Neutral Citation Number: [2019] EWHC 475 (Ch)

Case No: HC-2016-000441

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch.D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/03/2019

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

SIMER KAUR DHILLON	**Claimant**
- and -	
(1) BARCLAYS BANK PLC	
(2) CHIEF LAND REGISTRAR	**Defendants**

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- -

Mr Christopher McCarthy (instructed by **Rainer Hughes, Solicitors**) for the **Claimant**
Mr Timothy Polli QC (instructed by **Dentons UK and Middle East LLP**) for the **First Defendant**
Mr Nicholas Trompeter (instructed by **Government Legal Department**) for the **Second Defendant**

Hearing dates: 12-14 February and 12 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by which the claimant seeks an order directing the rectification alternatively alteration of the register maintained by the second defendant ("CLR") for a property at 47 Moresby Road, London E5 9LE ("Property") pursuant to Paragraph 2 of Schedule 4 to the Land Registration Act 2002 ("LRA") by deleting the entry in the Charges Register made on 20 November 2002 relating to a legal charge originally granted by Crayford Estates Limited ("CEL") to Woolwich Plc, to which the first defendant ("BB") has succeeded ("BB Charge"). Hereafter I do not distinguish between Woolwich Plc and BB, since nothing material turns on the distinction, other than in relation to BB's contention that these proceedings constitute an abuse of process.

2. The claimant maintains that the transfer of the Property to CEL was void by reason of her signature as registered proprietor having been forged on the transfer document by which what she contends to be her title to the Property was transferred to CEL and that although the Charge was valid as between CEL and BB, its entry should be removed from the Property's charges register because it is derived from the allegedly fraudulent transfer to CEL. Both defendants oppose the claim on a variety of different procedural and substantive grounds.

3. In addition, the CLR maintains that if the BB Charge is to be removed then that alteration would not be a rectification within the meaning of LRA, Schedule 4, Paragraph 1. The CLR is concerned about this point because rectification (but not mere alteration) will expose the CLR to a claim for an indemnity by BB under the statutory compensation scheme contained in LRA, Schedule 8. BB maintains that such an alteration would be a rectification entitling it to an indemnity under the scheme. For reasons that have not been explained, BB has not counterclaimed for an indemnity from the CLR in the alternative to its defence to the claim. BB submits in those circumstances that if I conclude that it is at least realistically arguable that such an alteration would not be a rectification then that would be an exceptional circumstance within the meaning of the Sched. 4 scheme that would justify not making the alteration sought. I return to this issue in more detail later in this judgment.

4. BB counterclaims against the claimant for a declaration that it is entitled to be subrogated either to the first charge or an unpaid vendor's lien arising prior to the allegedly fraudulent transfer to CEL in the event that the entry relating to the BB Charge is removed from the Property's Charges Register.

5. The trial took place between 12 and 14 February 2019. The only witness was the claimant. For reasons that I explain in detail below, I have concluded that the claimant's evidence is unreliable and in consequence I should be very cautious before accepting the evidence of the claimant save where it is admitted, corroborated by contemporaneous documentation or is against her interest.

Factual Background and Findings

6. At all material times prior to 3 October 2002 the Property was registered in the names of the Mayor and Burgesses of the London Borough of Hackney ("Hackney") and was occupied by the claimant as a secure tenant from no later than 26 August 1993. She shared occupation of the property with her second husband, Mr Shaukat Hussain ("Mr. Hussain") and her children.

7. The claimant maintained before me that she was and is unable to speak or write English (other than her name), that the only language she speaks is Punjabi but that she was and is unable to read or write that language. She gave her evidence throughout via an interpreter. Her assertion that she is unable to speak English is impliedly contradicted by an affidavit sworn by the claimant in earlier proceedings commenced by her against the Crown Estate Commissioners and BB relating to the freehold title of the Property ("the Title Transfer proceedings"), where she says only that she is unable to read or write English. I explain the significance of these proceedings later in this judgment. The claimant's assertion that she cannot now read or write English is contrary to an assertion contained in her statement in these proceedings. Both the statement and the earlier affidavit are written in English not Punjabi and signed by her. Although she maintains that the statement and affidavit were translated and read over to her in Punjabi before she signed them, there is no evidence that is so other than her oral evidence.

8. The claimant's first husband had died some years prior to the events with which these proceedings are concerned. The claimant claims that he left her various properties located in India although there is no documentation or other evidence apart from the claimant's assertion that this is so. There is no mention of this point in her statement filed in these proceedings or in her affidavit sworn in the Title Transfer proceedings. She maintains that at all times down to 3 October 2002 and thereafter she was in receipt of benefits but she was unable to tell me what benefits she was in receipt of. She said in the course of her evidence that the properties in India left to her by her first husband were sold and the proceeds transferred to her in England. She was unable to give any evidence as to when this is alleged to have happened, nor was she able to explain how the properties were realised and the proceeds transferred to the UK. The claimant suggested that the sum she received totalled about £80,000. It was not suggested by either defendant that the transfer of such a sum from India to the UK either violated Indian Exchange Control legislation or could have been effected only with the consent of the Reserve Bank of India. It was suggested to her however that she would have been obliged to report such a receipt to the UK government agencies that paid her benefits. Having been given a warning against incrimination by me on the application of her counsel before answering this question, the claimant then told me that the sum was not all for her, that the part she received was about £10,000 and the remainder belonged to and was divided equally between her five children.

9. Given that there is (a) no mention of the fact of this receipt in either the claimant's statement or earlier affidavit, (b) there is no corroboration in the form of bank statements or any other contemporaneous documentation nor (c) any evidence offered by any of the claimant's children that corroborates her assertion that each was entitled to receive and received some of the money allegedly derived from their late father's property in India, I reject her evidence that she received funds from India as she alleges (whether for herself alone or for herself and her children) as being untrue and

recent invention. Whilst I acknowledge that she maintains that many of her documents were lost in the circumstances referred to below, it is inherently improbable that the properties said to be in India could have been realised without generating a paper trail involving lawyers, land agents, personal representatives and banks. Whilst it may be true to say that any documents held by third parties would have been destroyed by now that was much less likely to have been the case in 2003 when this dispute first arose. Indeed, had there been any truth in the point I am now considering, it is inherently probable that the claimant would have asserted it when first she instructed solicitors in 2003 and documentation to support it could and would have been obtained from relevant third parties by those solicitors even if the claimant no longer had such documentation. I return to the significance of this untrue assertion and the probable reasons for it later in this judgment. My conclusion on this issue is one of the reasons why I conclude that I must be cautious before accepting the claimant's evidence other than when it is admitted, against her interest or corroborated.

10. It is common ground that by 1999, the claimant had acquired a right to buy the Property under s.118 of the Housing Act 1985. The claimant claimed in her evidence that she sought to exercise that right by notice given to Hackney, which she maintains she completed with the help of her daughter. The claimant's case is that Mr Hussain fraudulently hijacked her application to exercise her right to buy at some stage thereafter and in the course of doing so forged her signature on a number of documents. I address this in more detail below. For present purposes it is necessary to note only that Mr Hussain was arrested, charged and convicted of offences apparently arising out of these events. In the course of the police investigation various interviews were conducted. One was of the claimant by Detective Constable Syria Hussain ("DC Hussain"). That interview is summarised in a statement by DC Hussain dated 1 July 2005 prepared in connection with the criminal proceedings against Mr Hussain. In that statement, DC Hussain refers to various documents including a letter dated 20 August 1999 relating to the claimant's " … *initial right to buy application* …" Although DC Hussain did not give evidence before me, there is no reason to suppose that her reference to documents within her witness statement is in any way inaccurate. Its accuracy was not challenged by any of the parties before me. In those circumstances, I accept that a right to buy application was made in the name of the claimant in 1999. In the course of her interview with DC Hussain, the claimant maintained that the signature on the right to buy application was hers. I accept this to be so. However, there is no evidence other than her assertion that it was she who made the application with the assistance of her daughter.

11. According to the claimant nothing happened in relation to the application between then and about September 2002. There is a complete absence of any documentation between 1999 and 2002. The claimant says that her daughter wrote a single chasing letter on her behalf but again that is not in evidence and her daughter did not give evidence. She maintains that she thought the process was proceeding at the usual pace. She maintains that the process was fraudulently hijacked as I have explained and that unknown to her the application was being managed by Mr Hussain. In her interview by DC Hussain, she maintained that every document down to and including a Land registry TR1 transfer dated 9 September 2002, by which Hackney purported to transfer the Property to the claimant subject to various covenants by the claimant,

contained signatures that purported to be hers but were forged. These included the letter dated 20 August 1999.

12. Mr Anthony Okumah, a partner in a firm of solicitors called Duncan Lewis, represented the claimant in the Title Transfer proceedings. He provided a statement dated 23 November 2012 in those proceedings. In paragraphs 6-9 of that statement he stated:

> "6. By 1999, C[1] became eligible to purchase [the Property] under the right to buy scheme. She had made an application to [Hackney] but had not heard back from them as she was sent to Pakistan by her husband and forced to stay there until 2003.
>
> 7. It later transpired that further to her application to purchase [the Property] ... Mr ... Hussain had pursued the matter further without [the claimant's] knowledge.
>
> 8. On or around 9.9.2002 [Mr Hussain] fraudulently purchased [the Property] in [the claimant's] name from [Hackney]…"

13. The version of events set out in paragraph 6 of Mr Okemah's statement is radically different from the claimant's evidence in these and the Title Transfer proceedings. In her affidavit in the Title Transfer proceedings, dated 28 January 2010, the claimant had asserted, at paragraph 2, that "*… I cannot read or write, except my name, in English or my own language. My elder daughter usually reads documents to me …"* before saying of the period between the date when she submitted her application to buy in 1999 and 9 September 2002 only that "*… I heard nothing further from the council …"*. There is no mention of the chasing letter referred to in her oral evidence; and in paragraph 7 her evidence concerning the trip to Pakistan was that she was forced to leave for Pakistan in March 2003 and returned on 2 July 2003 following the intervention of a village elder in the village in Pakistan where she was staying. In these proceedings the claimant provided a witness statement dated 6 December 2018. It is in English as I have said. In that statement the claimant maintained that she did not hear back from Hackney after she exercised her right to buy in 1999 (paragraph 7) and in relation to her trip to Pakistan she stated at paragraph 12:

> "I can confirm that in March 2003, Mr Hussain forced me with two of my children to go to Pakistan with him."

and, in paragraphs 13 and 14, that she was able to leave Pakistan only because a village elder directed Mr Hussain to take her and the children back to England and that she arrived back on 2 July 2003.

14. As I have explained already both the affidavit in the Title Transfer proceedings and her statement in these proceedings are in English. There is no evidence as to how she came to approve the contents of the affidavit and she maintains that her current solicitor, who speaks Punjabi, read over her statement in these proceedings to her and

[1] The claimant in these and the Title Transfer proceedings.

she approved the contents before signing it. There are some real difficulties about that. As I have explained already there is no statement from the claimant's solicitor confirming this to be so. The other real difficulty is paragraph 6 of her statement in these proceedings in which she states:

> "Until recently, I could not read or write English and have always relied on my children, namely my eldest daughter to read any documents to me that I receive".

15. I find that what is stated in the statement in these proceedings concerning the claimant's visit to Pakistan is more likely to be correct than what is stated by Mr Okumah. I reach that conclusion for the following reasons. First, the claimant's own evidence on this point is consistent in both her affidavit (which is dated 28 January 2010 and thus pre-dates the statement by Mr Okumah, which is dated 23 November 2012) and her statement in these proceedings. Secondly, what was stated by Mr Okumah concerning the claimant's absence in Pakistan between 1999 and 2003 would have (i) provided an explanation for the claimant's lack of engagement with her right to buy application between 1999 and 2002, (ii) made it impossible in practical terms for her to have signed the documents dated in this period that purportedly bear her signature and, (iii) thus provided substantial support for her case in these proceedings. If she had been absent for such a protracted period it could have been proved by the production of her passport. It is improbable that her current solicitor would not have investigated this issue for these reasons had she alleged to him that she had been absent in Pakistan between 1999 and 2003 and ensured it was deployed if it proved to be correct. In fact, when cross-examined about this issue, the claimant maintained very strongly that her case as set out in her statement in these proceedings was correct. In those circumstances, I conclude that what Mr Okumah said in his statement was wrong and probably the result of a misunderstanding on his part.

16. How the implicit assertion that the claimant could now read and write English came to be included within paragraph 6 of the claimant's statement in these proceedings is unexplained. It suggests a lack of care in the preparation of the statement and in the means by which its contents were approved by the claimant. Having seen the claimant give evidence I suspect that obtaining the instructions necessary for the preparation of the statement would have been difficult even for a Punjabi speaker. Whilst it is possible that the claimant was deliberately misleading me when she maintained that she was unable to read or write English, having seen her in the witness box for most of a day I am satisfied that on this point she was not doing so. I reach that conclusion from the manner in which her evidence was given. I watched closely for any indications that she understood any of the questions asked of her before they were translated or of her correcting the translations into English by the interpreter. There was none. What there was were occasional misunderstandings caused by the difficulty for the interpreter in translating some parts of some questions and documents and in the claimant's comprehension of what she was being asked even after the question had been translated, often a number of times.

17. All this persuades me that the claimant could not read or write English (other than her name) at any material time. Although neither her statement nor her affidavit in the earlier proceedings says she cannot speak English, I am satisfied for these reasons that her spoken English is at best rudimentary. It follows that I conclude that the words

"*Until recently"* should not have appeared in the claimant's statement. No explanation is offered as to how they came to be inserted but I think it highly unlikely that it was there to mislead. Although some attempt was made to rely on the inclusion of this phrase as supporting the defendants' submission that I ought not to rely on the claimant's evidence, I reject that submission. I consider it more likely that the phrase was included in error by the claimant's solicitors. Its inclusion suggests however that the statement may not have been prepared or checked as rigorously as it ought to have been and thus that it should not be accepted uncritically.

18. On 9 September 2002 Hackney executed a Transfer of the registered title to the Property to a transferee identified in Box 6 as the claimant ("Transfer 1"). The sum paid to Hackney was £167,000 – see Box 9 - and at Box 12 there were various rights granted or reserved broadly in order to give effect to the statutory restrictions imposed by the Housing Act 1985 in respect of right to buy disposals. These included various covenants made by the transferee thereby leading to the need for the document to be executed by the transferee. At the end of the document there is a signature that purports to be that of the claimant. Mr C Hus purportedly witnessed the claimant's signature. This payment was made by CEL, initially by means of bridging finance provided by Commercial Acceptances Limited ("CAL").

19. The claimant's pleaded case concerning Transfer 1 is that what purports to be her signature is not in fact her signature – see paragraph 9 of the Particulars of Claim, where she pleads:

> "It is further averred that the Claimant has no knowledge of this transfer having taken place, she did not sign the transfer and Mr Hus did not witness her signature."

This is consistent with Mr C Hus's statement to the police dated 20 January 2004 in which he stated:

> "I never had any dealings with [the claimant]. I've seen her when I went to the house but we never spoke …
>
> DC Hussain showed me a copy of [Transfer 1]. On page 9 there is a signature of Simer Kaur Dhillon and I confirm the signature underneath is mine. I do not recollect [the claimant] signing it in front of me. Mr Hussain brought various documents to me and asked what he should do with them. I signed this document witnessing his wife's signature. I had no reason to believe anyone other than her had signed it. "

It is consistent too with what the claimant told the police as recorded in DC Hussain's statement of 1 July 2005, where the claimant is recorded as having told DC Hussain that the signature on page 9 of Transfer 1 and the initials on the top page "*... were not done by her"*. It is consistent too with what she said in her affidavit in the Title Transfer proceedings, where she says of Transfer 1 that "*... neither the initials nor the signatures were written by me and I knew nothing of this form until it was shown to me by the police"*. Although the claimant does not state expressly in her statement in these proceedings that the signature on Transfer 1 is a forgery, that is the clear implication of what she states in paragraph 9 of her statement. Neither defendant

admitted this allegation – see paragraph 9 of BB's Defence and paragraph 9 of the CLR's Defence and, in the course of his closing submissions, Mr Trompeter invited me to conclude that the claimant had in fact signed it.

20. This point is of some significance at a factual level because (i) Mr Trompeter submits that if I conclude that the signature on Transfer 1 is in fact the claimant's signature then it is probable that she was involved in what I refer to below as Transfer 2 even if she did not herself sign the document because, he submits, the two are in reality parts of a single transaction and Mr Polli QC submits that the claimant cannot claim that the BB Charge should be removed from the register without also showing that she was entitled to the property free of the Charge, which, he maintains, she is unable to do because the transfer purportedly to her was on her own case fraudulent and void.

21. When the claimant was cross-examined by Mr Trompeter, her evidence concerning Transfer 1 was radically different from what she had stated in her pleadings, to the police, in her affidavit in the earlier proceedings and in para. 9 of her statement in these proceedings. When Mr Trompeter asked the claimant whether the signature on Transfer 1 was hers, she replied,[2] "*Probably that is mine, it seems like my signature. At that time I did not have the tremors that I have now."* Mr Trompeter asked her whether she understood that the document he was asking about was the transfer from Hackney to her to which she responded "*yes"*. Mr Trompeter then asked the claimant to confirm that if the signature on Transfer 1 was probably hers then "*... we can be confident you knew of the transfer from Hackney to you"*. The claimant responded, "*Yes it was transferred to me."* Mr McCarthy returned to this issue in re-examination. He asked the claimant whether she was aware of Transfer 1 at any time prior to her return from Pakistan in July 2003. Her response was "*I was not aware. I only remember the application to which there was no response"*. Her answer in re-examination was inconsistent with the answers she gave to Mr. Trompeter. This is another reason why I ought to treat the claimant's evidence as unreliable save where it is admitted, corroborated or against her interest.

22. Before I decide whether the signature on Transfer 1 is the claimant's signature, it is necessary I complete my findings of fact because my conclusions concerning what happened after the signature of Transfer 1 may assist in resolving whether the claimant signed it. I am driven to adopt that approach because there is no direct evidence on the issue other than that of the claimant. Her evidence is unreliable – see paragraph 9 above - and her evidence in cross-examination and re-examination on the question of whether she signed Transfer 1 was inconsistent and contradictory. It is therefore without probative value on that issue. There is no expert evidence available so the only other way forward is to reach a conclusion on the balance of probabilities based on the inferences to be drawn from my other findings.

23. As I have explained the transfer by Hackney ostensibly to the claimant required that there be a payment to Hackney of £167,000. I find that the claimant did not have the means of making such a payment. I further conclude that there were no other familial sources of cash from which the purchase could be funded. First, the claimant told me and I accept that she was in arrears with her rent to Hackney. I make that finding because the claimant's evidence on this point was against her interest and is consistent

[2] The quotations from oral evidence included in the judgment are from the evidence as recorded in my notebook

what Mr Bude (the solicitor retained by Mr Hussain to act nominally on behalf of the claimant in relation to the acquisition from Hackney) says in his police statement where he states:

> "Mr Hussain informed us that Mrs Dhillon … was about to lose her right to buy. He also told us that she was in significant arrears and therefore could not exercise the right to buy and could not afford to purchase the property. However because [of the] discount then in the event that the [Property] would be sold to a third party she would stand to make a significant profit."

I can think of no reason why Mr Bude would want to misrepresent the occurrence or content of this conversation. Although what Mr Hussain said is worthy of little weight in itself, on this point it is consistent with what the claimant says. Secondly, I reject the notion that the claimant had available to her either £80,000 or any sum derived from the estate of her late husband as she alleges for the reasons set out already. Thirdly, whilst she maintained that her children were highly educated and high earners, there is no evidence even from the claimant, much less any of her children, that they could have made a significant or even any capital contribution to the acquisition price. Even if I am wrong to reject the claimant's case that she received about £80,000 from her first husband's estate, some of which the children were entitled to, that was still not sufficient to fund the acquisition. There is no explanation offered as to where the remainder was to come from. I reject her evidence that the children could have raised the money required by way of mortgage. They could not. They were not and were not entitled to be registered as proprietors or joint proprietors with the claimant of the Property. It is highly unlikely that a reputable lender would lend to a third party to fund the acquisition of a property to be registered in the name of someone other than the borrower. Finally, it is not suggested by the claimant that either she or Mr Hussain were in a position to service a loan of the sum or even a part of the sums required to purchase the Property from Hackney, whether secured or otherwise. It is entirely unclear therefore how the Property could have been acquired other than by utilising funds provided by a third party. In the circumstances, it is highly unlikely that an unconnected third party would provide funding other than on the basis of a sub-sale of the Property to the third party concerned.

24. On 20 September 2002, a subsequent transfer of registered title ("Transfer 2") was executed by which the claimant purportedly transferred her interest in the Property to CEL for a stated consideration of £250,000. It is common ground between the parties that the signature on Transfer 2 is not that of the claimant even though it purports to be her signature. Although the signature that purports to be that of the claimant is almost invisible on the copies in the bundles, it is there. Mr C Hus, the same person who had apparently witnessed the claimant's signature on Transfer 1, purportedly witnessed her signature on Transfer 2. In his statement to the police, Ms C Hus says that he signed the Transfer 2 but did not do so in the presence of the claimant.

25. As I have noted already, CEL funded its purchase of the Property initially by means of bridging finance provided by CAL. CAL obtained a valuation of the Property at a sum of £425,000. CAL's interest was protected by a first legal charge registered on the same day that CEL was registered as registered proprietor of the Property. The claimant was never in fact registered as proprietor of the Property. An application to register Transfer 1 was received by HM Land Registry on 3 October 2002. The

application to register CAL's charge and Transfer 2 was received the following day. Both applications were processed by HMLR at the same time and in the result the claimant was not registered as proprietor, CEL was registered as proprietor of the Property and CAL was registered as first chargee.

26. CAL did not have any contact with the claimant – see the statement of Mr Hertz, at the material time one of CAL's directors. This is not surprising since CAL was lending to CEL. However, Mr Hertz says that CAL was aware that the transaction ostensibly between the claimant and CEL was "*... not an arm's length transaction i.e. the borrower and purchaser know each other. So it must be considered a transfer at an under value. For this reason our solicitors were instructed to arrange a deed of gift indemnity policy ...".* As far as CAL was concerned the sale was at an under-value because its appointed valuers had valued the Property at £425,000 and it was being sold, ostensibly by the claimant, to CEL for £250,000.

27. CEL entered into negotiations with BB concerning loan facilities that resulted in BB offering a loan facility of £337,500 to CEL on 19 September 2002. Prior to that, BB had obtained a valuation of the Property, which had valued the Property at £450,000. The valuer recorded that the Property was occupied. In the circumstances, I conclude that the occupiers were probably the claimant and her family. It is not suggested that anyone else was occupying the Property at this time. As I have said, the claimant did not travel to Pakistan until March 2003. On 18 October 2002, the loan by BB to CEL was completed, the loan by CAL to CEL was discharged, the charge in favour of CAL was released, and CEL granted the BB Charge to BB as security for its loan to CEL. On 20 November 2002, the BB Charge was registered.

28. As I have explained already, the claimant travelled to Pakistan in March 2003. She maintains that while she was in Pakistan she received a phone call from one of her daughters who she alleges told her that the daughter had been to the Property and that it had been emptied. The claimant maintains that most if not all her documentation that might have been relevant to these proceedings were lost as a result. She maintains that she wished to return to the UK but was prevented from doing so by Mr Hussain until the Elder of the village where she was staying intervened. There is no evidence that supports any of these assertions other than that of the claimant herself.

29. What is not in dispute is that the claimant returned to the UK on 2 July 2003, that she arranged for someone to call the police, that there was a police investigation that led to the arrest of Mr Hussain and ultimately to his trial and conviction. The claimant's case is that Mr Husain's arrest, trial and conviction was in respect of his hijacking of the claimant's right to buy the Property. As Mr Trompeter submitted in paragraph 17 of his written opening submissions, there was at the start of the trial no evidence that supported that proposition. Although there were various police statements, there was no indictment, no transcript of the trial and no certificate of conviction. When cross-examined about this, the claimant maintained that she was present in the Crown Court and witnessed Mr Hussain being tried, convicted and sentenced. It is surprising that she did not give evidence at that trial. Shortly before the end of this trial, the claimant's solicitors obtained a Certificate of Conviction. It shows that on 15 September 2006, Mr Hussain was convicted of "*... Procuring execution of valuable security by deception x 1, Forgery of Registrar's record x 1, Attempting to dishonestly obtain a money transfer by deception x 1"*. The evidence on this part of the case is not satisfactory. In my judgment however, had either defendant wished to allege that the

conviction related to offences unconnected with the matter in in dispute, they could and should have obtained a transcript of the proceedings from the Crown Court. They did not do so. The nature of the police-generated material that is before me coupled with the terms of the Certificate of Conviction satisfy me that Mr. Hussain's conviction was probably in respect of his hijacking of the claimant's right to buy the Property. Although the evidence is not complete, there is nothing that contradicts this as being the correct inference. Given the contents of the police statements, I am satisfied that the prosecution was probably on the basis that both Transfer 1 and Transfer 2 were forgeries.

30. What followed were a series of steps taken on behalf of the claimant in relation to the Property. The claimant instructed a firm of solicitors called Gill & Co following her return from Pakistan. Initially those solicitors wrote to the Land Registry on 18 August 2003 stating;

> "… We are instructed that [the claimant] is the registered proprietor of the above property although the office copy entries show the proprietor as [CEL].
>
> Our client has informed us that she has not signed any papers to transfer the [Property] to a limited liability company and nor has she received any payment for such transfer or otherwise …"

This resulted in a formal response from the Land Registry dated 27 August 2003 in which amongst other things the Assistant Land Registrar advised that if "*... your client maintains that the signature on the transfer is not hers, she will no doubt wish to make a formal application for rectification of this title ...*". On 10 October Gill & Co wrote again to the Land Registry. The exclusive focus of that letter was examination of Transfer 2 by a handwriting expert. Following a conversation between the claimant's solicitor and the Land Registry, during which it became apparent that the claimant was alleging that not merely had she not signed the transfer to CEL but that the right to buy had been exercised by someone other than her, the Assistant Land Registrar wrote to Gill & Co on 14 October 2003 stating that "*... if that is the case then it would seem that your client would not be able to make an application for the register to be rectified to restore her as registered proprietor but that any application ... would need to be to restore [Hackney] as registered proprietors ...*". She added that if the claimant had exercised the right to buy but did not execute Transfer 2 then she could apply for a restriction. She advised that such an application should be supported by a statutory declaration "*... made by your client establishing that she did exercise her right to buy the above property and took a transfer of it from the council but did not execute the transfer to the current registered proprietor or authorise anyone else to do so on her behalf ...*"

31. On 28 October 2003, the claimant acting by Gill & Co applied for a restriction to be entered against the tile of the Property. That application was supported by a statutory declaration dated 27 October 2003 by the claimant in English but signed by her stating:

> "I ... can confirm that I exercised my right to buy [the Property] in light of the Transfer from [Hackney]. I cannot recall the dates clearly in my mind.
>
> I can confirm that I did not execute the Transfer to [CEL] or authorise anyone else to do so on my behalf. … I can confirm that I have no recollection whatsoever of this Transfer and can also confirm that I did not execute the same.
>
> I am currently not in occupation of any or part of the land of the title. I ceased to be in occupation of the [Property] when I left … in March 2003 for a holiday. I have returned to the [Property] to try and obtain access, however there appears to be new owners of the [Property] in the premises and I am unable to gain access."

The Land Registry having informed Gill & Co of the circumstances in which applying for a restriction would be appropriate, the implication that arises from the application is that the claimant's case at that stage was she had exercised the right to buy and had taken a transfer of the Property from Hackney but had not executed Transfer 2. If that was her case at that stage, the very ambiguous language used in the first two lines of the Statutory Declaration set out above suggests that at least the claimant's solicitor perceived a difficulty about Transfer 1, which would arise only if the claimant was saying that Transfer 1 was also a forgery. The suggestion that the trip to Pakistan in March 2003 was a "*holiday"* is another reason for treating the claimant's evidence with caution though again there is no evidence as to how this document came to be approved and it may be doubtful whether she fully understood the contents of the document before she signed it. The Land Registry entered the restriction sought on the Property's register. This suggests that the Land Registry understood the claimant's case to be that she had exercised her right to buy the above property, had taken a transfer of it from Hackney but had not executed the transfer to CEL or authorised anyone to do so on her behalf.

32. The next event of significance was that on 25 April 2005, CEL was struck off the register and dissolved. In consequence the Property vested in the Crown and in July 2009 the Crown's title was disclaimed.

33. On 17 February 2010, the claimant commenced the Title Transfer proceedings. The defendants were (1) the Crown Estate Commissioners and (2) BB. The CLR was not a party to those proceedings. As against BB, the claimant sought disclosure of the statements of account between BB and CEL and as against the Commissioners, an order that title in the Property be vested in the claimant. Those proceedings resulted in an Order against the Commissioners, to which the Commissioners did not object, made by Master Moncaster (apparently without a hearing) on 21 October 2010 ("Moncaster Order") that:

> "… the land specified in the Attached Schedule do vest in [the claimant] for all the estate and interest which immediately prior to its dissolution was vested in [CEL] …"

The land referred to in the schedule to the Order was the "*… Freehold land at 47 Moresby Road, London E5 9LE registered at HM Land Registry under Title Number LN151025"*.

34. It was submitted on behalf of the claimant that the effect of the Order was to transfer title in the Property to the claimant free of the BB Charge. Both BB and the CLR challenged that submission and I reject it. The terms of the Order make clear that what was being transferred was CEL's interest in the Property immediately prior to its dissolution. That interest was the freehold title to the Property but subject to the BB Charge. The effect of the Moncaster Order was that the claimant became the registered proprietor of the Property but the Property remained charged with the BB Charge. It was for that reason that on 11 February 2015 the claimant commenced these proceedings.

The Foundation Factual Issue

35. The claimant maintains that Transfer 1 and Transfer 2 are both void and in consequence that the Register ought to be altered so as to remove the BB Charge from the title. As was submitted by both Mr Polli and Mr Trompeter the logical first issue that arises is whether either or both Transfers are void. This is primarily a factual question in the circumstances of this case since it is common ground between the parties that a forged transfer is a void disposition – see Argyle BS v. Hammond (1985) 49 P & C R 148, in relation to the Land Registration Act 1925, approved in relation to the LRA in NRAM v. Evans [2018] 1 WLR 639 by Kitchin LJ at [58]. The factual questions that arise therefore are whether (a) the signature of the claimant that appears on the Transfer 1 is forged or genuine and (b) assuming the signature the answer to (a) is that it is genuine, whether it can be inferred that the signature on the Transfer 2 (which it is common ground is not that of the claimant) was authorised by the claimant. Given the lack of any alternative finance, and given that it is **not** the claimant's case that the hijack of her right to buy occurred after she had signed Transfer 1 but before Transfer 2 was forged, the inference that Transfer 1 and Transfer 2 were part of an inter-dependent set of transactions is almost irrefutable. The only way that the purchase from Hackney could be funded was by the sale to CEL.

36. As I have explained already, the claimant has asserted mutually contradictory cases concerning Transfer 1. The most acute contrast lies between her oral evidence given in the course of her cross examination by Mr Trompeter and what has been pleaded on her behalf in these proceedings and stated by her in her affidavit in the Title Transfer proceedings. The contradiction is apparent also from the dealings between the Land Registry and the claimant concerning this issue set out above. In summary, the claimant by Gill & Co first asserted that the claimant was " … *the registered proprietor of the above property* …" then that the right to buy had been exercised by someone other than her and then that " … *I exercised my right to buy [the Property] in light of the Transfer from* …" Hackney, which evades the issue of whether the claimant's signature on Transfer 1 was forged or not.

37. Mr Trompeter maintains that it is to be inferred that the claimant signed Transfer 1 from the surrounding circumstances. This is a permissible approach given that (i) there is no expert evidence that assists on the issue I am now considering and (ii) I cannot safely rely on the uncorroborated evidence of the claimant and her evidence on

this issue is contradictory and inconsistent. Mr Trompeter submits that I should accept the oral evidence of the claimant given in cross examination on this issue because (a) her oral evidence on this issue contradicts her case as pleaded and opened and is against her interests and (b) because it is consistent with the 2003 correspondence. There is some force in the first of these points not least because of the fair way in which the document was identified to the claimant so that she could alter her evidence if she chose but when she was re-examined she said she could not remember signing Transfer 1. This answer is inconsistent with her answer in cross-examination that the signature on Transfer 1 was probably hers. The claimant is elderly, not in good physical health and was only able to complete her evidence with a number of breaks during the process. She became progressively and visibly more tired as the day went on. The process of being asked and then answering questions via an interpreter often leads to more confusion and is more likely to do so where the witness is elderly, frail and is required to give evidence for a significant period (in this case most of one day). Although this is not in any way the fault of Mr. Trompeter, I have real doubt whether the claimant fully understood what she was being asked about when he asked her about her signature on Transfer 1.

38. I have already referred to most of the correspondence relied on by Mr Trompeter as being consistent with the signature on Transfer 1 being the claimant's. He relies on the 18 August 2003 letter from Gill & Co to the Land Registry. It was written less than a year after the relevant events had occurred and a month after the claimant had returned from Pakistan. Mr Trompeter submits that the letter is consistent only with the Property having been transferred to the claimant to her knowledge and with her consent. That this was the understanding of the Assistant Land Registrar is apparent from her reply dated 27 August, which focusses exclusively on Transfer 2 and which advises that the remedy lies in applying to rectify the register. That would not have been appropriate if the Assistant Land Registrar had understood Gill & Co to be asserting that both transfers were forged – something that is readily apparent from the Assistant Land Registrar's letter of 14 October 2003, the relevant part of which I have set out above. This understanding of the claimant's case was further encouraged by Gill & Co's letter of 10 October 2003. It referred to the submission of a single document for hand writing analysis. That single document was and could only have been understood to be a reference to Transfer 2 given what had been stated in the letter of 18 August.

39. The Statutory Declaration made in support of the application for a restriction referred to earlier created the same impression although with hindsight at least there is very significant ambiguity about how the claimant has described the transfer of the Property to her in that document. A similar ambiguity emerges from the letter under cover of which the restriction application was sent to the Land Registry. In that letter Gill & Co state that "*... It is correct that our client received the Right to Buy and the property was in her sole name. Thereafter she has no recollection of the property being transferred out of her name to ...*" CEL.

40. Whilst I agree that the understanding of the Assistant Land Registrar as set out in her 27 August letter is the most natural in the circumstances, that understanding is founded on implication not express words. Gill & Co's letter is also consistent with the claimant adopting Transfer 1 after the event even though she had not signed it. It is apparent that Gill & Co informed the Assistant Land Registrar that Transfer 1 was

also a forgery in the conversation on 10 October. It is likely that no real thought had been given by Gill & Co to the implications of Transfer 1 having been forged. However, by the time the application for registration of a restriction on the title of the Property came to be made on 28 October 2003, it strikes me that they were aware, but wished to avoid stating expressly, that the claimant's signature on the Transfer 1 was a forgery. The reason why it is likely that the claimant and her solicitors wished to avoid that was the advice given by the Land Registry as to the consequences of that being so – that is that any application for alteration of the register would have to be to restore Hackney as registered proprietors.

41. I conclude that the signature on Transfer 1 is probably not that of the claimant notwithstanding what she said in the course of her oral evidence. I reach that conclusion for the following reasons. First, the signature on Transfer 1 is unlike any other genuine signature of the claimant in evidence in these proceedings. This is most obvious when comparing the signature on Transfer 1 dated 9 September 2002 with the signature on the Statutory Declaration dated 27 October 2003. There are dangers in judges attempting to resolve handwriting issues without the assistance of experts in the field but the difference is here very obvious. Secondly, that conclusion is consistent with the tenor of the 2003 correspondence and the Statutory Declaration declared by the claimant in support of the restriction application. As I have explained already, the Assistant Land Registrar had carefully explained in her letter of 14 October 2002 what the consequences would be if the claimant's signature had been forged on Transfer 1. That letter set out what would be required to obtain a restriction. That included establishing that the claimant exercised her right to buy the Property and took a transfer of it from the council. The ambiguity that followed in both the Statutory Declaration and the letter under cover of which it was sent to the Land Registry in particular persuade me that in truth the signature on Transfer 1 was not that of the claimant or put upon it by someone other than the claimant with her permission. At that stage, the claimant's interests lay fairly and squarely in asserting that the signature on Transfer 1 was hers or was put on it with her consent. In those circumstances, had that been the position it could and would have been unambiguously stated. That it was not is consistent only with the signature not being hers or put on the document with her consent.

42. Thirdly, no reason has been suggested that explains why, if she had signed Transfer 1, she would not have signed Transfer 2 as well. There is no evidence that demonstrates the claimant could have afforded to exercise her right to buy the Property other than by third party funding. There is no evidence that the claimant or the claimant acting in concert with her husband could have obtained funding other than by using an arrangement such as that adopted by Mr Hussain with CEL. My reasons for these conclusions are set out earlier in this judgment. In those circumstances, either the claimant was acting in concert with Mr Hussain at all times, in which case there is no reason why she would not have signed both Transfer 1 and Transfer 2 or she is correct in her assertion that she signed neither. The third possibility (that initially she was acting with Mr. Hussain but Mr. Hussain then hijacked the scheme for his own benefit after the claimant had signed Transfer 1) was not suggested to the claimant during the trial and was not suggested by or on behalf of the claimant. Fourthly, it is improbable that Mr Hus would have been invited to sign Transfer 1 and 2, as he was, if the claimant's signatures on each had been genuine. The course adopted is more consistent with the signatures being forged than being genuine. Finally, it was the

claimant who initiated the police investigation. She gave a statement to the police in which she denied that she was the signatory of either Transfer. It is inconceivable that she would have given dishonest answers to the police in the course of an interview thereby exposing herself to the risk of prosecution herself. It was not suggested to the claimant and she did not suggest that she was unaware of such risks.

43. In those circumstances, I conclude that the signature on Transfer 1 and Transfer 2 was not that of the claimant and was not placed on either with her authority.

BB's Abuse of Process Submission

44. BB submits that the claimant should not be permitted to bring or continue with this claim applying the principles set out in Johnson v. Gore Wood & Co [2002] 2 AC 1 because it could and should have been brought in or as part of the Title Transfer proceedings. The applicable principles are those stated by Lord Bingham at page 31:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent,

> the rule has in my view a valuable part to play in protecting the interests of justice."

The correct application of those principles requires the court to assess whether (in this case the claimant's) conduct is an abuse applying a broad merits based approach, noting that there will rarely be a finding of abuse unless the later proceeding involved what the court concludes is unjust harassment of a party – see Aldi Stores Limited v. WSP Group Plc [2008] 1 WLR 748, where it was emphasised that a claim against someone who was a party in the earlier proceedings is much more likely to be an abuse than a later action against someone who was not a party to the earlier proceedings.

45. I was at one stage concerned that BB had not pleaded in its defence that these proceedings were abusive. It was submitted by Mr Polli that there was no requirement for BB to have pleaded this point. None of the parties were able to find any authority that assists on this point and I proceed on the basis that there is no such requirement. Nonetheless, such a point should usually be brought before a court at the earliest practical opportunity and the usual practice is to plead in a defence an allegation that the proceedings are contended to be an abuse of process. It should usually not be left until the trial of a claim for such a point to be deployed. If the point has not been pleaded and is to be relied on at trial, then basic fairness requires that notice of such a point should be given well before the commencement of the trial. Here not merely did that not happen but the point was not highlighted until Mr. Polli filed and served his skeleton submissions. That is an inappropriate way of proceeding and one which is likely to impact on costs issues even if it does not bar the taking of the point altogether.

46. The absence of this point from BB's pleading and its failure to apply to strike out the proceedings by reference to this point at a much earlier stage points to another more important point. These factors are consistent with BB having suffered no real vexation by reason of the failure to claim the relief now sought in the earlier proceedings. Had BB suffered any actual prejudice or vexation by reason of the claimant failing to make this claim in the earlier proceedings, it is inconceivable that the point would not have been deployed earlier either in the defence or in an early application to strike out this claim. It is difficult to see what commercial (as opposed to possible forensic) prejudice could have been suffered by them since until the claimant succeeds in her claim for alteration of the register BB is fully protected and has the additional benefit that the Property has increased in value over the years thereby strengthening the quality of its security.

47. Mr Polli submits that BB was a party to the Title Transfer proceedings and that most if not all the same factual evidence was relevant both to the Title Transfer proceedings and these proceedings. He relies on the fact that the claimant acknowledged in the course of her oral evidence that she knew everything she knows now when the earlier proceedings were commenced. He maintains that BB has been prejudiced by the loss of documents, by the decay of the memory of witnesses and that documents held by third parties that might have been available when the Title Transfer proceedings were commenced are almost certainly not available now.

48. The onus of proving that this is so rests on BB. Mere generalised assertion does not constitute evidence. Some reliance is placed on the written evidence of Mr Maurice

Cooper, the BB official who is now responsible for these proceedings. He points out that none of the officials responsible for the original lending to CEL remain employees of BB. This evidence is nonspecific as to who has ceased to be employed by the bank or when, or as to what if any steps have been taken to trace and adduce evidence from the persons he alludes to, none of whom are identified by him. No attempt has been made to identify what evidence these officials could have given that would be relevant to the issues that arise in these proceedings. In my judgment this evidence does not assist BB to discharge the burden that rests on them to show that the claimant's conduct amounts to an abuse.

49. Although Mr Cooper states that "*... other professionals involved at the time have since merged or ceased to trade making locating records difficult ...*" again this is nonspecific. It is to be remembered that the Title Transfer proceedings were commenced in February 2010. If it is to be alleged that BB has been prejudiced by the passage of time since then, it needs to adduce some evidence that demonstrates that to be so as for example by identifying officials who have retired since February 2010 and are not contactable, or third party professional practices that have ceased to exist since February 2010. It is not alleged that any such prejudice had been suffered at the time when the Title Transfer proceedings has been commenced. Given that the same evidence was relevant to both that claim and this, it is unclear why the evidence could not reasonably have been obtained then. Mr Cooper refers to the takeover by BB of Woolwich Plc. He says and I accept that a number of attempts have been made to find Woolwich Plc's file without success. However he says those attempts were first made in 2011. BB acquired Woolwich in 2003. It is improbable and in any event it is not suggested that the records were lost in the period between the commencement of the Title Transfer proceedings and the commencement of these proceedings. In any event it would appear that BB maintained sufficient records on its Trinity electronic document storage system to enable it to respond properly to these proceedings as is apparent from Mr. Cooper's statement.

50. I accept that it is much easier for BB (as a party to the Title Transfer proceedings) to establish that these proceedings are abusive than it would be for a party who was not joined to those proceedings, but the onus remains on BB to establish that these proceedings amount to unjust harassment. In my judgment the material available that is relied on by BB does not enable it to discharge the burden on it of proving that by commencing these proceedings the claimant is guilty of abuse of process or unjust harassment.

51. Mr Trompeter adopted Mr Polli's submissions on the issue I am now considering without suggesting that the CLR had suffered any relevant prejudice. In those circumstances, it is difficult to see how these proceedings could be regarded as unjust harassment of the CLR, particularly since the CLR was not a party to the Title Transfer proceedings. That would have been the case even if BB had satisfied me that the proceedings against BB were abusive.

52. Mr. Polli also submitted that the claimant's claim ought not to be permitted to succeed applying the principles to be derived from Patel v. Mirsa [2016] UKSC 42 [2017] AC 467. It is convenient to address this submission when considering the claimant's case on its merits.

The Alteration and Rectification Issues

Principles applicable to alteration of the Register.

53. The rules applicable to the alteration of the Register are contained in LRA, Schedule 4. In so far as is material for present purposes, it provides as follows:

> "Introductory
>
> 1 In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor.
>
> Alteration pursuant to a court order
>
> 2 (1) The court may make an order for alteration of the register for the purpose of—
>
> (a) correcting a mistake,
>
> (b) bringing the register up to date, or
>
> (c) giving effect to any estate, right or interest excepted from the effect of registration.
>
> (2) …
>
> 3 (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
>
> (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
>
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
>
> (b) it would for any other reason be unjust for the alteration not to be made.
>
> (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so."

The "*mistake"* concept referred to in Sched. 4, para. 1(a) and para. (2)(1)(a) is not defined within the Act or Schedule. However, it is now well established that it includes the case where a person has been registered as proprietor pursuant to a void disposition such as a forged transfer – see NRAM v. Evans (ibid.) *per* Kitchin LJ at

para. 53 and Antoine v. Barclays Bank UK Plc [2018] EWCA Civ 2846 *per* Asplin LJ at para. 44.

54. The further issue is the extent to which so-called "*derivative"* mistakes come within the scope of Sched. 4, para. 2(1)(a). This problem arises where there is a void disposition by a fraudster to B of a registered property registered in the name of A. In those circumstances, the legal estate is deemed vested in B even though it is a void disposition – see LRA, s.58. B then grants a legal charge over the property to C. The charge by B to C is valid. Although the effect of LRA, s.58 might be thought to preclude the registration of the charge by B to C being a mistake, it is now recognised that the power to correct mistakes includes the power to remove the registration of such derivative dispositions – see Barclays Bank Plc v. Guy [2010] EWCA Civ 1396 [2011] 1 WLR 681 *per* Lord Neuberger MR at Paras. 35-36, where he identified the underlying *rationale* as being either that (a) the removal of A's name from the proprietorship register was a void disposition and thus a mistake and in order to correct that mistake it was necessary to remove not merely the registration of B as proprietor but also C's charge from the charges register, or (b) the registration of C's charge flowed from the mistake in registering B as proprietor and thus should be treated as part and parcel of the same mistake; and Macleod v. Gold Harp Properties Limited [2014] EWCA Civ 1084 [2015] 1 WLR 1249 *per* Underhill LJ at para. 85 where, having conducted a comprehensive review of all the relevant authorities including a number of decisions of Land Registry adjudicators, he concluded that "*... it is established by the decisions to which I have referred that the power [to correct mistakes] extends to correcting the consequences of such mistakes."*

55. If the alteration sought (so far as relating to rectification) affects the title of the proprietor of a registered estate in land, no order may be made under Sched. 4, para 2 without the proprietor's consent in relation to land in his possession unless it would be unjust for the alteration not to be made – see Sched.4, para.3(2) – but if the alteration does not affect the title of a registered proprietor in possession then the court must direct alteration unless there are "*exceptional circumstances*" which justify its not doing so – see Sched. 4. Para 3(3). The somewhat convoluted language of Sched. 4, para 3(2)(b) and Para. 3(3) does not assist the easy application of these provisions. The phrase " *... the proprietor of a registered estate in land...*" applies in this case to the claimant because she is the registered proprietor of the Property who was in possession of it at all material times. It does not apply to BB because it was and is not in possession even if it is to be treated as being the proprietor of a registered estate and not merely of a charge. It follows that the only proprietor relevant in this case for the purposes of Sched. 4 para. 3(2) is the claimant. The general meaning of the word "*affects"* is of having an effect on, or making a difference to, the person affected. However, in Sched. 4 para. 3(2) the context in which the word is used shows that it has the more limited meaning of an effect on, or difference to, the relevant proprietor that is adverse to that proprietor's interest. Since BB is not in possession and the claimant would not be adversely affected by the alteration sought in these proceedings, it follows that Sched. 4, para3(2) is of no direct relevance to these proceedings. However, both BB and the CLR assert that there are exceptional circumstances within the meaning of Sched. 4. Para 3(3) that justify the order sought not being made.

56. One factor relied on by BB relates to the availability of an indemntiy from the CLR in the event that the claimant succeeds in these proceedings. The CLR contends that an indemnity would not be available. BB contends that if this is realistically arguable then that is a factor which justifies not making the order sought because the arguable non availability of an indemnity would be an exceptional circumstance justifying not making the order sought by the claimant. Mr. Trompeter urges me not to reach a final conclusion on this issue (because it does not arise directly since there is no claim by BB for an indemnity made in these proceedings). He submits that it is necessary only to decide whether it is arguable that an indemnity would not be available. This approach is not one that is available if I conclude that is not arguably the position however. Furthermore, I doubt whether mere arguability is a proper basis for concluding that there exists an exceptional circumstance justifying not making the order sought by the claimant. Potentially, that would place the defendants in a better position to resist the claimant's claim than would have been the case had BB applied for an indemnity in these proceedings, when the question of the availability of an indemnity could have been decided finally.

57. The indemnity scheme is contained in LRA, Schedule 8. In so far as is material it provides that:

> "1 (1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of—"
>
> (a) rectification of the register,
>
> (b) a mistake whose correction would involve rectification of the register,
>
> (c) …
>
> (2) For the purposes of sub-paragraph (1)(a)—
>
> (a) …
>
> (b) the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged.
>
> (3) No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision.
>
> …
>
> Interpretation
>
> 11 (1) …

> (2) In this Schedule, references to rectification of the register are to alteration of the register which—
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor."

As will be apparent from this, it is only an alteration that is also a rectification that gives rise to an entitlement to an indemnity. Only an alteration that involves the correction of a mistake and which prejudicially affects the title of a registered proprietor will be a rectification – see Sched. 8, para. 1(1)(a) and Para. 11(2) and Swift 1st Limited v. CLR [2015] EWCA Civ 330 [2015] Ch 602 *per* Patten LJ at para. 12-13. This language unsurprisingly mirrors that used in Sched.4, para. 1. The statutory intention is clear: any alteration that is a rectification within the meaning of Sched.4, para. 1 should in principle enable a prejudicially affected registered proprietor to obtain an indemnity by operation of Sched. 8, para. 1(1)(a).

58. Whether a correction prejudicially affects the title of a registered proprietor is a question of fact, the only qualification being that a correction to give effect to an overriding interest that is binding on the registered title generally does not give rise to such prejudice because the registered proprietor was "*… all along subject to the rights …*" that constituted the overriding interest concerned – see Swift 1st Limited v. CLR (ibid.) *per* Patten LJ at paras. 19-20, approving In re Chowood's Registered Land [1933] Ch 574 *per* Clauson J at 581, decided under the 1925 Act. However, whilst the right to obtain rectification of the register is capable of taking effect as an overriding interest – see Malory Enterprises Limited v. Cheshire Homes (UK) Limited [2002] Ch 216 (CA) – that does not lead to the conclusion that no prejudice is suffered by the proprietor of a registered estate or charge that is removed as a consequence – see Swift 1st Limited v. CLR (ibid.) *per* Patten LJ at para. 51. In the result, where there is a forged disposition, Sched. 8, para 1(2)(b) prevails over the general principle so that the registered proprietor of a legal charge made in consequence of a forged disposition who has acted in good faith in advancing the loan to the apparent owner is entitled to an indemnity. It has not been sugested on behalf of the CLR that BB has acted other than in good faith.

Alteration

59. The CLR accepts that if Transfer 2 is a forgery then in principle registration of Transfer 2 was a mistake and the register must be altered by removing the BB Charge applying LRA, Sched. 4, para 2(1)(a) and the principles referred to in para. 53-54 above. There is no necessity to do anything in relation to Transfer 2 because the claimant has been registered as proprietor pursuant to the Moncaster Order. Indeed, the claimant does not claim any relief of any sort in relation to Transfer 2. There is no requirement that the claimant should have an interest in the land in respect of which alteration is sought – see Paton v. Todd [2012] EWHC 1248 (Ch) *per* Morgan J at para. 51. In fact, by operation of the Moncaster Order, the claimant has the interest in the Property that CEL apparently had.

60. Mr Polli submits that this is an impermissible conclusion because "*… C was never entitled to the freehold estate: she was no more than a secured tenant of the Property.*

Master Moncaster's vesting order already gives her more than she was ever entitled to" – see para. 25 of Mr Polli's opening submissions. Mr Trompeter takes a more circumspect line in his opening submissions, stating merely that "… *it is worth reflecting on … first if [the claimant's] evidence is accepted then the registration of [Transfer 1] was just as much a mistake as the registration of [Transfer 2]. [The claimant] nowhere explains why she ought to be entitled to retain the benefit of the former, whilst avoiding the consequence of the latter …"* In my judgment these are issues which if they are relevant at all are relevant only to the question whether there are exceptional circumstances that justify not making the order sought. I do not consider that Mr. Polli is right when he suggests that the facts that he relies on prevent the alteration sought by the claimant being the correction of a mistake. The mistake arises from the registration of the BB Charge when it is derived from a void disposition. The implied assertion that the Moncaster Order is wrongly made is not one that is open to BB because it amounts to a collateral attack on a final order made by a court with the jurisdiction to make it.

Rectification – Prejudicial Effect

61. The CLR contends that there is no prejudicial effect in altering the charges register for the property by removing the BB Charge because the claimant was in actual occupation of the property at the time when Transfer 2 was executed and as such her right to claim alteration of the register so as to remove Transfer 2 was an overriding interest. If this is right then the alteration that the claimant seeks if made would simply give effect to a right to which the BB Charge was "… *all along subject …*" and thus could have no prejudicial effect. In consequence, it would not be rectification of the register and thus BB would not be entitled to an indemnity under the Sched 8 scheme. As explained already, BB argue that if this point is realistically arguable then that would provide an exceptional circumstance that would justify not ordering alteration. It is necessary therefore that this issue is determined at this stage before turning to those issues.

62. I am not able to accept the CLR's submission on this issue. In my judgment it is a submission that is not available to the CLR unless the Supreme Court overrule Swift 1st Limited v. CLR (ibid.). Whilst Swift 1st Limited v. CLR (ibid.) was a claim against the CLR for an indemnity under LRA, Sched 8, it is unreal to suppose that the Court of Appeal would adopt a different approach in relation to Sched. 4 from that it has adopted in relation to Sched.8. Patten LJ's reasoning, in particular in para. 51 of his judgment in Swift 1st Limited v. CLR (ibid.), applies with equal force to LRA, Sched 4 as it does to Sched 8. No legislative purpose has been identified by the CLR that would justify a different approach in relation to Sched. 4 from that it has adopted in relation to Sched.8. Adopting such an approach would create a disconnect between Sched.4 and Sched. 8 that would be at least potentially unfair and arbitary as well as serving no legislative purpose. The contrary conclusion leads to absurdity and defeats the statutory scheme. That being so I do not consider it realistically arguable that the alteration that the claimant seeks would not be a rectification by reference to the overriding interest point. It follows that the argument that the right to seek alteration is an overrriding interest does not make it not unjust not to order alteration or create an exceptional circumstance.

63. This does not lead necessarily to the conclusion that any claim by BB for an indemnity will succeed. There are other issues that might arise and BB has chosen not

to claim an indemnity from the CLR in these proceedings. However, that the claim to an indemnity may fail on grounds other than overriding interest point is immaterial to this claim. Not merely have no points been deployed before me that suggest an indemnity claim might fail on other grounds, but those issues are ones for which BB is responsible, not the claimant, and have only not been resolved (if they exist) because BB has chosen not to claim an indemnity in these proceedings.

Exceptional Circumstances

64. It is common ground that what constitutes exceptional in this context is to be tested applying the definition set out by Morgan J in Paton v. Todd [2012] 2 EGLR 19 at para. 67 – that to be exceptional the fact or matter relied on has to be " *... out of the ordinary course, or unusual or special, or uncommon ... it cannot be one that is regularly or routinely or normally encountered ... which have a bearing on the ultimate question whether such circumstances justify not rectifying the register"*.

65. The CLR argues that there are exceptional circumstances which justify not making the order sought by the claimant, being that the claimant will be left with an unencumbered property for which she has never paid a penny, could not afford to acquire at the time she purported to exercise her right to buy down to the date of purported transfer first to her then CEL and in respect of which (prior to Transfer 1) she was only ever a tenant. There are other factors relied on by the CLR that in my judgment are immaterial. The fact that BB may be unable to recover its loan to CEL is immaterial. If they recover an indemnity that will mitigate or eliminate that loss but in any event any loss suffered by BB is not exceptional tested in the way outlined above.

66. BB argues that by adopting Transfer 1, being the first part of the fraudulent scheme, the claimant is seeking to take advantage of her husband's fraud and she ought not to be permitted to do so since the effect would be to give her a windfall to which she is plainly not entitled and could never have obtained and because CEL's interest in the Property was subject to the BB Charge from the date of its inclusion within the charges register. However it is put, BB submits, the claimant was never entitled to and could never have hoped to acquire the unencumbered freehold of the Property.

67. The claimant submits that none of this constitutes exceptional circumstances. She maintains that she and BB are innocent victims of a fraud but the scheme of Sched. 4 and Sched. 8 is such that BB loses its security over the Property but gains the benefit of an indemnity from the CLR, who is in effect an insurer of first resort. It was submitted that the defendants' argument amounted to no more than that the claimant would obtain a windfall but a windfall does not give rise to injustice nor does it constitute an exceptional circumstance following the decision of the Court of Appeal in Walker v. Burton [2013] EWCA Civ 1228 [2014] 1 P & CR 9. In my judgment that is not a correct analysis of that authority. In each case it is a question of fact whether in the particular circumstances there are exceptional circumstances as to why the alteration sought should not be made – see Walker v. Burton (ibid.) at para. 100. Once that point has been reached, no further assistance can be obtained from that authority.

68. In my judgment the defendants are correct in the submissions they make. If and to the extent that the claimant relies on the Moncaster Order then she ought to be in no better position than CEL would have been in had it still been the registered proprietor.

It had borrowed money in order to finance the acquisition of the Property and had charged the Property as security for its borrowings from BB. As between it and BB, either there was no mistake that required alteration or it would be obviously not unjust for the register not to be altered as long as CEL was the registered proprietor, or those facts would constitute exceptional circumstances that would justify a court not making the order sought. As I have said earlier in this judgment, the effect of the Moncaster Order was to place the claimant in no better position than CEL would have been in. Thus, if and to the extent that the claimant relies on her position as registered proprietor by virtue of the Moncaster Order, any alteration that had the effect of placing her in a better position than CEL would have been in would not be just and would provide an exceptional reason why the register should not be altered.

69. The only basis on which the claimant can say that she is entitled to be placed in a better position than CEL would have been in is if she is entitled to adopt and rely on Transfer 1. However, that is a void disposition that has never been registered. In seeking to rely on Transfer 1, the claimant is seeking to rely on a document that she maintains she did not see at the time, did not sign and which she maintains was the first stage of the fraud of which she had no knowledge and to which she was not party, by which her right to purchase the Property was hijacked by Mr. Hussain.

70. Although Mr. Polli submits that such conduct is contrary to the principles to be derived from Patel v. Mirsa (ibid.), I think that goes too far because that case is concerned with allegations that a party is profiting from his own wrong. The claimant is not seeking to profit from her own wrong but seeking to take advantage of another's wrong in circumstances where it is at least arguable that it is she (rather than Hackney) that is the victim of the wrong doing.

71. She is however seeking to place herself in a better position than she could ever have been in by relying on a void disposition. As I have explained, she did not have any capital of her own. She rented the property from Hackney but was in substantial arrears with her rent. Although she asserts that the money needed to exercise her right to buy would have come from her children there is no evidence that this is so other than her assertion and I have concluded that it is improbable that she could have afforded to purchase the Property from Hackney otherwise than by selling it on at a profit and retaining the difference between the purchase price (including repayment to Hackney of any right to buy discount) and the price at which it could be sold on. This would have meant that the best she could have hoped to achieve by exercising her right to buy would have been to purchase and then sell on thereby profiting from the margin between the purchase and the sale price and, possibly entering into a lease back arrangement with the purchaser.

72. On that basis, by not ordering the alteration she seeks the claimant will be left in much the position she would have been in had her exercise of her right to buy proceeded in the only way that on the evidence it could have proceeded. She will be left with the Property (which is now valued at in excess of £1 million) but subject to a charge that can be discharged only by selling the Property or, which seems highly unlikely, obtaining replacement borrowing to discharge the BB secured loan. This outcome also gives effect to the Moncaster Order because it placed her in the shoes of CEL and CEL would have had no case for seeking alteration as long as it remained the registered proprietor of the Property.

Conclusion

73. Although the claimant has standing to apply for alteration of the charges register of the Property by removing the BB Charge, there are exceptional circumstances that justify not doing so. In those circumstances, the claimant's claim fails and is dismissed and it is neither necessary nor appropriate that I should attempt to decide the counterclaim, which I could do only on counter factual and hypothetical facts.