[2013] UKPC 22
Privy Council Appeal No 0028 of 2013

JUDGMENT

Prime Sight Limited (A company Registered in Gibraltar) (Appellant) *v* Edgar Charles Lavarello (Official Trustee of Benjamin Marrache a Bankrupt) (Respondent)

From the Court of Appeal of Gibraltar

before

Lord Neuberger
Lord Wilson
Lord Reed
Lord Carnwath
Lord Toulson

JUDGMENT DELIVERED BY

LORD TOULSON

ON

9 JULY 2013

Heard on 10 June 2013

Appellant
Isaac Jacob
Conn MacEvilly
(Instructed by Charles Gomez & Co., Gibraltar)

Respondent
Nick Cruz

(Instructed by Cruz & Co. Gibraltar)

LORD TOULSON

1. If a written agreement contains an acknowledgement of a fact which both parties at the time of the agreement know to be untrue, does the law enable one of them to rely on that acknowledgement so as to estop the other from controverting the agreed statement in an action brought on the agreement? This question arises on an appeal by Prime Sight Limited ("the company") against an order for the winding up of the company made on the petition of the Official Trustee of Mr Benjamin Marrache ("the Official Trustee") in the Supreme Court of Gibraltar under the Companies Act 1930.

2. The company applied for an order striking out the petition on the basis that the debt on which the petition was founded was genuinely disputed on substantial grounds. It was common ground between the parties that this was the appropriate legal test, as under English company law.

3. The matter came first before Prescott J. At that stage no estoppel argument was advanced by the company. In a short judgment given on 13 February 2013 the judge concluded that the company had failed to show that the debt was disputed on substantial grounds. She therefore dismissed its application to strike out the petition and made a winding up order.

4. The company appealed. In its grounds of appeal it raised for the first time the argument that the Official Trustee was estopped from asserting that there was a debt owed by the company. The Court of Appeal (Sir Paul Kennedy P, Sir Jonathan Parker JA and Sir William Aldous JA) allowed the point to be raised, but dismissed the appeal for reasons given by Sir Jonathan Parker. Permission to appeal against that decision was given by the Board.

Facts

5. The alleged debt arose from a deed of assignment dated 14 May 2007 between Mr Marrache and the company. The company had been formed two weeks earlier with an issued share capital of 1000 shares of £1.00. Mrs Marrache was the beneficial owner of 999 shares. The remaining share was held in trust for Mr Marrache, who according to Mrs Marrache held it in trust for herself.

6. The assignment related to an underlease of an apartment at 20 Ragged Staff Wharf, Queensway Quay, Gibraltar ("the property"). The underlease was for a term of 149 years from 1 October 1991. It was acquired by Mr Marrache for £192,500 by an agreement between himself and the head lessor dated 1 March 1995.

7. The preamble to the deed of assignment recited that:

> "The Assignor [Mr Marrache] has agreed to sell and the Assignee [the company] have agreed to purchase the Premises … … for all the unexpired residue of the Term for the sum of £499,950 and on terms hereinafter appearing."

8. Clause 1 stated:

> "In a consideration of the sum of £499,950 now paid by the Assignee to the Assignor (receipt and payment of which the Assignor hereby acknowledges) the Assignor as beneficial owner hereby assigns under the Assignee all and singular the Premises … to hold the same unto the Assignee for the unexpired residue of the Term …"

9. It is common ground that no payment was in fact made by the company to Mr Marrache. The Official Trustee's case is that the company therefore remains indebted to Mr Marrache for the agreed purchase price. The company has no assets other than the property, which was mortgaged to Barclays Bank in 2008 and 2010 by way of security for loans to the firm of Marrache & Company. The validity of those mortgages is in issue in other proceedings.

10. Marrache & Co was a law firm in which Mr Marrache was a partner. On 26 November 2010 Mr Marrache was adjudicated bankrupt. The Official Trustee estimates that his debts amount to about £40,000,000, including £28,000,000 owed to former clients of the firm. The Official Trustee has had difficulty in realising his assets, as they are mainly held in complex company structures involving nominee companies.

11. On 4 March 2011 the Official Trustee wrote to Mrs Marrache, as sole director of the company, referring to the deed of assignment and stating that he had not been able to account for payment of the purchase sum of £499,950. He asked Mrs Marrache for confirmation that the sum had been paid, together with details of the company's bank account and confirmation of the source of funds that enabled the company to enter into the transaction.

12. The Official Trustee received no reply to his letter and on 25 May 2011 he issued a statutory demand. On 10 June 2011 the law firm of Charles Gomez & Co. wrote to him stating that they were instructed by the company to respond to the statutory demand. The letter denied that the company was liable to Mr Marrache for the following reason:

> "Mr Marrache procured our client to issue two mortgages in favour of Barclays Bank plc to secure a maximum liability of £3,483,000 loaned to Marrache & Co of which Benjamin Marrache was one of two partners. Accordingly our client (with Mrs Marrache its helpless beneficiary) at Marrache's request on the face of the charges made itself liable for a sum greatly in excess of the amount shown as consideration in the assignment. On any basis, the firm of Marrache and Co would have a liability to our client in respect of the £3,483,000. This sum greatly exceeds the amount shown in your statutory notice."

13. On 15 March 2012 the Official Trustee presented a winding-up petition.

14. On 27 April 2012 Charles Gomez & Co wrote to the Official Trustee's solicitors setting out different grounds for contending that the petition was misconceived. According to the account set out in the letter, when the property was acquired in the name of Mr Marrache in 1995, it was agreed that Mr and Mrs Marrache should be joint beneficial owners. In the following year Mrs Marrache became pregnant. She was a barrister and Mr Marrache wanted her to stop working for the sake of her health. They agreed that she would close her offices and would in return be compensated for her loss of practice income, but at that stage the amount of the compensation was left unquantified. The parties married shortly thereafter. In accordance with their agreement she did not return to work, although she hoped to do so when their children had grown up. In 2006 they agreed that she should become the sole beneficial owner of the property, subject to her paying off the amount then owed by way of a mortgage loan. She duly paid off the amount outstanding and it was agreed that from that moment Mr Marrache would hold the legal interest in the property entirely for her.

15. It was allegedly further agreed that the property should be transferred to a company owned by Mrs Marrache at a figure which represented its value, in case it should later be decided to sell the property. However, since it was absurd for Mrs Marrache to raise the money to enable the company to pay the purchase price to Mr Marrache, in circumstances where he would hold the proceeds as a bare trustee for her, the parties (Mr Marrache, Mrs Marrache and the company through her) agreed to forgive or waive Mr Marrache's claim against the company "on the basis that Mrs Marrache treated the trust as at an end and did not look to Mr Marrache to obtain the purchase monies and hold them for her benefit".

16. Prescott J rejected the submission that these assertions amounted to substantial grounds for disputing the existence of the debt. She said:

> "The flaw in this argument as I see it is that it ignores that by operation of law a company is a fully recognised legal persona. I know of no authority and there is none before me that would support the submission that from a legal perspective the company is the same person as its ultimate beneficial shareholder. Of course, the owner of a property is entitled to transfer that property to another. When that transfer is effected by deed of assignment for consideration it becomes a legally binding transaction. If that consideration is unpaid it becomes actionable."

17. Prescott J accepted that there might be a genuine dispute about whether Mrs Marrache had previously acquired a proprietary interest in the property and that, if so, she might be entitled to some form of claim against Mr Marrache's estate, but that would be a matter for another court on another day and it did not affect the existence of a debt owed by the company.

18. Before the Court of Appeal the company advanced three grounds. First, the Official Trustee was estopped by the terms of the deed of assignment from asserting that there was any debt owed by the company. Secondly, the alleged debt was not an asset vested in the Official Trustee, since he would have held the proceeds in trust for Mrs Marrache. Thirdly, the debt had been waived by Mr Marrache prior to his bankruptcy.

19. The court held that there was a short answer to the second ground. Unless and until Mrs Marrache established her claim, which was denied by the Official Trustee, he was entitled to proceed with a winding up petition in his capacity as legal owner of the debt.

20. As to the third ground, the court held that a waiver of the debt was inconsistent with the terms of the deed which created the debt. It concluded that the judge had been right to find that the deed created an immediate obligation on the company to pay the purchase money, and that the obligation was still subsisting.

21. There remained the estoppel argument. Mr Jacob, who represented the company before the Court of Appeal and before the Board, relied in the Court of Appeal on the decision of the House of Lords in *Greer v Kettle* [1938] AC 156 and, in particular, on part of the speech of Lord Maugham in which he approved the following passage from the head note of the decision of Lord Romilly MR in *Brooke v Haynes* [1868] 6LREq25:

> "A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part."

22. The court did not consider that this statement of principle supported the use which the company sought to make of it. Sir Jonathan Parker said:

> "As the statement of principle approved by Lord Maugham in *Greer v Kettle* makes clear, equity will not prevent a party to a deed who has, by mistake, allowed the deed to state that purchase money has been paid when in fact it has not from asserting the true position. Mr Jacob tries, in effect, to turn that principle on its head in order to create an estoppel in the instant case. In the instant case, however, the only inference that can be drawn from the parties' decision to include statements in the Deed of Assignment which they knew at the time to be untrue is that the statements were so included in order to conceal the true position. In such circumstances, I can conceive of no principle of law or equity which could prevent the court from recognising the truth of the matter and giving effect to it."

Further arguments

23. On the hearing of the appeal the Board drew Counsel's attention to the judgment of Dixon J in the High Court of Australia in *Grundt v Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641 and to a passage in Spencer Bower on *Estoppel by Representation* 4th ed (2004), at 197, to the effect that parties to a transaction may choose to enter into it on the basis that certain facts are to be treated as correct as between themselves for the purpose of the transaction, although both know that they are contrary to the true state of affairs, in which case the necessary convention for an estoppel will be established.

24. Although the company had raised the issue of estoppel by deed before the Court of Appeal, this way of approaching the issue and the authorities supporting it had not been raised at any stage of the proceedings and counsel for the Official Trustee was understandably taken by surprise. The parties were invited to put in further written submissions and have done so. In all, the Board has received three supplemental sets of submissions, two on behalf of the Official Trustee and one on behalf of the company.

25. In his further submissions Mr Cruz has contended that *Grundt* is distinguishable because in that case the court was dealing with a case of estoppel by convention and not estoppel by deed.

26. Mr Cruz has further submitted that it would be contrary to legal principle and to public policy for an estoppel to be permitted in a case such as the present. The deed of assignment, registered with the Registrar of Land Titles, was a public record under the Gibraltar Land Titles Act 2011. Such a document was liable to be relied on by third parties as proof of title, and statements made in it as to the price and other details of the property were likely to influence innocent third parties including buyers and lenders. The proposition that a party could ask a court to ignore the fact that an important statement in the deed was untrue would be repugnant to any reasonable person and was contrary to public law policy. As Mr Cruz put it,

> "Instinctively, the concept that parties to a Deed are entitled to include information that they know to be completely false and untrue on a fundamental issue such as consideration, size of property or number of rooms, feels entirely wrong in law and equity, and indeed contrary to any moral principle. This unbelievable proposition cannot, it is submitted, be understood by lay persons and legal professionals alike, or indeed the judiciary."

In his submission, the Court of Appeal was right to say that there was no principle of law or equity which would prevent the court from recognising the truth of the matter and giving effect to it.

27. Further or alternatively, the conduct of Mr and Mrs Marrache and the company was in breach of, or contrary to the public policy underlying, various statutory provisions, including the Stamp Duties Act 2005, Gibraltar insolvency legislation and the accounting obligations of the company under the Gibraltar Companies Act 1930 and under the 4th and 7th EU Directives.

Discussion

28. Mr Cruz has submitted that there is a relevant distinction to be drawn in the present case between the doctrine of estoppel by convention and the doctrine of estoppel by deed.

29. The doctrine of estoppel by deed overlaps with the doctrines of estoppel by representation and estoppel by convention. The basis of estoppel by representation is that the representor induced the representee to enter into the relevant transaction on

the faith of a statement in circumstances which would make it unfair that the representor should go back on the statement. The basis of estoppel by convention is that the parties expressly or impliedly agreed that a certain state of facts or law was to be treated as true for the purposes of the transaction, and that it would be unfair for one or other to resile from the basis on which the transaction had proceeded.

30. It is suggested in Chitty on *Contracts*, 30th ed (2008), para 1-112, that there is little point in now preserving any separate category of estoppel by deed, since the basis of the estoppel appears now to be covered by estoppel by representation or by convention. That may be going too far. (For one thing, a convention may be contractual or non-contractual. Consideration is still ordinarily a requirement of a contract. In *Johnson v Gore Wood* [2002] 2AC1, 39-40, Lord Goff expressed reservation about attempting to encapsulate the many circumstances capable of giving rise to an estoppel within a single formula, in part because consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel. A particular characteristic of a deed is that consideration is not ordinarily required for it to be effective as between the parties.) However, where there is a contractual convention, it makes no difference in principle whether or not the contract is embodied in a deed.

31. Once upon a time it was the law that mere recitals in a deed could not found an estoppel, but the law has long since changed. In *Carpenter v Buller* (1841) 8M & W 209, 212-213, Parke B said:

> "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352; and a recital in instruments not under seal may be such as to be conclusive to the same extent … By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence."

32. Whether a recital in a contract is intended to be binding on either or both parties involves a question of construction. This is illustrated by the decision of the House of Lords in *Greer v Kettle*. Company A, at the request of company B, advanced £250,000 to company C on the security of 275,000 shares in company D. Company A entered into a separate agreement with company B by which B guaranteed the repayment of company C's debt. The agreement between company A and company B

recited that the loan was secured by a charge over the shares in company D. Company C defaulted on the loan and it transpired that the shares had never been validly issued. Company A went into liquidation and the liquidators sought to enforce company B's guarantee. Company B argued that it had agreed to guarantee the repayment of a debt secured by 275,000 fully paid shares and that, as the debt was not so secured, it was under no liability. The liquidators argued that company B was estopped by the recital in the agreement of guarantee from denying that the shares had been validly issued and charged. It was held by the House of Lords that the recital was to be construed as a statement by company A, not a statement by company B. Accordingly, company B was not estopped from denying that the shares had been issued and therefore that it was under no liability to company A. Lord Russell and Lord Maugham (with whom Lords Atkin, MacMillan and Roche agreed) cited with approval, at 167 and 170, the judgment of Patteson J in *Stroughill v Buck* (1850) 14 QB 781, 787, in which he said:

> "When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument."

33. Lord Maugham also noted that there would be an exception to the estoppel if the deed was fraudulent or illegal or if one party induced an untrue recital by his own representation to the other party.

34. The House of Lords was not concerned in that case with a situation in which a deed contained a recital of fact known by both parties to be untrue. The Court of Appeal in the present case was right for that reason to regard the decision as not directly in point. There are, however, other cases (not cited to the Court of Appeal) in which that situation has been considered.

35. In *Horton v Westminster Improvement Commissioners* (1852) 7 Ex 780 the plaintiff sued as the assignee of a bond issued by the defendants to A for the payment of £10,000. It contained a recital that the defendants had borrowed £5,000 from A for the purposes of carrying out works under the Westminster Improvement Acts 1845 and 1847. The defendants pleaded that they had not borrowed any money from A. The underlying facts, according to the defendants, were that the defendants owed money to B and C, who were induced by A into agreeing that the defendants should issue the bond to A in lieu of payment to themselves. B and C then discovered that they were the victim of a scam and requested the defendants not to pay the bond. In short, the parties to the bond, A and the defendants, both knew when it was issued that the recital about A having lent money to the defendants was false. It was held that the defendants were estopped from denying the truth of the facts stated. Martin B stated the principle as follows:

> "The meaning of estoppel is this – that the parties agreed, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them."

36. He added that the position would be different if the statement had been made for the purpose of concealing an illegal contract, but that was not the case. Nor was it alleged that A had practised a fraud on the defendants. He was alleged to have deceived B and C, when they directed the defendants to give the bond to A, but that did not affect the validity of the bond.

37. In *Ashpitel v Bryan* (1863) 3 B & S 474 a businessman named John Peto died leaving stock in trade which one of his next of kin, James Peto, agreed to sell to the defendant. It was also agreed between them that it should be made to appear that John Peto had sold the goods to the defendant in his lifetime. A bill of exchange for the amount of the agreed purchase price was drawn in the name of John Peto, indorsed in the name of John Peto to James Peto, and accepted by the defendant. In due course James Peto also died and his executor sought to enforce payment of the bill. The defendant refused to pay it and sought to defend the claim on the ground that the bill was made and indorsed in the name of John Peto after his death. It was held that he was estopped from denying that the bill had been properly drawn and indorsed. James Peto and the defendant both knew that John Peto was dead at the time when the bill was issued, but the known falsity of the bill did not prevent an estoppel from arising. In the Queen's Bench Crompton J said at 493:

> "If it appears … that, by express agreement between the parties, a bill was drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered, as in the present case, by giving up certain goods to the other, that other is not at liberty afterwards to say that the fact which was assumed as the basis of the contract or arrangement, and upon which the other party acted, and thereby altered his position, was really untrue and that the bill is void."

38. There was an appeal to the Exchequer Chamber and the decision was affirmed at (1864) 5 B & S 723. Pollock CB, with whom Williams and Wills JJ and Bramwell and Channell BB agreed, said at 728:

> "We all agree with the Court below that there may arise an estoppel by agreement, and that such an estoppel arises here. The parties agreed that the transaction should have this character, viz, that the defendant should appear to have bought the goods of John Peto, and that therefore the bill should be drawn and indorsed in the name of John Peto, and it was

> afterwards accepted by the defendant on the basis of that agreement. The defendant having accepted the bill after it had been drawn and indorsed in that name, and having promised payment of it, now says that it was not drawn and indorsed by John Peto; but he is estopped from doing so."

39. In *M'Cance v London and North Western Railway Company* (1864) 3H C 343, 345, Williams J cited with approval Blackburn's statement in his *Treaty on the Contract of Sale* that "when parties have agreed to act upon an assumed state of facts their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth."

40. In *Grundt* Dixon J said at 675-676:

> "The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied."

41. This is consistent with Lord Maugham's recognition in *Greer v Kettle*, at 171, that it had first to be decided as a matter of construction whether the recital in the deed was to be regarded as a statement by one party to the other or something more than that; and secondly, that if "as a mere matter of construction" a "perhaps ill-framed recital" was to be regarded as mutually agreed to be true, an estoppel based on it might nevertheless be defeated on the grounds mentioned above (illegality, misrepresentation, etc). However, if as a matter of construction the recital amounts to a mutual agreement to treat it as true, and if there are no vitiating factors such as illegality or misrepresentation, the fact that the parties have willingly so bound themselves is itself sufficient reason for the contract to be enforced.

42. Dixon J continued in *Grundt* at 676:

> "It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption

> which they know to be contrary to the actual state of affairs. … Parties to a deed sometimes deliberately set out an hypothetical state of affairs as the basis of their covenance in order to create a mutual estoppel."

43. By way of example, Dixon J cited the judgment at Isaacs J in *Ferrier v Stewart* [1912] 15 CLR 32, 44-46. The plaintiffs were the surviving members of a firm to whom the defendant's husband was indebted under certain promissory notes. The firm agreed to extend his credit by accepting new promissory notes, provided that they were indorsed by the defendant so as to make her liable on the notes. This she agreed to do. In order to effect a contract between herself and the firm, the notes had formally to be indorsed by the firm to her before she put her indorsement on them. In fact, the notes were given to her, for her indorsement, before the firm's indorsement appeared on them and she placed her indorsement on them as if they had already been indorsed to her. The notes were thereafter indorsed by the firm, so that on their face they appeared to have been indorsed in the correct chronological sequence, contrary to the facts as both parties knew them to be. The defendant subsequently refused to pay the bills on the ground that they had not been indorsed to her at the time of her signature. This defence failed. Dixon J summarised the reasoning of Isaacs J as follows:

> "The ground on which His Honour put the estoppel simply was that the parties adopted a conventional basis for the transaction. They impliedly agreed that, when the promissory note should be completed by other indorsements, it should be assumed to have been issued and indorsed by the parties in due order. From this assumption the indorsee was not permitted to depart, although all parties had been aware of the actual state of affairs."

44. Dixon J's judgment in *Grundt* was cited with general approval by Denning LJ in *Central Newbury Car Auctions Limited v Unity Finance Limited* [1957] 1 QB 371, 380. (Denning LJ was in the minority but not for reasons which are relevant in the present case.) It was cited again by Lord Denning in *Amalgamated Property v Texas Bank* at 121 and by Lord Bingham in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453 at [73]. As these citations illustrate, the judgment is well-known.

45. The law is correctly analysed by Spencer Bower at page 197:

> "… an estoppel by convention need not involve any misleading of a representee by a representor, nor is it essential that the representee shall be shown to have believed in the assumed state of facts or law. The full facts may be known to both parties; but if, even knowing those facts to the full, they are shown to have assumed a different state of facts or law

> *as between themselves* for the purposes of a particular transaction, then a convention will be established. The claim of the party raising the estoppel is, not that he believed the assumed version of facts or law was true, but that he believed (and agreed) that it should be *treated* as true."

46. This passage refers to estoppel by convention and not expressly to estoppel by deed. However, there is no logical reason to treat declaratory statements in a deed which are intended to be contractually binding as less effective than any other express or implied contractual convention. The law as stated by Spencer Bower not only carries the considerable authority of Dixon J, who was a master of the common law, and is supported by earlier authorities to which reference has been made, but more fundamentally it accords with the principle of party autonomy which underlies the common law of contract.

47. Parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them. There are exceptions and qualifications, but these too are part of the general law of contract. In *Greer v Kettle* Lord Maugham referred to fraud, illegality, mistake and misrepresentation. Similarly, just as a court may refuse in some circumstances to enforce a contract on grounds of public policy (a topic closely related to illegality), the same will apply to a contractual convention. So in *Welch v Nagy* [1950] 1 KB 455 the Court of Appeal held that just as parties to an agreement to rent unfurnished premises were not competent to contract out of provisions of the Rent Restriction Acts which protected tenants under such agreements, so a tenant could not be estopped from proving that a tenancy was an unfurnished tenancy by entering into an agreement which described it as a furnished tenancy. The effect of such an estoppel would have been to confer on the courts a jurisdiction which Parliament had said that they should not have, namely an untrammelled power to make orders for possession of unfurnished premises. In short, contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise.

48. In the present case no question of mistake or misrepresentation arises, and it was not part of the Official Trustee's case before Prescott J or the Court of Appeal that the deed of assignment was entered into for a fraudulent or otherwise unlawful purpose.

49. In the Court of Appeal Sir Jonathan Parker said, rightly, that it was not for that court to speculate as to the reasons why the parties acted as they did. However, he also commented that the real purpose of Mr and Mrs Marrache in selling the property to the company must be open to serious question, and that the only inference that could be drawn from their decision to include statements in the deed of assignment which

they knew at the time to be untrue was that the statements were so included in order to conceal the true position.

50. Mrs Marrache has put forward reasons for the parties acting as they did. She has said that the object of the transfer of the property to the company was the mitigation of tax on rental income. She has said that the notional sale price was intended to reflect its true value, should it be decided to sell the property later, and that the reason for contracting on the basis that the property price had been paid was to avoid the cost and inconvenience of raising money which would go round in a circle. These explanations may or may not be truthful, but the issue at this stage is limited to the question whether the winding up petition is genuinely disputed on substantial grounds.

51. As to the various issues of illegality and public policy raised in the Official Trustee's latest written submissions, there may be grounds for asserting that the transaction was illegal or otherwise contrary to public policy, but, if so, the grounds and the relevant facts would need to be properly identified so that the company, or in reality Mrs Marrache, would have a fair opportunity to address them. Take, for example, Mr Cruz's reference to the provisions of the Stamp Duties Act. He has accepted that stamp duty was paid in respect of the sale, but he observes that there has been no evidence to show that the valuation of the property was a true value at the time of the transaction. More pertinently, there is no evidence before the Board to suggest that it was an incorrect valuation.

52. Moreover even if there was some form of illegality, it would be another step to say that the property did not therefore pass on the terms set out in the deed of assignment. (Property may pass under an illegal transaction: *Singh v Ali* [1960] AC 167.) The basis of the Official Trustee's claim is that the deed contained a genuine contract of sale, but he seeks to discard as bogus the part of the document which treats the price as paid. However, there is no principled basis for having it both ways, by splitting the contractual provisions of the deed in that manner.

53. To treat the deed as creating a valid contract but delete the acknowledgement of payment would be to alter significantly the nature of the transaction agreed between the parties.

54. The Official Trustee might have sought to argue that whilst the deed was effective to transfer the legal title to the property, the supposed contract of sale was a sham adopted for an unlawful purpose, and that the company therefore held the property on trust for Mr Marrache as beneficial owner. However, on that analysis the claim would not be for payment of a contract debt, which is the basis of the winding up petition. On the basis that the deed contained a valid contract of sale, the company

is entitled on ordinary contractual principles to rely upon the terms of the deed by which the purchase price was treated as between the parties as having been paid.

55. Mr Cruz complains, understandably, that the defence of estoppel was never argued before Prescott J, and that, although it was argued before the Court of Appeal, that court was not invited to consider the analysis and authorities set out in this judgment. That is relevant to the issue of costs but it cannot affect the proper disposal of the appeal. The Board concludes that the company has substantial grounds for disputing the claimed debt on the basis that the Official Trustee is estopped by the terms of the deed of assignment from asserting that the purchase price has not been paid.

56. That makes it unnecessary to consider the other grounds of appeal. As Latham CJ said in *Grundt* at 658,

> "The line between estoppel, which precludes a person from proving and relying upon a particular fact, and waiver which involves an abandonment of a right by acting in a manner inconsistent with the continued existence of the right, is not always clearly drawn."

57. In the present case the waiver analysis does not fit naturally with the language of the deed of assignment and the Board considers that the Court of Appeal was justified in rejecting the company's argument that there was some form of collateral waiver.

58. On the other ground of appeal, based on the assertion that the alleged debt was not an asset vested in the Official Trustee, the Board sees no error of law in the approach of Prescott J and the Court of Appeal. Whether Mrs Marrache would be entitled to the proceeds of the sale of the property was a contentious matter and in those circumstances it was proper for the Official Trustee to want to collect any debt owed by the company to Mr Marrache, without prejudice to Mrs Marrache's right to assert and establish her claim to be entitled to the money.

59. By reason of the estoppel argument the Board will humbly advise Her Majesty that the appeal should be allowed and the order of Prescott J for the winding up of the company be set aside. The parties should make their submissions on costs within 14 days.