Neutral citation number: [2020] EWHC 2909 (Ch)

Case No: E30LV374

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LIVERPOOL
PROPERTY TRUSTS AND PROBATE LIST

Liverpool Civil & Family Courts
35 Vernon Street
Liverpool, L2 2BX

Date: Wednesday, 30th September 2020
Start Time:**14.04** Finish Time: **16.00**

Page Count: 41
Word Count: 12266
Number of Folios: 171

Before:

HIS HONOUR JUDGE HODGE, QC
Sitting as a Judge of the High Court

- -

Between:

JOHN JOSEPH AINSCOUGH	**Claimant**
- and -	
(1) CHRISTOPHER MARTIN AINSCOUGH	
(2) BANK OF SCOTLAND PLC	**Defendants**

- -

The **Claimant** appeared **In Person**
The **First Defendant** appeared **In Person**
MR THOMAS ROTHWELL (instructed by **TLT LLP)** appeared for the **Second Defendant**

- -

APPROVED JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.

Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE HODGE QC:

1. This is my extemporary judgment on a claim brought by Mr John Joseph Ainscough against Mr Christopher Martin Ainscough and Bank of Scotland PLC in the County Court at Liverpool under case number E30LV374. There is also a counterclaim by the first defendant against the claimant. This judgment is divided into six sections as follows: I: Introduction and overview II: Factual background III: Findings of fact IV: Abuse of process V: Rectification of the land register and VI: Conclusion.

I: Introduction and Overview

2. By a Part 8 claim form dated 13th August 2018 the claimant, who is now 63 years of age, simply sought an order that the name of his younger brother, the first defendant, should be removed from the property deeds of the residential property known as and situated at 30 Kearsley Street, Kirkdale, Liverpool L4 4BL and registered under title number MS82198. Apart from a brief period when he was represented by Forbes solicitors (from 18th April to 25th May 2019), the claimant has acted as a litigant in person throughout and he continues to do so. The first defendant has always acted as a litigant in person.

3. The case has been extensively case managed by no less than four Business and Property Court District Judges sitting in Liverpool and it has evolved with the passage of time. There are no less than eight procedural case management orders in the hearing bundle and I have found others in the court file that have not made their way into that hearing bundle. Despite the best efforts of the District Judges to ascertain the precise nature of the cases of the claimant and

the first defendant, as manifested in their various case management orders, until the beginning of this trial those cases have remained to some extent obscure. However, it is now clear that the claimant seeks two remedies: first, the removal of the first defendant's name from the registered freehold title to the property and, secondly, the removal of the second defendant's registered charge from the register of title.

4. By its defence, the second defendant, as registered mortgagee, specifically resists the grant of the latter remedy; but it is the second defendant's position that the claimant is not entitled to any relief in this action at all. The first defendant has also brought a counterclaim against the claimant seeking the registration of the freehold title to the property in his sole name. The first defendant has not, however, brought any formal additional claim against the second defendant in respect of its registered charge.

5. At the commencement of this trial, I spent almost two hours exercising the court's case management powers available in a case involving unrepresented parties under CPR 3.1A to adopt such procedure as the court considers appropriate to further the overriding objective of the Civil Procedure Rules by establishing from each of the claimant and the first defendant, in turn, the precise nature of, and the basis for, their respective cases and their responses to the cases of their opposing party. Before doing so, I ensured that the oath or form of affirmation had been administered to both of them so that what they said was formally part of the evidence in the case. I afforded each of them the opportunity of responding to the other's case.

6. At the end of this process, which took until the luncheon adjournment on the first day of the two-day trial, everyone was better informed about the nature of the case of each of the unrepresented parties, and this greatly reduced the need for cross-examination, which I also controlled in accordance with CPR.32.1, without in any way constraining the ability of either the claimant or the first defendant to put their evidence and case to the other unrepresented party. At times, this involved the court in reformulating the questions so as more clearly to convey the point the cross-examining unrepresented party was seeking to put to his brother.

7. By an order of District Judge Johnson made on 24th September 2018, the case had been ordered to proceed as a Part 7 claim. Having at one time been allocated to the fast track, the case was reallocated to the multi-track by an order of District Judge Deane made on 19th May 2020. By then, the second defendant had been joined to the proceedings by an order of District Judge Deane dated 9th March 2020. District Judge Deane made that order because it had become clear that the claimant was also seeking the removal from the registered title of a mortgage now vested in the second defendant and granted on 12th February 2007 to its predecessor mortgagee, Halifax PLC (trading as Birmingham Midshires). That registered charge had been granted by the claimant's son, Mr Joseph Ainscough, when he was the sole registered proprietor of the property. The second defendant is represented by Mr Thomas Rothwell (of counsel), instructed by TLT Solicitors of Manchester.

8. This case appears to have been listed for trial on no less than three previous occasions. On 2nd October 2019, District Judge Deane adjourned the first trial

listing. She did so because the court considered that the matter could not proceed to trial that day without a bundle and without the parties, or the court, having seen (and without copies being available at court of) certain key documents in the case, namely the witness statements of each party and of the claimant's two other witnesses.

9. On 9th October 2019 a further trial notice was sent out for a trial to commence on 11th December 2019 and to continue on the following day. A trial bundle was received by the court from the claimant for that hearing on 26th November 2019. The court file does not disclose why the trial did not proceed in December 2019, although the claimant thought that this might have been something to do with an Inheritance Act claim which was then on foot against, amongst others, the first defendant.

10. A fresh hearing notice was sent out on 18th December 2019 for a trial to take place on 9th and 10th March 2020. On 9th March 2020 that trial was adjourned, apparently because of the intervention of the second defendant which applied to be joined to the proceedings. As I have indicated, that application was successful.

11. On 5th August 2020, notice of this present trial was sent out for 29th and 30th September 2020. I have received a 342 page hearing bundle from the second defendant's solicitors which incorporates a detailed, and helpful, skeleton argument and chronology from Mr Rothwell. I have received no written skeleton arguments from either the claimant or the first defendant.

12. Because of the issues raised in Mr Rothwell's skeleton argument, and notwithstanding the relatively low monetary value of the property in dispute,

at the commencement of this trial I transferred these proceedings to the Chancery Division of the High Court of my own motion, pursuant to section 42(2) and (3) of the County Courts Act 1984 and I assigned them to the Property, Trusts and Probate List in the Business and Property Courts in Liverpool. My reason for doing this was because of the submission by Mr Rothwell that the claimant's claim for an order that the second defendant's charge should be removed from the register should either be struck out or dismissed as an abuse of process because it had already effectively been the subject of an adjudication by the Land Registry. It seemed to me that that apparently novel contention merited consideration by a Judge of the High Court. I continued the trial sitting as a Judge of that court, pursuant to section 9 of the Senior Courts Act 1981.

II: Factual Background

13. I can set out the factual background to the claim by reference to Mr Rothwell's chronology and skeleton argument, which I have independently verified as correct by reference to the contemporaneous documentation. By a conveyance dated 20th October 1978 the property was purchased by the claimant for a sum of £4,000. The property was acquired with the benefit of a 100% mortgage, in the sum of £4,000, from Liverpool City Council. By a further conveyance dated 10th June 1998 the claimant transferred the property into the sole name of the first defendant. That was expressed to be in consideration of the discharge of the existing mortgage in favour of Liverpool City Council.

14. There is a clear factual dispute between the claimant and the first defendant about the reasons behind this transfer. The first defendant claims to have

bought the property from the claimant for the sum of £10,000 in order to provide him with some immediate financial assistance at a time when his family was experiencing difficulties. It was also purchased by the first defendant to ensure that the claimant's wife and children could continue to occupy the property. It is the claimant's case that the first defendant merely loaned him the sum of approximately £7,000, in return for which he transferred the property into the first defendant's name "as surety".

15. It is common ground that the existing mortgage over the property in favour of Liverpool City Council which, because of accrued mortgage arrears, then stood at the sum of £5,474.56 was discharged out of the £7,000 which the claimant accepts that he received from the first defendant. The second defendant has no knowledge of this transaction and so cannot assist in the resolution of this evidential dispute and it leaves it to the court, to the extent that it is relevant to do so, to resolve that dispute at this trial. There can be no doubt, however, that as a result of this transaction, which the claimant accepts that he freely entered into, the title of the property became registered in the sole name of the first defendant, without any apparent encumbrance on the title in favour of the claimant or anyone else.

16. It appears to be common ground that the first defendant later refused to reconvey the freehold title to the property to the claimant in exchange for repayment of the loan, with accrued interest, in 2006. It is common ground that the first defendant was seeking from the claimant a sum of £35,000 which was perceived to be roughly half the value of the property, then in the order of

£70,000 to £75,000, although the first defendant accepts that he later reduced his demand to £32,500.

17. The first defendant's position is simply that because he had acquired absolute title to the property in 1998, free from any encumbrance in favour of the claimant, he was entitled to sell the property to him for whatever sum he wished. He considers that he was generous in offering the property to his brother for approximately half its market value. The claimant's position is that he was being generous to the first defendant in offering to acquire the property back from him for up to the sum of £17,000, considerably in excess of the £10,000 original loan, together with any accrued interest. Again, the second defendant is unable to comment specifically on this dispute because it has no specific knowledge of what happened at that time.

18. What is, however, clear is that by a further conveyance, expressed to be for nil consideration and dated 28th June 2006, the first defendant conveyed the freehold title into the joint names of himself and the claimant. Both parties accept that they executed this transfer. The transfer included an express declaration that they would hold the title on trust for each other as tenants in common in equal shares. There is no suggestion or evidence of any mistake or misrepresentation leading up to that transfer. Therefore, as a matter of law, both parties are bound by the declaration that they were tenants in common in equal shares of the property. There is no legal basis for suggesting that that transfer was either void, illegal or should otherwise be set aside.

19. In August 2006, the claimant was sentenced to 12 months imprisonment in connection with the cultivation of illegal drugs. It is the claimant's evidence

and case that he was arrested and immediately remanded in custody and that he was sentenced about a month later. He served six months of his 12 months sentence, credit no doubt being given for time spent in custody prior to sentence, and he told the court that he was released in about the middle of February 2007 – he put the date at 12th or 14th February 2007.

20. Whilst the claimant was serving his sentence of imprisonment, on 3rd November 2006 there was executed a purported transfer of the property from the claimant and the first defendant into the name of the claimant's son, and the first defendant's nephew, Mr Joseph Ainscough. That transfer was expressed to be for no consideration and it contained no declaration of trust. At about the time of the claimant's release from prison, the property was mortgaged by Mr Joseph Ainscough to the Birmingham Midshires. There was a mortgage offer on 29th January 2007. The mortgage advance was £56,000, and a further £840 was advanced to cover the fees of the transaction. There was initially a retention for various works to be carried out to the property of £20,000. The net mortgage advance was expressed to be £36,965. The property had apparently been valued for mortgage purposes at £70,000.

21. On 2nd February 2007, a certificate of title was provided to the Birmingham Midshires by Mr Joseph Ainscough's solicitors, who were MHM Solicitors, practising from offices in Leicester. The mortgage was in fact completed by a mortgage deed dated 12th February 2007, and the charge was duly registered in the charges register of the title to the property on 21st February 2007. On 24th September 2007 the second defendant was registered as the proprietor of that charge. Although the funds advanced by the Birmingham Midshires were

initially provided to Joseph, the first defendant accepts that he received £30,000 of those funds; and the claimant accepts that he received, first, £1,700 and, later, sums totalling £15,000 from Mr Joseph Ainscough, his son.

22. On 14th June 2013, a restraining order was granted by the Liverpool and Knowsley Magistrates Court preventing the claimant from contacting the first defendant and others, including Mr Joseph Ainscough, for a period of five years, until 13th June 2018. It was during the period of that restraining order's operation that, on 10th April 2014, the claimant claims to have discovered, by a visit to the local District Land Registry office, that his signature had been forged on the transfer deed dated 3rd November 2006. Almost a year later, in March 2015, the claimant applied to the Land Registry for rectification of the title to the property by the removal of Joseph Ainscough as registered proprietor and his replacement by the claimant; and he also sought the removal of the registered charge in favour of the second defendant.

23. That application generated a number of letters which I do not propose to reproduce in full in this judgment. So far as material, there was a letter from the Land Registry of 15th April 2015 raising various requisitions which the claimant duly answered: see divider 8, page 43. There was then a letter from the Land Registry to the claimant dated 27th July 2015 (at divider 8, page 48). That letter explained in terms that the Land Registry considered it to be the case that the mortgage constituted a mistake on the register but that exceptional circumstances were considered to exist which justified not removing the mortgage from the Land Register. The letter stated:

> "The exceptional circumstances would be that you adopted the mortgage by your actions after it was created, even though at the time you may not have understood fully the mechanism whereby your son was able to mortgage the property. You accepted the existence of the mortgage by making mortgage payments for a period of time and you confirmed the receipt of two lump sums from your son - £1,700 to build a kitchen extension on the property and a further £15,000. These sums appear to derive from the mortgage proceeds and were therefore a benefit that you received under the mortgage. In these circumstances the Land Registrar would not remove the mortgage from the register."

24. On 12th January 2016, the objections officer at the Birkenhead office of the Land Registry wrote to the claimant noting that he had by then confirmed that he wished to continue with his application. That was notwithstanding what had been communicated about the Land Registry's refusal to accept the removal of the legal charge from the charges register of the title to the property.

25. The claimant proceeded with his application to have his name restored to the title register. He did so on the basis that, since he had been in prison when the purported transfer was executed, he could not himself have signed it and it was therefore void. In support of his case the claimant relied upon: (1) a witness statement from Mr Joseph Ainscough's former partner, Miss Lisa Farrell, dated 2nd May 2014, in which she stated that although she had allegedly witnessed the purported transfer, she could confirm that she had not seen the claimant sign the relevant document, and (2) an expert forensic handwriting report from an appropriately qualified and apparently reputable forensic document examiner, Mr Derek Aves, dated 8th October 2015. His conclusion was that there was "strong evidence" that the disputed signature on the transfer

was not that of the claimant and there was also "moderate evidence" that it could have been signed by Mr Joseph Ainscough.

26. The Land Registry had previously, by a letter dated 15th April 2019 (at divider 22, page 129), made it clear that since immediately preceding the transfer dated 3rd November 2006 the claimant and the first defendant had been the joint registered proprietors of the property, a successful application to rectify the register would result in the two of them being restored to the register in place of Mr Joseph Ainscough. By an email sent to Ms Carol Cotterill of the Birkenhead District Land Registry on 27th June 2015 the claimant had expressly consented to his application being treated on that basis.

27. The second defendant had originally, through its then solicitors Eversheds, objected to the application to rectify the register by removing Mr Joseph Ainscough as the registered proprietor; but by a letter to the claimant dated 20th July 2016 (at divider 27, page 280) the Land Registry confirmed that Eversheds had by then withdrawn their objection to the restoration of the claimant and the first defendant to the proprietorship register of the title to the property. The letter indicated that the Land Registry would now complete the application and provide up-to-date copies of the register.

28. The second defendant, through its solicitors Eversheds, had previously written to the claimant on 18th December 2015 (at divider 29, page 303) setting out its basis for objecting to the claimant's application to rectify the register of title to the property. That letter recorded that Eversheds had been informed by the Land Registry that the claimant had applied to have the register rectified so that the second defendant's borrower, Mr Joseph Ainscough, was removed as

the proprietor of the property and so that the second defendant's legal charge was deleted from the charges register. Eversheds appear not, at that stage, to have appreciated that the Land Registry had made it clear that the charge would not be removed from the register.

29. The claimant relies heavily upon a statement on the third page of that letter, to the effect that Joseph Ainscough was, and is, obliged to repay all the money that he had borrowed on the security of the property back to the second defendant. The letter referred to the benefits that each of the first defendant and the claimant had received from the mortgage proceeds. It was said that the first defendant had received £30,000, with some £20,000 being paid to the claimant. The letter stated:

> "Having received £20,000 for your share in the property, it is not open for you to now claim that you are entitled to be the owner or joint owner of the property. If the title to the property were to be rectified as you have proposed, you will be unjustly enriched at our client's expense because £20,000 of money advanced to Joseph by our client was paid directly to you. If you were restored to being the owner of the property, and if our client's charge was removed, then you will have received £20,000 of our client's money and will not have parted with the property or charged the property to our client until such time as our client is repaid. This is inequitable and not something that the court will allow.
>
> "If you continue your application, and in the event that the Land Registry does rectify the register as you have requested, which we consider unlikely given the various objections, please note that we will be instructed to pursue legal proceedings against you on the basis that you have been unjustly enriched by reason of receiving money from our client to which you would only have been entitled if you had parted with ownership of the property.
>
> "We hope that you will now notify the Land Registry of your intention to withdraw your application."

30. It is clear therefore that although Eversheds may have indicated that Joseph Ainscough would continue to be obliged to repay all the money that he had borrowed on the security of the property back to the second defendant, if its charge were to be removed from the property then the second defendant would be looking for partial reimbursement from the claimant himself.

31. The clear inference which I draw - and I find as a fact - that the reason for the second defendant's withdrawal of its objection to the rectification of the register of title to the property was because they subsequently appreciated that the Land Registry was not proposing to remove the second defendant's legal charge from the charges register of the title to the property.

32. As I have indicated, the application by the claimant to rectify the proprietorship register of the title by restoring the claimant and the first defendant to the position in which they had been prior to the purported transfer to Joseph Ainscough of 13th November 2006 was successful; and, in due course, the claimant and the first defendant were retrospectively restored to the register as the registered proprietors on 21st July 2016, with effect from the date of the original application, 26th March 2015.

33. This Part 8 claim was issued against the first defendant alone on 13th August 2018. The claimant says that the reason for the delay in issuing the claim was because the five year restraining order only expired on 13th June 2018. Be that as it may, there would, of course, have been no reason for him not to have brought a claim against the second defendant at a much earlier date because the restraining order did not extend to the second defendant.

34. There was an initial hearing before District Judge Johnson on 24th September 2018 and on 6th October 2018 the claimant filed amended Particulars of Claim as required by that order. There was another hearing before District Judge Wright on 20th November 2018 and a further hearing before District Judge Johnson on 24th January 2019. There was a hearing before District Judge Deane on 21st May 2019, pursuant to which the claimant filed further amended Particulars of Claim on 3rd June 2019; and the first defendant filed an amended defence and counterclaim on 14th June 2019. I have already indicated that the trial originally fixed for 2nd October 2019 was adjourned on that day.

35. I have already mentioned that the case was relisted for trial on 9th October 2019, to take place on 11th and 12th December 2019, but that relisted trial was itself adjourned. A further trial date of 9th March 2020 was fixed but the trial listed for that day was also adjourned by an order of District Judge Deane, who added the second defendant to the proceedings on that day and gave consequential directions for the filing of a defence and witness statements. The second defendant's defence was filed on 20th April 2020. The claim was eventually listed for this trial on 5th August 2020. That concludes the recital of the factual background to the claim.

III: Findings of Fact

36. The claimant gave evidence for a little under two hours, after the luncheon adjournment on day one. He was cross-examined by his brother, the first defendant, for about 55 minutes and then by Mr Rothwell for a further 50 minutes or so. In addition to the claimant's own evidence, I received witness statements in support of his case from the claimant's daughter, Ms Tricia

Todd, and his sister, Mrs Marie Maher. I was told that Ms Todd was unable to attend court for health reasons so I admitted her witness statement as hearsay evidence. Before the luncheon adjournment on Day 1, both the first defendant and Mr Rothwell had indicated that neither of them wished to put any questions to Mrs Maher and so her evidence was accepted as unchallenged. After the short adjournment I was told by my clerk that Mrs Maher had wished me to read a further short written statement from her but, in view of the extensive case management orders that had previously been made regulating the service of written evidence, I declined her request. In the event, I find the evidence of these two witnesses to be of little, if any, relevance to the issues the court has to decide.

37. The first defendant then gave evidence and he was cross-examined by Mr Rothwell for less than ten minutes. He was then cross-examined by his brother for about 40 minutes. Much of the claimant's cross-examination of his brother inevitably covered matters that had already been thoroughly canvassed, either during the exchanges between the unrepresented parties and the bench on the first morning, or during the claimant's own cross-examination by his brother. Perhaps inevitably, there was also much comment and argument during the claimant's cross-examination of the first defendant.

38. Before the luncheon adjournment, both the claimant and the first defendant had confirmed that they did not wish to put any questions to the second defendant's sole witness, Miss Caroline Johnson, whose evidence therefore stands as unchallenged. This was understandable because she has no first-

hand knowledge of events and her evidence is derived solely from her reading of the various documents.

39. On the whole, where there are conflicts of evidence between the claimant and his brother, the first defendant, I prefer the evidence of the first defendant. I do so because I find the first defendant to have been more restrained and considered in his evidence and submissions and because, save in relation to the circumstances surrounding the 1998 transfer, his evidence seems to me to accord more closely with the inherent probabilities and the contemporaneous documents and events. Even though, having heeded my warning about the privilege against self-incrimination, the first defendant declined to answer certain questions, which the claimant then did not press in cross-examination, I am satisfied that the first defendant did so because of the Land Registry's finding that the transfer to Joseph was a forgery. In my judgment, based upon my assessment of the whole of the evidence in this case, that does not detract from what I am satisfied was the first defendant's genuine evidence about the 1998 and 28th June 2006 transfers.

40. It is common ground that in June 1998 the first defendant took out a £10,000 Barclays loan which he used to discharge the existing mortgage on the property to Liverpool City Council, which was then in arrears and amounted to £5,474.56. It is also common ground that the first defendant accepted a transfer of the property into his sole name. The claimant accepts that in addition to the discharge of the mortgage, the first defendant also received, or received credit for, further sums which brought his total liability to his brother up to the sum of £7,000.

41. The claimant says that the balance of £3,000 went to pay for his brother, the first defendant, to go on a trip to Australia, although he accepted that he, the claimant, was to be liable for the full £10,000 loan which his brother had taken out. The claimant also says that he only transferred the property to his brother, effectively as security for the repayment of the claimant's liability to his brother, together with interest. He does not suggest that the rate of interest, or the time, terms or basis of the repayment of his liability to his brother, were ever discussed or agreed. The agreement was simply that when the time came, the first defendant would be repaid, and the claimant's name would go back on the title deeds to the property.

42. The claimant asked rhetorically: Why should he have agreed to transfer his property to his brother for only £10,000 when he perceived it then to be worth some £28,000, even though the mortgage was then in arrears? According to the claimant the mortgage had first started to fall into arrears in about 1981 after he had been made redundant from his job with Cammell Laird, the shipbuilders.

43. According to the first defendant, he never retained £3,000 for a trip to Australia. He says that the claimant received all the money that he had borrowed from Barclays, apart from a sum of about £1,000 which the first defendant had retained to meet the repayments on his loan until housing benefit began to be paid to the claimant's wife, who was to remain, and who did remain, as the first defendant's tenant in the property after the transfer, together with her children. The transfer was a straightforward purchase, the first defendant says, of the claimant's interest in the property.

44. For reasons which will become apparent, it is strictly unnecessary for me to make any findings on this aspect of the case. However, I prefer the first defendant's version of events. It fits more closely to what actually happened. There was a transfer to the first defendant, without any legal charge or other documentation evidencing any security arrangement. There was, even on the claimant's case, no express agreement, even verbally, as to the terms for the repayment of any alleged loan made to the claimant by the first defendant, or as to any interest on that loan.

45. At first sight, I acknowledge that it may be surprising that the claimant was prepared to transfer his interest in the property to the first defendant for only £10,000 when it was then worth £28,000. However, the claimant had never put any actual cash into the property, having acquired it with a 100% loan from the council; and, according to the claimant, although he had carried out improvements to the property, he had done so with the benefit of a full grant. The claimant had been, or was, serving a prison sentence at this time and his evidence was that he had moved, or was moving, away from the Liverpool area to North Wales. He was in substantial arrears with his mortgage to Liverpool City Council. The first defendant was, on the claimant's own account, his little brother whom he loved and trusted. In cross-examination by Mr Rothwell, the claimant said that he had thought that there was no-one he could trust more.

46. The claimant may have thought that, if his future circumstances ever permitted, the first defendant would re-transfer the property to the claimant on advantageous terms; but I am satisfied that there was no formal, or binding,

agreement or arrangement to that effect. Clearly this finding colours what then happened in 2006, and it strengthens the first defendant's version of those events; but I reach my decision as to what happened in 2006 entirely independently of my finding as to the basis on which the first defendant had acquired the property in 2006. In answer to a question from the first defendant in cross-examination, and only after much hesitation and pause for thought, the claimant accepted that he had paid nothing for the property since 1988. In his closing speech, he enquired why it should have been thought that he should have done so, since he had transferred the property to his brother.

47. Turning now to 2006, the claimant's account is that in that year the first defendant took advantage of his position as sole registered proprietor of the property. He wanted £35,000 for his interest in the property, which he later reduced to a demand for £32,500. He is said to have demanded his money back from the claimant, with threats to sell the property if he did not receive it. Whereas previously the claimant had been prepared to repay the first defendant the original £10,000 Barclays loan, together with interest and a bonus amounting, in total, to perhaps somewhere between £15,000 to £17,000, thereafter, in view of the first defendant's greedy demands, the claimant said that he was only prepared to repay the original loan from his brother, together with interest, but without any bonus.

48. It is the claimant's evidence and case that after March 2006, when he says that his brother effectively barged into the home without any invitation and issued aggressive threats to him, the claimant never spoke to his brother again. It is the claimant's evidence and case that his son Joseph, whom he described as

his favourite son, acted as a go-between between the claimant and his brother. In reality, however, it is said by the claimant that Joseph was supporting his uncle, colluding and conspiring with him to do his father out of his true interest in the property. Joseph is said to have secured the transfer of the property into joint names. There is said to have been no agreement that preceded that.

49. The claimant said that he regarded this as a positive first step towards his goal of securing the re-transfer of the property into his sole name; but when the claimant refused to pay the first defendant the reduced sum of £32,500, on the claimant's case Joseph and the first defendant then took matters into their own hands, colluding and conspiring together to transfer the property into Joseph's name, without the claimant's knowledge, and against his wishes, so that Joseph could re-mortgage the property and pay over the £32,500 demanded by the first defendant.

50. In cross-examination by Mr Rothwell, the claimant accepted that he did not have access to funds to repay his brother himself, so he acknowledged it to be a possibility that Joseph would repay the moneys. Joseph, however, had favoured his uncle, the claimant's brother, at the expense of his own father. In cross-examination by Mr Rothwell, the claimant accepted that the only real dispute had been that the claimant was prepared to pay his brother only up to £17,000 whilst the first defendant had wanted £32,500. The claimant accepted that he would have had to repay the first defendant; but he said that he was not prepared to pay a penny more than he had been lent, together with accrued interest.

51. In cross-examination by Mr Rothwell, the claimant said that the disagreement with his brother had been about the fact that he was claiming that he had bought the property from the claimant. The claimant accepted that there was an agreement that the first defendant would be paid a sum of money, and that the property would be transferred back into the claimant's sole name, and that there had been a renegotiation over that figure; but he maintained that the transfer to Joseph had been effected without any discussion or negotiation with the claimant.

52. After his release from prison, the claimant said that although he had made payments towards the mortgage, they had in fact been taken out of the salary which he was receiving as Joseph's employee whether he, the claimant, liked it or not. He told the court that he had been aware of the statutes of limitation; but he considered that he had needed to have something concrete before he could take legal action. He accepted that he had been told that the Land Registry had made it clear that if the rectification application were successful, both his name, and that of his brother, would be restored to the register of title; but he said that he had accepted that that was the only option available to the Land Registry because, before the forged transfer, the property had been lawfully vested in both their names.

53. He told the court that he had taken legal advice at the time and he had been advised that if the Land Registry admitted that there had been a mistake in registering the forged transfer, then the Registrar should also agree to remove the charge in favour of the second defendant. He said that he had been told that a judge in civil proceedings could overrule the Land Registry's decision

not to remove the legal charge. He had not thought at the time that he had had to appeal that decision. In his closing speech this morning, the claimant revealed that he had taken advice from a Mr Tony Marriott, who had said that he could bring a civil action.

54. By contrast, the first defendant's evidence and case is that he put the claimant's name on the title deeds so that the claimant would have the necessary leverage to raise a mortgage to pay the first defendant £32,500, which had been reduced from the first defendant's original demand for £35,000. The first defendant said he was not being greedy because the property was his but that he had been trying to help his brother, who had succeeded in negotiating him down from his original demand for £35,000 to £32,500. He said that this was before the transfer into their joint names. As soon as the claimant's name was on the deeds, however, the first defendant said the claimant's attitude changed. The next thing he knew, the claimant was in gaol. The first defendant could not understand how the claimant could have hoped to raise any money in order to repay him when he was facing a criminal prosecution.

55. The claimant's evidence and case is that he did not know that he was facing criminal prosecution before the transfer into joint names. He had been arrested, and remanded in custody, and he was then sentenced, as part of a seamless process and this, therefore, must have post-dated the transfer into joint names. It is the first defendant's case that the claimant manipulated the first defendant so as to get his name on the title deeds so that he would then be in a position of power. The first defendant made it clear that he had been

happy to accept the £30,000 that he had received from Joseph Ainscough, and that he was not bothered about the outstanding £2,500, but that he was defending these proceedings because he felt that he had to defend himself against what he perceived as the claimant's baseless assertions.

56. Again, as between those cases, those conflicting versions of events, I prefer the version of the first defendant, subject to one minor modification. The first defendant's evidence is that the figure had been reduced from £35,000 to £32,500 before the transfer into joint names. That does not seem to me to fit in with what is said in the two letters which are in evidence and which were written by Joseph Ainscough to his father, the claimant, when the claimant was serving his sentence of imprisonment. The first of those letters talks about a figure of £35,000, and the second a figure of £32,500.

57. I find that it was whilst the claimant was in prison, and thus after the transfer into joint names, that the first defendant had reduced his demand from £35,000 to £32,500. Subject to that, however, I accept the first defendant's version of events in preference to that of the claimant. It seems to me that there is simply no reason why the first defendant would have transferred the property into the joint names of himself and the claimant unless and until he had reached some form of agreement in principle that he would receive a payment from the claimant. The amount he was demanding at that stage was £35,000. Therefore I am satisfied that there must have been an agreement that the claimant would pay him that amount.

58. That is supported by the extract from the letter written by the claimant to Tricia that appears at divider 25, pages 232 to 233. Having initially suggested

that this had been written shortly before the forged transfer of the property to Joseph on 3rd November 2006, when the court pointed out to the claimant that it was clearly written before the claimant had been sentenced, the claimant acknowledged this. The letter was therefore written in or about August of 2006. The first page of the letter, and indeed any other pages before the last two pages, are not in evidence, and so the date is not apparent. However, the first of the two pages that are in evidence talks about a "remortgage." It also talks about the first defendant's extortionate demands and the claimant wanting to renegotiate with him once he is in a stronger position.

59. All of that supports the first defendant's evidence and case that there had been some agreement about money being raised by way of a remortgage and that the claimant was still seeking to renegotiate that arrangement because he considered it to be extortionate. That fits in rather better with the first defendant's evidence than that of the claimant, that there was no agreement before the transfer into joint names. As I say, I am satisfied that the first defendant would not have transferred the property into joint names unless he had come to some arrangement with his brother because there would have been no reason for him to do so.

60. All that, however, is to a large extent irrelevant because it is quite clear from the terms of the transfer into joint names that thereafter the claimant and the first defendant held the property as beneficial tenants in common in equal shares. They therefore owned the property 50/50. To the extent that the property was worth £70,000, which was the mortgage valuation, then the first defendant was entitled to an interest in the property worth some £35,000.

61. It is unnecessary for me to make any specific findings as to the circumstances in which the forged transfer was executed. It would also be procedurally unfair for me to do so. Joseph Ainscough is not a party to these proceedings; as a result there has been no evidence from him, and there is no permission for any forensic handwriting evidence as a result. Procedurally, it seems to me that it would be unfair, in the absence of Joseph Ainscough, to make any finding as to whether it was he who had forged the signature on the disputed transfer, or whether he had done so with, or without, knowledge on the part of his father.

62. Had the Land Registry not accepted that the transfer was a forgery, Joseph Ainscough would no doubt have been joined as a party to these proceedings, and there would have been the opportunity for him to put evidence before the court. It would also have been possible for the court to have properly investigated the circumstances in which that transfer came to be effected. The Land Registry have determined that the transfer was a forgery, and therefore void, and have restored the registration of the claimant and the first defendant as joint registered proprietors; and the court has to proceed on that basis. The real question is whether the charge in favour of the second defendant should also be removed from the register. I therefore turn to consider that aspect of the case.

IV: Abuse of Process

63. The applicable law was addressed in Mr Rothwell's written skeleton argument and, unsurprisingly, there was no challenge as to his analysis of the law, which I accept. The second defendant's primary position is quite simply that the

claimant's claim for an order that the second defendant's charge be removed from the register is an abuse of process; and, on that simple basis, his claim should be dismissed. In short, the position is said to be that the Land Registry has already decided that the second defendant's charge should not be removed from the register; and it is not now open to the claimant to seek to go behind that decision and, effectively, to seek to have a second bite at the cherry. In legal parlance, these proceedings are said to be a collateral attack on a valid decision of the Assistant Land Registrar, acting within her proper powers, and that the court ought not to condone such an attack.

64. The court has been referred to the leading case of *Hunter v Chief Constable of the West Midlands* [1982] AC 529 as establishing, at the highest level, the court's power to strike out a claim as an abuse of process when it would amount to a collateral attack on a previous decision of a competent court of law. That decision made it clear that a plea of abuse of process, which formed part of a body of procedural law, was quite separate from the substantive doctrine of *res judicata*, which arises only where a cause of action has already been adjudicated upon by a civil, but not a criminal, court of competent jurisdiction.

65. Although *Hunter* related to a previous decision made by a criminal court, subsequent decisions have also made it clear that the collateral attack principle, being part of the wider law of abuse of process, applies not only to decisions of courts of competent jurisdiction but also to decisions of administrative bodies. Mr Rothwell referred me to the decision of Mr Justice Laddie in the case of *Iberian (UK) Limited v BPB Industries plc* [1997] ICR

164 where it was held that the collateral attack principle applied to a decision in competition proceedings before the European Commission. Mr Rothwell referred me to the recognition in Mr Justice Laddie's judgment of the special position of the European Court in relation to competition proceedings; and he submitted that the position of the Land Registry, as the guardian of the land register, was an analogous situation.

66. Mr Rothwell also referred me to the decision of Mr Justice Jonathan Parker in *Re Barings plc (No 3)* where it was held that the collateral attack principle was relevant to a previous decision by a disciplinary tribunal of the Securities and Futures Association (as it then was): see [1999] BCC 639 at pages 651-653. In *Kamoka v The Security Service [*2017] EWCA Civ 1665 at paragraphs 58-59 the Court of Appeal had cited Mr Justice Jonathan Parker's decision in *Re Barings plc (No 3)* with approval.

67. I am satisfied that subsequent decisions have made it clear that the collateral attack principle, as part of the wider law of abuse of process, not only applies to decisions of courts of competent jurisdiction but also to decisions of administrative bodies. Mr Rothwell points out that a decision of the Land Registrar, acting under his or her statutory powers, amounts to an administrative, rather than a judicial, decision and it is for that reason that decisions of the Registrar are amenable to judicial review. He accepts that a strict plea of *res judicata* would not be available in this case because of the lack of any decision by a court of competent jurisdiction. However, he submits that a submission of abuse of process is nevertheless available in circumstances such as the present, where the claimant's claim amounts to a

clear collateral attack on the decision of an administrative body acting within its proper powers.

68. I accept Mr Rothwell's analysis of the authorities, his reasoning and his conclusion. I accept that the principle of abuse of process applies in the present context. Once it is determined that the collateral attack principle applies, as it has been, Mr Rothwell went on to examine the application of that principle to the present case. The test, which he distilled from Mr Justice Jonathan Parker's judgment in *Re Barings (No 3)* at page 653, letter C, is whether in all the circumstances of the particular case it would be manifestly unfair to a party to litigation before the court, or would otherwise bring the administration of justice into disrepute among right-thinking people, to allow the claim to proceed.

69. Applying that test to the facts of the present case, Mr Rothwell submits that there is clear reason why the claimant's attempt to relitigate the very issue decided by the Registrar in the letter of 27th July 2015 would be manifestly unfair to the second defendant and would also bring the administration of justice into disrepute amongst right-thinking people. Mr Rothwell relies upon the following:

> (1) The Registrar is given a clear power, by paragraph 6(3) of Schedule 4 to the Land Registration Act 2002 to refuse an application to alter the register if "there are exceptional circumstances which justify not making the alteration".
>
> (2) That is precisely the power which was exercised in this case, after full and detailed requisitions had been raised from the claimant. Those replies had been considered with care by the Assistant Registrar. She had made a reasoned decision refusing to alter the register on the basis of "exceptional circumstances", which she explained in the Land Registry's letter of 27th July 2015.

> (3) If the claimant believed that this decision was incorrect or unlawful at the time, he had a clear remedy. Although there is no right of appeal against a decision of the Registrar, that decision was judicially reviewable. Although the second defendant would contend that any application for judicial review would have failed on the facts of the present case, it is clear in principle that the claimant could have applied to the Administrative Court for an order quashing the Assistant Registrar's decision and requiring it to be remade in accordance with law.
>
> (4) The claimant did not see fit to seek this remedy at the time or, or immediately after, the impugned decision; rather he waited more than three years before issuing this claim, which was initially brought only against the first defendant, with the second defendant only being added some 18 months or so later. That is notwithstanding the fact that where judicial review is available, the rules are clear that the claimant must act "promptly" and, in any event, issue a claim form within three months from the date that the grounds for judicial review arose.
>
> (5) In all the circumstances, right-thinking people would no doubt conclude that where a decision of the Registrar can only be challenged by way of judicial review, and where there is a clear three-month time limit for initiating such a challenge, the decision of the Assistant Registrar must be taken to stand after that date.

70. Any other conclusion would, Mr Rothwell says, mean that a party aggrieved by a decision of the Registrar could, in effect, ignore the strict time limit for judicial review and simply issue a fresh claim in court on exactly the same grounds as his original, and rejected, application at any time the claimant saw fit in the future. It is said that that would render the application of the time restriction on judicial review claims entirely meaningless. Where the rules seek to strike an important balance between judicial and executive decision-making, it is said that it cannot be right for the claimant to ride roughshod over those clear rules. Allowing the claimant to do so would bring the administration of justice into disrepute. It would also be unfair to the second defendant, which had acted on the faith of the original decision by the

Assistant Registrar and so has had to incur two sets of substantial legal costs as a result of the claimant's actions.

71. For those reasons, Mr Rothwell invites the court, on behalf of the second defendant, to strike out or dismiss the claim against the second defendant purely on the basis that it is an abuse of the court's process.

72. I accept those submissions. I accept, for the reasons that Mr Rothwell has given, as set out above, that it is an abuse of the court's process for the claimant to seek to have the second defendant's legal charge removed from the register.

73. In addition to the reasons advanced by Mr Rothwell, it seems to me that there are two further reasons why it is manifestly an abuse of process for the claimant to be advancing his present claim against the second defendant. The first is that the second defendant had initially objected to the application for rectification of the register, in the belief that the claimant was also seeking to have the legal charge removed. The second defendant then withdrew its objection. I am satisfied that it did so because it had become apparent to the second defendant that the charge would remain on the register, notwithstanding the restoration to the proprietorship register of the names of the claimant and the first defendant.

74. The second defendant was effectively denied the opportunity of persisting in its objection to Joseph Ainscough's removal from the proprietorship register of title. In those circumstances, it would be unfair, and an abuse of process, to allow the claimant to effectively have his cake, in the form of the restoration of his name and that of his brother to the proprietorship register, and to eat it

too, in the form of seeking to have the legal charge removed when this had previously been denied him by the Land Registry. It makes no difference that the claimant may have been advised that he could take that course; that advice, in my judgment, was incorrect.

75. Secondly, and closely allied to that, is that it seems to me that it is manifestly an abuse of process for the claimant to seek to take the benefit of part of the Land Registry's decision to rectify the proprietorship register by reason of the forged transfer without also accepting the Land Registry's prior collateral decision not to remove the second defendant's registered charge from the charges register, and not seeking to challenge that decision. It seems to me that it is manifestly unfair, and an abuse of process, to allow the claimant, effectively, to have a second bite at the cherry, having already consumed the only half of the cherry offered to him by his application to the Land Registry.

76. It also seems to me that it is procedurally unfair for me to consider the application to remove the legal charge without Joseph Ainscough having been a party to the proceedings. He was not made a party because there was no need for him to be a party; there was no need for him to be a party because of the way in which the matter had proceeded in the Land Registry, and in which the claimant had acquiesced. So, for all of those reasons, I accept that this claim is an abuse of the court's process and should be dismissed on that ground alone.

V: Rectification of the register

77. In the light of my decision on abuse of process, this further issue strictly does not arise. However, lest I am wrong about my decision on abuse of process, I

will address this matter on the assumption, contrary to my holding, that it is not an abuse of process for the claimant to pursue the present claim against the second defendant. On that basis, I must determine the matter by reference to the substantive law of land registration.

78. The governing statutory provisions are to be found in Schedule 4 to the Land Registration Act 2002. So far as material to this case, by paragraph 2(1): "The court may make an order for alteration of the register for the purpose of - (a) correcting a mistake …" Paragraph 3 applies to that power "so far as relating to rectification". I am satisfied that this is a case of rectification. Since the land is not in the possession of the second defendant, the provisions of paragraph 3(2) have no present application. The case falls to be decided by reference to paragraph 3(3). That provides that the court is required to rectify the register "unless there are exceptional circumstances which justify its not doing so".

79. It is for the second defendant to make out those "exceptional circumstances". In his closing, the claimant rightly submitted that each and every case of exceptional circumstances must be judged on its own merits. Mr Rothwell accepts that, in principle, rectification is available where a person has been registered as a proprietor of registered land as a result of a void transfer. He therefore accepts the finding of the Assistant Registrar that the claimant did not sign the purported transfer, his signature having been forged, and that that in principle justified the alteration of the proprietorship register. He also accepts that where a person has become registered as proprietor pursuant to a void transfer, and thereafter takes out a mortgage over the property in

question, the registration of the charge in consequence of that person's registration as proprietor may also properly be termed "a mistake" which the court has power to remedy by way of an order for rectification of the register.

80. In those circumstances, and absent the previous decision of the Land Registry, Mr Rothwell would accept that either the court, or the Land Registrar, would have had the necessary power, in an ordinary case, to remove not only Joseph's name, but also the second defendant's charge, from the register, both having been entered upon the register "by mistake". However, Mr Rothwell submits that this is not an ordinary case. Even if the court is satisfied that the second defendant's charge was initially entered on to the register by mistake, thereby giving the court power to order alteration of the register, Mr Rothwell submits that the continued presence of the second defendant's charge on the charges register cannot now properly be termed "a mistake". That is because the Land Registrar, on an application for rectification of the register by the claimant, has consciously, and with knowledge of the full background facts, exercised her discretion under paragraph 6(3) of Schedule 4 to the 2002 Act not to remove the second defendant's charge from the register. That is a decision which the claimant has not sought to challenge.

81. On that footing, Mr Rothwell submits that even if there was originally "a mistake" in entering the second defendant's charge on to the register, its presence there can no longer properly be characterised as a mistake because the Land Registrar has validly exercised her discretion to treat the circumstances as exceptional circumstances which justify not making the alteration of the register. In those circumstances, Mr Rothwell says there is no

longer any mistake and, as such, there is no basis to make an order for rectification of the register now. Again, I would accept that submission. I cannot see any answer to it.

82. Assuming, however, that I am wrong on that, then I have to consider the provisions of Schedule 4 in the ordinary way. Since this is a case of rectification, and since the second defendant is not in possession of the property, then the court is required to rectify the register by the deletion of the second defendant's charge unless the second defendant succeeds in persuading the court that there are "exceptional circumstances" which justify the court in not ordering rectification.

83. The leading case on the application of the "exceptional circumstances" test in Schedule 4, paragraph 3(3), is said to be the decision of Mr Justice Morgan in *Paton v Todd* [2012] EWHC 1248 (Ch). There, at paragraph 66, Mr Justice Morgan explained that the application of the exceptional circumstances test involves the consideration of two separate questions, namely (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? That case was said to have been accepted as the best guide on this question by the Court of Appeal in the case of *Dhillon v Barclays Bank* [2020] EWCA Civ 619.

84. At paragraph 67 Mr Justice Morgan went on to consider the meaning of "exceptional circumstances":

> "'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."

85. In the second defendant's submission, the circumstances of this case are clearly "exceptional" in the sense that they are not regularly or routinely or normally encountered. In the course of his opening, the claimant accepted that this was a case that was out of the ordinary, although he went on to submit that it was outweighed by his own exceptional circumstances.

86. Mr Rothwell relies on three facts and matters in support of his submission that the circumstances of this case are clearly "exceptional". First, this is not a standard case where a fraudster forges a transfer or other registered document, takes out a mortgage over the relevant property, and then absconds with the proceeds, leaving the defrauded proprietor's property subject to an onerous charge. Instead, this is a case in which the vast majority of the mortgage monies that were advanced by the second defendant were transferred directly to the claimant and the first defendant, who were the true registered proprietors, as has been admitted by them both. Despite the fact that the claimant had not signed the original transfer to Joseph Ainscough, he, and the first defendant, have both directly benefited from the mortgage monies that were advanced to Joseph Ainscough, and they have had the use of them for their own purposes for over ten years.

87. Second, the claimant, as part of his written case to the Land Registry, accepted that he had paid instalments of the mortgage for a period without challenging its legality, although he later said in evidence that they had simply been deducted by Joseph from the wages that he was paying him. This is therefore

not a routine case where the party subject to the mortgage subsequently claims that its presence on the register is a mistake. This is not a case where a defrauded proprietor only discovers the existence of a mortgage after default has been made by the absconding fraudster.

88. Third, it is said that the claimant was always aware of Joseph's intention to take out a mortgage over the property. There are clear references to a remortgage in the correspondence that was sent to, and by, the claimant whilst he was in custody, both before and after he was sentenced. Despite that, the legality of the mortgage was not challenged in terms of an application to the Land Registry until some nine years later in 2015. That is not a usual state of affairs. In cross-examination by Mr Rothwell, the claimant had accepted that he did not have access to any funds to pay over to the first defendant, so Joseph obtaining funds by way of a remortgage was clearly in the claimant's contemplation.

89. I am satisfied that the circumstances of this case are "exceptional" for the reasons that Mr Rothwell gives. In my judgment there is a further reason why the circumstances of this case are exceptional. That is that the claimant has already successfully applied to the Land Registry for the proprietorship register of title to be rectified; and, in doing so, he accepted that the charges register should **not** be rectified. He has effectively secured the rectification of the proprietorship register without the need for any court action; and he now brings court proceedings, not in relation to the forged transfer, but in relation to the legal charge derived from it. That also, it seems to me, is an "exceptional" circumstance.

90. I then have to consider whether those exceptional circumstances justify a refusal to remove the second defendant's charge from the register. I have to consider the two possible outcomes, which are rectification, and non-rectification, of the charges register. I am reminded by Mr Rothwell that the possibility of applying to the Land Registry for an indemnity is not a relevant factor in this balancing exercise. First, what if the register were to be rectified and the second defendant's charge removed? In that event, the second defendant would lose its security over the property and it would be left with an unsecured money claim against Joseph only. In his oral closing, the claimant himself emphasised doubts as to Joseph Ainscough's solvency.

91. By contrast, both the claimant and his brother would have benefited directly from the funds originally advanced by the second defendant, to the extent that they were paid over to them by Joseph, and would take the property entirely free of any encumbrances. That would give rise to a clear windfall. They would have received the benefit of the cash originally provided to them in or around 2007, but they would now each have a 50% equity stake in the property. The claimant would have effectively secured the release of at least part of his brother's beneficial interest, at no cost to himself; and he would have received some £16,700 in addition. Had there been no mortgage, there would have been no recourse to any of those funds provided by the second defendant.

92. In all the circumstances, it is said that that would be a highly unjust result. In effect, the court would be sanctioning the claimant, and the first defendant, being able to have their cake and to eat it, too. The claimant could at once

complain that he had been wronged by Joseph's forging his signature to the transfer whilst, at the same time, directly benefiting from that wrong-doing by retaining a substantial sum of money, which he had received as a result of the mortgage consequent upon that transfer, and also being able to escape the consequences of the second defendant's resulting security. The effect would be that the claimant, and the first defendant, would both have been unjustly enriched, in both the broad and the narrow senses of that term.

93. Conversely, if the second defendant's charge is not removed from the register, the property will remain subject to that charge, although Joseph will remain the party contractually liable on the underlying loan agreement. If the second defendant were to sell the property, it appreciates that the claimant and the first defendant are unlikely to obtain much, if any, money after the charge has been satisfied and the costs of this litigation and of any sale have been discharged. That can hardly be seen as an unjust result, however, given that the claimant and the first defendant have between them already benefited from the majority of the original mortgage advance. Although the claimant has made some repayments under the mortgage, it is now in arrears according to the evidence of Miss Johnson. The claimant and the first defendant would have had access to funds which they would never have received but for the mortgage.

94. Moreover, the claimant has effectively accepted, or acquiesced, in the existence of the mortgage over many years, making payments for a time and taking no steps to challenge its legality, despite knowing about the mortgage's existence even if he did not know about the precise mechanism by which it

had come into existence. That is said to be a further exceptional factor justifying non-alteration of the register. Because of the claimant's *de facto* adoption of the mortgage and his general inaction, if the charge were now to be removed from the register, many of the claims which the second defendant might conceivably have had against the claimant and the first defendant now run the risk of being treated as statute-barred, or further frustrated because the funds handed over by Joseph, as long ago as 2007, are likely now to have been dissipated, thereby barring any additional remedy such as equitable tracing. Mr Rothwell also submits that the court should be slow to go behind the previous reasoning of the Land Registry as to "exceptional circumstances", which he submits was correct in principle and in accordance with the evidence.

95. I accept, for the reasons that Mr Rothwell has given, that this case is one where "exceptional circumstances" have been demonstrated to exist which justify the non-alteration or non-rectification of the charges register of the title to the property. There is no injustice to the claimant if the charge remains in place. He has had the benefit of monies being paid to his brother which he would otherwise have had to bear himself; and he has received monies through the mortgage advance in return. In those circumstances, and for those reasons, I therefore dismiss the claim against the second defendant.

96. So far as the claim against the first defendant is concerned, I can see no basis for removing his name from the proprietorship register of the property. As a result of the rectification ordered by the Land Registry, the position has been restored to that which applied before the forged transfer to Joseph. That gives

effect to the June 2006 transfer, which is clearly binding upon both the claimant and the first defendant. In those circumstances I cannot see that there is any relevant mistake which can give rise to a claim for rectification or alteration of the register. Likewise, I can see no legal or evidential basis for the first defendant's counterclaim to have his brother's name removed from the register of title to the property. The first defendant has received £30,000 out of the £32,500 which he had been content to receive for his beneficial interest in the property, albeit that this sum was derived, not from the claimant, but from the mortgage taken out by Joseph Ainscough with the second defendant's predecessor mortgagee.

97. Although, perhaps understandably, it was not raised before me, I have considered whether the claimant may have some claim in accordance with the principle in the case of *Saunders v Vautier*, namely that he is now the sole beneficial owner of the property and entitled to call for a transfer to himself from the legal trustees, the registered proprietors, who are himself and the first defendant. However, the effect of the June 2006 transfer was that the first defendant and the claimant were tenants in common in equal shares. Even if the first defendant is to be treated as having received £30,000 on account of his beneficial interest in the property through the mortgage from the second defendant, on the evidence his beneficial interest was worth £35,000 at the time, even though he may have been content to accept £32,500.

98. What is clear is that the first defendant has not yet received the full extent of his beneficial interest and therefore he remains beneficially interested in the

property. On that basis, I can see no reason why he should not be entitled to remain a registered proprietor of the property.

VI: Conclusion

99. For those reasons, therefore, I dismiss the claim against both the first and the second defendants. I appreciate that the claimant will be disappointed; but he has received the benefit of some £16,700. His brother has also received £30,000, having indicated that he was content to accept £32,500. It may be that this will give rise to further litigation between the claimant and the first defendant. It seems to me that at present there may be a claim that the first defendant has no more than a beneficial interest of some 3.85%, or thereabouts, in the property if one treats him as having been content to accept £32,500 and having received £30,000. It may be, on that basis, that the claimant and the first defendant can come to some sort of arrangement whereby the first defendant's continuing proprietorship of the property can be bought out for a relatively small sum of money; but as these proceedings presently stand, it seems to me that the first defendant is presently entitled to maintain his place on the proprietorship register of title.

100. For those reasons I dismiss the claim against both defendants. I also dismiss the first defendant's counterclaim.
