

NOTE

A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—12TH AND 13TH DECEMBER 1957

COURT OF APPEAL—5TH JUNE 1958

Parway Estates Ltd. v. Commissioners of Inland Revenue

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Stamp duty—Conveyance or transfer on sale—Exemption—Transfer between associated companies—Property transferred by subsidiary to principal company after latter had contracted to sell its shares in subsidiary—Vendor of shares required by sale agreement to do certain things before completion—Whether transferee still “beneficial owner” of shares in transferor—Stamp Act 1891 (54 & 55 Vict. c. 39), Sch. 1; Finance Act 1930 (20 & 21 Geo. 5, c. 28), s. 42.

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On 12th January 1956 the Appellant Company agreed to sell to a third party the share capital of a wholly-owned subsidiary which had accumulated losses qualifying for relief from income tax. Under the agreement the Appellant was required before completion to purchase the subsidiary's assets and procure the discharge of its liabilities. Accordingly, on 28th February 1956 two instruments were executed whereby the subsidiary's interests in certain leasehold properties were assigned or transferred to the Appellant. On 29th February 1956 transfers of the shares to the purchaser were executed in consideration of the payment by him of the sum due under the agreement.

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The Appellant Company contended that the transfers relating to the leasehold properties were exempt from ad valorem stamp duty on the ground that when they were executed it (being the transferee) was the beneficial owner of more than 90 per cent. of the issued share capital of the transferor. The Commissioners of Inland Revenue were of opinion that having regard to the terms of the agreement for the sale of the shares the Appellant Company had ceased to be the beneficial owner thereof, and assessed the transfers to ad valorem duty.

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Held, that the equitable and beneficial interest in the shares became vested in the purchaser when the agreement for sale was signed.

CASE

Stated by the Commissioners of Inland Revenue, pursuant to s. 13 of the Stamp Act 1891.

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1. Two instruments, one of which was made between Parr (Builders) Ltd., of the one part, and the Appellant Company, of the other part, and the other of which was made between Parr (Builders) Ltd., of the first part, the Appellant Company, of the second part, and the Cheltenham and Gloucester Building Society, of the third part, and each of which was dated 28th February 1956, were presented on behalf of the Appellant Company to the Commissioners of Inland Revenue under s. 12 of the Stamp Act 1891 for their opinion as to the

stamp duty chargeable upon them. Copies of the two instruments are annexed hereto, marked "A" and "B" respectively, and form part of this Case⁽¹⁾. Exhibit A is an assignment on sale of two leasehold properties. Exhibit B is a Land Registry transfer on sale of two other leasehold properties. A

2. The Appellant Company was incorporated on 1st August 1947 under the Companies Act 1929 as a company limited by shares with a nominal capital of £50,000 divided into 1,000,000 shares of 1s. each. B

3. Parr (Builders) Ltd. was incorporated on 24th May 1944 under the Companies Act 1929 as a company limited by shares with a nominal capital of £5,000 divided into 4,500 preference shares of £1 each and 10,000 ordinary shares of 1s. each. On 12th January 1956, the date of the agreement mentioned in the next succeeding clause hereof, all of the said shares in Parr (Builders) Ltd. had been issued and had been fully paid up. 4,493 of the preference shares and all of the ordinary shares were registered in the name of the Appellant Company. C
The remaining seven preference shares were registered in the names of nominees for the Appellant Company.

4.(a) By an agreement dated 12th January 1956 (hereinafter called "the share agreement") made between the Appellant Company, of the first part, Otto Sputz and Peter John Phillips, of the second part, and Robert Ashley Peck (hereinafter called "Mr. Peck") of the third part, the Appellant Company agreed to sell to Mr. Peck the whole of the share capital of Parr (Builders) Ltd., that is to say, 4,500 preference shares of £1 each and 10,000 ordinary shares of 1s. each, together with the whole of the indebtedness of Parr (Builders) Ltd., to the Appellant Company, in consideration of the payment by Mr. Peck to the Appellant Company of a sum to be calculated in the manner mentioned in clauses 1 and 2 thereof. D
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(b) By clause 3 of the share agreement it was provided that the transaction thereby effected should be completed on 21st January 1956.

(c) By clause 4 of the share agreement it was provided that on or before the date thereinbefore fixed for completion the Appellant Company would procure the purchase from Parr (Builders) Ltd. at the expense of the Appellant Company of all the assets of Parr (Builders) Ltd. detailed in the schedule thereto, at a price calculated in the manner set out in the schedule and to be paid by means of a reduction in the amount of the indebtedness shown to be due from Parr (Builders) Ltd. to the Appellant Company. F

(d) By clause 5 of the share agreement it was further provided that on or before the date thereinbefore fixed for completion the Appellant Company would procure the discharge by Parr (Builders) Ltd. of all liabilities due by that company whatsoever (with the sole exception of certain loans due by that company to the Appellant Company) and the release of that company of its covenants to its mortgagees, and would procure the execution by the holder of every debenture in Parr (Builders) Ltd., whether fixed or floating, of every document necessary to effect the immediate discharge of such debenture and should duly cause to be registered with H.M. Companies Registry a memorandum of satisfaction of every such debenture. G
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(1) Not included in the present print.

A (e) A copy of the share agreement is annexed hereto, marked "C", and forms part of this Case⁽¹⁾.

5. The provisions of clause 3 of the share agreement were varied by mutual consent, and completion of the transaction thereby effected was postponed until 29th February 1956.

B 6. On 28th February 1956 Parr (Builders) Ltd. assured or transferred to the Appellant Company the four properties referred to in the schedule to the agreement under the sub-heading "Fixed Assets", viz., nos. 19 and 97 Westbourne Terrace, 14 Holland Park Road and 6 Melbury Road. Nos. 19 and 97 Westbourne Terrace were assigned by one of the instruments presented for adjudication (exhibit A) and no. 14 Holland Park Road and no. 6 Melbury Road were transferred by the other instrument presented for adjudication (exhibit B).

C The consideration for the assignment of nos. 19 and 97 Westbourne Terrace was expressed to be the sum of £27,279, the receipt whereof Parr (Builders) Ltd. acknowledged in the assignment (exhibit A). The consideration for the transfer of no. 14 Holland Park Road and no. 6 Melbury Road was expressed to be the sum of £15,118 15s. 4d., the receipt whereof Parr (Builders) Ltd. acknowledged in the transfer (exhibit B), and the covenants on the part of the Appellant

D Company thereafter contained, one of which was with The Cheltenham & Gloucester Building Society to pay all principal moneys and interest secured by the charge therein referred to, which at the date of transfer amounted to the sum of £24,705 4s. 5d. The said cash considerations were in fact satisfied by the corresponding reduction in the amount of moneys due on loan account from Parr (Builders) Ltd. to the Appellant Company.

E 7. On 29th February 1956 the Appellant Company, pursuant to the share agreement (exhibit C), transferred or caused to be transferred to Mr. Peck the whole of the share capital of Parr (Builders) Ltd. in consideration of the payment by Mr. Peck of a sum calculated in accordance with the relevant provisions of the share agreement.

F 8. Also annexed hereto⁽¹⁾ is a copy of a statutory declaration (exhibit D) declared on 19th March 1956 by Barry Karsberg, a solicitor employed by the firm of A. Kramer & Co., the solicitors for the Appellant Company.

G 9. As appears from the statutory declaration (exhibit D), the Appellant Company contended that neither of the instruments presented for adjudication was liable to ad valorem stamp duty under or by reference to the head "Conveyance or Transfer on Sale" in Sch.1 to the Stamp Act 1891, as (according to its contentions) (*inter alia*) the effect of each of the said instruments was to convey or transfer a beneficial interest in property from one company with limited liability, namely, Parr (Builders) Ltd., to another such company, namely, the Appellant Company, and the Appellant Company was at the relevant time beneficial owner of not less than 90 per cent. of the issued share capital of Parr (Builders) Ltd. The Appellant Company therefore contended that the relief granted by s. 42 of the Finance Act 1930 was applicable.

H 10. The Commissioners were of opinion that the relief from ad valorem "Conveyance on Sale" duty which had been claimed did not apply in this case.

(1) Not included in the present print.

The Commissioners were not satisfied as regards either instrument that at the relevant time the Appellant Company was beneficial owner of not less than 90 per cent. of the issued share capital of Parr (Builders) Ltd., or not less than 90 per cent. of the issued share capital of each of the companies was in the beneficial ownership of a third company. Having regard to the terms of the share agreement, the Commissioners took the view that at the relevant time the Appellant Company had ceased to be the beneficial owner of the shares thereby agreed to be sold. A
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11. The Commissioners accordingly assessed the stamp duty on the instruments presented for adjudication as follows:

On the assignment (exhibit A), ad valorem "Conveyance on Sale" duty on £27,279	£ 546 0. 0	
On the transfer (exhibit B), ad valorem "Conveyance on Sale" duty on		C
(a) the cash consideration of £15,118 15s. 4d. and		
(b) the mortgage debt assumed, amounting to £24,705 4s. 8d.	£797 0. 0	
	£1,343 0. 0	

The amount of the mortgage debt assumed was in fact £24,705 4s. 5d. and not £24,705 4s. 8d. as stated in the assessment. D

12. Being dissatisfied with the assessments made, and having paid the duty in accordance with those assessments, the Appellant Company has in pursuance of s. 13 of the Stamp Act 1891 asked the Commissioners to state and sign a Case setting forth the question upon which their opinion was required and the assessments made by them, and the Commissioners do hereby state and sign this Case accordingly. E

13. The questions for the opinion of the Court are:—

- (1) whether the instruments presented for adjudication are liable to the duty assessed by the Commissioners;
- (2) if not, with what duty (if any) the instruments are chargeable.

Given under the hands of the Commissioners this 26th day of June 1957. F

R. Willis.

W. W. Morton.

The case came before Upjohn J. in the Chancery Division on 12th and 13th December 1957, when judgment was given in favour of the Crown, with costs.

John Pennycook Q.C. and *J.P. Warner* for the Company. G

Hilary Magnus Q.C. and *E. B. Stamp* for the Crown.

Upjohn J.—This is an appeal by way of Case Stated under s. 13 of the Stamp Act 1891, having relation to the assessment by the Commissioners of Inland Revenue of stamp duty on two transfers both dated 28th February 1956, which were assessed to ad valorem stamp duty as conveyances on sale. The whole point

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(Upjohn J.)

turns, in fact, upon s. 42 of the Finance Act 1930, which grants relief from stamp duty in the case of transfers of property as between associated companies. I will read that section forthwith:

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“(1) Stamp duty under the heading ‘Conveyance or Transfer on Sale’ in the First Schedule to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies: Provided that no such instrument shall be deemed to be duly stamped unless either it is stamped with the duty to which it would but for this section be liable, or it has in accordance with the provisions of section twelve of the said Act been stamped with a particular stamp denoting either that it is not chargeable with any duty or that it is duly stamped. (2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company and (b) that either (i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company”.

I need not read the alternative, which has no application.

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Now the whole point I have to consider is whether at the date of the transfers I have mentioned one of the companies can properly be said to be the beneficial owner of not less than 90 per cent. of the issued share capital of the other company. The two companies concerned were the Appellant, Parway Estates Ltd., and Parr (Builders) Ltd. Parway Estates Ltd. undoubtedly immediately before 12th January 1956 was the owner of all the shares of the company known as Parr (Builders) Ltd. That latter company had an issued capital of 4,500 preference shares of £1 each and 10,000 ordinary shares of 1s. each. The Appellant Company was, immediately before 12th January 1956, registered as the proprietor of the whole of the ordinary shares and all but seven of the preference shares, the remaining seven preference shares being in the names of nominees.

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On 12th January 1956 the Appellant Company entered into a contract for a sale of all these shares. The circumstances were a little unusual. Parr (Builders) Ltd., as its name implies, carried on the business of building contractors, and it seems to have done so with a singular lack of success, so much so that it had substantial income tax losses to its credit. Now it is known that that, curiously enough, is quite an attractive asset, because, if you can buy the shell of a company with a series of income tax losses and make it do a profitable business in the future, you can earn some nice tax-free profits because you can set them off against the losses. This transaction was of that type. The Appellant Company were going to sell, to a gentlemen of the name of Peck, this company with its income tax losses. Of course what you had to do was to strip the company of all its assets, make it discharge all its liabilities, and sell it as a mere shell with a

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history of income tax losses. That is what this agreement did. The Appellant Company apparently was a creditor for a very substantial amount, and therefore the transaction took this form. The parties were Parway Estates Ltd. (who were called “the vendors”), two gentlemen who were joined as sureties, of the second part, and Mr. Peck, the purchaser, of the third part.

(Upjohn J.)

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I need not read the recitals. The first operative paragraph says that the vendors agreed with the purchaser for the sale of the whole of the share capital of the company, that is, Parr (Builders) Ltd.—and then it sets them out—and also:

“the whole of the indebtedness of the Company to the Vendors as is calculated as hereinafter appears in consideration of the payment by the Purchaser to the Vendors of a sum equivalent to 12½% of the net taxation loss of the Company as at the 31st December 1955 as calculated in accordance with Paragraph 2 hereof less the sum of £300”.

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That was defined as “the purchase price”. Paragraph 2 merely provided this: that the net taxation loss was taken as £27,000 and the purchase price was to be 12½ per cent. on that; but it was realised that there might be some alterations, and so a provision is made for adjustment should the net taxation loss have reached a different figure to be certified by the accountants. By para. 3 the transaction was to be completed on 21st January 1956. Paragraph 4 provided that the vendors would purchase from the company all the assets of the company as detailed in the schedule, and provision was made for calculating the price. That was to be paid by a reduction in the indebtedness of the company to the vendor. Then, in para. 5, the vendors were bound to procure the discharge by the company of all liabilities due by it and to secure the discharge of debentures, mortgages and so forth. Paragraph 6 made provision for the amount of the indebtedness of the company to be calculated in a certain way. I need not read that clause. Paragraph 7 contains certain warranties and representations. Paragraph 8 contained an undertaking by the vendors to indemnify the company and the purchaser against all actions, proceedings, claims and demands arising out of any breach or non-observance or non-performance of the representations and warranties. Paragraph 9 provided that the vendors should do certain things on the completion. That was in effect to put Mr. Peck and his nominees in control of the company. Finally, there was a covenant by the sureties guaranteeing performance.

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That was the contract, and pursuant to that contract the transfers which I have mentioned were executed. They were, in effect, transfers of certain of the properties set out in the schedule to the agreement which, by para. 4, the vendors were going to purchase; so there was undoubtedly a transfer of certain properties belonging to the company to its parent company, the Appellants. By mutual agreement the completion date was postponed until 29th February 1956. It was on 28th February that these transfers of the company's property were executed and tendered for stamping. On the next day the shares, the subject-matter of the agreement, were transferred to Mr. Peck and, no doubt, the indebtedness was also assigned.

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Those are the facts. Upon those facts I have to determine whether it is proper to say that at the time of the transfer the Appellant Company was the beneficial owner of not less than 90 per cent. of the issued share capital of the other company, that is Parr (Builders) Ltd. Of course it was the legal owner, but, with all respect to the argument that has been addressed to me, I should have thought it was perfectly plain that it was a misuse of legal language to describe the Appellant Company as then the beneficial owner of these shares,

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(Upjohn J.)

for they had by that unconditional contract, of which specific performance, it seems to me, would plainly have been granted, if necessary, contracted to sell them, and the sale was indeed completed upon the next day. However, it was submitted that, in fact, the equitable interest in the property did not pass until completion on 29th February and that until that time it was proper to describe the Appellant Company as the beneficial owner of the shares.

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It is said that the doctrine of conversion in equity depends on the principle that equity regards as done that which ought to be done, and much reliance was placed on a passage in the speech of Lord Atkinson in *De Beers Consolidated Mines Ltd. v. British South Africa Co.* [1912] A.C. 52, at pages 65–6. He said this:

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“Much reliance was placed by counsel for the company in argument on the application to the agreement of December 7, 1892, and especially to its first paragraph, of the well-known doctrine of courts of equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, to be done.”

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It is said here, having regard especially to paras. 4 and 5 of the agreement, that the vendors had certain rights: they were entitled to purchase certain assets in reduction of the indebtedness of Parr (Builders) Ltd.; they were bound to procure the discharge of certain other indemnities. It is said that on 12th January there could be no equitable vesting of these shares in the purchaser because he had not contracted to purchase those shares in that state, for, it was said, on 12th January Parr (Builders) Ltd. had certain assets and certain liabilities and those were to be taken over by the vendors, and therefore nothing passed to the purchaser on that date.

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I am quite unable to accept that view. It seems to me in accordance with principle and authority that the contract is plainly a type of contract of which at an appropriate time and in appropriate circumstances specific performance would be decreed, and therefore, upon the execution of the contract, which was an absolute and unconditional contract—and that at once serves to distinguish the other case of *Counter v. Macpherson* (1845) 5 Moo. P.C.C. 83, upon which much reliance was placed—the equitable interest in the shares vested in the purchaser, of course subject to and with the benefit of the terms of the agreement. I, for myself, find no difficulty in that conception of the law.

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It is plain, I would have thought, that, if on 13th January the vendors had utterly repudiated the contract, the purchaser could have sued for damages for anticipatory breach. That is familiar law, to be found in *Frost v. Knight* (1872) L.R. 7 Ex. 111, at page 114; and if he could have sued in law, he could, it seems to me, on principle, have issued his writ for specific performance although the time for completion had not arrived. Whether, however, he would have had to wait until the date for completion before suing for specific performance I need

(Upjohn J.)

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not consider, because it is perfectly plain that he could on 13th January, on hearing of the repudiation, have issued a writ restraining the vendors from acting in relation to the shares and in relation to the building company otherwise than in accordance with the contract.

It seems to me, therefore, that, even taking the most technical view of the whole matter, it is not right to describe the vendors at the date of the transfer as the equitable owner. However, I rest my judgment in the main on this: that when you look at the words "beneficial owner" in s. 42 of the Finance Act 1930, those words must in my judgment be construed in what has been described in connection with another Statute as "its ordinary or popular sense": see *English Sewing Cotton Co. Ltd. v. Commissioners of Inland Revenue* (1946) 62 T.L.R. 608, at page 610. I do not further refer to that case, for it was dealing with a different Statute. But when one looks at the facts of this case, and asks oneself was the Appellant Company in its popular or ordinary sense the beneficial owner of the shares on 28th February 1956, there can only be one answer to that question: it was not; it was bound by contract to transfer them to another the very next day.

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The appeal is dismissed with costs.

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Magnus Q.C.—Would your Lordship, in your Lordship's Order, provide that the duty as assessed by the Commissioners be confirmed under s. 13?

Upjohn J.—I confirm the assessment. Stamp duty has been paid.

The Company having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Parker and Pearce L.JJ.) on 5th June 1958, when judgment was given unanimously in favour of the Crown, with costs.

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John Pennycuick Q.C. and *J. P. Warner* for the Company.

Hilary Magnus Q.C. and *E. B. Stamp* for the Crown.

Jenkins L.J.—This is an appeal from a judgment of Upjohn J., dated 13th December last year, whereby he affirmed a decision of the Commissioners of Inland Revenue to the effect that ad valorem stamp duty was payable upon two conveyances or transfers. Those conveyances or transfers transferred certain leasehold properties from a company called Parr (Builders) Ltd. to a company called Parway Estates Ltd. Parway Estates Ltd. is the present Appellant, and contends that ad valorem stamp duty was not exigible on these documents in as much as the case fell within the exemption afforded by s. 42 of the Finance Act 1930.

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That section, so far as material, is in these terms:

"*Relief from transfer stamp duty in case of transfer of property as between associated companies.* 42—(1) Stamp duty under the heading 'Conveyance or Transfer on Sale' in the First Schedule to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies". Then there

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(Jenkins L.J.)

is a proviso with which I need not trouble. The enactment continues: “(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company; (b) that either—(i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company”.

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Then there is an alternative where a third company holds not less than 90 per cent. of the shares of two other companies; that case does not apply here.

Now it is not in dispute and is not open to doubt that down to 12th January 1956 the Appellant, Parway Estates Ltd., did own the whole of the issued share capital of Parr (Builders) Ltd., but the view of the Commissioners, upheld by the learned Judge, was to the effect that at the date of the actual transfers Parway Estates Ltd. had ceased to be beneficial owner of the share capital of Parr (Builders) Ltd. by virtue of an agreement for sale dated 12th January 1956. The two documents, the stamp duty on which is in question in this case, were dated 28th February 1956. If, therefore, the Commissioners’ view is accepted, it follows that the beneficial interest in the shares had ceased to be held by Parway Estates Ltd. on 12th January 1956, and accordingly that at the date of those transfers the condition of exemption required by s. 42 was not fulfilled.

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I should next refer to the agreement of 12th January 1956, because I think the case really turns entirely on the construction of that agreement. It was made between Parway Estates Ltd. and two gentlemen, Mr. Otto Sputz and Mr. Peter John Phillips, as sureties, of the second part—they have no concern with this case—and Robert Ashley Peck, who was the purchaser, of the third part. The agreement goes on to recite the particulars of the capital of Parr (Builders) Ltd., with which I need not trouble. Then there is a recital:

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“(2) The Vendors” [that is Parway Estates Ltd.] “and their nominees are the owners of the whole of the said share capital of the Company. (3) The Company is indebted to the Vendors for monies advanced by the Vendors to the Company in a sum which as at the 31st day of December 1955 stood at a total of” blank pounds. That presumably was at some stage filled in. Then there is a recital that: “(4) The Company since the 24th May 1944 has carried on the business of building contractors”

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and, to put it shortly, that the company had made losses with the result that it had a net tax loss of approximately £27,000 on 21st December 1955. The next recital is:

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“(5) With the object of improving the financial position of the Company the Purchaser is desirous of purchasing for himself and his nominees the whole of the issued share capital in the Company. (6) The Vendors have agreed with the Purchaser for the sale to him of all the issued share capital of the Company and have further agreed for the assignment to the Purchaser of the said debt owing by the Company to them upon the terms and subject to the conditions herein contained.”

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(Jenkins L.J.)

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Then comes the operative part of the agreement:

“(1) The Vendors hereby agree with the Purchaser for the sale to him of the whole of the share capital of the Company that is to say”—then the details of the share capital are set out; I do not think I need trouble with them—“together with the whole of the indebtedness of the Company to the Vendors as is calculated as hereinafter appears in consideration of the payment by the Purchaser to the Vendors of a sum equivalent to 12½% of the net taxation loss of the Company as at the 31st December 1955 as calculated in accordance with Paragraph 2 hereof less the sum of £300 (hereinafter called ‘the Purchase Price’)”.

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Then in para. 2 there is a provision as to the calculation of the price. I do not think anything turns on that. There is a provision in para. 3 for completion “on or before the 21st day of January 1956.” That date was later postponed by agreement to 29th February 1956. Then come two paragraphs which have taken a prominent part in the argument:

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“4. The Vendors will on or before the date hereinbefore fixed for completion procure the purchase from the Company at the Vendors expense of all the assets of the Company as detailed in the Schedule hereto at a price to be calculated in accordance with the principle as to calculation set out in the said Schedule and to be paid by means of an equivalent reduction in the amount of the indebtedness shown to be due from the Company to the Vendor. 5. The Vendors will on or before the date hereinbefore fixed for completion procure the discharge by the Company of all liabilities due by the Company whatsoever (with the sole exception of the said loans due by the Company to the Vendors) and the release by the Company of its covenants to its mortgagees and will at their own expense procure the execution by the holder of every debenture in the Company whether fixed or floating of every document necessary to effect the immediate discharge of such debenture and shall duly cause to be registered with H.M. Companies Registry a Memorandum of Satisfaction of every such debenture.”

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There is a provision in para. 6 as to the calculation of the amount of indebtedness of Parr (Builders) Ltd. to the vendors. In para. 7(a) there is a warranty by the vendors that there will be no changes in the structure of the share capital of Parr (Builders) Ltd. In para. 7(b) they

“warrant and represent that there are and will be at the date of the completion of this agreement no unperformed contracts of the Company.”

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In para. 10:

“The parties hereto hereby agree to do all such acts and things and to execute all such further documents as may be necessary for the due performance of this agreement.”

I think those are all the passages in the agreement to which I need refer.

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The transaction was a curious one, though, I understand, not uncommon in these days, in that its object appears to have been to make over to Mr. Peck this company divested of all its assets and liabilities save for a useful asset of

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(Jenkins L.J.)

a rather peculiar character, namely, the amount of the tax loss. But the intentions underlying this agreement are not, I think, material for the present purpose: the question is whether the agreement on its true construction had the effect of divesting Parway Estates Ltd. of its beneficial interest in the shares of Parr (Builders) Ltd. before the two documents of 28th February 1956 were executed.

B As I have said, completion of the agreement for the sale of the shares was postponed to 29th February 1956. Completion in fact took place on that day, but it follows that the vital transfers were executed the day before completion of the agreement for sale of the shares, or just within the time when that agreement still rested incomplete.

C I do not think there is anything in the details of the two conveyances or transfers. One was a transfer off the register of 19 Westbourne Terrace and 97 Westbourne Terrace; the other was a registered transfer of 14 Holland Park Road and 6 Melbury Road. The consideration in respect of the Westbourne Terrace property was £27,000 odd, and in respect of the Holland Park and Melbury Road properties it was £15,000 odd together with the assumption by Parway Estates Ltd. of the liability for a mortgage of £24,000. Those transfers
D were in accordance with the provisions of the agreement for sale of the shares.

E I think those are all the relevant facts, and I should now return to the agreement. I have already read its material provisions and I need not, I think, refer to them again in detail. Mr. Pennycuick, for Parway Estates Ltd., puts his case in this way. He does not dispute that an agreement for the sale and purchase of shares such as these is an agreement of a kind of which the Court will grant specific performance. He further agrees that an agreement of this sort entered into in unconditional terms has the effect of vesting the property sold, that is to say, the shares in this case, in point of beneficial interest in the purchaser from the date on which the contract is executed although completion may be fixed for some more distant date. But, says Mr. Pennycuick, this is not an unconditional contract for sale; before the obligations of the parties, on the one hand to sell and on the other hand to buy, become effective,
F there are in the provisions of this agreement certain obligations imposed on the vendors which they must first perform; and it is said that those obligations are imposed by paragraphs 4 and 5. Mr. Pennycuick puts these obligations as conditions which have to be fulfilled before there is a contract for sale and purchase which can have the effect of transferring the beneficial interest.

G I must refer again to those two paragraphs. The first of them reads:

“The Vendors will on or before the date hereinbefore fixed for completion procure the purchase from the Company at the Vendors expense of all the assets of the Company as detailed in the Schedule hereto at a price to be calculated in accordance with the principle as to calculation set out in the said Schedule and to be paid by means of an equivalent reduction in the amount of the indebtedness shown to be due from the Company to the Vendor.”
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The other reads:

“5. The Vendors will on or before the date hereinbefore fixed for completion procure the discharge by the Company of all liabilities due by the Company whatsoever”

(Jenkins L.J.)

—and that is developed in detail by referring to mortgages, debentures and so forth. Mr. Pennycuick says that these are in the nature of conditions with the result I have mentioned. Of course I think it is really reasonably plain that, if one has a contract of sale and purchase which is expressed to be conditional on the happening of some event—the procuring of some consent or something of that sort—the contract for sale and purchase is in abeyance until such time as the condition is fulfilled, though it may well be that there might be a repudiation even before the condition was fulfilled if one of the parties announced they were never going to perform the contract whether the condition was fulfilled or not. But that is not, as I understand it, this case. I cannot see that either of these paragraphs are conditions precedent.

Mr. Pennycuick referred us to a passage cited in the judgment of Upjohn J. from the speech of Lord Atkinson in *De Beers Consolidated Mines Ltd. v. British South Africa Co.* [1912] A.C. 52, at pages 65–6:

“Much reliance was placed by counsel for the company in argument on the application to the agreement of December 7, 1892, and especially to its first paragraph, of the well-known doctrine of courts of equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, to be done.”

Mr. Pennycuick says that there is no room here for the application of the doctrine of conversion, or, in other words, the maxim that equity looks on that as done which ought to be done, so long as the vendors' obligations set out in paras. 4 and 5 of the agreement remained unperformed. As I understand it, he admitted that the purchaser might, if so minded, enforce the contract while the vendors were still in default under paras. 4 and 5, but said that the vendors on their side could not enforce it until they performed their part of the bargain, and adduced from the vendors' inability to enforce it until then that the doctrine of conversion could not apply. I do not altogether follow that argument. It appears to me that for the present purpose the material matter is the position of the purchaser. If the purchaser has a contract for the purchase by himself of shares which he can enforce against the legal owner of those shares, I should have thought one is coming near to saying that the vendors have become trustees of the shares for the purchaser on the strength of the purchaser's right to call for specific performance.

Mr. Pennycuick referred us in particular as aiding his case to *Counter v. Macpherson* (1845) 5 Moo. P.C.C. 83. That was a most unusual case. The facts are stated at very great length, but I think they probably appear sufficiently for the present purpose from the headnote.

“Agreement for a lease for five years, from the 1st of April, 1840, the landlord undertaking to erect, by that time, a new warehouse, on part of the ground to be demised, and to put the old warehouse in repair, the amount

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(Jenkins L.J.)

of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on the 1st of April, but no objection was made by the intended lessees, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire.

B

In such circumstances,—Held, upon a Bill filed by the landlord, for specific performance of the agreement, and for the defendants to rebuild the premises, and to accept a lease; that it was a condition precedent that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity, and the Bill dismissed.”

C

Mr. Pennycuick submits that that case is in point here because, he says, it was a case in which something had to be done to the subject-matter of the bargain before the bargain was to take effect. The landlord undertook to erect a new warehouse on part of the ground and to put the old warehouse in repair; there was to be a lease from April 1840, but the rent payable under that lease was to depend upon the landlord's expenditure on the buildings.

D

Mr Pennycuick said that was so here: until the vendors had done what they undertook to do under paras. 4 and 5 there was no effective agreement for sale, any more than there was an effective agreement for a lease in the case just cited.

E

With respect, this case appears to me to be very far removed from *Counter v. Macpherson*⁽¹⁾. In that case apparently the landlord had, in effect, to bring into being the subject-matter of the lease before the lease was to be granted; in the present case the subject-matter of the sale is the share capital of Parr (Builders) Ltd. The subject-matter of these obligations in paras. 4 and 5 of the agreement consists of certain properties and liabilities of Parr (Builders) Ltd. The performance by the vendors of those obligations no doubt had its effect on the value of the shares, but it did not alter the fact that the agreement was an

F

agreement for the sale and purchase of the shares and nothing else. It does not appear to me, looking at this agreement, that, upon its true construction, it imposes any conditions the fulfilment of which is a necessary preliminary to any effective agreement for sale and purchase. Of course, there were in any case certain obligations which the vendors undertook and had to perform before they could call upon the purchaser to pay the purchase money. The vendors

G

had to deliver the shares and show a good title to them; unless and until they did that the purchaser could not be compelled to pay his money. There are mutual obligations as in any contract.

H

The contract was for the purchase of the shares on the terms stated in the agreement, and the vendors agreed not only to sell the shares but also to do the things mentioned in paras. 4 and 5. In as much as Parway Estates Ltd. were at that time the legal owners of all the shares in Parr (Builders) Ltd., there could be no doubt but that they, the vendors, would be able to do all the things mentioned in paras. 4 and 5, so this is not a case where the performance of a contract depends on the vendors' doing something which it is beyond their

(1) 5 Moo. P.C.C. 83.

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powers to do. I cannot see that paras. 4 and 5 are conditions in the sense of that expression as used by Mr. Pennycuik, any more than the obligation to deliver the shares on the day fixed for completion is a condition in that sense. No doubt, as I have said, the purchaser could refuse to pay the purchase price until the shares were delivered and a good title shown; equally, he could refuse to pay the purchase price if the vendors failed to perform that other part of the vendors' bargain which is contained in paras. 4 and 5. But this does not mean that this agreement is taken out of the well-established general principle that, once a contract for sale is executed, the subject-matter—the shares in the present case—becomes in equity the property of the purchaser. If that doctrine was excluded from every contract where the vendors assumed certain obligations to be performed on or before the date fixed for completion it would be reduced indeed to very narrow limits.

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C

The point is not one which admits of any great elaboration, but I cannot see any reason here for excluding the general rule, and if the general rule applies so that Mr. Peck, the purchaser, becomes by virtue of the agreement the owner in equity of the shares in question, then, in my view, it necessarily follows that at the date of the two transfers the Appellant Company, Parway Estates Ltd., was not the beneficial owner of the share capital of Parr (Builders) Ltd. No doubt the Appellant Company was the legal owner and the registered proprietor, but the equitable or beneficial interest in the shares had vested in the purchaser.

D

I need only add that I find myself in complete agreement with the learned Judge, who reached the same conclusion as I have done; that is, with one qualification, In the last paragraph of his judgment the learned Judge said this⁽¹⁾:

E

“However, I rest my judgment in the main on this: that when you look at the words ‘beneficial owner’ in s. 42 of the Finance Act 1930, those words must in my judgment be construed in what has been described in connection with another Statute as ‘its ordinary or popular sense’ ”.

Then there is a reference to *English Sewing Cotton Co. Ltd. v. Commissioners of Inland Revenue* (1946) 62 T.L.R. 608. Speaking for myself, I find it difficult as at present advised to derive any assistance from consideration of what the ordinary person would understand by the words “beneficial owner” in their ordinary sense. I am open to conviction, but *prima facie* it seems to me difficult to ascribe any different meaning to those words from their legal meaning, and that little assistance can be derived from speculation as to what an ordinary person would take them to mean in their popular sense. For my part, I prefer to found myself on the ground that there is nothing in this agreement to take the case out of the general rule, under which there is no doubt that the equitable interest in the shares became vested in the purchaser when the agreement of 12th January 1956 was signed.

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For these reasons, I would dismiss this appeal.

H

(1) See page 142 *ante*.

A **Parker L.J.**—I entirely agree and have nothing to add.

Pearce L.J.—I agree.

Magnus Q.C.—Will the appeal be dismissed with costs?

Jenkins L.J.—I am afraid you cannot resist it, Mr. Pennycuick.

Pennycuick Q.C.—No, my Lord, I cannot resist it.

[Solicitors:—A. Kramer & Co.; Solicitor of Inland Revenue.]

