Contract Rights assigned to TFC do not include Lexi's right to set aside the property transfers.

33. The fourth area of contention is over the effect of the Deed of Release in relation to the purported loan agreements. Mr Hutchings submits that as a matter of construction that deed is effective to release Barclays' security interest over the right to set the transfers aside.

34. What was no doubt in mind when the Deed of Release was drafted was that Lexi would enter into new bridging loans with unconnected third parties for the acquisition and/or development by them of properties over which Lexi would take security, assigning the benefit of the loan (ie the right to repayment, and related security) to TFC for a price which would fund the loan itself. It was designed to ensure that the new rights arising against the new borrower, and the new security he gave, were excluded from Barclays' debenture which would otherwise give rise to charges or assignments in favour of Barclays, so that a clear title could be sold to TFC. Not surprisingly, the language of the deed does not fit well with a transaction in which the property purchased was one in which Lexi (and therefore Barclays) already held an interest, and still less with the very indirect interest now in issue by virtue of security over a right to set the transfer aside.

35. It is convenient at this point to restate the definition of "Released Property" in the Deed of Release:

> "Any bridging loans made after the date hereof by [Lexi] to third parties which have been financed in full by The Funding Corporation Block Discounting Ltd pursuant to a facility agreement dated on or about the date of this deed of release."

36. It was at an earlier stage Barclays' case that this language was not sufficient to release even the benefit of the loans (assuming they had been advanced) themselves, as they had not been "financed in full" by TFC and/or because the connected companies were not "third parties". TFC purchased them at a price of 80% of the stated loan amount, so that if the stated loan had been advanced, 20% must have come from other sources. A quantity of evidence was devoted to whether Barclays all along knew that this would be the case, so that the Deed should be construed to anticipate it. In the end however Mr Handyside did not rely on these points, and accepted that the Deed of Release was effective to release from Barclays' security the benefit of the loan agreements, and any related security (including equitable security) given by the named borrowers, insofar as the loan agreements were effective at all.

37. He maintained the argument however that the Deed of Release could not be construed so as to release any security over the properties that Barclays already held prior to and independently of Lexi entering into an agreement for a new bridging loan. Thus, he submitted, there was no release of Barclays' security interests

    i) over the legal charges created by the original borrowers, or

    ii) over Lexi's right to set the transfer aside.

38. As a matter of construction, in my view this is correct. The property released is the benefit of loans made "after the date hereof". Security interests held by Lexi are not expressly mentioned; it is no doubt right to accept that by implication the release extends to security taken by Lexi for a loan that is itself released, but that implication cannot extend to other interests that Lexi (or Barclays) may already hold in a different connection. The deed is not expressed (though no doubt in principle it could have been) to release all security held by Barclays over a property so that TFC may acquire a first charge over it. Suppose for instance that Lexi had previously made one advance to a borrower, funded by Barclays and taking first charge security, and now made a second loan, funded by TFC and taking a second charge. It could not be suggested that the language of the release extended to the benefit of the first loan, or the security for it.

39. The point does not assist Mr Handyside in relation to the security created by the original borrowers- that as I hold was extinguished on the registration of the transfers to the connected companies.

40. However he is in my judgment correct in relation to security over the right to set the transfer of the property aside, at least in relation to the properties other than the Dawnay Arms. That right is given by s322 Companies Act 1985 to Lexi and arose on the transfer of those properties, which pre- dated the purported loans funded by TFC. It does not in any sense arise out of or in connection with those loans and so cannot be said, in my view, to be impliedly included in a release of those loans themselves.

41. The position is not so clear in relation to the Dawnay Arms transaction. In that case, the transfer to Halfway took place at or about the time of the purported loan to Halfway, and its assignment to TFC. The documents appear to show the transfer being after the date of the loan, which corresponds with Ms Dempsey's evidence of completion on or about 20 December (W1/53). It must I think be assumed that there were two linked transactions at or about the same time, consisting of the sale of the property and the purported funding arrangements to pay the price for it. If that is so, the sale was no doubt a "substantial property transaction" falling within s 320 of the 1985 Act and the purported loan was caught by s330, both being voidable at Lexi's instance pursuant to ss 322 and 341 respectively. They are separate rights, and Lexi could in principle have elected to avoid the loan but to affirm the property transfer. In my view, a release of the loan from Barclays' security by implication releases the closely linked right to recover the amount lent by a restitutionary claim if the contract of loan is avoided, but the implication does not extend to release of a separate right to avoid the transfer of the property, even if the purpose of the loan is to pay the price of the property. Accordingly, on this point also I would accept Mr Handyside's submission.

42. We reach the point then that Barclays has a claim in respect of all the properties, by virtue of the right to set aside the transfers. TFC has no claim on the Tinsett properties. In respect of the others, TFC has a claim by way of equitable assignment of equitable or legal charge, and the issue is one of priority.

Priority issues

43. The next stage in the chronology is that TFC has registered a unilateral notice against each property to protect its interest. Mr Hutchings accepts this cannot achieve priority

over any already existing equitable interest, but submits that it is effective against Barclays, which does not acquire any proprietary interest in the properties until the right to avoid is exercised. Further, he relies on the provisions of s322 intended to protect rights acquired by third parties, as follows:

> "(1) An arrangement entered into by a company in contravention of section 320, and any transaction entered into in pursuance of the arrangement (whether by the company or any other person) is voidable at the instance of the company unless one or more of the conditions specified in the next subsection is satisfied.
>
> (2) Those conditions are that—
>
> (a)…
>
> (b) any rights acquired bona fide for value and without actual notice of the contravention by any person who is not a party to the arrangement or transaction would be affected by its avoidance"

44. His submission is that TFC's rights fall within subsection (2)(b), and plainly would be affected by setting aside the transfer if that meant revesting the property in Lexi (or in the original borrower subject to a charge to Lexi) without preserving those rights. The court should not have made the avoidance order. Now that it has done so, TFC must be put in the position it would have been had there been no order, by treating its rights as a first claim on the proceeds.

45. Mr Handyside does not dispute that if TFC has an equitable interest, it falls within subsection (2)(b). His submission however is that it could not have been relied on to resist setting aside the transfers because Barclays' interest at all times held priority. TFC's interest would not be "affected" by avoiding the transfer as they were at all times postponed to the right to avoid.

46. In support, he deployed an argument based on the effect of the Land Registration Act 2002, which I summarise as follows:

i) The right to avoid a transfer of land is a mere equity. By s116 of the 2002 Act, in relation to registered land a mere equity "has effect as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)", ie it is in effect treated as an equitable proprietary interest in the land.

ii) Such a right is not affected by registration of the title of the transferee under the voidable disposition. TFC's pleaded case is that such registration "destroyed" Barclays' prior interest. Mr Hutchings submitted that this was indeed the effect of s29, which provides that:

> "(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".

iii) This would, as Mr Handyside noted, be a remarkable result if correct, depriving s322 and similar provisions of much if not all of their effect in relation to registered land. The answer is, he submits (and I agree) that the right to avoid given by s 322 is not a right "affecting the estate immediately before the [voidable] disposition" but one that arises upon the making of that disposition itself.

iv) Consequently, its priority is governed by s28 and not s29. The basic rule is that priority as between interests is determined by the order of their creation, and by s 28 :

> "(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.
>
> (2) It makes no difference for the purposes of this section whether the interest or disposition is registered."

v) Thus, the argument goes, the (unregistered) right to avoid was not affected by the later creation of an equitable charge in favour of TFC (which was not itself a "registrable disposition" for the purposes of s29; see s27(2)) notwithstanding the later entry of a unilateral notice of that charge.

47. The fallacy in this argument in the circumstances of this case, it seems to me, is that it ignores the nature of the right that is said to have priority. The right to avoid the transfer is only available if third party rights (meeting the requirements of s322(2)(b)) would not be affected. The very nature of that right means that it can never operate to give the restored proprietor priority over such third party rights. If TFC had been made party to or given notice of the applications to set the transfers aside it would have been able to object to the avoidance and its objection could not then have been defeated by an argument that its rights had been acquired after the voidable transaction. Protection of after acquired rights is the very object of the section.

48. The facts that the right to avoid has been exercised when it ought not to have been, and that an order of the court has been made, presumably without the court being aware of TFC's rights, cannot have the effect of defeating those rights. Briggs J when the matter was before him said that on the face of it TFC would be entitled to have those orders set aside, but he was minded to think that it was not necessary to do so and TFC's claim could be given effect to as a claim to the proceeds. Another route to the same result would be to construe the "avoidance" as being achieved so that the property is revested in the transferor subject to the rights acquired by TFC, and that insofar as the original borrowers' charges to Lexi are restored, they are subordinated to TFC's acquired rights. The orders that have been made in this case might be construed, or amended if need be, to achieve that effect. It is not hard to imagine other circumstances in which the existence of third party rights might emerge after a transfer has been avoided- a transferee of land might for instance have granted an easement over it in the meantime. I do not have to decide this, but it seems to me that

a revesting of the property subject to the easement would be within the section as not "affecting" the acquired right.

49. Although Barclays was not a party to the arrangement by which TFC agreed to the removal of its notices, and so is not bound by anything agreed between TFC and the administrators, in my judgment the removal makes no difference. TFC's equitable interest did not require registration to be effective as against the title holder, and the absence of registration could not result in it being defeated by the retransfer made on avoidance, for the reasons given above.

50. I conclude that Barclays is entitled to the proceeds of sale of the Tinsett properties, but TFC is entitled to the proceeds of the others. It was not suggested that in the case of any of them, the proceeds exceeded the amounts to which the parties would be entitled if their claims were upheld.

51. There need be no attendance when judgment is handed down. If the parties are unable to agree the order or matters arising, they should contact my clerk with an agreed time estimate for a further hearing.

Schedule:

Property	Original borrower	Transfer to Connected Company						
		Transferee	Date	Reg'd	sale by	Seller Sol.	Price	Borrower
61 Banner Street	Weiner	Serton	14/06/05	13/07/05	Receiver	Halliwells	£415,000	Serton
Cemetary Lodge	Charalambous	Serton	17/08/05	20/09/05	Receiver	Halliwells	£100,000	Serton
12 Rimsdale Walk	Bhatta	Serton	24/11/05	28/12/05	Lexi	Pearson Lowe	£80,000	Tinsett
76 Ullswater Rd	Da Silva/Newton		16/11/05	14/12/05		Pearson Lowe	£120,000	
32 Devoke Rd	Da Silva/Newton		23/05/06	03/06/06		Pearson Lowe	£250,000	
47 Heaton Rd	Da Silva/Newton		07/03/06	24/04/06		Pearson Lowe	£150,000	
6 Gower Rd	Da Silva/Newton		23/02/06	07/03/06		Pearson Lowe	£180,000	
						Total	**£780,000**	
Roundcroft	Bentley	Charyn	24/01/06	24/02/06	Lexi	Berryman	£600,000	Charyn
Dawnay Arms	Three M's Pub Co	Halfway	21/12/05	30/01/06	Lexi	Pearson Lowe	£415,000	Halfway