Neutral Citation Number: [2021] EWHC 2752 (Ch).

Case No: PT-2020-000793

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
Fetter Lane, London, EC4A 1NL

Date: 15 October 2021

Before:

DEPUTY MASTER FRANCIS

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Between:

(1) DERRILE SINGH LOHIA
(2) DELVIN SINGH — **Claimants**

- and –

DALBARA SINGH LOHIA (deceased)
(proceeding by the representative of the Deceased's estate, Gurmesh Kaur Lohia) — **Defendant**

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Araba Taylor (instructed by **Premier Solicitors**) for the **Claimants**
George Woodhead (instructed by **Vanderpump & Sykes LLP**) for the **Defendant**

Hearing dates: 1, 2 and 3 September 2021

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APPROVED JUDGMENT

I direct that this approved judgment, sent to the parties by email on 15 October 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

Deputy Master Francis:-

Introduction

1. 34 Wilberforce Road is a three-storey semi-detached property in Finsbury Park, London N4 ("the Property"). It was for many years the family home of Joginder Singh Lohia, his wife Harbhajan Kaur Lohia, and their seven children: Margret (born in 1968), Geeta (born in 1969), Dalbara (born in 1970), Seeta (born in 1973), Derrile (born in 1978), Delvin (born in 1980) and Narinder (born in 1987). I shall refer to all the family members by their given names for convenience in the course of this judgment, without intending any discourtesy thereby.

2. Joginder acquired the Property in his sole name in 1978 and he was registered as proprietor under title number LN184295. He died on 3 January 1988, without having made a will. His estate has never been fully administered, or at any rate the administration properly documented and concluded in accordance with the formal rules of intestate succession. However, the Property remained for many years the family home, where the younger children were brought up after the elder children had bought or set up homes elsewhere. The Property has now been divided into three self-contained flats, under redevelopment works carried out by Delvin and assisted by Derrile in the period between 2016 and 2018. One of those flats is now occupied by Delvin and his family; there is a dispute as to whether another is or continues to be occupied by Harbhajan; the third at any rate is rented out.

3. The present dispute, in form at least, is one between Derrile and Delvin, the named claimants, and Gurmesh Kaur Lohia, as representative of Dalbara's estate, following his regrettable death on 13 January 2021 whilst these proceedings were ongoing, a victim of Covid 19. It arises following the transfer of the Property into the joint names of Dalbara, Derrile and Delvin in October 2014 in circumstances which I will have to set out and examine in detail in this judgment. That transfer, in form TR1, contained a declaration that the Property was held by the transferees as tenants in common in equal shares, effected by the simple expedient of checking the second of the three boxes in panel 10 of the form. Derrile and Delvin contend that this was a mistake and did not properly reflect the intentions of the parties to the transfer, which were that Dalbara should have no beneficial share in the Property, and they seek an order for rectification of the transfer accordingly. On behalf of Dalbara's estate Gurmesh disputes such contention, and by counterclaim seeks declaratory relief that the Property is held beneficially in such declared shares, together with an order for the sale of the Property and the taking of accounts.

4. Both sides have been ably represented by counsel at the trial of this dispute, Derrile and Delvin by Ms Araba Taylor, and Gurmesh by Mr George Woodhead. They have fought their respective clients' cases doggedly but with courtesy and respect, and I have been greatly assisted by them throughout the course of the trial for which I express my gratitude.

Background

5. In order to set the dispute in its proper context, I must first set out some more of the background, identifying along the way various matters of factual controversy, some of which at least I will need to resolve in reaching my determination on the key issues.

6. Letters of administration to Joginder's estate were granted to Harbhajan and Dalbara on 1 November 1989. His estate was declared to have a gross value of £95,198, and a net value of £94,515. No estate accounts have been produced showing of what it consisted, but it may reasonably be inferred that the Property was the only declared asset of the estate of any value.

7. Under the rules of intestate succession, Harbhajan was entitled to a statutory legacy of £75,000 from her husband's estate. Subject to that and following the due administration of the estate, the residuary estate would be held on the statutory trusts arising under section 46 of the Administration of Justice Act 1925, that is as to a life interest in one half thereof for Harbhajan, and as to the remainder for the children in equal one-seventh shares. As personal representatives Harbhajan and Dalbara would have held the Property and any other assets within the estate as fiduciaries pending the due administration of the estate and thereafter on those statutory trusts.

8. On 2 March 1992 Harbhajan and Dalbara executed an assent as personal representatives vesting the Property in themselves. It is evident that a firm of solicitors, Harman Garfinkel & Co were acting for them at the time; that firm lodged an accompanying application to register the dealing with HM Land Registry on the same date, stating the value of the property then to be £100,000.

9. It is common ground that Margret, Geeta and Seeta entered into a deed of variation at or around this time under which they transferred their entitlement in Joginder's estate to their mother, Harbhajan. No copy of the deed has been produced, or, so far as anyone is aware, still exists. There is a statement in evidence from David Garfinkel, who identifies himself as the solicitor who acted in the administration of Joginder's estate, in which he states his recollection that:-

> "Those children who were aged 18 or over agreed to enter into a Deed of Variation and executed a Deed of Variation transferring their interest to [Harbhajan]. The children who were under 18 though could not execute a Deed of Variation and were entitled to their interest in their father's estate"

   Insofar as this statement suggests that Dalbara too was a party to the deed of variation (he had turned 18 in 1988) it is inconsistent with the evidence not only of Delvin and Derrile but all other family members, none of whom state that Dalbara entered into any such deed. In the light of that, and as Mr Garfinkel was not called to give evidence so that he might be questioned on this point, I am unable to place any reliance upon his suggestion that Dalbara was also party to the deed.

10. It is nevertheless Delvin's and Derrile's case that Dalbara received monies from Harbhajan which were intended to be paid in satisfaction of his share of the estate. Three sums are alleged to have been paid or taken: a sum of £15,000 drawn from a lump sum Harbhajan had received from her husband's London Transport pension scheme, a sum of £25,000, and a sum of £13,000 which Dalbara is alleged to have taken from Harbhajan's bank account. It was suggested that these sums were used by Dalbara and Gurmesh to finance the acquisition of two properties during the 1990s – a property at 38 Vicarage Road in Leyton which they purchased in June 1993 for a sum of £52,000, and a property

at Grove Green Road purchased in 1996. For her part, Gurmesh accepts that Dalbara was given £15,000 by his mother to assist with the purchase of the first property, but disputes that any other monies were given to Dalbara by his mother and used to fund either purchase. She does accept that an additional sum of £25,000 was given to Dalbara but says that this was only some years later from the proceeds of the *Lohia v Lohia* litigation to which I shall refer shortly.

11. Despite their purchase of these two properties, Dalbara and Gurmesh continued to live at the Property from the time they were married in 1990 until 1998 when they moved out. Gurmesh explains in her evidence that they stayed at the Property because she had been left by Harbhajan with responsibility to look after Derrile, Delvin and Narinder who were all still young children, whilst Harbhajan spent time in India. She accepts they lived at the Property all this time rent free, but explains that they met the general household expenses including food and clothing for the children.

12. Although it appears that the Property was the only declared asset of any value in Joginder's estate, there was in fact a second valuable asset, Joginder's claim to a beneficial half-share in a property at 41 Aberdeen Road in nearby Highbury, a property which had been held in the sole name of Joginder's father, Man Singh Lohia, prior to his death in 1971, and which would have passed on his intestacy to Joginder and his older brother, Ugara Singh Lohia. Proceedings had been issued by Joginder against his brother to vindicate his interest in the Aberdeen Road property in 1987, and an order was subsequently made in 1992 substituting Dalbara and Harbhajan as plaintiffs in the proceedings following their appointment as personal representatives of Joginder's estate. It was not disputed that Joginder was entitled at least to a one quarter share in the property, the issue between them being whether their father had held the property prior to his death for the brother as to a 50% beneficial share. It must therefore have been clear to both Dalbara and Harbhajan at least at the time they were substituted as plaintiffs to the proceedings that they were likely to yield further substantial sums for the estate. In the event, following a trial of the action in 2000 before Nicholas Strauss QC sitting as a deputy judge of the High Court, they succeeded in establishing the estate's claim to a half-share in the property. An appeal from the judge's decision was thereafter dismissed by the Court of Appeal in November 2001 ([2001] EWCA Civ 1691). In due course, following agreement that his brother should buy out Joginder's interest, a sum of £274,375 was paid out to Ralph Davis, the solicitors acting for Harbhajan and Dalbara, representing the proceeds of such buy-out less £75,000 for which it was agreed that the estate should be accountable in respect of maintenance costs, in September 2002.

13. There was some controversy as to what had happened to the proceeds of the *Lohia v Lohia* litigation. In a series of witness statements prepared before the present claim was issued and dating from September 2019, Derrile and Delvin, together with Harbhajan, had advanced a case that Dalbara and Gurmesh had misappropriated as much as £150,000 from the sum of £350,000 which had been received following the successful conclusion of the litigation without Harbhajan's knowledge or consent. In their particulars of claim, Derrile and Delvin relied upon this allegation, together with the allegation that Dalbara had previously received or taken other monies from Harbhajan (referred to in paragraph 10 above) as part of the factual matrix which underlay Dalbara's alleged agreement to relinquish any further claim in Joginder's estate including any beneficial interest in the Property. In fact, as Derrile ultimately conceded in cross-examination, the amount of monies in dispute as allegedly misappropriated was at most the difference between the

sum of £274,375 received by Ralph Davies and paid by that firm into a joint account held in the name of Harbhajan and Dalbara, and the sum of £200,000 which was subsequently transferred by Harbhajan from that account into another in her name, she says after discovering that Dalbara had helped himself to monies in the account. Of those "missing" monies, it was Gurmesh's case that, far from being misappropriated, they had all been paid out to various persons at Harbhajan's direction or at any rate with her agreement: £15,000 was paid to an uncle, Kewal Singh, in India; £25,000 to Dalbara, £25,000 to Derrile (used by him to buy a car) and £10,000 to Margret. Subsequently, she alleges, Harbhajan distributed the remaining £200,000, by payments of £100,000 to Derrile, £15,000 to Geeta, and further sums to Margret and Narinder; so there was (contrary to the case as put by Derrile and Delvin) no question that Dalbara had received any unfair or excessive share of the overall proceeds beyond that to which he was in any event entitled as beneficiary. I shall have to make findings on these matters in due course.

14. The youngest of the children, Narinder, turned 18 in 2005. At some point she married, receiving a sum which she thinks may have been £30,000 from her mother, although I was not told the date of her wedding. It appears however that she continued to live at the Property with her husband for some years thereafter, together with Delvin and Harbhajan.

15. It is Derrile and Delvin's case that a family meeting was called by Harbhajan in 2007 to discuss the future of the Property. In their trial witness statements they explain that Harbhajan expressed her wish at this meeting to transfer her share in the Property to Derrile and Delvin, on the basis that she had already helped out her other children financially but they had to date not received anything; they state that Dalbara agreed to this, as did the other children present at the meeting, Margret and Geeta. They also both refer to the fact that the prospective conversion of the Property into self-contained flats was discussed at the meeting.

16. In their trial statements Derrile and Delvin state that further family meetings took place in 2010 and 2014, attended by the same persons, at which Delvin provided more details of the works which he proposed for the conversion of the Property and the costs and financing of the same. It was at the 2014 meeting, Delvin states, that Harbhajan decided that a solicitor should be instructed to proceed with the transfer of the Property, telling Dalbara that he would only be a trustee for Narinder's interest with the rest of the Property going to Derrile and Delvin.

17. Gurmesh was not present at these alleged meetings, and so has no direct knowledge whether they took place as alleged or what was discussed, as she acknowledged in cross-examination. She explained that she was not told about any meetings by Dalbara, but in any event did not know in whose name the Property was held until 2014. At that time, she says that she learnt that Harbhajan wished to transfer the Property out of her name and into the names of her three sons, although she says that Harbhajan changed her mind on more than one occasion whether to proceed.

18. In any event, in or about August 2014 Delvin contacted a solicitor, Keith Doherty of the firm Guney Clark Ryan. Three e-mails have been disclosed by him containing the instructions which he gave. The first is dated 4 August 2014 and is headed "34 Wilberforce rd name transfer". It reads as follows (and I quote the text verbatim with all typographical errors preserved):-

> Hi Keith
> I would like to confirm the names that should be added and the name to be removed.
> ADD
> Delvin Singh
> Derrile Singh lohia
>
> REMOVE
> Harbhajan kaur lohia
>
> If you require any further information please contact me asap.

A second e-mail timed at 12.37pm on 26 August 2014 headed "34 Wilberforce rd" reads as follows"-

> Hi Keith
> further our phone and e-mail conversation I just would like to confirm that my instruction is to remove my mothers name harbhajan kaur lohia and add myself and my brother derrile Singh lohia, I know you need my mother consent which she will do this week and my brother should be contacting you soon.

A third e-mail timed at 12.53pm on the same day reads as follows:-

> Hi Keith
> further to my last e-mail I forgot to say please go ahead and prepare the paperwork as everybody has givenen their consent and is happy to proceed to Sign all nessary paperwork so please prepare the paperwork asap.

19. Remarkably, these e-mails are the only documents disclosed which record or evidence instructions given to Mr Doherty concerning the proposed transfer or any queries, advice or information provided by Mr Doherty or his firm relating to those instructions or the transfer itself. The first of the e-mails from Delvin to Mr Doherty on 26 August 2014 suggests that there were other communications with him by e-mail, and in the ordinary course, assuming a basic competence and adherence to professional standards, Mr Doherty might be expected to have sent client care letters and letters confirming his instructions not only to Delvin (from whom his instructions were received), but also to Harbhajan and Dalbara, as the transferors, and Delvin and Derrile, as transferees, for all of whom Mr Doherty was presumably acting. Neither side has disclosed any such correspondence, whether as documents presently or formerly within their control. Nor has either side been successful in locating or obtaining the solicitor's file which Mr Doherty would presumably have created in relation to the transfer, although Premier Solicitors have made some attempts to do so, stifled by the fact that Guney Ryan Clark ceased trading in 2017 and Mr Doherty himself has failed to respond to enquiries sent to his new firm, Anderson Clapp.

20. In addition to the documentary evidence of instructions given to Mr Doherty referred to above, in her trial witness statement Harbhajan states that she gave oral instructions to Mr Doherty over the telephone as follows:-

> "I clearly stated that I wanted to transfer my share of the house to Delvin and Derrile. He asked about Dalbara and I said I wanted him to hold a share for Narinder. I went on to say that this was my personal decision and that I had decided this long ago."

In oral evidence, Harbhajan explained that such instructions were given through Delvin, who acted as her interpreter. For his part, Delvin in his oral evidence stated that he told Mr Doherty to "… remove my mother and add us in". He then explained:-

> "I meant by that we are taking our mother's share. Dalbara's position was just to remain as trustee"

21. Derrile and Delvin's case is that there was then a meeting at Mr Doherty's office in September or October 2014 attended by Dalbara, Harbhajan and both of them at which a transfer in form TR1 was presented by Mr Doherty to them all for signature. There were some differences in their trial statements as to the sequence of events, with Delvin stating that the transfer was produced by Mr Doherty after a short break in the meeting where in contrast Derrile and Harbhajan refer to the transfer being prepared and ready for their signature when they arrived. In any event the document which Mr Doherty prepared was one by which Dalbara and Harbhajan as transferors transferred the Property to Dalbara, Derrile and Delvin as transferees. In panel 10 of the transfer the second box was checked so as to declare that the transferees were to hold the Property on trust for themselves as tenants in common in equal shares.

22. Derrile and Delvin contend that they signed the transfer without seeing the checked box in panel 10 or understanding what it meant and without Mr Doherty having brought this to their attention and explained it to them. They maintain that Mr Doherty had not been instructed to prepare a transfer with this effect, and indeed that it was contrary to the instructions given to him, and contrary to what all the parties to the transfer intended.

23. Gurmesh challenges their account of the circumstances in which the transfer was executed and the contention that it did not reflect the parties' intentions. She does so not as someone who was present at the meeting or on the basis of what she was told by Dalbara took place at the meeting; she quite fairly acknowledges that she has no first-hand knowledge and did not discuss the events surrounding the transfer with Dalbara. Instead, she contends that their account is both inconsistent and highly improbable, and their evidence, as it has emerged from cross-examination, not credible or capable of being relied upon. She believes that it was indeed everyone's intention that the Property was to be substantively owned by the three brothers, with Dalbara on the title deeds not simply as a trustee.

24. Delvin had applied for planning permission for the conversion of the Property into four self-contained flats in July 2013, using a firm of architects, Inhouse Design Associates. Permission was granted for the development that September, and further design and planning work thereafter undertaken on Delvin's instructions to obtain building regulation consent and approval for various matters reserved under the conditions of the planning permission. Delvin commenced the conversion works themselves in the latter part of 2016 and they were complete by 2018. Delvin contends that the works were initially funded by personal loans which he took out in his own name, before a bridging loan was taken out in all three brothers' names in March 2017 for a sum of £465,700. That was replaced by a mortgage loan of £609,000 granted by One Savings Bank plc in March 2018 for a 20 year term secured by a registered charge over the Property. There is a dispute between the parties as to the use to which the balance of the mortgage monies were put but that will be an issue for determination on the taking of accounts.

25. It is, I think, common ground that Dalbara took little part in the development. He was opposed to the works to convert the Property into self-contained flats, and considered that the Property could instead be let out on a room-by-room basis. It is Delvin's case that Dalbara in fact stymied the intended conversion works to the basement of the Property to create the fourth of the intended self-contained flats. For present purposes, these matters are relevant only to the extent that they throw any light on the question whether Dalbara himself considered that he had any financial interest, as a joint beneficial owner of the Property, in the development and its successful completion: Derrile and Delvin contend that he did not, and that was the reason he played little part; Gurmesh on the other hand contends that the reason Dalbara was not more involved was because of his opposition to the project.

26. In any event, the present dispute arose after Dalbara asserted a right to an account of the rental income which had been received from the letting of the ground and top floor flats within the converted Property as beneficial owner of a one-third share in the Property in a letter written by his solicitors, Vanderpump & Sykes LLP, on 11 June 2019. By their own letter of claim prepared by Premier Solicitors and dated 4 December 2019, Derrile and Delvin asserted that Dalbara remained on the title to the Property as trustee only and invited him to consent to the removal of his name.

27. These proceedings then started life in October 2020 as a Part 8 claim in which Derrile and Delvin contended that Dalbara had no beneficial interest in the Property and sought his removal as a trustee under section 41 of the Trustee Act 1925. On Dalbara's application, Chief Master Marsh ordered on 17 December 2020 that the proceedings should continue as a Part 7 claim and be properly pleaded out. In the particulars of claim subsequently filed in January 2020, Derrile and Delvin asserted for the first time a claim for rectification of the transfer on the footing that the declaration of trust contained therein, purportedly conferring a one-third beneficial share in the Property on Dalbara, did not reflect the true intention of the parties to the transfer.

The issues and the legal framework in which they arise

28. On the face of the particulars of claim, Derrile and Delvin's case is relatively straightforward in its scope, a claim for rectification of the transfer based on common mistake. They contend that:-

    a) there was a prior accord between Harbhajan, Dalbara and themselves that:-

        i) Harbhajan would transfer all her existing beneficial interest in the Property – the three-sevenths share to which Margret, Geeta and Seeta would have been entitled under the statutory trusts which had been transferred to her by the deed of variation together with her own life interest under the intestacy - to Derrile and Delvin by way of gift;

        ii) Harbhajan would nevertheless have a continuing right to occupation for life of one of the flats in the converted Property;

        iii) Dalbara would remain for the time being one of the legal owners of the Property, as trustee (to protect Narinder's interest), but would relinquish his beneficial

entitlement – the one-seventh share to which he was entitled under the statutory trusts – in recognition of the sums he had already received;

iv) this accord left unaffected Narinder's one seventh interest in the Property under the statutory trusts, so the Property would be held by Dalbara, Derrile and Delvin as trustees in effect for Derrile and Delvin as to three-seventh shares each in the Property and Narinder as to one-seventh share, subject to Harbhajan's lifetime right of occupation;

b) by a mistake in its drafting the transfer did not reflect that prior accord, which represented the continuing common intention of the parties to the deed, or the instructions given to Mr Doherty.

29. By her defence and counterclaim Gurmesh contends that:-

a) following the 1992 assent of the Property into the joint names of Harbhajan and Dalbara, the Property was held by them for themselves as beneficial tenants in common in equal shares;

b) it was agreed in 2014 that Harbhajan should cease to be legal owner and the Property should be transferred into the joint names of Dalbara, Delvin and Derrile;

c) the declaration of trust within the transfer reflected the true intention of the parties, and there were no grounds for rectification of the same;

d) if there were otherwise grounds for rectification, such relief should be refused on grounds of unconscionable delay;

e) the effect of the transfer was that the Property was held by Dalbara, Delvin and Derrile on trusts for themselves as beneficial tenants in common in equal shares.

30. On behalf of Gurmesh, Mr Woodhead withdrew the first of those pleaded contentions during the trial. He accepted, rightly in my judgment, that the 1992 assent did not dispose of or affect the beneficial interests in the Property arising pursuant the rules of intestate succession and the statutory trusts thereunder.

31. Before considering the question of rectification, a further question arises as to the effect of the transfer in the absence of any claim for rectification. Relying upon the well-known Court of Appeal decisions in *Pink v Lawrence* (1978) 36 P&CR 98 and *Goodman v Gallant* [1986] Fam 106, Mr Woodhead submitted that the declaration therein was conclusive as to the beneficial interests under which the Property was held and there was no room for the court to go behind it. I agree that as between the parties to the transfer that proposition correct. However, where prior to the transfer the Property was held on trust for one or more persons who were not parties to the transfer, I do not accept that the declaration of trust within the transfer could operate to override such prior beneficial interest otherwise than through that interest being overreached under section 2 of the Law of Property Act 1925. As the transfer in this case was not one involving any purchase for valuable consideration the doctrine of overreaching is of no application. Accordingly, there is no doubt, in my judgment, that, regardless of the declaration of trust contained within the transfer, the Property was held upon completion of the transfer by Dalbara,

Derrile and Delvin subject to Narinder's existing one-seventh beneficial interest under the statutory trusts on which the Property was formerly held, assuming at least that such interest had not previously been disclaimed by Narinder or otherwise released. Although Mr Woodhead sought to suggest that Narinder's interest had been disclaimed or released, she was not made a party to the present claim as she could have been if Gurmesh wished so to argue and I could not possibly deal with any such contention without her having been joined.

32. I should add in this regard that this same point would apply also to the beneficial interests of Margret, Geeta and Seeta arising under the statutory trusts if, contrary to the agreed position of the parties before me, they had not previously entered into a deed of variation transferring their interests to Harbhajan. In Margret's and Geeta's cases, they have themselves made witness statements in these proceedings in which they confirm that they entered into such a deed, but Seeta has not made any statement giving any such confirmation.

33. Turning then to the question what Derrile and Delvin must establish in order to make out a claim for rectification of the transfer, I was referred to the leading modern authority, the decision of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361; [2020] Ch 365, and the very recent further Court of Appeal decision in *Ralph v Ralph* [2021] EWCA Civ 1106.

34. In *FSHC* the Court of Appeal reconsidered the principles of rectification as they apply to commercial contracts. Their conclusions are set out in paragraph 176 as follows:-

> "We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

It will be assumed in any case that the terms of the written agreement do conform with the parties' common intention, so convincing proof is required to establish that this was not so: see *Joscelyne v Nissen* [1970] QB 86 at p. 98C-D.

35. *Ralph v Ralph* concerned a claim for rectification of a transfer in form TR1 in which, like the present case, the second box in what is now panel 10 of the TR1 had been checked so as to declare that the transferees held the property on trust for themselves as tenants in common in equal shares. The transfer was executed to effect the purchase of a property intended for the use and occupation of a father, where his son had joined with him in the purchase to facilitate the raising of a mortgage loan (in their joint names) to fund the purchase. The box containing the declaration of trust had been checked (I assume) by the solicitor who acted for them on the purchase without instructions in circumstances where neither had given any thought to how the property was to be owned beneficially. Although there had undoubtedly been a mistake in checking the box where neither party

had intended to make any such declaration as to the beneficial interests, the father's claim in rectification was dismissed in the Court of Appeal (on a second appeal) because he was unable to establish any positive prior common intention between him and his son as to how the property was to be held beneficially. It was impermissible to rectify the TR1 simply by deleting the declaration, as the judge on the first appeal had done, in the absence of any evidence that the parties positively intended that the transfer should deal with legal ownership alone; there was no such evidence because neither had given any thought to it: see the judgment of Sir Geoffrey Vos MR paragraphs 39 – 41.

36. Importantly, however, the court left open the question whether the requirements for rectification set out in *FSHC* as they applied to commercial contracts should apply with the same rigour to non-commercial dealings such as property transfers. The parties before the Court of Appeal had not argued that some different approach was appropriate and so the court had proceeded on the footing the *FSHC* principles applied, but the Master of Rolls pointed to four reasons why it could be argued they should not, as follows at paragraph 27 to 30:-

> "27. First, the rules relating to rectification of a commercial contract assume that the parties have, in some sense, negotiated that contract. This point is made good in the passages that I have cited from *Butlin's*. Negotiation may take many forms, but the rationale of the authorities is that there will have been exchanges or discussions that lead to the written agreement in question. In this case, there were, on the trial judge's findings, no such exchanges or discussions, and more importantly there could not have been. Had the single solicitor acting for David and Dean known that they disagreed about how the beneficial interest in the property was to be divided, he would have been required by best professional practice to advise that separate representation was sought.
>
> "28. Secondly, and by way of a related but more general point, it must be relatively common for family members buying property jointly not to discuss openly how the beneficial interest is to be held. Plainly if the TR1 is signed by the transferees, such a discussion is more likely, but still not inevitable.
>
> "29. Thirdly, whilst the situation in this case is not at all the same as the situation in the pension scheme cases, which Leggatt LJ singled out for special treatment, it has features that distinguish it from a commercial context. *Butlin's* makes clear that different considerations will apply to settlements and declarations of trust. It may be that declarations of trust of the kind in issue in this case would also demonstrate special features.
>
> "30. Fourthly, the joint purchasers of properties hold the legal estate as trustees. *Butlin's* makes clear, at least, that the trustees' intentions may be relevant to rectification if they have themselves made a bargain. The bargain could mean that the beneficial interests would be held by persons other than or in addition to the trustees. In this case, for example, on one analysis David intended the property to be held for "his family"."

37. One exception to the *FSHC* principles, discussed in both *FSHC* and *Ralph*, is in cases of voluntary settlements or gifts, as established in *Re Butlin's Settlement Trusts* [1976] Ch 251. In that case Brightman J rectified a voluntary settlement to insert a power which the

settlor had intended should be conferred on the trustees to the settlement but of which at least two of the trustees were ignorant. It could not therefore be established that all the parties to the settlement had a common intention that the power should have been included or, by the same token, that the mistake in omitting the power was mutual. The judge concluded that whilst in any case involving an actual bargain between settlor and trustees it would be surprising if the settlement could be rectified in the absence of proof of a mutual mistake, the position was different in the case of a purely voluntary settlement. He set out his conclusions at pp. 260 – 1, and p. 262 as follows:-

> "There is, in my judgment, no doubt that the court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain, such as an ante-nuptial marriage settlement. … Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention …"

He then considered an objection to rectification that the trustees of the settlement, although volunteers, could find themselves subject to provisions of which they were aware and subject to which they would not have consented to act as trustees. As he explained at page 262, the solution to this was the rectification was a discretionary remedy:-

> "In other words, in the absence of an actual bargain between the settlor and the trustees, (i) a settlor may seek rectification by proving that the settlement does not express his true intention, or the true intention of himself and any party with whom he has bargained, such as a spouse in the case of an ante-nuptial settlement; (ii) it is not essential for him to prove that the settlement fails to express the true intention of the trustees if they have not bargained; but (iii) the court may in its discretion decline to rectify a settlement against a protesting trustee who objects to rectification."

38. *Butlin's* case was approved and applied in *Day v Day* [2013] EWCA Civ 280; [2014] Ch 114. That case concerned a claim for rectification of a conveyance by which a mother, acting through her solicitor under a general power of attorney, had transferred her house into the joint names of herself and the defendant, one of her three sons. The conveyance contained a declaration that the house was to be held by them as beneficial joint tenants. The mother's two other sons, her personal representatives, contended that it had never been her intention to give any beneficial interest in the house to the defendant, the sole purpose of the conveyance being to enable him to obtain a loan secured against it, and sought to rectify the conveyance to declare that the house was held beneficially for the mother absolutely. It was accepted by all parties that the conveyance was a voluntary transaction for which the defendant had given no consideration, and it was found as a matter of fact by the recorder at first instance that the mother had no intention to give any beneficial interest in the house to the defendant. In those circumstances, the claim to rectification succeeded in the Court of Appeal. Sir Terence Etherton C said this at paragraph 22:-

> "What is relevant in such a case is the subjective intention of the settlor. It is not a legal requirement for rectification of a voluntary settlement that there is any outward expression or objective communication of the settlor's intention equivalent to the need to show an outward expression of accord for rectification of a contract for mutual mistake … Although, as I have said, there is no legal requirement of an outward expression or objective communication of the settlor's intention in such a case, it will plainly be difficult as a matter of evidence to discharge the burden of proving that there was a mistake in the absence of an outward expression of intention."

39. In contrast to the facts of *Day*, in *Ralph* the declaration of trust within the transfer could not be characterised as a voluntary settlement or unilateral gift by father in favour of his son, since as part of the transaction the son had assumed liability under the mortgage taken out in order to acquire the property. On the face of the claim as it is brought by Derrile and Delvin in this case, the transaction which is sought to be rectified was not simply a unilateral gift by Harbhajan of her existing beneficial share in the Property since they claim that as part of the intended transaction Dalbara was also to relinquish his existing share in the Property and they seek to give effect to this bargain by the rectification of the transfer. However, if they are unable to establish any common intention on the part of Dalbara that he should relinquish his existing beneficial interest in the Property, that does not in my judgment preclude them from the lesser alternative claim for rectification of the transfer simply in relation to the disposal by Harbhajan of her beneficial interest in the Property if on the evidence there is convincing proof that Harbhajan as donor of that interest intended to dispose of it to Derrile and Delvin alone. In such a case it would not be necessary to show that Dalbara, or indeed Derrile and Delvin, shared in any common intention relating to the disposal of Harbhajan's interest, the claim instead depending upon what her subjective intention was and whether by a mistake that was not given effect to in the transfer.

40. Nor, in my judgment, is it correct, as Mr Woodhead suggested, that such a claim could only be brought by Harbhajan herself. As intended recipients of her bounty, Derrile and Delvin had *locus standi* to bring a claim in their own name. Harbhajan should properly have been joined to the proceedings, as defendant if not as a claimant, but I do not regard her non-joinder as necessarily fatal to the claim, as she took part in the claim as a witness supporting Derrile and Delvin's case and clearly consented to and agreed with the claim as it was brought by them. Any irregularity arising from her non-joinder could be rectified even now by her being added as a party.

41. Ms Taylor, in her submissions on behalf of Derrile and Delvin, pursued a rather more elaborate line of argument. She suggested that the court had power to rectify the declaration of trust in the transfer even in the absence of proof of any common intention between all the parties as to the terms thereof in order to remedy a breach of trust on Dalbara's part arising from the transfer to him of trust property. This argument in my judgment faces a number of insuperable difficulties. First, no claim based on breach of trust is pleaded, nor was any application made at the outset or during the course of the trial for permission to amend the claim to plead any breach of trust. In my judgment the argument founders on this ground alone. Second, it is well-established that a disposition of trust property in breach of trust may be set aside in certain circumstances, or an order may be made against the defaulting trustees for equitable compensation. But I have not been referred to any authority providing support for the view that the remedy of rectification is available in cases of breach of trust, and as a matter of first principle I

cannot see how or why it should be. Third, I cannot see how Derrile and Delvin could complain of any breach of trust arising from a transfer to which they were parties; by entering into the transfer on those terms, they must have consented to any breach of trust.

The witnesses

42. It is necessary to preface my assessment of the witnesses who gave evidence before me by some more general comments about the statements served on Derrile and Delvin's behalf and relied upon them at trial.

43. Before the present claim was issued, witness statements were prepared in support of the intended claim in the names of Derrile, Delvin, Harbhajan, Margret, Geeta and Narinder (amongst others) which were sent to Dalbara's solicitors with Derrile and Delvin's letter of claim dated 9 December 2019. Large swathes of these statements are identically worded, indicating quite clearly that they were prepared by the same person, and were not the hand of the individuals in whose names the statements were given. It is not clear to me what purpose it was thought would be achieved by sending statements in such a form, so obviously not the work of the witnesses themselves, but if those statements had not subsequently once again seen the light of day at the trial of the claim, perhaps it would not have mattered. However, the pre-action statements were produced and affirmed as being true by the witnesses who made them and who gave oral evidence at trial. As I shall expand upon below, there were substantial inconsistencies on key issues of fact between these statements and the later statements prepared for trial which Mr Woodhead quite fairly explored in cross-examination and to which I will have to have regard in assessing the reliability of those witnesses on those factual issues.

44. Trial witness statements were ordered to be exchanged on 18 June 2021, subsequently extended by agreement to 9 July 2021. Practice Direction 57AC was by then in operation, governing the content and preparation of such statements in the Business and Property Courts. On that date, witness statements of Derrile, Delvin, Harbhajan, Margret, Geeta, Narinder, together with three other witnesses of only peripheral relevance, were served in support of Derrile and Delvin's case by Premier Solicitors. None of those statements complied with the formal requirements of paragraphs 4.1 and 4.3 of the Practice Direction in containing a confirmation of compliance within the statement of truth signed by the witness or a certificate of compliance by the solicitors. When subsequently this was pointed out to them, the solicitors thereafter prepared amended statements in which the required confirmation and certificates were added in, together in Delvin's case with a list of documents to which he had referred in making his statement as required under paragraph 3.2 of the Practice Direction, but which were otherwise identical in wording to the statements which they replaced. These amended statements were then served out of time on Vanderpump & Sykes on 3 August 2021.

45. On 11 August 2021, Premier Solicitors filed an application seeking relief from the sanction which would otherwise preclude reliance on the amended statements at trial. In her statement in support of the application, Jodin Gherra of that firm apologised for her inadvertent error in failing to comply with the Practice Direction in preparing the original statements, but noted in paragraph 12 that the amendments which had been made in order

to comply with the Practice Direction were "very minor and do not detract from the main contents within the statements". She went on in paragraph 13 to state that:-

> "It is further noted that the statements are not compliant in that the witnesses were not necessarily informed of the practice direction before the statements were taken. However, the statements were based off their own account and from their own knowledge and were approved by the witnesses as being true to their belief and in their own words"

Of course, by signing the certificate of compliance appended to the amended statements Ms Gherra was herself certifying amongst other things her belief that the statements had been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

46. Vanderpump & Sykes initially opposed the application for relief and it was listed to be heard at the outset of the trial. At that hearing Mr Woodhead changed tack and indicated that he would not oppose the grant of relief so as to permit Derrile and Delvin to rely on the amended statements at trial but reserved his position as to the weight to be attached to such statements and as to the costs of the application and of preparing the defective statements. In the light of that, I granted the relief sought.

47. However, it was and is abundantly clear from considering the contents of the amended statements that they could not all have been prepared in accordance with the Statement of Best Practice. Most obviously, the first seventeen paragraphs of the statements of Margret and Geeta were word-for-word identical (just as their pre-action statements had been identical) and so could not possibly have been prepared in the witnesses' own words or in the manner contemplated by paragraphs 3.2 and 3.9 to 3.13 of the Statement of Best Practice. Narinder's statement was also in parts very similarly worded, and was otherwise to a large degree simply hearsay evidence of what was discussed at the three meetings at which she was not present, and so also could not have been prepared in compliance with those paragraphs. These obvious and fundamental discrepancies mean that I cannot take at face value the certificate of compliance appended to these amended statements.

48. The amended statements of Derrile and Delvin themselves, being differently worded, are not obviously non-complaint with the Statement of Best Practice in the same way, although they do include within them some material which goes beyond evidence which could properly be given on examination-in-chief. However, in the light of the aforesaid criticisms I must also treat with some caution the certificate of compliance appended to these statements, and to consider carefully whether the evidence in the statements is indeed the witnesses' own words and the product of their own recollection as far as possible unaltered and uninfluenced by external factors.

49. The process by which Harbhajan's trial witness statement was prepared is also of real concern. Her first language is Punjabi, in written form in the Gurmukhi script. She speaks little English. However, on the face of it her trial witness statement was prepared in English, then translated into Gurmukhi for her to approve and sign, before being translated back into English. A statement prepared in this manner could hardly be in the witness's own words. When questioned about this, Harbhajan explained that she had given her account to Derrile and Delvin orally in Punjabi, and they had written it down in English, and a statement prepared by their solicitor from this in English. This may have been a practical way of proceeding, but in my judgment it is quite unsatisfactory for the

statement of a witness whose evidence is of key importance to the claim to be prepared in such a manner, with whatever she may have said being filtered through Derrile and Delvin before reaching the solicitor who was responsible for compiling it into a statement.

50. In Ms Gherra's statement dated 11 August 2021 she quite properly acknowledged that as she was neither able to speak Punjabi nor to read the Gurmukhi script she had been unable to explain to Harbhajan the requirements of the Practice Direction but had left it to Derrile and Delvin to do so, and sought permission accordingly to modify the wording of the certificate of compliance which she had signed appended to the amended statement. But it is of little comfort to me in considering the reliability of her written statement to be told that Harbhajan had belatedly been informed of the requirements of the Practice Direction by her sons after her statement had been prepared.

51. I turn then to my impression of the witnesses who gave oral evidence in support of the claim.

52. Derrile was the first to give evidence. He was taken to his 2019 statement and confirmed that he had signed the statement of truth to it. He was then taken in turn to various demonstrable inaccuracies in the statement – his allegation that £150,000 had been misappropriated in paragraph 14 of the statement - and inconsistencies between that statement and his later statement, in particular concerning Harbhajan's intentions as to the disposal of her share in the Property. To his credit, he was prepared to acknowledge a mistake in that statement when confronted with it but nevertheless continued to maintain it was true and accurate in all other respects only then to be confronted with further demonstrable mistakes and inconsistencies, all of which served to undermine his reliability as a witness on the key issues of fact. Whilst I did not find him to be evasive or deliberately untruthful, I treat his evidence with caution where uncorroborated by contemporaneous documents.

53. Harbhajan was the next to give evidence through an interpreter. Whether because of her age, the language barrier or for other reasons, she did not fare well in giving oral evidence. In many of her answers she was quite clearly confused and unable to answer the question that was put to her. In the course of giving evidence, she made a number of broad allegations against Dalbara of misappropriation of monies and verbal abuse or aggression, and of forgery on the part of Gurmesh, all of which were unsubstantiated and some not prefigured by anything she had previously said in her statements. When asked about the meeting with Mr Doherty at which she and her three sons signed the transfer she was unable to recall Dalbara being present, or what parts of the transfer were completed when she signed the document, or whether Mr Doherty was in the room or not. I am afraid that I was left with little confidence in her ability to recollect key events or more generally in the reliability of her evidence.

54. Delvin was also cross-examined at some length on his 2019 statement and the inconsistencies between that and his trial statement. There was no shortage of confidence in the way in which he responded to questions put to him, but in the face of questions as to the similarities between his 2019 statement and Derrile's 2019 statement and inconsistencies between that statement and his later statement, his answers became somewhat implausible. On a number of occasions he did not give the impression to me of someone doing his best to provide an accurate account to the court in response to

questions put to him, but rather someone saying the first thing that came into his head. I treat his evidence with some caution.

55. Geeta's evidence was very unsatisfactory. She was adamant that her 2019 statement was not written by her solicitor but by herself, and when asked then to explain why it was identically worded to Margret's, maintained the statement to be her own and the fact that it was identical to her sister's was simply because they thought alike. She maintained the same about her trial witness statement despite that also being identically worded to Margret's. In her closing submissions, Ms Taylor was unable to muster any words to defend her evidence which she accepted was "not candid". At the conclusion of her evidence, I myself asked Geeta to tell me in her own words what happened at the three meetings in 2007, 2010 and 2014 which she had referred to in her statement. In answer, she gave an account of the 2007 meeting which was broadly consistent with her statement but then maintained the same discussion took place at the two later meetings, inconsistent with what she had said in her statement. Again, I was left unable to place any reliance on her evidence.

56. Narinder could not really assist me in her evidence, most of which was hearsay.

57. Marik Singh and Annil Singh, the final two witnesses called by Derrile and Delvin, gave evidence only on ancillary matters concerning Dalbara's lack of involvement in the conversion works. I found both of them to be perfectly straightforward but their evidence of little assistance in the determination of the key issues in the case.

58. Although she had made a trial statement, Margret did not attend trial on grounds of alleged intimidation, and Derrile and Delvin seek to rely on her written statement as hearsay evidence. Whilst the statement may be admitted as such, I am unable to give any weight, in particular in circumstances where the first seventeen paragraphs are identically worded to Geeta's statement.

59. On the defence side, only Gurmesh gave oral evidence. She was an impressive witness in her grasp of detail and recollection of events surrounding the receipt and subsequent distribution of the proceeds of the *Lohia v Lohia* litigation. She acknowledged that she knew little about the ownership of the property, or of the events leading up to the transfer. It was somewhat surprising in the face of that acknowledgment that when questioned towards the end of her evidence what she knew of the 2014 transaction, she maintained that she knew it involved the transfer of the property into the names of the three sons "equally". I found this part of her evidence unconvincing, and was unsure that this was not simply the result of her later rationalisation of events.

My conclusions

60. I must now set out the conclusions which I have reached on the key factual and legal issues.

61. First, on the evidence before me I am not satisfied on the balance of probabilities that Dalbara had already received his share of his father's estate in the 1990s through monies received or taken from Harbhajan to finance the purchase of the properties at Vicarage Road and Grove Green Road. Gurmesh accepts that Dalbara was given £15,000 by Harbhajan to assist in the purchase of Vicarage Road, but maintains that the balance of

the purchase price was funded through a mortgage loan taken out by her brother and a further £6000 provided by him, and similarly maintains that Grove Green Road was financed by a mortgage loan with the balance from their own savings. No documents have been disclosed on either side which throw any further light on these questions. I find Gurmesh to have been a credible witness, where in contrast I felt unable to place reliance on Harbhajan's evidence, and so do not find established the allegation that Dalbara received further sums of £25,000 and £13,000 from Harbhajan which were used to finance these purchases.

62. Second, I am likewise not satisfied that Dalbara received or took sums of £150,000, or £75,000, from the proceeds of the *Lohia v Lohia* litigation. Gurmesh accepts that Dalbara was given £25,000 from such proceeds, but contends that he received no more than other siblings (save perhaps Delvin) from such proceeds. I find Gurmesh's account of what happened to those proceeds, as set out in paragraphs 24 to 32 of her trial statement, and tested in cross-examination, to be credible, where in contrast the allegations made by Derrile, Delvin and Harbhajan were exaggerated, unspecific and ultimately entirely unproven. Such documentary evidence as there was supported Gurmesh's account, in particular the evidence relating to the transfer of funds to Kewal Singh which was paid by Dalbara from funds in his personal account transferred from the joint account before the £200,000 balance of the funds in that account was transferred by Harbhajan into another account in her sole name.

63. Third, whilst I consider it entirely credible that discussions took place within the family in and after 2007 concerning future plans for the Property, and I am satisfied that Delvin was from an early stage promoting his idea for the conversion of the Property into self-contained flats, I am not satisfied on the balance of probabilities that Dalbara agreed in 2007 or at any later meeting to relinquish the one-seventh share in the Property to which he was and remained entitled under the intestacy. This in part follows from my conclusions on the first and second points above. But over and above that, Derrile and Delvin's case on this question, as it has been presented in successive statements, has been replete with inconsistency and ambiguity. I note the follow points:-

    a) in their 2019 statements, Derrile and Delvin both state that there was a discussion in the 2007 meeting about "Dalbara removing his name from the title for the Property so that my brother's names [sic] could be added" but that "he was rather vague and avoided confirming he would do this"; Delvin repeated this in his first witness statement in the claim itself dated 7 October 2020;

    b) in their trial statements, Derrile and Delvin's account of the 2007 meeting is markedly different; but even in these statements neither clearly states that there was any agreement on Dalbara's part that he was to relinquish his own existing share in the Property; instead they refer to discussions concerning the transfer of Harbhajan's share in the Property to Derrile and Delvin, to which they say Dalbara agreed;

    c) both trial statements are then ambiguous and inconsistent in later paragraphs as to whether Harbhajan was simply disposing of her share in the Property or whether Dalbara was also agreeing to relinquish his existing share in the Property so that Derrile and Delvin were to take beneficial ownership of the Property as a whole (subject only to Narinder's share); Derrile refers in paragraph 24 of his statement to his mother's wish being "to transfer her share to me and Delvin and for Dalbara to

remain as a trustee for Narinder"; Delvin refers in paragraph 23 to it being his "mother's share of the estate which was being transferred", but in the same paragraph says that "the only people who were supposed to have beneficial interests were me, Derrile and Narinder";

d) the same ambiguity permeates Harbhajan's trial statement; she refers in paragraphs 9 and 11 to discussions at the 2007 meeting about Derrile and Delvin having "the Property" and Dalbara remaining on the title only as trustee for Narinder, to which she says Dalbara agreed; but then she refers in paragraphs 12 and 15 which follow not to Derrile and Delvin taking the Property as a whole but instead simply her transferring her share of the Property to them, as something to which Dalbara agreed;

64. I remind myself that a party seeking rectification must satisfy the court with convincing proof that the impugned instrument did not reflect the common intention of the parties to it. The inconsistencies and ambiguities in the statements to which I refer above were an unpromising basis upon which to bring a claim in rectification concerning not just the disposition of Harbhajan's share of the Property but also the relinquishment of Dalbara's share. I was left no more clear of the true position from the oral evidence as it was given by Derrile, Delvin and Harbhajan, and so, however Harbhajan may have intended to dispose of her share in the Property, I cannot be satisfied that Dalbara agreed that he would relinquish his existing share, and that there was any common intention between the parties to the transfer that it should have this effect.

65. Fourth, what then was Harbhajan's intention as regards the transfer of her beneficial share in the Property? Did she intend to gift her share equally to Dalbara, Derrile and Delvin, as was in fact the effect of the 2014 transfer? Or did she intend instead that her share should go only to Derrile and Delvin? Or was it not intended to deal by the 2014 transfer with her beneficial share at all? I have found this the most difficult question to resolve, but ultimately have concluded with some diffidence that I cannot be satisfied on a balance of probabilities that Harbhajan intended only to benefit Derrile and Delvin and to exclude Dalbara.

66. I start with the oral evidence relating to Harbhajan's intention. It is right to say that in their trial witness statements, Derrile, Delvin and Harbhajan are all consistent in their evidence that Harbhajan intended to transfer her share to Derrile and Delvin. However this account differed from that which they gave in their 2019 statements in which they state that Harbhajan had decided in 2014 to transfer her share of the Property to Delvin alone. When cross-examined about this inconsistency, Derrile and Delvin both explained that reference to Derrile had been omitted by mistake. I do not think that the inconsistency between the 2019 statements and their trial statements can easily be passed off in this way as a simple inadvertent omission. The relevant paragraphs – paragraph 18 of Derrile's and Delvin's statements and paragraph 23 of Harbhajan's statement – all labour the point that her share was to go to Delvin, as the person who was then going to develop the Property, at some length. It is, to say the least, surprising that the statements were prepared in this way, and the omission of reference to Derrile not picked up, if the intention was that Harbhajan's share should go to both of them, but not Dalbara.

67. I turn then to the evidence of the instructions which were given to Mr Doherty. I have referred above to the available contemporaneous documents in which instructions to Mr Doherty were conveyed. On the face of these documents, Mr Doherty was given no

instructions at all as to how the Property was to be held beneficially following the transfer, but instead was instructed simply to effect a transfer of the legal title from the joint names of Harbhajan and Dalbara to the joint names of Dalbara, Derrile and Delvin. In his oral evidence, Delvin stated that he had told Mr Doherty to "remove my mother and add us in" which, without more, is consistent with those written instructions. It is conceivable that based on those instructions alone Mr Doherty could have completed the transfer by checking the second box of panel 10 on the assumption that the Property was to be held by the transferees as tenants in common in equal shares when in fact he had been given no express instruction as regards beneficial ownership to this or any other effect.

68. However in her trial statement, Harbhajan states that she spoke with Mr Doherty over the telephone, in a call initiated by Delvin who was present with her, and told him that she wanted to transfer her share to Derrile and Delvin. There is, surprisingly, no mention of such telephone call in Delvin's trial statement, although he did refer to it in his oral evidence. Nor is there mention in Harbhajan's statement of the fact that Delvin was acting as her interpreter in her telephone conversation with Mr Doherty, although this came out in her oral evidence. If Mr Doherty was told by Harbhajan that she wanted to transfer her share to Derrile and Delvin it would be very surprising if he had then prepared the transfer to include such a declaration of trust which was quite inconsistent with those instructions.

69. To add further to the confusion, Derrile's, Delvin's and Harbhajan's accounts of what happened at the meeting with Mr Doherty are inconsistent. In his trial statement, Delvin states that on attending Mr Doherty's offices "we explained to Keith what we wanted" and Mr Doherty then left the meeting for a short while before returning with a completed TR1 for them to sign. In his oral evidence Delvin stated that Mr Doherty was told at the meeting that "we wanted to take mother's name off and add our name". However in Derrile's trial statement, he states that on attending the solicitor's office they were led downstairs into a room with a table on which the document which they were to sign was already present. In cross-examination Derrile confirmed that they simply went downstairs and signed the paper; he did not speak himself with Mr Doherty, and he did not believe that anyone spoke to Mr Doherty at the meeting causing him to leave the room. In her trial statement, Harbhajan similarly states that at the meeting the solicitor simply pointed at the piece of paper which they were to sign. In cross-examination, she was unable even to recall a solicitor being present at the meeting.

70. We do not, unfortunately, have any witness statement from Dalbara setting out his account of what discussions took place which led to the transfer, or of the events surrounding the transfer itself. Apart from the defence and counterclaim, the statement of truth to which was signed by Dalbara's solicitor, the closest we have to any account on his part of what took place is in the first letter written by Vanderpump & Sykes to Delvin on 11 June 2019. This states as follows:-

> "… The ownership of the Property remained unchanged until the developments described below
>
> "Just under seven years ago, we understand that you and your brother began to place pressure on our client to appoint you and your brother as joint proprietors of the Property. We understand that your mother did not wish to remain named as a legal proprietor and was not opposed to the Property being transferred into the joint names of her three sons in equal shares

> "The freehold of the Property was therefore registered in joint names in 2014. There was no discussion as to beneficial shares in the Property and therefore the beneficial interests in the Property are held to equal third shares by our client you and your brother. This is consistent with a well established legal doctrine that beneficial interests in the Property in the absence of evidence to the contrary follows the legal title"

This is somewhat perplexing. The writer of the letter appears then to have been unaware that the transfer itself contained an express declaration of trust, the very matter now in issue. But perhaps more significantly, she states that there were no discussions about beneficial shares in the Property – I assume she means at the time of the transfer leading to the registration of the Property. This might be said to be consistent with the written instructions given by Delvin to Mr Doherty which make no reference to beneficial ownership but refers simply to the transfer of the legal title, and might support a theory of the case that the 2014 transfer was not intended to deal with beneficial interests in the Property at all but simply to deal with legal title. However, this is not the case that either party has made or sought to argue before me, and indeed is inconsistent with what Harbhajan herself states she intended.

71. Overall, the picture that emerges is incomplete, in the absence of any file relating to the transaction which was maintained by Mr Doherty, and confused, with many inconsistencies which were not satisfactorily explained or indeed resolved by the evidence given in cross-examination. Ultimately, however, the transfer containing the declaration of trust was signed by Harbhajan, Derrile and Delvin. It stretches the elastic of credibility that they signed such document without being taken to or reading through its provisions, and without sight or knowledge of the declaration. If that declaration did not properly give effect to what they, and in particular Harbhajan, intended should happen as regards her share in the Property, convincing proof must be provided. In my judgment, I am afraid to say, Derrile and Delvin have failed to make this out.

72. To complete my findings as to the factual matters in dispute between the parties, I should state that I accept the evidence put forward on Derrile and Delvin's behalf that Dalbara did not play any part in the works to convert the Property. However, this does not provide any particularly compelling support for Derrile and Delvin's case that Dalbara had no interest in the Property. His reason for remaining aloof from the project could equally have been that he did not support converting the Property in this way, preferring instead to keep the Property as a single dwellinghouse, with individual rooms being let out as and when appropriate.

73. It remains for me to deal briefly with the plea of unconscionable delay upon which Mr Woodhead relied as a defence to the claim in rectification, had it otherwise been established. He submitted that the claim could and should have been brought much earlier, and that Gurmesh had been substantially prejudiced by the delay, in particular as a result of the tragic and unforeseen death of Dalbara. In response to questions which I put to him concerning the mortgage loan taken out in the joint names of the three brothers, he also contended that relevant prejudice arose by reason of the fact that Dalbara had assumed joint liability for repayment of the loan in circumstances where, if rectification was granted, he would have no corresponding interest in the Property and his estate may not now be adequately protected by any indemnity in respect of such liability as may be offered by his brothers.

74. I do not consider the claim for rectification, if it were otherwise made out, would have been defeated by reason of any delay in bringing it. Delvin and Derrile were unaware, on their case, of the terms of the transfer until 2018; on his case, Delvin wrote to Mr Doherty in November that year after learning of the terms of the transfer, although the authenticity of the e-mail in question is disputed. In any event, the claim was brought not more than six years after the transfer had been executed, which by analogy with applicable limitation periods for claims based in contract at common law was not unduly late. And whilst Gurmesh was undoubtedly hindered in her defence of the claim by reason of Dalbara's untimely death, the circumstances of his death were not ones which could reasonably have been anticipated and have no connection with any delay in bringing the claim.

75. In the event the transfer had fallen to be rectified, I also find that Dalbara's estate would have been adequately protected in respect of the liability which he had assumed under the mortgage loan by the estate being indemnified by Derrile and Delvin for such liability. I would not therefore have refused rectification on that ground.

Disposal

76. The claim for rectification of the transfer falls to be dismissed. On the counterclaim as it is pursued by Gurmesh, subject to any finer points of drafting which counsel may suggest I will declare that the Property is held by Derrile and Delvin as the surviving trustees on trust for themselves and Dalbara's estate in equal shares but subject to Narinder's pre-existing one-seventh interest under the statutory trusts in Joginder's intestacy if that interest has not previously been satisfied.