Neutral Citation No: [2018] EWHC 395 (Ch)
Claim No:

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The High Court of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 2 March 2018

HC-2016-002311
HC-06C04188

Before :
Miss Joanna Smith QC sitting as a Deputy Judge of the High Court
Between :

TREVOR ANTHONY ANTOINE
(Administrator of the estate of Joseph Antoine deceased)
Claimant

- and -

(1) BARCLAYS BANK PLC
(2) THE CHIEF LAND REGISTRAR
(3) ATHENA ETHEL TAYLOR
(As the Personal Representative of George Taylor deceased)
Defendants

And between:

ATHENA ETHEL TAYLOR
(as Personal Representative of George Taylor deceased)
Claimant

- and -

TREVOR ANTHONY ANTOINE
(Administrator of the estate of Joseph Antoine deceased)
Defendant

Mr Umezuruike (instructed by Riverbrooke Solicitors) for Mr Antoine
Mr Serugo-Lugo (instructed by Montas Solicitors) for Mrs Taylor
Mr Althaus (instructed by TLT LLP) for Barclays Bank Plc
Ms Yates (instructed by the Government Legal Department) for the Chief Land Registrar

Hearing dates: 20-22 February 2018

JUDGMENT

Pursuant to CPR PD 39A Para 6.1, I direct that no official shorthand note shall be taken of the judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This case involves the trial of two separate actions which have been directed to be heard on the same occasion by Order of the Court.

2. The first action in time (HC-06C04188) ("**the 2006 Claim**") dates back to 2006 and concerns a dispute between Mrs Athena Taylor ("**Mrs Taylor**") as Personal Representative of her deceased husband, Mr George Taylor ("**Mr Taylor**") and Mr Trevor Antoine ("**Mr Antoine**"), as Administrator of the estate of his late father, Mr Antoine Joseph, also known as Joseph Antoine ("**Mr Joseph**"). Mr Joseph died on 21 February 1996. Administration of his estate was granted to Mr Antoine on 14 August 1996.

3. The 2006 Claim involved a claim for relief by Mr Taylor in respect of a property at 14 Mirabel Road, London SW6 7EH ("**the Property**") which he said was used as the security for a loan of £11,000 provided by Mr Taylor to Mr Joseph in 1987 ("**the 1987 Transaction**"). He relied on three documents as evidencing the 1987 Transaction ("**the Contested Documents**") and, amongst other things, sought by way of relief the transfer to him of the leasehold and freehold interests in the Property (which were registered in Mr Joseph's name), alternatively the sum of £11,000.

4. On 12 July 2007, Mr Taylor obtained an order from Master Moncaster in Mr Antoine's absence ("**the July 2007 Order**") to the effect that in default of payment of what was referred to as "the Mortgage Debt" and absent notice of intention to redeem the mortgage, Mr Taylor would be absolutely entitled to all the estate and the interest of Mr Joseph in the freehold of the Property and to have transfer thereof. In the event of default by an identified date, it was ordered that Mr Taylor be registered as the proprietor of the freehold in the Property and that the leasehold would vest in Mr Taylor.

5. Mr Taylor received no payment and no notice of intention to redeem the mortgage by the default date and title to the Property vested in him pursuant to the July 2007

Order. HM Land Registry ("**HMLR**"), acting on the July 2007 Order, then registered Mr Taylor as the proprietor of the Property.

6. In early 2008, Mr Taylor obtained a loan by way of legal mortgage from Woolwich Mortgages (by then a part or a subsidiary of Barclays Bank) ("**Barclays**") in the sum of £80,000 which was secured on the Property by way of a legal charge dated 26 February 2008 ("**the Legal Charge**"). The Legal Charge was registered at HMLR.

7. In 2008, Mr Antoine discovered that Mr Taylor was carrying out renovations at the Property and applied to set aside the July 2007 Order on the grounds that it was obtained by fraud. In particular, Mr Antoine asserted that the Contested Documents were all forgeries and that his father's signature on two of the three Contested Documents was not genuine.

8. By an Order dated 10 July 2008 ("**the July 2008 Order**"), Master Moncaster ordered that the 2006 Claim should continue against Mr Antoine as personal representative of Mr Joseph. He set aside the July 2007 Order albeit without prejudice to the rights of Barclays and their registered Legal Charge over the Property. HMLR, acting on the July 2008 Order, reinstated Mr Antoine as Administrator of his father's estate, as the proprietor of the Property.

9. Some further steps were taken in the 2006 Claim, as more particularly set out below, but it was ultimately not pursued beyond the receipt of a report on the signatures on the Contested Documents from a jointly instructed handwriting expert (Dr Audrey Giles) dated 26 March 2009.

10. In the second action in time (HC-0002311) ("**the 2016 Claim**"), originally commenced only against Barclays and the Chief Land Registrar ("**the Registrar**") as Defendants, Mr Antoine seeks a declaration that the two Contested Documents which purport to have been signed by Mr Joseph are null and void and of no legal effect. Further, he seeks an order pursuant to paragraph 2(1)(a) of Schedule 4 of the Land Registration Act 2002 ("**the LRA 2002**") that the register be altered by the deletion of the Legal Charge created by Mr Taylor in favour of Barclays and an order removing from the register a Unilateral Notice in respect of a pending land action that was registered in favour of Mr Taylor on 19 March 2009 in respect of the Property.

11. Barclays and the Registrar do not dispute that the Contested Documents are forgeries but dispute the claim for an order altering the register on grounds of mistake. They both maintain, for reasons I shall return to later, that there is no proper basis for the register to be altered so as to delete the Legal Charge. Mrs Taylor, later joined as

third Defendant in the 2016 Claim, denies that the Contested Documents are forgeries and claims damages which she says she has suffered, as Mr Taylor's Personal Representative, by reason of this false claim.

12. On the first morning of the trial, Mr Antoine made an application to amend his Reply to Barclays' Amended Defence in the 2016 Claim which I permitted in part and shall return to in due course. He also made an application to extend time for service of a Reply to the Registrar's Amended Defence in which he pleaded a new case to the effect that the Registrar ought to have entered an observation in the register to the effect that Mr Taylor was registered as the proprietor of the Property as the result of the July 2007 Order (which had been made in the absence of Mr Joseph) and that if this had been done, Barclays would have been alerted to the fact that the July 2007 Order might be susceptible to challenge. This is said to support the argument that the registration of the Legal Charge "*on the basis of the suggested defective registration of George Taylor as a proprietor of the Property, was a mistake*".

13. Ms Yates, acting on behalf of the Registrar, invited me to take a pragmatic approach to this application. Although she maintains that the new case has no prospect of success, she was not prejudiced in dealing with it and proposed that I deal with it *de bene esse*, which I agreed to do. I return to it later in this Judgment.

The Issues

14. At the heart of this case lies an important point of principle as to whether a court order said to have been obtained by reference to forged documents and given effect to by an entry on the register at HMLR results in a "mistake" for the purposes of the Land Registration Act 2002 ("**the LRA**") such that the Court has power to alter the register for the purpose of correcting that mistake.

15. The parties are agreed that the following issues fall to be determined at trial:

16. Issues Common to both the 2006 and 2016 Claims:

    16.1 Were the Contested Documents forgeries?

17. Issues particular to the 2006 Claim (all of which, apart from the Issue at 17.3, assume that the Contested Documents were forgeries):

    17.1 Should Mrs Taylor's claim be dismissed in its entirety, or should she be granted relief in the form of either:

        17.1.1 Payment of money by Mr Antoine to reflect unjust enrichment to him arising from the enhancement of the value of the

Property resulting from renovation carried out by Mr Taylor (and if so, how much), and/or

17.1.2 Repayment to her from Mr Antoine of the cost of renovating the Property, including the interest on the loan from Barclays to Mr Taylor (and if so, how much)?

17.2 Should Mr Antoine be entitled to compensation from Mrs Taylor:

17.2.1 For the fact that a legal charge was placed on the Property in favour of Barclays (and if so, how much); and/or

17.2.2 For use and occupation of the Property (and if so, how much)?

In his closing submissions, Mr Umezuruike, acting on behalf of Mr Antoine, in fact abandoned this claim in circumstances where Mr Taylor's estate was worth nothing and it was accepted that Mr Antoine had no prospect of making any recovery. He invited me to make no order on the claim, which I shall do.

17.3 If the Contested Documents were genuine, should there be an order for foreclosure in favour of Mrs Taylor, or should Mr Antoine be allowed to exercise his equitable right of redemption (and if so, on what terms)?

18. Issues particular to the 2016 Claim (all of, which apart from the issue at 18.5, assume that the Contested Documents were forgeries)

18.1 Was it a "mistake" for the purpose of the LRA Sch. 4 para 2(a) for the Registrar to have entered Mr Taylor as the Registered Proprietor upon service of the July 2007 Order on the Registrar:

18.1.1 At all, because the July 2007 Order was made on the basis of forged documents, or

18.1.2 Without an observation on the register that the entry was made pursuant to the July 2007 Order?

18.2 Was it a "mistake" for the purposes of the LRA Sch. 4 para 2(a) for the Registrar to have entered the Legal Charge in favour of Barclays on the register?

18.3 If the court found that the entry of Mr Taylor on the register was a mistake, but that the entry of the Legal Charge on the register was not a mistake, would it nevertheless have the power to order removal of the Legal Charge on some other basis?

18.4 If the court would otherwise have the power to remove the Legal Charge under Paragraph 2(1)(a), are there exceptional circumstances which would justify its not doing so?

18.5 If the Contested Documents were genuine, should there be an order for Mr Antoine to pay Mrs Taylor damages for loss of rental income and if so how much?

19. In his skeleton argument for trial and during the course of his closing submissions, Mr Serugo-Lugo, appearing on behalf of Mrs Taylor, raised some additional points which he invited me to consider. I shall pick these up during the course of my judgment.

The Witnesses

20. The parties each called witnesses in support of their cases:

20.1 Mr Antoine gave evidence on his own behalf in support of four witness statements signed by him on 8 May 2008, 26 June 2008, 31 July 2017 and 15 February 2018. Although (unsurprisingly) he had trouble remembering the precise details of events which occurred a long time ago, Mr Antoine struck me as a credible witness who was doing his best to assist the court and I accept his evidence.

20.2 Barclays relied on the oral evidence of Ms Natasha Heslop, given in support of her witness statement of 31 August 2017. Ms Heslop had no direct knowledge of the events surrounding the making of the loan by Barclays to Mr Taylor but had set out in her statement a helpful explanation of key documents. Owing to her lack of involvement, Ms Heslop was largely unable to address questions of detail in her oral evidence.

20.3 The Registrar relied on the oral evidence of Ms Shah, provided in support of her two witness statements dated 31 January 2018 and 9 February 2018. Ms Shah's oral evidence concentrated largely on the practice and procedures of HMLR and I accept her evidence.

20.4 Mrs Taylor gave evidence on her own behalf in support of her witness statement dated 15 June 2017. Her evidence focussed largely on the state of the Property when Mr Taylor took over possession, the money he spent in renovating the Property and the details surrounding the letting of the Property by Mr Taylor in 2010. I have no reason to doubt that Mrs Taylor was seeking to give truthful evidence albeit that in many instances she had

no clear recollection, or did not know the detail, of relevant events. She appears to have been mistaken in her oral evidence when she said that her husband only let out the Property when he was in possession of it. This was contradicted by her witness statement and by a tenancy agreement from 2010.

20.5 Mrs Taylor called Mr Ernest Borland to give oral evidence in support of his witness statements of 13 November 2006 and 15 June 2017. Mr Borland was at a considerable disadvantage in giving his evidence owing to the fact that he was suffering from hearing loss. However, notwithstanding this disability and making every allowance for it, I nevertheless found his evidence to be highly unsatisfactory for reasons I shall return to in detail later.

Experts

21. In addition to the report of Dr Giles obtained in the context of the 2006 Claim, a further report dated 22 August 2017 was obtained in the 2016 Proceedings by Mrs Taylor from Mr Stephen Cosslett. Dr Giles and Mr Cosslett signed a Joint Statement in September 2017. In light of their agreement that the disputed signatures of Mr Joseph in the Contested Documents "*demonstrate significant and consistent differences*" when compared with undisputed examples of his signature and their respective views that:

21.1 the two Contested Documents with Mr Joseph's signatures "*are attempts to simulate his genuine signature*" (Dr Giles) and

21.2 "*there is strong evidence to support the view that Mr Joseph did not sign the disputed Consent Document dated 29th July 1987 or the Leasehold Documents dated 3rd September 1987*" (Mr Coslett),

the parties did not seek to rely on their oral evidence at trial or to test that evidence by cross-examination. As I have already indicated, Mr Antoine, Barclays and the Registrar all accept that the Contested Documents are not genuine. Only Mrs Taylor maintains that the experts are wrong.

The Registration and Conveyancing History of the Property

22. Before I address the issues in this matter, I need to set out in some detail the registration and conveyancing history of the Property.

23. On 22 November 1963 Hearts of Oak Benefit Society, as owner of the unregistered freehold, granted a lease of the Property to Mr Bernard Benjamin ("**Mr Benjamin**")

for a term of 87½ years from 24 June 1963. On the same date, Mr Benjamin executed a legal charge over the leasehold title in favour of Fulham Borough Council ("**the 1963 Charge**").

24. First registration of the leasehold title occurred on 31 January 1964 (under title number LN237624) and the 1963 Charge was entered in the charges register on the same date.

25. On 5 August 1964 Mr Benjamin and Mr Joseph signed a memorandum of agreement for the sale of the leasehold interest in the Property for £4,700. On 7 September 1964 Mr Benjamin duly conveyed the leasehold interest to Mr Joseph for that sum. On the same date Mr Joseph executed a legal charge over the leasehold title in favour of the Metropolitan Borough of Fulham ("**the 1964 Charge**"). It would appear that the 1963 Charge was discharged at the same time.

26. Mr Joseph was registered as proprietor of the leasehold title on 14 October 1964 and the 1964 Charge was entered in the charges register on the same date.

27. On 26 March 1971 Mr Joseph purchased the freehold reversion to the Property from Hearts of Oak Benefit Society for £2,100. On the same date Mr Joseph executed a legal charge over the Freehold in favour of the London Borough of Hammersmith ("**the 1971 Charge**"). The conveyance as originally drafted contained a provision (at clause 2) for the leasehold title to merge and be extinguished in the freehold title, but the provision was struck through prior to execution, thus ensuring that both titles remained extant.

28. On 31 March 1971, Mr Joseph applied for first registration of the freehold title. He was registered as proprietor on 19 April 1971 (under title number NGL162212) and the 1971 Charge was entered in the charges register on the same date.

29. According to Mrs Taylor's case in the 2006 Claim, the 1987 Transaction took place as evidenced by the Contested Documents:

    29.1 On 29 July 1987 Mr Joseph signed a document ("**the Contested Notice Document**") by which he confirmed that he had been notified by the (unnamed) leaseholder of the Property of the latter's intended transfer of the leasehold title to Mr Taylor "*to take effect in the year 2001 under agreement to be dated 30-7-1987*". Given that from September 1964 Mr Joseph had himself been the proprietor of the leasehold title, this document appears on its face to be peculiar, at best.

29.2 On 30 July 1987 Mr Benjamin signed a document ("**the Contested Leasehold Document**") by which he purported to "*cede*" the leasehold title to Mr Taylor "*to take effect in the year 2001*", in consideration for the receipt of payments from Mr Taylor via Helen Pisani ("**Ms Pisani**") (Mr Taylor's sister, now deceased) totalling £23,000 between the years 1983 and 1987. However, Mr Benjamin was not in a position to cede the leasehold title to Mr Taylor as he had already transferred it to Mr Joseph in September 1964.

29.3 On 3 September 1987 Mr Joseph signed a document ("**the Contested Freehold Document**") by which he confirmed receipt of a loan of £11,000 from Mr Taylor (again via Ms Pisani) and promised that, if the loan was not repaid with interest by November 2004, Mr Taylor would be "*at liberty to consider me being in default and accordingly becomes the Freeholder of [the Property*]".

30. It would appear that Mr Taylor knew nothing about the Contested Documents at the time when they were executed. His case in the 2006 Claim was that he first learned of their existence in May 2005, when they were provided to him by Mr Borland, who had been a witness to the execution of each of them. Mr Borland's evidence is that he was not only present at the time of the signing of the Contested Documents but that he also prepared them on behalf of Ms Pisani.

31. As referred to above, Mr Joseph died on 21 February 1996 and administration of his estate was granted to Mr Antoine on 14 August 1996. Mr Antoine confirmed in his oral evidence that he did not take any legal advice as to his duties as administrator and did not register himself as proprietor of the Property.

32. Mr Antoine decided to retain the Property but did not live in it (his own residence being 66 Saltoun Road SW2 ("**Saltoun Road**")) and it was left unoccupied for many years. Mr Antoine's oral evidence was that he visited the Property to collect mail every month or so, but that he did not arrange for mail addressed to the Property to be forwarded to him.

33. In 2005, squatters broke into the Property. Mr Antoine persuaded them to leave voluntarily, without the need to take legal proceedings, and he then boarded up the Property in an attempt to make it more secure. By this time, Mr Antoine accepted in cross-examination that he was visiting the Property less frequently owing to medical problems and from about March 2006, Mr Antoine did not visit the Property at all.

34. In about October 2007, Mr Antoine and his family left Saltoun Road to move to New Zealand. Although Mr Antoine arranged for mail addressed to Saltoun Road to be forwarded to his sister's address, he still made no arrangement for mail addressed to the Property to be forwarded to an alternative address.

35. On 25 November 2005, Mr Taylor applied to HMLR by UN1 to enter a unilateral notice against the freehold and leasehold titles in reliance on the Contested Documents. HMLR rejected the application on 29 November 2005 and invited him to resubmit the application in a different format. On 13 December 2005, Mr Taylor made a fresh application by two RX1s for restrictions in Form N, one in respect of each title.

36. On 19 December 2005, HMLR sent a notice of the applications to Mr Joseph at the Property, asking for any objection thereto to be made by 12 January 2006. In the absence of receipt of any objection, HMLR completed the freehold application with deemed effect from 13 December 2005, and completed the leasehold application with deemed effect from 19 December 2005.

37. On 4 August 2006 Mr Taylor issued the 2006 Claim claiming against Mr Joseph an order for the transfer of both titles in the Property in reliance on the Contested Documents. In the Claim Form, Mr Taylor gave the Property as Mr Joseph's address for service.

38. On 11 January 2007 and 15 January 2007 respectively, Mr Taylor applied to HMLR by form AP1 to discharge the 1971 Charge and the 1964 Charge from the freehold and leasehold title, enclosing DS1s from the London Borough of Hammersmith and Fulham. The application was completed in respect of both titles with deemed effect from 15 January 2007.

39. In circumstances where Mr Taylor asserted that he had been unable to effect service at the Property of the 2006 Claim on Mr Joseph and had been unable to trace Mr Joseph despite the involvement of a private investigator, Master Moncaster made an order dated 9 March 2007 for substituted service of the 2006 Claim, which required the claim to be advertised in local newspapers in Fulham, Grenada and St Lucia.

40. On 12 July 2007, in the absence of Mr Joseph, Master Moncaster made the July 2007 Order referred to above and on 11 September 2007, having received no payment and no notice to redeem, Mr Taylor applied to HMLR by form AP1 for a transfer of both the freehold and leasehold interest pursuant to the July 2007 Order.

41. On 14 September 2007 HMLR received an application on behalf of Mr Taylor to be registered as the proprietor of the freehold and leasehold titles to the Property. This application was made on form AP1, Panel 6 of which specified that a single document was lodged with the application: *"a sealed court order dated the 12th July 2007"*; that is, the July 2007 Order.

42. Also on 14 September 2007, HMLR raised a requisition that requested a postal address for Mr Taylor and sent a notice of the application addressed to Mr Joseph at the Property, inviting an objection to the application by 12pm on 5 October 2007. There was no objection and the application was completed on 8 October 2007 and Mr Taylor was registered as the proprietor with deemed effect from 14 September 2007.

43. On 19 September 2007, HMLR received an application on behalf of Mr Taylor on form RX4 (dated 17 September 2007) to remove the restrictions that had been entered onto the freehold and leasehold titles in December 2005, and the application was completed.

44. By a letter dated 14 November 2007, Mr Taylor personally made an application to HMLR to change his postal address to the Property, stating that he had *"now been able to move to the above address"*. The application was completed with deemed effect on 16 November 2007. Letters were sent by HMLR to Mr Taylor at the Property on 16 November 2007 in respect of the freehold and leasehold titles. These letters did not come to Mr Antoine's attention at the time, although he fairly accepted in cross-examination that if he had made arrangements for mail addressed to the Property to be forwarded to an alternative address, they would have come to his attention.

45. On 12 December 2007 Mr Taylor made a mortgage application to Barclays, seeking a loan of £70,000 in order to renovate the Property.

46. On 2 January 2008 a mortgage valuation report was prepared for Barclays, valuing the Property at £650,000 and noting that it was vacant and in need of major refurbishment.

47. On 3 January 2008 Mr Taylor wrote to HMLR asking for the leasehold title to be closed in readiness for registering a charge against the freehold title in favour of Barclays.

48. On 10 January 2008 HMLR effected a merger of the two titles, thereby bringing the leasehold title to an end. The deemed date of determination of the title, and of closure of the register, was 4 January 2008.

49. On or about 4 February 2008 Mr Taylor asked to increase the amount of the loan to £80,000, which Barclays approved by way of a formal mortgage offer on 6 February 2008 for £80,000 together with an application fee.

50. On 26 February 2008 Mr Taylor executed the Legal Charge in favour of the Bank charging the freehold title to the Property as security for repayment of the loan.

51. On 29 February 2008, Mr Taylor's solicitors applied to HMLR to register the Legal Charge against the title to the Property, which was deemed completed on the same date.

52. Mr Antoine's case in the 2016 Claim (which I accept) is that he first discovered that the freehold title to the Property had been transferred into Mr Taylor's name in about April 2008, and first became aware of the existence of the July 2007 Order when it was sent to his solicitors by HMLR on 23 April 2008 following a request by them for documents to show how Mr Taylor had become registered as the owner of the Property.

53. On 8 May 2008 Mr Antoine applied to be joined to the 2006 Claim and to set aside the July 2007 Order, on the basis that he had not been served with the proceedings and that the July 2007 Order had been obtained by defrauding the Court. On 9 May 2008, Mr Antoine also applied for an injunction to restrain Mr Taylor from dealing with the Property.

54. On 13 May 2008 Mr Antoine applied to HMLR by UN1 to enter a unilateral notice against the freehold title to the Property ("**the Unilateral Notice**") on the basis of the pending 2006 Claim. The notice was entered in the charges register on 14 May 2008.

55. Master Moncaster made the July 2008 Order setting aside the July 2007 Order without prejudice to Barclay's rights pursuant to the Legal Charge and gave directions for the parties to file and serve statements of case. Between 22 August and 27 October 2008, the parties to the 2006 Claim filed and served their respective statements of case.

56. On 26 March 2009, Dr Giles acting as joint expert provided her report on the authenticity of the signatures in the Contested Documents. On or about 24 April 2009, Mr Taylor filed his allocation questionnaire in the 2006 Claim. No further progress was made in those proceedings at that time.

57. On 9 February 2009 Mr Antoine applied to HMLR by AP1 for the register to be altered so as to show him as the registered proprietor of the freehold title, but without

prejudice to the rights of Barclays (pursuant to the July 2008 Order). The application was entered onto the Day List on 11 February 2009.

58. HMLR gave notice of the application to Mr Taylor via his solicitors on 18 February 2009. Mr Taylor's solicitors objected in writing on 24 February 2009 and again on 11 March 2009. After giving a provisional decision on 3 March 2009, HMLR finally deemed the objection to be groundless on 11 March 2009. The application was completed on 12 March 2009, albeit that owing to a clerical error the date of the entry was left as 14 September 2007 (the date corresponding to Mr Taylor's entry), rather than 11 February 2009, the date when Mr Antoine's application was entered onto the Day List.

59. Mr Taylor died intestate on 13 June 2013 and payments of the mortgage to Barclays ceased in July 2013. It was Mrs Taylor's oral evidence that her husband's estate had nil value other than the Property, or the claim to the Property. In September 2013, Barclays was informed of Mr Taylor's death by Mrs Taylor.

60. On 20 February 2015 Barclays appointed Touchstone CPS Ltd as LPA receiver. It is Barclay's case that it did not become aware of Mr Antoine's interest in the Property until March 2016, and that the first written notification it received from him was on 18th of that month. Having received such notification Barclays immediately dis-instructed the receiver.

61. The 2016 Claim which is the lead claim in these joined proceedings, was issued against Barclays and the Registrar on 4 August 2016. At a CMC on 17 October 2016, Master Bowles gave Mr Antoine the opportunity to join Mr Taylor's estate to the 2016 Claim and to amend the proceedings. At a further CMC on 7 July 2017, Master Bowles directed that the two claims be heard together and gave directions for trial.

62. A PTR was held on 30 January 2018 at which the court directed that the experts' respective reports would stand as their evidence and that they would not be cross-examined at trial. It seems that Mrs Taylor made an application for disclosure of original documents at the PTR which she wanted to provide to Mr Cosslett who, unlike Dr Giles, had seen only copies. However this application was dismissed.

Discussion of the Issues

63. Before I turn to address the live issues in the order they have been identified earlier in this Judgment, I should deal with a submission from Mr Serugo-Lugo on the part of Mrs Taylor to the effect that Master Moncaster should not have heard the application to set aside the July 2007 Order which it is argued was in effect an appeal from his

own judgment. Mr Serugo-Lugo also submits that Master Moncaster should have recused himself on grounds of bias. He argues that the effect of Master Moncaster's failure to stand down is that the July 2008 Order setting aside the July 2007 Order "*took no effect*" and that, in the circumstances, Mr Taylor remains the proprietor of the Property. If I am with him on this point, he says, then that is the end of the proceedings.

64. I reject these submissions. Mr Serugo-Lugo was unable to show me any authority supporting the proposition that Master Moncaster should have refused to hear the application to set aside the July 2007 Order and he was unable to explain the grounds on which he said Master Moncaster was biased. The July 2007 Order was made in the absence of Mr Joseph (the original Defendant) and Mr Antoine's evidence, which I accept, is that he had been unaware of the 2006 Claim at that stage. The July 2007 Order gave liberty to the parties to apply. When Mr Antoine discovered the existence of the July 2007 Order, he made an application to set it aside. He did so (as Ms Yates submitted) not by way of an appeal from a regular order, but pursuant to the inherent jurisdiction of the court that entitles it to set aside irregular orders (*Isaacs v Robertson* [1985] 1 AC 99 (PC) per Lord Diplock at p. 103). I can see no proper basis on which I could find that the July 2008 Order took no effect.

Issues common to both the 2006 and 2016 Claims:

Were the Contested Documents forgeries?

65. An allegation of forgery is an allegation of fraud. Mr Serugo-Lugo directed my attention to the decision of Mr John Martin QC, sitting as a Deputy High Court Judge in *Tony Pittas v Katerina Christou* [2014] EWHC 79 (Ch), a case involving an allegation of forgery in relation to a will, on the approach to be adopted to such an allegation.

66. At paragraph 13 of his judgment, Mr Martin QC said this:

"*…there is no dispute that the approach I should adopt…is first to assess the lay evidence and then see whether or not the handwriting evidence supports the view I have formed of the lay evidence: Supple v Pender [2007] WTLR 1461. As to the standard of proof, there was agreement between the parties that the relevant approach was that set out in Re H [1996] AC 536, where Lord Nicholls said this (at pp 586-7):*

'the balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more

likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence…Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event in itself is a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established…This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters'."

67. I did not understand any of the other parties to disagree with the guidance and approach articulated in *Re H*, and I have approached my analysis accordingly. As to the order in which I should assess the evidence, Ms Yates submitted that as a matter of discretion the court is entitled to decide upon the order in which it deals with the evidence of fact and the expert evidence and she said that whilst the approach taken in *Supple v Pender* had involved an exercise of the Judge's discretion to consider the factual evidence first, there is no rule of law that requires me to take that approach. I am inclined to agree with Ms Yates about that, but in any event I shall, in this case, consider the evidence of fact first, before going on to consider whether the expert evidence supports the view that I have taken as to that evidence. I shall determine the issue of forgery against that background.

68. Mrs Taylor's case is that the Contested Documents are genuine. She says that she is the victim of a carefully planned scheme by Mr Antoine to dispossess her late husband of the Property by reliance on false allegations of fraud, albeit that this case was not in fact put to Mr Antoine in cross-examination. In passing, I note that Mr Serugo-Lugo sought in his skeleton argument and in his oral closing to question Mr Antoine's true identity, but in circumstances where Mr Antoine was not questioned

about his identity and it was not suggested to him that Mr Joseph was not his father, I discount this point.

69. Mrs Taylor relies on Mr Borland's evidence to support her case that the Contested Documents are genuine.

70. According to Mr Borland's witness statements, the Contested Documents came to be prepared in the following circumstances.

70.1 Mr Borland says that he had known Mr Taylor since about 1953 and that he had also known Mr Taylor's sister, Ms Pisani for a long time. In 1987 Ms Pisani was doing business from a shop in Portobello Road. Mr Borland had known Mr Joseph from the 1970s on a social basis, they regularly played dominoes together at various London pubs and they also used to play cricket together in Harlesden.

70.2 In about 1983, Ms Pisani told Mr Borland that she regularly received money from Mr Taylor, who was then in the Merchant Navy, for safekeeping. She said that she was looking to invest some of that money. Mr Borland says that Mr Joseph had told him that Mr Benjamin was looking for a loan. He arranged a meeting between Mr Joseph, Mr Benjamin and Ms Pisani at the Property in the summer of 1983 at which the possibility of Ms Pisani lending money in cash to Mr Benjamin was raised. Thereafter various sums were loaned to Mr Benjamin by Ms Pisani.

70.3 In July 1987, Mr Borland negotiated an agreement between Mr Benjamin, Mr Joseph and Ms Pisani that in consideration of the monies lent to Mr Benjamin (then totalling £23,000), Mr Benjamin would transfer the leasehold title in the Property to Mr Taylor, such transfer to take effect in the year 2001. Mr Joseph gave his consent to this transfer. Mr Borland says he saw a copy of the Land Registry title at the time showing both freehold and leasehold title and that, on the basis of this, he thought that Mr Benjamin owned the leasehold interest. During his cross-examination by Mr Umezuruike, acting on behalf of Mr Antoine, Mr Borland asserted that Mr Joseph had confirmed that Mr Benjamin was the leaseholder.

70.4 Mr Borland wrote out the Contested Leasehold Document dated 30 July 1987 and the Contested Notice Document from Mr Joseph dated 29 July

1987 and they were signed and witnessed. Mr Taylor did not know of these arrangements.

70.5 In early August 1987, Mr Joseph asked Mr Borland if he knew of someone who would be willing to lend him £11,000. Mr Borland approached Ms Pisani who agreed to lend the money on the basis of an agreement as to repayment of the principal loan and interest by November 2004, failing which Mr Taylor would be at liberty to consider Mr Joseph as being in default, in which case Mr Taylor would become the freehold owner of the Property. In his oral evidence, Mr Borland confirmed that he prepared the Contested Freehold Document dated 3 September 1987 and was present in Ms Pisani's shop, together with Mr Benjamin, when it was signed by Mr Joseph. He said that Ms Pisani handed over £11,000 (the equivalent today of something in the region of £30,000) to Mr Joseph in cash.

70.6 The dates of 2001 and 2004 for repayment of the loans were to roughly coincide with a likely date for Mr Taylor's retirement

70.7 Following the signing of the Contested Documents (which Mr Borland says were not copied for Mr Joseph), Ms Pisani gave them to Mr Borland for safe-keeping. Ms Pisani died in early 1988 and thereafter he had continued to see Mr Taylor on a regular basis. He lost contact with Mr Joseph and had not seen him since the 1980s.

70.8 Mr Borland did not mention in his statement, but maintained in his oral evidence for the first time, that in 2004 Mr Taylor was staying in a room at his (Mr Borland's) address at 29 Ewelme Road as a paying guest. However, Mr Borland said that he had not then told Mr Taylor about the existence of the Contested Documents because he had forgotten about them. In his statement he records that he only discovered the Contested Documents in about early 2005.

70.9 Mr Borland expresses the view that Mr Joseph is a person of questionable probity and suggests that any simulation of Mr Joseph's signature might be by Mr Joseph himself. Mr Serugo-Lugo did not suggest to Mr Antoine in cross-examination that his father was of questionable probity and I have seen no other evidence to that effect. I reject any such suggestion.

71. In my judgment there are a number of significant difficulties with Mr Borland's evidence. However, before I address these difficulties, I need to summarise Mr Antoine's evidence:

71.1 Mr Antoine was not present at the 1987 Transaction but it is his evidence that the signature on the Contested Freehold Document is not his father's signature and that he immediately identified that when he first saw the document. It is also his evidence (by reference to examples of documents on which Mr Joseph's genuine signature appears) that he believes the signature on the Contested Notice Document to have been crudely forged. It was not suggested to him that he might be mistaken about this.

71.2 Mr Antoine lived with Mr Joseph at the Property between 1964 and 1993 and says he was close to his father and knew him well. He says that his father had no interest in cricket and that he never heard of him playing dominoes. This evidence was not challenged. Mr Antoine says that he never heard the names Mr Borland, Ms Pisani, Mr Taylor or Joseph Williams (the witness to the Contested Documents).

71.3 In January 1984, Mrs Joseph died leaving to her husband savings of £14,391 and no debts. By January 1987, Mr Joseph had finished paying off mortgages on the Property. He was careful with his money and he saved and invested his earnings. He discussed his savings and investments with Mr Antoine who says that he can think of no reason why his father would suddenly have needed to borrow £11,000 in 1987 and, in the process, jeopardise his home. As at the date of his death in February 1996 he had assets worth £37,046 in the UK which included shares valued at £20,072 and money at the bank of over £14,000; the Property was valued at £140,000. The estate had debts of £3,843.97 which included funeral expenses, utility bills and a small reimbursement of overpaid pension. Mr Antoine's clear evidence is that Mr Joseph was never short of money and never borrowed money from anyone. Mr Antoine was asked briefly about this in cross-examination by Mr Serugo-Lugo, who suggested that Mr Joseph obviously knew about the 1987 Transaction. Mr Antoine replied "*He wouldn't have known about any loan as he didn't have one*". There is no documentary evidence other than the Contested Documents to support the proposition that Mr Joseph was short of money.

71.4 When Mr Antoine went through Mr Joseph's personal papers and documents following his death he found them to be in proper order. He did not find any document suggesting that his father had outstanding debts and he did not find copies of the Contested Documents (although given Mr Borland's evidence that copies of the Contested Documents were not made, this is perhaps unsurprising).

72. I have already said that I accept Mr Antoine's evidence, and in a number of important respects it is obviously inconsistent with Mr Borland's evidence, which I consider to be unreliable. I do not accept from Mr Borland that he had any form of social relationship with Mr Joseph – he was certainly unable to give any description of Mr Joseph when asked to do so in cross-examination and I believe that if he had enjoyed the social interaction with Mr Joseph that he says he had, this would inevitably have come to the attention of Mr Antoine. In light of Mr Antoine's evidence as to the state of his father's finances, I find it very difficult to believe that Mr Joseph would have needed to borrow £11,000 in 1987, or indeed that he would have sought out an arrangement of the type alleged (as opposed to seeking a loan through more conventional channels). Furthermore, I find it incredible that he would have confirmed to Mr Borland that Mr Benjamin was the leasehold owner of the Property when he, Mr Joseph, had become the leasehold owner many years before. I also find it incredible that Mr Joseph would have jeopardised his home for a loan of £11,000 (at a rate of 6% interest per annum), that he would not have kept any record for himself of such a loan and that he would have said nothing about it to Mr Antoine. In short, I am unable to accept Mr Borland's evidence as to the 1987 Transaction, and in particular, his evidence that Mr Joseph signed the Contested Notice Document and the Contested Freehold Document.

73. Mr Umezuruike points out that Mr Borland has criminal convictions for dishonesty and he relies in particular upon convictions which are recorded in what appears to be an unreported judgment of the Court of Appeal dated 20 May 1969; *R v Ernest Courtney Borland*. Mr Borland confirmed in cross-examination that this case had indeed involved him. Mr Umezuruike says I must have regard to what he referred to as "a conviction" in this case as similar fact evidence.

74. It is clear from the judgment that Mr Borland had been appealing against two convictions of obtaining money by false pretences and one count of larceny. The former convictions appear from the report to have arisen in circumstances where Mr

Borland was purporting to act as an estate agent and (i) took £125 from a prospective purchaser, a Mr May, provided him with a receipt indicating that the money was part payment of the purchase price of a property, but then used the majority of the money to pay off a debt owed by one Mr Gooding to Ilford Borough Council in respect of a mortgage on that same property (count 1), and (ii) took £13 from Mr May which he said was a survey fee having asked him to sign a document which he said was an application form for a mortgage (count 3).

75. In the judgment, Edmund Davies LJ records at page 2D-F the background facts to the case and, amongst other things, he records that it was Mr Gooding's case at the trial that he had signed a document which he did not read understanding that it was to facilitate a loan from his building society, when in fact it was a document whereby Mr Gooding had agreed to transfer his house to Mr Borland for £3,950. Mr Gooding disputed that the signature on this document was his and said that he never agreed to sell his house at that figure. It is this passage on which Mr Umezuruike seeks to rely.

76. I am bound to say that I have some difficulty with this submission. There appears to have been no conviction based on these background facts and certainly I can find no indication in the judgment of the Court of Appeal that any finding was made in respect of these facts. The matters in respect of which Mr Borland was in fact convicted (which convictions were all upheld by the Court of Appeal) do not, in my judgment, amount to similar fact evidence. Further and in any event, I was not shown any authority as to the approach to be taken by a civil court to similar fact evidence, or indeed as to what might properly be said to amount to similar fact evidence.

77. In the circumstances, I reject the suggestion that I must have regard to similar fact evidence in this case, although it seems to me (as was accepted by Mr Serugo-Lugo) that I can and should have regard to the fact that Mr Borland has convictions for dishonesty in the context of my assessment of his general credibility. To this extent only, the existence of these convictions supports my decision that Mr Borland's evidence is unreliable.

78. Aside from the evidence of Mr Borland, the Contested Documents themselves appear to me to contain a number of oddities:

    78.1 First, the Contested Notice Document purports to be a confirmation by Mr Joseph that he has "*been notified by the Leaseholder* of the Property of the transfer of his interest to Mr George Taylor to take effect in the year 2001.

However, Mr Joseph <u>was</u> the leaseholder and I can see no reason why he would have signed such a document.

78.2 Second, Mr Umezuruike suggested in cross-examination of Mr Borland that it is a remarkable coincidence that the date for repayment of the loan on the Contested Freehold Document is November 2004, given that Mr Taylor was apparently residing at Mr Borland's Property in 2004. He suggested that the Contested Freehold Document was created at that time and not in 1987. I do not need to decide that he is right about that, just as I do not need to decide who was involved in forging Mr Joseph's signature on the Contested Documents, but I agree with him that in all the circumstances this does appear suspicious.

79. I turn shortly, then, to the expert evidence, which I have already summarised. As I understood his submissions, Mr Serugo-Lugo sought to challenge that evidence (notwithstanding that all parties had agreed that there should be no cross-examination of the experts) on two grounds:

79.1 First that Dr Giles had access to Mr Joseph's diary amongst the various documents available to her (referred to in her report as a "Notebook") but that she did not comment on it. Mr Serugo-Lugo suggests that this diary must have been signed every day by Mr Joseph (a point which he did not put to Mr Antoine) and that Dr Giles should have compared the signatures in the diary with the disputed signatures on the Contested Documents. I reject this criticism. Dr Giles had access to eleven other documents bearing undisputed signatures listed on page 5 of her report. Further and in any event, she says in terms on page 6 of her report that "*The Notebook…contains no relevant signatures and I have not examined this document further*". Dr Giles is a well-known and highly respected handwriting expert and although Mr Serugo-Lugo invited me to accept that Dr Giles was wrong in saying that the Notebook contained no relevant signatures, I am not prepared to make such a finding. As I have already said, all parties (including Mrs Taylor) agreed that there should be no cross-examination of the experts.

79.2 Second that although Dr Giles had access to the originals of the various documents referred to in her report, Mr Cosslett (instructed on behalf of Mrs Taylor) only ever saw copies. It is for this reason that he says in the

joint statement that his conclusions are more restricted than those arrived at by Dr Giles. Again, I reject this criticism. An application was made to the court at the PTR for the originals of the relevant documents to be provided to Mrs Taylor's legal team and this application was refused, apparently (as I was told by Miss Yates) because none of the other parties had the originals in their custody or control. Even without access to the original documents, it was still Mr Cosslett's opinion that there was "*strong evidence*" to support the view that Mr Joseph did not sign the Contested Notice Document and the Contested Leasehold Document.

80. In my judgment, there is strong evidence that the Contested Documents are forgeries and I accept that the burden of establishing that has been satisfied. I shall now turn to deal with the remaining issues on the basis that the Contested Documents were forged; I shall not address those issues which are premised upon the assumption that the Contested Documents are genuine.

Issues particular to the 2006 Claim

Should Mrs Taylor's claim be dismissed in its entirety, or should she be granted relief sought in her Re-Amended Particulars of Claim to reflect unjust enrichment to Mr Antoine or to compensate her for the cost of renovating the Property?

81. Mr Umezuruike submits that Mrs Taylor's claim should be dismissed in its entirety for the following reasons:

    81.1 Any increase in the value of the Property by the renovation is not unjust as Mr Antoine did not encourage it;

    81.2 It will be extremely difficult, if not impossible, to determine in 2018 to what extent the renovation of the Property in fact increased its value in 2008. Further, that the evidence of the renovations and their cost is unreliable;

    81.3 By his actions, Mr Taylor forced Mr Antoine to spend a considerable amount of money in taking action to remove the registration of Mr Taylor as proprietor of the Property from the register; and

    81.4 Any sum of money that is adjudged to be payable to Mrs Taylor will vest in Barclays under the doctrine of subrogation. Mr Althaus submitted, and I accept, that this final point is erroneous.

82. I was not shown any authorities as to unjust enrichment and I was not addressed as to the appropriate legal test. Mr Serugo-Lugo made no submissions on this issue.

83. Doing the best I can, in the circumstances, I take the view that Mrs Taylor's claim should be dismissed in its entirety and that she is not entitled to the relief claimed.

84. Whilst I accept that extensive renovations were carried out to the Property by Mr Taylor, there is no evidence on which I can determine whether, and if so to what extent, such renovations have in fact increased the value of the Property. Furthermore, in light of findings I make later in this judgment, Mr Antoine will now be left in the unenviable position of either having to sell the Property to repay the monies due under the loan obtained by Mr Taylor from Barclays or of being subject to the exercise of Barclay's power to sell the Property to recover the outstanding sum due under that loan, which I understand from Mr Althaus to be £149,973.97 as at 19 February 2018, of which some £69,378.97 is overdue arrears. It is very difficult to see how Mr Antoine could possibly have been unjustly enriched in such circumstances.

85. As to the claim for compensation in relation to the cost of renovation of the Property (including the interest on the Barclay's loan), there is some evidence of the cost of renovation, which appears to have been in the sum of £87,600, but the vast majority of that sum appears to have been funded by the Barclays loan. Although Mrs Taylor's claim in the 2016 Claim suggests that an additional sum of £20,000 was borrowed by Mr Taylor for renovations, Mrs Taylor was unable to confirm that this was in fact the case, saying that although she thought her husband had borrowed money from their daughter, she did not know how much money or what it was for.

86. In any event, I fail to see why Mrs Taylor should be entitled to compensation in circumstances where her husband (whether he realised it or not) had not obtained title to the Property by lawful means at the time and took out the loan from Barclays at his own risk without the knowledge of Mr Antoine. It would appear from a tenancy agreement dated 28 June 2010 that even after the July 2008 Order, Mr Taylor rented out the Property to tenants as "the Landlord", thereby making a profit from the Property to which he was plainly not entitled. Although Mr Antoine has a claim to recover damages in the 2006 Claim for use and occupation of the Property, that claim was not pursued before me (as I have indicated already) in circumstances where he accepts that Mr Taylor's estate is worth nothing. As a matter of justice, I find it very difficult to see why Mrs Taylor should be entitled to recover for the costs of renovation (including interest on the Barclays loan) in all of these circumstances.

87. Accordingly, I dismiss the 2006 Claim and I accept the submissions made on behalf of the Registrar and Mr Antoine that as a consequence of my decision I should direct the deletion by HMLR of the Unilateral Notice registered against title number NGL 162212 in favour of Mr Taylor, dated 19 March 2009.

Issues particular to the 2016 Claim

Was it a "mistake" for the purpose of LRA Sch. 4 para 2(a) for the Registrar to have entered Mr Taylor as the Registered Proprietor upon service of the July 2007 Order on the Registrar either (i) because the July 2007 Order was made on the basis of forged documents, or (ii) without an observation on the register that the entry was made pursuant to the July 2007 Order?

The Land Registration Act 2002

88. The LRA is not merely a scheme for registering title: it is a scheme of title by registration. Accordingly, by s. 27(2)(a), *"If a disposition of a registered estate... is required to be registered, it does not operate at law until the relevant registration requirements are met"* (s. 27(1)). As the authors of Ruoff & Roper, Registered Conveyancing point out at para 46.001 "*the policy of the LRA is that the Register should be a complete and accurate reflection of the state of the title to the registered estate at any given time. Registration not only records the effect of the transaction taking effect in the general law, but actually constitutes a registered proprietor's title to a registered estate or charge*".

89. The register of title is kept by the registrar pursuant to section 1(1) of the LRA. He is bound by the Land Registration Rules 2003 ("**the Rules**") as to the keeping of the register and his duties are circumscribed by the LRA and by the Rules.

90. Section 27(5) LRA provides that subject to three exceptions which are irrelevant for the purposes of this case, dispositions by operation of law are treated as registrable dispositions that must be completed by registration to take effect.

91. Pursuant to section 9 of the Law of Property Act 1925 ("**the LPA**"), a vesting order made by any court of competent authority for the purpose of vesting, conveying or creating a legal estate "*shall operate to convey or create the legal estate disposed of in like manner as if the same had been a conveyance executed by the estate owner of the legal estate to which the order…relates*". A vesting order is thus a disposition by operation of law and is treated as a registrable disposition.

92. An application to register a disposition by operation of law must be accompanied by sufficient evidence of the disposition (the Rules at 161(1)). Where a vesting order has

been made the application must be accompanied by a copy of the order (the Rules at 161(2)). It is common ground that where an application is made to the Registrar to give effect to a vesting order, he cannot look behind that order; he must instead give effect to it by registration. To do otherwise would be contrary to the requirements of LRA section 27. In this case the July 2007 Order expressly required at paragraph 6 that Mr Taylor "*be registered as the proprietor of the Freehold*" and this had to be given effect to by the Registrar pursuant to the duty imposed by LRA Schedule 4, para 2(2), which I address below. Insofar as the leasehold title was concerned, the July 2007 Order provided at paragraph 11 that "*the leasehold property do vest in the Claimant for the estate and interest therein now vested in the Defendant*". It was either implicit from this that registration should be effected, or this was sufficient evidence (pursuant to Rule 129) to support the requirement for registration under Rule 161(1). I did not understand there to be any disagreement by the parties as to this proposition.

93. Once the registration requirements have been satisfied, the entry of a person in the register as the proprietor of a registered estate is conclusive as to title (s. 58(1) LRA): "*If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration".*

94. A person who is the registered proprietor of an estate has the right to exercise *"owner's powers"* (LRA s. 24), which consist of the power to make a disposition of any kind permitted by the general law, including to charge the estate at law with the payment of money (LRA s. 23(1)(b)). The right to exercise owner's powers in relation to a registered estate or charge is taken to be free from any limitation affecting the validity of a disposition, so as to prevent the disponee's title being questioned (LRA s. 26).

95. The conclusiveness of the register is subject to the powers of alteration conferred on the Registrar and the Court by LRA s. 65 and Schedule 4.

96. By Schedule 4 para. 2, 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.

Although Mr Antoine originally sought to rely on sub-para (b) above, he now relies solely on sub-para (a) in support of his contention that the register should be altered to remove the Legal Charge.

97. Schedule 4 para. 2(2), provides that "*An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it".*

98. By reason of Schedule 4 para. 1, "rectification" is a specific type of alteration of the register, "*which-*

(a) involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor.

99. It follows that an alteration of the register only constitutes *"rectification"* where there is a *"mistake"* on the register that is being corrected, which *"prejudicially affects"* the title of a registered proprietor. In this case, the Bank's title as registered proprietor of the Legal Charge would be prejudicially affected if the register were to be corrected so as to remove the Legal Charge. Accordingly, this is a case in which I am concerned with the exercise of the power to rectify the register, under Schedule 4 para 3. Different rules apply to updating the register, where the alteration does not amount to rectification.

100. Schedule 4, para 3 provides as follows:

(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.

(4) *In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.*

101. I note in passing that some arguments were addressed to me during the hearing by Mr Umezuruike by reference to Schedule 4, para 3(2), but it was ultimately accepted that those arguments were not relevant to the issues that I have to decide and they were not pursued.

102. The Registrar enjoys similar powers of alteration, including rectification, as the Court (Schedule 4, paras 5 and 6).

103. The indemnity provisions of LRA s. 103 and Sch. 8 are the corollary of the powers to rectify the register. Indemnity is therefore an important part of the statutory context for rectification, and a potential consequence of such an order being made. However, I am not invited to make any order pursuant to the indemnity provisions in this case.

The meaning of "mistake" for the purpose of LRA Schedule 4

104. It is common ground that "mistake" is not defined in the LRA itself. However, the question of the circumstances in which a mistake may arise has recently been considered by the Court of Appeal in *NRAM Ltd v Evans* [2018] 1 WLR 639. In that case, the Bank had made an administrative error by mistakenly lodging an e-DS1 discharge with HMLR. A key issue on the appeal was whether the subsequent re-registration of the charge constituted the rectification of a mistake or simply an update to the register.

105. In his judgment (with which Richards LJ and Henderson LJ agreed) at paragraphs 48-59, Kitchin LJ examines this question is some detail. At paragraph 51, he sets out an extract from *Ruoff & Roper, Registered Conveyancing* at para 46.009 in which the authors adopt a very similar formulation to that of the editors of *Megarry & Wade: The Law of Real Property 8th Ed (2012)*, to this effect:

> "*[T]here will be a mistake whenever the registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration …"*

106. Kitchin LJ goes on to say at paragraph 52: "*It will be noted that both these formulations focus on the position at the point in time that the entry or deletion is*

made. That, so it seems to me, must be right. If a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake".

107. Kitchin LJ rejected the argument that the re-registration of the charge constituted the rectification of a mistake making, amongst others, the following points relevant to the issue in this case:

107.1 Notwithstanding that there has over the years been a degree of controversy on the point, there is a "*principled and correct*" distinction to be made between a void and a voidable disposition. Thus "*an entry made in the register of an interest acquired under a void disposition should not have been made and the registrar would not have made it had the true facts been known at the time. By contrast, a change made to the register to reflect a transaction which is merely voidable is correct at the time it is made*" [53].

107.2 Accordingly, "*…the registration of a voidable disposition…is not a mistake for the purposes of Schedule 4 to the LRA 2002. Such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake. It may be the case that the disposition was made by mistake but that does not render its entry on the register a mistake, and it is entries on the register with which Schedule 4 is concerned. Nor, so it seems to me, can such an entry become a mistake if the disposition is at some later date avoided. Were it otherwise, the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined. In this connection, I believe the authors of Ruoff & Roper, Registered Conveyancing put it very well at para 46.009:*

"An entry cannot retroactively become a mistake. It cannot be argued therefore that the rescission of a voidable transaction retroactively makes the entry which recorded the disposition – being an entry made at the time while the disposition was still effective – a mistake. That would undermine the policy of the 2002 Act that the register should be a complete statement of title at any given time. Consequent upon such rescission, application may be made for an order for alteration of the register to reflect rescission. This would, however, be an alteration for the purposes of

bringing the register up to date…rather than for the purposes of correcting a mistake".

108. On 15 February 2018, the Supreme Court refused permission to appeal the decision in *NRAM Ltd v Evans* [2018] 1 WLR 639.

109. Various authorities were cited to me in argument as examples of cases involving, on the one hand, voidable transactions which did not give rise to a "mistake" for the purposes of LRA (for example *NRAM Ltd v Evans* itself), and, on the other hand, void transactions at the time of registration which would give rise to a mistake (for example a forged transfer - *Argyle Building Society v Hammond* (1985) 49 P&CR 148 (CA) - and the closure of a leasehold title on the basis of a void forfeiture - *MacLeod v Gold Harp Properties Ltd* [2015] 1 WLR 1249 (CA)). I was also referred to the very useful commentary in *Ruoff & Roper: Registered Conveyancing* at 46.024-46.040, which includes a number of helpful factual scenarios.

110. However, none of these materials deals specifically with what I understand to be the novel issue that arises in this case, namely whether the registration of a vesting order made by the court in circumstances where that order has been induced by fraud (here by reason of the reliance upon forged documents) is capable of amounting to a "mistake" such that the Court has power under LRA Schedule 4 para 2(1)(a) to correct the register.

The Effect of Court Orders

111. Ms Yates and Mr Althaus both made submissions as to the general law on the effect of Court Orders, which they prayed in aid in addressing the issue identified above. They argued that the authorities are united in treating a Court Order as valid and binding until it is set aside (notwithstanding that it might be irregular in varying respects). Between them, they relied upon the following propositions:

111.1 *"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void"* (*Hadkinson v Hadkinson* [1952] P 285 (CA), at 288, per Romer LJ);

111.2 *"[A]n order made by a court of unlimited jurisdiction... must be obeyed unless or until it has been set aside by an order of the court"* (*Isaacs v Robertson* [1987] AC 97 (PC), at 101, per Lord Diplock). I note in

passing that Lord Diplock expressed the view in this case at 102-103 that in relation to orders of the court of unlimited jurisdiction it is "*misleading to seek to draw distinctions between orders that are void in the sense that they can be ignored with impunity by those persons to whom they are addressed and orders that are voidable and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions void and voidable respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals Marsh v Marsh [1945] AC 271, 284 and MacFoy v United Africa Co Ltd [1962] AC 152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside*" ;

111.3 *"[A]n order is either irregular or regular. If it is irregular it can be set aside by the court that made in upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies"* (Isaacs v Robertson, at 103, per Lord Diplock);

111.4 If a court order is made on the basis of a mistake, it is not a nullity. Rather, *"a document emanating from the court and good on its face... must be acted upon until declared void by the court"* (Firman v Ellis [1978] 1 QB 886 (CA), at 914E – H, per Ormerod LJ, with whom Geoffrey Lane LJ agreed at 917B);

111.5 Where the irregularity in the order is such as to undermine the whole proceedings, the order is only referred to as "void" in the sense of the Court, on an application, having no option but to set it aside: *"In such cases, the applicant is entitled ex debito justitiae to have the order set aside, but it is not accurate to say that the order is a nullity, because it is good on its face and valid until set aside"* (In re F (Infants) (Adoption Order: Validity) [1977] Fam 165 (CA), at 171B – D, per Ormerod LJ, giving the judgment of the Court).

111.6 The fact that an order is to be treated as valid until set aside is a "*very important and salutary principle which plays a significant role in the enforcement of orders*" (*Raiffeisenlandesbank Oberosterreich AG v Meyden* [2016] EWHC 414 (Ch) at 35).

Discussion

112. Mr Umezuruike, on behalf of Mr Antoine, submits as his primary case that a registration of title pursuant to a Court Order obtained by fraud is a mistake. Alternatively, he submits that the registration of Mr Taylor as the proprietor of the Property in 2007 without an observation in the register that Mr Taylor was registered pursuant to an Order which had been made in default of the attendance at the hearing of the defendant, was a mistake. This latter argument is the argument that I have agreed to address *de bene esse*.

113. In support of his primary case, Mr Umezuruike argues persuasively that the 2007 July Order was made by mistake because if the court had known that the Contested Documents were forged it would not have made the order. Accordingly, he says, the order is null and void because it was induced by fraud and the registration of Mr Taylor as proprietor of the Property in compliance with the July 2007 Order was a mistake.

114. He drew my attention to the judgment of Lord Denning MR in *Firman v Ellis* [1978] 1 QB 886 at p. 908C-G where Lord Denning deals with the void or voidable issue in the context of a court order in *Pheasant v Smith*, one of four cases joined together for the purposes of this appeal, finding that an order in that case was "*a nullity and void ab initio*" such that the claimant was not precluded by the provisions of the Limitation Act 1975 (which had retrospective effect but did not apply where there had been "a final order") from pursuing proceedings against the defendants and saying this:

"*On being set aside [the order] is thereupon shown to have been a nullity from the beginning and void. So, after some vacillation, I would adopt the meanings of "void" and "voidable" given by Professor Wade in his Administrative Law, 4th ed. (1977). Pp. 300, 450. Seeing that it was a nullity, it follows that in point of law no action had been "commenced"…The Act of 1975 operates retrospectively so as to enable Mr Pheasant to bring an action against the Smiths…*"

Mr Umezuruike argues that this judgment supports his analysis of the status of the July 2007 Order.

115. Mr Umezuruike goes on to say that his submissions are reinforced by the provisions of section 9 LPA (which I have set out above) because section 9 makes it clear that an order of the court is to be treated in like manner to a disposition by the owner of the legal estate; if a disposition is void when induced by fraud, it follows that a court order induced by fraud is also void. Mr Umezuruike points to the inherent irrationality in treating differently the situation of a fraudster providing HMLR with forged documents so as to procure registration and the situation of a fraudster who presents those documents to the court first so as to obtain an order which entitles him to registration.

116. Although I see the logic in Mr Umezuruike's position and recognise the apparent injustice that Mr Antoine will suffer if I arrive at a different conclusion, after careful consideration I have decided that I cannot accept his arguments. I say that for the following reasons (which in large part adopt the arguments advanced by Ms Yates and Mr Althaus, for the Registrar and Barclays respectively):

116.1 The Contested Documents had no dispositive effect in themselves; this is not a case in which a forged transfer has been registered. Indeed, although the Contested Documents had been provided to HMLR at an earlier date, they were not provided to HMLR at the time of the AP1 application for transfer of the freehold and leasehold title in the Property to Mr Taylor. That application was made solely on the basis of the July 2007 Order. Without a court order the Registrar could not have made any entry in the register. The Contested Freehold Document was at best an equitable charge which required the intervention of the court to declare that Mr Taylor was entitled by virtue of that document to be the legal mortgagee and then to make a foreclosure order in default of which he was deemed to acquire freeholder rights. The Contested Leasehold Document was nothing more than a contract to transfer the lease. If it had been presented to the Registrar without a Court Order, he would not have made any entry in the register, not only because it was just a contract, but also because the purported leaseholder, Mr Benjamin, was not in fact the registered leaseholder. It required the intervention of the court to order specific performance of the contract and then to make a vesting order.

116.2 The July 2007 Order effected the disposition of title; it conferred title on Mr Taylor independently of the Contested Documents.

116.3 At the time it was made, the July 2007 Order was valid and effective, albeit susceptible to being set aside by a further order of the Court. It had to be complied with unless and until it was set aside.

116.4 The reasoning of Lord Denning MR in *Firman v Ellis* was not the reasoning of the majority of the Court of Appeal (albeit that there was no disagreement as to the outcome). Geoffrey Lane LJ agreed with the reasoning and conclusions of Ormerod LJ at page 917, which reasoning was different from that of Lord Denning MR. Importantly, it was not Ormerod LJ's view that the order in that case was a nullity simply because it had subsequently been set aside. Further, albeit that *Firman v Ellis* was not cited to the Privy Council in *Isaacs v Robertson* it is plain that their Lordships in the latter case would not have agreed with the approach adopted by Lord Denning MR, which is also not consistent with the statements of principle in the other cases referred to in para 111 above. I reject Mr Umezuruike's submission that the terms "void" and "voidable", when used to describe an order of the court are to be viewed in the context of the facts of the relevant case and that whilst there is no question in this case that the July 2007 Order had to be obeyed, it was nevertheless "a nullity". I do not believe this is a finding that I can properly make in light of the clear statements of principle to contrary effect.

116.5 I accept the submissions made on behalf of the Registrar and Barclays that whether or not it is right as a matter of terminology to refer to a court order as being "voidable", the July 2007 Order was certainly akin to a voidable transaction for the purposes of the analysis of whether it amounts to a mistake under LRA Schedule 4, para 2(1)(a). I accept that the *NRAM* principles as to the distinction between void and voidable transactions thus apply either directly, or by analogy, in this new factual context.

116.6 In my judgment, Mr Umezuruike's argument that section 9 LPA assists him is misconceived. That provision is designed to ensure that a vesting order (amongst other things) will operate without more as a conveyance by an estate owner. It cannot, in my judgment, be interpreted as supporting the proposition that a Court Order obtained by fraud is void.

116.7 When the application was made to the Registrar by reference to the July 2007 Order, he had only to satisfy himself that the order had been made

and that a copy of the order had been enclosed with the application (Rule 161). It was not for him to seek to explore the validity of the order. That would have been outside his statutory powers.

116.8 In determining whether a mistake has been made, it is clear from the decision in *NRAM*, that one can only have regard to the position at the point in time that the entry was made on the register. As I have already made clear, at that time, the July 2007 Order was good on its face. The fact that the July 2008 Order set aside the July 2007 Order and that the register was subsequently updated to reflect the July 2008 Order did not have retrospective effect in the sense that it did not retrospectively mean that the original registration of the July 2007 Order was a mistake.

116.9 Accordingly, the registration of Mr Taylor as proprietor on the basis of the July 2007 Order was not a mistake at the time, or at all.

116.10 There is a wide point of public policy and principle here. If the registration of title pursuant to a Court Order, valid on its face at the time of registration, could be impugned as a mistake, the statutory provisions I have set out above and the policy of the LRA as to the conclusiveness of registration might well be undermined. Indeed there might even be broader implications for the inviolable status of court orders.

116.11 Although I am very conscious that the outcome of my judgment will inevitably be detrimental to Mr Antoine, who is, in effect, the victim of this fraud, and while I have every sympathy with his plight, I do not feel that I can allow that to influence my application of the law.

117. Mr Umezuruike's alternative argument, that it was a mistake on the part of the Registrar for the purposes of LRA Schedule 4, paragraph 2(1)(a) not to include an observation in the register at the time of registering Mr Taylor's interest that Mr Taylor was registered pursuant to an order which had been made in default of the attendance at the hearing of the defendant, has no merit in my judgment.

118. Mr Umezuruike accepts that there is no express rule or provision that requires the Registrar to register an interest so as to record the existence of an order of this type, but he says that registration should be consistent with the policy of the LRA and that if the Registrar is aware of anything that might undermine a proprietor's title then that should be noted on the register. In this case, he says that an order made in the absence of the defendant clearly rendered Mr Taylor's title precarious such that it should have

been obvious to the Registrar that the defendant might have a right to set aside the July 2007 Order. He even went so far as to suggest that the mere inclusion of the words "*liberty to apply*" in a court order should alert the Registrar to a possible issue, such that reference to that provision would need to be made on the register. In his closing submissions he raised an entirely new argument that the failure on the part of HMLR to have rules dealing with the need to record the existence of court orders which might render precarious an individual's title, was also a mistake for the purposes of LRA Schedule 4, para 2(1)(a).

119. In my judgment this alternative argument amounts to a contention that the Registrar has made an entry in the wrong form, alternatively has omitted an entry he should have made. Of course these are paradigm situations in which a "mistake" may be made, but in circumstances where there is no duty on the part of the Registrar (under the LRA, the Rules or otherwise) to record the existence of such an Order, I cannot see that his failure to do so can possibly amount to a mistake. As Ms Yates submitted, it is hardly surprising that there is no duty on the Registrar to record the fact that there may be reason to think an order is precarious (whether because it was made in the absence of the defendant or whether because it gives liberty to apply – which is in any event implied in all court orders). Any such duty would be tantamount to requiring the Registrar to go behind the terms of the order, the very thing that it is accepted by everyone that the Registrar may not do. Furthermore, it would undermine the purpose of the legislation, in particular the conclusive nature of registration.

120. In all the circumstances I refuse Mr Antoine's application for an extension of time to serve his Reply (in which he pleads this argument for the first time), on the grounds it has no merit. Even if I am wrong to refuse that application, I reject the argument for all of the reasons set out above.

<u>Was it a "mistake" for the purposes of LRA 2002 Sch. 4 para 2(a) for the Registrar to have entered the Legal Charge in favour of Barclays on the register?</u>

121. In light of my decision on the preceding issue, it is my judgment that the registration of the Legal Charge at a time when the July 2007 Order had not yet been set aside and Mr Taylor was registered as the proprietor of the Property could not possibly have been a mistake. I agree with Mr Althaus' submissions to the effect that:

    121.1 As registered proprietor of the freehold title, Mr Taylor was entitled to exercise owner's powers in relation to it pursuant to LRA section 24.

121.2 These powers included the power to charge the freehold at law with the payment of money (LRA, section 23(1)(b)).

121.3 In granting the Legal Charge, Mr Taylor was exercising that power.

121.4 Furthermore, section 26(3) of LRA precludes the title of a disponee under owner's powers being questioned on the basis that some limitation would otherwise affect the validity of the disposition.

121.5 It cannot therefore be said that the creation of the Legal Charge was invalid, nor that its entry on the register was a "mistake" for the purposes of Schedule 4, para 2(1)(a).

121.6 Accordingly, the Legal Charge is valid and binds the freehold title. Any right or equity that Mr Antoine had to apply to set aside the July 2007 Order was unprotected on the register at the time when the Legal Charge was registered and therefore the Legal Charge takes priority over it pursuant to section 29 LRA.

122. Mr Umezuruike relied upon *Ajibade v Bank of Scotland Plc and Endeavour Personal Finance Limited (REF/2006/0163/0174)* (which I believe to be unreported), a decision of a deputy adjudicator to HMLR, in support of his case that it was a mistake on the part of the Registrar to have registered the Legal Charge. However, in my opinion, this reliance was misplaced.

123. In summary, *Ajibade* concerned an application to rectify the register for mistake in circumstances where there had been a forged transfer of property to Mr Abiola (which transfer had been duly registered) and a subsequent loan made by Endeavour to Mr Abiola secured on the property by way of legal charge. It was common ground that the forged transfer of the property rendered the registration of Mr Abiola "*an operative mistake*" (para 12 of the Decision), but Endeavour argued that the registration of the subsequent legal charge was not a mistake given that Mr Abiola was the registered proprietor of the property (with all that entails) at the time of the registration of the legal charge. The Deputy Adjudicator rejected that submission. The real question, he said, was how far the Registrar can go in "*correcting*" the acknowledged mistake and he held that the registration of the legal charge, made as a consequence of the original mistake, should be removed from the register.

124. However, in this case I am not concerned with whether I should correct the consequences of an existing mistake. Here I have found that the original registration of Mr Taylor as proprietor was <u>not</u> a mistake; accordingly I cannot see how the

decision in *Ajibade* assists me. The same may be said of *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084, a case in respect of which I also heard argument. *MacLeod v Gold Harp Properties Ltd* is also authority for the proposition that the register may be corrected so as to correct the consequences of an acknowledged mistake (see in particular, paragraph 95 of the judgment of Underhill LJ), but it is not in my judgment authority for the proposition that a legal charge registered in circumstances where there is no mistake as to the title of the proprietor of the freehold may be set aside as a mistake.

125. During his closing submissions, Mr Umezuruike sought to resurrect an argument which he had pleaded in his proposed amended Reply to Barclays' Amended Defence in the 2016 Claim in respect of which he had sought permission on the first day of trial. This argument was to the effect that the registration of Barclays' Legal Charge was a mistake because before Barclays registered the charge it knew or ought to have known of the existence and nature of the July 2007 Order that conferred title on Mr Taylor and thus that the July 2007 Order rendered Mr Taylor's title susceptible to being set aside.

126. I rejected the application to amend to pursue this argument (applying the principles inherent in the Overriding Objective) in circumstances where it seemed to me to have no real prospect of success, it was raised extremely late and, if permitted at this trial, it would have caused real prejudice to Barclays. Mr Althaus told me that Barclays would wish to investigate the possibility of calling internal evidence as to the state of its knowledge at the relevant time together with evidence from its solicitor, through whom it was alleged knowledge should be imputed to it. Had I permitted the amendment, it seemed to me that the trial would have had to be adjourned.

127. The argument did not improve when it was raised a second time in closing and I told Mr Umezuruike that I was not going to permit him to rely upon it. No authorities were cited to me by the parties on late amendments but I am aware of the relevant principles as set out in *Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm)* by Carr J at paragraphs 36-39 and *Vilca v Xstrata Ltd* [2017] EWHC 2096 by Stuart-Smith J at paragraphs 22-30. In particular for these purposes, I note from paragraph 38(b) of Carr J's judgment in that case that a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice requires him to be able to pursue it. In my judgment, this was not a burden that Mr Antoine could begin to satisfy. In short, even if Barclays knew about the July

2007 Order and even if Barclays recognised that the July 2007 Order might somehow be precarious in the sense that it might be set aside at a later date, it does not seem to me that such knowledge would have the effect of rendering the registration by HMLR of the Legal Charge a mistake for all the reasons set out above in paragraph 121. Barclays' knowledge is nothing to the point.

If the court found that the entry of Mr Taylor on the register was a mistake, but that the entry of the Legal Charge on the register was not a mistake, would it nevertheless have the power to order removal of the Legal Charge on some other basis?

128. This issue does not arise in light of the findings set out earlier in this Judgment. Should it be relevant, if I had found that the original registration of Mr Taylor as proprietor was a mistake, I would have gone on to hold (following the decision in *MacLeod v Gold Harp Properties Ltd*) that the registration of the Legal Charge was a consequence of that mistake and that I had power to order its removal from the register, a point which was conceded by Mr Althaus on behalf of Barclays strictly for the purposes of this case only.

If the court would otherwise have the power to remove the Legal Charge under Schedule 4, paragraph 2(1)(a), are there exceptional circumstances which would justify its not doing so?

129. Again, this issue no longer arises. However, I should record briefly what my decision would have been had this issue remained live.

130. Paragraph 3(3) of LRA Schedule 4 provides that 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.

131. Although various grounds were pleaded as amounting to "exceptional circumstances" in Barclays' Amended Defence, Mr Althaus indicated that he relied on only two of those grounds for the purposes of this argument at trial (and further that he did not pursue the pleaded case on the exercise of the court's equitable jurisdiction or estoppel). First, Barclays relied on the failure on the part of Mr Antoine to register his interest in the Property in or after 21 February 1996 as the administrator of the estate of Mr Joseph; and second it relied on the fact that its loan had been used to renovate the Property, which had thereby enriched Mr Antoine.

132. "Exceptional circumstances" are not defined in LRA, but guidance as to how to interpret the requirement for exceptional circumstances in the context of paragraph 6(3) of Schedule 4 LRA (a parallel provision) was given by Morgan J in *Paton v Todd* [2012] EWHC 1248 (Ch) at paragraphs 63-67. In particular:

132.1 The court must ask itself two questions: (1) Are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration?

132.2 The first of these questions requires one to know what is meant by "exceptional circumstances" and then to establish whether such circumstances exist as a matter of fact.

132.3 "Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered. Further the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register.

133. In my judgment, the two particular circumstances relied upon by Barclays do not amount to "exceptional circumstances" which would justify not making the rectification order under paragraph 2 of Schedule 4 LRA (assuming I had found that such an Order should be made).

134. It is common ground that Mr Antoine did not register his interest in the Property as Administrator on or after 21 February 1996 when his father died and Mr Althaus argues that there was in fact a protracted lack of care in respect of the Property for over 10 years; it was allowed to sit empty, attracting squatters; mail was not re-directed and Mr Antoine did not think to appoint anyone else as Administrator when he went to live in New Zealand (all of which was accepted by Mr Antoine in cross-examination). Whilst Mr Althaus accepts that a Personal Representative is not obliged to place himself on the register, he says that Mr Antoine's failure to do so "*caused*" the fraudulent transfer of the Property. In particular, Mr Althaus draws my attention to various documents which were delivered to the Property which, had Mr Antoine seen them, would have alerted him to Mr Taylor's claims. Mr Althaus contends that a PR is obliged to administer the estate and if he is not going to do so properly, he must at the very least ensure that his interest is recorded on the register so that any nefarious activity will come to his attention.

135. I accept from Mr Umezuruike that the facts as to lack of care relied upon by Mr Althaus were not all pleaded; in particular, Barclays did not seek to rely upon the

failure to forward mail and the failure to attend the Property on a regular basis as amounting to exceptional circumstances. This is important because in my judgment the failure on the part of Mr Antoine to register his interest was obviously not the only matter on which Mr Althaus was really seeking to rely under this head, as is clear from his submission that "if a PR is not going to administer the estate properly" he must at least register his interest. On its own, the failure to register his interest (which Mr Antoine after all had no duty to do) did not cause the fraud. Taken together with various other unpleaded acts and omissions on the part of Mr Antoine on which Barclays now seeks to rely, it may have left the way open for the fraud, but on its own, I cannot see that it is a sufficiently unusual or uncommon circumstance and nor do I see that, again, on its own, it would justify the refusal to rectify the register so as to remove the Legal Charge (assuming a power to do that).

136. As to the second ground relied upon by Barclays, I find it difficult to see why the fact that the loan provided by Barclays was used to renovate the Property (as I accept on balance it was, to the tune of something in the region of £87,600) can be an exceptional circumstance. It may be unusual, as Mr Althaus suggests (although I have no evidence to this effect), for a fraudster to plough the proceeds of a loan secured on a Property, title to which he has obtained unlawfully, back into the Property itself but here, there is no basis on which I can find that Mr Taylor knew that the Contested Documents were forged. His case in the 2006 Claim was that the Contested Documents had been given to him by Mr Borland in 2005 and that he (Mr Taylor) had never seen them before. The use of the proceeds of a loan for renovations is neither unusual nor uncommon and given that I cannot say whether Mr Taylor was in on the fraud, I cannot see why the fact of the renovations amounts to an exceptional circumstance. I accept that if the Legal Charge is removed Mr Antoine will be left with the benefit of the renovations, but there is no evidence on which I could conclude that the value of the Property was enhanced by those renovations and if it was, to what extent. Furthermore, I am inclined to accept Mr Umezuruike's submissions that any likely monetary advantage gained by Mr Antoine by reason of the renovations has been extinguished by the expenses he has incurred in seeking to address the situation in which he finds himself.

Conclusion

137. I will hear the parties as to the form of Order required to reflect the decisions I have made on the various issues. Issues of costs and any other consequential matters will be dealt with on the formal handing down of this judgment to the parties, if they cannot be agreed.