from going back on its promise. However, the Court of Appeal found that such a claim would not have succeeded. Even though MWB had received a "practical benefit", Rock had suffered no detriment, and could readily be restored to its previous position: it was not inequitable for MWB to go back on its representation. Kitchin L.J. emphasised that it would not be inequitable to go back on the promise simply because the representee made a payment in reliance on a representation (cf. *Collier v P. & M.J. Wright (Holdings) Ltd.* [2007] EWCA Civ 1329; [2008] 1 W.L.R. 643, which only concerned summary judgment: see *MWB*, at [92], per Arden L.J.). Kitchin L.J. also thought that, although promissory estoppel will often only suspend an obligation, estoppel might operate to extinguish the obligation, depending on the nature of the promise made: "[a]ll will depend upon the circumstances" (at [61]).

MWB highlights that the decision in *Foakes v Beer* might be attacked on one side through adopting a "practical benefit" approach to consideration and on the other side from promissory estoppel. Both routes can effectively mean that a debtor does not have to pay the entirety of the debt. If the very same facts of *Foakes* were to arise today, it is perhaps unclear what result a court would favour. In 1937, the Law Revision Committee recommended a departure from *Foakes*, essentially because a creditor would obtain a practical benefit from the prompt payment of part of a debt rather than trying to insist on the payment of the whole sum due. But it is significant that Parliament has not accepted or implemented those reforms. Moreover, the decision in *Foakes* has been supported by some commentators, not least because it provides clear guidance as to what constitutes consideration (see e.g. J. O'Sullivan, "In Defence of *Foakes v Beer*" [1996] C.L.J. 219). As a result, it is not entirely satisfactory for the Court of Appeal effectively to side step *Foakes* and resort to the notion of "practical benefit" that was clearly not endorsed by the House of Lords in *Foakes* itself. In the absence of legislation, it is to be hoped that the Supreme Court will soon have the opportunity to provide guidance on this issue.

PAUL S. DAVIES

Address for Correspondence: St. Catherine's College, Oxford, OX1 3UJ, UK. Email: paul.davies2@law.ox.ac.uk

UNCONSCIONABLE BARGAINS, OVERREACHING AND OVERRIDING INTERESTS

MORTGAGE Express v Lambert [2016] EWCA Civ 555 concerned a sale and leaseback. In desperate circumstances, the naïve and vulnerable *A* (Ms Lambert) entered into a sale and leaseback arrangement in respect of her flat. She was paid a small proportion of the value of the flat, which was then registered in the joint names of *B* (the buyers). *B* mortgaged it without

https://doi.org/10.1017/S0008197316000714 Published online by Cambridge University Press

disclosing to *C* (the mortgagee) the leaseback arrangement to *A*. The mortgage was registered, but no lease was. Ultimately, *B* defaulted on the mortgage and *C* sought to sell the property. The litigation concerned whether *A* had a right that could bind *C*. The Court of Appeal held that *A* did not and allowed the sale to proceed.

Explaining this result, Lewison L.J., with the agreement of Gloster L.J. and Cobb J., ruled that *A* had an equity to set aside the sale as an unconscionable transaction. This equity was held to be a proprietary right in the land, exactly as if the sale had been procured by misrepresentation or undue influence. The judgment then focused on two questions. First, did *A*'s equity have priority over *C*'s mortgage under the general law? Secondly, if so, was *A*'s off-register equity an overriding interest which bound *C*'s registered legal mortgage?

On the question of priority under the general law, Lewison L.J. ruled that *A*'s equity to set aside the transaction was overreached when *B* mortgaged the flat. In particular, Lewison L.J. reasoned that *B*, as both registered joint proprietors and trustees for themselves (by operation of law as co-owners), had the power to grant a mortgage of the property free of *A*'s equity, under s. 6(1) of the Trusts of Land and Appointment of Trustees Act 1996 and s. 26 of the Land Registration Act 2002. Accordingly, *C* had priority over *A* under the general law.

This reasoning is problematic. Overreaching is an incident of what is usually a trustee's authority in equity to exercise their powers over trust property. The rights of trust beneficiaries are always subject to the trust's terms, and so beneficiary interests are overreached where trustees exercise their powers conferred by the trust deed. Section 6(1) of TOLATA by default makes it an implied term of a trust of land that the trustees have power to dispose of the assets as absolute owners. However, in *Mortgage Express,* *A*'s equity to set aside the sale of the lease was not subject to the terms of the trust, as it had priority over *B*'s legal title and equitable interests. Nevertheless, Lewison L.J. ruled that overreaching was effected by ss. 2(1)(ii) and 2(2) of the Law of Property Act 1925, which provide that trustees, by exercising their powers under a trust, can overreach some types of equitable interests which have priority over the trust itself, *so long as the trustee is a trust corporation, or the trustees are two or more individuals approved or appointed by the court.* It is hard to see how the section could have applied on the facts: *B* had not been appointed or approved as trustees by the court.

The Court of Appeal's discussion of overreaching also relied on the owner's powers conferred by the LRA 2002. The role played by this reasoning in the court's decision is hard to discern: it is not clear whether the LRA 2002 was used simply to explain what powers of an absolute owner are implied by TOLATA into the terms of a trust of land, or whether the powers conferred on *B* as registered owners were said to effect a form of overreaching that would have occurred even in the absence of a trust. The former interpretation fits best with the Court's reasoning – otherwise the discussion of trusts would have been otiose – but sections of the judgment suggest the opposite, and so it is necessary also to consider the latter interpretation.

The court's reasoning focused on s. 26 of the LRA 2002. On an orthodox reading, the provision simply states that a registered owner of land can make dispositions of that land, regardless of any limitation on his powers or authority to do so under the general law, unless a restriction is placed on the register (see Megarry and Wade, *The Law of Real Property*, 8th ed. (London 2012), para. 7-051). Lewison L.J. adopted a more expansive interpretation. Although *A*'s equity did not affect *B*'s *power* to transfer legal title, the court could not allow it to be asserted against *C* without allowing the "validity of [*C*'s] title" to be questioned, contrary to s. 26, because the content of *A*'s equity was to set aside the initial sale of the property. The effect is that, whenever title to registered land is transferred by *A* to *B* in a voidable transaction and *B* then sells or mortgages the land to *C*, then *C* will automatically have priority over *A*.

The desirability of this interpretation is questionable. First, *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] 2 A.C. 773 made clear that banks should be bound by equities to set aside mortgages where they have not asked proper questions. *Mortgage Express* seems to provide the reverse, which dis-incentivises banks from undertaking proper checks by allowing them to take free of such rights in all three-party cases founded on a voidable transaction.

Second, the reasoning circumvents the application of s. 29 and Sch. 3 in three-party priority disputes concerning voidable transactions. These provisions are designed to resolve such disputes in a balanced way. Reliance on the register is protected by the default rule that a registered purchaser for value will take free of off-register interests. Owner-occupiers are protected by the fact that this default rule will not apply in cases where holders of off-register interests are in actual occupation (and their rights have priority over the purchaser under the general law). Why would the statute impose an automatic "buyer wins" rule through s. 26, when it also provides machinery to resolve priority disputes in this more policy-driven way? Lewison L.J. appears to have changed his mind since *Thomson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P. & C.R. 16, at [137], where he suggested that such cases would be resolved through s. 29 and Sch. 3 (although s. 26 was not argued in *Thomson*).

Third, the ruling makes the law inconsistent. Where *A*'s interest has been removed from the register by mistake in favour of *B* and *B* then mortgages or sells to *C, A* will usually succeed in having the register rectified against *C* (see Goymour [2013] C.L.J. 617). Such cases involve the same policy concerns as *Mortgage Express* about the nature of the register's guarantee of title. The discrepancy lacks an obvious justification.

The final portion of the judgment contains dicta on whether *A*'s equity would have been protected as an overriding interest if, contrary to the court's view, it had been capable of taking priority under the general law. The point turned on Sch. 3, para. 2(b) of the LRA, which provides that the "interest" of a person in actual occupation will not override if inquiry was made of her before the disposition and she failed to disclose it when she could reasonably have been expected to do so.

Two facts of the case put the precise scope of the provision in issue. First, *A* had not disclosed any interest on the overriding interests questionnaire she received before the sale to *B* (thus also before the mortgage to *C*), although she had expected that *B* would give her a lease over the property. Second, *C* was aware that the sale by *A* to *B* was at an undervalue but asked no further questions.

Lewison L.J. ruled that *A*'s interest would not have overridden the mortgage to *C*. He acknowledged that *A* could not be "reasonably expected" to disclose her equity to set aside the transaction with *B*, at least in those very terms, but held that her failure to disclose the lease that she had expected would be granted to her prevented her equity to set aside the transaction from being an overriding interest. This ruling extends the terms of the statute in *C*'s favour, since it refers only to whether the claimant would have been expected to disclose the "right" asserted by her, rather than some other related right arising from the same transaction.

However, Lewison L.J.'s extension of the statutory terms is justifiable as a matter of policy. Sch. 3, para. 2(b) is designed to incentivise *C* to ask questions of occupiers before they agree to become a purchaser. It thereby facilitates the discovery of fraud before purchase. With some types of rights arising by operation of law – especially through misrepresentation or proprietary estoppel – if *C* makes enquiries of *A* before purchase and *A* reveals whatever rights she thinks she has, then *C* should realise that something is generally amiss with *B*'s title to the property. In such a case, *C* should be allowed to take free of any interest that *A* does not disclose even if it is not the very same interest that *A* thought she had. That said, this approach should not apply in cases of undue influence, where any disclosure made by *A* is unlikely to reveal the wrong done to her. At the time of the purchase by *C, A* may still be subject to *B*'s influence.

Lewison L.J. was also right to disregard *C*'s awareness that *A* sold to *B* at an undervalue. The LRA 2002 was intended to replace the doctrine of notice, in particular constructive notice and to allow purchasers to take free of pre-existing rights without making detailed investigations of title. This aim would be undermined if Sch. 3, para. 2 were read as requiring purchasers to do more than simply ask parties in the occupation of the property what their interests were. *C*, after all, did not have actual knowledge of the fraud.

Andreas Televantos

Address for Correspondence: Fitzwilliam College, Cambridge, CB3 0DG, UK. Email: ait30@cam.ac.uk

TRACING TO AND FRO

THE era of civil litigation to recover the proceeds of fraud continues and, with it, the elaboration of principles of judge-made law as to when defrauded persons may recover. These principles reflect a truth of human nature. Apart from the silly, reckless and brazen, those who commit fraud wish their takings to be undetectable. A crucial development in the history of English law, therefore, was to accept that, for some purposes, persons may make juridical claims not only to an asset originally taken from them, but also to other assets representing the original: Maitland, "Trust and Corporation", in *Selected Essays* (Cambridge, 1936), 171–72. The concept of assets "representing" the original assets is at the heart of the equitable and common law doctrines of tracing and civil recovery for fraud.

At issue in *Federal Republic of Brazil v Durant International Corp.* [2015] UKPC 35; [2016] 1 A.C. 297 was how ready a court will be to conclude that assets in a defendant's name, possession or control represent the plaintiff's original assets. The nominal plaintiff was the Federal Republic of Brazil, the active plaintiff being the Municipality of São Paulo. The Municipality had suffered fraud. Its then mayor, Mr. Maluf, secretly received bribes in person and through agents. The bribe moneys were converted into US dollars and paid into an account, with a New York bank, controlled by Mr. Maluf's son ("the C account"). Ultimately, the plaintiffs' claims for recovery were directed elsewhere. Messrs Maluf senior and junior were not the defendants, nor did the plaintiffs claim moneys or assets from them. The plaintiffs instead claimed that Durant, a company registered in the British Virgin Islands, received US$13,500,000 into its bank account in Jersey ("the D account") as the proceeds of the bribes. They further alleged that US$10,500,055.35 of that money now stood in the Jersey bank account of another company registered in the British Virgin Islands, Kildare ("the K account") and that the US$10,500,055.35 were traceable to the fraud practised on the Municipality.

The import of the case lies less in the plaintiffs' victory and more in their success in repelling two arguments which the Privy Council found "[c]onceptually … coherent and … supported by a good deal of authority" (at [18]). Both arguments are familiar from the textbooks. First, the

https://doi.org/10.1017/S0008197316000714 Published online by Cambridge University Press