Chapter 15

Question 1: In *National Provincial Bank v Ainsworth*, Mrs Ainsworth acquired her 'deserted wife's equity' before National Provincial Bank acquired its charge. So why was her claim to remain in occupation of the land unsuccessful?

The facts of *National Provincial Bank v Ainsworth* provide a good example of the priority triangle in practice. B (Mrs Ainsworth) had a right to occupy land belonging to A (Mr Ainsworth). A then gave a legal property right in that same land to C (the National Provincial Bank). It is true that Mrs Ainsworth thus acquired her right before the bank; but '[t]o determine the priority question, we have to do more than simply ask whose right came first in time'. The problem for Mrs Ainsworth was that her right to occupy the land, a product of her 'deserted wife's equity', was simply a personal right against her husband. As a result, it could be asserted only against her husband and so could not be used to prevent the bank removing her from the land.

Question 2: Do you agree with the approach to the *scintilla temporis* question adopted by the House of Lords in *Abbey National v Cann*? Should that approach be limited to cases in which a mortgage loan is necessary in order to enable the borrower to buy the land in question? Should the Supreme Court in *Scott v Southern Pacific Mortgages* have been willing to regard Mrs Scott's interest as, in substance, arising prior to that of the purchasing firm, and, therefore, prior to that of the lender?

This first of these two issues are discussed as part of our examination of the timing question. The *scintilla temporis* doctrine, when applied to charges, stated that, if C claimed to have acquired a charge from A, C must admit that A had a right *before* C acquired its charge. The doctrine has a logical basis: after all, A cannot give C a charge over land until A has himself acquired a right in that land.

In *Abbey National v Cann*, however, the House of Lords did not apply the *scintilla temporis* doctrine. In that case, George Cann (A) and Daisy Cann (B) bought a home together: each contributed to the purchase price, but the freehold was acquired by A alone, with the assistance of a mortgage loan from the Abbey National Building Society (C). As a result of her contributions to the purchase price, B acquired an equitable property right: A held his freehold on trust for both A and B. B's equitable property right arose as soon as A acquired his freehold. B therefore relied on the *scintilla temporis* doctrine to argue that her equitable property right arose before C acquired its charge. The House of Lords rejected that argument, stating that it would be unrealistic and artificial to view A, or anyone buying a home with the assistance of a mortgage, as ever holding the land free from a charge in favour of the lender.

It is possible to sympathise with the view that the *scintilla temporis* doctrine, whilst logically correct, is artificial. However, the artificiality seems to depend on viewing C's acquisition of a charge as essential to A's acquisition of his freehold. In a case where, as a matter of fact, A *could* have acquired his freehold without taking out the loan secured by the charge, this reason for rejecting the *scintilla temporis* doctrine seems much less convincing. Further, in a case such as *Cann*, A purchased the home by relying on *both* the mortgage loan from C *and* the money received from B: why then should C's charge be viewed as arising before B's equitable property right? For discussion see R Smith (1990) 109 LQR 545.

In *Scott v Southern Pacific*, the Supreme Court accepted the *Cann* analysis that, in the standard case where a purchase of land is financed by a mortgage, it would be artificial to regard the grant of the charge to C as separate from the acquisition by A of an estate in the land (note that Lady Hale at [109]-[114] reserved her position as to whether this analysis should also apply in a case where the mortgage loan was not required for the purchase of the estate). Indeed, Lord Collins and Lord Sumption considered that the grant of the charge to C could also be seen, in effect, as simultaneous with the *contract* for the purchase of the estate in the land entered into by A and the vendor: Lady Hale, Lord Wilson, and Lord Reed did not however go that far.

An interesting point about *Scott*, made by Calnan in the extract in section 3.1.3, is that one could go further back, to the point before any charge was granted, and note that B (Mrs Scott) had originally held an estate in

the land, and had sold it to A as part of a mortgage rescue scheme under which A would then allow her to remain in occupation of the home, for as long as she wished, as a tenant. It could therefore be said that, just as it would be artificial in *Cann* to regard A as ever having an estate free from a charge to C, it would be unrealistic in *Scott* to regard A as ever having an estate free from a lease to B. On that view, of course, the result in *Scott* would have been different: if A's estate was always subject to B's lease, the same must be true of C's charge (given that C cannot rely on s 29 of the LRA 2002 as B's actual occupation of the land gave her an overriding interest).

Question 3: What is an 'overriding interest'? Can you explain why Mrs Boland had such a right in *Williams and Glyn's Bank v Boland*, but Mrs Ainsworth did not in *National Provincial Bank v Ainsworth*?

An overriding interest is best described as a property right, existing in relation to registered land, that is immune to the lack of registration defence. The lack of registration defence provides important protection to a third party acquiring, for value, a legal property right in registered land. The essence of the defence is that such a third party only be bound by a pre-existing property right in the land if that property right has been recorded on the register. However, overriding interests are exempt from the lack of registration defence. So, if B's pre-existing property right counts as an overriding interest, C will never be able to use the lack of registration defence against B's right.

To determine if B's pre-existing property right is overriding, we simply need to look at the list of overriding interests provided by the Land Registration Act 2002. One particularly important provision is Schedule 3, paragraph 2. We will examine this rule in detail in Chapter 16, section 4.2. Its basic effect is that, if B is in actual occupation of the registered land at the relevant time, any property right held by B can then count as an overriding interest. In *Williams and Glyn's Bank v Boland*, Mrs Boland relied on the equivalent provision in the Land Registration Act 1925. It meant that her equitable property right (arising because Mr Boland held his freehold on trust for both Mr and Mrs Boland) counted as an overriding interest. As a result, her failure to register her right could not prevent the right binding the bank.

In *National Provincial Bank v Ainsworth*, Mrs Ainsworth was also in occupation of the land when the bank acquired its charge. However, as we saw in Chapter 1, section 5.4 and Chapter 6, section 5.3, Mrs Ainsworth did not have a property right in the land: her 'deserted wife's equity' gave her only a personal right against Mr Ainsworth. As Mrs Ainsworth had no property right, she could not have an overriding interest. After all, an overriding interest is a right that is immune to the lack of registration defence; and when B has no property right, C has no need to rely on any defence.

Question 4: In a case such as *Abbey National Building Society v Cann*, does it make sense to say that Mrs Cann impliedly consented to the building society taking priority?

It is clear that C can have a defence to B's pre-existing property right if B expressly agrees that her right will not bind C. *Abbey National v Cann* raises the trickier question of when B can be said to have *impliedly* consented to not asserting her property right against C. As seen in the extract from Lord Oliver's speech, the House of Lords took the view that such consent could be implied from the fact that Daisy Cann (B) knew that her son, George (A), would have to borrow money in order to finance the purchase of their new home. Daisy knew that a mortgage loan would be necessary, and so impliedly agreed that any equitable property right she would acquire in the home could not bind a mortgage lender, C, acquiring a charge over the land.

There may be some difficulties with the reasoning of the House of Lords on this point. After all, on the facts of *Cann*, Daisy knew that a further £4,000 was required to purchase the house; yet George, without Daisy's knowledge or consent, borrowed £25,000 and secured that loan by giving the Abbey National Building Society a charge over the land. It therefore seems that the notion of implied consent is, perhaps, being abused in order to protect mortgage lenders from the risk of being bound by certain types of pre-existing equitable property right. In the extract set out on, McFarlane argues that, given that such lenders are already protected (at least in relation to first mortgages) by the removal of the *scintilla temporis* rule (see Question 2 above), there is no need for them to enjoy the extra protection provided by an artificial extension of the notion of implied consent.

Question 5: What is the '*Brocklesby* principle'? Should it have been applied to give priority to the bank in *Williams and Glyn's Bank v Boland*?

There is some debate over the scope of the '*Brocklesby* principle'. On a narrow view, there is no distinct principle: the result in the *Brocklesby* case can be explained as simply an application of the well-established doctrine of apparent, or ostensible, authority. That doctrine means that an act of an agent (e.g. entering into a particular transaction on behalf of the principal) may bind a principal even if the agent had no actual authority from the principal to carry out that act. The doctrine is sometimes seen as based on a form of estoppel: if the principal has impliedly represented that the agent does have authority to carry out such an act, and the third party then relies on this by entering into a particular transaction, the principal can be bound.

In *Wishart v Credit & Mercantile*, however, Sales LJ, following the approach of Lewison J in *Thompson v Foy*, identified the *Brockelsby* principle with a broader idea, which can apply even where there is no standard agency relationship between A and B. That broader idea is based on B, a party with an interest in property, allowing A to deal with that property in such a way as makes it seem to a third party that A has full authority to deal with that property. Such an idea could apply in a case such as *Boland*: although there was no standard agency relationship between Mr and Mrs Boland, it has been pointed out (e.g. by Dixon) that Mrs Boland could be said to have left Mr Boland, as sole registered owner, the freedom to deal with the asset as though he had full authority to do so. It would however be surprising if the decision in *Boland*, which has been very important in establishing the balance between protection B and C, were subject to revision in this way. As noted by Televantos ([2016] Conv 181), there are therefore good reasons to favour a narrow rather than a broad view when considering the '*Brocklesby* principle'.