

# Constructive Trusts Arising from 'Subject To' Undertakings: The Boundaries of Liability Revisited

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Let us consider a typical land transaction where a vendor (V) agrees to sell his or her title to land to a purchaser (P) in circumstances where P has agreed with V to honour the rights of a third party (T) in relation to the land in question. P agrees to purchase the land and take a transfer of the title from V expressly 'subject to' the rights of T. If P seeks to renege on this 'subject-to' undertaking, equity can hold P to his undertaking through the imposition of a constructive trust.<sup>1</sup> In what circumstances, however, will such a trust be upheld? Is the current law too restrictive in applying the constructive trust in this context? The writers seek to argue that such a trust in certain 'subject to' situations has a valuable role to play and that a clear set of guidelines may help in shaping any future development in this important area of property law.

## Case law development

The origins of the law in this area lie in the case of *Binions v Evans*.<sup>2</sup> Here, the purchaser promised the vendors that they would permit the defendant (who held a contractual licence) to continue living in a cottage on the land in question for the remainder of her life. In exchange for this promise, the purchaser received a significant discount on the purchase price. After the sale, the purchaser sought to renege on this assurance and evict the defendant. The majority of the Court of Appeal<sup>3</sup> held that the defendant had a life interest under the Settled Land Act 1925 which was binding on the purchaser. However, Lord Denning MR took a different approach deciding that the purchaser was bound to give effect to the defendant's contractual licence because the purchaser had bought the land expressly 'subject to' it. In his Lordship's view, the licensee was protected against eviction by the purchaser

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<sup>1</sup> The constructive trust arises by operation of law and requires no formality: s.53(2) of the Law of Property Act 1925.

<sup>2</sup> [1972] EWCA Civ 6.

<sup>3</sup> Megaw and Stephenson LJ, applying the decision in *Bannister v Bannister* [1948] 2 All ER 133, where the purchaser's undertaking to allow the vendor to live in the cottage rent free for so long as she wished was not included in the formal conveyance. Similarly, in *Hodgson v Marks* [1971] Ch 892, the voluntary transfer made no express mention of the arrangement between A and B that the beneficial ownership was to remain in A.

because equity would impose a constructive trust<sup>4</sup> on the purchaser behind which the licence could take effect.<sup>5</sup>

Similarly, in *Lys v Prowsa Developments Ltd*,<sup>6</sup> involving a registered title, the claimants contracted to buy a plot of land which was part of an estate being developed by the vendor company. A house was to be built which would then be occupied by the claimants. The company subsequently became insolvent before the house was built. The company's bank held a legal charge, granted before the claimant's contract, over the whole estate. Significantly, the bank was under no liability to complete the claimant's contract but, nevertheless, sold the land to the first defendant expressly subject to and with the benefit of it. Later, the first defendant contracted to sell the plot to the second defendants on the same terms. Clearly, the claimant's contract should have been protected on the register as a minor interest. Despite the lack of registration, Dillon J imposed a constructive trust on the first defendants to give effect to the claimant's prior contractual rights. This, in turn, bound the second defendants. The crucial factor here was that the bank was not bound by the prior contract and could have given a title which was free from it. Instead, it made the conveyance expressly subject to the contract so that the clear intention was to make the first purchaser give effect to the claimant's rights. Moreover, there was also evidence of an undertaking given by the first purchaser to the bank that it would take all reasonable steps to make sure that the interests of the claimant were dealt with satisfactorily. On these facts, it would clearly have been inequitable for the purchaser to deny the claimant's rights contrary to the express stipulation subject to which it took the plot.<sup>7</sup> In the words of Dillon J:<sup>8</sup>

. . . the fraud on the part of the defendants in the present case lies not just in relying on the legal rights conferred by [the Land Registration Act 1925], but in the first defendant reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land.

In reaching this conclusion, his Lordship referred specifically to the principle in *Rochevoucauld v Boustead*<sup>9</sup> to the effect that it is a fraud for a person to whom land is conveyed as trustee for another to deny the trust and, relying on the terms of the statute, to claim the land for himself. On this reasoning, if the contract for sale had expressly stated that the purchaser would hold the plot of land upon trust to give effect to the claimant's prior contractual rights, the express trust would not be overreached or rendered ineffective by the provisions of the Law of Property Act 1925. The underlying principle would be the same in both cases, namely, the imposition of a constructive trust to 'counter unconscionable conduct or fraud'<sup>10</sup> and, as Pearce and Stevens<sup>11</sup> have observed, the essence of the trust is 'the purchaser's voluntary acceptance of obligations in favour of the third party'.

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<sup>4</sup> Citing Cardozo J in the American case of *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, at 386: "A constructive trust is the formula through which the conscience of equity finds expression".

<sup>5</sup> Lord Denning seemed willing to go so far as to suggest that a constructive trust could be imposed whenever a purchaser impliedly took land subject to a third party's rights, such implication arising by virtue of the third party's actual occupation of the land at the time of sale. Such an over-generous approach would mean that all occupying licensees could potentially bind purchasers.

<sup>6</sup> [1982] 1 WLR 1044.

<sup>7</sup> Compare, *Hollington Brothers Ltd v Rhodes* [1951] 2 All ER 578, where Harman J held that the purchaser took free of the claimant's estate contract, even though he had purchased expressly subject to it, because of the lack of registration under the Land Charges Act 1925.

<sup>8</sup> [1982] 1 WLR 1044, at 1054.

<sup>9</sup> [1897] 1 Ch 196.

<sup>10</sup> [1982] 1 WLR 1044, at 1052, per Dillon J.

In *Ashburn Anstalt v Arnold*,<sup>12</sup> land was sold expressly 'subject to' a prior written agreement granting the defendant the right to occupy the premises as licensee without payment of rent. The Court of Appeal held, inter alia, that the agreement constituted an overriding interest under s.70(1)(g) of the Land Registration Act 1925 and, therefore, was binding on the purchaser for that reason. The Court also intimated, however, that a mere contractual licence to occupy land could bind a purchaser if the circumstances gave rise to the imposition of a constructive trust. In order for such a trust to be imposed, however, the conscience of the purchaser had to be so affected that it would be inequitable to allow him to deny the claimant's interest in the property. Significantly, this required evidence that the purchaser had undertaken a *new* obligation in respect of the claimant's rights involving, for example, the receipt of a correlative benefit in return for the 'subject to' undertaking such as a reduction in the purchase price or the receipt of some other consideration. No such benefit, however, was in evidence in the instant case and, therefore, the claim failed. Fox LJ, giving the leading judgment of the Court, adopted a restrictive approach stating that:<sup>13</sup> 'we do not think it is desirable that constructive trusts of land should be imposed in reliance on inference from slender materials'. Interestingly, however, his Lordship accepted Lord Denning's approach in *Binions v Evans* as a legitimate application of the doctrine of constructive trusts largely because the contract for sale in that case was subject to the agreement and the purchasers had accepted a lower purchase price in consequence of the defendant's prior rights in the property.

In the later case of *Lloyd v Dugdale*,<sup>14</sup> the Court of Appeal took the opportunity to formulate the relevant legal principles in the following terms:<sup>15</sup>

(1) Even in a case where, on a sale of land, the vendor had stipulated that the sale shall be subject to stated possible encumbrances or prior interests, there is no general rule that the court will impose a constructive trust on a purchaser to give effect to them. (2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property. (3) In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant encumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed . . . (5) proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant incumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it.

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<sup>11</sup> Pearce and Stevens, *The Law of Trusts and Equitable Obligations*, (2nd ed., Butterworths, 1998), at p. 264.

<sup>12</sup> [1989] Ch 1.

<sup>13</sup> See, *Ashburn Anstalt v Arnold* [1989] Ch 1, at 25.

<sup>14</sup> [2001] EWCA Civ 1754. Whilst the relevant deed in that case assigning possession proceedings to Lloyd showed that he took the property with knowledge of Dugdale's interest, the Court of Appeal held that he had not taken on any new obligation to give effect to Dugdale's equitable rights and, therefore, the prerequisite for the creation of a constructive trust had not been fulfilled. See also, *Melbury Road Properties 1999 Ltd v Kreidi* [1999] 3 EGLR 108, (County Court, West London).

<sup>15</sup> [2001] EWCA Civ 1754, at [52].

Not every case, therefore, will merit the implication of a constructive trust in this context. Thus, the mere fact that land is expressed to be sold “subject to” a contract will not necessarily imply that the purchaser is to be under an obligation to give effect to the provisions of the contract. Although such words will import notice on the part of the purchaser, they will not in themselves be enough to impose liability as a constructive trustee in the absence of facts affecting his conscience. In *Ashburn*, for example, the Court of Appeal were clearly of the view that the facts in *Re Sharpe*<sup>16</sup> did not warrant the implication of a constructive trust against the debtor’s trustee in bankruptcy. In that case, although the aunt had provided money for the purchase of the house, this was done by loan and there was nothing to suggest that, when the property was sold by the trustee in bankruptcy, he was assuming any liability in respect of the aunt’s rights of occupation. Indeed, prior to the contract for sale, the trustee in bankruptcy wrote to the aunt to find out what rights (if any) she claimed in consequence of the loan, but she did not reply to his letters. Again, in *IDC Group Ltd v Clark*,<sup>17</sup> Sir Nicholas Browne-Wilkinson V-C considered that very special circumstances amounting to unconscionable conduct were needed to justify the inference of a constructive trust where a person, having received property, sought not to give effect to the terms on which he had received it. In that case, his Lordship held that Mrs Clark was not bound by a prior agreement relating to certain fire-escape route rights, subject to which she had expressly bought the premises, on the ground that there was nothing to suggest that she had undertaken a new liability to give effect to those rights for the benefit of third parties. In his Lordship’s view:<sup>18</sup>

To raise constructive trusts which do not fit into the conveyancing machinery currently operating, thereby giving rise to liabilities of which purchasers might otherwise not be aware, is a dangerous course to pursue.

In *Clark*, in the absence of any form of bargain between Mrs Clark and her vendor that she was undertaking to honour de novo the obligations relating to the fire-escape, her conscience was unaffected so as to give rise to any obligation to ‘meet the legitimate expectations of the third party’.<sup>19</sup>

In these circumstances, there is no fraud on the part of the purchaser simply taking advantage of the statutory requirements regarding registration if the relevant interest requires to be registered in order to secure protection either under the Land Charges Act 1972 or the Land Registration Act 1925. A good example is *Lloyds Bank plc v Carrick*,<sup>20</sup> involving an unregistered title, where a widow sold her house and gave the proceeds of sale to her brother-in-law on the basis of an oral agreement that it would form the purchase price for a maisonette where she would live, the lease of which was owned by him. He subsequently charged the lease as security for a loan in favour of the claimant bank. The Court of Appeal held that the widow had no interest valid against the bank sufficient to raise a defence against its claim for possession when the brother-in-law defaulted on the charge. The bank’s argument was that the widow’s interest was void for want of registration against the bank as a purchaser for value. As against this, the widow argued that she had an interest separate and distinct from that which arose under the unregistered estate contract by virtue of, inter alia, a

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<sup>16</sup> [1980] 1 WLR 219.

<sup>17</sup> [1992] 1 EGLR 187. See also, *Lloyd v Dugdale* [2002] 2 P & CR 13, where the prerequisite of a new obligation in order to raise a constructive trust was reiterated by the Court of Appeal.

<sup>18</sup> [1982] 1 EGLR 187, at 190.

<sup>19</sup> [1982] 1 EGLR 182, at 190.

<sup>20</sup> [1996] 4 All ER 630 .

constructive trust.<sup>21</sup> In particular, she contended that she was entitled to the whole beneficial interest in the property and that that interest was not registrable so that the bank, having had constructive notice of it, took subject to it. Morritt LJ (who gave the leading judgment of the Court of Appeal<sup>22</sup>) rejected this approach concluding that, where there was a specifically enforceable contract, the court was not entitled to superimpose a further constructive trust on the vendor other than that which already existed in consequence of the contractual relationship between vendor and purchaser. His Lordship was mindful that this conclusion gave rise to the anomaly that Mrs Carrick's position (with the benefit of a binding contract) was actually worse than it would have been if there had been no contract. The reason for the divergence was, however, that:

. . . she failed to do that which Parliament has ordained must be done if her interest is to prevail over that of the bank, namely to register the estate contract.<sup>23</sup>

A more recent example of the court's restrictive approach to the imposition of a constructive trust in the context of 'subject to' dealings is to be found in *Chaudhary v Yavuz*.<sup>24</sup> Mr Chaudhary, the owner of a building comprising a ground floor shop with residential flats above, built a metal stairway and landing in an alleyway owned by his neighbour which lay between his building and his neighbour's building. The structure was built by an informal agreement between the neighbours for the benefit of both of them; the stairway led up from the street to the upper floors of the neighbour's building and also gave access via the metal landing to the flats on the upper floors of Mr Chaudhary's building. The legal effect of this was held to vest ownership of the metal structure (built in the neighbour's airspace) in the neighbour, but to give Mr Chaudhary a right of way over it by proprietary estoppel in the form of an equitable easement. Mr Chaudhary could have protected this easement on the land register by entering a notice but failed to do so. The neighbour later sold his land to Yavuz by a transfer which did not specifically make reference to the staircase but did include a standard form term stating that 'the transfer was subject to incumbrances discoverable by inspection of the property'. When Yavuz bought the neighbouring land, he did not realise that the alleyway, and hence the metal structure, was included in the land he was purchasing, but it was common ground that it would have been obvious at a glance that the structure provided the only access to the flats in Mr Chaudhary's building. Thus, the issue was whether Mr Chaudhary's right of access over the metal structure was enforceable against the new purchaser Yavuz.

The Court of Appeal held that the estoppel-based equitable easement of access was not enforceable as an overriding interest under the Land Registration Act 2002 as the holder of such an easement could not be said to be in 'actual occupation' of the relevant land. A person 'using' an easement does not equate with the concept of being in actual occupation of land. It was also held that Yavuz was not bound by the easement via any form of personal constructive trust. In this connection, Lloyd LJ concluded that there was nothing in the sale contract to suggest that a positive obligation was being imposed on Yavuz to respect Chaudhary's rights. Further, his Lordship suggested that *Lyus*, mentioned earlier, was an exceptional case in that the prior interest was expressly identified in the sale contract, the

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<sup>21</sup> She also argued on the basis of a bare trust and proprietary estoppel, both of which were also rejected.

<sup>22</sup> Sir Ralph Gibson and Beldam LJ agreed.

<sup>23</sup> [1996] 4 All ER 630, at 639.

<sup>24</sup> [2011] EWCA Civ 1314.

bank had no need to protect itself as regards enforcement of the contract because it could not be effective against the bank whose mortgage had priority, and the holder of the prior interest could not have made it enforceable against a purchaser by taking the appropriate steps to register the same under s.29 of the 2002 Act. On this point, Lloyd LJ stated:<sup>25</sup>

Since the basis of the *Lyus* case is showing that the conscience of the purchaser is affected, it might be argued that the apparatus of registration has no relevance to the question arising. In the *Lyus* case itself it had none, because nothing which the plaintiffs could have done could have protected their rights against the defendants. In a directly comparable case that might again be the case. But in a case such as the present, where the rights asserted are capable of protection on the register and where they are not referred to in the contract in specific but only in general terms, then it seems to me that the registration system is relevant. That is for at least two reasons. One is that, absent a specific reference in the contract, the purchaser may be thought to be entitled to rely on third parties protecting themselves in the manner provided for under the legislation. The other is that the contract provision will more readily be interpreted as intended to protect the vendor against a possible claim by the purchaser than as imposing a new personal obligation on the purchaser towards the third party'.<sup>26</sup>

Finally, it is pertinent to examine briefly the decision in *Groveholt Ltd v Hughes*,<sup>27</sup> where again the claimant failed to establish a constructive trust in the absence of evidence that the transferee of the land had undertaken a new obligation to give effect to the claimant's prior interest. In this case, Hughes sold part of a development site owned by him to a development company. Part of the land sold was referred to as the 'Phase One Residential Land'; the remaining part was referred to as the 'Phase Two Residential Land'. The former became the subject of development. The sale contract envisaged that the Phase Two Residential Land would be developed at a later stage; it provided that if the relevant planning consent was not obtained within 10 years, the land would be transferred back to Hughes for a nominal consideration. Significantly, Hughes did not at any time register his right to a re-transfer of the Phase Two Residential Land as an estate contract under the Land Registration Act 2002. In 2000, the development company sold the entire site owned by it to Groveholt Ltd. As it turned out, planning consent was not obtained within the 10 year period and Hughes sought specific performance of the obligation to re-transfer the Phase Two Residential Land to him. David Richards J rejected the claim. According to his Lordship, the crucial question was whether the transferee of the land had undertaken a new obligation to give effect to the

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<sup>25</sup> [2011] EWCA Civ 1314, at [62].

<sup>26</sup> The words 'subject to' the rights of the third party often found in standardised land sale contracts and/or transfers are somewhat ambiguous and can bear different interpretations. The first and, perhaps more likely, interpretation is that the purchaser is promising not to raise any objection if it transpires that the rights exist and he is bound by them. In such a case, the promise is not intended to benefit the third party at all but to relieve the seller from potential legal liability to the purchaser and to remove the risk the purchaser may rescind the contract or claim damages. The second interpretation is that the purchaser promises to give effect to the third party's rights for the benefit of the third party; the only reason for obtaining such an undertaking is to benefit the third party claimant. A third interpretation might arise where the purchaser promises to benefit the third party, but for the reason that the seller wishes to avoid being liable to the third party, the seller extracts the promise from the purchaser to protect himself. See Roger J Smith, *Property Law*, (10<sup>th</sup>ed, 2020, Longman Law Series, Pearson), at p.146.

<sup>27</sup> [2012] EWHC 3351 (Ch).

relevant encumbrance or prior interest. Although Groveholt Ltd had accepted that it had knowledge (or notice) of Hughes' rights as contained in the sale contract, it had not assumed an obligation to re-transfer the Phase Two Residential Land to him under the contract. The effect of one clause in the contract was that the development company sold with full title guarantee *free* of all rights created by it including Hughes' right to a re-transfer. Another clause provided that the property was sold subject to the entries on the property and charges registers and to certain other matters, none of which included Hughes' right. Moreover, there was no specific reference in the contract to Hughes' right to a re-transfer of the Phase Two Residential Land. His Lordship summarised the earlier case law in the following terms:<sup>28</sup>

It is well established that in certain circumstances a constructive trust may be imposed on a transferee of registered land to give effect to third party rights notwithstanding their non-registration. Because this clearly cuts across the underlying premise of the land registration system that purchasers should acquire good title free of any interests which do not appear on the register, subject to statutorily defined overriding interests, the circumstances in which a constructive trust will arise have been narrowly confined.

Needless to say, if the *Chaudhary* and earlier decisions in this area remain good law, it will be very rare for a constructive trust to arise in the context of a purchaser buying land expressly 'subject to' a third party's rights, even where he has received consideration for such an undertaking. Indeed, a third party's failure to protect their interest by registration seems now to be largely fatal to the imposition of a constructive trust, the logic here being that it is not unreasonable for a purchaser to expect the third party to comply with the basic rules of land registration. The writers would argue, however, that this cannot be right - it is surely more unreasonable for a third party to be denied equitable relief through the mechanism of a constructive trust where a specific 'subject to' obligation has been given by a purchaser for consideration by means of (typically) a reduction in the contract price.

### Some observations

Hopkins<sup>29</sup> is correct when he suggests that it is the genuine desire to prevent unconscionability which provides the crucial backdrop to the case law concerning the constructive trust in the 'subject to' land transaction cases. The overwhelming desire to avoid an unconscionable result has long been the preserve of equity and permeates our land law in a variety of scenarios including, for example, acquiring rights over land under the doctrine of proprietary estoppel,<sup>30</sup> implied trusts arising in relation to the quasi-matrimonial home,<sup>31</sup> imperfect transfers of land,<sup>32</sup> joint venture agreements,<sup>33</sup> secret trusts,<sup>34</sup> mutual wills,<sup>35</sup> and

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<sup>28</sup> [2012] EWHC 3351 (Ch), at [14].

<sup>29</sup> See, N Hopkins, 'Conscience, Discretion and the Creation of Property Rights', (2006) 26 LS 475.

<sup>30</sup> See, *Jennings v Rice* [2003] 1 P & CR 100 and *Thorner v Major* [2009] 1 WLR 776.

<sup>31</sup> See, *Lloyds Bank v Rossett* [1991] AC 107.

<sup>32</sup> See, *Pennington v Wayne* [2002] 1 WLR 2075.

<sup>33</sup> See, *Pallant v Morgan* [1953] Ch 43.

<sup>34</sup> In *Re Cleaver*, [1981] 1 WLR 939, at 947, Nourse J characterised secret trusts as constructive trusts. In *Kasperbauer v Griffith*, [2000] WTLR 333, the Court of Appeal accepted that, in secret trust cases, equity acts to prevent fraud or unconscionable conduct by imposing a constructive trust on the secret trustee. In *Gillett v*

knowing receipt liability.<sup>36</sup> It seems entirely logical, therefore, to apply the same underpinning rationale of unconscionability in the context of 'subject to' land transfers.<sup>37</sup> If, however, the ruling of Lloyd LJ in *Chaudhary* and earlier case law is to be followed, a third party who has failed to register his property interest at the Land Registry would not be able to seek to enforce any such right against a purchaser, even where that purchaser has given a 'subject-to' undertaking and received a benefit for the same such as a discount to the purchase price. This, it is submitted, is too strict an approach, resulting in an equally unconscionable result – a dubious enrichment to the purchaser.<sup>38</sup>

The ultimate aim, it is submitted, of the constructive trust in this context is to prevent unconscionability on the part of the purchaser who seeks to renege on his or her undertaking in honouring a third party's rights. In the writers' view, therefore, the following guidelines should determine whether a constructive trust should be imposed so as to protect a third party's interest against the purchaser:

1. An express or specific assurance is given by the purchaser (in either the sale contract or transfer deed) to the effect that the purchaser will take the land to be purchased 'subject to' the identified rights of a third party;
2. Consideration is provided by the vendor to the purchaser in return for the purchaser giving an express 'subject to' undertaking, for example, a reduction in the purchase price or some other benefit;
3. The 'subject to' undertaking need only be *a* cause of the sale from the vendor to purchaser not *the* cause;
4. The fact that the third party has not protected his or her interest by registration<sup>39</sup> should not be determinative of equity's intervention;
5. Where (1) to (3) have been satisfied, a new obligation in equity can be said to arise requiring the purchaser to honour the rights of the third party *via* a constructive trust;<sup>40</sup>

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*Holt*, [2001] Ch 210, at 228, Robert Walker LJ acknowledged that secret trusts are enforced in order to prevent unconscionable conduct.

<sup>35</sup> See, *Ollins v Walters* [2009] Ch 212, at [37], per Mummery LJ.

<sup>36</sup> See, *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 221.

<sup>37</sup> In the context of contracts for the sale of personal property, the general rule is that a bona fide purchaser for value without notice takes free of any third party rights and interests. If such a purchaser were to take a transfer of personalty 'subject to' any third party's right, this would clearly put the purchaser on notice of any such right which would then bind the purchaser. This simple approach does not correlate in land law where principles of registration come into play and the 'subject to' constructive trust exists outside the normal rules of conveyancing priority and operates as an exception to the same.

<sup>38</sup> The tension existing here, particularly in the context of land registration, is over the general need for mechanistic conveyancing certainty and the need for justice in individual cases.

<sup>39</sup> Whether under the Land Registration Act 2002, or as a land charge under the Land Charges Act 1972 in cases involving unregistered land.

<sup>40</sup> Arguably, the nature of this trust is a bare trust albeit of the constructive variety in how it arises with no active duties falling upon the purchaser other than to honour the prior interest of the third party.

6. Only the property interests (as opposed to the personal rights) of a third party can be protected by means of a constructive trust where (1) to (3) have been satisfied.

### **The guidelines**

It is the writers' view, the purchaser must provide an express 'subject to' undertaking either in the contract of sale or the subsequent transfer deed in order to bind the purchaser by way of a constructive trust.<sup>41</sup> It follows that no such undertaking should be inferred - it must be clearly and specifically spelt out in the sale documentation in line with routine conveyancing practice.<sup>42</sup>

The writers would also argue that consideration is a crucial requirement for the constructive trust to operate in a 'subject to' purchase situation.<sup>43</sup> The consideration might take the form of a discounted purchase price or some other benefit accruing to the purchaser. Significantly, it is this consideration which provides the necessary evidence that the purchaser is willing to take on a new obligation in honouring the third party's rights; it also serves the function of demonstrating that, once a purchaser has received a clear benefit, it would render any subsequent reneging on that obligation unconscionable.<sup>44</sup>

The writers also suggest that the 'subject to' undertaking need not be the sole cause of why the vendor was willing to sell the property to the purchaser, but should at least be *a* cause. This generous and flexible approach would be reflective of the approach English property law has taken as regards other causes of action, notably, in the context of the doctrine of proprietary estoppel.<sup>45</sup>

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<sup>41</sup> As was the case in *Lysus v Prowsa Developments* [1982] 1 WLR 1044. See also the comments of Lloyd LJ in *Chaudhary v Yavuz* [2011] EWCA Civ 1314 and David Richards J in *Groveholt Ltd v Hughes* [2012] EWHC 3351 (Ch). Such a specific written undertaking arguably demonstrates a sufficiently serious level of conveyancing intention on the part of any purchaser. All the case law reflects this requirement – the conveyancing *documentation* must exhaustively contain all relevant terms and obligations.

<sup>42</sup> By way of analogy with proprietary estoppel, there may well be an argument for allowing a constructive trust to be imposed where the purchaser's 'subject to' undertaking is purely verbal in nature. The difficulty here, however, may be evidential.

<sup>43</sup> In *Lysus v Prowsa Developments* [1982] 1 WLR 1044, there was no reduction in the purchase price on the part of the purchaser, yet the personal constructive trust was upheld. However, doubt was cast on this approach in *Ashburn Anstalt v Arnold* [1989] Ch 1 and *Lloyd v Dugdale* [2001] EWCA Civ 1754.

<sup>44</sup> It is interesting to note the observations of Roger J Smith in *Property Law* (10<sup>th</sup> ed. Pearson), at p.147, who states '...the presence of a reduced price is not [in itself] enough to prove a trust. Even where it is clear that neither seller nor purchaser wants the purchaser to respect the interest, they may recognise a significant risk that he may be bound by it. In this type of situation, no sane purchaser would pay the full normal market price (especially where the purchaser does not obtain vacant possession): some reduction will be necessary to take account of the risk'.

<sup>45</sup> In the context of proprietary estoppel doctrine, any assurance given by a landowner to the claimant must be a cause of their change in position (detrimental reliance), not the sole cause: *Wayling v Jones* (1993) 69 P & CR 170. The writers would, therefore, take issue with the rather absolutist and strict view which has been advanced in New Zealand in this respect. In *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124, at p.163. Mahon J stated that: 'The key to this type of inquiry in my opinion lies in the question whether the transferor would have parted with his property *but for* the oral undertaking of the transferee'.

The fact that the third party could have protected his interest by way of registration and failed to do so should not, in the writers' view, deny the third party equitable relief.<sup>46</sup> As mentioned earlier, the constructive trust in the context of 'subject to' transactions operates to prevent unconscionable dealing in land and the existence of the land registration machinery should not inhibit this laudable objective. In this connection, it is interesting to note the comment in *Snell's Equity*,<sup>47</sup> which states that:

. . . it is not an objection to the constructive trust that the claimant did not protect the priority of his interest under the Land Registration Act 2002. The claimant's right is independently of the Land Registration Act 2002. Indeed, the rules of priority in the Land Registration Act 2002 would generally have extinguished the prior interest that the transferee undertook to recognise.

The writers would, therefore, agree with McFarlane<sup>48</sup> that, in these 'subject to' situations, a new obligation arises on the part of the purchaser to respect the third party's interest and it is this obligation which the constructive trust seeks to protect independently of the land registration rules.<sup>49</sup>

Finally, the authors would suggest that only the property interests of the third party (rather than personal rights) should be protected via the constructive trust in the context of 'subject to' land transactions.<sup>50</sup> There is no need to enforce personal rights in this way as these can bind a purchaser for value under the Contract Rights of Third Parties Act 1999 without any formal requirement of registration.<sup>51</sup>

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<sup>46</sup> If the third party's right comprises an equitable interest under a trust and the sale is made by vendors who are two or more trustees, the purchaser's interest will normally overreach the right of the third party in this scenario: see, ss. 2 and 27 of the Law of Property Act 1925. However, if the purchaser, for consideration, gives a 'subject to' undertaking to honour the third party's right, any statutory overreaching machinery would arguably not apply.

<sup>47</sup> (34th ed., 2022, Sweet and Maxwell), at para 26-010.

<sup>48</sup> See, B McFarlane, 'Constrictive Trusts Arising on a Receipt of Property Sub Conditione', (2004) 120 LQR 667. It is noteworthy that a purchaser who knows of a third party interest that has not been protected by registration and who, nonetheless, purchases land to secure a bargain, is not acting unconscionably simply because they have taken advantage of the provisions of the Land Registration Act 2002. Unconscionability here means that the purchaser, who is trying to renege on a 'subject to' undertaking, must have offered a clear promise to the vendor to honour and respect the rights of the third party and received some benefit from the purchaser as a result of having given his promise. An interesting debate might occur over the timing as to when the constructive trusts arises. Is it institutional in nature arising when the 'subject to' undertaking is given? Or, is it remedial in nature, arising when such a purchaser seeks to renege on his or her 'subject to' undertaking? Following McFarlane's logic, it may well be institutional in nature, arising when the 'subject to' undertaking is given, as it is then that he suggests a new obligation is undertaken.

<sup>49</sup> By way of analogy, there is considerable judicial support for a purely estoppel-based exception to legal formality in the context of an oral agreement which falls foul of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. The point here is that proprietary estoppel provides the claimant with a separate and distinct cause of action which may operate independently of the statutory exemption contained in s.2(5) of the 1989 Act: See further, M Pawlowski, 'Informal Agreements and Estoppel: Formality No Bar to Estoppel', (2021) PLJ 387, pp. 15-23.

<sup>50</sup> This view is also supported by Gardner in *Introduction to the Law of Trusts*, (3rd ed., 2011, Clarendon Law Series, OUP), at p.331, who makes the general point that obligations under trusts are proprietary in nature not personal.

<sup>51</sup> See, S Bright, 'The Third Party's Conscience in Land Law', [2000] Conv 398, who prefers the contractual claim to the use of the constructive trust. However, contract law may not always provide an answer where the necessary formalities under s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 are absent as

## Conclusion

As we have seen, a constructive trust may arise under the current law where a purchaser (P) has purchased land from a vendor (V) in circumstances where the P has promised to buy the land expressly 'subject to' the rights of a third party (T) and where P is now seeking to renege on the promise. Indeed, as we have seen, this has been judicially<sup>52</sup> accepted as a legitimate application of the *Rochefoucauld* principle. But, not every case will merit equity's intervention in this way since it is apparent that P's conscience will only be affected if he has undertaken a new liability in respect of T's prior rights.<sup>53</sup> In the absence, therefore, of unconscionable conduct on P's part, the formality rule will prevail requiring T's rights to be appropriately protected by registration in order to bind P.

Significantly, a third party's failure to protect his interest by registration seems now to be largely fatal to the imposition of a constructive trust, the logic here being that it is not unreasonable for a purchaser to expect the third party to comply with the basic rules of land registration. In the writers' view, however, the fact that the third party could have protected his interest by way of registration and failed to do so should not deny the third party equitable relief. The constructive trust in the context of 'subject to' transactions should operate independently of the land registration rules so as to prevent unconscionable dealing in land. To this end, the writers have put forward a list of guidelines as to how the constructive trust should operate in the future protecting third party rights from what would otherwise be unconscionable conduct. It is also hoped that the Supreme Court will have the opportunity to review and clarify this important area of property law in the not too distant future.

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was the case in *Chadhaury v Yavuz*, [2013] Ch 249 involving an estoppel-based easement. See also N Hopkins, 'Conscience, Discretion and the Creation of Property Rights', (2006) 26 LS 475, at pp.485-486. A third party licensee holding on a 'personal' right could, however, enforce as against the purchaser under the Contracts (Rights of Third Parties) Act 1999 and claim any remedy against him, such as damages, injunction or specific performance as if he had been a party to the contract: s.1(5) of the 1999 Act. Such a contractual licence, being only a personal right, is not affected by the strict formality rules which exist in relation to contracts for the sale or disposition of interests in land by virtue of S.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.

<sup>52</sup> *Lys v Prowsa Developments Ltd* [1982] 1 WLR 1044.

<sup>53</sup> The obvious advantage of imposing such a trust is that it protects the third party's property interest as against any assignees of the purchaser such as a trustee in bankruptcy or the personal representatives of the purchaser where the purchaser has died.