

*289 Sainsbury's Supermarkets Ltd v Olympia Homes Ltd

Chancery Division

17 June 2005

[2005] EWHC 1235

[2006] 1 P. & C.R. 17

(Mann J.):

June 17, 2005¹

Equitable interests; Land registers; Mistake; Non registration; Options; Rectification; Sale of land

H1 Real property—agreement to transfer such part of an area of land as should be required for specified purposes—whether created an equitable interest in land—application for compulsory first registration of land—effect of cancellation of application—effect of vesting order under s.90 of the Law of Property Act 1925—claim for rectification of the register—whether registration as a result of a mistake—whether proprietor substantially contributed to mistake by lack of proper care—whether other reasons why unjust for rectification not to be made

H2 BG was the freehold owner of some unregistered land. BG sold the land to Mr Hughes in August 1998. In September 1998, Mr Hughes entered into an agreement with Sainsbury's to convey or make available to them such part or parts of the land as were required for the construction of a roundabout. The sale from BG to Mr Hughes was subject to compulsory registration, but Mr Hughes' application for registration was subsequently cancelled for non-response to certain requisitions. Sainsbury's sought to protect their interest by cautions and then cautions against registration. In February 2000, Westpac obtained a charging order over Mr Hughes' interest in the land. In June 2000, an order for sale was made under the charging order, with an order under s.90 of the Law of Property Act 1925 that there be created and vested in Westpac a term of 3,000 years in the land as if the charge had been created by way of legal mortgage. In February 2004, Westpac sold the land to Olympia under that order. Olympia were then registered as freehold proprietors of the land, and free from Sainsbury's interest (since Sainsbury's had failed to respond to the Land Registry's enquiries to them in time). Sainsbury's claimed rectification of the register so as to delete the title completely or so as to ensure it was subject to its rights the 1998 agreement. The issues were: (1) whether Sainsbury's' rights under the 1998 agreement were merely personal or whether they gave rise to an equitable interest in the land; (2) whether the title acquired by Mr Hughes from BG became an interest under a trust only, and an equitable title only, as a result of the cancellation of his application to register; (3) the nature of the interest subject to Westpac's charging order; (4) whether the Master's order for sale gave Westpac the power to sell the legal estate if Mr Hughes had an equitable *290 interest only; (5) if Westpac could only convey the equitable, and not the legal, interest in the land, whether Olympia was registered as the legal estate owner as a result of a mistake; (6) if so, whether Olympia substantially contribute to that mistake by lack of proper care; (7) if not, whether it was for other reasons unjust for the rectification sought not to be made.

H3 **Held**, allowing the claim, and ordering rectification of the register: (1) in the case of an option, it is the right to call for the land which gives the purchaser an equitable interest in it. Such a right exists if the land falls to be identified by the purchaser where it is part of an identified whole, and the equitable interest exists in such parts of the whole as are capable of being affected by the right. Sainsbury's right to call for land to be provided for the roundabout was, on the true construction of the option provisions, capable of binding the whole or any part of the gas board site. It thus gave rise to an equitable interest affecting that site. (2) The effect of s.123A of the Land Registration Act 1925 and r.317 of the Land Registration Rules 1925, was that by virtue of the cancellation of Mr Hughes' application for first registration, the legal estate reverted to BG which held it on trust for Mr Hughes, who thereafter had an equitable interest only. (3) The charging order on its terms charged such interest as Mr Hughes had in the property, and could never have caught more as a matter of principle. The charging order was therefore an equitable charge over an equitable interest. (4) The Master's order under s.90 of the Law of Property Act 1925 only gave power to sell the equitable interest in the property, since the charged property was only an equitable interest. Thus Westpac could only sell to Olympia the equitable interest,

and not the legal estate. Since the option agreement created a prior equity, that prior equity prevailed and was not defeated at that stage of the operation by the sale, because a legal estate was not transferred. (5) The Land Registry made a mistake in registering Olympia with title absolute, because Olympia did not acquire the legal freehold. (6) The land was in the possession of Olympia for the purposes of para.3(2) of Sch.4 to the 2002 Act. Although Olympia did not contribute to that mistake by lack of proper care, an order for rectification should nevertheless be made because it would be unjust not to do so for other reasons. At all material times, both before and after completion, Olympia believed that it was going to have to make land available for the roundabout without payment, and did not think it was purchasing free from the option rights. Were the register not to be rectified then Olympia would have acquired a potentially very significant windfall; it would be in a position which no-one ever contemplated they would be in, and which (as a matter of conveyancing) it ought not to have been in. Westpac did not seek to sell free from the right, and had the matter been drawn to the Master's attention, the orders for sale would have been expressly subject to the option.

H4 Cases referred to:

- (1) Banner Homes Holdings Ltd (formerly Banner Homes Group Plc) v Luff Developments Ltd (No.2) [2000] Ch. 372
- (2) Freer v Unwins Ltd [1976] Ch. 288
- (3) Gillett v Holt [2001] Ch. 210; (2000) 80 P. & C.R. D3
- (4) Greasley v Cooke [1980] 1 W.L.R. 1306
- (5) Horrill v Cooper (1999) 78 P. & C.R. 336
- (6) James Hay Pension Trustees Ltd v Cooper Estates Ltd [2005] EWHC 36
- (7) London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd (1994) 67 P. & C.R. 1; [1994] 1 W.L.R. 31
- (8) London & South Western Rail Co v Gomm (1881–82) L.R. 20 Ch. D. 562
- (9) Midland Bank Trust Co. Ltd v Green (No.1) [1981] A.C. 513; (1981) 42 P. & C.R. 201
- (10) Pallant v Morgan [1953] Ch. 43
- (11) Pearce v Watts (1875) L.R. 20 Eq. 492

Legislation referred to:

- (1) Charging Order Act 1979, s.3
- (2) Land Registration Act 1925, s.123A
- (3) Land Registration Act 2002, s.65, Sch.4
- (4) Law of Property Act 1925, s.90
- (5) Land Registration Rules 1925, r.317

H6 Claim by Sainsbury's for the following relief: (a) rectification of the register so as to delete the register entry in its entirety (leaving Olympia with an equitable interest subject to the option); (b) alternatively, rectification so as to record that Olympia's title is subject to the burden of the option; (c) alternatively, rectification so that it is subject to Sainsbury's entitlement to construct the roundabout on the gas board site and to acquire title to the site of the roundabout; (d) a declaration that Olympia holds its title on trust to give effect to an arrangement, understanding or estoppel to provide for Sainsbury's rights under the option; (e) specific performance of the deed of novation in accordance with the letter of February 16, 2005; (f) an inquiry as to the damages payable by Olympia for breach of the deed of novation. The trial of issues (e) and (f) was adjourned. The facts are set out in the judgment of Mann J.

H7 Representation

- Romie Tager Q.C. and Mark Warwick, instructed by Addleshaw Goddard, for the claimant.
- Jonathan Gaunt Q.C. and John de Waal, instructed by Thursfields, for the first defendant.
- James Aldridge, instructed by Herbert Smith, for the third defendant.

JUDGMENT

Introduction and the parties

1 This is an action seeking rectification of the register in respect of land at Matlock in Derbyshire. The first defendant (“Olympia”) is the registered proprietor of the relevant land, which I shall call the gas board site. Until August 12, 1998 the land was unregistered and was owned legally and beneficially by the second defendant, then known as British Gas but now known as Transco plc (“Transco” or “BG” in this judgment). On that date BG sold the gas board site to the fifth defendant, Mr Alan Hughes. Just over a month later, on September 16, 1998, Mr Hughes entered into an agreement with the claimant (“Sainsbury’s”) and Chelverton Properties *292 Ltd (“Chelverton”), in which he agreed to convey or make available such part or parts of the gas board site as were required for certain works, which works have, in the event, come to mean the construction of a roundabout. It is said that this agreement gave rise to an obligation on Mr Hughes which was potentially enforceable against third parties as an option. The relevant agreement was described as a deed of novation, and I shall refer to it as such in this judgment, though it is the option (or alleged option) which is the crucial feature of that deed. Although one of the issues in this case was whether or not the relevant obligation was indeed an option (as that term is usually understood) I shall (for ease of exposition) refer to it as though it was wherever it is convenient to do so without prejudging the questions that arise as to its actual effect.

2 The sale to Mr Hughes attracted compulsory registration, and Mr Hughes duly applied for registration. However, his registration application was cancelled for non-response to certain requisitions. It is said by Sainsbury’s that the effect of that is to cause the legal estate to revert to BG. On February 24, 2000 the third defendant Westpac Banking Corporation (“Westpac”) obtained a charging order over Mr Hughes’ interest in respect of a judgment exceeding £3.75m. In due course they sold the gas board site under that charging order on February 11, 2004 (having obtained an order from Master Bragge for the vesting in them of a term for that purpose under s.90 of the Law of Property Act 1925), and the sale was to Olympia. On the same date the property was charged to the fourth defendant (“Natwest”). Sainsbury’s and Chelverton had sought to protect their interests under the deed of novation initially by cautions, and then by cautions against first registration, and not by registration under the Land Charges Act 1972. In due course Sainsbury’s was invited by the Land Registry to justify its claim that its option bound Olympia, and when Sainsbury’s failed to respond to a time limit for providing a response Olympia were registered as proprietors of the freehold title free from Sainsbury’s’ interest under the option in the deed of novation. In those circumstances Sainsbury’s has commenced this action in which it seeks rectification of the register so as to delete the title completely or so as to ensure it is subject to the option. It also seeks specific performance of the option and damages against Olympia, though those last two claims were not the subject of the actual hearing before me and are to be adjourned if I am otherwise in Sainsbury’s’ favour. In the alternative Sainsbury’s runs a trust or estoppel claim, seeking a declaration that in the light of certain dealings between Olympia and Sainsbury’s, Olympia holds the gas board site on trust to give effect to the option arrangements. For its part, Olympia counterclaims for an order removing a unilateral notice entered against Olympia’s title to the site; that is merely a natural counterpart to Sainsbury’s’ claims. In addition to this action (and indeed before this action was commenced) Sainsbury’s made an application under CPR 40.9 for the setting aside of the order vesting a term of years in Westpac (for the purposes of sale), or alternatively for a variation of that order to include a provision making it plain that the sale to be effected under it was to be subject to the rights under the deed of novation. That application has come on for hearing at the same time as the trial of this action. A speedy trial was ordered by Peter Smith J. on the occasion of an application for injunctive relief on February 18, 2005. *293

The parties and the issues

3 Sainsbury’s and Olympia are natural parties and opponents in this action. Westpac was joined because it was an inevitable party to the application under CPR 40.9, and presumably because it

was the vendor under the order for sale. Natwest was joined because it had an interest which would be affected by the claim, if successful. Westpac appeared before me, represented by counsel (Mr Aldridge). On the footing that no relief was sought against it (which it was not) and on the footing that its sale was not impugned (which was less clear, but in the end it was not, or not materially), and on the footing that no criticism was made of the evidence on which it obtained Master Bragge's order (which it was, though not in a manner which Westpac thought it necessary to respond to) it took no part in the proceedings other than to provide the court with assistance and to be prepared to defend itself against attack by Mr Hughes. Mr Aldridge's skeleton argument provided very material assistance to me in terms of the legal analysis of the situation, and he addressed me shortly in a final speech (which was equally helpful). Other than that, Westpac did not take any part and did not take a position in relation to the relief sought. Natwest has reached an agreement with Sainsbury's under which its interests as chargee were adequately protected, and it took no part in the trial whatsoever.

4 Mr Hughes' position was different. He was not originally joined, or to be joined, to the present action (though he was, of course, a party to the proceedings in which the order for sale was made and in which the application under CPR 40.9 was made), but was joined at the direction of Peter Smith J. He filed a Defence which was highly critical of the making of the order for sale, and alleged that the order of Master Bragge ought to be set aside and the sale to Olympia "nullified". It also raises other complaints against Westpac, including a complaint of sale at an undervalue, though it does not counterclaim. Mr Hughes claims to have no funds to represent himself (as a result, he says, of a freezing order procured at the behest of Westpac), and has been assisted by one or more Mackenzie advisers. On the afternoon of the working day before the trial started I received a lengthy communication from one of those advisers, on behalf of Mr Hughes, enclosing a medical certificate. It explained that Mr Hughes needed two months to recover from the cumulative effects of this and other litigation, and asked for an adjournment of about that length of time for that purpose. Mr Hughes did not attend the trial. Having heard the other parties, having considered the matter carefully, and having considered the carefully worded terms of the medical certificate, I determined at the outset of this trial that the trial should continue. I do not intend to repeat here what I said in my short judgment at the time. It was not a wholly satisfactory state of affairs, but bearing in mind the costs incurred, the need for a speedy trial, the extent to which Mr Hughes' legitimate concerns were likely to be covered anyway, the lack of prejudice to Mr Hughes of continuing and the poverty of the medical evidence, together with all other relevant factors, it seemed to me right to let the trial go ahead. He had served a witness statement, and I treated it as evidence in the case.

5 In those circumstances issues arise as to the effect of the non-registration of Mr Hughes' purchase, the nature of the option obligation in the deed of novation, the ^{*294} effect of Master Bragge's order (whether it entitled Westpac to sell a legal estate), whether the interest of Sainsbury's (if any) under the deed of novation was capable of surviving that sale, whether the dealings between Sainsbury's and Olympia give rise to a Pallant v Morgan equity or an estoppel, and whether the conditions required for rectification of the register are made out. These issues are factually detailed and legally complex.

The facts

6 Matlock lies in a valley through which the River Derwent and railway tracks run in a roughly east-west direction. A large part of the town lies to the north of the river, and there is bridge crossing the river which gives access to the station and to that part of the town lying to the south. The A6 runs through the town along the north side of the river. At one time it was a busier road than it now is, but it is still busy. To the south of the river, opposite part of the town, is an old quarry called Cawdor Quarry. Mr Hughes acquired this quarry and on December 23, 1996 he agreed to sell part of it to J Sainsbury plc who planned to use it for a new retail store. The price was £7.3m of which £2.3m was to be paid on completion, with the balance payable after satisfactory planning permission was obtained and other transactions entered into so that the whole of the relevant development could proceed. The balance was only to be due to Mr Hughes after deducting the cost of what are described as the "Infrastructure Works" and the "Site Assembly Costs", as they are defined there. The Infrastructure Works are described in the contract as follows:

"Infrastructure works' means the works relating to the Relief Road and construction of estate roadways and services and all such other works as may be necessary to provide

fully levelled and serviced sites to enable the Sainsbury Development to be implemented upon the Property

All such works being in accordance with the details thereof set out in the Third Schedule hereto.”

...

[Third Schedule]

“ Relief Road. The cost of design and construction of a road from Dale Road to Bakewell Road including traffic controlled signals at its junctions with Bakewell Road and Dale Road, the cost of bridges over the railway line and River Derwent ...”

7 Another of the defined terms is “Site Assembly process”, which are set out in the fourth schedule as follows (so far as relevant to this action).

[Site assembly process]

“In order for the Parties to obtain and implement Planning Permission, it is anticipated that various transactions will have to be negotiated and concluded with owners of adjoining land in order that the Infrastructure Works can take place in particular including construction of the Matlock Inner Relief Road diverting the route of the current A6 Bakewell/Matlock trunk road” ***295**

8 Those terms need to be put in context. It was expected that access to the new development would be gained by crossing the river not at the old bridge to which I have referred above but by a new bridge constructed to the west which would cross the river and the old railway tracks. That would link to the A6 at a new junction which would have to be constructed. The contract indicates that a traffic light junction was anticipated, but at some point in 1997 the idea for the junction was changed to a roundabout, and that is still the current plan. As well as connecting the development to the A6, the junction and bridge would connect with a new road running south of the river which would divert the A6 traffic from the centre of town—that is the relief road. It will be apparent from that that the project is important to the whole town.

9 The contract was completed on January 30, 1997. Later that year Mr Hughes revealed that he was going to acquire another plot of land in Matlock. This land was the gas board site, so called because it was a former gas board depot. It lay to the north of the river and was roughly rectangular in shape, with its long (southern) side fronting on to the A6. Its south-eastern corner was adjacent to the area of the proposed new junction. Mr Hughes threatened to sell it to one of the Sainsbury group's competitors. This generated negotiation with the group, which resulted in a loan agreement between Mr Hughes, J Sainsbury plc and Sainsbury's (the claimant), dated March 10, 1998. That agreement provided for a loan from Sainsbury's (the claimant) to him of £2.3m, to be applied in part in completing the purchase of the gas board site, and it substituted Sainsbury's as the relevant party to the 1996 contract in place of J Sainsbury plc. It provided for the grant of restrictive covenants by Mr Hughes on completion of the purchase of the gas board site, restricting competing retail use of that site. It also contained the following term:

(a) The Borrower hereby agrees with the Lender that, without prejudice to any provision of the Contract, the Borrower shall at his own cost make available to the Lender all land in which the Borrower (or any body corporate in relation to which the Borrower has control) has an interest for the purposes of completion of the Site Assembly Process and/or Infrastructure Works.”

10 At the same time Mr Hughes was negotiating with Chelverton to sell them the remainder of the Cawdor Quarry site for a substantial residential development (over 400 houses are planned). Chelverton purchased that land and reached various arrangements with him at the time, into which I need not go.

11 Mr Hughes completed his purchase of the gas board site on August 12, 1998. He bought it from BG. At the same time he entered into the deed of covenant containing restrictive covenants,

as provided for in the loan agreement. Shortly thereafter he entered into the deed of novation which lies at the heart of this action. What was novated were the obligations of Mr Hughes and Sainsbury's to each other, arising out of the 1996 contract. Chelverton and Sainsbury's assumed mutual obligations in that respect. Apart from some immaterial provisions it contained the following provision which contains the obligations relied on by Sainsbury's in this action: *296

Mr Hughes' covenants

4.1 Mr Hughes hereby covenants with Chelverton and as a separate covenant with Sainsbury's:

(c) ... to convey, transfer, dedicate or other[wise] dispose of or make available free of any monetary payment or other consideration whatsoever such part or parts of the Gas Board site (as defined in the Contract) and of all such other lands or interests in land at any time belonging to or under the control of Mr Hughes as may be required in order to assist in completing the Site Assembly Process and/or Infrastructure Works (as defined in the Contract) and/or obtaining any planning permissions or other consents referred to or anticipated by the Contract."

12 It is this provision which gives rise to the rights claimed by Sainsbury's in this action and application. The following points arise in relation to it:

- a) The reference to the "Gas Board site (as defined in the Contract)" is erroneous. The "Contract" is defined as meaning the 1996 contract identified above, and that site is not identified in that contract. However, it is identified in the loan agreement, which is also referred to in this deed, and the reference to the "Contract" is clearly a mistaken reference to that agreement, and all parties before me accepted as much. The obligation therefore relates to the gas board site as purchased by Mr Hughes the previous month.
- b) The word "other" appears in the first line when what is obviously intended is the word "otherwise".
- c) This document was entered into at a time when what was intended by all relevant parties was a roundabout junction within the Infrastructure Works, not a traffic light junction. The roundabout was to be situated off the south east of the gas board site, and its actual site was anticipated to impinge on an arc taken out of the southern boundary at its eastern end. It was land of this nature, and to this extent, that was shown on plans at the time. It was also probably intended that the construction of the roundabout would require the temporary use of a more substantial area at the eastern end of the gas board site for working space and storage.

13 What has happened in this case is that the gas board site has been sold on to Olympia, and Sainsbury's seeks to enforce that provision against Olympia in order to be able to build the roundabout. Olympia denies that it is bound by the option because it was not properly registered. How one gets to that situation is a tortuous journey.

14 Mr Hughes' purchase attracted compulsory first registration under the Land Registration Act 1925. He duly applied for registration within the two months provided by s.123(A) of that Act. On October 12, 1998 Sainsbury's solicitors (Addleshaw Booth & Co, as they then were) applied to register a caution to protect Sainsbury's' interest under the deed of novation. On April 28, 1999 Chelverton did the same. However, Mr Hughes' registration application ran into trouble. On May 4, 1999 the Land Registry raised various points which it required to be dealt with *297 before registration could take place. It appears they (or if not those queries, other queries) were never dealt with, and as a result the application for registration was cancelled by July 19, 1999 (and probably on July 16). It appears that the solicitors acting for Chelverton and Sainsbury's foresaw something like this happening, and they corresponded with each other about how to protect themselves. Messrs Lawrence Graham, acting for Chelverton, were told by the Land Registry that in the event of cancellation of the application they could protect themselves by registering a caution against first registration, and that firm passed on that advice to Addleshaw Booth in a letter dated June 17, 1999. Addleshaw Booth submitted such an application on July 1, and the caution was registered on July 6 against the gas board site. The statutory declaration in support of that application paraphrased the obligation in cl.4 of the deed of novation but it did not set it

out verbatim. Addleshaw Booth learnt of the cancellation of Mr Hughes' application for registration by virtue of a letter of July 19, 1999.

15 Thus at this point in time Mr Hughes had purchased the land, made an application for first registration and had had his application cancelled. There was a dispute before me as to the effect of that. For reasons that will appear below, I find that its effect was that by virtue of the cancellation Mr Hughes no longer had a legal estate; the legal estate in the land was held on trust for him by BG by virtue of s.123(A) of the Land Registration Act 1925. Sainsbury's had what it considered to be an option and had sought to protect that option against third parties by registering a caution against first registration against the gas board site.

16 Mr Hughes apparently owed considerable sums to Westpac, and he got into difficulties over it. On September 30, 1998 Westpac obtained judgment against him in the sum of approximately £4.24m and interest. An application to set aside the judgment was unsuccessful and a worldwide freezing order followed. Westpac sought to enforce its judgment and obtained charging orders over land other than the gas board site. Its solicitors were Herbert Smith, and that firm corresponded with Lawrence Graham (for Chelverton). On December 7, 1999 Lawrence Graham provided Herbert Smith with a copy of the deed of novation, and pointed out the rights of Chelverton and Sainsbury's to a transfer of the land. The letter invited co-operation to procure a transfer of the land without there being a breach of the freezing order. It also pointed out that Chelverton had protected itself by registering a caution against first registration. On December 15, 1999 Herbert Smith acknowledged that Chelverton's claim might have priority over the protection provided by the freezing order, but wanted a copy of the "underlying agreement" (which cannot have meant the deed of novation, because they already had it). That firm's letter announced Westpac's intention to obtain a charging order over "the remainder of" the gas board site, by which they presumably meant those parts not required to fulfil the obligations under the deed of novation. However, shortly thereafter, when Westpac applied for such an order, its application extended to the whole of the site. A witness statement was provided in support of the application, which indicated that the application extended to "the legal and beneficial interests of [Mr Hughes] in the [site]" and cited several sources of the witness's belief that Mr Hughes was "the sole legal freehold owner" of the site. It referred to the fact that the property was not registered, and it also referred to the possibility that Chelverton might have an interest in the site but no reference was *298 made to the failed application for registration. In the circumstances no consideration was given as to exactly what was being charged. I am not sure when the charging order nisi was made, but in any event on February 24, Master Leslie made a charging order absolute under which:

"the interest of [Mr Hughes] in the asset specified in the schedule [thereto] stand charged with the payment of [the balance of the judgment debt]".

The property specified in the schedule was the gas board site. It follows from my conclusion as to what Mr Hughes' interest was that what was charged was his equitable interest in the site. This was not appreciated later on when the charging order was enforced and was probably not appreciated at the time of the charging order itself.

17 Westpac apparently waited for Mr Hughes to sell the gas board site, but on March 27, 2000 Herbert Smith gave notice that its client was no longer prepared to wait for that, and that Westpac would apply for an order for sale. This it did in May 2000, supported by a witness statement of Westpac's Mr David Fullagar. That witness statement said that:

"In the light of Alan Hughes' attempts to sell the Gas Board Site, I have no reason to believe that Alan Hughes is not legally and beneficially entitled to the property. Nothing to suggest that Alan Hughes is not the legal and beneficial owner of the Gas Board Site has ever come to my attention."

At para.39 of his witness statement Mr Fullagar referred to the possibility that Mr Hughes might agree to transfer a portion of the site to Chelverton to enable completion of essential infrastructure works required by the construction of a supermarket on the site of Cawdor Quarry, and said that apart from that potential interest in the site Mr Fullagar was not aware of any prior encumbrancers of the property. The court was provided with valuations. As a result of this application Master Bragge made an order for sale on June 20, 2000. The material parts read:

"And it appearing that the claimant is by virtue of the charging orders ... entitled to an

equitable charge upon the interest of the defendant in the property specified in the [schedule].

... it is ordered:

(1) that each of the Properties be sold without further reference to the Court except for the purpose of fixing a price;

(2) pursuant to s.90 of the Law of Property Act 1925 and for the purpose of enabling the claimant to carry out the sales, there be creating and vested in the claimant a term of 3,000 years in the properties as if the mortgage in respect of the properties had been created by way of legal mortgage pursuant to the said Act.

The reference to "Properties" occurred because Westpac was seeking an order for sale of a second property; nothing turns on that for the purposes of this action. The gas board site was referred to in the schedule as well.

18 Lawrence Graham then corresponded with Herbert Smith in order to protect their client's (Chelverton's) interest. By a letter of August 21, 2000 they provided the deed of novation as proving their client's interest, and they also pointed out that *299 Sainsbury's had the benefit of the same covenant. Westpac had instructed valuers to act on the sale, namely GVA Grimley ("Grimleys"). On September 5, 2000 Lawrence Graham wrote to those agents (copied to Herbert Smith) pointing out that both Chelverton and Sainsbury's had interests under the deed of novation, enclosing a copy of the relevant page and pointing out that both Chelverton and Sainsbury's had cautions against first registration.

19 By February 2001 Grimleys had prepared Particulars of Sale for the gas board site. It was apparent that Westpac were proposing to sell the fee simple. Whether or not they were entitled to do so under the order they had obtained is one of the questions in this action. On the first page Grimleys recorded:

i) "We understand that part of the site will be affected by temporary highways works required for construction of a roundabout in connection with the development of Cawdor quarry.

ii) The Ordnance Survey map on the back of these particulars sets out an indicative plan of the scheme with the shaded area representing the land required for the roundabout and the cross-hatched area indicating the temporary working space."

20 The areas thus indicated were a sort of hump-shaped bite taken out of the eastern one-third of the southern boundary of the site for the roundabout itself, and the rest of that one third part for the temporary works. It is thus apparent that the sale was to proceed on the footing that the land would be subject to these works, though Olympia disputes that it was to be subject to an obligation to dedicate or provide land for these matters. Mr Gaunt Q.C., who appeared for Olympia, said that this provision acknowledged a likely planning condition (without an actual obligation) and did not necessarily acknowledge the obligation to Sainsbury's (and Chelverton).

21 Some time after this Olympia came on the scene. It was sent a "Matlock pack" by Grimleys on May 22, 2002, and made a conditional offer of £600,000 on June 7. The offer was neither accepted nor rejected, but Grimleys offered not to market the property for two months while Olympia carried out site investigations. Olympia seems to have thought it was accepted, and instructed solicitors (Messrs Rickards & Cleaver) to advise on August 1, 2002. On August 14, Lawrence Graham asked Herbert Smith what they were doing about registering the site at HM Land Registry, and on August 27 they were told that Westpac was not proceeding with registration of the site (or title) as it was not obliged to do so.

22 On October 3, 2002 outline planning permission for residential development was given for the gas board site. One of the conditions was that:

"No development hereby permitted shall be carried out within the area hatched red on the attached plan which would prevent the formation of a roundabout on the A6 unless the prior written approval of the Local Planning Authority has been granted in writing."

This reason for this condition was:

“To enable the A6 Trunk Road to continue to be an effective part of the system of routes for through traffic, in accordance with s.10(2) of the Highways Act 1980 by avoiding the disruption to flow on those routes by traffic expected to be generated” and

“To ensure that the potential development of the Cawdor Quarry, including the construction of the A6 relief road is not prejudiced by the development of this site”.

23 For some reason the last 15 words of that second reason appear in manuscript on one version of the notification of approval, but not apparently on all. However, I treat them as being an appropriate expression of the determination of the planning authority. The hatched land was in substance the same as the “bite” shown on the sales particulars and referred to above.

24 Olympia was not fully aware of the status of the land required for the roundabout at this stage. On October 9, Mr Humphries, a senior employee of Olympia (and who gave evidence before me) wrote to Grimley saying that they needed to discuss what was being marketed “as we are advised by Transco that they have retained a portion of the site”. This is a little puzzling since there is no evidence that Transco (BG) said any such thing, but Mr Humphries clearly realised there was something to clear up. In fact the restriction on the area capable of development by virtue of the roundabout was one of the reasons that he gave to Grimley on October 18, 2002 for reducing Olympia's offer to £500,000. This reduction was not responded to.

25 While this was going on Chelverton was getting into financial difficulties. On July 4, 2001 it sold its interest in the Cawdor Quarry site to Groveholt Ltd, and on October 15, 2002 it was voluntarily wound up. Mr Eifion Phillips was a consultant who had worked for Chelverton on this project, and he transferred to Groveholt when that company took over the residential development. He was concerned to make sure that Grimleys knew of or remained mindful of the condition requiring land to be made available for the roundabout, and he wrote to Grimleys on November 18, 2002 reminding them of this. Herbert Smith were also reminded again when Lawrence Graham (apparently now on behalf of Groveholt) indicated that their client wished to identify the land required for the roundabout and take a transfer; this was in a letter dated February 10, 2003. Herbert Smith replied asking for clarification of the Chelverton/Groveholt relationship, and acknowledging that “Westpac's charge is of course subject to an option in favour of Sainsbury's and Chelverton.”

26 Over the next few months Westpac finally achieved an agreement to sell to Olympia. In a letter dated May 28, 2003 to their client, Rickards & Cleaver recorded that Olympia had increased its offer back to £600,000 and had instructed the solicitors to act in a sale at that price. Quite when that offer was made is not apparent, but it does not matter. On July 11 Grimleys reported to Herbert Smith on the marketing history and advised that about £500,000 was the most likely disposal price. Curiously, it does not report the increase in Olympia's offer. This letter was put before the court in an application by Westpac seeking permission inter alia to sell the gas board site for a sum exceeding £480,000. The supporting witness statement refers to the witness's understanding that the developers of the Cawdor Quarry site required the transfer of part of the site for a roundabout (which it describes as “impediments”) and states that “Olympia Homes is aware of these *301 impediments and is prepared to acquire the land subject to them”. This must be on the footing of the contacts that had taken place with representatives of Olympia. The result of this application was another order of Master Bragge, this time dated October 9, 2003, in which the Master directed a sale at not less than £480,000 but required that before agreeing to any such sale four of the companies who had made offers for the site should be required to submit a final unconditional offer to purchase. This turned out to be a very good idea, because Olympia became concerned about other bidders and on November 7, 2003 it made a final unconditional offer of £750,000. This offer was accepted and is the price at which the sale to Olympia ultimately completed. Shortly after this first Grimleys and then Herbert Smith received another reminder from Mr Phillips (acting for Groveholt) of the cautions registered by Chelverton (of which Groveholt claimed the benefit) and Sainsbury's. It was accompanied by another letter from engineers called Birse saying that they were not yet in a position to confirm the extent of the land requirement under the option because investigations (including access for site investigations) had not been completed.

27 At this point Olympia instructed new solicitors—Thursfields, acting by Mr O'Hara (who gave

evidence before me). They were also in due course instructed to act for Natwest, who were due to take a charge over the property. From now on it will be useful to follow through two strands of events. The first is the dealings between Herbert Smith, Thursfields and the Land Registry. The second is the activities of Thursfields and Olympia in relation to the sale. This latter strand can be traced fully because Olympia waived privilege in relation to it. I will deal with the Herbert Smith/Thursfield/Land Registry strand first. It is necessary to consider this in detail because it is material to the basis on which Sainsbury's claim to be entitled to rectification of the register. In considering this narrative it will be useful to have identified in advance the two title points that emerged in the course of the conveyancing, and that lie at the heart of this case.

- i) The first is what I shall call the “legal title” or “legal estate” point. It is alleged by Sainsbury's that once Mr Hughes' application for first registration had been cancelled he had merely an equitable, and not a legal, title—see above. Since what was charged by the charging order was Mr Hughes' interest in the land, all that was apparently charged was that equitable interest. That being the case, one of the points that arises is whether the order granting the 3000 term was capable of creating a mechanism by which the legal, as opposed to the equitable, interest could be conveyed. I shall answer this point below. For the time being it is merely necessary to note that the point exists and emerged in the conveyancing.
- ii) The second is what I shall call the land charge point. This point is whether the interest under the Sainsbury option, assuming it to be capable of conferring an equitable interest in, and therefore of binding, the land, should have been protected by registration as a land charge under the Land Charges Act 1972, and not having been so protected could be overridden by a sale of the legal estate. *302

28 Herbert Smith had been trying to get hold of the title documentation so that a sale could be carried out. They experienced some difficulty in tracking down documents, but by August 13, 2003 they confirmed (to Rickards & Cleaver) that they had what they needed. On October 1, 2003 Herbert Smith reported on “title issues” to their client (with a view to onward transmission to valuers). They stated that they had contacted HM Land Registry who had said that provided that a purchaser could provide it with the title documents, a transfer from Westpac as mortgagee and copies of the relevant court order evidencing a power of sale, the Registry would be minded to register a purchaser of the site. This reflected advice that they had been given by the Land Registry the previous May. The letter referred to many other matters, including the covenant in the deed of novation, which it quoted. It refers to this covenant as being with Chelverton and Sainsbury's, but then goes on to refer to the possibility that “Chelverton” should have registered the deed as a land charge in the Land Charges Registry, though the presence of a caution would give them the opportunity to argue their case with the Land Registry. On December 16, 2003 Herbert Smith sent copy deeds and a draft contract to Thursfields, pointed out the previous failed application to register and suggested that Thursfields might like to contact a Moira Knight at Nottingham District Land Registry to ease concerns about getting first registration. Apparently the enclosures did not include the court order, because on January 6, 2004 Thursfields replied asking for a copy of the order, whose existence was apparent from the contract. Thursfields also asked for details of the extent to which four cautions against first registration (which must have included Sainsbury's' and Chelvertons) would impose obligations on the land. On January 8, Mr Fahy of Herbert Smith (who dealt with the matter throughout on behalf of that firm) stated that some of the cautions would be there to protect documents which would need to be registered on first registration; any effect on development would be for Thursfields to advise their own clients on. On January 8, Mr O'Hara made contact with Moira Knight at the Land Registry, but she had to retrieve the files before she could help. She did not manage to get back to him until January 19, when she reported by telephone that the paperwork had still not come back to her. Mr O'Hara took the opportunity of discussing the cautions with her and he recognised that one related to the positioning of the roundabout for the Sainsbury's development. They also discussed the notification procedure which would apply to the cautions after completion—the procedure was new because the Land Registration Act 2002 had only been in force for a few months.

29 Mr O'Hara had not heard from Mr Fahy at Herbert Smith by January 22, so he e-mailed him asking for an indication of progress about the caution and the provision of the court order. He expressed the view that it was essential that they establish whether there would be any objection to the registration of title. The next day they spoke on the telephone. The following material points arose:

- • Mr O'Hara confirmed that he was satisfied with the title subject to another conversation with Moira Knight.
- • Mr O'Hara still did not have a copy of the court order authorising sale. Mr Fahy agreed to send it, along with details of the cautions. *303
- • There were then "detailed discussions" (according to Mr O'Hara's attendance note) about the cautions, in which the apparent obligation to convey to Sainsbury's was referred to, and Mr O'Hara observed that on the wording it seemed that Sainsbury's could call for the whole site; Mr O'Hara wanted to see the underlying documentation (indicating that he had not seen the deed of novation at this point).
- • Mr O'Hara acknowledged that he would want to set out the potential problems to his clients in a letter.
- • Mr Fahy observed that there were no land charges registered in respect of this land (which was correct) and that he believed that the cautions might be inadequate to protect the interests.

30 The last point made by Mr Fahy in that conversation was the first time that it was appreciated by anyone on Olympia's side of the transaction that the cautions might not be sufficient to protect the interests of Sainsbury's arising under the option in the deed of novation. Mr O'Hara says that it was the first time that it occurred to him that that was the case, and I accept that evidence. It had not previously occurred to his clients either (not surprisingly).

31 Mr Fahy returned to this point in a letter he sent to Mr O'Hara the same day. It enclosed the information that he had received from the Land Registry about the cautions and made observations about them, and in particular the cautions of Sainsbury's and Chelverton to protect the option. He observed that it would be worth finding out from the local authority what assurances could be given about the position of the roundabout, and referred to the discussion the previous day which floated the idea that the failure to register the option as a land charge might mean that a purchaser would take free of them. His letter says that "You would need to look at the Land Charges Act 1972 but, on a cursory examination, I would say that there is a good chance that the relevant Cautions protect 'estate contracts'". There was some debate before me as to whether Mr Fahy was expressing the opposite view about this to that expressed on the telephone, that is to say that he now thought the registration of the cautions protected the option. I doubt if it matters, but in case it does I express my view that Mr Fahy was not doing that. He was repeating what he said the day before about whether the argument could be run. The true thrust of his sentence is "there is a good argument for saying that the cautions purport to protect things that are in fact 'estate contracts', which would require registration under the 1972 Act".

32 Shortly before February 2 Mr O'Hara made a land charges search. The Land Registry issued a certificate on February 2, 2004, with a protection period ending on February 23, which, of course, did not show the option agreement in the deed of novation as having been registered in that register.

33 On February 3, Mr O'Hara emailed Mr Fahy to ask yet again for copies of the court orders, together with copies of Land Registry searches (if any). He ended his email by saying that he awaited evidence from the Land Registry that "our client will experience no difficulties in registering his purchase from your clients even though the land is legally held by British Gas on trust for Alan Hughes." He thereby demonstrated that he was aware of the legal estate point. Mr Fahy's *304 response on the same day was not particularly helpful. He referred to the attitude of the Land Registry but did not really deal with Mr O'Hara's point. Nevertheless he pressed for a response as to whether Mr O'Hara was satisfied with title, even if the response was to be subject to a response from the Land Registry arising out of the fact that BG held the legal estate on trust. Again on the same day, Mr Fahy told Mr O'Hara by fax that he was investigating the position with the Land Registry, and he faxed the Land Registry as well. In the fax he outlined the facts (the failure of the first application for first registration, and the charging order) and asked if the Land Registry would confirm:

"That the Land Registry is agreeable in principle to a purchaser from the bank submitting an application for first registration without ever having the judgment debtor

registered as the legal owner.”

This is not quite the point. He does not expressly point out that BG had the legal estate. It was in fact written to the wrong district (Lytham, not Nottingham). A later conversation between Mr Fahy and Mr O'Hara on this same day contained further articulation of the problem by Mr O'Hara, and he said that he thought that any sale must be with the consent or approval of BG. Mr Fahy said that he thought that he had covered this point with the Land Registry and had something in writing, but he never managed to produce this and it seems likely he was wrong about this.

34 Mr O'Hara was by this time very concerned about the title point and consulted a number of other people in his office. The consensus in the office was that the client should be advised not to proceed. (As will be seen, this advice was communicated but Olympia went ahead anyway.) The legal title point was clearly articulated by Mr O'Hara in an email on February 4, and he pointed out in terms that the court order failed to address the point that Westpac could apparently not transfer more than Mr Hughes had, that is to say, an equitable title. He asked Mr Fahy for his contact at the Land Registry so that he could speak to the Land Registry direct, and finally managed to make telephone contact with a Mrs Gibson, a lawyer there, at some point on February 5. They discussed the title point. Her “off the top of her head” view was that there would not be a problem arising out of the failure of Mr Hughes' registration, and subject to a point about certified copies she could not see why Olympia's title should not be perfected, though she wanted time to consider. She said she would respond to Herbert Smith because Olympia was not an interested party.

35 Mr O'Hara having spotted that Herbert Smith's letter to the Land Registry of February 3 had gone to the wrong district, Herbert Smith re-sent it to Nottingham on February 6. On that same day Mrs Gibson telephoned Mr O'Hara to say that the fact that Mr Hughes was not registered was not a problem. She faxed Herbert Smith on that day to say that “in principle, the fact that the debtor to whom you refer was not registered is not a bar to registration.” Mr Fahy copied this letter to Mr O'Hara and he reported it to his client.

36 One of the most important points emerging from this is that the title point was canvassed with the Land Registry by both the vendor and the purchaser.

37 Exchange and completion took place on the same day, namely February 11, 2004. No further debate took place between Mr O'Hara and Mr Fahy about the legal title point or the land charge point prior to that time. Mr O'Hara was ***305** cross-examined extensively on the history of this matter. It is clear, and I find, that his main concern in the period approaching completion was whether his client Olympia, and his client Natwest, would get a good legal title, bearing in mind the non-registration of Mr Hughes' title and nature of the interest apparently charged under the charging order. He was aware of the land charge point, and as will appear he raised it briefly with Olympia, but he did not give it full consideration and proceeded on the assumption that completion could take place subject to whatever rights might exist in respect of the option. He told me, and I accept, that he did not want his client to put any weight at all on the possibility that the option might not be enforceable, and for that reason played it down.

38 It is now necessary to go back and show how the client, Olympia, arrived at completion, and what its state of mind was. There was a lot of detail in relation to this at the hearing, but I think that I can summarise much of it. One of the key issues in this case was the state of mind and intention of Olympia when it completed on the footing of the existence of the cautions against first registration. The sole director and shareholder of Olympia was a Mr Gary Key, and it is apparent that he was the ultimate decision-maker. However, he did not give evidence. Evidence on behalf of Olympia was given by Mr Michael Humphries, an architect employed by Olympia as its design and construction manager. It is clear that he had a close involvement with considering the site and in deciding what offers to make, but he did not make the actual big decisions himself. Although I infer that he enjoyed a close working relationship with Mr Key, and claimed to be able to speak as to Mr Key's state of mind from time to time, it was apparent that he was not entirely privy to his thinking because Mr Key did not tell him about a plan to sell the land on at a price of £1.4m, which is a little surprising.

39 Mr Key first identified the gas board site as a possibility for purchase in early 2002. The Grimley particulars were obtained and Mr Humphries discussed the planning aspects with a planning officer and saw the planning officer's report. Olympia thought that it would be able to get

between 35 and 45 apartments on the site and pursued its interest on that basis. No formal calculations were done—the prices offered were matters of unrefined judgment. When Olympia made its first offer (£600,000) it knew, from the sales particulars, that land would be required for the roundabout and working space. In cross-examination Mr Humphries told me that he and Mr Key discussed the sales particulars plan at an early stage of formulating the offer which was ultimately made. I find on the basis of his evidence that the offer was made on the assumption that the land required for the roundabout itself (whose precise extent was uncertain but whose general area could be the subject of an intelligent assessment) would not be available for development, and the working space would be temporarily unavailable too. They both appreciated that and were prepared to offer £600,000 on that basis. I also find that they believed that if they acquired the roundabout area then at some stage, if the development across the river went ahead, they would be required to give it up, and they were prepared to do that. At no stage during the period of the various offers did either Mr Humphries or Mr Key think that they would be entitled to demand payment for giving up this land, and from the outset they pitched their offers on the assumption that it would have to be given up. It is true that when Olympia revised its offer downwards to £500,000 one of the reasons given was the need to give up the land, *306 but that was probably a negotiating ploy. Their initial offer already reflected the roundabout and working space requirements, as did the final offer of £750,000. All that was confirmed in cross-examination, and if contemporaneous confirmation is required it appears in a letter from Mr Humphries to Thursfields of December 21, 2003. However, what Olympia did not know about at the time of the offers was the detail of Sainsbury's' and Chelverton's rights to the land. They knew or assumed it would have to be given up if required, but that particular piece of the mechanism was not known to them. Indeed, when the initial offers were made Mr Humphries did not know much about the development across the river, though he knew more by the time of the final offer and knew of Sainsbury's' involvement at or shortly after the time of the final offer.

40 At some point Mr Humphries was told by Grimleys that cautions existed over the land—that much appears from a letter that Mr Humphries sent to the Land Registry on November 25, 2003 asking for details of the cautions. On November 24, he instructed Thursfields to act in the purchase and stated that Olympia's primary concern was to establish the full extent of the site being purchased and the wording and implication of the cautions. His letter of that date said that he had asked for details from the Land Registry, but in fact he did not do so until the next day by the letter referred to earlier in this paragraph. The Land Registry sent out brief details on November 27, so presumably Mr Humphries received them on November 28.

41 The detail provided to Mr Humphries was not very great, and he felt he needed to try to understand what land would ultimately be required and what the timescale for this was. That is entirely understandable, and I accept that he and Mr Key needed to know that. He therefore identified a Mr Tunney as being a useful contact in Sainsbury's who could possibly help him with that. On January 7 he had a telephone call with him which he confirmed in an e-mail on January 8. I shall have to return to some of the detail of this telephone call in due course when I consider Sainsbury's' trust or estoppel claim, but for present purposes it is sufficient to find that in this telephone call he did not get much help other than an indication that the Sainsbury/Groveholt development (on which the timing of the roundabout depended) was being held up by litigation with Mr Hughes over the residential part of the site. On about January 13, he received a letter from Mr Phillips, sent on behalf of Groveholt, and enclosing earlier correspondence making clear Groveholts' and Sainsbury's' interests in the site. It pointed out that it was not possible at that time to agree the final design or the working space round the roundabout. Undaunted, Mr Humphries rang Mr Gibson of Birse (design and build contractors) to try to get some further information. He spoke to him on January 13, and confirmed his conversation in an e-mail. Again, I shall have to refer to the detail of this conversation and email when I consider the trust/estoppel claim, but for present purposes it is sufficient to note that Mr Humphries professed an intention to co-operate and sought information as to the positioning of the roundabout.

42 The result of the uncertainty over the roundabout was that Mr Humphries' preference was to stall the deal until the Hughes court proceedings were dealt with in March (which he had understood would be the case), and in the meanwhile gather as much information as possible. However, on January 19 Mr Humphries instructed Mr O'Hara to keep on gathering information on the cautions. Mr O'Hara *307 kept Mr Humphries informed of what he was finding out, and on January 22 reported on his first conversation with Mrs Gibson and pointed out that it was likely that Olympia or the bank (for whom he was also acting) would have to take a gamble on what would happen in relation to the cautions. At this point, however, no reference was made to the

land charge point because it had not emerged. By February 3 the legal title point had emerged and Mr O'Hara was considering it. Mr O'Hara told Mr Humphries that it was a big risk to buy the property; he had just had a conversation about the title point with Mr Fahy and this was probably in his mind, along with the risks arising out of the Sainsbury's option which he explained the next day, February 4, when he met Mr Key and Mr Humphries and advised on the risks. According to his attendance note, a lot of emphasis was placed on the effect of the rights under the option, which Mr O'Hara pointed out could extend to the whole of the site. It is clear that he was advising on the footing that the option would bind the site as a result of the cautions being in place. This would mean that he could not give a clear title report to the bank which was lending the purchase money (Natwest). He also referred to the title problem, but it rather looks as though that was not given the same emphasis (somewhat oddly, bearing in mind that he had spotted it as a real problem).

43 One thing that I find he did not report on at this stage was the possibility that the interests ostensibly protected by the cautions would not bind. As I have already said, although the point had been raised in his dealings with Mr Fahy Mr O'Hara did not want his clients being distracted by it. He obviously thought there were other big problems, and I do not think he would have clouded the issues relating to those at this point. His concerns over the problems were so great that on February 5 he explained the problems again to Mr Humphries (the title problem and the risk to the property from the exercise of rights under the Sainsbury's caution) and when Mr Humphries indicated that they wished to exchange anyway he required Olympia to write a letter acknowledging that it was aware of the difficulties and wished to proceed in any event. Such a letter was written by Mr Key on that date. Mr O'Hara then spoke to Natwest and told them of the problems and that they would not be able to confirm a clear title. In a later conversation Mr Key told him he was negotiating with Natwest over granting security over other properties. The title point was the subject of another discussion between Mr O'Hara and the bank the next day, by which time Mr O'Hara had had his conversation with Mrs Gibson that "off the top of her head" she thought that title would be perfected. There was then a lengthy discussion with the bank about the caution and Sainsbury's rights under it, and Mr O'Hara records himself as having told them that "he could only tell them that right was there".

44 On February 6, Herbert Smith, and then Mr O'Hara, received the Land Registry letter of the same day. Mr O'Hara told Mr Humphries about this, and reported to Natwest that the title point had probably been resolved. He also wrote to Mr Key on the same day, (though before receipt of the Land Registry letter) informing him of what the Land Registry had said on the telephone and pointing out that he (Mr Key) was aware of the "cautions that are registered and their effect but should you require clarification please let me know." The February 9 was a Monday, and on that day Mr O'Hara sent his report on title to the bank. He pointed up the title *308 problem and the Land Registry's response to it, and reported on the existence of (inter alia) the Sainsbury's caution of which details had already been provided.

45 On February 10, Mr O'Hara had yet another meeting with Mr Key. The latter expressed his intention to sell the site on soon. The attendance note records that he said he would like Mr O'Hara "to raise the point of the registration of the land charges with the land registry and to see if some pressure can be put on Sainsbury's for them to come to an agreement. He anticipates there being an agreement and it being sorted. He does not really want to and have [sic] and argument with them but would like to think that they do not hold all the cards." A number of things are apparent from this and from the oral evidence of Mr O'Hara and Mr Humphries:

- a) Mr O'Hara had apparently previously mentioned the land charge point before, and Mr Key had apparently been thinking about it.
- b) Mr Key's prime concern was to use the point as a means of manoeuvring Sainsbury's into reaching an agreement over the land take required for the roundabout. He was not apparently expecting the point to succeed.
- c) The fact that the occasion on which the advice was given is not recorded in any of Mr O'Hara's attendance notes supports his evidence that he played the point down and did not want it given any significance. His attendance notes are otherwise very full (and numerous)—he told me (and I accept) that the full attendance notes are because he was very concerned about this transaction. Had he raised the point as one of any significance it would have been recorded. He must have raised it as a passing point on some earlier date. It is not clear when, but I do not think that that matters. What matters is that it was raised as

no more than a passing point.

- d) In association with the state of mind referred to at (c), it was the view of Olympia that the roundabout design was sufficiently well advanced to enable Olympia to proceed with its development (if necessary) before it was formally decided what land had to be given up to it. In other words, Olympia were confident that it would not obstruct the development of the gas board site.

46 Thus completion and exchange were arrived at on February 11, 2004. Natwest took a charge over the land but also took charges over other properties. The state of mind of Mr O'Hara and Olympia was, as I find, as follows:

- a) They were aware of the legal title point but hoped, and probably thought it likely, that it would be resolved on the footing of the Land Registry indications from Mrs Gibson.
- b) Mr O'Hara was aware of the land charge point as a theoretical point, but did not consider it a particularly good one so far as he considered it at all. He probably mentioned it no more than once, and then only in passing, and gave his client no encouragement to think it was good. The assumption on which he was working was that the caution protected the option, and the option was binding. He reported to the bank that it was.
- c) Mr Key and Mr Humphrey were aware of the land charge point, but only as a point lurking in the background and as one on which they put no weight at all. In particular, it played no part in their decision to purchase, *309 which had already been taken. They took the land with a clear understanding that the option would have to be complied with in accordance with its terms, because of the caution.

47 I can now move a little more quickly to the events which led up to the Land Registry's removal of the Sainsbury's caution and this action. On March 17, Mr O'Hara submitted his application for registration of his client's title. In his covering letter he raised the land charge point and invited comments on whether the various cautions were apt to protect the interests recorded in them. On March 17 he reported to his client that it would be interesting to see what the response of the cautioners would be when they were given notice of the application to register. His application for registration was on form FR1, as required, and it was accompanied by form D1 which listed the documents lodged. They were many, and they did not include the deed of novation (a copy of which had been in the possession of Mr O'Hara for a little time). Mr O'Hara said that this was an accident or oversight, and I accept that. An allegation made by Sainsbury's that it was deliberate was abandoned at the trial.

48 In the next few months Olympia were concerned to establish the land that would be necessary for the roundabout. Mr Humphries contacted Addleshaw Goddard, who act for Sainsbury's, about this, and a letter from them on March 2 confirmed that he said he was prepared to enter into a substitute deed in order to allow the caution to be withdrawn. This demonstrates that at the time Olympia had no real intention of disputing the entitlement of Sainsbury's to the land. However, Sainsbury's were not able to identify the extent of the land required at that stage. On March 18, Addleshaw Goddard told Thursfields that they thought they would be able to identify it within the next three or four months, but that depended on the outcome of proceedings with Mr Hughes because that in turn affected when they could commence work. By March 31 things had firmed up a little and Addleshaw Goddard were able to send Thursfields a preliminary plan showing the roundabout area and required working space, saying a definitive plan ought to be available in the next month or so. There remained some uncertainty about the hearing date which would finalise matters with Mr Hughes. On April 26, Mr O'Hara told Mr Humphries that he was reluctant to discuss a deed replacing the cautions in case there was some mileage in the argument that the cautions did not successfully protect the option. Another attendance note of the same day indicates that he thought the arguments would not be accepted, but it was not apparent what had led him to that view. On May 6 the Land Registry reported to Mr O'Hara that the Chelverton caution, and one entered by Groveholt, had been withdrawn leaving only Sainsbury's' cautions to be dealt with (one protecting the option agreement and the other protecting the restrictive covenant). The letter enclosed a copy of a page from a conveyancing work called Coveney and Pain, which referred to the need to protect interests in unregistered land by entries in the land charges register, which may have encouraged Mr O'Hara a little.

49 On May 5, Addleshaw Goddard provided a further plan which was said to be likely to be

definitive subject to any slight variations required by the highways authority, and they provided a draft transfer which included a clause for the *310 adjustment of the boundary if necessary. Two days later, on May 7, the Land Registry served a notice on Sainsbury's as cautioners stating that any objection should be made by noon on May 28. It will be useful to follow through the fate of this procedure at this stage before reverting to the contemporaneous dealings between those acting for Sainsbury's and Olympia. On May 24 Addleshaw Goddard responded to the Land Registry notice, stating that objection was made to the registration because of the rights under the deed of novation and because of the restrictive covenants. The Land Registry responded promptly on May 27, saying that the deed of novation was not protected by registration under the Land Charges Act and therefore Sainsbury's' objection was groundless, but accepting that the restrictive covenants would be protected. This was copied to Thursfields. Addleshaw Goddard was asked to state if they were not satisfied with this within two weeks. Addleshaw Goddard failed to do so, and on June 21 the Land Registry informed Addleshaw Goddard that they were proposing to act in accordance with their earlier letter unless there was a response by June 30. Addleshaw Goddard replied by asking for an extension of time to consider the point, and they were given a final extension of time to July 9. Addleshaw Goddard did not respond within that time, and the registration process was completed by July 12 without Sainsbury's' interest under the deed of novation being noted or otherwise protected. Olympia was registered as freehold proprietor without reference to the option, (but subject to the restrictive covenant in Sainsbury's' favour). Eventually, on August 26, Addleshaw Goddard got round to responding, but by then it was too late. The response raised the legal title point, after a fashion, and claimed that it was not possible to register the estate contract under the Land Charges Act 1972 because Mr Hughes did not have a legal estate once his application for registration had been cancelled. Mrs Gibson responded by telephone that she had not investigated the points raised in relation to the land charge, but since one had not been registered she did not consider pursuing the matter further (I do not pretend to understand this part of the relevant attendance note fully). When Addleshaw Goddard asked her why the registration had proceeded in the absence of participation from BG as the legal owner, Mrs Gibson is recorded as saying that "the transfer to Olympia had been authorised by the court order and that, so far as she was concerned, that was all that was necessary." A letter of September 24 from the Land Registry confirmed that "according to our records a court order was lodged (one of several) authorising the transfer and registration was completed on that basis".

50 What was going on on the Thursfields/Olympia/Sainsbury's (Addleshaw Goddards) front can be dealt with shortly. The Land Registry had sent to Thursfields a copy of their response to Addleshaw Goddard of May 27, taking the land charge point, which must have given Mr O'Hara some encouragement. Olympia's initial idea was to use any dispute over the land charge point as a lever to try to get Sainsbury's to commit themselves to the scope of the land take and timing. In due course it decided to try to wait until the outcome of the caution proceedings before deciding whether or not to enter into a new deed or transfer with Sainsbury's, but the idea was still to use the situation to get Sainsbury's to commit. This required some stalling. Mr Humphries and Mr O'Hara denied that this is what was happening, but in substance it was. I do not need to set out the *311 chronology. By the end of June a draft s.278 agreement was available. I think it likely that Olympia and Sainsbury's would have been able to reach agreement on the land take by July 9 had Olympia really wanted to. On August 24, 2004 Sainsbury's entered a protective entry on the land charges register against the names "Transco plc" and "BG plc".

51 In due course the attitude of the parties hardened. Olympia has declined to give Sainsbury's the land it seeks, and Mr Key and Mr Humphries have speculated that they might be able to ask for six or even seven figure sums as the price of doing so. This was not initially in their mind, but it clearly is now. Hence these proceedings. By a letter dated February 16, 2005 Addleshaw Goddard, on behalf of Sainsbury's, formally required the following (all the land referred to being coloured on a plan accompanying the letter):

- a) The permanent transfer to Sainsbury's of a curve of land being land required for the roundabout itself.
- b) A curved piece of land, about 10 feet wide, following the curve of the roundabout, described as "required working space". This is required for the exclusive use and possession of Sainsbury's and its contractors to enable labour and machinery to gain access to the roundabout area.
- c) A section of land to the west of those parts, as a compound for huts and machinery. This,

too, is expressed to be for the exclusive use and possession of Sainsbury's and its contractors.

The land identified under (a) and (b) corresponds roughly to the part-circular "bite" which has always been anticipated to be required for the roundabout and as referred to above. Items (b) and (c) are said to be required for 52 weeks from April 1, 2005. Since Sainsbury's does not at present seek an order for specific performance, I need not consider the terms of the demand further save to observe that the requirement under heads (b) and (c) appears to be for a licence.

The issues

52 Against the above background Sainsbury's seeks the following relief:

- a) Rectification of the register so as to delete the register entry in its entirety (leaving Olympia with an equitable interest subject to the option).
- b) Alternatively, rectification so as to record that Olympia's title is subject to the burden of the option.
- c) Alternatively, rectification so that it is subject to Sainsbury's' entitlement to construct the roundabout on the gas board site and to acquire title to the site of the roundabout. It is not clear to me how this differs from (b).
- d) A declaration that Olympia holds its title on trust to give effect to an arrangement, understanding or estoppel to provide for Sainsbury's's rights under the option.
- e) Specific performance of the deed of novation in accordance with the letter of 16th February 2005.
- f) An inquiry as to the damages payable by Olympia for breach of the deed of novation.

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As already recorded, I am not invited at this stage to rule on (e) and (f). I can confine myself to determining the principle of whether, and to what extent, the option is now capable of being enforced against Olympia via rectification or equitable relief.

53 Sainsbury's claims that what I have called the option arising under the deed of novation gives rise to an equitable interest in the land. It accepts that if the interest under the option required registration for it to be protected against Olympia, then its caution against first registration was insufficient and any registration should have been effected under the Land Charges Act 1972. If Olympia acquired a legal estate then s.4(6) of that Act would operate to defeat any rights under the option. However, Olympia did not acquire a legal interest. It is said that while Mr Hughes originally acquired a legal interest, once his application for first registration was cancelled he had only an equitable interest. Westpac's charging order therefore caught only an equitable interest, and the Master's order creating a term of years for the purposes of the sale could not authorise the sale of anything other than that equitable interest. Therefore Olympia acquired only an equitable interest, and s.4(6) is not engaged; Sainsbury's rights under the option had priority as being a prior equity. Olympia should therefore not have been registered as a freehold owner. It seeks rectification on the basis that the Land Registry made a mistake, and either Olympia substantially contributed to that mistake through lack of care, or it would be unjust not to make the alterations sought (within the provisions of Sch.4 of the Land Registration Act 2002). In the alternative, Sainsbury's says that the legal term ordered by the Master should have been registered, and when it was not registered in time it became an equitable interest which entitled Westpac to sell no more than an equitable title, with the same result so far as Sainsbury's' option rights are concerned. In the further alternative, Mr Tager Q.C., who appeared for Sainsbury's, claims to be able to get to the same result by getting an amendment of the Master's order for sale to reflect the fact that the sale should and would have been subject to Sainsbury's' interest had Westpac put the full picture before the Master. If these claims fail then it claims that Olympia is obliged to give effect to Sainsbury's' rights by virtue of a trust or estoppel arising out of dealings between them—I shall amplify this when I consider the argument.

54 In order to deal with the claims other than the trust/estoppel claims it is necessary to deal with the following issues:

- a) Are Sainsbury's' rights under the deed of novation merely personal or are they capable of giving rise to an equitable interest in the land?

- b) Did the title acquired by Mr Hughes from BG end up as an interest under a trust only (and equitable title only) as a result of the cancellation of his application to register?
- c) What was the nature of the interest caught by Westpac's charging order?
- d) Did the Master's order for sale give Westpac the power to sell the legal estate if it be the case that Mr Hughes had an equitable interest only?
- e) If Westpac could only convey the equitable, and not the legal, interest in the gas board site, was Olympia registered as the legal estate owner as a result of a mistake? ***313**
- f) If so, did Olympia substantially contribute to that mistake by lack of proper care?
- g) If not, would it for other reasons be unjust for the rectification sought not to be made?

55 I shall tackle those issues in turn.

Did the option agreement give rise to an equitable interest?

56 As a working definition, the main characteristics of an option are that it is an undertaking to sell property to the grantee if the latter wishes to purchase it, usually within a specified period. The covenant in the present case has at least some of these characteristics—it includes an obligation to convey or transfer, even if it includes obligations to do other things (dispose of, make available), and although it is not expressed to be dependent on a form of election by the holders of the option (Chelverton and Sainsbury's) on its true construction that must be the case—putting the option in the context of the proposed, but not finalised, development, it is plain that the obligation to do something did not accrue until Chelverton or Sainsbury's required it. It is true that it did not specify a time within which that was to happen, but it does not seem to me that that is of the essence of an option. If a person binds himself for an indeterminate period to convey at the behest of another, I do not see why that should not take effect in contract, and why it should not be characterised as an option (subject always to the rule against perpetuities). Thus far, therefore, the deed of novation contains a provision which has at least some of the elements of an option.

57 However, Mr Gaunt for Olympia submitted that there were a number of elements which deprived this provision of the characteristics of being an option capable of creating an equitable interest. They were as follows.

58 First, he submitted that the land to be taken was not defined (although the land out of which it was to be carved was). This was not a contractual certainty point. Mr Gaunt was prepared to accept that a mechanism existed by which the land required for the purposes of the provision could be made certain (if necessary by resorting to the court). His point was a different one, namely that as a matter of principle an equitable interest cannot arise over the whole of land to be the subject of an option if the subject part is not identified and cannot be identified at the date of the grant of the option even if it can be identified thereafter with the assistance of some sort of machinery (either involving a third party, or some other mechanical process, or the election of the grantee).

59 In support of this Mr Gaunt made two principal submissions. The first was an appeal to one's sense of the ridiculous. He invited me to imagine a property owner's large estate (such as one of the Duke of Westminster's estate) and an agreement to convey for value a house from that estate to be chosen at some point in the future by the purchaser with an appropriate mechanism for making sure that the obligation were not void for uncertainty. Mr Gaunt said it would be absurd if the whole of the estate (or least that part comprising houses) were subject to an equitable interest when only a relatively small part could ultimately be taken. I do not find this particularly compelling. The sense of the ridiculous abates if one imagines, say, a choice of one of merely three houses, or a right to choose a ***314** specified amount (in the sense that the area is identified though the precise land is not) of a plot of, say, one acre. It is just as compelling a reaction to find the bargain foolish as to consider it to be wrong that an equitable interest should arise in relation to the whole. Neither is a sensible guide as to whether the bargain gives rise to an equitable interest.

60 Mr Gaunt's second submission was based on an analogy. In *London & Blenheim Estates v Ladbroke Retail Parks Ltd* [1994] 1 W.L.R. 31 the Court of Appeal held that an agreement to

grant a right of way in favour of a dominant tenement that could not be identified at the time (but which might be rendered apparent in due course) could not exist as an estate contract. One of the essentials of an easement was the existence of a dominant tenement, and

“an essential part of the interest to be granted was left uncertain ... if one asks why the law should require that there should be a dominant tenement before there can be a grant, or a contract for a grant, of an easement sufficient to create an interest binding successors in title to the servient land, the answer would appear to lie in the policy against encumbering land with burdens of uncertain extent ...

“A further related answer lies in the reluctance of the law to recognise new forms of burden on property conferring more than contractual rights ... A right intended as an easement and attached to a servient tenement before the dominant tenement is identified would in my view be an incident of a novel kind” (per Peter Gibson L.J. at 37E–G).

Peter Gibson L.J. thus relied on the absence of one of the ingredients of an easement as the key to his reasoning. I do not think there is any equivalent absence in the present case. I do not see why the failure to identify the land should be treated as an equivalent absence; there is no reason for applying the analogy. The identification of a purchaser is not crucial to the existence of an estate contract in the sense that a contract in favour of an as yet unidentified purchaser to be nominated by a contracting party is a valid estate contract as Peter Gibson L.J. recognised in *London & Blenheim* at 37D. If analogies are to be sought then I find that more compelling.

61 Mr Gaunt also relied on *Pearce v Watts* (1875) L.R. 20 Eq. 492 as demonstrating that an option to take land unidentified at the date of the option was bad. This case involved an agreement for the sale which included the following reservation:

“[The Vendor] reserves the necessary land for making a railway through the estate to Prince Town.”

Specific performance of that contract was sought by the purchaser, and the vendor objected that it was void for uncertainty. In argument the purchaser disputed this, saying that the court could determine what land was necessary for the railway. Sir G Jessel M.R. refused the claim, and held that:

“The present contract is one which cannot be carried out by conveyance; and that being so, I do not see how the Court can alter it and make a new contract which can be carried out by conveyance. ... If the contract were executed in this form [ie with the reservation], it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for *315 uncertainty. But this is not the intention of the parties, for the vendor intended to reserve a substantial part of the estate. The contract does not show what it is. I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it, and, therefore, I cannot enforce specific performance of the contract.”

Although he does not say so in terms, I think it is clear that he is rejecting the purchaser's arguments against the uncertainty point. He held in terms that the reservation would have been void for uncertainty, and it is clear to me that that is the basis on which he rejects the specific performance claim. The case therefore turns on a point which does not arise in the present case since Mr Gaunt has conceded that there is no contractual certainty point. It therefore does not assist him.

62 Nor is there anything else in principle which prevents an equitable interest arising in these circumstances. The basis on which an equitable interest arises in the case of an option appears from Jessel M.R.'s classic statement in *London & South Western Rail Co v Gomm* (1881–82) L.R. 20 Ch. D. 562 at 581:

“The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate

or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.”

63 So it is the right to call for the land which gives the equitable interest. Such a right exists if the land falls to be identified by the purchaser where it is part of an identified whole, and the equitable interest exists in such parts of the whole as are capable of being affected by the right. I can see nothing contrary to principle in this.

64 Mr Gaunt put forward other reasons why the deed of novation could not have created an equitable interest under the option provisions. He relied on the following points:

- a) It contains two covenants, one in favour of Chelverton and one in favour of Sainsbury's. I do not consider that that would prevent there being an equitable interest. It might lead to interesting priority points as between the two of them, but that is different. If Mr Hughes had entered into the same obligations to the same persons but in two separate documents I do not think that would mean that neither got an equitable interest, and this document is in substance the same as that notional situation.
- b) The agreement requires the grant of interests which are less than an interest in land—it entitles the grantees to call for a licence (as indeed they have done) and does not confine itself to a right to call for legal or equitable interests. That seems to me to be right as a matter of construction. What the grantees are entitled to call for is such transfers and rights as are necessary to construct the roundabout. If what is necessary is a licence to use land then that is what they can call for in that ***316** respect. So far as the option confers that opportunity then it does not create an equitable interest in the land because a licence is not an interest in land. However, that does not mean that the option is incapable of creating an equitable interest in respect of those parts of the land that are to be transferred permanently. I do not see why that obligation under the option should not create an equitable interest. This means that if there were an equitable interest it would only extend to those parts, which in turn means that if and insofar as part of Sainsbury's' notice of February 16, 2005 claims a licence, that part would be bad. Mr Tager sought to get round this problem as a matter of practicality in this case by saying that if his clients were not entitled to call for a licence as against a successor then they would go further and call for a lease of the working space and the compound space, or a conveyance with a term requiring reconveyance when the use was no longer required. This, however, misses the point. The obligation in the option is determined by the construction of the option itself, not by what would be necessary in order to make sure the right is capable of being a right which would give Sainsbury's the right to claim it as against successors in title. What Sainsbury's is entitled to is what is “required”. If a licence is all that is required, then that is all that it is entitled to.
- c) The option extends to other lands owned by Mr Hughes, and apparently to after-acquired land. Whether or not this would be a problem in relation to that other land, I do not consider it would prevent an equitable interest arising in relation to the gas board site, which is specifically identified.
- d) It is said that the document otherwise indicates that the rights conferred are personal to Chelverton and Sainsbury's—for example, the first two sub-clauses of cl.4.1 contain personal rights. I would be prepared to accept that as a matter of principle a right which on its face was an option which would normally be expected to bind the land could be held to be a personal right which operated only between the immediate parties and was therefore incapable of operating against anyone other than the grantor personally if an intention to that effect were apparent from the terms of the bargain. However, such an intention would have to be apparent from the document or the surrounding circumstances, and I do not consider that there is sufficient in the document or in the surrounding circumstances in this case to demonstrate that the obligation was intended to be personal to Mr Hughes. Indeed, the surrounding circumstances would suggest the contrary—this was an important covenant operating so as to allow the development of nearby land. There is every reason for believing that it was not merely personal but was intended to bind the gas board site.

65 The right to call for land to be provided for the roundabout is, on the true construction of the

option provisions, capable of binding the whole or any part of the gas board site. In the light of the reasoning appearing above, it gave rise to an equitable interest affecting that site. *317

66 I therefore have to go on to consider whether those rights have been affected by the registration of Olympia, and whether there should be rectification of its title. This requires an analysis of the steps that have given rise to present situation.

What was the effect of the cancellation of Mr Hughes' application for first registration?

67 At the date of Mr Hughes' purchase it was the Land Registration Act 1925 (as amended) that was in force. His purchase generated compulsory registration of title under s.123 of that Act. Section 123A provided that:

“(2) Where any [disposition requiring compulsory registration] is affected, then ... [the donee] must, before the end of the applicable period, apply to the Registrar to be registered ... as the first proprietor of that estate.

(3) In this section 'the applicable period' means in the first instance the period of two months beginning with the date of the disposition

(4) Pending compliance with subs.(2) above, the disposition shall operate to transfer or grant a legal estate or (as the case may be) create a legal mortgage in accordance with its terms.

(5) If subs.(2) above is not complied with, the disposition shall, at the end of the applicable period, become void as regards any such transfer, grant or creation of a legal estate; and —

(a) if it is a disposition purporting to transfer a legal estate, the title to that estate shall thereupon revert to the transferor, who shall hold that estate on a bare trust for the transferee ...”

68 Mr Hughes complied with these obligations and therefore initially acquired a legal estate. His default was not a failure to apply; it was a failure to pursue his application properly. There is nothing express in the Act or in the Land Registration Rules which expressly deals with what happens in that event, and at the opening of the trial all parties were minded to accept that Mr Hughes' legal estate became an equitable interest and the legal estate passed back to BG. However, having reflected on the matter Mr Gaunt submitted that is not in fact what happened. He pointed out that Mr Hughes acquired a legal estate by virtue of the transfer, and if he was to be deprived of that legal estate then there had to be some clear statutory warrant or authority for it. Since there was none, it must follow that Mr Hughes had a legal estate.

69 In my view Mr Gaunt's first views were correct. The answer to the question lies in r.317 of the Land Registration Rules 1925 (the rules then in force). That rule provides:

(1) If an application is not in order, the Registrar may raise such requisitions as he may consider necessary and may specify a period (being not less than one month) within which the applicant shall *318 comply therewith and, if the applicant fails to comply with the requisitions within that period, the Registrar may cancel the application or may extend the period when this appears to him to be reasonable in the circumstances.”

70 That is the provision which governed what happened to Mr Hughes' application. It was cancelled. In this context it seems to me to be right to view the cancellation as meaning that the application is (for these purposes) treated as never having been made. If it had never been made then the legal estate reverted to BG in accordance with s.123A. I accept that it does so at a time which is different from that specified in s.123A, so the solution is not altogether elegant insofar as the legal estate comes and goes by virtue of acts which are not clear disposing acts, but that sort of effect is inherent in the operation of s.123A anyway—see subs.(5), and subs.(6) which provides for the moving of the legal estate back to the donee in the event of late application for registration. It has sufficient warrant in statute (or legislation) in order to deprive Mr Hughes of his legal estate, and it produces a more consistent overall effect than Mr

Gaunt's proposal, and is therefore more likely to have been Parliament's intention. It would be rather odd if Mr Hughes had acquired and maintained a legal estate notwithstanding his failure to comply with what was required of him for first registration.

71 I therefore find that by virtue of the cancellation of his application for first registration the legal estate reverted to BG which held it on trust for Mr Hughes, who thereafter had an equitable interest only.

What was the nature of the interest caught by Westpac's charging order?

72 This is one of the easier questions arising in this litigation. In the normal way the charging order on its terms charged such interest as Mr Hughes had in the property, and could never have caught more as a matter of principle. It therefore caught an equitable interest only. The charging order was therefore an equitable charge over an equitable interest.

Did the Master's order give power to sell the legal, or only the equitable, interest in the property?

73 The charging order took effect as an equitable charge:

“... a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor in writing under his hand” (Charging Order Act 1979 s 3(4)).

74 That means that an order for sale was required before the property could be sold. The Master's order was made under s.90 of the Law of Property Act 1925 which provides:

(1) Where an order for sale is made by the court in reference to an equitable mortgage on land (not secured by a legal term of years absolute or by a charge by way of legal mortgage) the court may, in ***319** favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land or create and vest in the mortgagee a legal term of years absolute to enable him to carry out the sale, as the case may require, in like manner as if the mortgage had been created by deed by way of legal mortgage pursuant to this Act, but without prejudice to any encumbrance having priority to the equitable mortgage unless the encumbrancer consents to the sale.”

75 Mr Tager submitted, amongst other things, that the creation of a legal term of years in these circumstances was inappropriate, and so far as anything was created it could not have been more than an equitable term because Mr Hughes's interest was merely an equitable one. As such it did not carry with it the power of sale normally conferred on mortgage terms by s.88 of the same Act. He said a vesting order would probably be a more appropriate mechanism for effecting a sale of the equitable interest. No legal estate could be created without the participation of BG. In those circumstances the legal estate could not be conveyed pursuant to that grant of a term. Mr Gaunt submitted that s.90 was a deeming provision and was capable of empowering a sale of the legal estate even though technically only an equitable interest was charged. He relied on the fact that the point of s.90, in the case of an equitable charge, was to enable the equitable chargee to convey the fee simple.

76 In my view Mr Tager is right about this. An equitable chargee of land will have no power of sale. He has to resort to the courts to have a sale ordered. An order for sale is made under the court's general equitable jurisdiction, or perhaps under s.91(2) of the Law of Property Act 1925. Section 90 provides a mechanism for that sale, and it lists various technical methods by which that can be accomplished. One of them is the creation of a term of years. This enables a chargee to effect a sale because it vests in him the same rights as a mortgagee has under the now old-fashioned technique of creating a mortgage by a demise with a cesser on redemption. One has to determine, however, just what it is that is to be sold. What is being sold is the mortgaged property. That is plain on the terms of s.91(2) (“the court ... may direct a sale of the mortgaged property”), and it is obviously inherent in the equitable jurisdiction to order a sale. There is no basis on which one can say that the court could order the sale of anything other than what is mortgaged. Section 90 operates in that context—it provides mechanisms for achieving a sale of *the mortgaged property*. If the mortgaged (or equitably charged) property is the legal fee simple,

then that is what the mechanism bites on. If it is less than the legal fee simple then that lesser interest is what it bites on.

77 If one then translates that to the facts of the present case, the s.90 order of the Master could never operate on anything more, or anything beyond, that which was charged by the charging order. For the reasons given above, what was charged by that order was Mr Hughes' equitable interest. That being the case, the order for sale could not provide for the sale of anything more than that, and the mechanisms provided by s.90 could not achieve anything more than a sale of the same thing. In other words, s.90 could not achieve a sale of the legal interest when the legal interest was not caught by the charge. The fact that the order of the Master invoked a mechanism appropriate to a mortgage of a legal interest (the creation and vesting ***320** of a term of years) does not mean that it was capable of affecting anything beyond that which was actually the subject of the charge.

78 All this is true as a matter of principle, and in fact the wording of the order did not purport to give a power to convey anything more than Mr Hughes had anyway. The order recited that Westpac was entitled to an equitable charge "upon the interest of [Mr Hughes] in the properties specified in the Schedule ('the Properties')" (emphasis supplied). One of the scheduled properties was the gas board site. It then ordered "that each of the Properties be sold" and that "pursuant to s.90 of the Law of Property Act 1925 and for the purpose of enabling [Westpac] to carry out the sales there be created [a term of years etc]". It is apparent from that wording that the order never purported to deal with anything more than whatever interest it was that Mr Hughes had, which in the case of the gas board site was an equitable interest only (though it is almost certain that those involved in the hearing had lost sight of, or never fully appreciated, that fact).

79 It follows from this that Westpac could not sell, and Olympia could not acquire, the legal estate. All that could pass was the equitable interest. Since the option agreement created a prior equity that prior equity prevailed and was not defeated at that stage of the operation by the sale, because a legal estate was not transferred.

80 Mr Tager sought to arrive at the same conclusion by an additional route. Even if the term of years was capable of giving a power to convey the legal as well as the separate equitable interest, by the time of sale to Olympia it had become only an equitable term of years which had ceased to be capable of carrying with it the relevant power of sale which a legal term of years would have had. This was because the creation of that mortgage term was something which itself generated a requirement for first registration, and it was not registered in time (or indeed at all). So if it was originally a legal term it ceased to be so. Being only an equitable term, it could not carry a power to sell the legal estate.

81 Since the hypothesis on which this alternative argument is run (that the order for sale was capable of extending to the legal estate) is false I do not strictly need to consider this, but I will express my views on it shortly. Section 123 of the Land Registration Act 1925 requires registration of certain "qualifying" dispositions, and s.123(1)(b) requires registration of "any qualifying grant of a term of years absolute of more than 21 years from the date of the grant". That is the provision relied on by Mr Tager. Section 123(6) provides that a

"conveyance, grant or assignment is a 'qualifying' conveyance, grant or assignment if it is made—

- (i) for valuable consideration
- (ii) by way of gift, or
- (iii) in pursuance of an order of any court"

The order vesting a term of years cannot fall within (i) or (ii), so if it is to be a qualifying disposition (iii) is the only candidate. Mr Gaunt submitted that that the s.90 order did not come under this head because it was not a "grant ... in pursuance of an order of any court". I agree with him. First, it is not a grant, and second it is not made "in pursuance of" an order of the court. It is a creation by an order of the court, which seems to me to be different. Nobody has granted anything. The court ***321** has created or vested. What the section is dealing with is something different—the situation where the court has ordered that a conveyance or grant should take place, and it then takes place in implementation of, or in compliance with, that court order. That puts it on the same footing as grants for consideration or by way of gift. This was not such a

situation, for the reason just given. The order itself operated to create whatever was created and there was no subsequent grant pursuant to it. This distinction was one which occurred to the Law Commission whose report was implemented by the enactment of this form of s.123, and it did not propose that court orders which actually effected a vesting should be within the compulsory registration regime—see the notes to the section in Halsbury's Statutes Vol 37 at p.488.

Does that conclusion lead to a claim for rectification of the register?

82 The question of rectification is governed by a different Land Registration Act 1925 to that considered hitherto. By the time of the registration of Olympia's title the Land Registration Act 2002 had come into force. It is the rectification provisions of that Act which apply.

83 Section 65 of the 2002 Act implements the alteration or rectification provisions in Sch.4, so it is to that Schedule to which we have to turn. The relevant provisions are as follows:

Schedule 4

"1. In this schedule, references to rectification, in relation to alteration of the register, are to alteration which:

- (a) involves the correction of a mistake, and
- (b) prejudicially affects the title of a registered proprietor.

(1) The court may make an order for alteration of the register for the purpose of—

- (a) correcting a mistake;

...

(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.

(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—

- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
- (b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so."

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84 Sainsbury's seeks to invoke those provisions in order to procure that Olympia's registered title is subject to the interest that it claims under the option in the deed of novation. It says that the Land Registry made a mistake in registering Olympia with title absolute (because Olympia did not acquire a freehold), and that although the land is in the possession of Olympia for the purposes of para.3(2) I should nevertheless make an order because Olympia contributed to that mistake by lack of proper care, or in the alternative that it would for other reasons be unjust not to order the alteration to the register. Olympia accepts that if the s.90 order did not give Westpac the power to convey the legal estate then the Land Registry made two mistakes, namely registering Olympia as the proprietor of a legal estate, and second registering Olympia as taking free from Sainsbury's equity (assuming for these purposes that it had one). There is thus no dispute as to the mistake part of the schedule, and I can record that had Mr Gaunt not made the concession that he did then I would nonetheless still have found that the Land Registry made the mistakes that he conceded. The disputes therefore concern the contribution to the mistake and the other circumstances said to make it unjust for the alteration not to be made.

85 The first question is whether it can be said that Olympia contributed to the mistake for the purposes of para.2, and that that was due to lack of care on the part of its solicitors. The contribution and lack of care were said to be that the failure on the part of Olympia's solicitors to bring to the registrar's notice the concerns they had as to the effect of the June 20 order and the

fact that it was apparently made as a result of the Master having a misapprehension as to Mr Hughes' title, their failure to bring to the Registrar's attention the fact that BG ought to have been a party to the transfer if a legal estate was to pass, a failure to draw to the registry's attention the fact that the legal title seemed to have reverted to BG and that the order did not allow a transfer of the legal estate. All this amounted to a contribution to the error and lack of proper care—there was said to be a duty to point out to the Land Registry relevant matters so that the registry could register a title without mistakes. There was also said to be a further want of care in not including the novation deed in the documents submitted on the application for registration.

86 This basis of the claim to rectification fails on a proper and fair analysis of the facts and the law, because I do not think that Olympia's solicitors (which means Mr O'Hara) contributed to the mistake in any relevant sense, or that if he did it was due to a lack of care. I have set out the relevant chain of events above. The Land Registry was first alerted to the existence of a problem by Herbert Smith's fax of February 3, 2004, addressed to the wrong District Land Registry, but repeated to the correct one on February 6. This did not expressly articulate the problem as being one arising out of the reverter of the legal estate under s.123A, but it is reasonable to suppose that the Land Registry would be alive to that facet of the reasoning. Mr O'Hara had his own pre-completion contacts with the Registry, and discussed the matter with Mrs Gibson on February 5. According to the terms of his attendance note, she confirmed that "if they had an application which was on the basis of a s.90 Court Order authorising power of sale" she did not think "there would be a problem as a result of the title not being perfected by the transfer from the gas board to Mr Hughes and its registration". So there was clearly a discussion on the footing that she knew of defects in Mr Hughes' title. Her letter of February 6, 2004 to Herbert Smith firms up on that, and again clearly demonstrates that she *323 appeared to be aware of the circumstances in which Mr Hughes might be said not to have had the legal estate. She anticipated receiving a "court order (presumably under s.90 of the Law of Property Act 1925) authorising the sale". This was passed on to Mr O'Hara. As far as he was concerned, therefore, she would have been aware of the legal estate point. What she will not have known of at any stage was the evidential basis on which the Master made the order (which did not address the legal estate point), but there is no evidence Mr O'Hara knew of that himself. The purchase was then completed, and Mr O'Hara submitted all the relevant documents, with the exception of the deed of novation. These documents included copies of the relevant orders, from which their efficacy could be judged by the Land Registry. I fail to see how this can be said to have been contributing to the mistake in any meaningful sense. The potential problems arising out of the legal estate were flagged up for the Registry in advance. The only sense in which it might theoretically be said at this stage that Mr O'Hara contributed to the Registry's ultimate mistake was in failing to point up in terms the fact that it could be argued that the order was not capable of justifying a conveyance of the legal estate. But the Land Registry would have been capable of identifying that for itself, or at least identifying that there was an arguable point. I do not accept that a solicitor who flags up a potential problem, gets a favourable answer and who then submits documents from which additional aspects of the problem might be seen by a competent conveyancer, but who fails to point up those additional aspects, is somehow guilty of contributing to the mistake if it turns out that the conveyancing effect is not all that was thought or hoped for. The only contribution in any sense of the word was the submission of the application with supporting documents, but the Act must require something more active or significant than that. Put another way, nothing that Mr O'Hara did up to this stage was causative of the Land Registry's mistake in any sense other than a *causa sine qua non* sense, and I do not think that that is sufficient. He caused or contributed to the registration; he did not cause or contribute to the mistake.

87 Had I reached the contrary conclusion I would still have concluded that any contribution on the part of Mr O'Hara did not arise as a result of a lack of due care. Mr Tager made various submissions as to the duty of a solicitor in connection with applications for registration. The topic is curiously void of discussion or consideration in the authorities and text books (or at least I was not shown any). However, it is still clear to me that Mr O'Hara cannot be accused of any relevant lack of care. I am not convinced that on the facts of this case Mr O'Hara should have been expected to do anything more than submit the title documents with which he had been supplied so that the Land Registry could make up its own mind on what sort of title they entitled his client to, but in any event he did more than that in his discussions with Mrs Gibson, knowing that the points had been raised by Herbert Smith. I accept that those contacts took place with a view to finding out what sort of title Westpac could convey rather than alerting the Registry to an interesting problem that its solicitors might like to consider, but they still had the effect of drawing

the problem to the Registry's attention. I do not think that anything more could be expected of Mr O'Hara. If anyone could be expected or required to point up defects in title on the facts of this case, it would have been Sainsbury's who were duly warned of the proposal to register. Sainsbury's had an *324 opportunity to have these points clearly ventilated, and it was from their own (or their solicitors') failure to make submissions in time that the Registry was not aware of whatever submissions it was that they would have wanted to make at the time.

88 That means that that route to achieving rectification is not open to Sainsbury's. However, there is an alternative route, namely that:

“... it would [for other reasons] be unjust for the alteration not to be made.” (Land Registration Act 2002 Sch.4 para.3(2)(b)).

The reasons why Sainsbury's say it would be unjust not to rectify can be summarised shortly. They say that the evidence shows that at no time did Westpac intend to sell the land other than subject to the obligations under the deed of novation; that the Master cannot have intended to make an order for sale which would defeat those rights; Olympia's purchase did not, as a matter of law, defeat those rights; that the land was actually sold on the footing that the gas board site was subject to the obligation to provide land for the roundabout; that Olympia bought on the basis that they would have to provide that land, and never expected that the land would be free of those rights in its hands; the price was based on the land being subject to those rights; until some time after the purchase was completed Olympia continued to assume it was subject to those rights and to negotiate with Sainsbury's and Groveholt on the footing that it was bound; and that it would now confer a very substantial and unfair windfall on Olympia if it were to be found that it had the land free from the obligations.

89 I find that all those facts are established.

- a) The witness statement in support of the application for an order for sale reported that Mr Hughes “may have agreed” to transfer part of the gas board site to Chelverton for essential infrastructure works. It went on to say that “other than the potential interest of Chelverton in the Gas Board Site” the bank was not aware of any prior incumbrancers of any of the property which was to be subject to the order for sale. Although this witness statement refers to Chelverton, Chelverton's rights were essentially the same as Sainsbury's'.
- b) At and after this time Lawrence Graham were corresponding with Grimleys to make sure that that firm knew of the rights of their client (Chelverton).
- c) When Grimleys subsequently prepared sales particulars it is clear that the land was marketed on the footing that a portion of the land would be likely to be subject to the roundabout and associated temporary works—see above. The land was never marketed on any other basis.
- d) All Olympia's offers were on the basis that they would not have the land required for the roundabout. So far as contemporaneous material is concerned, this is demonstrated by, inter alia, the letter that Mr Humphries wrote on October 18, 2002 to reduce its offer for the land from £600,000 to £500,000. It identified the land potentially subject to the option arrangements as being one of the “principle [sic] concerns for any purchaser.” *325
- e) The witness statement provided to the Master when he fixed a final method of determining the price made it clear that the land was subject to the option and that Olympia had agreed to take subject to it—see above. It even exhibited the deed of novation.
- f) While Mr Humphries' evidence was a little equivocal as to the extent to which he subjectively appreciated the private right aspects (as opposed to the highways aspects) of the requirement of the roundabout land, I am quite satisfied, having heard him, that he and Olympia made the offers they made on the footing that that was a price they were prepared to pay knowing that they might well have to give up the land with no payment. The possibility of a ransom payment never occurred to him until some time after completion. On December 1, 2003 Mr Humphries told Natwest, from whom Olympia wished to borrow, that he was aware of the cautions relating to the construction of the roundabout and that “we have always been aware of this and subject to sight of the detailed wording of the agreement and covenant referred to we do not see a problem”. This view never changed. In other words, at all material times Olympia's price was one they were prepared to pay on the

footing that the land was subject to obligations in the deed of novation. Since Mr Key did not give evidence I am not prepared to attribute a more qualified intention to him and find he had the same view. This is perhaps because he thought the land was an extremely good buy at that price—there was some evidence that at about the time of completion Mr Key had the possibility of an early sale-on at £1.4m. At all events, the final purchase price offered was one with which Olympia was entirely comfortable on the footing of being subject to the Sainsbury's/Chelverton/Groveholt rights.

- g) Olympia's dealings thereafter did not demonstrate any resiling from that position. There was probably a gathering awareness of the possibility that there was a question-mark over whether the option rights were properly protected, but Olympia's main concern was to try to achieve some prompt determination of what land would be required. A letter from Addleshaw Goddard to Mr O'Hara of March 2, 2004 records that Mr Humphries had said to that firm that Olympia would enter into a new deed of covenant to protect Sainsbury's' interests if the caution could be withdrawn. At a meeting on March 4, 2004 involving Mr Key and Mr Kilkelly, a surveyor acting for Groveholt, and in a confirmatory letter from Olympia dated March 10, protestations were made to the effect that Olympia intended to provide the necessary land and it did not interfere with its plans. Although Mr Humphries conceded that this letter was less than frank because it concealed part of his agenda, it is nonetheless consistent with Olympia's attitude that it had paid a price which reflected the need to provide land for the roundabout and temporary works.
- h) Accordingly, if it were to be the case that in the absence of rectification the rights would not bind the land, Olympia would be in a far better position than they had paid for and than they ever really expected to be in, and if it enabled them to extract a payment from Sainsbury's so that the roundabout could be created they would be in receipt of a windfall. Mr *326 Humphries said that he and Mr Key had talked of payments amounting to six or even seven figure sums.

90 Mr Gaunt pointed out, correctly, that the burden of establishing the relevant injustice is on Sainsbury's, and that it is a heavy one. He said it was not fulfilled, and relied on the following matters:

- a) Olympia bargained for, and got, a legal estate. That is what they wanted, and if they wanted it (and having got it) it entitled them to take free from land charges unless they were properly registered. The arrangements under the deed of novation were not properly registered and protected.
- b) The failure to register and protect the land charges properly was Addleshaw Goddard's mistake, not the Land Registry's. Sainsbury's is effectively seeking rectification to correct the mistake of someone other than the Land Registry.
- c) There is nothing wrong with Olympia seeking to benefit from the technical effects of the registration regime and the consequences of a failure of a person to protect himself under it. In this respect he relied in *Midland Bank v Green (No.1)* [1981] A.C. 513.
- d) Following completion Olympia negotiated on the footing that they had got a legal estate. It borrowed against the land on that footing.
- e) Sainsbury's failed to take their opportunity to object to the registration of Olympia when there was no response to the deadlines of the Land Registry.

91 So far as Mr Gaunt's submissions raise matters of fact, they are correct. Olympia did technically bargain for a legal title, and managed to get what it paid for. However, that does not meet Mr Tager's point that they were assuming they would get a legal estate subject to the rights of Sainsbury's. There was indeed a failure by Sainsbury's' solicitors to protect the rights properly, though it seemed the Land Registry played a small part in the perpetuation of this in suggesting a caution against first registration (this last point is but a small one in the overall context of this case—I do not mean to attribute blame to the Land Registry, who were seeking to be helpful).

92 It is also true that Sainsbury's have brought some of its misfortune on its own head by failing to participate in the Land Registry proceedings in time. However, I do not think that that is very telling. Had Addleshaw Goddard participated in time then the sort of issues which have been debated in these proceedings in relation to the legal estate point would have been canvassed in

those proceedings. It would then have been found in those proceedings that Sainsbury's had an interest capable of persisting through various ownerships of land and that Olympia had not acquired a legal estate, so that Sainsbury's' rights took priority. Olympia would then not have been registered at all (or at least not until they had taken steps to fix the point) by which time Sainsbury's could probably have done something to protect their position by registration or otherwise. Sainsbury's (or its solicitors) deprived itself of the opportunity to have that fight at that time, but bearing in mind that not much time has elapsed since then I do not consider that that has much weight. Were it to be given a lot of weight then Sainsbury's would be being *327 punished for not conducting the fight in the earlier forum, and to rule them out on that basis would be to give its failure a disproportionate effect.

93 Nor do I think that much weight can be given to what Olympia has done by way of charging the property post-completion. The chargee itself (Natwest) does not seek to advance a case against rectification. What could matter is what Olympia has done, on the basis that it had a clear understanding that it had an unencumbered legal estate, and whether what it has done has weight to put in the scales in assessing the justice and injustice of not rectifying. Mr Key is the important person here because at the end of the day he was the decision maker and his views and intentions are those that count. He has not given evidence, and I am not prepared to make the sort of findings that Mr Gaunt seeks in the absence of evidence from him. No real reason was given for his not giving evidence (indeed, he was present in court for at least one day of the trial). Mr Humphries' witness statement does not seek to advance a factual case based on this, and indeed indicates that Olympia is still planning to avoid building on the roundabout site.

94 Mr Tager drew my attention to one authority on rectification, namely *Horrill v Cooper* (1999) 78 P. & C.R. 336. This is a first instance decision of H.H. Judge Colyer Q.C., sitting as a deputy judge of the Chancery Division. It went to the Court of Appeal, where it was decided on a different footing. It was deployed by Mr Tager not so much as an authority but as an example of the exercise of the jurisdiction. In that case restrictive covenants were registered against unregistered land, but were not revealed by a subsequent formal search with the result (as the judge found) that as matter of technicality the purchaser took free from them. However, that purchaser knew of the covenants and treated himself as taking subject to them. The judge was prepared to find that he paid a price appropriate to the land being subject to them. In the circumstances the purchaser would have got an "undeserved and unbargained for windfall" if rectification were not allowed so as to subject the land to the covenants, and this brought the case within the equivalent words in the then legislation. In the Court of Appeal (80 P. & C.R. D16) Mummery L.J. held that the land charges search carried out by the purchaser was not sufficient to entitle him to take free from the covenants (and to that extent differed from the trial judge), and when he came to consider rectification he again pointed out that not to order rectification would give the purchaser a windfall. In other circumstances, in *James Hay Pension Trustees Ltd v Cooper Estates Ltd* [2005] EWHC 36 (drawn to my attention after the end of argument), Hart J. granted rectification of the register in circumstances where not to do so would give the then registered proprietor an unattractive and uncovenanted ransom position.

95 I have concluded, as those three judges did, that it would be unjust not to order rectification. It is quite clear from the evidence that at all material times, both before and after completion, Olympia believed that it was going to have to make land available for the roundabout without payment. The main concern as to title was that arising out of Westpac's power to convey a legal estate. While there was some awareness of some other point in relation to the option in the deed of novation, that was not uppermost in anyone's mind, and Mr O'Hara told me that he did not give this any weight in his dealings with the client. What was of more concern to Olympia was what land would have to be provided, and when, but there was never any serious question as to whether land would have to be provided, or at *328 least not until some time after completion. It may be that once completion had taken place there was a growing realisation that there was a real point to be taken and argued, but it was no more than that. The whole basis on which Olympia acquired the gas board site was that land would be taken from it for the purposes of the roundabout. Were the register not to be rectified then it would have acquired a windfall which would be potentially very significant indeed. The scope of that windfall in financial terms was not debated before me—its size might depend on whether compulsory purchase powers could and would be exercised as against it, or whether Olympia would be in a position to demand a ransom payment from Sainsbury's, but on any footing Olympia would be in a position which no-one ever contemplated they would be in, and which (as a matter of conveyancing) it ought not to have been in. I am confident that, had the matter been drawn to the Master's attention, orders for sale

would have expressly been subject to the option, that Westpac did not seek to sell from from the right, and that Olympia did not think it was purchasing free from the rights. I am quite satisfied that it would be unjust not to rectify the register so as to register the option.

96 I therefore grant the rectification sought by Sainsbury's so as to reflect its interest in the gas board site. Mr Gaunt's skeleton argument sought to argue that since rectification of the register operates only from the date of the rectification, Olympia took free from such rights as the rectification would seek to protect because Olympia had become the registered owner of the gas board site at a time when the interest was not registered. Registration was not retrospective. In this respect he relied on *Freer v Unwins* [1976] Ch. 288 as setting out the law under the 1925 Act, and Sch.4 para.8 of the 2002 Act as codifying it. He also relied on a passage in *Ruoff & Roper* at paras 47.017 and 47.018. This point was not much pressed in oral argument, and in my view rightly so. It is not a good point. What *Freer v Unwins* decides is that where A gets registered as proprietor, then makes a registered disposition to B, and A's title is then rectified to reflect some third party interest, the rectification does not bind B because B took from a registered proprietor at a time when the third party interest was not protected. It does not purport to deal (or deal fully) with how the interest affects A and A's estate. It presupposes that for the future A's estate will be affected by the third party interest, and that therefore A is affected by it for the future. If Mr Gaunt's argument were right it is hard to see how there could ever be a useful rectification. The proprietor could always say that he took his title free from the interest because it was not protected by registration when he was registered with his title; the rectification is not retrospective; therefore it cannot bind him. That cannot be right. In cases such as the present the question is whether the proprietor should have been registered free from the interest in the first place. Rectification is allowed to bring the situation into line with what it should have been had the mistake not been made at the time of registration. To allow the registration itself to bar the effect of that would be to let the tail wag the dog. The non-retrospective aspect of rectification means that pending rectification the land is treated as not being subject to the relevant interest, so that those relying on the state of the register at that time would not be bound by it; but it is not saying any more than that. Once registration takes place the land, and the proprietor against whom it is ordered, is bound. *329 Accordingly, rectification prevents Olympia from saying that it now holds the land free from the relevant rights. It is now that matters.

97 There is one further technical point as to the form of rectification. It follows from my findings that strictly speaking Olympia should not have been registered as proprietors of the freehold of the gas board site. That is probably why one of the heads of relief sought by Sainsbury's is rectification removing Olympia's legal title. That, however, seems to go to far. On the facts no-one is concerned that it should not have a legal estate, provided (so far as Sainsbury's is concerned) that registration does not prejudice its option rights. The sensible way of achieving that is to rectify the register so as to reflect its rights while leaving Olympia's legal interest otherwise intact.

An alternative route—variation of the order for sale

98 As an alternative route, Mr Tager seeks an order varying the orders of June 20, 2000 and of October 9, 2003. The former order should, he says, be amended by deleting the reference to the grant of the 3,000 year term and by providing that any sale would be subject to the deed of novation. Either or both of them should be amended by providing for the vesting of BG's freehold on that basis. The jurisdiction for this is said to be CPR 40.9:

“40.9 A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.”

Sainsbury's is said to be a person affected by those orders who ought to be able to apply to have the orders varied as referred to. Mr Tager relies on this particularly in relation to the land of which only temporary use is required, presumably because if this involves a mere licence then there are obvious difficulties in such an interest binding the land now.

99 This claim must, it seems to me, fail. I shall assume for present purposes, without deciding it, that Sainsbury's is an affected person for the purposes of the rule, and that there is jurisdiction to make the variation orders sought. So far as any proprietary claims are concerned, variation or setting aside would be neither necessary nor effective. It would not be necessary because the real question is whether proprietary rights have survived or not; I have decided that question above. It would be ineffective because varying or setting aside the order, at this stage and

without more, would achieve nothing. Certain conveyancing steps have taken place, and the real question is what the effect of those steps is. Varying or setting aside the order would not unscramble, or detract from, or otherwise affect, those steps. So far as non-proprietary claims are concerned, varying or setting aside the orders would be equally ineffective for the same reasons. The orders would be changed, but that would say nothing about the effect of the intervening steps because it does not unscramble them. Accordingly, I decline to make any order under this head.

Constructive trust or estoppel

100 This brings me to the last principal matter which arose in this case. It is an argument that arises only if Sainsbury's fails on rectification, so it is no longer *330 strictly relevant. However, since I have heard argument and a significant amount of evidence on it, and in case my findings in relation to rectification are challenged elsewhere, I should make some findings about it.

101 Sainsbury's says that if it is not entitled to enforce the option via the rectification route, then it is nonetheless entitled to have the benefit of it via a trust or estoppel route. Mr Tager's prime route was via a constructive trust, and estoppel was put as an alternative analysis of the same facts. Put shortly, Sainsbury's says that Olympia encouraged Sainsbury's to believe that it would acknowledge the effect of the option arrangements, and as a result Sainsbury's did not take steps that it could and would otherwise have taken to protect itself. Although the original case on this point encompassed a wider timescale, by the time of final speeches the timeframe for the relevant acts had contracted to the period between January 8, 2004 and completion of Olympia's purchase on February 11. Mr Tager expressly conceded that if no equity had arisen at that date, then nothing which happened thereafter was capable of giving rise to an equity in his client's favour. That enables me to limit what would otherwise have to be another detailed and lengthy factual investigation.

102 The high point of Mr Tager's case on this point is the telephone conversation that took place between Mr Humphries and Mr Tunney on January 7, 2004, followed up by an e-mail the next day. Some reliance was also placed on the subsequent conversation with a Mr Gibson on January 14, and a follow-up email from Mr Humphries. The relevant material is as follows.

103 I have set out above the circumstances in which those telephone conversations took place. Mr Humphries told me, and I find, that when he rang Mr Tunney he was trying to ascertain the extent of the land required and the timescale within which it would be required. He had identified Mr Tunney, who was an in-house development surveyor with Sainsbury's with day to day responsibility for the Matlock development, as being someone who might be able to help him with the relevant information. According to Mr Tunney, Mr Humphries told him that "he did not anticipate difficulty in making land available to Sainsbury's, but simply wanted to confirm the timing of the construction of the roundabout, and the amount of land which was required." I find that the conversation took place on the common footing that land was going to have to be provided, but that was more assumed than made explicit. Questions of timing and extent were what were canvassed, but Mr Tunney was not in a position to provide much useful information to Mr Humphries. Mr Tunney asked Mr Humphries to confirm his requirements in writing and gave him an email address for that purpose. The next day Mr Humphries wrote an e-mail. Mr Humphries' witness statement did not give particulars of the conversation but said that this email confirmed the conversation. I do not accept that it was necessarily a full reflection of the conversation. In his oral evidence Mr Humphries was at pains to stress that this was a carefully crafted email. So far as it was carefully crafted then I think that the emphasis was not in making sure that it necessarily confirmed what passed between them, but rather that it said what he wanted it to say, whether or not he had referred to it in his conversation. It probably provided detail that had not passed between them in their conversation. The e-mail reads as follows: *331

"Dear Mr Tunney

Further to our telecon of yesterday we confirm our interest in the above development. We have agreed to purchase from Westpac Bank the land fronting Bakewell Road which was formerly the British Gas depot and which now has outline planning approval for residential development. A condition of the approval is the reservation of a small portion of the site for the construction of a new traffic roundabout on the A6 to serve the Cawdor Quarry development. We understand from the architects and engineers

Hadfield Cawkwell Davidson that the design of the roundabout has reached an advanced stage and that it would be relatively easy to establish within reasonable limits the area and location of the land required. Your interest in this are [sic] safeguarded by three cautions against First Registration to which Sainsbury's are a party. One caution refers to a covenant restricting the use of the British Gas site to activities not conflicting with those of Sainsbury's and we have acquired a copy of this from Land Registry. The remaining cautions both refer to a Novation Deed dated 16 September 1998 made between Sainsbury's, Alan Hughes and Chelverton Properties Limited and lodged by Addleshaw Booth Solicitors (Leeds). The Land Registry have a short extract from the wording of this deed on file but it is not sufficiently detailed to establish the full extent of the restrictions which could be imposed on development of the site either temporarily or permanently. The court has now authorised the sale of the land and we are progressing towards an exchange of contracts at the earliest opportunity. We would however welcome any help you can give in clarifying the detail of your agreement and on the assumption that this is generally in line with what we have been able to establish to date we do not foresee any problem in meeting the requirements of the deed should they transfer to us as purchaser of the land. We would however welcome the opportunity to discuss how we might achieve this without if possible affecting the implementation of the current planning approval should we be in a position to commence prior to the construction of the road improvements referred to in the planning approval and the deed.

Any assistance would be much appreciated and we should be pleased to discuss the above or to meet with your representatives at the earliest opportunity. For your information our details are as follows ... [details supplied]".

104 Mr Humphries's witness statement said that he took particular care in the conversation to emphasise that Olympia would consider meeting the requirements of the deed of novation only if those requirements should transfer to them as purchaser of the land. It is true that there are words to that effect at the end of the email ("... we do not see any problem in meeting the requirements of the deed should they transfer to us as purchaser of the land"), but I do not think that they contain any emphasis. At most they are an expression of caution. If this email had been drafted so as to emphasise the point (and it will be remembered that Mr Humphries said it was carefully drafted) then more prominence would have been given to the idea. Nor do I think it likely that the point was in any way emphasised *332 in the conversation with Mr Tunney. There are several reasons for my finding this. First, I do not think that the issue was sufficiently at the forefront of Mr Humphries' mind to lead him to give it any emphasis. His working assumption was that the land would be taken subject to the obligation to build the roundabout, and the idea that this might not be the case was only a slight lurking point which was not sufficiently formulated to bring it forward as a position that might need protecting. Mr Humphries told me that he knew there were cautions (which he obviously did) and had some idea that cautions could be challenged, but even if he had formulated that idea at the time (which I doubt) it was all very much in the back of his mind and had not grown to the extent that it was an idea which needed to be preserved by an appropriate reservation in conversation and correspondence. Secondly, the purpose of his call was to try to extract information from Mr Tunney. He needed to be a bit canny. It would have been counterproductive to emphasise the possibility that the option would not bind, because for all he knew it might have alerted Sainsbury's to something that it was not aware of and caused it to take protective measures or make other difficulties. Third, the email itself is based much more on the assumption that Sainsbury's was protected than the possibility that it might not be—see the references to Sainsbury's interests being "safeguarded". This is likely to reflect the tone, if not the precise content, of the conversation, which is inconsistent with the emphasis which Mr Humphries would have me find. Fourth, Mr Tunney did not think that this emphasis existed, and I prefer his evidence on the point, both because of the manner of his evidence and because of the probabilities (reflected in the other points made in this paragraph).

105 Mr Tunney's evidence was to the effect that Mr Humphries told him that he was fully aware of Sainsbury's involvement and did not foresee any difficulty in making the land available. His evidence in chief is consistent with the main purpose of the telephone call being to find out about timing and the extent of the land required, and I find that that was its main thrust. His evidence was equivocal as to whether there was an express qualification to the effect of "so far as [the obligations] transfer to [Olympia]", and I find that if there was any such remark it was very casual.

However, the important point about this conversation is that, as I find, it did not contain any positive acceptance by Mr Humphries that Olympia would be bound. Rather, the conversation took place on an assumption that Olympia would have to make the land available.

106 The email speaks for itself. Again, it proceeds principally on an assumption that Olympia is likely to be bound. There is, of course, the qualification that I have quoted above. It is, perhaps, a little equivocal in that the words "should they transfer to us as purchaser of the land" might be taken to refer to the eventuality of purchase rather than the eventuality of the obligations being found to be binding, but whatever be their meaning I do not think that this email can be taken to be a positive representation that Olympia would be bound. It reflects the same shared assumption as the conversation proceeded on. Mr Tunney told me, and I accept, that the purpose of the telephone call was not to give assurances, but to extract information, and he also told me that me (and again I accept) that he himself did not understand that Olympia was accepting that the obligations would transfer to Olympia as purchaser of the land. *333

107 Mr Tunney did not act on the email other than to forward it to Addleshaw Goddard and to Capital Retail (Sainsbury's' retained agent). There is no evidence that anyone in those firms acted on the email, or what their view of it was. Its trail goes cold at that point.

108 On January 13, 2004 Mr Humphries made another attempt to get information about the amount of land required for the roundabout, and about timing. This time he telephoned Mr Robert Gibson, a civil engineer employed by Birse Civils Ltd, who were the proposed design and build contractors for the Sainsbury's scheme. I accept what Mr Gibson told me about the content of this conversation. Mr Humphries told him that Olympia intended to purchase the gas board site, and understood that it was under an obligation to make land available for the roundabout for the site. He wanted to find out what the design situation was because Olympia had only an old drawing and he wanted to meet to talk about Birse having permission to take the land. Once again Mr Humphries was probing for information; and once again the assumption on which he and Mr Gibson were apparently operating was that Olympia was going to have to make land available. This conversation was followed up by an email from Mr Humphries in which he indicated a willingness to work with all parties to establish what land would be required, acknowledged the desirability of making land temporarily available for the purposes of the works, proffered a topographical survey which he had commissioned, and asked for such details of the land take and timing as Mr Gibson could provide. The email started by confirming Olympia's intention to purchase the gas board site and "we understand the obligations we will inherit regarding the provision of space on the site to construct a traffic roundabout serving the Cawdor quarry development". At no time in this email, or in the preceding conversation, did Mr Humphries express any qualifications in relation to the assumption of those obligations.

109 A meeting followed this email. It took place on March 4, after completion. Since Mr Tager has acknowledged that nothing that happened after completion could create or give rise to an equity that did not exist, then what happened at this meeting cannot be significant in that context. However, the content of this meeting does help me to resolve one element of the disputed facts in relation to the Humphries/Tunney conversation and the former's approach in the various conversations to the possibility of Olympia not being bound by the option arrangements. The meeting was between Mr Key for Olympia, and Mr Phillips of EWP (a project director engaged by Chelverton), a Mr Kilkelly (of Groveholt) and Mr Gibson. Mr Key's attitude at that meeting was that he would make available whatever land was needed. It was not qualified in any way. I think that this reflects the view of Olympia at the time that it would make the land available, and makes it highly unlikely that in January Mr Humphries had been as careful as he says he was to reserve Olympia's position. Following this meeting Mr Humphries wrote a letter expressing an ostensible willingness to enter into an agreement transferring the obligations directly to Olympia. Mr Humphries said he was not being entirely frank in this letter; his attitude was (he said) that Olympia would enter into such an agreement if it had to, but he did not want to say that because he wanted to keep his relationships good with the other parties. If he is right about that, then I think that that too makes it unlikely that in the January he would have flagged up in any *334 noticeable terms the possibility that Olympia would not be bound if it purchased the land.

110 Based on that pre-completion material, Mr Tager said that a constructive trust arose as a result of which Olympia was obliged to give effect to the option agreement even it was not, on more conventional principles, obliged to do so. He said that prior to completion there was "an arrangement or understanding" (to quote from the Particulars of Claim) that if Olympia acquired the gas board site it would give access to it to allow the roundabout to be constructed, and would

convey the land on which it was necessary to construct it. In reliance on that arrangement or understanding Sainsbury's omitted to take steps to investigate the circumstances of Olympia's purchase, or to protect or enforce its rights or to acquire parts of the gas board site itself. As a result of this Olympia has been able to acquire the land free from any obligation to Sainsbury's and to hold Sainsbury's to ransom. This is said to make it inequitable for Olympia to retain the gas board site for itself free from the obligations of the deed of novation. In this respect Sainsbury's relied on the equity arising in *Pallant v Morgan* [1953] Ch. 43, as elaborated in *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch. 372.

111 I do not consider that that line of cases has any application in the present case. The cases themselves start with a situation in which there are two parties, neither of which owns a particular property, and in which there is then an arrangement pursuant to which the property is to be acquired and there is an arrangement that each (or at least the ultimately disappointed party) should have an interest. The essence of the equity is a pre-acquisition arrangement:

"It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and which leads to his being treated as a trustee if he seeks to act inconsistently with it." (per Chadwick L.J. in *Banner* at 397G)

"It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property." (at 398)

That does not describe the situation in the present case. There is some element of joint enterprise in a *Pallant v Morgan* situation, and that the arrangement is made in that context. Nothing like that existed in the present case. Sainsbury's had, or thought it had, its interest. Olympia intended to acquire the land and believed that it was subject to Sainsbury's interest. There was no arrangement that Sainsbury's would acquire an interest as a result of the acquisition; it already had one. Nothing in the dealings between Mr Humphries and Mr Tunney, or Mr Humphries and Mr Gibson, gave rise to such an arrangement. Insofar as there was an acknowledgment of Sainsbury's interest, that did not amount to an arrangement within the *Pallant v Morgan* type of case. The situation is different from that which gives rise to a *Pallant v Morgan* equity and despite the flexibility which equity demonstrates in fashioning such rights (see *Banner* at 397F) it does not come within it or any sensible extension of it.

112 The alternative way in which the case was put was estoppel. For this purpose the dealings between Mr Humphries on the one hand and Mr Tunney and Mr Gibson on the other are relied on as encouragement by the former to believe that if ***335** Olympia acquired the gas board site it would give Sainsbury's access for the roundabout construction and would provide the land for the roundabout itself, in reliance on which Sainsbury's did not take steps to protect its position. As a result, Olympia is said to be estopped from denying Sainsbury's its rights under the deed of novation.

113 Although it struck me that if there were any equitable rights they would be better placed in estoppel than in *Pallant v Morgan*, Mr Tager did not develop this argument much. In my view the point fails. I do not consider that what passed between Mr Humphries and the two Sainsbury representatives amounted to a representation on which they were intended to rely, or on encouragement for the purposes of estoppel. The context and purpose of the conversations was Mr Humphries' pursuit of information. He did not create any belief on the part of Sainsbury's that it had a binding interest because Sainsbury's already had that belief. While the conversations took place on an assumption that Sainsbury's had a protected interest, nothing that Mr Humphries said encouraged that belief, and since there is no evidence of a question-mark about Sainsbury's belief then nothing that he said was taken by them to be encouragement about the position, either present or future. Nor was there any reliance by Sainsbury's on anything that Mr Humphries said in this respect. It may be the case that if Mr Humphries had indicated that he did not consider that Olympia would be bound then Sainsbury's would have taken some step or other, but that is not the same as saying that Sainsbury's actually relied on something that Mr Humphries said, either expressly or implicitly. Mr Tager said that reliance should be presumed and relied on the short statement to that effect by Robert Walker L.J. in *Gillett v Holt* [2001] Ch. 210 at p 228F:

"In any event reliance would be presumed — see *Greasley v Cooke* [1980] 1 W.L.R.

1306”

However, that does not assist Mr Tager. *Greasley v Cooke* provides its presumption when it is shown that a representation has been made which is calculated to influence the judgment of the recipient. Mr Humphries made no such representation. When he spoke to Mr Tunney and Mr Gibson he was seeking information, and it was no part of his purpose to make representations. Nor did he make any incidentally. Accordingly the circumstances in which the presumption of *Greasley v Cooke* might operate were not present. Neither Mr Tunney nor Mr Gibson said that they thought that a representation was being made, and Mr Tunney said that he expected that each side would take its own advice on the question of the construction of the roundabout on the gas board site. In short, to portray the conversations as containing representations, let alone representations or encouragement on which the parties were intended to rely, is to mischaracterize those conversations.

114 In the circumstances the representation, encouragement and reliance on which the pleaded estoppel claim is based are absent, and this estoppel claim fails. For the sake of completeness I should deal with estoppel by convention. It struck me that since the conversations took place on the basis of assumptions as to the position rather than assertions, estoppel by convention might be a better candidate for an estoppel argument than whatever brand it was that Mr Tager was arguing. In ***336** response to my suggestion to that effect Mr Tager accepted that that might be an alternative way of describing it, but did not press it and at the end of his submissions accepted that the trial had not been conducted on the basis of such an estoppel. In the circumstances I do not consider that point further, but would observe that it is hard to see why, given the apparently shared assumption, it would be unfair for Olympia to resile from it. It was merely a shared assumption which operated for a relatively short period of time on the basis of which Mr Humphries sought (and failed to get) information that he wanted in order to consider how the position would or might impact on his employer. There was no material dealing between Olympia and Sainsbury's. This does not give rise to unfairness when Olympia resiled from its previous assumption.

115 In the circumstances the estoppel argument fails.

Conclusion

116 I shall therefore make an order rectifying the register to record Sainsbury's' rights under the deed of novation so far as they give rise to an enforceable estate contract. The precise form of order, and any further relief, can be the subject of further argument.

1. Paragraph numbers in this judgment are as assigned by the court.