Are the rights in s.26 FSMA 2000 capable of binding third-party transferees? – *Orchard & Orchard v Dhillon* [2025] EWHC 834 (Ch)

Summary

The High Court has held that the statutory right in s.26 of the Financial Services and Markets Act 2000 ("FSMA") to recover real property transferred under an agreement which contravenes s.19 FSMA is a right capable of binding third-party transferees of the property, and amounts to a "mere equity" for the purposes of the Land Registration Act 2002.

Facts and Decision at First Instance

The Defendants, Mr and Mrs Orchard, were the joint owners of a registered freehold property in Essex ("the Property"). In 2010 they entered into a sale and rent back agreement ("the SRB Agreement") with Red 2 Black Ltd ("R2BL"), under which they sold the Property to R2BL, and then occupied it under an assured shorthold tenancy.

R2BL was required to be, but was not, authorised by the Financial Conduct Authority to conduct sale and rent back business under FSMA. The general prohibition in FSMA s.19 was therefore contravened, and so, pursuant to s.26, the SRB Agreement was unenforceable, and the Defendants were entitled to recover the Property from R2BL (although a Court would have been able to deny recovery if it were just and equitable to do so: s.28(3)).

At the time of the SRB Agreement, the Claimant was a 50% shareholder in R2BL, her then husband being the other shareholder and sole director.

A long chain of events followed, including the Claimant herself becoming (a) divorced (b) sole shareholder of R2BL (c) purchaser from R2BL of the Property (d) bankrupt (e) able to enforce rights in the Property following an agreement with her trustee in bankruptcy.

She then brought proceedings for possession, on the grounds of arrears of rent, and for payment of the arrears. The Defendants counterclaimed to recover the Property, including a claim based on s.26 FSMA – but not the claim based on that section which was later raised on appeal.

At trial, the Defendants argued unsuccessfully that there had been fraudulent misrepresentation by R2BL. They also argued that *the Claimant* had herself conducted activities contrary to the general prohibition in s.19 FSMA by collecting rent, and notifying the Defendants of changes in the amount of rent, changes in their landlord and changes to the bank account to which payment

should be made under the SRB Agreement, and so could not rely on that agreement. However, the judge found that the Claimant had not carried on these activities "by way of business" within the meaning of s.22 FSMA, and therefore awarded the Claimant possession and judgment for rent arrears.

The Appeal

The Defendants sought to argue three grounds. The most important was one which had not been argued at first instance.

They now wanted to argue that:

(a) *R2BL* had made the SRB Agreement in breach of the general prohibition in FSMA s.19;

(b) accordingly, they had had a right to recover the freehold interest under FSMA s.26;

(c) that right was potentially enforceable against a successor in title to R2BL;

(d) that right had not required to be registered, being, it was argued, a "mere equity" within the meaning of s. 116 of the Land Registration Act 2002 ("LRA"); and

(e) because they had been in occupation, the right had not been lost as a result of the Claimant having purchased the Property from R2BL.

The Claimant contended that the Defendants could not advance this argument for the first time on appeal, alternatively that the s.26 right was not a "mere equity: "mere equities" were claims to equitable remedies and fell into recognised categories, whereas a claim under s.26 only arose under statute and did not fall into any such category.

The Defendants were allowed to take the point

Miles J noted [67] the guidance of Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at paras. 16 to 18 that an appellate court would not generally permit a new point to be raised on appeal which would necessitate new evidence or would have resulted in the trial being conducted differently with regards to the evidence. Even a new point of pure law would not be permitted unless the other party had had adequate time to deal with it, had not acted to his detriment, and could be adequately protected in costs. Miles J considered the present case a "hybrid case" where the factual basis for the argument about mere equities and the LRA had been in issue on the pleadings, but the way in which the case had been argued before the trial judge meant the

judge had not made findings on certain points which would arise if the Defendants' argument were correct (and so a further hearing would be needed if the appeal succeeded). However, the trial itself would not have run a materially different course, and the Claimant could be adequately protected in costs. Miles J therefore allowed the Defendants to run the new argument [98]-[103].

Did a right recover the freehold end when the contravening party parted with the Property to someone else?

Miles J reasoned as follows:

1. The starting point is that, where the transferee of a property has infringed the general prohibition, s.26 FSMA enables the transferor to recover the property, subject to the possible effect of s.28.

2. S.28 FSMA empowers the court, notwithstanding s.26, to permit enforcement of an offending agreement if just and equitable in the circumstances of the case.

3. Together, ss.26 and 28 rendered an offending agreement voidable not void, and ought to be read against the background of general principles of law regarding the proprietary rights of an innocent party to set aside a contract for fraud or undue influence. [106]–[109], [114]

4. Hamblen J was therefore wrong in *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm) to decide that s.26 did not allow a claim against a person who was not a party to the original agreement, and wrong to suggest that the statutory entitlement in s.26 to recover *property* was automatically defeated by the transfer of the property to a third party. [111]–[121]

5. FSMA should be construed in a way which enhances consumer protection, which supported the conclusion that the s.26 right was capable of binding third parties, at least in relation to proprietary claims. [115]

Was the right under FSMA s.26 a "mere equity" for Land Registration purposes?

It was common ground that if the right under FSMA s.26 was a "mere equity" the Defendants would be protected as against the Claimant, because they had been in actual occupation when the Claimant bought the Property, making their interest an overriding one. [141]

Miles J held that the right was a "mere equity". He held that the categories of mere equities were not closed by reference to the existing cases [132], and noted that there was an analogy with *Mid-Glamorgan County Council v Ogwr Borough Council* (1994) 68 P & CR 1, in which Hoffmann LJ

characterised the right to recover property compulsorily purchased outside the ambit of the relevant statutory power as a mere equity. [124]

The Claimant argued that to be a "mere equity" the right had to be inchoate, and that a s.26 right was established by statute and so choate. This argument was rejected on the basis that even if the s.26 right was not inchoate it was subject to defeasance in s.28 and so the innocent party had to perform some legal act to cause the s.26 claim to be determined or crystallised. [134] (For the origin of this wording, see Snell's Equity 34th Ed. at 2-006, cited with approval in *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 [2023] A.C. 877 at [104].)

The appeal was therefore allowed on the basis that the Defendants were entitled to recover the Property from the Claimant.

Art. 63J(6) of the 2001 Order

The Defendants also sought to argue that the effect of Art.63J(6) of the Financial Services and Markets 2000 (Regulated Activities) Order 2001 (2001 No. 544) was that the Claimant had stepped into the shoes of R2BL and become subject to the obligation in s.26 to return the Property to the Defendants. The Claimant said this argument had been raised too late and was wrong as a matter of construction. Miles J agreed that the argument had been advanced too late, and that even if Art. 63J(6) meant that the Claimant was to be treated as having entered a regulated sale and rent back agreement, it did not mean that she automatically became subject to the obligation owed by R2BL to return the Property [143]–[149].

Conclusion

The decision is important in at least three respects.

First, the decision that the right under s.26 FSMA to recovery of property is not limited to recovery from the party which infringed the general prohibition is a new and significant statement of a consumer right.

Second, the decision that the right given by statute is a "mere equity" for the purposes of Land Registration protects that right in some circumstances.

Third, the complexity of the factual history and resultant arguments, the extent of which can be seen from the full judgment, shows the practitioner the depth of exploration necessary in preparing a case of this kind.

In the writers' view, the decision seems applicable to personal property as well as real property, but that question did not fall to be determined.

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