Neutral Citation Number: [2019] EWHC 949 (Ch)

Case No: HC-2015-005152

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

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 24/04/2019

Before:

CHIEF MASTER MARSH

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Between:

(1) VALLABH HARIBHAI BAKRANIA
(2) HANSABEN HARIBHAI PRAGJI BAKRANIA — **Claimants**

- and -

(1) RAJESH SHAH
(2) JAWARHALA TEELUCK
(3) SHAH LONDON LIMITED
(4) PREMIER SOLICITORS LIMITED
(5) BHUPENDRA KHETIA
(6) HM LAND REGISTRY — **Defendants**

Simon Brilliant (instructed by **Longmores Solicitors**) for the **1st Claimant**
David Halpern QC (instructed by **Mills & Reeve LLP**) for the **1st and 3rd Defendants**
Aaron Walder (instructed by **The Treasury Solicitor**) for the **6th Defendant**

Hearing date: 28 February 2019

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Approved Judgment

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

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CHIEF MASTER MARSH

Chief Master Marsh:

1. This judgment arises from an application made by the 1st and 3rd defendants ("the Applicants") to strike out the claim pursuant to CPR 3.4(2)(a) or for judgment on the claim against them pursuant to CPR 24.2.

2. The claim concerns 17 Wilmer Way, Southgate, London N14 7JD which is registered at HM Land Registry with title number MX 59981. The claimants, who are brother and sister, together with another sibling, Jayantilal Bakrania, were registered as the freehold proprietors of the property with effect from 26 February 1986. They held the land as joint owners and therefore as trustees of land. It does not matter for present purposes whether they were joint tenants or tenants in common. For convenience, and without intending any disrespect, I will refer to the claimants as Vallabh and Hansa and their brother as Jayanti.

3. On 21 December 2009 a transfer was executed in the names of Vallabh, Hansa and Jayanti transferring the title to the property into the names of Hansa and Jayanti. The transfer states that it was not executed for money or anything that has a monetary value. Title in the names of Hansa and Jayanti was registered at HM Land Registry ("HMLR") on 4 February 2010. The third defendant, now named Shah London Limited, which was at the time a practising firm of solicitors, handled the transaction and acted for both the transferors and the transferees. I will refer to this transfer as the First Transfer.

4. On 2 July 2010 a further transfer was executed transferring title to the property from Hansa and Jayanti to third parties, Mr and Mrs Souris. The consideration for the transfer is stated to have been £440,000. Mr and Mrs Souris became the registered proprietors on 17 August 2010. I will refer to this transfer as the Second Transfer.

5. Mr and Ms Souris purchased the property with the benefit of a loan from Lloyds TSB Bank plc ("Lloyds") and a charge was registered in favour of Lloyds on the same date as the purchase. The fourth defendant, Premier Solicitors LLP dealt with the Second Transfer on behalf of the transferors. There is no connection between Shah London Limited and Premier Solicitors LLP.

6. Jayanti died on 18 September 2010.

7. On 20 February 2012 Vallabh and Hansa applied to HM Land Registry to alter the register to show them as the proprietors of the property in place of Mr and Mrs Souris. On 17 December 2015 they issued this claim which joins the individuals who were at one time directors of Shah London Limited as the first and second defendants, the two firms of solicitors as the third and fourth defendants, the fifth defendant who was a member of Premier Solicitors LLP and HM Land Registry as the sixth defendant.

8. The claimants' case, which for the purposes of the application is not challenged by the Applicants, is that the First and Second Transfers were executed by fraudsters and that neither they nor Jayanti knew anything about their execution or the registration of title that followed. It follows from the claimants' case that neither firm of solicitors was instructed by them (or Jayanti) and that the instructions to the solicitors were provided by or on behalf of the fraudsters.

9. The fourth and fifth defendants also listed an application to strike the claim at hearing on 28 February 2019. However, it did not proceed because the claim as against those defendants was struck out automatically as result of the claimants' failure to comply with an unless order. The claimants' application for relief from sanctions was dismissed on 25 February 2019.

The Land Registry claim

10. The claimants' first step when the discovered the fraud was to apply under the provisions contained in Schedule 4 of the Land Registration Act 2002 ("LRA 2002") for "alteration" of the register. There are broadly similar powers to make an alteration of the register pursuant to a court order (paragraphs 2 to 4) and otherwise than pursuant to a court order (paragraphs 5 to 7). The Property Chamber, First-Tier Tribunal, Land Registration Division ("FTT") stands in the shoes of the Registrar and so a decision of the FTT to grant or refuse rectification of the register is treated as if it were a decision of the Registrar and is made under paragraphs 5 to 7 of Schedule 4. The powers provided by the Schedule include the ability to alter the register for the purpose of "correcting a mistake". It is clear from the decision of the Court of Appeal in *NRAM Ltd v Evans* [2018] 1 WLR 639 per Kitchin LJ at [48 -53] that the notion of a mistake is to be widely construed.

11. Rectification is treated in Schedule 4 as a sub-species of alteration and is defined in paragraph 1. The distinction is an important one. The Registrar has a general power to alter the register to correct a mistake but where the alteration affects the title of the proprietor, it is treated for the purposes of the regime set out in the Schedule as rectification and is subject to limitations. The relevant provisions are contained in paragraph 6(2) and (3):

> "(2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 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 on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration."

12. Thus, the registrar's power to alter the register affecting the title of the registered proprietor is restricted if they are in possession of the land. The register can only be altered if one of the circumstances set out in (2)(a) or (b) applies. In that event, the register must be altered unless there are exceptional circumstances justifying not making the alteration.

13. The application to the FTT took a long time to come on for hearing because it was adjourned to await the outcome of an appeal to the Court of Appeal in *Swift 1st Ltd v Chief Land Registrar* [2015] Ch 602. It will be necessary to consider *Swift* later in this

judgment. The decision of Tribunal Judge McAllister in the FTT was provided on 13 April 2017. The principal issue before her was whether the claimants were in possession of the property at the date of registration in the names of Mr and Mrs Souris. The judge proceeded on the basis that the transfers were forgeries and the claimants were unaware of them. She noted that if the claimants applied for an indemnity under Schedule 8 LRA 2002, the issue would be investigated by the Land Registry.

14. The judge concluded on the facts that Mr and Mrs Souris were in possession of the land at the relevant date and, therefore, it was necessary for the claimants to show that either by reason of lack of care Mr and Mrs Souris substantially contributed to the mistake or it would not be unjust for any other reason for the alteration not to be made. At one time, the claimants sought to contend that the price at which Mr and Mrs Souris purchased the property was a substantial undervalue and this demonstrated a lack of care on their part. The claimants obtained a valuation report which expressed the opinion that the purchase price was well below market value. However, when the joint meeting of experts took place, the claimants' valuer revised his opinion and agreed with the valuer acting for Mr and Mrs Souris that the sale price was at or around market value.

15. The judge was unable to accept that there was a lack of proper care and that, had it been necessary to do so, she would have held that there were exceptional circumstances which justified not making the alteration.

The High Court claim

16. This claim was issued on 17 December 2015. It was stayed over an extended period pending the determination in the FTT. For the purposes of the application, the Applicants proceeded on the basis that they would assume against themselves that:

    (1) The third defendant owed a duty of care to Vallabh, Hansa and Jayanti;

    (2) There were two frauds, or two stages of one fraud, perpetrated against the siblings and that both transfers were without their knowledge or consent;

    (3) The third defendant was in breach of its duty in relation to the First Transfer; and

    (4) Vallabh suffered loss. It is significant that Vallabh only makes a claim for loss relating to the First Transfer. The loss he claims broadly comprises the loss of his interest in the property and the costs incurred in the FTT proceedings. The Applicants' approach leaves open whether the loss claimed was caused to Vallabh by the First Transfer.

17. Hansa pursued a claim against the fourth defendant in relation to the Second Transfer. She claims no loss arising from the First Transfer. Her claim has been struck out.

18. Both Vallabh and Hansa make a claim against the sixth defendant, HM Land Registry, for an indemnity under schedule 8 of the LRA 2002. They claim the indemnity relying on the refusal of the FTT (and therefore the Registrar) to remove Mr and Mrs Souris as the registered proprietors and to reinstate them. The amount of

the indemnity sought as it is currently pleaded is the value of the property in July 2010, namely £650,000. During the course of the hearing, Mr Brilliant, who appeared for the claimants, sought permission to amend that part of the claim to add the costs of the FTT proceedings into the claim for an indemnity. The application, which was made informally and without prior notice, was opposed by Mr Walder who appeared for the Land Registry. I will return to that subject later in this judgment.

The first and third defendants' application

19. The Applicants seek to strike out the claim pursuant to CPR 3.4(2)(a) or, in the alternative, they seek judgment pursuant to CPR 24.2. Mr Halpern, who appeared for the Applicants, referred to the well-known guidance provided by Lewison J as he then was *in EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 330 (Ch) at [15] which I do not need to set out in this judgment. However, the guidance only relates to CPR 24.2. An application under CPR 3.4(2)(a) is subject to a more stringent test and one which focuses on the statement of case, rather than the claim or an issue. The applicant must show that the claim or defence is bound to fail. However, there is no difference between the way the two tests apply on this application because there are no relevant facts that are in dispute and the claimants do not rely on the second limb of CPR 24.2. Mr Halpern was content to accept that he had to show that the claim against the Applicants is bound to fail.

20. The first and second defendants were both solicitors who were either directors of or employed by the third defendant firm. Neither was the person who undertook the legal work relating to the First Transfer. The first defendant says he was not a director at the material time but, even if he is wrong about that, the claim is not pleaded on the basis that "he assumed personal liability and that there was necessary reliance": per Lord Steyn in *Williams v Natural Life* [1998] 1 WLR 830 at p.837G. The second defendant is no longer alive and a claim could only be made against his estate. In any event, it would face the same difficulty as the claim against the first defendant. It must follow that the claim against the first and second defendants is bound to fail because the duty was owed by the third defendant, not the individual defendants.

21. There is a secondary point concerning the first and second defendants. They say they have not been served with the claim. Although it is strictly unnecessary to determine the point, Mr Brilliant accepted there was a failure to serve the particulars of claim on these defendants with the period provided in CPR 7.4(1) and (2). He submitted that sending the particulars of claim to the business address of the firm, albeit it was not addressed to them, could be service on the first and second defendant because they would inevitably come to learn of it. In effect, he submitted service on the third defendant amounted to service on the first and second defendants. That submission is not sustainable.

22. In the alternative, Mr Brilliant made an oral application for relief from sanctions on the basis that the failure to serve the particulars of claim was a trivial breach of the rules and, in the further alternative, he applied orally for an extension of time for service. It is fair to say that neither application was pursued with much enthusiasm and rightly so. I need only say that the hearing of the application made the Applicants had been on foot for many months. There is no good reason why a formal application notice could not have been issued long before the hearing. In any event, neither application has any merit whatever.

23. Even if there is a viable claim against the first and second defendants, the first and second claimants are unable to pursue it.

24. The third defendant was served within time at its registered office. The case put forward by Mr Halpern on its behalf can be summarised as follows:

    (1) The First Transfer cannot have caused any loss to Hansa (and Jayanti) because she remained the joint registered proprietor of the property with Jayanti. Indeed, it is not pleaded that the First Transfer caused loss to her.

    (2) The First Transfer also caused no loss to Vallabh. It is not suggested that Hansa and Jayanti were fraudsters seeking to deprive their brother of his interest in the property. It was a transfer from three trustees to two, leaving the underlying trust of which the three of them were trustees unaffected.

    (3) Mr Halpern accepted that notional loss may have been caused to Vallabh, or possibly to all three siblings, being the nominal cost of getting the register rectified. However, that loss was not incurred and, in any event, has not been claimed.

    (4) The First Transfer did not affect Vallabh's equitable interest in the property or at least his interest under the trust. It left Hansa and Jayanti with responsibility to rectify the register so as to show the true position.

    (5) The loss that the claimants' claim, properly analysed, does not flow from the First Transfer. It was the Second Transfer that took away rights in the property and that transfer was not carried out with the assistance of the third defendant. The fraudsters chose to use a separate firm, against whom the claim is now struck out.

25. Mr Halpern also put his submissions, in the alternative, on the basis that either the cost of the FTT claim were not recoverable, because they were not reasonably incurred, or that the second transfer could be seen as a break in the chain of causation. Neither of these areas needs to be explored.

26. Mr Brilliant pursued an interesting line of argument against the principal basis upon which it is said there was no loss caused by the First Transfer. He submitted that in light of the decision of the Court of Appeal in *Swift 1st Limited v Chief Land Registrar* [2015] Ch 602, it was not open to Mr Halpern to rely on Vallabh having retained any interest in the property after the First Transfer had been registered. This is because the Court of Appeal in *Swift* declined to follow the approach adopted by Arden LJ in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] Ch 216. Mr Brilliant relies on the analysis set out by Prof. Martin Dixon in the Conveyancer in an article where he discusses the decision of the FTT in *Bakrania v Lloyds Bank and Souris*. Prof. Dixon says:

> "Following from [*Swift*], it can no longer be argued that the applicants retained any interest in the property once it had been registered in the names of the new proprietors, even if the new proprietors had acquired it fraudulently or from a fraudster. In short, a "void" transaction has no meaning in the law of registered title because s.58 LRA 2002 deems the registration to be effective to transfer

absolute ownership. Consequently, the Bakranias as former owners would have no interest under a trust or similar which could be used to challenge the new proprietors."

27. Put more colloquially, it is said that the 'statutory magic' of section 58 LRA 2002 gives good title where the transferee had no title to transfer.

28. It is, however, necessary, to consider the decision in *Malory* a little further in order to see the effect of the decision in *Swift*. *Malory* was decided under the Land Registration Act 1925 and concerned rectification rather an indemnity against the Registrar. The claimant had acquired land but another company with a similar name dishonestly obtained a registered title and sold the land to the defendant which was a bona fide purchaser for value without notice. The Court of Appeal held that the claimant was entitled to rectification on two grounds:

    (1) At [64 – 65] Arden LJ concluded that section 69 Land Registration Act 1925 only dealt with the legal estate. Thus, the registered proprietor which had obtained title fraudulently held the title subject to the rights of the claimant, the transferee. ["Malory 1"]

    (2) At [68] Arden LJ also held that a right to seek rectification of the register is a right in reference to land that is capable of transmission through different ownerships of land. Hence, provided the person entitled to rectify is in possession of the property, the right amounts to an overriding interest despite the fact that rectification is discretionary. ["Malory 2"]

29. *Swift*, by contrast was decided under the LRA 2002 and concerned indemnity, not rectification. The registered proprietor, Mrs Rani, was in possession of the land. A third party forged a charge in her name in favour of a home loans company which purported to secure a loan which was registered against the title. The fraudster then executed a second charge in favour of the claimant, an honest lender, to secure a further loan. Both charges were entered in the charges register. The claimant then redeemed the first charge, believing it to be valid and advanced the balance of the purported loan. The claimant brought possession proceedings against Mrs Rani on the basis of non-payment of the loan but had to concede that it had no enforceable security and agreed a consent order requiring the Registrar to exercise his powers under paragraph 4 of schedule 4 LRA 2002 to amend to register to delete the entry in favour of the claimant. The claimant then brought proceedings seeking an indemnity from the Registrar under schedule 8 LRA 2002.

30. The Court of Appeal decided that:

    (1) Malory 1 was decided per incuriam and was wrong. The effect of registration was to confer good title on the registered proprietor both as to legal and beneficial ownership: per Patten LJ [44 – 45].

    (2) Malory 2 was correct. On the facts in *Swift*, Mrs Rani always had power to set aside the forged charge. As the registered proprietor in possession, this power took effect as an overriding interest which always had priority over the lender's registered charge.

31. Applying those principles, it is correct that the transfer of title to Jayanti and Hansa vested in them the entire legal estate including the equitable interests. However, the registration of the title in the names of Jayanti and Hansa was capable of being rectified in one of two ways. Had Vallabh asked the Registrar to alter the register to correct the 'mistake' caused by the fraudster, there is no reason to suppose that Jayanti and Hansa would not have agreed to it. Alternatively, had Jayanti and Hansa declined or failed to agree, Vallabh could have applied under schedule 4 LRA 2002 to correct a mistake. His application would have quite different to the application made by Jayanti and Hansa after the Second Transfer. Jayanti and Hansa gave no consideration and were unaware of the transfer. The transfer was a windfall in their hands. Furthermore, the finding in the FTT that Jayanti and Hansa were not in possession would not have created a difficulty because either all three were in possession or none of them. If they were not in possession consent was not required.

32. Mr Halpern accepts that Vallabh's entitlement to seek rectification did not give him a proprietary interest. He was not in possession and therefore did not have an overriding interest. As between the three siblings, the trust they had created, that was recognised in the joint ownership of land, subsisted after the transfer from three names into two. The land ceased to be held by the three of them in trust for each other and was then held by Jayanti and Hansa as trustees for the three siblings. They had not given value for the transfer of title and, in any event, it is not part of the claimant's case that two of them were to benefit at the expense of the third. I do not accept Mr Brilliant's submission that in light of the decision in *Swift*, on registration of the title in the names of Jayanti and Hansa, any equity or interest of Vallabh is extinguished. It seems to me such a submission conflates the position as to the registered title and the position between the three siblings as beneficiaries of a trust. Vallabh had both proprietary and personal rights against his siblings by virtue of the trust they had created. A refusal to recognise his interest would have amounted to a breach of trust by them.

33. The claim is made on behalf of Vallabh on the basis that loss was suffered by him as a consequence of the First Transfer. For the purposes of his claim, it is right to disregard the second transfer because it is not alleged that he has any claim against Premier Solicitors LLP, the fourth defendant, who acted on that transfer. His claim is only made as against Shah London Ltd, the third defendant which acted on the First Transfer. Whether the position is analysed by reference to Vallabh's entitlement to obtain an alteration to the register on transfer of the title into the names of Jayanti and Hansa, or by reference to the subsistence of the trust between the three of them, the position remains the same. Vallabh has no claim he can made in light of the manner in which the fraud was carried out save for the nominal costs of altering the register, but that is not a claim he has made.

34. The position can also be analysed in a different way if account is taken of the Second Transfer. It is not pleaded that Shah London LLP should have foreseen that a second fraud would take place. Such a claim would have been unarguable. It could not be said that it was within the scope of their responsibility to foresee that there would be another fraud. All they were doing was acting on a transfer from three joint owners to two without payment and such a transaction is entirely normal.

35. It is unnecessary to consider whether the Second Transfer amounted to a break in the chain of causation in respect of a claim by Vallabh against Shah London LLP.

36. I conclude that the claim made by Vallabh is bound to fail and must be struck out.

The claim against the Land Registry

37. The position in light of the decision I have reached is that unless the claimants are permitted to amend their particulars of claim, there is no claim left as against the Land Registry. That is because Vallabh only claims loss arising from the First Transfer and the entirety of the claim relating to the Second Transfer has been struck out. This leaves the claimants without a claim unless they are able to pursue an indemnity from the Land Registry in respect of the costs of the FTT proceedings. However, paragraphs 34 to 36 of the particulars of claim only pleads a claim against the Land Registry in respect of the value of the property as at July 2010, the date of the Second Transfer. No claim against the Land Registry has been made for the costs of the FTT proceedings.

38. Mr Brilliant made an oral application for permission to amend. He points out that both Vallabh and Hansa expressly pleaded a claim against the respective solicitors for the costs incurred in the FTT proceedings which were estimated at the time the amended particulars of claim were served at £199,514.08 together with an indemnity against the costs of Lloyds and Mr and Mrs Souris they were ordered to pay. He submits that the failure to claim costs against the Land Registry was an obvious omission.

39. The application has to be seen in light of the merits of the claim for such costs. The FTT claim was stayed to await the decision of the Court of Appeal in *Swift*. Although the claim had merit before that decision was handed down, it ceased to have any merit thereafter. It cannot be said the claimants were obliged to pursue the FTT claim in order to pursue these proceedings. The FTT claim was pressed on a basis that failed and it was unreasonable to continue with the claim once the law had been clarified by Swift.

40. Mr Walder for the Land Registry points out that his client has been waiting on the sidelines on the basis of the claim (both in its original and amended form) that did not seek an indemnity for the costs of the FTT claim. He submits that it would be a wrong exercise of discretion to permit an amendment on an informal application for permission made without prior notice in the course of an application to strike out the claim. The Land Registry has relied on the case put forward by the claimants. It pleaded at paragraph 8 of its defence that the transfer into the name of Mr and Mrs Souris was prima facie a mistake since the transfer was executed fraudulently.

41. The claimants when pursuing the FTT claim were faced with an unfortunate change of view by their valuer. His initial advice was that the property had a value of £650,000 at the date of transfer to Mr and Mrs Souris. This enabled the claimants to contend that Mr and Mrs Souris lacked proper care on the transfer given that the consideration for the purchase was £440,000. However, the valuer agreed with the Souris' valuer for the purposes of their joint statement that the sum paid by them reflected the market value at the time. On any view it was no longer reasonable to pursue the FTT claim from that point onward at the latest.

42. I do not consider the court should exercise its discretion to permit the amendment. I have regard to the current stage of the claim and the conduct of the claimants. The claim as against both firms of solicitors has been struck out. The claimants have

shown considerable reluctance to progress this claim albeit that the subject matter is very stale. They applied on 4 October 2018 to stay the claim for 6 months on the ground that there had been a change of solicitors. The application was dismissed on 31 October 2018 and orders for costs were made against the claimants. Those orders were not complied with and on an application by the fourth and fifth defendants an unless order was made. Had the first and third claimants made a similar application there is no reason to suppose either that a different order would have been made or that relief from sanctions would have been granted. Such a context is not one that encourages the court to exercise its discretion in favour of the claimants although I note that the outstanding costs due to the first and third defendants have now been paid.

43. It seems to me that the application for permission to amend should be dismissed. The application lacks any real merit. To grant it would be unfairly prejudicial to the Land Registry and, in any event, the subject of the amendment lacks merit.

Conclusion

44. The claim made against the first to third defendants will be struck out. So far as the sixth defendant is concerned, there is no subsisting claim that remains and I will also order that it is struck out. I will deal with costs and the form of the order on the handing down of this judgment if they are not agreed.