UPPER TRIBUNAL (LANDS CHAMBER)

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Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) (LAND REGISTRATION DIVISION)

Catchwords: LAND REGISTRATION – APPLICATION TO CANCEL RESTRICTION – whether Appellant bound by payment agreement – whether the doctrine of ostensible authority can operate in the case of a forged document – whether Section 44(5) of the Companies Act 2006 can apply to validate a forged document – meaning of disposal – duration of restriction – appeal allowed in part

BETWEEN:

CARLTON VALE LIMITED

Appellant

-and-

ADAM JASON GAPPER

Respondent

Re: The Carlton Tavern,
Carlton Vale,
London,
NW6 5EU

The President, Mr Justice Edwin Johnson
16th May 2023

Decision Date: 10th July 2023

Brooke Lyne, instructed by Naylor Solicitors LLP for the appellant
The Respondent in person

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The following cases are referred to in this decision:

Ruben v Great Fingall Consolidated [1906] AC 439
Lloyd v Grace, Smith & Co. [1912] AC 716
Freeman & Lockyer v Buckhurst Park [1964] 2 QB 480
Lovett v Carson Country Homes Ltd [2009] EWHC 1143 (Ch) [2011] BCC 789
Royal British Bank v Turquand (1856) 119 ER 886
Gentle v Faulkner [1900] 2 QB 267
Alghussein Establishment v Eton College [1988] 1 WLR 587
Eurobank Ergasias SA v Kalliroi Navigation Company Limited [2015] EWHC 2377 (Comm)
Petroplus Marketing AG v Shell Trading International Ltd [2009] EWHC 1024 (Comm) [2009] 1 CLC 743
BDW Trading Limited v JM Rowe (Investments) Limited [2011] EWCA Civ 548
Cheall v APEX [1983] 2 AC 180
Patel v Mirza [2016] UKSC 42
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55 [2015] AC 430

Introduction

1. In this case the Appellant is seeking the removal of a restriction from the registered freehold title to the property known as The Carlton Tavern, Carlton Vale, London NW6 5EU (**"the Property"**).

2. The Appellant is the registered freehold proprietor of the Property. The Respondent was the sole director and owner of a company called GPS Entertainment Limited (**"GPS"**). GPS was the tenant of the Property pursuant to a lease dated 18th October 2010.

3. The restriction (**"the Restriction"**) was entered against the registered title to the Property on 7th August 2015, apparently pursuant to what was described as a payment agreement, dated 8th April 2015, and expressed to be entered into between the Appellant, GPS and the Respondent.

4. The application for removal of the Restriction (**"the Application"**) was originally made to HM Land Registry, by application notice dated 23rd June 2020. The Respondent objected to the removal of the Restriction. The Application was therefore referred by the Land Registry to the Property Chamber (Land Registration Division) of the First-tier Tribunal (**"the FTT"**).

5. The Application was heard in the FTT, before Judge Max Thorowgood (**"the Judge"**), on 4th – 6th May 2022. For the reasons set out in his decision dated 13th September 2022 (**"the Decision"**), the Judge concluded that the Appellant was not entitled to have the Restriction removed. By an order of the same date (**"the Order"**), the Judge directed the Chief Land Registrar to cancel the Application.

6. With the permission of the Judge, the Appellant appeals against the Decision and the Order. Directions for the hearing of the appeal (**"the Appeal"**) were given on 3rd January 2023. Pursuant to those directions the Appeal is to be heard by way of review.

7. At the hearing of the Appeal Ms Lyne, counsel, appeared for the Appellant. The Respondent appeared in person. I am most grateful to Ms Lyne and to the Respondent for their submissions on the issues raised by the Appeal. This is my decision on the Appeal.

The relevant background

8. The hearing before the Judge occupied three days, during which the Judge heard oral evidence from the key individuals involved in the case. The Judge set out a full account of the background to this dispute in the Decision. My own account of the relevant background is confined to what is necessary to set the scene for the issues which I have to decide in the Appeal. My account is taken largely from the Decision, and also from other documents which I have seen in the Appeal. I am indebted to the Judge for his account of the background to the dispute. As the Appeal is being heard by way of review I am not, in this decision, making any findings of fact of my own.

9. Reference to Paragraphs in this decision are, unless otherwise indicated, references to the paragraphs of the Decision. Italics have been added to quotations in this decision.

10. The freehold title to the Property is registered under title number NGL674581 (**"the Registered Title"**). The Appellant acquired the Property on 11th July 2013, and was

registered as the freehold proprietor of the Property on 19th August 2013. The Appellant, which is now known as Carlton Vale Limited, was then known as CLTX Limited. The Appellant acquired the Property with the intention of demolishing and redeveloping the Property. The sole director of the Appellant at that time was a Mr Ori Calif (**"Mr Calif"**). Mr Calif's evidence, as recorded in the Decision at Paragraph 2.3, was that at the material time he was a tax lawyer practising predominantly in Israel and was also, between 2013 and 2016, an overseas investor in the London property market.

11. Prior to the Appellant's acquisition of the Property, Mr Calif was introduced to Mr Matan Amitai (**"Mr Amitai"**), who held himself out as an experienced property developer. Mr Amitai had already exchanged contracts for the purchase of the Property, and had paid a substantial deposit, but had found himself unable to raise the funds required to complete the purchase. Mr Calif, through the medium of the Appellant, agreed to step in and provide the necessary funding.

12. The Property was then subject to a lease held by GPS. This lease (**"the Lease"**), which was dated 18th October 2010, had been granted to GPS for a term of 20 years by Punch Partnerships (PTL) Limited. In order to proceed with its redevelopment plan, the Appellant needed vacant possession of the Property, which in turn required the termination of the Lease. Mr Calif was introduced by Mr Amitai to Fladgate, solicitors (**"Fladgate"**). The Appellant instructed Fladgate to, as the Judge put the matter (Paragraph 2.5), *"put pressure on GPS and the Respondent with a view to achieving either a forfeiture or a surrender"* of the Lease.

13. Following negotiations between the parties, a surrender of the Lease was agreed. The terms on which that surrender was agreed were the subject of considerable dispute at the hearing in the FTT. What does not appear to have been in dispute is that GPS did surrender the Lease to the Appellant. There is a form of transfer (TR1), dated 8th April 2015, by which the surrender was expressed to be effected. This form of transfer (**"the TR1"**) identified the consideration paid for the surrender of the Lease as the sum of £344,024.41.

14. The Respondent's case was, and remains that the terms of the surrender of the Lease included the payment agreement, to which I have previously referred. As this payment agreement is central to this dispute, and to the Appeal, it is necessary to introduce it at some length.

15. The payment agreement bears the date of 8th April 2015 and, as I have already said, was expressed to be entered into between the Appellant, GPS and the Respondent. Although described as a payment agreement, the document was stated to have been executed as a deed. In terms of execution of the payment agreement, the counterpart of the payment agreement which is contained in the appeal bundle for the hearing of the Appeal purports to have been executed by the Appellant, acting by a director. The purported signature of Mr Calif appears on the counterpart, as the director acting on behalf of the Appellant. The witness to the purported signature of Mr Calif is identified as Mr Amitai, whose name and address are printed in manuscript on the counterpart, accompanied by the signature of Mr Amitai as witness.

16. I will refer to this payment agreement, which purports to have been executed as a deed in counterpart on 8th April 2015, as **"the Payment Agreement"**. This is a term of convenience. It is intended to be a neutral expression and, in advance of my conclusions in the Appeal, implies no view, one way or the other, as to whether the Payment Agreement was or is binding upon the Appellant. Equally, where I refer to what were the terms of the Payment Agreement, I am referring to those terms as they appeared in the Payment Agreement on the date of its purported execution (8th April 2015). Again, and in advance of my conclusions on the Appeal, this implies no view, one way or the other, as to whether the Payment Agreement was or is binding upon the Appellant.

17. Turning to the terms of the Payment Agreement, I will need to come back to these in more detail later in this decision. For present purposes, it is necessary to identify a few of the clauses of the Payment Agreement at this stage. For convenience, references to Clauses in the remainder of this decision mean, unless otherwise indicated, the clauses of the Payment Agreement. Equally, where I use terms in this decision which were defined terms in the Payment Agreement, I use those defined terms as they were defined in the Payment Agreement, unless otherwise indicated.

18. It is convenient to start with Clause 3.2, which was in the following terms:

> *"3.2 Within 7 days following the obtaining of a Satisfactory Planning Permission or if earlier a disposal of the Premises by the Landlord other than by way of a Permitted Disposal, the Landlord shall pay to the Tenant or to Mr Gapper at Mr Gapper's direction the Payment such sum to be paid by the Landlord's Solicitor to the Tenant's and Mr Gapper's Solicitor's Account by direct credit. The Landlord shall keep the Tenant and Mr Gapper fully informed of the progress of obtaining a Satisfactory Planning Permission and shall promptly provide the Tenant with copies of all material documentation and correspondence relating to it."*

19. The Payment was defined to mean the sum of £90,000. As can be seen therefore, Clause 3.2 was essentially an overage clause, imposing a contractual obligation upon the Appellant to pay to GPS or the Respondent the sum of £90,000 in the event of the obtaining of a Satisfactory Planning Permission or, if earlier, a disposal of the Property by the Appellant other than by way of a Permitted Disposal. I use the expression **"a Disposal"** to refer to a disposal falling within the terms of Clause 3.2. The expression *"a disposal"*, as it appears in Clause 3.2, was not defined in the Payment Agreement, and the question of what dealings with the Property were included in this expression is in dispute in the Appeal.

20. Clause 3.3 provided as follows, in terms of the duration of the obligation to make the Payment

> *"3.3 Subject always to the Landlord's compliance with the terms of this agreement in the event that the Landlord has not obtained a Satisfactory Planning Permission within five years of the date of this agreement the Payment shall be no longer payable to the Tenant (or Mr Gapper) and the Landlord's Solicitor shall be entitled to return the Payment to the Landlord."*

21. Clause 6.2 provided for the entry of a restriction against the Registered Title, in the following terms:

> *"6.2 The Landlord shall apply for the entry of the following restriction against the Landlord's Registered Title at HM Land Registry on the date of this agreement and shall procure that the restriction has priority to any mortgage or charge entered into by the Landlord:*
>
> > *"No disposition of the registered estate by the proprietor of the registered estate (other than a Permitted Disposal as defined in an agreement dated) 8 [written in manuscript] April 2015 made between CL TX Limited (1) GPS Entertainment Limited (2) and Adam Jason Gapper (3)) is to be registered without a written consent signed by GPS Entertainment Limited and Adam Jason Gapper or their conveyancers"*

22. Clause 6.4 provided for the removal of this restriction, in the following terms:

> *"6.4 On payment of the Payment under clause 3.2 or expiry of the period of five years from the date of this deed (whichever is the earlier) the Tenant and Mr Gapper jointly and severally undertake to procure that the restriction mentioned in clause 6.2 is removed from the Registered Title and to assist the Landlord in achieving such removal."*

23. Returning to the narrative, the negotiations concerning the surrender of the Lease are dealt with in detail in the Decision. For present purposes it is sufficient to record that it does not seem to have been disputed that the surrender of the Lease (**"the Surrender"**) was completed on 8th April 2015, and that a premium was paid to GPS in consideration of the Surrender.

24. The Appellant then proceeded with the demolition of the Carlton Tavern, without having first obtained planning permission for the demolition and redevelopment. This resulted in enforcement proceedings by the local planning authority which, after what appears to have been a lengthy planning battle, resulted in a situation where the Appellant was obliged to rebuild the Carlton Tavern.

25. In order to finance the rebuilding work the Appellant agreed to borrow the required funds from Perly Capital Limited (**"Perly Capital"**), a company controlled by Mr Calif's brother, Ran Calif. The funding was effected by a bond agreement dated 17th January 2017 (**"the Bond"**) and a charge (**"the Charge"**) dated 24th February 2017. By the Charge the Appellant charged the Property to Perly Capital as security for all the present and future liabilities of the Appellant to Perly Capital. The Appellant's solicitors then registered the Charge at Companies House, and applied to register the Charge against the Registered Title.

26. At this point a problem was encountered. On 7th August 2015 the Restriction had been entered on the Registered Title. It was in the following terms:

> *"(07.08.2015) RESTRICTION: No disposition of the registered estate by the proprietor of the registered estate is to be registered without a certificate signed by GPS Entertainment Limited and Adam Jason Gapper both of Flat 3, 40 Kellet Road, London SW2 lED and of 17 9 Bridgnorth Road, Stourton, Stourbridge, West Midlands DY7 6RY that the provisions of clause 6 of an Agreement dated 8*

April 2015 made between (1) CLTX Limited (2) GPS Entertainment Limited and (3) Adam Jason Gapper have been complied with or that they do not apply to the disposition."

27. The Appellant did not pursue the application to register the Charge, and the Charge was removed from the register at Companies House, by the filing of a notice that it had been satisfied. The evidence of Mr Calif in the FTT was that there was no redemption of the Charge because no charge had been created, save possibly in equity, and no monies had been lent pursuant to the Bond. Mr Calif also gave evidence that he only became aware of the Restriction when it was encountered on the application to register the Charge.

28. The application to register the Charge was notified to the Respondent, who claimed that the Charge was a Disposal, within the meaning of Clause 3.2, with the consequence that the obligation to make the overage payment (the Payment as defined in the Payment Agreement) had been triggered. This resulted in the Respondent serving a statutory demand on the Appellant, which in turn resulted in the Appellant applying for an injunction to restrain the presentation of a winding up petition by the Respondent. In his witness statement in support of the application for an injunction Mr Calif claimed for the first time that he had not signed the Payment Agreement, and that he had no knowledge of the Payment Agreement until he was alerted to its existence by the Appellant's solicitors, when they sought to register the Charge against the Registered Title. In the event, it appears that the Respondent did not contest the application for an injunction. The Respondent's evidence in the FTT was that he had been unwilling to take on the risk of having to pay the costs of the application, if it was successful.

29. In April 2020 the periods of five years referred to in Clauses 3.3 and 6.4 came to an end. On 2nd June 2020 the Appellant's solicitors wrote to the Respondent and invited him to agree to the removal of the Restriction, on the basis that the term of the Payment Agreement had expired, without a Disposal having occurred. The Respondent refused to agree. The result was the Application, which was then referred by the Land Registry to the FTT pursuant to Section 73(7) of the Land Registration Act 2002.

The Decision

30. The Judge summarised the cases of the parties in the FTT at Paragraphs 3.1 and 3.2. It is easiest simply to set out this summary:

> *"3 .1. Very briefly summarised, the case advanced on behalf of the Applicant before me was as follows:*
>
> *3.1.1. Mr Calif did not sign the Payment Agreement and did not authorise it to be signed. He had no knowledge of it and, hence, the Applicant is not bound by it. For that reason alone, the restriction should be cancelled.*
>
> *3.1.2. Even if the Applicant is bound by the Payment Agreement, there has been no relevant disposition triggering any obligation to pay under the agreement which has now expired; and*
>
> *3.1.3. Even if an obligation to pay has arisen, it is not the function of a restriction to secure payment under the agreement and the restriction should be discharged in accordance with its terms even if there has been a failure to pay under it or any other material breach of the agreement.*

3.2. The Respondent contended:

3.2.1. That Mr Ori Calif had signed the Payment Agreement;

3.2.2. If he did not, that Mr Amitai had the Applicant's authority either by way of delegation or as an alternate director to bind the Applicant;

3.2.3. The obligation to pay under the Payment Agreement has been triggered by the Applicant's grant of the Charge to Perly Capital which was a disposal of the Property for the purposes of the Payment Agreement; and

3.2.4. Once the obligation to pay has been triggered the restriction ought not to be cancelled unless and until the obligations the performance of which it was intended to protect have been discharged."

31. In terms of witnesses the Judge heard oral evidence from Mr Calif, from the Respondent, and from Ms Louise Floate, an expert in the field of handwriting and document examination instructed by the Appellant.

32. So far as the evidence of Mr Calif and Ms Floate was concerned, the Judge expressed the following assessment, at Paragraphs 4.6 and 4.7:

"4.6. On balance, however, I was left with the impression, despite the Respondent's very able cross examination of Mr Calif, that I could trust the evidence which he gave me.

4.7. I am fortified in that conclusion by the evidence of Ms Floate as to the authenticity of Mr Califs signature of the Payment Agreement. It was her clear conclusion having considered the expanded sample of signatures provided by Mr Calif that there was strong evidence to support the conclusion that Mr Calif did not signed either the TR l or the Payment Agreement. Despite his failure to mention it in his initial application to HM Land Registry to remove the restriction, which I accept was for the reasons he gave, it has been his consistent position since that he did not sign those documents and that he had no knowledge of the Payment Agreement. I did not feel that the Respondent's cogent criticisms of some of the sample signatures provided by Mr Calif undermined Ms Floate's conclusions."

33. This resulted in the following, key finding of fact by the Judge, at Paragraph 4.8:

"4.8. I therefore conclude, in relation to the primary factual question which I need to determine, that Mr Calif did not sign the Payment Agreement."

34. The Judge thus found that Mr Calif did not sign the Payment Agreement. It will be noted that the Judge also recorded the evidence of Mr Calif, supported by Ms Floate, that Mr Calif did not sign the TR1. The Judge does not appear to have made a distinct finding that Mr Calif did not sign the TR1, although this may be said to follow from what the Judge said, at Paragraphs 4.6 - 4.8. For the purposes of the Appeal, the critical point was that the purported signature of Mr Calif in his capacity as a director of the Appellant, which appeared on the Appellant's counterpart of the Payment Agreement, was a forgery.

35. The Judge then went on to consider, in Paragraph 4.9, whether it could be said that Mr Calif authorised Mr Amitai to sign the Payment Agreement on the basis that it was in fact Mr Calif who was signing. The Judge rejected this possibility. This left what the Judge identified as one final relevant question, in Paragraph 4.10, in the following terms:

"4.10.The final relevant question is whether, by its admitted instruction of Fladgate to act for it and to have conduct of the transaction in question, the Applicant company can be said now to be estopped from asserting that the Payment Agreement was not duly executed and is consequently not binding upon it. This is principally a matter of law which I shall consider below. However, it is relevant to note that, although I saw no documents to this effect, there was no suggestion that it was anyone other than Fladgate which exchanged the executed Surrender and Payment Agreement with Child & Child on 8th April 2015."

36. Following a review of the law, the Judge then came to his conclusions on the question of whether the Appellant was bound by the Payment Agreement, notwithstanding the forgery of Mr Calif's signature. The Judge identified what were essentially two questions in this respect. The first question was whether Mr Amitai or Fladgate had, in their dealings with the Respondent and his solicitors, acted in such a way, with the ostensible authority of the Appellant, as to cause the Appellant to be bound by the Payment Agreement. The second question, if this had not occurred, was whether the Respondent could rely upon Section 44(5) of the Companies Act 2006, to get to the same result.

37. The Judge expressed his conclusions on these two questions in the following terms, at Paragraphs 5.14 and 5.15:

"5.14. So, here, it seems to me that Fladgate, by exchanging the ostensibly executed copy of the Payment Agreement, represented on behalf of the Applicant and with its ostensible (if not actual) authority that it had been validly executed on behalf of its client. That the documents which they sent to the Respondent were the Applicant's deeds, not forged nullities. After all, it is impossible to think that Fladgate would have exchanged the documents on any other basis than that it believed them to be genuine. What else then could the Respondent and his solicitors reasonably have concluded upon receiving the signed copy of the Payment Agreement from Fladgate?

5.15. If I am wrong in that, I nevertheless conclude that it is the effect of s. 44(5), because the Respondent is a bona fide purchaser for value and because the Payment Agreement purports to have been validly executed by the Applicant, that it is to be deemed to be so for the reasons given by Davis J at § §98-102."

38. Accordingly, the Judge concluded that the Appellant was bound by the Payment Agreement. This left the question of whether the Restriction should be cancelled, pursuant to Rule 97(2) of the Land Registration Rules 2003. This in turn engaged the question of whether it could be said that the Restriction was no longer required, within the meaning of Rule 97(2). This in turn engaged the argument of the Appellant that, pursuant to Clause 6.4, the Respondent was subject to a contractual obligation to procure the removal of the Restriction or to assist the Appellant in the removal of the Restriction. The Judge did not accept this argument. He expressed his decision on this argument in the following terms, at Paragraph 6.5:

"6.5. This seems an extraordinary submission to me. It requires an acceptance that it was the intention of the parties that even though:

6.5.1. the obligation to pay which it was the primary purpose of the agreement to create had arisen;

6.5.2. had not been satisfied so that the Applicant was in breach of its obligations under the agreement; and

6.5.3. the Applicant had expressed its intention not to remedy its breach,

the Court, Registrar or Tribunal would nevertheless be required as a matter of contract, unconditionally, to make an order which might very well allow the Applicant to escape its obligation to pay the Respondent. I do not believe that was the intention of the parties. It seems plain to me: i) that no injunction or order would be made in the Applicant's favour such circumstances in the exercise of the Court's discretion; and ii) as the Respondent contends, that the opening words of clause 3.3 expressly exclude the obligation to remove the restriction if the terms of the agreement have not been complied with."

39. As I read this Paragraph, what the Judge decided was that in circumstances where the obligation to make to the Payment pursuant to Clause 3.2 had been triggered, the obligation upon the Respondent to remove or assist in the removal of the Restriction could not arise, until the Payment was actually made, to GPS or the Respondent, by the Appellant.

40. As the Judge noted, this led on to the question of whether the obligation upon the Appellant to make the Payment had been triggered. This turned on whether the creation of the Charge qualified as a Disposal (a disposal within the meaning of Clause 3.2). The Judge concluded that the creation of the Charge had qualified as a Disposal, thereby triggering the obligation upon the Appellant to make the Payment.

41. The overall conclusion of the Judge was therefore that the Restriction was still required, given his conclusions that the obligation to make the Payment had arisen, but had not been complied with. By the Order the Judge directed the Chief Land Registrar to cancel the Application. By a separate order the Judge ordered the Appellant to pay the Respondent's costs of the reference to the FTT, to be subject to a detailed assessment, if not agreed.

The grounds of the Appeal

42. There are four grounds of appeal, as follows:
    (1) The Judge was wrong to conclude that the Appellant was bound by the Payment Agreement and that it was estopped from denying that it had authorised the Payment Agreement in circumstances where that document had been forged (**"Ground 1"**).
    (2) The Judge was wrong to conclude that the effect of Section 44(5) of the Companies Act 2006 was to deem that the Payment Agreement had been validly executed in circumstances where that document had been forged (**"Ground 2"**).
    (3) The Judge was wrong to conclude that the Charge was a Disposal (**"Ground 3"**).
    (4) The Judge was wrong to conclude that the Payment Agreement did not require the removal of the Restriction five years after the Payment Agreement was entered into (**"Ground 4"**).

Ground 1 – analysis

43. So far as Ground 1 is concerned, the starting point is to identify the basis on which the Judge decided that the Appellant was bound by the Payment Agreement, notwithstanding that the purported signature of Mr Calif on the relevant counterpart was a forgery. In the absence of this signature the Payment Agreement was, without more, of no effect. The

requirements for the execution of a document by a company are set out in Section 44 of the Companies Act 2006 (**"Section 44"**). By Section 44(2)(b) a document is validly executed by a company if it is signed by a director of the company in the presence of a witness who attests the signature. In the present case this did not happen. Mr Calif did not sign the Payment Agreement.

44. It seems to me that the critical paragraphs in the Judge's reasoning in this respect are Paragraphs 5.12 and 5.14. As I read these Paragraphs, the Judge's key reasoning was as follows:
    (1) Mr Amitai was authorised by the Appellant to negotiate with the Respondent, for the purposes of securing vacant possession of the Property.
    (2) The Appellant appointed Fladgate to act as its solicitors in its dealings with the Respondent.
    (3) The Appellant caused or permitted Fladgate to hold itself out to the Respondent and his solicitors as acting for the Appellant.
    (4) There was no substantial dispute to the Respondent's case that he and his solicitors reasonably relied upon the representations of Mr Amitai and Fladgate to the effect that they were duly authorised by the Appellant to cause both the Surrender and the Payment to be completed by exchange of executed documents and payment of the monies immediately due.
    (5) Fladgate, by exchanging the ostensibly executed copy of the Payment Agreement, represented on behalf of the Appellant and with the ostensible authority of the Appellant that the Payment Agreement had been validly executed on behalf of the Appellant, and that the documents which they sent to the Respondent were the Appellant's deeds, not forged nullities.
    (6) An estoppel thereby arose, which prevented and prevents the Appellant from denying that the Payment Agreement was validly executed.

45. The final step in the above summary of the Judge's reasoning, at sub-paragraph (6), is not spelt out in terms in Paragraphs 5.12 or 5.14, or in the summary of the Judge's conclusions at Paragraph 7.1.4. It seems to me however that this must have been what the Judge had in mind when he stated his conclusion, at Paragraph 7.1.4, that the Appellant is bound by the Payment Agreement.

46. As Ms Lyne developed her case on Ground 1 in oral submissions, the Appellant's challenge to the relevant part of the Decision essentially involved three arguments, as follows:
    (1) The Judge did not, in the Decision, make findings sufficient to support the existence of an estoppel preventing the Appellant from denying the Payment Agreement was validly executed. The essential point made by Ms Lyne was that the Judge did not make a finding that a representation had been made, on behalf of the Appellant, by Fladgate or any other party to the effect that the Payment Agreement had been validly executed or to the effect that the documents which were sent to the Respondent were the Appellant's deeds, not forged nullities. Nor did the Judge make a finding of reliance by the Respondent upon any such representation.
    (2) Even assuming that the Judge did make the required findings of representation and reliance, the facts of the present case fell well short of what would have been required to support a finding that Fladgate had actually represented, on behalf of the Appellant, that the Payment Agreement had been validly executed.

(3) Beyond this, and continuing to assume that the Judge did make findings of representation and reliance, it was not open to the Judge to make a finding that Fladgate acted with the ostensible authority of the Appellant, in representing that the Payment Agreement had been validly executed, In a case of forgery, such as the present case, there was no room for the doctrine of ostensible authority to operate. By reason of the forged signature of Mr Calif, the Payment Agreement was a nullity. It could not, as a matter of law, be converted into an agreement binding upon the Appellant by the route taken by the Judge.

47. I can take the first of these arguments very shortly. I start with Paragraph 5.12, which is in the following terms:

> *"5.12.The Applicant accepts: a) that Matan Amitai was authorised by it to negotiate with the Respondent on its behalf for the purpose of securing vacant possession of the Property; b) that it appointed Fladgate to act as its solicitor in its dealings with the Respondent; and c) that it caused or permitted Fladgate to hold itself out to the Respondent and his solicitors as acting for the Applicant. Nor did it substantially dispute the Respondent's case that as a matter of fact he and his solicitors reasonably relied upon Mr Amitai's and Fladgate's representations to the effect that they were duly authorised by the Applicant to cause both the Surrender and the Payment Agreement to be completed by exchange of the executed documents and payment of the monies immediately due."*

48. So far as (a), (b) and (c) are concerned these matters were recorded as not being in dispute. There was no suggestion that the Judge had make an error in recording these matters as not being dispute. Ms Lyne however disputed that the Judge had actually made a finding of reasonable reliance on the representations in the last sentence of Paragraph 5.12. All the Judge had done, so she submitted, was to record that the Respondent's case on reasonable reliance was not substantially disputed.

49. I do not accept this argument. While, with due respect to the Judge, I can see that the last sentence of Paragraph 5.12 might have been more clearly expressed, it seems clear to me that the Judge was accepting, and finding (i) that the representations set out in the final sentence of Paragraph 5.12 had been made, and (ii) that there had been reasonable reliance upon those representations by the Respondent and his solicitors.

50. Turning to Paragraph 5.14, it is in the following terms:

> *"5.14. So, here, it seems to me that Fladgate, by exchanging the ostensibly executed copy of the Payment Agreement, represented on behalf of the Applicant and with its ostensible (if not actual) authority that it had been validly executed on behalf of its client. That the documents which they sent to the Respondent were the Applicant's deeds, not forged nullities. After all, it is impossible to think that Fladgate would have exchanged the documents on any other basis than that it believed them to be genuine. What else then could the Respondent and his solicitors reasonably have concluded upon receiving the signed copy of the Payment Agreement from Fladgate?"*

51. The argument was essentially the same in relation to this Paragraph. The Judge, so Ms Lyne submitted, had not actually made a finding that Fladgate made the representation set out in the first and second sentences of Paragraph 5.14.

52. Again, I cannot accept this argument. Indeed, it does not seem to me that there is any ambiguity in what the Judge said in the first two sentences of Paragraph 5.14. As I read these two sentences the Judge, whether he was entitled to do so or not, was making a finding that Fladgate had, by exchanging the ostensibly executed copy of the Payment Agreement, represented on behalf of the Appellant and with its ostensible authority (i) that the Payment Agreement had been validly executed on behalf of the Appellant, and (ii) that the documents which they sent to the Respondent (I assume this to be a reference to the Payment Agreement and the TR1) were the Appellant's deeds and not forged nullities. I will refer to these two representations, as found by the Judge in the first two sentences of Paragraph 5.14, as **"the Representations"**.

53. It seems to me that the findings in Paragraphs 5.12 and 5.14, assuming that the Judge was entitled to make those findings, were sufficient to support the conclusion of the Judge that the Appellant was bound by the Payment Agreement. The Judge did not, in Paragraph 5.14, make a specific finding of reasonable reliance on the Representations on the part of the Respondent or his solicitors. It seems to me however that this finding followed from the finding of reasonable reliance made by the Judge in Paragraph 5.12, and from what the Judge said in the last sentence of Paragraph 5.14. As I have already noted, the Judge did not state, in terms, that an estoppel had been created which prevented the Appellant from denying the validity of the Payment Agreement. It seems to me however that the findings in Paragraphs 5.12 and 5.14 were sufficient to support the conclusion that an estoppel arose, by which the Appellant is prevented from denying that it is bound by the Payment Agreement.

54. What I have said in my previous paragraph assumes of course that the Judge was entitled to find that the Representations were made. This brings me to Ms Lyne's second and third arguments.

55. I will take the third argument before the second argument. It seems to me that the question of whether the doctrine of ostensible authority can be invoked at all, in circumstances where the Payment Agreement is said to have been rendered a nullity by the forgery of Mr Calif's signature, falls to be considered before the question of whether the Judge was, in the present case, entitled to find the Representations.

56. In support of her third argument Ms Lyne relied upon the decision of the House of Lords in *Ruben v Great Fingall Consolidated* [1906] AC 439 (*"Ruben"*). The facts of this case were as follows. The appellants advanced in good faith a sum of money to the secretary of the respondent company on the security of a share certificate of the company. The share certificate, as issued to them by the company secretary, confirmed that the appellants were registered in the company's register of shareholders, as transferees of the shares against which the appellants had advanced the sum of money. The company secretary had authority to issue share certificates on behalf of the company, but such share certificates had to bear the seal of the company and required the signature of two directors of the company, counter-signed by the company secretary. The share certificate issued to the appellants appeared to comply with these requirements but, unknown to the appellants, the

seal of the company had been affixed fraudulently to the certificate by the company secretary and the signatures of the directors had been forged by the company secretary. The appellants sought damages from the respondent company in respect of the refusal of the respondent company to register the appellants as owners of the relevant shares.

57. The House of Lords upheld the decision of the Court of Appeal (reversing the decision of the judge at first instance) that the action failed. Essentially, the House of Lords decided that there was no basis upon which the respondent could be held responsible for the fraudulent activities of the company secretary. It is however necessary to look at several of the speeches in the House of Lords, in order to understand the reasoning of their Lordships.

58. Lord Loreburn LC stated his conclusion in the following short terms, at page 443:

> *"I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."*

59. Lord Loreburn then went on to consider the argument that the certificate was delivered by Rowe (the company secretary) in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. His Lordship rejected this argument, also at page 443, in the following terms:

> *"Another ground was pressed upon us, namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document."*

60. Lord Macnaghten, at page 444, said this:

> *"The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so. Then how can*

the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel."

61. Lord Davey expressed much the same sentiments, at page 445:

"The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was' entitled to speak and act for it. It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition the appellants slide into another and a very different one, that it was the secretary's duty to warrant on behalf of the company the genuineness of the documents he delivered. There is no evidence that any such 'duty or power was, in fact, entrusted to Rowe, and it is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents."

62. It will be noted that the essential point which emerges from each of the above extracts which I have cited is that the respondent company had no involvement in the fraudulent transaction, from start to finish. All that the company secretary was authorised to do was to deliver certificates to those entitled to them. As such, there was no basis for saying that the secretary had given a warranty, on behalf of the respondent, that the share certificate was genuine.

63. The decision in *Ruben* must be read subject to the subsequent decision of the House of Lords in *Lloyd v Grace, Smith & Co.* [1912] AC 716 that an employer can be vicariously liable for a fraud committed by an employee in the course of his employment. Putting aside however the question of vicarious liability, I do not think that this subsequent decision affects the authority of *Ruben* on the question of whether a party can be held liable on a document which has been created by a forgery.

64. In the present case the question is not one of vicarious liability. Ms Lyne's third argument was however that *Ruben* is authority for the proposition that the doctrine of ostensible authority cannot operate in a case involving a forgery. In the present case, it will be recalled, the Judge found that Fladgate had made the Representations with the ostensible authority of the Appellant. The Appellant was thereby bound by the representation that the Payment Agreement had been validly executed by the Appellant, notwithstanding that the required signature on behalf of the Appellant had been forged.

65. It seems to me that there are a number of difficulties which confront the third argument. The starting point is to identify what is meant by ostensible authority, as opposed to actual authority. The distinction was explained by Diplock LJ (as he then was) in *Freeman & Lockyer v Buckhurst Park* [1964] 2 QB 480. In his judgment Diplock LJ first considered the question of whether actual authority to employ agents had been conferred on the relevant party in that case; a Mr Kapoor. After concluding that there was insufficient to establish actual authority, Diplock LJ proceeded to consider ostensible authority. At page 503 Diplock LJ explained ostensible authority in the following terms:

"An " apparent " or " ostensible " authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the " apparent " authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

66. It will be noted that ostensible authority rests upon an estoppel. The ostensible authority of the agent is founded upon the representation of the principal, to the other contracting party, that the agent has the required authority to enter into the contract on behalf of the principal.

67. As Diplock LJ went on to explain, at 503-504, the representation may take different forms:

"The representation which creates " apparent " authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually " actual " authority to enter into."

68. Diplock LJ then went on to identify two further factors which are to be borne in mind when dealing with a case of ostensible authority. The first was that the capacity of a corporation is limited by its constitution; that is to say, in the case of a company incorporated under the Companies Act, the memorandum and articles of association. The second was that a corporation cannot do any act, including make a representation, except through its agent. It therefore followed that the person making the representation on behalf of the company which founded the ostensible authority did require the actual authority of the company to make that representation. Diplock LJ then stated, at 505-506, the following four conditions which would need to be satisfied before a contract could be enforced against the company which had been entered into by an agent for the company who had no actual authority to enter into such a contract:

"If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:

(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent."

69. Pausing in my review of the authorities at this point, I do not find anything in the analysis of Diplock LJ in *Freeman & Lockyer* which seems to me to rule out the operation of the doctrine of ostensible authority in a case where the signature of a person on a contract, which purports to be the signature of a person signing the contract on behalf of a company, turns out to be a forgery. I can see that it would take a fairly unusual set of facts for the company to be bound by such a contract. The company would have had to have made a representation to the other party to the contract which founded an ostensible authority on the basis of which the other party was entitled to treat the contract as validly signed, notwithstanding the forgery. In theory however I cannot see that the doctrine of ostensible authority is excluded in any such case. It seems to me that the availability of the doctrine will depend upon the particular facts of the case, to which may be added the point that a fairly unusual set of facts would be required for the doctrine to be capable of operating in a case of forgery of a company document. One would expect most cases to resemble the facts of *Ruben*.

70. This seems to me to be borne out by the following extract from Bowstead & Reynolds on Agency (22nd Edition), at 8-041 (underlining also added):

> ***"Forgery***
>
> *As under apparent authority generally, [251] the company can be bound, though the agent effects a forgery in the sense of executing an unauthorised signature. But an actual counterfeit signature would simply be a nullity. [252] There may, however, be an estoppel against setting up a forgery in either sense, if the elements of a holding out and reliance can be established. [253] It has also been suggested, in relation to companies, that s.44 of the Companies Act 2006 might give effect to forged signatures. [254] In particular, s.44(5) provides: "[i]n favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2)". Forged directors' signatures do purport to be official signatures. However, this would lead to the most surprising, and not very just, conclusion that a company could be bound by forged signatures that were placed on a document by persons who had no connection whatsoever with the company. It is difficult to believe that this outcome was contemplated by the section. [255]"*

71. I will need to come back to Section 44 in my discussion of Ground 2, but it will be noted that the editors of Bowstead & Reynolds express the view that there may be an estoppel against a company relying upon a forgery to say that it is not bound by a contract, where the signature of the relevant representative of the company has been forged.

72. Amongst the footnoted cases in this extract, Ms Lyne concentrated upon the decision of Davis J in *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch) [2011] BCC 789, which was referred to by the Judge, at some length, in the Decision. It is necessary to go

through the case in some detail, in order to identify what Davis J decided, and for what reasons.

73. The issue in *Lovett* was whether the administrators of a company had been properly appointed. The administrators were appointed by a bank pursuant to a debenture which had purportedly been granted by the company to the bank. It was alleged that the signature of one of the company's directors had been forged on the debenture, with the consequence that it was a nullity, as was the appointment of the administrators. At the relevant times the company had two directors, a Mr Jewson and a Mr Carter. Mr Carter's evidence, which was accepted, was that he had known nothing about the debenture or a related guarantee. The judge found that his signatures on the debenture and related documents had all been forged. The judge however also made the following findings, at [55]:

> ***"55.*** *My view, having regard to the evidence, was that in reality Mr Carter did not mind and was perfectly prepared to accept that Mr Jewson could sign documents in the name of Mr Carter provided that Mr Carter knew in general terms of the underlying transaction. It seems to me that Mr Carter must, for example, have known of the need of countersigned facility letters and other formal documents with regard to Barclays Bank. After all, he had initially signed one such for The Chapel property and he was content thereafter for Mr Jewson to do so on his behalf if that proved to be convenient. Likewise, for example, Mr Carter knew, as he accepted, of the need for a legal charge requiring two signatures in respect of the Mirfield transaction. I did not find his evidence that he assumed a solicitor had signed on his behalf convincing. I think that as before he simply was content, for the purposes of dealing with the bank, to leave the mechanics of signature entirely to Mr Jewson."*

74. The judge went on to consider *Ruben*. At [89] the judge summarised the effect of Ruben in the following terms:

> ***"89.*** *The decision and approach in Ruben has, as it seems to me, to be set in the context of the subsequent well-known decision of the House of Lords in Lloyd v Grace, Smith & Co [1912] A.C. 716 to which, indeed, Lord Loreburn and Lord Macnaghten were themselves party. But whilst aspects of the comments of Lord Davey in his speech in Ruben were expressly disapproved in Lloyd v Grace, Smith, the decision itself was not; see also the comments of Diplock L.J. in Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716 at 737. Since that time, it seems to be the case that by and large Ruben has, nevertheless, been represented as setting out the general position that a forgery is a nullity which cannot be validated, albeit there may be circumstances in which a party may be estopped from disputing the validity of a forged document; see Halsbury's Laws of England, 4th edn (London: LexisNexis), Vol.13, para.72. A particularly extreme version of the purported application of the decision in Ruben can be found in the case of South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch. 496. There, even though the signatures of director and secretary on the certificate were valid and they had affixed the seal, and even though they had done so in order to defer proceedings threatened against the company, it was held that the fact that the board had not authorised the affixing of the seal rendered the certificate a forgery and a nullity: a decision which to my mind is very hard to sustain."*

75. As the judge went on to point out however, at [90], a forged corporate document may not be a nullity for all purposes:

> ***"90.*** *No doubt a forged corporate document is a nullity in the sense that no one has actual authority on the part of a company to issue a forged document. But as the exception of estoppel shows, that does not mean that the forged document can in no circumstances have any effect whatsoever: just because circumstances can arise whereby the company may be estopped from disputing its validity. But once one accepts that, then, in my opinion, that immediately opens up the prospect that such a document cannot be sidelined as a nullity for all purposes in the case of apparent authority. Indeed, the principles of apparent authority are a broad reflection of the general principles of estoppel. That that may be so is borne out by Ruben itself in my view: for, admittedly in somewhat grudging terms, Shaw was not formally disapproved as a decision but instead was distinguished as being capable on its facts as connoting that the secretary was held out as having authority to warrant the genuineness of a certificate."*

76. The judge summarised his view of the position, at [91]:

> ***"91.*** *Thus Ruben was to be distinguished, not in point of principle, of course, but in point of fact. In Ruben there was no ostensible authority vested in the secretary."*

77. On the basis of his analysis of the law, Davis J reached the following conclusions, at [94] and [95]:

> ***"94.*** *In my view, that approach is the correct approach and gives the answer to the present case on the facts, finding as I do that the bank was a bona fide purchaser for valuable consideration. The question of the authority, both actual and ostensible, of a company secretary has unquestionably moved on since the days of Ruben, as a number of authorities show. Moreover, there may well be cases where an officer or employee of a company can in any event be authorised actually or ostensibly by the company to warrant that procedures have been properly complied with and that documents are genuine. Indeed, the realities of modern commerce can sometimes require as much. An example can be found in the court of Appeal decision in First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] B.C.C. 533.*
>
> ***95.*** *Moreover, in general agreement with the comments in Gore-Browne, I can see no reason in principle why some special approach should be grafted on in the case of forgery by reciting the mantra that a forgery is a nullity which is not to be grafted on in the case of fraud. After all, while not all frauds involve forgeries, all forgeries in their own way involve a fraud. No officer or servant has actual authority to commit a fraud any more than he has actual authority to commit a forgery. But it is clear ever since the decision in Lloyd v Grace, Smith, that a principal may in appropriate circumstances be bound by the fraudulent acts of his agent in circumstances where there is ostensible authority. True it is that in contractual terms fraud may make a contract voidable, not void, but the general point still remains that something which is done with authority, actual or apparent, is capable of binding the principal. Indeed, were that not so, I do not see how the House of Lords in Ruben could have approached the case of Shaw as they did or made the comments that they made on authority. Nor, were that not*

so, do I see how Sir Wilfred Greene M.R., could have stated the position as he did in the Uxbridge Building Society case."

78. The judge then turned to the facts of the case before him, at [96]:

> ***"96.*** *On the facts here, Mr Jewson was both director and secretary of CCH, as well as a shareholder in CCH both directly and indirectly through SGJ. But more than that, through the years of the company's incorporation, and by consent of Mr Carter, he and he alone had had on behalf of CCH all dealings with the bank. This was not merely a self-appointed role on his part; this was the way he and Mr Carter, the other director, had on behalf of CCH agreed that things should be done. As Mr Jewson said and I accept, Mr Carter left all the bank dealings and documentation to him and was happy for him to look after it all. The bank itself had no reason to think otherwise. In matters of documentation, therefore, it was to Mr Jewson on behalf of the directors of CCH that Barclays Bank looked in its dealings with CCH, and Mr Carter had throughout been content that that should be so. Further, as I have said, on a significant number of occasions—not just with a separate bank, Denizbank, but also with the bank itself—Mr Carter had been content to leave it to Mr Jewson to communicate the appropriate signed formal documents to the bank when Mr Carter must have known that two signatories were required and that he himself had not signed and when he knew that Mr Jewson had been wont to sign bank documents using Mr Carter's purported signature."*

79. The judge's conclusion, at the end of [96], was in the following terms:

> *"In such circumstances, I conclude that Mr Jewson had been clothed by CCH with ostensible authority to warrant to the bank that all formalities relating to approval and execution of the debenture and guarantee had been duly complied with and that the signatures could be relied upon as genuine."*

80. The judge then turned to consider the effect of Section 44. I will need to come back to that part of the judgment, when I come to consider Section 44. It should be noted at this stage however that what the judge had to say about Section 44 was obiter, because the judge had already concluded that Mr Jewson had been clothed by the company with ostensible authority to warrant to the bank that all formalities relating to the approval and execution of the debenture and guarantee had been duly complied with and that the signatures could be relied upon as genuine.

81. Ms Lyne submitted that it was impossible to reconcile the reasoning in *Lovett* with the decision of the House of Lords in *Ruben*, with the consequence that the Judge should have followed *Ruben*, rather than *Lovett*.

82. I do not accept this submission. I have quoted from both *Ruben* and *Lovett* at considerable length because it seems to me to be quite clear, from an analysis of the facts and reasoning in each case, that there is no conflict between the two decisions. Starting with *Ruben*, and as their Lordships made clear, there was no room for the operation of ostensible authority in that case. The company in that case knew nothing of the fraudulent activities of its secretary, and had had no dealings with the plaintiffs, who had lent money to the secretary on the security of what they believed to be a valid share certificate. Nor was there any course of conduct in that case, by which the company could be said to have authorised the

secretary to issue share certificates on his own initiative, bypassing the required formalities by forging the required signatures. In those circumstances the plaintiffs were left with the argument that they were entitled to assume that the share certificate had been validly issued, and that the forgery was an irregularity in the company procedures which did not affect them as they had no notice of the forgery, and no reason to make any inquiries in that respect. This argument did not work because, as their Lordships explained, the forged certificate was a pure nullity *"from beginning to end"* (Lord Macnaghten at page 444 of the report).

83. Turning to *Lovett*, the facts were significantly different. The key facts, as found by Davis J, were summarised at [96] in his judgment, which I have quoted above. On the basis of those facts, the judge decided that Mr Jewson had had the ostensible authority of the company, by reason of the previous conduct of the company in its dealings with the bank. As such, Mr Jewson had ostensible authority to warrant to the bank that the required formalities, including the required signatures, had been met in relation to the approval and execution of the debenture and guarantee. Leaving aside the judge's obiter consideration of Section 44, to which I shall return, the judge's actual decision in *Lovett* was made on the basis of ostensible authority, as that doctrine was explained by Diplock LJ in *Freeman & Lockyer*. The doctrine of ostensible authority was not available on the facts of *Ruben*, and thus played no part in the decision of their Lordships in *Ruben*.

84. In summary, I cannot see any conflict between the actual decisions in *Ruben* and *Lovett*. Nor can I see any basis for saying that the actual decision in *Lovett* was wrong. It seems to me that the actual decision in *Lovett* involved the application of a well-established doctrine, namely ostensible authority, to what may be said to have been the unusual facts of that case.

85. Ms Lyne also submitted that if *Lovett* states the law correctly, which in my view it does in the context of ostensible authority, and if *Lovett* can reconciled with *Ruben*, as I have decided it can, the Judge was still wrong to apply *Lovett* in the present case because the facts of that case are distinguishable from the present case. The ground of distinction, so Ms Lyne submitted, was that the forger in Lovett was a director of the company who had previously been engaged in all dealings with the bank. In the present case by contrast, so Ms Lyne contended, the forger (Mr Amitai) never had any role in the Appellant. Mr Amitai simply acted as agent of the Appellant, in the negotiations for the Surrender. This submission however seems to me to go back into the territory of Ms Lyne's first argument in support of Ground 1, which was that the Judge did not make sufficient findings to support his conclusion that the Appellant was estopped from denying the validity of the Payment Agreement.

86. The Judge did however find that the Appellant had done sufficient to *"clothe"*, in the language of *Lovett*, Mr Amitai and Fladgate with the ostensible authority of the Appellant to represent that the Payment Agreement had been validly executed; see my analysis of Ms Lyne's first argument in support of Ground 1. As such, it seems to me that the Judge was right to follow *Lovett*, and would have been wrong to distinguish the case.

87. One might think it surprising that the Appellant could have done sufficient to clothe either Mr Amitai or Fladgate with the ostensible authority of the Appellant to make representations to the effect that documents were validly executed by the Appellant in

circumstances where, unbeknown to the Appellant, the signature of its director on the Payment Agreement had been forged. This however was a factual question for the Judge, to be answered on all the evidence before the Judge. This engages Ms Lyne's second argument in support of Ground 1, which is that even if the Judge did make the required findings of representation and reliance, the facts of the present case fell well short of what would have been required to support a finding that Fladgate had actually represented, on behalf of the Appellant, that the Payment Agreement had been validly executed. I will come next to this second argument but, so far as the third argument is concerned, I can see no basis for the argument that the Judge should have distinguished the actual decision in *Lovett*, if it is assumed that the Judge was entitled to make the finding of representation and reliance which, as I have decided, the Judge did make in the Decision.

88. In conclusion, I reject Ms Lyne's third argument in support of Ground 2. For the reasons which I have set out, I do not see any conflict between *Ruben* or the actual decision in *Lovett*. Nor do I see anything wrong in the actual decision in *Lovett*. In my view the doctrine of ostensible authority is capable of operating in a situation where the signature of a person purporting to sign a contract on behalf of a company turns out to have been forged. In such a case it seems to me that the doctrine of ostensible authority is capable of operating so as to produce the result that the contract falls to be treated as having been validly signed on behalf of the company. It may be said that a relatively unusual set of facts, such as occurred in *Lovett*, is required before the doctrine of ostensible authority can be relied upon in order to bind a party to a forged document, but in principle I cannot see that the doctrine of ostensible authority is excluded in such a case. As a matter of law therefore, it seems to me that was open to the Judge, at least in principle, to make a finding that Fladgate acted with the ostensible authority of the Appellant, in representing that the Payment Agreement had been validly executed, with the result that the Payment Agreement was binding upon the Appellant. Whether the Judge was entitled to find the facts required to support the application of the doctrine of ostensible authority, being the question raised by Ms Lyne's second argument, is the question to which I now turn.

89. I can deal with Ms Lyne's second argument much more shortly. As I have said, one might think it surprising that the Appellant could have done sufficient to clothe either Mr Amitai or Fladgate with the ostensible authority of the Appellant to make representations to the effect that documents were validly executed by the Appellant in circumstances where, unbeknown to the Appellant, the signature of its director on the Payment Agreement had been forged.

90. As however I have also said, the question of what ostensible authority Fladgate had when they exchanged the ostensibly executed copy of the Payment Agreement was a factual question for the Judge. The Judge read and heard all the evidence in the case, which was extensive. I did not. Ms Lyne did not seek to take me through the evidence which was before the Judge, for the purposes of explaining why that evidence was insufficient to support the findings made by the Judge. There was no transcript available of the cross examination of the witnesses before the Judge. I do not say any of this by way of criticism. Appeals on pure questions of fact are never easy to pursue, while taking an appeal court through excerpts of the evidence below is rarely a productive or useful exercise. Ultimately, it seems to me that there is no basis upon which I could safely conclude that the findings made by the Judge, in support of his conclusion that the

Appellant was bound by the Payment Agreement, were findings which were not open to the Judge. I can see no basis for interfering with those findings.

91. I therefore conclude that Ground 1 fails. The Appellant has failed to establish that the Judge was wrong, either as a matter of law or as a matter of fact, in his conclusions (i) that the Appellant was estopped from denying that it had authorised the Payment Agreement in circumstances where that document had been forged, and (ii) that the Appellant was thereby bound by the Payment Agreement. It follows that the Decision stands, at least so far as the Judge decided that the Appellant was bound by the Payment Agreement.

Ground 2 – analysis

92. My conclusion in relation to Ground 1 means that it is not strictly necessary to deal with Ground 2. As I read Paragraph 5.15, the Judge relied upon Section 44(5) as an additional ground for concluding that the Appellant was bound by the Payment Agreement, if he had been wrong to conclude that the Appellant was bound by the Payment Agreement by reason of the Representations. If the Judge was wrong in his analysis of Section 44(5), this does not affect his reasoning, in Paragraph 5.14, based upon the Representations. In deference however to Ms Lyne's submissions on Section 44, I will set out my views on the argument in support of Ground 2.

93. The starting point is the rule of common law, established in *Turquand's* case (*Royal British Bank v Turquand* (1856) 119 ER 886), to the effect that a third party dealing with a company is not concerned to inquire into the regularity of the internal proceedings, or indoor management of a company. A person dealing with the company in good faith, without notice of an irregularity, is entitled to assume that the internal regulations of the company have been observed, when entering into a transaction with the company; see Palmer's Company Law, at 3.331-3.335.

94. It was this rule which Lord Loreburn LC articulated in *Ruben*, at 443. I have set out above the relevant extract from Lord Loreburn's speech, but I set it out again for ease of reference:

> *"I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."*

95. As Lord Loreburn stated in *Ruben*, this rule did not apply in the case of a forgery, where the relevant document was a pure nullity.

96. While I am concerned specifically with Section 44(5), it is convenient to set out the entirety of Section 44, which provides as follows:

> *"(1) Under the law of England and Wales or Northern Ireland a document is executed by a company–*
>
> *(a) by the affixing of its common seal, or*
>
> *(b) by signature in accordance with the following provisions.*

(2) A document is validly executed by a company if it is signed on behalf of the company–

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) The following are "authorised signatories" for the purposes of subsection (2)–

(a) every director of the company, and

(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.

(4) A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company.

(5) In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2). A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

(6) Where a document is to be signed by a person on behalf of more than one company, it is not duly signed by that person for the purposes of this section unless he signs it separately in each capacity.

(7) References in this section to a document being (or purporting to be) signed by a director or secretary are to be read, in a case where that office is held by a firm, as references to its being (or purporting to be) signed by an individual authorised by the firm to sign on its behalf.

(8) This section applies to a document that is (or purports to be) executed by a company in the name of or on behalf of another person whether or not that person is also a company."

97. Section 44(5) thus deems a document to have been duly executed by a company if it purports to be signed in accordance with subsection (2). The deeming is in favour of a purchaser, who must be a purchaser in good faith for valuable consideration.

98. The Judge considered that the Respondent was a bona fide purchaser for valuable consideration. The Judge also considered that the Payment Agreement purported to be signed in accordance with Section 44(2). As such, so the Judge reasoned, the Payment Agreement was, by virtue of Section 44(5), deemed to have been duly executed by the Appellant. In reaching this conclusion the Judge relied upon the reasoning of Davis J in *Lovett*.

99. This reasoning is to be found in the penultimate part of the judgment of Davis J in *Lovett*, at [98]-[102]. As Davis J noted, this part of his judgment was obiter, because he had already concluded, in the part of his judgment which I have considered in the previous section of this decision, that Mr Jewson had had the ostensible authority of the company to warrant to the bank that all formalities had been dealt with in relation to the approval and execution of the debenture and guarantee; see [96] in the judgment. Davis J commenced his analysis in the following terms, at [98].

> ***"98.*** *That conclusion makes it unnecessary to reach a conclusion on the issue of whether the bank could still rely on s.44(5) even if there were neither actual nor*

ostensible authority conferred by CCH on Mr Jewson. It seems to me that so to conclude would undoubtedly be a departure from the principles established by Ruben. The question thus is whether Parliament has by s.44(5), reflecting broadly s.36A of the Companies Act 1985 before it, made such departure."

100. The judge continued his analysis in the following terms, at [99]:

> ***"99.*** *As may be gathered from some of my earlier comments, I see much force in the submission that it has. Such a conclusion would by no means be lacking in purpose or sense. On the contrary, it might be said in modern times to be promotional of the interests of commerce—notwithstanding, for example, the current position with regard to bills of exchange—and to be an acknowledgement of the difficulties for banks and other third parties (provided, crucially, they are purchasers as defined) realistically making enquiries as to the validity of signatures and so would be a further protection in addition to those offered by, for example, s.161 of the 2006 Act. Further, such a conclusion at least reflects the actual wording used and would give rise to a degree of certainty. "Purport" is a word of wide ambit and it is rather difficult to see why as a matter of language it should, for example, extend to the genuine signature of a person having no authority as director but not extend to the forged signature in the name of a person who is a director. In other words, why, as a matter of language, "purport" should be taken to cover some defects but not others is not obvious. Putting it another way again, the argument that s.44(5) does not extend to forgeries in effect requires a starting presumption that the decision in Ruben is taken as still to be intended to apply and thus then requires a notional writing in of such an exception into s.44(5). But it is not at all obvious why or how such a proviso could or should be so written in as a matter of statutory implication: and that is so even assuming, which itself may be a matter of debate, that the word "forgery" is itself sufficiently precise."*

101. Davis J then went on, at [100] and [101], to consider the Consultation Paper and Law Commission Report (1998, Law Com.253) on the Execution of Deeds and Documents by or on behalf of Bodies Corporate. This consultation paper was said by counsel for the bank to negate the conclusion suggested by the judge at [99]. The judge was not convinced that this consultation paper was persuasive, in considering whether Section 44(5) extended to cases of forgery. Ultimately however the judge did not reach a conclusion on this question. He expressed his final thoughts in the following terms, at [102]:

> ***"102.*** *Since any view I express on this point would necessarily be obiter in the light of my prior conclusions, I think on the whole it would be better if I did not express any concluded view on this particular point. All I would say is that having regard to the actual wording of s.44(5), the matter is to my way of thinking by no means concluded by the points advanced in the Law Commission Consultation Paper or the Report itself."*

102. *Lovett* does not therefore contain even an obiter decision that Section 44(5) can be relied upon by a purchaser in good faith for valuable consideration in a case where the signature or signatures on behalf of the company, which appear on the relevant document in apparent compliance with the requirements of Section 44(2), have been forged. The most

that can be said is that Davis J had an open mind on the point, while possibly leaning towards the view that Section 44(5) could be relied upon in such a case.

103. In my view Section 44(5) was not intended to operate, and does not operate in a case of forgery of the kind which I have identified in my previous paragraph. My reasons for reaching this conclusion are essentially those upon which Ms Lyne relied in support of her arguments on Ground 2. I summarise those reasons in the following terms.

104. First, if Section 44(5) was capable of applying in the case of a forged document, this would produce a surprising, and apparently unjust result. This is the point made by the editors of Bowstead & Reynolds, at 8-041. I have already quoted the relevant extract, but I repeat the same for ease of reference (with my underlining added):

> ***"Forgery***
>
> *As under apparent authority generally, [251] the company can be bound, though the agent effects a forgery in the sense of executing an unauthorised signature. But an actual counterfeit signature would simply be a nullity. [252] There may, however, be an estoppel against setting up a forgery in either sense, if the elements of a holding out and reliance can be established. [253] It has also been suggested, in relation to companies, that s.44 of the Companies Act 2006 might give effect to forged signatures. [254] In particular, s.44(5) provides: "[i]n favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2)". Forged directors' signatures do purport to be official signatures. However, this would lead to the most surprising, and not very just, conclusion that a company could be bound by forged signatures that were placed on a document by persons who had no connection whatsoever with the company. It is difficult to believe that this outcome was contemplated by the section. [255]"*

105. The point made by the editors of Bowstead & Reynolds seems to me to be a compelling one. If Section 44(5) can apply in a case of forgery, this would mean that a company could be bound by forged signatures on a contract in circumstances where, although the signatures appeared to be those of persons required to sign the relevant contract for the purposes of satisfying the requirements of Section 44(2), the persons forging the signatures had no connection with the company whatsoever. Put more simply, the relevant company could find itself bound by a contract of which it knew nothing, containing signatures forged by persons with whom it had no connection and over whom it had no means of control. This strikes me as an unjust result. I say this in particular because, in a case such as *Lovett*, where it could legitimately be said that the company was responsible for allowing its business with the bank to be conducted without regard for the required formalities, the doctrine of ostensible authority was available to prevent the company from escaping the terms of the debenture. The doctrine of ostensible authority prevented the company from relying upon the forged signature on the debenture; being a forged signature for which it was reasonable to require the company to take responsibility. It seems to me that the doctrines of ostensible authority and estoppel are a much fairer means by which to decide whether a company should be bound by a forged contract than a bald application of Section 44(5).

106. Second, if the reach of Section 44(5) is this wide, this would constitute a reversal of the common law position, not just in relation to Section 44(5), but also in its statutory

predecessor, Section 36A of the Companies Act 1985 (in its original and amended versions). This common law position was well settled for decades prior to the introduction of Section 36A of the Companies Act 1985; see, but only by way of example in this instance, *Ruben*.

107. Ms Lyne drew my attention to an extract from Bennion, Bailey and Norbury on Statutory Interpretation (Eighth Edition) at 25.3, where the following principle is stated:

> *"Where an Act operates in the context of a particular area of law, such as property, tort or contract, the assumption is that it is intended to be informed in its construction and otherwise operate in the context of existing rules and principles making up that area of law. Similarly, the interpretation of an Act may be informed by relevant general legal principles such as agency."*

108. Later in the same extract, the editors comment as follows:

> *"There are also many instances where the general law operating in a particular area will impliedly qualify the operation of an enactment expressed in absolute terms. Legislation takes much for granted."*

109. Moving on to 25.6 in Bennion, the following presumption is stated:

> *"Presumption against changes to the common law*
>
> *(1) In accordance with the doctrine of parliamentary sovereignty, the Parliament of the United Kingdom may abolish, modify or displace any existing common law rule. A devolved legislature may do likewise, within its competence.*
>
> (2) *But there remains a general presumption that the legislature does not intend to make changes to the common law."*

110. The editors comment further, at 25.6, in the following terms:

> *"The influence of the presumption against changes to the common law is apparent in the many of the examples considered elsewhere in this chapter. But its importance should not be overstated. It is clear that an Act may abolish, modify or displace existing common law rules, expressly or by implication. The overriding consideration is, as always, to ascertain the legislative intention."*
>
> *"Presumption of minimum change to common law*
> *Where some change is clearly contemplated by an Act but the presumption is not entirely rebutted, the courts will seek to minimise the degree of legislative interference, for example by preferring to treat an Act as regulating rather than replacing a common law rule. As Lord Reid said in Black-Clawson International Ltd v Papeirwerek Waldhof-Aschaffenburg AG, Parliament "can be presumed not to have altered the common law farther than was necessary."*

111. I agree with Ms Lyne that Section 44(5) and its statutory predecessors must be construed against the relevant common law background, which is exemplified by the decision in *Ruben*. It seems unlikely to me that Parliament intended to change this common law position when it enacted Section 44(5) and its statutory predecessors.

112. As I understood Ms Lyne's submissions, she did not challenge the decision of the Judge, at Paragraph 5.15, that the Respondent qualified as a purchaser in good faith for valuable consideration, within the meaning of Section 44(5). Her submission was that the Judge

had been wrong to decide that Section 44(5) could operate, so as to deem the Payment Agreement to have been validly executed by the Appellant, in circumstances where the signature of its director on the Payment Agreement had been forged.

113. I accept this submission. For the reasons which I have stated, I respectfully disagree with the Judge in his (admittedly obiter) decision in Paragraph 5.15 that Section 44(5) could operate so as to deem the Payment Agreement to have been validly executed by the Appellant, in circumstances where the signature of its director on the Payment Agreement had been forged. In my view the Judge was wrong, as a matter of law, in this decision.

114. If therefore Ground 2 had been a live ground of appeal, I would have decided that Ground 2 succeeds. Given my decision on Ground 1, the fact that I disagree with the Judge in his decision on the application of Section 44(5) in the present case is not material to the outcome of the Appeal.

Ground 3 – analysis

115. A Disposal, that is to say a *"disposal"* as referred to in Clause 3.2, is not defined in the Payment Agreement. Ms Lyne contended that its meaning was limited to legal disposals, which I take to mean disposals of the legal title to the Property. If this is correct, the grant of the Charge, which was not completed by registration and only took effect as a charge in equity, was not a Disposal, and the grant of the Charge did not trigger the payment obligation in Clause 3.2.

116. I do not accept this contention. As I construe the Payment Agreement, a Disposal was intended to catch, and did catch any dealing with the Property, whether at law or in equity. I say this for the following reasons.

117. I start with the general position. The word *"disposal"*, in the context of real property, is a word capable of wide meaning. As a general rule one would not expect its meaning to be limited to disposals involving only the legal title to a property, in the absence of an express provision to this effect. In this context, I note that the Judge made reference to Section 205(1)(ii) of the Law of Property Act 1925, which contains the following definitions:

> *"(ii) "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;"*

118. There is no definition of the actual word *"disposal"* in Section 205, but I think that the paragraph of Section 205(1) cited by the Judge is of some relevance because it seems to me to support the point that, as a general rule, the word *"disposal"* in the context of real property, is capable of having a wide meaning, in much the same way as *"conveyance"* and *"disposition"* in paragraph (ii) of Section 205(1). Beyond this, paragraph (ii) confirms that the words *"dispose of"* have a similarly wide meaning. While the definitions in paragraph (ii) are for the purposes of the Law of Property Act 1925, they seem to me to be relevant in relation to the general meaning of the word *"disposal"* in the context of real property.

119. It is next necessary to consider the Payment Agreement itself, in order to see what guidance it provides as to the meaning of a Disposal. As I have said, a Disposal is not defined in the Payment Agreement. Looking however at the Payment Agreement as a whole, it seems to me that there is some useful guidance to be found as to the intended extent of a Disposal.

120. First, there is the definition of a Permitted Disposal. This was defined in the Payment Agreement. A Permitted Disposal was confined to what I will call inter-group disposals of the registered title to the Property and the grant of rack rented leases for terms not exceeding ten years from the date of the Payment Agreement. There are two relevant points to make in relation to this definition. First, one might reasonably expect a Disposal to mean any kind of disposal not qualifying as a Permitted Disposal. If there was intended to be a category of disposals which were not Permitted Disposals, but which were also outside the meaning of a Disposal, one might have expected the Payment Agreement to spell this out. Second, the definition of a Permitted Disposal is a narrow one, and appears to have been intended to catch disposals which would not necessarily affect or compromise the value of the Property. As such, it would be odd if disposals taking effect in equity only, which would be quite capable of compromising the value of the Property, were not within the scope of a Disposal.

121. Second, it seems to me that it is a useful exercise to consider the overall scheme of the Payment Agreement.

122. Although Clause 3.2 conferred the right to receive the Payment upon GPS or the Respondent, at the direction of the Respondent, it is convenient to discuss the Payment Agreement on the basis of the Respondent's rights under the Payment Agreement.

123. The obligation to make the Payment, in Clause 3.2, was simply a contractual obligation, once triggered. If the Payment was triggered, the Payment Agreement did not confer any direct interest in the Property upon the Respondent. In order to enforce payment of the Payment against the Property, it would have been necessary for the Respondent to obtain a judgment against the Appellant, pursuant to his contractual right to the Payment under Clause 3.2, and then to seek to enforce that judgment by obtaining a charging order over the Property. Such a charging order would have had the status of an equitable charge, and would have required protection by registration against the Property.

124. This created an obvious problem, in terms of securing payment of the Payment, if the obligation to make the Payment was triggered. The obvious asset against which the right to the Payment could be enforced, if the Appellant did not make the Payment, was the Property. Prior to the obligation being triggered, or after the obligation had been triggered but before enforcement of the right to Payment, the Respondent was exposed to the risk that a disposal might take place which would remove or reduce the value in the Property against which the Respondent could enforce his right to the Payment. An obvious example of such a disposal would be the creation of a charge over the Property by the Appellant.

125. It seems to me that this problem was addressed in two ways in the Payment Agreement. First, there was the ban on dealings with the Registered Title, save by way of Permitted Disposal, in Clause 6.1. This ban was reinforced by the provision for the entry of a

restriction on the Registered Title pursuant to Clause 6.2. These provisions only prevented however dealings with the Registered Title. They did not affect dealings in equity. Such dealings in equity were capable of prejudicing the position of the Respondent because, as I have already noted, the provisions of the Payment Agreement gave the Respondent no direct interest in the Property by way of security for the Payment. In these circumstances it seems to me reasonable to assume that the second way in which the problem with enforcing payment of the Payment against the Property was addressed was to provide that a disposal of the Property, other than a Permitted Disposal, would itself trigger the obligation to make the Payment, even if a Satisfactory Planning Permission had not been obtained. While this did not directly solve the problem of enforcement against the Property because, on this hypothesis, the relevant disposal would already have taken place, it seems reasonable to assume that the triggering of the obligation to make the Payment by such a disposal would have operated as a disincentive to make the relevant disposal.

126. If, however, a Disposal was limited to a dealing with the Registered Title, as Ms Lyne submitted, this would have left the Appellant free to make disposals in equity, which were themselves capable of removing or reducing the value in the Property, without triggering the obligation to make the Payment pursuant to Clause 3.2. It is difficult to believe that this was what was intended. If a Disposal was confined to a dealing with the registered title to the Property, this would have left what seems to me to be a substantial hole in the protection provided to the Respondent by the Payment Agreement. One can test this by considering the facts of the present case. The Appellant granted the Charge. While the Charge only took effect in equity, it remained an interest in the Property and, depending upon what sum was secured by the Charge, would have reduced the value of the Property available to any other creditors of the Appellant seeking to enforce debts against the Property. It would seem strange if the Appellant was able to do this without suffering the consequence of triggering the obligation to make the Payment pursuant to Clause 3.2.

127. There is also another reason why confining the meaning of a Disposal to a dealing with the Registered Title does not make much sense. As the Respondent pointed out in his submissions at the hearing of the Appeal, treating a Disposal as confined to a dealing with the Registered Title seems pointless. Dealings with the Registered Title were prevented by the entry of a restriction on the Registered Title. There was also the ban on dealings with the Registered Title in Clause 6.1. Given these provisions, it is difficult to see what the point was of providing that a Disposal would trigger the obligation to make the Payment, if a Disposal was confined to a dealing with the Registered Title. In what circumstances could such a disposal be expected to occur, given the entry of a restriction against the Registered Title prohibiting any such dealing, and given the contractual ban on such dealings in Clause 6.1?

128. In conclusion on my consideration of the overall scheme of the Payment Agreement, it seems to me that the overall scheme of the Payment Agreement points strongly to the conclusion that a Disposal was not intended to be confined to dealings with the Registered Title, but was also intended to include dealings with the Property taking effect in equity only.

129. Ms Lyne relied upon the case of *Gentle v Faulkner* [1900] 2 QB 267 in support of her argument that a Disposal was confined to dealings with the Registered Title. *Gentle v Faulkner* is one of a line of authorities which support the well-established principle of

landlord and tenant law that a bare covenant against assignment is only breached by an assignment of the legal title to the relevant lease. I refer to a bare covenant because a well-drafted covenant against alienation of the relevant lease will normally be expressed much more widely than a simple covenant against assignment, and may well restrict the ability of the tenant to make an assignment which takes effect in equity only. It remains the position however that, without more, a bare covenant against assignment is not breached by an assignment taking effect in equity only.

130. I do not regard *Gentle v Faulkner* or any of the cases in the line of authorities to which it belongs as being relevant to the question in the present case of what was meant by the reference to a Disposal in Clause 3.2.l The context in the present case is completely different. That seems to me to be illustrated by the opening part of the judgment of Romer LJ in *Gentle v Faulkner*, at 276-277:

> *"Upon the first point, it seems to me to be clear that a covenant in a lease against assigning the demised premises, in the absence of any context shewing that the covenant is to have an extended meaning, covers only a legal assignment. The covenant against assignment is, therefore, not broken by anything short of a legal assignment. In my opinion such a covenant is not broken by the lessee executing a declaration of trust of the demised premises. With all respect to my brother Ridley, s. 24, sub-s. 4, of the Judicature Act, 1873, has no application to the present case. Before the Judicature Act the Court of Chancery would never have regarded the cestui que trust as a lessee for the purposes of the lease as between the lessor and the lessee, nor would the Court have regarded a declaration of trust by the lessee of the demised premises as a breach of the lessee's covenant against assignment."*

131. In the context of the relationship of landlord and tenant, it is readily understandable that a covenant against assignment is not broken by an assignment in equity. In the case of such an assignment the legal title to the relevant lease will remain with the assignor tenant, who will hold the same as trustee for the equitable assignee. The landlord however is not concerned with this relationship in equity. The tenant, so far as the landlord is concerned, remains the party holding the legal title to the relevant lease. In these circumstance it is not surprising that the courts have not been prepared to treat assignments in equity as breaching covenants against assignment. This would create problems, in terms of the formal relationship of landlord and tenant. In the present case however the context is completely different, and considerations of this kind do not arise.

132. Drawing together all of the above discussion, I conclude that Ground 3 fails. I conclude that the Judge was right to decide that the Charge constituted a Disposal, and that the Judge was right to make the consequential decision that the grant of the Charge triggered the obligation of the Appellant to make the Payment, pursuant to the provisions of Clause 3.2.

133. While I did not understand this to be part of Ms Lyne's argument in support of Ground 3, I should say that it seems to me to make no difference that, according to the evidence of Mr Calif, the Charge was not subject to any redemption and was removed from the register of charges at Companies House. If the Charge qualified as a Disposal, and I agree with the Judge that it did, it seems to me that the creation of the Charge was what triggered the obligation to make the Payment. What happened thereafter to the Charge seems to me to have been irrelevant. The obligation to make the Payment had already been triggered.

Equally, if Mr Calif was unaware of the Payment Agreement at the time when he arranged for the creation of the Charge, this equally makes no difference. If the Appellant is bound by the Payment Agreement, and I agree with the Judge that it is, it seems to me that it is equally bound by the triggering of obligation to make the Payment pursuant to Clause 3.2, regardless of whether it was aware that this was the effect of the creation of the Charge or not.

134. Accordingly, the Decision stands, so far as the Judge decided that the obligation to make the Payment pursuant to Clause 3.2 was triggered by the creation of the Charge.

Ground 4 analysis

135. It is convenient to start by setting a summary of the Judge's reasoning in the relevant part of the Decision. At Paragraphs 6.3 and 6.4 the Judge summarised the submission of the Appellant, in the following terms:

> *"6.3. However, the Respondent contends primarily that the obligation to pay under the agreement has been triggered by the Applicant's grant of the Charge to Perly Capital within the period of the agreement and that the Applicant has, admittedly, refused to pay the sum which he contends is due. It follows, he says, that unless and until payment in accordance with the agreement has been made the restriction is required because the performance by the Applicant of its obligations under the agreement which it was manifestly, given the wording of the restriction, registered to protect has not been achieved.*
>
> *6.4. The Applicant in response says that, properly construed, clauses 3.3 and 6.4 create a mandatory contractual obligation upon the Respondent to procure or assist the removal of the restriction upon the occurrence of the relevant event, i.e. the sooner of payment pursuant to clause 3.2 or the expiry of the five-year term."*

136. I have already set out the Judge's reasoning in response to these arguments, at Paragraph 6.5. For ease of reference I repeat Paragraph 6.5:

> *"6.5. This seems an extraordinary submission to me. It requires an acceptance that it was the intention of the parties that even though:*
>
> *6.5.1. the obligation to pay which it was the primary purpose of the agreement to create had arisen;*
>
> *6.5.2. had not been satisfied so that the Applicant was in breach of its obligations under the agreement; and*
>
> *6.5.3. the Applicant had expressed its intention not to remedy its breach,*
>
> *the Court, Registrar or Tribunal would nevertheless be required as a matter of contract, unconditionally, to make an order which might very well allow the Applicant to escape its obligation to pay the Respondent. I do not believe that was the intention of the parties. It seems plain to me: i) that no injunction or order would be made in the Applicant's favour such circumstances in the exercise of the Court's discretion; and ii) as the Respondent contends, that the opening words of clause 3.3 expressly exclude the obligation to remove the restriction if the terms of the agreement have not been complied with."*

137. As I read this Paragraph, the Judge decided that in circumstances where the obligation to make to the Payment pursuant to Clause 3.2 had been triggered, the obligation upon the Respondent to remove or assist in the removal of the Restriction could not arise, until the

Payment was actually made, to GPS or the Respondent, by the Appellant. In reaching this conclusion, the Judge relied upon the opening words of Clause 3.3, which he described as expressly excluding the obligation to remove the Restriction if the terms of the Payment Agreement had not been complied with. As a matter of fact, the terms of the Payment Agreement had not been complied with, because the obligation to make the Payment had been triggered, but the Payment had not been paid by the Appellant, in breach of Clause 3.2.

138. Although Clause 3.2 conferred the right to receive the Payment upon GPS or the Respondent, at the direction of the Respondent, it is again convenient to discuss the Payment Agreement on the basis of the Respondent's rights under the Payment Agreement.

139. Ms Lyne's argument in support of Ground 4 was, in its essentials, a simple one. She relied on Clause 6.4, which I repeat for ease of reference:

> *"6.4 On payment of the Payment under clause 3.2 or expiry of the period of five years from the date of this deed (whichever is the earlier) the Tenant and Mr Gapper jointly and severally undertake to procure that the restriction mentioned in clause 6.2 is removed from the Registered Title and to assist the Landlord in achieving such removal."*

140. Ms Lyne contended that Clause 6.4 was clear. The Restriction was to be removed either if the Payment was made or if five years had elapsed from the date of the Payment Agreement *"whichever is the earlier"*. This wording was unequivocal. There were two triggers for the removal of the Restriction. One was the date of the Payment; meaning the date when the Payment was made. The other was the expiry of five years from the date of the Payment Agreement. On the earliest of these two events to occur, the Restriction fell to be removed. The Judge, so Ms Lyne submitted, had failed properly to consider the unequivocal wording of Clause 6.4, and had placed too much emphasis on Clause 3.3, which was a separate provision, directed to a different object.

141. The Respondent argued that the Judge had been correct in this decision. The Respondent's argument essentially fell into two related parts, as follows:

(1) As a matter of construction of the Payment Agreement, the reference to the first of the two dates in Clause 6.4, that is to say *"On payment of the Payment under Clause 3.2"*, was a reference to the date when the Payment fell due for payment pursuant to Clause 3.2. The charge was created on 24th February 2017. Assuming that the Charge qualified as a Disposal, the contractual date for payment of the Payment fell seven days after the date of creation of the Charge, which was 3rd March 2017. Thus, on the facts of the present case, the first of the two dates in Clause 6.4 was 3rd March 2017, which would always fall before the second of the two dates in Clause 6.4, namely the date of expiration of the five year period from the date of the Payment Agreement (8th April 2020). On this basis, so the Respondent argued, the Restriction should only be removed on payment of the Payment. Otherwise, proper effect was not given to the definition of the first of the two dates in Clause 6.4, or to the opening words of Clause 3.3.

(2) The Appellant's construction of Clause 6.4 was inconsistent with the main purpose of the Payment Agreement, and would allow the Appellant to profit from its own wrong; namely its refusal to make the Payment. Accordingly, the

Respondent's construction of the Payment Agreement should be preferred, because it would avoid a construction of the Payment Agreement which would allow the Appellant to profit from its breach of Clause 3.2. Alternatively, and more simply, the Appellant should not be permitted to profit from its own wrong in breaching its obligation of payment in Clause 3.2.

142. In relation to the second part of the Respondent's argument, it seemed to me that it engaged two principles which might assist the Respondent's opposition to the Appeal, in relation to Ground 4. The first principle was the principle that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of its own wrong. The second principle was the common law principle that a party cannot take advantage of its own wrong.

143. As neither of these principles was clearly articulated in the Respondent's written and oral submissions in relation to the Appeal, I gave the parties the opportunity to file further sequential written submissions, with the Appellant going first, on the following questions:
    (1) Is the construction of Clause 6.4 affected by the principle that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of his own wrong (**"Question 1"**)?
    (2) If so, what (if any) consequence does this have for the construction of Clause 6.4 (**"Question 2"**)?
    (3) Is the common law principle that a party cannot take advantage of his own wrong engaged in relation to the Appellant's reliance upon clause 6.4, if the Appellant is right in its construction of Clause 6.4 (**"Question 3"**)?
    (4) If so, what (if any) consequences follow from this (**"Question 4"**)?
    (5) Is it open to the Respondent to raise any of the above questions, given that this is an appeal, being heard by way of review (**"Question 5"**)?

144. Question 5 was included because it was the Appellant's case that Questions 1-4 had not been raised by the Respondent before the Judge. As such, there was an issue as to whether it was open to the Respondent to raise Questions 1-4 on the Appeal. The Appeal was directed to be heard by way of review, and not by way of rehearing.

145. Both Ms Lyne and the Respondent provided helpful further written submissions on these Questions. Ms Lyne's further submissions were subject to two qualifications.

146. The first qualification, which also applied to her existing submissions in support of Ground 4, was that Ms Lyne was assuming, contrary to her case on Grounds 1-3, that the Appellant was bound by the Payment Agreement and had, in breach of the Payment Agreement, failed to make the Payment. By reference to my decision, this qualification no longer applies. I have upheld the decision of the Judge that the Appellant was bound by the Payment Agreement and has, in breach of the Payment Agreement, failed to make the Payment, the obligation to pay which was triggered by the creation of the Charge.

147. The second qualification was the submission of Ms Lyne, in relation to Question 5, that it was not open to the Respondent to raise Questions 1-4 in the Appeal, because they had not been raised below, before the Judge. As Questions 1 and 2 raised what Ms

Lyne described as a pure point of law, in respect of which the Appellant had been given time to consider her position, Ms Lyne (sensibly) did not object to Questions 1 and 2 being raised. Ms Lyne did object to Questions 3 and 4 being raised. She contended that they were questions which had not been raised before the Judge, and had not been raised as part of the permission to appeal process. They were not confined to questions of law, and engaged a range of factors which were not in evidence before the Judge and in respect of which no findings of fact had been raised. If Questions 3 and 4 were to be considered, this would require new evidence, in circumstances where the Appeal had proceeded and been heard, pursuant to the directions given in the Appeal on 3rd January 2023, by way of review.

148. It is convenient to deal first with the question of whether it is open to the Respondent to raise arguments in relation to Questions 3 and 4 in the Appeal. I can take this issue shortly. I have seen a copy of the Respondent's Statement of Case in the FTT. The Statement of Case is accompanied by a document which is described as a *"Response to Applicant's statement of case by numbered paragraphs"*, dated 18th March 2021 (**"the Response"**). Paragraph 22 of this Response contains the following assertion:

> *"The Applicant's interpretation of clause 6.4 is inconsistent with the main purpose of the agreement and it would allow the Applicant to profit from its own wrong, as it has refused to pay the debt."*

149. I have not seen a transcript of the hearing before the Judge, but it appears from the terms of the Decision that the argument that the Appellant could not profit from its own wrong was either not raised at all as a distinct argument, or was not raised in a way which called for a specific decision on that argument by the Judge. Nevertheless, it seems to me to be clear that the argument was raised by the Respondent in paragraph 22 of the Response; see the extract from the Response document which I have quoted above. In these circumstances it seems to me that it would be wrong to shut the Respondent out from raising this particular argument in the Appeal. Accordingly, it seems to me that I should consider Questions 3 and 4. If there is an absence of evidence which may required for the purposes of considering Questions 3 and 4, it seems to me that that will be more to the prejudice of the Respondent than the Appellant, given that the burden is on the Respondent, if he can, to establish his ability to rely upon the principle that a party cannot take advantage of its own wrong.

150. I therefore conclude, in answer to Question 5 (so far as in issue), that it is open to the Respondent to pursue his case on Questions 3 and 4, in addition (as conceded) to pursuing his case on Questions 1 and 2.

151. I therefore turn specifically to my analysis of Ground 4. The starting point seems to me to be Clause 6.4, the terms of which I repeat, for ease of reference:

> *"6.4 On payment of the Payment under clause 3.2 or expiry of the period of five years from the date of this deed (whichever is the earlier) the Tenant and Mr Gapper jointly and severally undertake to procure that the restriction mentioned in clause 6.2 is removed from the Registered Title and to assist the Landlord in achieving such removal."*

152. Looked at in isolation, the terms of Clause 6.4 seem to me to be clear. If one of two triggering events occurs, the Respondent agrees to procure and assist in the removal of

the restriction from the Registered Title. The first triggering event is payment of the Payment. I stress the word *"payment"*. It seems clear to me that this first triggering event only occurs when the Payment is actually paid. The second triggering event is the expiry of the period of five years from the date of the Payment Agreement; that is to say (by my calculations) midnight on 8th April 2020. The Respondent's obligation to procure and assist in the removal of the restriction arises on the earlier of these triggering events. As I understand the position, the Payment has not been paid. Continuing to look at Clause 6.4 in isolation, this means that the earlier of the two triggering events specified in Clause 6.4 will have been the expiry of five years from the date of the Payment Agreement. This triggering event will have occurred (by my calculations, but the precise date is not important) at midnight on 8th April 2020.

153. This was not the analysis of the Judge. In Paragraph 6.5 the Judge was clearly influenced in his reasoning by the fact that such a construction of the Payment Agreement would, in the events which had occurred in this context, result in the Restriction being removed in circumstances where the Appellant had failed to make the Payment and was not prepared to make the Payment. In such circumstances, so the Judge reasoned, the relevant court or tribunal would be compelled to make an order for the removal of the Restriction, which might very well allow the Appellant to escape its obligation to pay the Respondent. I assume that the Judge had in mind a dealing with the Registered Title, following the removal of the Restriction, which would effectively remove the Property from the Respondent's reach, in terms of enforcing the Respondent's right to payment against the Property. This chain of reasoning led the Judge to the following two conclusions:
    (1) No injunction or order would be made in the Appellant's favour in such circumstances in the exercise of the court's discretion.
    (2) The opening words of Clause 3.3 expressly exclude the obligation to remove the restriction if the terms of the Payment Agreement have not been complied with.

154. I do not follow the first of these conclusions. As a general rule, if a party has a particular right under the terms of a contract, the court is bound to give effect to that right. If the remedy sought is a discretionary remedy, such as an injunction or an order for specific performance, the court has a discretion to exercise in terms of whether it should award that particular form of relief, but the discretion falls to be exercised in accordance with well-settled principles. The court cannot refuse to enforce the terms of a contract simply because the enforcement of the contractual right in question produces what the court regards as an unattractive or unfair result. In any event, in the present case the question for the Judge was whether the restriction should be cancelled, pursuant to Rule 97 of the Land Registration Rules 2003 (**"Rule 97"**). By Rule 97(3), the registrar was bound to cancel the Restriction if it was no longer required. If one assumes that the parties had, under the terms of the Payment Agreement, agreed to the removal of the Restriction after five years, the question for the Judge was whether it could be said that the Restriction was still required. It seems to me that the answer to that question depended upon whether the Respondent had any right to maintain the Restriction on the Registered Title. I cannot see that the question was one for the discretion of the Judge.

155. This leaves the second conclusion of the Judge, which was that Clause 3.3 expressly excluded the obligation to remove the restriction, if the terms of the Payment

Agreement had not been complied with. For ease of reference I set out Clause 3.3 again:

> *"3.3 Subject always to the Landlord's compliance with the terms of this agreement in the event that the Landlord has not obtained a Satisfactory Planning Permission within five years of the date of this agreement the Payment shall be no longer payable to the Tenant (or Mr Gapper) and the Landlord's Solicitor shall be entitled to return the Payment to the Landlord."*

156. It seems clear to me that Clause 3.3 was concerned with a matter separate to the question of the duration of the restriction. Clause 3.3 was concerned with what was to happen, in terms of the obligation to make the Payment, if a Satisfactory Planning Permission was not obtained. Clause 3.3 resolved this problem by putting a time limit on the obligation to make the Payment. If a Satisfactory Planning Permission was not obtained within five years of the date of the Payment Agreement, the Payment would no longer be payable. This provision was however expressed to be subject to the Appellant's compliance with the terms of the Payment Agreement. It is not entirely clear to me how this condition would have worked in practice, but this does not matter for present purposes. For present purposes the relevant point is that this condition does not seem to me to have been linked to the obligation of the Respondent, in Clause 6.4, to co-operate in the removal of the restriction. I can see nothing in the Payment Agreement which linked the condition to Clause 6.4. I agree with Ms Lyne that Clause 3.3 was directed to a different object, which I would identify as the duration of the obligation to make the Payment, if not triggered, to Clause 6.4, which was concerned with the duration of the restriction on the Registered Title.

157. Clause 3.3 is not as well drafted as it might be because it does seem to me that it fails to make clear whether, upon the expiry of the five year period without a Satisfactory Planning Permission having been obtained, (i) the obligation to make the Payment can no longer be triggered or (ii) that the Payment is no longer payable even if already triggered but left unpaid. It seems to me that the answer to this particular question must be (i). It would be absurd if the obligation to make the Payment, having been triggered by a Disposal during the five year period, could then disappear upon the expiration of the five year period.

158. Proceeding on the basis set out in my previous paragraph, and looking solely at the wording of Clause 3.3 and Clause 6.4, I cannot agree with the Judge's conclusion that the opening words of Clause 3.3 expressly exclude the obligation to remove the Restriction if the terms of the Payment Agreement have not been complied with. I do not think that the wording of these two Clauses produces this result.

159. I am also unable to accept the Respondent's arguments on the construction of the Payment Agreement. Continuing to put Questions 1-4 to one side for this purpose, it seems to me that there are two essential problems with the Respondent's arguments on the construction of the Payment Agreement.

160. The first problem is that the first of the two dates in Clause 6.4 does not seem to me to be tied to the date on which the Payment falls due for payment under Clause 3.2. As I read the opening words of Clause 6.4 the first of the dates referred to is the date when

payment of the Payment is actually made. This makes sense because it would be odd if the restriction had to be removed on the contractual date for payment. On this hypothesis the restriction might fall to be removed in a situation where the Payment fell due for payment well before the end of the five year period from the date of the Payment Agreement. If the Payment was not paid, in breach of Clause 3.2, the restriction would fall to be removed well before the end of the five year period, without the Payment having been made. This would produce a worse result, from the point of view of the Respondent, than the Appellant's construction, by reference to which the restriction will endure for five years in circumstances where the obligation to make the Payment is triggered, but the Payment is not made.

161. The second problem is that even if one accepts that the first of the two dates in Clause 6.4 is the contractual date for payment of the Payment, as opposed to the actual date of payment of the Payment, I do not see how this leads to the result contended for by the Respondent, namely that the restriction cannot be removed until payment of the Payment has been made. As I have already explained, I do not see how a condition of this kind can be read into Clause 6.4. I am not persuaded that the opening words of Clause 3.3 can be read into Clause 6.4 in this fashion. Nor can I find anything else in the Payment Agreement to support this construction of Clause 6.4.

162. So far however, I have been considering the construction of the Payment Agreement while putting to one side Questions 1 and 2. I now turn to consider Questions 1 and 2. Is the construction of Clause 6.4 affected by the principle that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of his own wrong? If so, what (if any) consequence does this have for the construction of Clause 6.4?

163. Questions of this kind were considered by the House of Lords in the case of *Alghussein Establishment v Eton College* [1988] 1 WLR 587. In that case their Lordships were concerned with an agreement for the grant of a long lease, which required the tenant to use its best endeavours to commence and proceed diligently with the development of a block of flats. Clause 4 of the agreement contained the following proviso:

> *"that if for any reason due to the wilful default of the tenant the development shall remain uncompleted by 29 September 1983 the lease shall forthwith be completed…"*

164. The successors in title to the tenant (the plaintiffs in the case) failed even to begin the development, whereupon the successors in title of the landlord (the defendants in the case) sought to treat the agreement as repudiated on the basis of this breach of the agreement. The plaintiffs, with what might have been considered to be remarkable nerve, contended that the proviso to clause 4 of the agreement had the effect that the parties were required to complete the agreement. Their argument was that the development remained uncompleted by reason of their own wilful default. On this basis the plaintiffs sought an order for specific performance of the agreement. On a preliminary issue the House of Lords upheld the decisions of Sir Nicholas Browne-Wilkinson V-C, as he then was, and the Court of Appeal that the plaintiffs could not rely on the proviso to clause 4 of the agreement.

165. In his speech in the House of Lords, with which the other members of the House of Lords agreed, Lord Jauncey identified the following principle, at 591D:

> *"My Lords it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party."*

166. In making his decision on the facts of the case, Lord Jauncey considered it a bizarre result that a tenant who had failed to complete or even start the development due to his own wilful default was entitled to demand that the agreement be completed and the lease granted to him. Lord Jauncey set out his conclusions on this question in the following terms, at 595D-F:

> *"Even if it were appropriate to imply the provision of clause 3(b) into any lease to be granted under the proviso to clause 4, and I make this assumption without deciding the matter one way or the other, there remains the question whether in the words of Lord Diplock in the Cheall case [1983] 2 A.C. 180, 189 the agreement contains clear express provisions to contradict the presumption that it was not the intention of parties that either should be entitled to rely on his own breach in order to obtain a benefit. I find no such clear express provision. Although the proviso refers specifically to the wilful default of the tenant it does not state that the tenant should be entitled to take advantage thereof. It is one thing for wilful default of a party to be made the occasion upon which a provision comes into operation but it is quite another thing for that party to be given the right to rely on that default. Furthermore it is not disputed that a lease granted under the proviso which contained no covenant to build would render the whole scheme unworkable. In that situation it is reasonable to assume that if the parties had intended in this extraordinary proviso to displace the presumption they would have expressly imported clause 3(b) into any such lease rather than leaving it to possible but uncertain implication. All in all I have no doubt that the terms of the proviso were not apt to displace the rule of construction and I consider that the Vice-Chancellor and the Court of Appeal were correct in concluding that the appellants were not entitled to invoke the proviso to clause 4."*

167. It is also to be noted that Lord Jauncey declined to decide whether the rule he was applying was one of construction or was an absolute rule of law. In concluding his speech Lord Jauncey said this, at 595G:

> *"It only remains to refer to the respondents' argument that there is an absolute rule of law and morality which prevents a party taking advantage of his own wrong whatever the terms of the contract. My Lords I do not find it necessary to deal with this. For my part I have no doubt that the weight of authority favours the view that in general the principle is embodied in a rule of construction rather than in an absolute rule of law. However, that is not to say that there cannot be situations such as self-induced frustration, to which Lord Diplock referred in the Cheall case, where an absolute rule exists. It is neither necessary nor would it be profitable to explore the matter further in this case."*

168. There is therefore at least a principle of construction that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of their own breach of that contract; see Lewison, The Interpretation of

Contracts (7th Edition) at 7.108-7.118. Two particular points may be noted in relation to the application of this principle:

(1) The principle applies where a causal connection can be shown between the wrong of the relevant party and the contractual right which that party seeks to rely upon. Putting the matter another way, the principle applies where, as in *Alghussein*, the party claims to have a contractual right or benefit as a result of that party's breach of the contract; see the judgment of His Honour Judge Waksman QC (as he then was) sitting as a High Court Judge in *Eurobank Ergasias SA v Kalliroi Navigation Company Limited* [2015] EWHC 2377 (Comm) at [48]-[53].

(2) The principle is not an absolute rule. It may be displaced by express contractual provision or by the intentions of the parties as made apparent by the express terms of the relevant contract. As Andrew Smith J explained in *Petroplus Marketing AG v Shell Trading International Ltd* [2009] EWHC 1024 (Comm) [2009] 1 CLC 743, at [17]:

> *"17. It is a general principle of construction that prima facie it will be presumed that the parties intended that neither should be entitled to rely on his own breach of duty to obtain a benefit under a contract, at least where the breach of duty is a breach of an obligation under that contract: see Chitty on Contracts, cit sup, vol. 1 at para. 12-082. This is sometimes presented not as a matter of contractual construction but an implied contractual term that a right or benefit conferred upon a party shall not be available to him if he relies upon his own breach of the contract to establish his claim: Chitty on Contracts, cit sup, vol. 1 at para. 13-012. However analysed, the principle is not inflexible or absolute: it may be displaced by express contractual provision or by the parties' intention to be understood from the express terms: Richco International Ltd v Alfred C Toepfer International GmbH [1991] 1 Ll Rep 136, 144."*

169. Turning to the application of the above principle to the present case, it seems to me clear that it cannot apply. The reason for this is the absence of a causal connection between the Appellant's breach of the Payment Agreement and the Appellant's reliance upon Clause 6.4. The Appellant is in breach of its obligation to make the Payment, pursuant to Clause 3.2. In order to rely upon Clause 6.4 however, the Appellant does not need to rely upon its breach of Clause 3.2. Rather, the Appellant relies upon the plain wording of Clause 6.4, which provides that the Restriction is removed after the end of the five year period. The period after which the Restriction has to be removed may be shorter, as a result of earlier payment of the Payment, but there is no provision for this period to be prolonged beyond the five years, either because the Payment has been triggered but has not been paid, or for any other reason. In my view this situation is not one where the Respondent can legitimately say that the Appellant is relying upon its own breach of the Payment Agreement in order to take advantage of the provisions for the removal of the Restriction in Clause 6.4.

170. I can see the point that one result of the removal of the Restriction from the Registered Title is that the Respondent will be left with a debt claim against the Appellant, without the protection of the Restriction being in place. It seems to me however that this is not the consequence of Appellant failing to make the Payment. Rather, it is the consequence of the original choice of the parties to the Payment Agreement to limit the

duration of the Restriction on the Registered Title to the specified period of five years. Indeed, one can see reasons why a limitation of five years on the duration of the restriction to be registered pursuant to clause 6.2 may have been considered as an acceptable compromise between the parties. The period of five years mirrored the period of five years within which the Satisfactory Planning Permission had to be obtained, if the obligation to make the Payment was to be triggered by the obtaining of a Satisfactory Planning Permission. While one can see why it might have made sense for the restriction to have endured for longer than five years, in order to give the Respondent some protection if the obligation to make the Payment was triggered right at the end of the five year period, one can also see that the period of five years might have been seen as an acceptable compromise between not having the restriction at all, and allowing the restriction to continue beyond the five year period.

171. In summary and in answer to Question 1, my conclusion is that the construction of Clause 6.4 is not affected by the principle that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of his own wrong. I do not think that the required causal connection exists between the Appellant's breach of clause 3.2 of the Payment Agreement and the Appellant's reliance upon Clause 6.4 for the principle to be engaged. As such, Question 2 does not arise.

172. Turning to the common law principle that a party cannot take advantage of its own wrong, that is say Questions 3 and 4, I can take these Questions much more shortly. Ms Lyne's primary argument on these questions was that there was no independent common law principle upon which the Respondent could rely in the present case. For this purpose Ms Lyne relied upon what was said by Patten LJ in *BDW Trading Limited v JM Rowe (Investments) Limited* [2011] EWCA Civ 548. After making reference to the principle that a party cannot rely upon its own breach of contract, as stated in what was then the 30th Edition of Chitty on Contracts, at 12.082, and after making reference to Lord Diplock's speech in *Cheall v APEX* [1983] 2 AC 180, Patten LJ said this, at [31]:

> *"31. Although there has been a certain amount of academic discussion as to whether the principle has the status of a rule of law which is imposed upon the parties to a contract almost regardless of what they have agreed, it is now clear as a matter of authority that the application of the principle can be excluded or modified by the terms of the contract and that its scope in any particular case will depend upon the construction of the relevant agreement."*

173. It seems to me however that all Patten LJ was doing in this part of his judgment in *BDW* was identifying the limits of the principle that a party cannot rely on its own breach of contract in order to take advantage of a provision in the same contract. There is the wider doctrine that a party cannot rely upon an illegality in support of a cause of action, as considered in *Patel v Mirza* [2016] UKSC 42. Ms Lyne contended that this principle was not capable of applying the present case, because its application was confined to cases where a party sought to rely upon criminal acts or quasi-criminal acts in support of its cause of action; see Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55 [2015] AC 430, at [28].

174. I agree with Ms Lyne that the wider doctrine that a party cannot rely upon an illegality in support of its cause of action is not capable of applying in the present case. It seems to me however that this wider doctrine, even if capable of applying in the present case, could not be relied upon for the same reason that the Respondent cannot rely on the principle that a party cannot take advantage of its own breach of contract in order to rely upon a provision of the contract. For the reasons which I have already set out in my answer to Questions 1 and 2, it seems to me that the Appellant has no need to rely upon its own breach of Clause 3.2, and does not rely upon its own breach of Clause 3.2, for the purposes of relying upon clause 6.4. The required causal connection, which is needed to found the necessary reliance upon the relevant wrong, does not exist.

175. In summary, and in answer to Question 3, I do not think that the common law principle that a party cannot take advantage of his own wrong is engaged in relation to the Appellant's reliance upon Clause 6.4. As such, Question 4 does not arise.

176. Now that I have dealt with Questions 1-5, I return to my construction of the wording of Clause 3.3 and Clause 6.4, and the Judge's conclusion, at Paragraph 6.5, that the opening words of Clause 3.3 expressly exclude the obligation to remove the Restriction in Clause 6.4, if the terms of the Payment Agreement have not been complied with. As I have stated, I cannot agree with this conclusion of the Judge. As I read and construe the Payment Agreement, the obligation of the Respondent to assist in the removal of the Restriction applies from the expiry of the five year period in Clause 6.4. This obligation is not affected by the fact that the Appellant's obligation to make the Payment has been triggered, but has not been complied with, either as a matter of construction of the Payment Agreement or by the application of any wider principle that a party cannot take advantage of its own wrong.

177. Accordingly Ground 4 succeeds. For the reasons which I have given I conclude that the Judge was wrong, as a matter of law, to decide that the Payment Agreement did not require the removal of the Restriction five years after the Payment Agreement was entered into. I think that the removal of the Restriction is required, by Clause 6.4.

<u>The outcome of the Appeal</u>

178. Although I have upheld substantial parts of the Decision, it follows from my decision on Ground 4 that I am unable to uphold the conclusions of the Judge at Paragraphs 7.1.6 and 7.1.7. Those conclusions were in the following terms:

> *"7 .1.6. In order to be required to cancel the restriction the Chief Land Registrar must be satisfied that it is no longer required.*
>
> *7 .1. 7. The restriction is still required because the Applicant has refused to comply with its obligation pursuant to clause 3.2 to make the payment due under the Payment Agreement."*

179. The Respondent is, by reference to my decision on Ground 4, subject to an obligation to assist the Appellant in the removal of the Restriction pursuant to Clause 6.4. As such, it seems to me that it is impossible to say that the Restriction is still required, within the meaning of Rule 97.2 of the Land Registration Rules 2003. It seems to me that the Chief Land Registrar can be satisfied that the Restriction is no longer required, within the meaning of Rule 97.3.

180. I therefore conclude that paragraph 1 of the Order, by which the Judge directed the Chief Land Registrar to cancel the Application, falls to be set aside, together with the conclusions of the Judge in the Decision, at Paragraphs 7.1.6 and 7.1.7. For the reasons which I have given, it seems to me that paragraph 1 of the Order and the conclusions at Paragraphs 7.1.6 and 7.1.7 are based upon errors on points of law, and cannot stand. For the sake of completeness it also seems to me that the Judge's conclusion at Paragraph 7.1.5, on Section 44(5), falls to be set aside as being based on an error of law, although this conclusion was strictly obiter to the Judge's reasoning on the question of whether the Appellant was bound by the Payment Agreement.

181. It seems to me that it is not necessary to remit the case to the Judge. Given my own reasoning in this decision, I am able to remake the relevant parts of the Decision as a decision that the Restriction is no longer required, and should be removed from the Registered Title.

182. Accordingly, I will make an order allowing the Appeal, in part, setting aside paragraph 1 of the Order, and directing the Chief Land Registrar to cancel the Restriction pursuant to the Application.

Mr Justice Edwin Johnson

President

10th July 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.