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# Priorities under the Land Registration Act 2002

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**Legislation:** Land Registration Act 2002 s.28 , s.29

**Case:** Halifax Plc v Curry Popeck (A Firm) [2008] EWHC 1692 (Ch); (2008) 152(37) S.J.L.B. 31 (Ch D)

***L.Q.R. 401*** IN *Halifax Plc and Bank of Scotland Plc v Curry Popeck* [2008] EWHC 1692, the Chancery Division had its first opportunity to consider the impact of the rules concerning priority of proprietary interests under the Land Registration Act 2002. These rules--found in ss.28 and 29 of the Act--are central to the operation of the revised system of land registration put in place in 2003. They replace familiar rules to like purpose previously found in the Land Registration Act 1925 (see especially s.20 of the Land Registration Act 1925), but the effect of their reformulation in ss.28 and 29 is not without doubt and may, of course, have a profound impact on how the land registration system works in practice.

The case arose out of a series of mortgage frauds which of necessity required the assistance (or repeated astonishing incompetence) of a conveyancer. The conveyancer in question had moved firms between frauds and the essence of the present action was to determine which firm (both being vicariously liable) was to be sued by which lender. There was enough money in the pot to satisfy only one lender, so even though the Halifax and the Bank of Scotland were now owned by the same company (Bank of Scotland Plc), the real issue was as to which solicitor's firm was to pay the shortfall. In turn, this depended on which lender's charge had priority over the land and hence any proceeds of sale. The lender whose charge had priority would be satisfied in full, and so the lender lacking priority would resort to the firm entrusted with securing its mortgage.

Normally, questions of priority in relation to mortgages are straightforward. The mortgage is registered as a legal charge and priority flows from the date of registration. Of course, such mortgages are evident from inspection of the title register of the charged property and so where mortgage fraud is intended, either a mortgage is not properly registered, or it is registered over different, less valuable land. Both routes require the assistance of a conveyancer and both were practised in this case. The Halifax's intended mortgage came first, and the lender believed it had secured a legal ***L.Q.R. 402*** charge over land belonging to the fraudsters--Tracey and John Whale. In fact, the charge was registered over a narrow, much less valuable strip of land parcelled off from the main property. This meant that the Halifax had no charge over the bungalow (the valuable property) and there was no written agreement within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 that could constitute an equitable charge over it (at [15]). However, all sides agreed that an estoppel arose in favour of the Halifax in respect of the bungalow because the Halifax had been led to believe that it would acquire a legal charge by the joint proprietors and had acted on that belief by providing the money. This estoppel was treated by the court as being equivalent to an equitable charge. Although the existence of the estoppel was not in dispute in the current case, two preliminary points of interest arise. First, Norris J. is explicit (at [26]) that whatever the previous position, the effect of s.116 of the Land Registration Act 2002 is to ensure that an interest generated by estoppel is proprietary and thus capable of binding successors in title to the representor. This is precisely what was intended by the Law Commission (Law Com. No.271 (2001), para.5.29), and it lays to rest any doubts over the effect of this very clear provision. Secondly, however, it is not certain that the finding of estoppel is consistent with the recent House of Lords' reformulation of the doctrine in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752. In that case, their Lordships (with the possible exception of Lord Walker of Gestingthorpe) emphasised that estoppel should not be used to circumvent established formality requirements for the creation or disposition of an interest in land (e.g. s.2 of the 1989 Act), especially where the parties were commercially experienced and where the requirement for such formality was notorious. In the event of an appeal, Halifax can rely on the Court of Appeal's decision in *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; [2005] W.T.L.R. 345

where a lender was able to establish an equitable charge by way of estoppel despite the absence of all formality, but that case did not involve a commercial mortgagee (thus unconscionability appears to have been easier to establish) and may be regarded as the high point of estoppel as it applies to failed property bargains. Of course, no one would deny that Halifax had a personal claim against the borrowers--see inter alia *Rochefoucauld v Boustead* [1897] 1 Ch. 196 CA--but, given that there is no suggestion of any third party taking with notice so as to be affected by a trust, the lender needs to establish a proprietary interest to be able (subject to priority issues) to enforce against the land in the hands of a third party. The estoppel claim provided that interest and so the priority question became central. In the absence of an estoppel, Halifax's claim disappears.

Following the generation by estoppel of the Halifax's equitable charge over the bungalow, John and Tracey transferred it by registered disposition ***L.Q.R. 403*** to a “John Sinclair”--being John under an assumed name. This transfer also was part of a fraudulent design as further mortgage monies were obtained from another lender, Verso, allegedly to fund this “purchase”. Verso did secure a legal charge over the bungalow and so were protected by registration and had priority, but there was yet another remortgage by John (still the sole registered proprietor) with the Bank of Scotland. However, like the Halifax, the Bank of Scotland did not obtain a charge over the bungalow and eventually found itself with a legal charge over a second strip of land again carved from the main title. This too was considerably less valuable than the intended mortgaged land. Of course, the fraud came to light when the mortgages were not repaid and the Bank of Scotland obtained a money judgment against John and then a charging order over the bungalow. The bungalow was sold pursuant to the charging order and so priorities attached to the proceeds of sale. The result was, then, that Verso had a priority legal charge over the bungalow or its proceeds (ss.26 and 29 of the Land Registration Act 2002) and was duly paid off. However, the Halifax had an equitable charge over the proceeds via estoppel and the Bank of Scotland had an equitable charge via a charging order. Yet, even though the Halifax's charge had come first, there had been an intervening transfer of the legal title (from Tracy and John to John) and the Halifax, unsurprisingly, had not secured an entry on the register of title protecting this equitable charge--of course, it believed it had a duly registered legal charge.

To be clear, had legal title to the bungalow never been transferred, the matter would be simple. Halifax's equitable charge would take priority because it was first in time. However, because title was transferred, albeit from Tracy and John as joint proprietors to John alone, ss.28 and 29 of the Land Registration Act 2002 were in play. Section 28 establishes the “basic” priority rule and provides that a transferee not for value takes the land subject to all pre-existing proprietary claims and that they rank in order of creation. Simply, if John were not a purchaser, the Halifax's estoppel charge would not lose its “first in time” priority against the land because of the transfer. In the result, Norris J. found on the facts that the transfer was not made for valuable consideration. The transfer was merely part of a fraudulent design and although it was a genuine transfer, it was not for value. Hence, the Halifax's unregistered equitable proprietary interest retained its priority and, being first in time, the Halifax had first call on the proceeds of sale. This is sufficient, of course, to dispose of the matter. Indeed, such documents as existed were incomplete, undated or showed signs of later alteration and it is difficult to quibble with Norris J.'s conclusion that in the light of these dealings “the concept of consideration is entirely meaningless” (at [43]).

***L.Q.R. 404*** However, counsel spent considerable time arguing in the alternative that John had provided valuable consideration for the transfer and Norris J. felt obliged to consider the position on the basis that s.29 of the 2002 Act did apply. Section 29, in essence, states that a duly registered transferee for valuable consideration takes the land subject only to entries on the register or unregistered interests which override within Sch.3 to the Act. The Halifax estoppel charge fell into neither category. With some hesitation, Norris J. agreed with counsel for the Bank of Scotland that this would mean that when John took a transfer of the registered title, the Halifax charge ceased to bind John's estate (s.29) and thus the Bank of Scotland's equitable charge would have proprietary priority because it was carved out of John's now unencumbered title. The Halifax would be left to its (worthless) personal remedies against John and Tracy or to a claim against its solicitors. Yet, is it certain that this is the effect of s.29 on unprotected proprietary interests?

*Possibility 1.* As suggested by Norris J., it could be that s.29 effectively destroys *as property rights* all prior unprotected proprietary interests on the occasion of a registered disposition for valuable consideration. In other words, s.29 postulates a voidness rule. It would mean that a newly registered proprietor *and* any person with a derivative interest (e.g. the Bank of Scotland in this case) always had priority. The purchaser benefits from statutory priority and the derivative interest holder from the *nemo dat* rule. This seems to have been the position under the former s.20 of the Land Registration Act 1925 and it is the view of s.29 adopted by Megarry and Wade (*Law of Real Property,* 7th edn

(2008), para.7-061, fn.398). It is unambiguous and simple to apply. Moreover, it would not prevent the holder of the "lost" right from taking action against the transferor personally (e.g. under a contract or for breach of trust) nor even pursuing a personal action against the third party purchaser, say perhaps in knowing receipt, for the tort of conspiracy or in unjust enrichment. Thus, in this case, the fact that John was instrumental in generating an estoppel in favour of the Halifax would mean that it had a personal claim against him, irrespective of his ownership of land. This claim could operate even when he was sole registered proprietor, but not *because* he was registered proprietor. The point would be, in effect, that the claim against the land would have been destroyed, but not personal remedies, although of course the latter might be worthless.

The difficulty with this analysis is, however, that this is not what s.29 actually says--even though it is plausible that it is what was intended in *some* circumstances. Section 29 says that a registered disposition for valuable consideration "has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration". It ***L.Q.R. 405*** does not say that the unprotected property interest is "void" or "ceases to exist as proprietary interest" but rather that its *priority* is "postponed" and then only "to the interest under the disposition". It is clear that this is no accidental reformulation and, given that the Land Registration Act 2002 is not simply a recasting of the 1925 Act, are there any other possibilities?

*Possibility 2.* Another view is that s.29 does not cause an unprotected right to be void as an interest against the land, but merely--as the section says--postpones it. The interest continues to exist as a property right, but cannot be enforced against any "interest under the disposition". In one sense, this is already accepted. Thus, where the first disposition is the grant of a lease of the whole (and see s.29(4)), an unprotected prior interest that binds the freehold will not bind the leasehold (s.29), but when the lease determines, the interest will resume its effect against the freehold. Clearly, this is perfectly proper and illustrates why s.29 is expressed in terms of "priority" rather than "voidness". However, can the same logic be applied to other dispositions? Can an unprotected interest survive a registered disposition, as it were in suspense, so that it could enjoy priority in a subsequent transaction either because the interest was entered on the register after the priority disposition (i.e. it became protected against a further disponee), or because a subsequent interest holder did not take "under the disposition" which enjoyed the priority? First, can a previously unprotected right be registered (or even gain overriding status) after the disposition to which it ceded priority so as to enjoy priority over further, later dispositions? For example, where X has an unregistered restrictive covenant against A's land, and A sells to B, may X register after the sale to B (it could not bind B--s.29) in order to bind any future purchaser, C? On a literal reading of the section, this would seem possible--the covenant merely has lost its priority against B, but still survives as a property right (as in the lease example). Yet, even assuming that one could persuade the Land Registry to agree to registration in such a case, the potential for serious injustice makes this an unattractive reading of s.29. Although the second purchaser (C) would know of the covenant, it being on the register, the value of B's land would be less than that which he had paid for it. There would also, of course, be uncertainty as to the future state of the title if apparently "lost" property rights could be re-energised. If at all possible, this analysis should be avoided. Secondly, does it matter that under s.29 priority is ceded to "the interest under the disposition"? In *Popeck,* Halifax was asserting its priority against the Bank of Scotland, not against the transferee. The transferee, John, did enjoy priority under s.29, his estate being the relevant "interest under the disposition". Of course, the Bank of Scotland had a derivative interest--an equitable charge--but this was "not the interest under the disposition" and it is not clear that s.29 ***L.Q.R. 406*** requires priority to be given to all derivative interests simply because they are carved out of an interest having priority. It might be otherwise--i.e. that priority *was* enjoyed--if the second disponee held the *same* interest as the first disponee. This solution would also deal neatly with the concerns raised above about post-disposition registrations of unprotected rights. To put it another way, if s.29 means what it says and does not destroy the proprietary status of an interest after a disposition, then

1. Any further person taking the same interest as that which did obtain priority under s.29--such as a further purchaser of the same legal estate or even a transferee not for value of it--would also enjoy priority over the unprotected right. The further purchaser or transferee is now the owner of "the interest under the disposition" to which the prior property right was postponed. This was not the case with the Bank of Scotland as they held an equitable charge. Neither would it matter if the "postponed" non-priority interest somehow found its way on to the register before the second disposition or became an overriding interest, because the transferee (whether having given value or not) would still hold "the interest" under "the disposition" and would enjoy the priority that it entailed. This will be a

regular occurrence.

2. Any person taking a different interest after the first priority disposition, but where that second transaction also amounts to a registered disposition within s.29 would of course also enjoy priority. This is the clear effect of ss.26 and 29 of the 2002 Act. This could have been the position of the Bank of Scotland had they acquired their anticipated legal charge over the bungalow. It was the position of Verso and is why they enjoyed priority over both the Halifax and the Bank of Scotland. However, the reasoning here is different from that considered immediately above. In the above situation, the second disponee enjoys the first disponee's priority because they are taking the same “interest under the disposition” and thus it matters not whether they gave value or whether the interest has become protected. In this scenario, the second disponee is enjoying their own priority because of s.29. Consequently, if a previously unprotected and postponed interest was brought on to the register between the first and second dispositions (or became an overriding interest), it would in principle bind the second disponee under s.29. Obviously, the second disponee would be aware of the interest through a search of the register (and see the definition of overriding interests in Sch.3) and need not take the disposition. Of course, the first disponee is to some extent ***L.Q.R. 407*** compromised in his ability to deal with his land, and it may well appear that an interest which did not actually bind him does, in practice, have a detrimental effect. However, this appears to be the effect of the reformulation of the priority rule in s.29 and we should remember that it will be rare for an interest ever to gain protection after a priority disposition. If there is such a rare case, the first disponee may still alienate his entire interest without limit as this would then fall within point (1) above.

3. If the contest is between an interest which has ceded priority to a disposition and an interest which falls in neither of the above categories, s.29 can be read as to preserve the priority of the first interest as against the second. This was the factual position in this case. Thus, the Halifax ceded priority to John under s.29 of the Act. But, the Bank of Scotland did not take a transfer of John's interest (not (1) above), nor did they complete a registered disposition of their own (not (2) above). Halifax's interest was not destroyed because s.29 stipulates a priority rule not a voidness rule. Consequently, in such cases, it can be argued that “the first in time prevails” because the contest is between two claims neither of which fall within the statutory priority rule. The consequence of this analysis is that an unprotected prior equitable proprietary interest can have priority over a later equitable proprietary interest even if there has been an intervening disposition for value. Priority is relative, not absolute.

The simple solution to the problem posed by this case is that adopted by Norris J. The transferee was not a purchaser, s.28 applied, and between the equitable charges, the first in time prevailed. Moreover, Norris J.'s conclusion in respect of s.29 is entirely understandable as it mirrors the old law and provides a simple, clean solution. It may be correct. However, s.29 is different from its predecessors and the Law Commission made it clear that it was recasting these rules precisely to make the point that “bindingness” is about priority not voidness. The solution postulated above is more complex, it may introduce elements of uncertainty in very unusual circumstances, but it is consistent with the language of s.29 and it maintains the proprietary nature of property rights despite a transfer of the estate to which they relate. It also has the merit of preserving the first-in-time rule when there is no other means of distinguishing between two claimants to priority. For example, in this case, the Bank of Scotland's claim to priority has no greater merit than that of the Halifax. The Halifax is first in time, but the Bank of Scotland pleads the fortunate intervention of another person's registered disposition. Had the Bank of Scotland been a transferee of the first disponee's interest, or had taken a registered ***L.Q.R. 408*** disposition of its own, then to give it priority would have upheld the policy of the Land Registration Act 2002. Without either, there is no reason why s.29 should come to its aid.

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L.Q.R. 2009, 125(Jul), 401-408

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