



Neutral Citation Number: [2025] EWHC 1013 (Ch)

Case No: BL-2024-000861

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/05/2025

Before :
Master McQuail
Between :

MTF (NH) Limited
- and -
(1) HAVIN HEVEDI
(2) CHIA HEVEDI

Claimant

Defendants

Alex Cunliffe (instructed by **Brightstone Law**) for the **Claimant**
Andrew Dymond (instructed by **Dumonts**) for the **Second Defendant**
(The First Defendant did not appear and was not represented)
Hearing dates: 11 February 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 2 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MASTER MCQUAIL

1. The parties to these proceedings are: MTF (NH) Limited), the claimant, Havin Hevedi, the first defendant, and Chia Hevedi, the second defendant. The proceedings concern a property at 3 Endcliffe Grove Avenue, Sheffield, S10 3EJ (**the Property**). The first defendant as sole legal proprietor of the Property charged it by way of legal mortgage (**the Mortgage**) to the claimant to secure a loan to her on 23 September 2022 (**the Relevant Date**).

2. The claimant commenced these proceedings in the County Court at Sheffield against the first defendant seeking possession of the Property on 4 November 2023 because the term of the loan to her had expired and the outstanding balance had fallen due. The second defendant applied to be joined as a party as he wished to counterclaim for a declaration that he has an overriding interest in the Property. He was joined by order of District Judge Modgill on the occasion of the first hearing of the proceedings on 12 December 2023. The proceedings were subsequently transferred to the Business and Property Courts (Chancery Division) in London by District Judge Preston. The intention was that they be case managed with a claim brought by the second defendant on 30 January 2023 against the first defendant (BL-2023-000167) seeking a declaration that he is the sole beneficial owner of the Property as well as a property at 53 East Road Sheffield (**53 East Road**) and one at 4 Echo Heights London E4 notwithstanding that the first defendant is the sole legal proprietor of each. The first defendant defends that claim.

3. On 13 September 2024 at a joint case management hearing I made an order that there be a trial of the following preliminary issues:

- (i) the nature of the second defendant's occupation of the Property, if any, on the Relevant Date;
- (ii) whether the second defendant's occupation of the Property, if any, on the Relevant Date would have been obvious on a reasonably careful inspection of the Property;
- (iii) on the assumed basis, as accepted by the second defendant, that he registered the Property in the name of the first defendant for the purpose of disguising his claimed beneficial interest (**the Alleged Interest**) from, amongst others, HMRC whether the Mortgage takes priority over the Alleged Interest, notwithstanding any occupation of the Property on the Relevant Date by the second defendant.

This is my judgment following the trial of those issues.

Factual Background

4. The following history that was not, save as mentioned, challenged by the claimant derives from the pleadings and the witness statements of the second defendant and his witness, from which the quoted extracts in the following paragraphs are taken.

5. The first and second defendant never married but were in a domestic relationship for a period and had two children together. The Property was purchased in the sole name of the first defendant in December 2014 and was occupied by the first and second defendants as their family home from some point in 2015.

6. In 2021 the first defendant left the property and went to live in London with the children. On 31 October 2021 the second defendant returned from a holiday with the children and took them to the first defendant's residence in London. The first defendant was not at home but arrived within an hour accompanied by two men who assaulted the

second defendant. (The second defendant explained during his oral evidence that the trial of those men for kidnap, ABH and criminal damage took place shortly before the preliminary issue trial; one of the men was convicted, the other acquitted.)

7. On 15 January 2022 the second defendant was living at the Property and set off for work in the morning. When he returned at the end of the day the locks had been changed. He engaged a locksmith to obtain re-entry and change the locks.

8. On 30 January 2022 being fearful of further assault the second defendant left the country, leaving his possessions at the Property. At this stage he gave his brother, Yilmaz Gun (**Yilmaz**), keys to the Property.

9. On 16 June 2022 the second defendant became aware from the internet that the property was being advertised for sale. He took steps to have the advertisement taken down and asked Yilmaz to visit the Property

10. On 17 June 2022 Yilmaz visited the Property and discovered that the locks had been changed again.

11. On 18 July 2022 the second defendant returned to the country and on the following day went to the Property with his brothers, Yilmaz and Ilyas Gun (**Ilyas**), a cousin and a locksmith. The locksmith enabled the second defendant and his family members to gain access and change the locks once again. They discovered that the Property:

“had effectively [been] emptied ... of visible signs of occupation. Kitchen appliances, furniture, books and the Second Defendant’s office files and all his personal possessions had been removed. Subsequently the Second Defendant discovered that many of his clothes had been hidden in the attic.”

12. On 30 July 2022 the second defendant again left the country.

13. On 8 August 2022 the second defendant again became aware from the internet that the Property was being advertised for sale. He again took steps to have the advertisement taken down.

14. On 14 August 2022 the second defendant returned to the country and on the 17 August went to the Property with his brothers to find the locks had been changed once more. This time the second defendant drilled out the locks gained entry and found the Property to be empty. On 18 August the second defendant arranged for the locksmith to change the locks once more.

15. The second defendant says that he:

“moved back into the Property and lived there with Ilyas Gun, his wife Idil [**Idil**], who was pregnant at the time, and their three children. On 29 August their fourth child ... was born. The family remained living at the Property as their home.”

(this part of the second defendant’s account was challenged in cross-examination).

16. On 4 September the second defendant was contacted by a Turkish gang member who warned him that there was a contract out for him. This caused the second defendant to leave the country and not return until 31 March 2023 and while he was away:

“Ilyas Gun and his wife Idil remained living in the Property with their four children, to look after it while I was away.”

The Pleadings, Disclosure and Witness Statements

17. The bundles for the trial contained significant amounts of disclosure from the second defendant concerning the incorporation of various companies, the source of funds for the purchase of the Property and his dispute with the first defendant. Most of this material has no relevance to the questions I must determine about the state of affairs on the Relevant Date.

18. Although the second defendant’s first witness statement submitted in support of his application to be joined as a party to the proceedings listed 8 documents which showed his address as the Property in the period 2021-2023, the disclosure given subsequently contained no further such documentation.

19. Mr Cunliffe for the claimant pointed up the absence of documentary evidential material pertinent to the Relevant Date. The second defendant has disclosed no utility bills, no council tax bills, no credit report, no credit card bills, no bank statements or mobile phone bills. No documentary evidence has been produced by him of replacing the personal possessions that were removed from the Property in mid-2022.

20. By a Part 18 request the claimant asked that the second defendant state with full particularity his case that “at all material times, he has been in actual occupation of” the Property. In answer the second defendant referred to his ownership of a flat at 306 City Lofts, Sheffield S1 2LN (**the Flat**) and explained that he stayed there occasionally. Despite being put to proof of the nature and periods of his residence at the Flat in the claimant’s reply, no documents relating to the Flat have been produced either and no details given in his witness evidence.

21. Mr Cunliffe invited me to infer that relevant documents were not produced in relation to either the Property or the Flat because they would not support the second defendant’s case and would instead show that he was in occupation of the Flat when in the UK.

22. The second defendant does not plead that his occupation of the Property would have been obvious on the Relevant Date, as was noted in the claimant’s reply. When asked by the claimant’s Part 18 request to set out his case on this aspect with full particularity, the second defendant’s response was that occupation by Ilyas and his family would have been obvious, that their occupation was on his behalf and that this would have been confirmed by Ilyas or Idil if they had been asked. Both Ilyas and Idil said in their witness statements that they were invited by the second defendant to live at the Property with him. Neither Ilyas nor Idil’s witness statement states that they would have confirmed that their occupation was on the second defendant’s behalf if they had been asked on the Relevant Date.

Oral Evidence at trial

23. The second defendant gave evidence at trial as did Ilyas, Idil, and Yilmaz.

24. The second defendant explained in cross-examination that the Flat was purchased in his sole name in 2008, that he lived there alone and subsequently with the first defendant

until late 2015 when they moved to the Property. He said that he has lived there ever since apart from occasions during the pandemic when he stayed over at the Flat to protect his family when he had been in contact with the public.

25. His second witness statement explained that in 2013 HMRC intimated a claim for some £287,000 against his company Coldco Refrigeration Limited. That company was later renamed Retail Refrigeration Limited and was placed into creditors' voluntary liquidation in August or September 2013. In cross-examination he agreed that he did not make himself bankrupt at that time as there was no reason to do so. That is in contrast to what he stated in his second witness statement which implied he was bankrupt before the purchase of the Property and that he had discussions with the first defendant about the Property being placed in the first defendant's name as a consequence of his bankruptcy with it being agreed that she would return assets to him after his discharge from bankruptcy. He was clear in his oral evidence that the reason for the Property being placed in the first defendant's name was to disguise it from HMRC. He said it was a mistake which he regretted and it was made as a result of bad advice.

26. The second defendant was asked about a claim for £900,000 that was brought against him in 2018 by the liquidators of Retail Refrigeration Limited for misfeasance and whether it was correct that he made himself bankrupt in February 2020 to avoid judgment being entered against him. He did not accept that that was his motivation but agreed, as he had to in light of documents in the bundle, that he became bankrupt in February 2020. His explanation for the Office of the Adjudicator writing to him at the Flat, rather than at the Property, in that month was that his address in documents had not been changed.

27. The second defendant acknowledged that he did not reveal to his trustees in bankruptcy assets of which he claims to be beneficial owner including a Turkish bank account, the Property and 53 East Road until he commenced claim BL-2023-000167 and made an application for a freezing injunction. He acknowledged that the proceedings were stayed by order of Mr Justice Fancourt as he had no right to bring the claim, his beneficial interest having vested in his trustees in bankruptcy, and that the stay was lifted only when the claims were assigned to him in March 2023 for £117,000.

28. None of the matters in the preceding two paragraphs was mentioned in the second defendant's witness statements. The second defendant did not accept in evidence that there was anything wrong with not having revealed his assets to his trustees in bankruptcy. He said that his agreement with the first defendant was that she would return his assets when the time was right.

29. The second defendant's witness statements gave no details about his accommodation arrangements when outside the UK during 2022. When asked about his time abroad from January 2022 all the second defendant said was that he travelled to Turkey and Dubai and that he made arrangements for his accommodation but did not own a property abroad.

30. When the second defendant was questioned about replacement of the possessions that he discovered had been removed from the Property in July 2022, he agreed that he did not replace the items; he said that it would have cost hundreds of thousands of pounds, there was not time and his priority was his own safety. He described the state of

the property when he moved back in with Ilyas and his family in August as not being in a great condition, that it had been looted and damaged.

31. As an experienced businessman the second defendant must have known that concealing assets from his trustees in bankruptcy was a serious matter but his answers in evidence failed to acknowledge that seriousness or take responsibility for his actions, rather than seeking to blame poor advice. The second defendant did not give direct answers to many of the questions that were put to him. In circumstances where it is the second defendant's position that he took steps to hide financial matters from HMRC and his trustees in bankruptcy when it might be to his financial advantage, I consider that I should be cautious about accepting his evidence which would deprive a creditor of the first defendant of all or part of its security over the Property to the second defendant's potential advantage. Where the second defendant's evidence is not supported by contemporaneous documents or is not inherently plausible I will approach it with some caution.

32. When questioned about the fact that the first defendant's name appeared as owner in planning applications documents and on insurance policies the second defendant's response was that that was because she was the legal owner, but also pointed out that he was a joint insurance policy holder for at least some periods.

33. The evidence of Ilyas and Idil that the Property was convenient as it was larger than their current rental property at which their tenancy was coming to an end, and was nearer to the hospital where their child was going to be born in late August 2022 and was admitted for treatment a few days later, was all entirely believable and explained why they would want to move to live there in late August 2022. It was not believable that parents of three children under 7 with a fourth about to be born would consider that it was appropriate to move into a Property at which their occupation would be for the purpose of protecting or looking after it if their safety might be at risk.

34. Yilmaz was not cross-examined on his witness statement. In it he said this about the Property on 18 July 2022:

“the Property was completely empty. There was no sign that anyone was living there.”

Relevant Law

Land Registration Act 2002

35. By section 29(1), Land Registration Act 2002:

“(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.”

36 By s.29(2)(a)(ii):

“(2) For the purposes of subsection (1), the priority of an interest is protected -

(a) in any case, if the interest -

(i) ...

(ii) falls within any of the paragraphs of Schedule 3, ...”.

37. Paragraph 2 of Schedule 3 provides as follows:

“An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for -

...

(c) an interest

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

Actual Occupation

38. In *Abbey National BS v Cann* [1991] 1 AC 56 at 93D-94B, Lord Oliver explained that actual occupation requires, “some degree of permanence and continuity which would rule out mere fleeting presence”.

39. The Court of Appeal in *Link Lending Ltd v Bustard* [2010] EWCA Civ 424 at [27] explained that so far as concerns “actual occupation” the case law decided on the same words in section 70(1)(g) of the Land Registration Act 1925 remains good law. The question whether a person was in actual occupation on particular date is an evaluative decision for the Court, based on findings of primary fact. There is no single test for determining whether a person is in actual occupation. The degree of permanence and continuity of presence of the person, the intentions and wishes of the person, the length of absence and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors to be evaluated and weighed. The burden of proof is on the person asserting the occupation.

40. In *Thompson v Foy* [2009] EWHC 1076 at 127, Lewison J (as he then was) said this about actual occupation:

“(i) the words “actual occupation” are ordinary words of plain English and should be interpreted as such. The word “actual” emphasises that physical presence is required: *Williams & Glyn’s Bank v Boland* [1981] A.C. 487 per Lord Wilberforce at 504;

(ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer: *Abbey National BS v Cann* [1991] 1 A.C. 56 per Lord Oliver at 93;

(iii) However actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor: *Strand Securities Ltd v Carswell* [1965] Ch 958 per Lord Denning MR at 981;

(iv) The mere presence of the some of the claimant’s furniture will not usually count as actual occupation: *Strand Securities Ltd v Carswell* [1965] Ch 958 per Russell LJ at 984;

(v) If the person said to be in actual occupation at any particular time is not physically present on the land at that time it will usually be necessary to show that his occupation was manifested and accompanied by a continuing intention to occupy: compare *Hoggett v Hoggett* (1980) 39 P&CR 121, pr Sir David Cairns at 127.

That summary was approved by the Court of Appeal in *Link Lending*.

Obvious Occupation

41. In *Thomas v Clydesdale Bank plc (t/a Yorkshire Bank)* [2010] EWHC 2755, Ramsey J said at [38] that:

“the concept of inspection strongly suggests that what has to be obvious is the relevant visible signs of occupation upon which a person who asserts an interest by actual occupation relies.... In order to determine whether somebody is in actual occupation it is necessary to determine not only matters which would be obvious on inspection but matters which would require enquiry to ascertain them. That includes such things as the permanence and continuity of the presence of the person concerned, the intentions and wishes of that person and the personal circumstances of the person concerned.”

Priority

42. In *Wishart v Credit and Mercantile Plc* [2015] EWCA Civ 655, the Court of Appeal upheld the decision of the Judge that the interest of Mr Wishart, who was the beneficial owner of the property, in question and was in occupation when the bank's charge was registered was subordinate to the mortgagee's interest. Mr Wishart had delegated the purchase of the property to a business associate who had the property transferred into the name of a company. The decision relied upon the principle in *Brocklesby v Temperance Permanent Building Society* [1895] A.C. 173, [1895] 3 WLUK 73. At paragraph 52, Sales LJ said this:

“The Brocklesby principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent. This combination of factors creates a situation in which it is fair, as between the owner of the asset and the innocent purchaser or lender, that the owner should bear the risk of fraud on the part of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud. The same principle applies where the dishonest vendor or mortgagor of the asset, who by the sale or mortgage raises money from an innocent third party, has been vested with the legal title as a trustee: *Rimmer v Webster* at p. 173. As Farwell J explained there:

“The gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the indicia of title as absolute owner for the purpose of enabling him to deal with the property, although in a limited way only; whether the trust was to sell only, or to mortgage only, is immaterial, if the mortgagee or purchaser had no notice of the existence of any trust at all.”

43. In the case of *Ali v Dinc* [2020] EWHC 3055 Sarah Worthington QC discussed the *Wishart* decision and pointed out that the line of consent cases could be explained as representing two lines of authority. First ones where the consent of the equitable owner meant their interest was inherently limited and could not have priority over a third party (see for example *Paddington Building Society v Mendelsohn* [1985] 50 P&CR 244,

where the legal title could only have been acquired with the assistance of a mortgage which therefore had priority over the interest of the party who contributed to the purchase price). Second ones where the equitable owner had appointed the legal owner as agent for the relevant purpose and had therefore authorised the transaction. *Emmet and Farrand* on Title and *Ruoff and Roper*'s Registered Conveyancing both comment with approval on this distinction.

Second Defendant's Case

44. It was submitted that the Property had been the second defendant's home since 2015 and he always intended to return to it. He was absent on various occasions through 2022, because he had left the UK because of fear for his life, but intended to return when it was safe. Ilyas and his family were in the Property looking after it for him while he was away. Accordingly he was in actual occupation.

45. The second defendant's occupation through Ilyas and his family would have been obvious on a reasonably careful inspection of the Property, given that Ilyas was living in the Property with his wife, and four children including a newly born baby. An inquiry of Ilyas or Idil would have revealed that they were occupying the Property for the second defendant.

46. To the extent that reliance is placed on the *Wishart* case by the claimant, Mr Dymond pointed me to the analysis of the learned Deputy Judge in *Ali v Dinc*. He said that the present case is not an acquisition mortgage case and nor is it a case where the second defendant has conferred any ostensible authority on the first defendant to enter into the mortgage.

Claimant's Case

47. The claimant submitted that in the absence of any evidence linking the second defendant to the Property on the Relevant Date, his absence from the country on that date and his failure to deal with the nature of his residence at the Flat or to say anything about where he lived when outside the country, the second defendant cannot establish actual occupation of the Property.

48. The second defendant did not assert in his pleadings that his occupation would have been visible at all, let alone obvious and in the absence of such a pleading his case must fail.

49. In any event Mr Cunliffe said the second defendant is caught by *Wishart*. He ensured that the first defendant was registered as proprietor so that she had power under section 23 of the Land Registration Act 2002 to exercise the powers of owner, including "to charge the estate at law with the payment of money." He said the actual authority given to the first defendant was evidenced by the planning applications made in her sole name.

Discussion and Conclusions

Actual Occupation

50. The second defendant produced no convincing documentary evidence to establish his actual occupation of the Property. There are in the bundle various letters addressed to him at the Property as listed in his first witness statement, but that is not surprising as he did at one stage live there with the first defendant and has been living there with his

brother and family since his return to the UK in March 2023. The fact that he was written to at the Flat in connection with his bankruptcy in early 2020 is indicative of the second defendant continuing to use that address for some purposes. If the Property was occupied by the second defendant permanently and continuously it could be expected that there would be addressed to him there at least some series of documents of a periodic nature, such as bank statements, utility bills or mobile phone bills covering the period from his sudden departure in January 2022 until after the Relevant Date to disprove any conclusion that, insofar as he was in actual occupation of any UK address, it was the Flat. If the second defendant did not retain or never had paper copies of such documents he could have requested or arranged to print off replacement documents and produce them for the purposes of the litigation. A complete absence of such documentation leads me to conclude that such documentation has not been disclosed because it does not support the second defendant's case as to his place of UK occupation.

51. The second defendant's caginess about the nature of his accommodation arrangements outside the UK for many months of 2022 and about particularising the relative periods of his occupation of the Flat and the Property further supports an inference that the second defendant was not in occupation of the Property and did not even stay there when he was in the UK, save for approximately a fortnight in August to September 2022.

52. Even leaving aside the question of the second defendant occupying the Flat rather than the Property, the second defendant's prolonged absences from the UK tell against any permanence and continuity of presence at the Property. Although a person might rely on threats of violence to explain a short period of absence from a property consistent with nevertheless being in actual occupation, the longer the period of absence the less plausible it is to assert that the absence is nevertheless consistent with actual occupation.

53. After the first lock change in January 2022 the second defendant absented himself for over 4 months, during which time Yilmaz was in possession of the keys but apparently took no step to check on the Property before the second defendant's discovery that the Property was being marketed in mid-June.

54. On the second defendant's return in mid-July 2022 he regained access and found the Property had been emptied. He gave no evidence that he stayed at the Property during this July visit to the UK. Even when he returned to the country in mid-August and moved into the Property with Ilyas and Idil he did not replace his possessions to facilitate his own occupation of the Property. He said there was no time and it would have been too expensive, even though it was not until 4 September that a new threat caused him to depart again.

55. The absences were prolonged and returns were prompted not by any apparent desire to resume occupation personally, but rather by a desire to thwart the first defendant's attempts to secure possession of the Property and sell it. The second defendant took no steps to re-establish his own occupation of the Property in a permanent and continuous manner either in July or in August 2022 by acquiring the possessions and chattels necessary to facilitate such occupation.

56. I have considered the distinction drawn by Russell LJ in the *Strand Securities* case (referred to by Lewison J in *Thompson v Foy*) between a caretaker employed as a matter

of duty to occupy on behalf of another and a person occupying on their own behalf as the other's licensee. Ilyas and Idil moved to the Property because their family needed accommodation and the Property was convenient for them. At the time they moved in they say they were invited by the second defendant to live "with him" and must have expected to be co-occupying with him, which they did for approximately a fortnight until the second defendant decided to go abroad again on 4 September. There is no evidence that they were paid to look after the property and I do not accept that they were only doing so as matter of obligation to protect the Property. It is wholly implausible that they would have put themselves and their young children in possible harm's way if occupation of the Property was not for their own purposes. Further, their occupation has continued since the second defendant's returned to the UK in March 2023. That continuing occupation is clearly on their own behalves, had they only been there to protect the Property, one would expect them to have vacated when the second defendant returned.

57. I do not accept that Ilyas and Idil occupied as caretakers for the second defendant's purposes. They were occupying on their own behalf as the second defendant's licensees. I conclude that the second defendant, Ilyas and Idil have constructed the suggestion that Ilyas and Idil lived at the Property as caretakers on behalf of the second defendant in response to the subsequent discovery of the first defendant charging the Property on the Relevant Date.

58. I do not consider that the second defendant who was not present at the Property on the Relevant Date has demonstrated that his occupation was manifested and accompanied by a continuing intention to occupy or that he occupied on that date by way of Ilyas and Idil as his caretakers or agents. I accordingly conclude on the first question that the second defendant was not in actual occupation of the Property on the Relevant Date either personally or by the agency of his brother and family.

Obvious Occupation

59. The second question, had the second defendant pleaded the point, would have been whether the second defendant's occupation would have been obvious on a reasonably careful inspection of the Property on the Relevant Date. There is no doubt that the Property had been emptied of the possessions, furniture and other physical manifestations of occupation by the second defendant or anyone else in July 2022. The second defendant did not replace any items of his own. To the extent that occupation was evident on the Relevant Date it can only have been occupation by Ilyas and Idil and their family that was evident, that cannot be enough to evidence the second defendant's occupation. Ilyas and Idil did not say in their witness statements that they would have answered the enquiry of someone sent to inspect by saying that they were occupying on behalf of the second defendant. I conclude that on a careful inspection there would have been no sign of actual occupation by the second defendant, as opposed to by Ilyas, Idil and their children.

Priority

60. Only if I am wrong and the second defendant was in actual occupation and that occupation would have been obvious on a reasonably careful inspection does the third question arise. That is: whether on the agreed assumption that the Property was registered in the name of the first defendant to disguise any interest he might have from HMRC the Mortgage nevertheless takes priority.

61 On this third question I am bound by the decision of Sales LJ in *Wishart*, which applies to the situation as it has been accepted to be by the second defendant for the purposes of the preliminary issues trial. The second defendant as equitable owner had the Property registered in the name of the first defendant and did not bring any limit on her authority to the attention of the claimant and thus it is fair as between the owner and lender that the owner bears the risk of the first defendant's fraud. I can see significant force in the reasoning of the learned Deputy Judge in the *Ali v Dinc* case that the *Brocklesby* decision is properly confined to the two categories of case which she identified and that on the facts here the relevant agency might not have existed.

Result

62. The claimant is entitled to possession of the Property against the second defendant