

Neutral Citation Number: [2022] EWHC 22 (Ch)

Case No: E30BM436

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 10/01/2022

Before :

JASON BEER QC
(Sitting as a Deputy Judge of the High Court)

Between :

ANTHONY CHANDLER
(as Executor of the Estate of CONCETTA
CHANDLER, deceased)

Claimant

- and -

JANET LOMBARDI

Defendant

Nicola Preston (instructed by **Wadsworths Solicitors**) for the **Claimant**
The Defendant appeared **in person**

Hearing dates: 16th – 17th November 2021

APPROVED JUDGMENT

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties or their representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 10th January 2022.

Jason Beer QC (Sitting as a Deputy Judge of the High Court):

A. Introduction

1. This is a claim for (i) a declaration that the transfer on 4th June 2018 of 34 Mallaby Close, Shirley, Solihull, B90 2PW (*“the Property”*) into the joint names of Concetta Chandler and Janet Lombardi, as tenants in common and in equal shares, was void; and (ii) accordingly, rectification of the Land Register pursuant to Schedule 4 to the Land Registration Act 2002 (*“the 2002 Act”*).
2. The Claimant in the proceedings is Anthony Chandler, as Executor of the Estate of Concetta Chandler. The Defendant is Janet Lombardi. They are brother and sister (and have two other siblings, who have taken no part in the proceedings (they live in the United States and Canada)). Mr Chandler and Ms Lombardi are the son and daughter of Concetta Chandler, who died aged 93 on 24th January 2019.
3. This is accordingly a familial dispute about property.
4. The trial was conducted before me on 16th and 17th November 2021. Mrs Nicola Preston appeared on behalf of Mr Chandler. Ms Lombardi appeared in person, meaning that the Court took a range of measures to ensure her full participation in the hearing, and to ensure the fairness of the proceedings – including:
 - a. The provision of an additional copy of the trial bundle to Ms Lombardi (Ms Lombardi had in fact previously received all of the documents contained in the trial bundle as part of a disclosure and inspection exercise conducted in January 2020 – Mr Chandler’s solicitors had sensibly taken the decision to provide, by way of inspection, copies of all of the documents that had been included on his List of Documents; counsel instructed by Ms Lombardi shortly before the trial, who in the event did not appear at the trial, had been sent a copy of the trial bundle; and a hard copy of the trial bundle had been sent to Ms Lombardi herself when it became clear that her counsel would not be appearing at the trial);
 - b. Allowing considerable latitude to Ms Lombardi in the questions that she asked Mr Chandler, both as to the subject matter of the questions in terms of the relevance to the issues arising in these proceedings, and in the formulation of the questions themselves;
 - c. Rising early on the first day of the trial (rather than proceeding directly to closing submissions), to allow Ms Lombardi the opportunity to formulate overnight exactly what she wished to say by way of closing.

B. The Facts

The Family

5. Concetta was born in Italy on 6th April 1926. She met her husband during the Second World War and came to live in Birmingham. As I have said, she had

four children; the documents speak of her being devoted to them. Concetta's marriage ended in the late 1980's, seemingly when she met Frank Stait.

The Property

6. The Property appears to have been purchased for £154,000 in 2005. Until June 2018, it was registered in the sole name of Concetta under Title Number WM 557163. Concetta lived at the Property with Mr Stait until he died on 27th January 2017.

The Will

7. On 18th August 1993 Concetta made a Will. So far as is relevant (subject to a life interest in favour of Mr Stait in respect of any property in which Concetta lived in as her main residence at the date of her death), it bequeathed the Property to Concetta's four children in equal shares.
8. On 15th January 2016 Concetta's GP wrote a letter stating that it was his professional opinion that Concetta had capacity to change the Will, including by creating a trust in Mr Stait's favour (it appears from other documents that it was anticipated that a life interest in the Property might be created – that, of course, was already provided for in the existing Will). In the event, nothing further happened following this letter from the GP.
9. On 29th February 2016 a solicitor from Seghal & Co attended the Property to meet with Concetta to take her instructions over her Will (albeit the attendance note does not on its face recognise that there was a Will in existence and instead approaches matters as if the issue was being considered for the first time). Ms Lombardi was also present. Although Concetta's instructions in relation to all issues do not emerge clearly from the attendance note (in part by reason of the arrival part way through the consultation of an interpreter, and consequently the repetition, sometimes in different ways, of earlier conversations), it is recorded that Concetta stated that she wished for Ms Lombardi "*to have her house if she were to pass away*". Again, in the event, no changes were made to Concetta's Will.

Concetta consults solicitors

10. In early 2016 Concetta consulted solicitors, Hadgkiss, Hughes & Beale ("*HHB*"), about a range of matters. Thus it was that:
 - a. On 4th January 2016 a solicitor employed by HHB went to the Property. In addition to Concetta, Ms Lombardi was also present. The solicitor's typed attendance note records that Concetta informed the solicitor that she wanted to (i) apply for a Lasting Power of Attorney ("*LPA*") in favour of Ms Lombardi, and (ii) transfer half of her interest in the Property to Ms Lombardi. The solicitor took initial instructions (in the course of which he recorded that "*I felt [Concetta] did have mental capacity, although she is hard of hearing*").
 - b. On 6th January 2016 HHB wrote an initial client care and retainer letter to Concetta concerning her instructions "*...to transfer half of your share of [the Property] to your daughter Janet Lombardi and would like to progress matters as quickly as possible*"

- c. On 6th January 2016 HHB also wrote such a letter to Concetta in relation to her instructions to prepare LPAs in respect of her property and affairs, and her health and welfare.

11. It seems that HHB had second thoughts about the wisdom or propriety of acting for Concetta in relation to the proposed transfer of an interest in the Property to Ms Lombardi: there is an internal email within HHB dated 11th February 2016 which stated that two members of the firm had spoken “...and we are both of the opinion this matter may come back to bite us regarding [the] client’s intention of transferring her property to her daughter...”. Accordingly, HHB wrote to Concetta stating “...it is with regret that I have to inform you that we are not prepared to continue with [sic] acting [sic] on your behalf with regard to the transfer of your property from your sole name into the joint names of yourself and your daughter. We will therefore now close our file...”

Lasting Powers of Attorney

12. The documents suggest that Concetta had a history of mental health issues going back a number of years (and which were being treated by her General Practitioner and Community Mental Health Team).
13. On 25th November 2016 Ms Lombardi was registered with the Office of the Public Guardian (“OPG”) as the attorney for Concetta in respect of her health and welfare. The form that created the LPA – LP1H, dated 20th October 2016 – was signed as ‘certificate provider’ by Dr Peter Nall, Concetta’s general practitioner: his certificate stated *inter alia* that he had discussed the LPA with her, that she understood what she was doing and that no-one was forcing her to do it.
14. On 28th November 2016 Ms Lombardi was registered with the OPG as the attorney for Concetta in respect of her property and financial affairs. The form that created the LPA – LP1F, again dated 20th October 2016 – was similarly signed as ‘certificate provider’ by Dr Nall: his certificate stated *inter alia* that he had discussed the LPA with her, that she understood what she was doing and that no-one was forcing her to do it.

15. Mr Chandler was away on holiday at the time of the creation of these LPAs; Ms Lombardi says that there was no relation between these events. What is clear, however, is that Mr Chandler only found out about the LPAs *after* they had been signed and registered.

Concetta’s declining health

16. After Mr Stait died in January 2017, Concetta lived alone at the Property. She was cared for (to an extent which is much in dispute, but which it is unnecessary for me to determine) by both Mr Chandler and Ms Lombardi.
17. On 17th January 2017 Ms Lombardi consulted a solicitor in relation to the ownership of the Property. Ms Lombardi says that the context was that Concetta wished for her, Ms Lombardi, to own all of the Property in return for all of the care and support that she had provided.

18. In November 2017 Concetta was admitted to the Solihull Hospital. In the course of her stay in hospital it was noted that she was suffering from dementia and delirium (with some records also referring to paranoid schizophrenia). From the Hospital, and in the circumstances set out below, she was discharged into residential nursing care.
19. On 30th November 2017 a Deprivation of Liberty Safeguards (“DoLS”) Form 3 was completed in relation to Concetta – it concluded that she lacked capacity to make decisions in relation to her accommodation and treatment and authorised a deprivation of liberty for 3 months (successive DoLS were subsequently completed). The Form 3 records that the author, a Social Worker, formed the view that Concetta did not know where she was or why she was there and that she had no understanding of her situation. It also records that Ms Lombardi was unhappy that the DoLS was to be imposed, and instead felt strongly that her mother should go home (this accords with the evidence that I heard from both Mr Chandler and Ms Lombardi, which was to the effect that they took a very different view as to Concetta’s best interests – with Mr Chandler believing that Concetta ought to be housed in residential nursing accommodation, and Ms Lombardi believing that Concetta ought to live at the Property). The Form 3 records that, by this stage, Ms Lombardi was herself living at the Property.
20. On 15th January 2018 a Mental Capacities and Substantial Difficulties Assessment was commenced in relation to Concetta’s ability to make a decision about returning to the Property or moving to a permanent placement in a residential nursing care home. Following a “Best Interests Meeting” on 7th March 2018, the author of the assessment document, a social worker, recorded that she had known Concetta since 2016, that Concetta had been diagnosed with dementia and paranoid schizophrenia, and that she lacked capacity to make the relevant decision.
21. On 21st June 2018 a “Safeguarding Concern” form was completed by the Council as a result of injuries that Concetta had sustained (in circumstances which are not relevant to this claim). Amongst other matters, it was recorded by the social worker completing the document that “*Concetta does not have mental capacity to make most decisions*”.

The Transfer

22. Relying on the LPA in respect of Concetta’s property and financial affairs, on 4th June 2018 Ms Lombardi purported to transfer the property into the joint names of herself and Concetta, as tenants in common in equal shares. The Land Registry’s Form TR1 is a document that transfers ownership of a property from one party to another - the transfer is then be registered at the Land Registry and noted on the Official Copy Entries. So far as is relevant the TR1 in this case states as follows:

“4. Transferor:
JANET LOMBARDI AS ATTORNEY FOR CONCETTA RITA
CHANDLER

5. Transferee for entry in the register:

CONCETTA RITA CHANDLER & JANET LOMBARDI

8. Consideration...The transfer is not for money or anything that has a monetary value.

10.Declaration of trust. The transferee is more than one person and...they are to hold the property on trust for themselves as tenants in common in equal shares.

12.Execution

Signed as a Deed by JANET LOMBARDI AS ATTORNEY FOR CONCETTA RITA CHANDLER”

23. The signature of the Deed by Ms Lombardi was witnessed by a solicitor.

24. Concetta and Ms Lombardi were therefore, from 8th June 2018 (the date of the entry on the register), the registered proprietors of the Property at the Land Registry under Title Number WM 557163.

The claim

25. The claim was issued by Mr Chandler, acting as the Litigation Friend of Concetta Chandler, on 25th October 2018.

26. Shortly after the proceedings were issued, on 31st October 2018 and on the application of Mr Chandler, HHJ McCahill QC, sitting as a Judge of the High Court, restrained Ms Lombardi, whether by herself, her servants or agents or howsoever otherwise from dealing with or charging the Property.

27. By 1st December 2018 it was recorded that Concetta’s dementia (of an Alzheimer’s type) was advanced. On 24th January 2019 Concetta passed away. According to the death certificate, a certified copy of which was produced to me in evidence, the cause of Concetta’s death was “End Stage Dementia”.

28. Following the death, Mr Chandler was substituted as the Claimant in these proceeds, as Executor of the Estate of Concetta Chandler, by Order of DJ Rouine on 30th August 2019. Directions taking this claim to a trial in a 6-month window commencing on 6th April 2020 were given. That timetable was not adhered to: partly because of delay in obtaining documents from the OPG and Solihull Metropolitan Borough Council (“*the Council*”), in respect of which an order for third party disclosure pursuant to CPR 31.17 was necessary; partly because of difficulties encountered by Ms Lombardi in complying with directions; and partly because of the pandemic.

C. The Issues

29. The issues that arise on this claim are as follows:

a. Firstly, whether Ms Lombardi had power or authority, as Concetta Chandler’s attorney, to transfer the Property into the joint names of Concetta Chandler and Janet Lombardi, as tenants in common and in equal shares, on 4th June 2018;

- b. Secondly, if Ms Lombardi did not have such power or authority, then whether the transfer purportedly effected on 4th June 2018 was void such that the registration of the transfer in the Land Register was a mistake which requires correction pursuant to paragraph 2(1)(a) of Schedule 4 to the 2002 Act (alternatively was voidable such that the Land Register should be altered so as to bring it up to date pursuant to paragraph 2(1)(b) of Schedule 4 to the 2002 Act); and
 - c. Thirdly, what relief, if any, ought to be granted.
30. Part of the claim that was advanced before me related to whether Concetta either had capacity, or lacked capacity, to effect a transfer of part of her interest in the Property. It was suggested by Mr Chandler that she lacked capacity and that I should make a finding to that effect. It was suggested by Ms Lombardi that she had such capacity and that I should make a finding to that effect. In my view it is neither necessary nor appropriate for me to make such findings.
 - a. It is not *necessary* because the transfer of 4th June 2018 was not effected by Concetta herself; and Ms Lombardi does not seek to suggest in these proceedings that Concetta herself effected such a transfer on 4th June 2018. In this regard, in the document that Ms Lombardi filed (and has been treated by the parties) as her Defence in these proceedings (an email of 21st November 2018, timed at 23:19), she stated at [9] that “...*at the time of the [transfer of 4th June 2018] [Concetta] did have some capacity, however at that time the gift was not communicated by [Concetta]*”. In her evidence to me, Ms Lombardi confirmed that this was intended to mean that in June 2018 Concetta had neither said that she wished to transfer part of her interest in the Property to Ms Lombardi, and nor had Concetta herself in fact transferred part of her interest in the Property to Ms Lombardi. Accordingly, as I have said above, the issue in the proceedings is whether the transfer of 4th June 2018 carried out by Ms Lombardi *as Concetta’s attorney* was effective, not whether some other supposed transfer by Concetta herself was effective.
 - b. Quite aside from the fact that such a finding is not necessary in order to determine the issues that arise on this claim, it is not *appropriate* because the date on which such supposed transfer by Concetta was effected was never identified to me in the course of the hearing. It is trite that capacity is decision-specific, so that capacity is judged in relation to the particular decision, transaction or activity involved: a person may be capable of making some decisions, but not others. And yet, on the approach floated by the parties in this claim, I would be making generalised findings as to Concetta’s capacity across a broad time period (the parameters of which were never identified) and in respect of an alleged decision which was not, in fact, carried into effect. Moreover, the documentary evidence that has been adduced in this case does *not* relate to Concetta’s capacity to transfer part of her interest in the Property to Ms Lombardi. It concerns, variously, her capacity to make decisions about her accommodation and treatment (the DoLS Form 3 assessments of 30th November 2017 and 17th December 2018); her capacity to return to live at home with support from personal assistants, rather than stay in a nursing care home (the Mental Capacity and Substantial Difficulties

Assessment of 15th January 2018); or her “general” capacity (the solicitor’s attendance note of 4th January 2016). Finally, no expert evidence was adduced in the trial before me in relation to Concetta’s capacity. I note that at one stage it was considered that a single joint expert in the field of geriatric psychiatry might be instructed to opine on the issue of capacity – indeed a direction to that effect was made in the Order of District Judge Rouine of 30th August 2019 (at Ms Lombardi’s request) - but that was not pursued and in the event no expert was instructed. Had it been necessary to determine Concetta’s capacity at a particular period in time to transfer part of her interest in the Property to Ms Lombardi, then evidence from an expert in this way may have been of assistance. As I say, however, this issue does not even arise for determination.

D. Analysis and decision

First Issue: did Ms Lombardi have power or authority, as Concetta Chandler’s attorney, to transfer the Property into the joint names of Concetta Chandler and Janet Lombardi, as tenants in common and in equal shares, on 4th June 2018?

31. The common law has long recognised that people need not always do for themselves things that change their legal relations with the world – they may instead authorise someone else to do those things for them: this is the law of agency. The relationship between the principal and the agent gives rise to certain obligations. Relevantly, the agent is bound to act in accordance with the terms of the authority given. In so doing and because the relationship is one of trust, fiduciary duties derived from equity arise, including a duty to avoid conflict of interest (unless with consent) and a duty not to profit from the position as agent (again, except with consent).
32. A power of attorney is a form of agency. The principal (“*the donor*”) executes a deed whereby he grants authorities to the agent (the “*donee*” or “*attorney*”). The general principles of agency apply.
33. At common law, a power of attorney is generally treated as revoked by the supervening incapacity of the donor: since an act carried out by an attorney is treated in law as an act carried out by the donor, and the attorney can only properly act within the given authority, for the agency to operate efficiently third parties need to be able to deal with the attorney on the basis of assumption (in the absence of evidence to the contrary) that the principal is able to know and approve of what is being done in his name. Once the principal lacks relevant capacity, such assumption is no longer safe and so the agency must end. Thereafter, the only way to deal properly with the affairs of a person lacking capacity would be by recourse to the court.
34. However, many people – rather than having to use a judicial process – would sooner make their own arrangements for management of their affairs if and when they lose capacity. And so it was that in 1983 the Law Commission proposed the creation of a new type of power: a power of attorney that would continue in force despite the donor’s subsequent incapacity: see *The Incapacitated Principal* (Cmnd. 8977). This led to the enactment Enduring Powers of Attorney Act 1985

("the 1985 Act"), which created a new type of power of attorney; one which would function in the same way as a common law power but, subject to a basic registration process, would endure beyond the onset of the donor's incapacity.

35. In addition to the creation of this new species of power, the Law Commission recognised the possibility that an attorney may not always act in the best interests of the donor - at paragraph 4.24 of its Report it stated:

"An unlimited authority to make gifts might tempt the attorney to abuse his position especially if he himself fell on hard times and persuaded himself that the donor, if capable, would have wanted him to benefit in this way. And the unscrupulous attorney might persuade a semi-capable donor that such an authority was standard practice and perfectly safe."

36. Similarly, in paragraph 4.83(vii) of the Report, the Law Commission stated:

"We have already recommended restrictions on the attorney's authority to use his EPA to benefit persons other than the donor himself. Such restriction would operate even if the EPA purported to give the donor greater authority in this respect. These restrictions were designed to protect the donor's interests but we see no reason why the Court should not be able to relax them and give the attorney greater authority to benefit others (including himself) provided that such greater authority was not prohibited by the instrument."

37. These recommendations were translated into law by s3(5) of the 1985 Act:

"...an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further, that is to say—

- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor, and
- (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts, provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate."

38. The 1985 Act was repealed with effect from 1st October 2007 and replaced by the Mental Capacity Act 2005 (itself in part of a creature of a further report by the Law Commission: *Mental Incapacity* (Law Comm No.31)).

39. In relation to gifts, s12 of the Mental Capacity Act 2005 ("the 2005 Act") provides as follows (with emphasis added):

Scope of lasting powers of attorney: gifts

- (1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).
 - (2) The donee may make gifts—
 - (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
 - (b) to any charity to whom the donor made or might have been expected to make gifts, if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.
 - (3) “Customary occasion” means—
 - (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or
 - (b) any other occasion on which presents are customarily given within families or among friends or associates.
 - (4) Subsection (2) is subject to any conditions or restrictions in the instrument.
40. If an attorney wishes to make a more extensive gift than is permitted by s12, then an application may be made to the Court of Protection for an order under s23(4), which says that “The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).” In the event that such an authorisation is given by the Court of Protection, then in the case of property on the land register, the order of the Court of Protection must be produced to the registrar in order to effect the registration: see r61 of the Land Registration Rules 2003.
41. In this case, the second of the LPAs referred to above (*cf* paragraph 14 of this judgment) conferred authority on Ms Lombardi to make decisions about Concetta’s property and affairs: it was therefore within the scope of 12(1) of the 2005 Act. By reason of the prohibition in s12(1) of the 2005 Act, however, that LPS did *not* authorise Ms Lombardi to dispose of Concetta’s property by way of a gift other than was permitted by s12(2) of the 2005 Act. The disposal of part of Concetta’s interest in the Property *was* a gift – a gift to Ms Lombardi herself. It was not a gift falling within the exceptions to the prohibition in s12(1) that are set out in s12(2) of the 2005 Act (and no-one in the course of the trial suggested that it was), most particularly because it was not made on a customary occasion or to a charity (and in any event would have been of unreasonable value – although no valuation evidence has been placed before me, it seems likely that the property is worth in excess of the £154,000 paid for it).

42. It appears that Ms Lombardi did not know that, in order for the transfer of Concetta's interest in the Property to be effective, the Court of Protection would have had to authorise it pursuant to s23(4) of the 2005 Act. Indeed, she pleads in paragraph 9 of her "Defence": "*The Defendant was not aware that she had to seek permission from the Court of Protection and was not informed by the solicitor before making the transfer*" (words to similar effect appear in paragraph 9 of Ms Lombardi's witness statement of 27th April 2021, prepared for the purposes of trial). No such authorisation was obtained.

43. Accordingly, in my clear view and by operation of s12 of the 2005 Act, Ms Lombardi had no power or authority, as Concetta's attorney, to transfer the Property into the joint names of Concetta and herself, as tenants in common and in equal shares, on 4th June 2018.

Second issue: was the transfer purportedly effected on 4th June 2018 void or voidable?

44. Debates as to whether a transaction is void or voidable are often interesting, but academic. However, in this case it matters. The reason is the decision of the Court of Appeal in *NRAM Ltd v Evans* [2018] 1 WLR 639. Paragraph 2(1)(a) of Schedule 4 to the 2002 Act gives the court power to alter the land register for the purpose of *inter alia* correcting a mistake. Whether an entry in the register is mistaken depends upon its effect at the time of registration. In *NRAM* a registered chargee had mistakenly discharged its charge from the register under the misapprehension that no monies remained secured under it. A subsequent application to the court by the chargee for an order for rescission of the discharge and alteration of the register so as to reinstate its charge was opposed by the proprietors of the registered title. Upholding the grant of such an order, the Court of Appeal held that the discharge constituted a voidable disposition which, until rescinded, was valid – accordingly, the cancellation of the charge from the register on the basis of that discharge could not constitute a mistake for the purposes of paragraph 2(1)(a) of Schedule 4. It follows that, in this class of cases of mistake, an entry in the title register can only be rectified pursuant to paragraph 2(1)(a) of Schedule 4 to the 2002 Act if the entry was made pursuant to a void, and not merely voidable, disposition.

45. It is rare for a statute *expressly* to state the consequences for a transaction where the terms of the transaction involve a breach of that statute. And that is the case with s12 of the 2005 Act: on its face, it does not set out the consequences for a gift that is made in breach of the prohibition in s12(1).

46. The question whether a statute has the *implied* effect of nullifying any contract which infringes it requires a purposive construction of the statute: see *Patel v Mirza* [2017] AC 467 at [40] *per* Lord Toulson (with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed).

47. In my judgment the effect of s12 of the 2005 Act is to render void transactions effected in breach of the prohibition in s12(1). This is for three reasons. First, as a matter of construction, the language of s12(1) points strongly towards such a conclusion: the section is concerned (according to its cross-heading), with the *scope* of LPAs, and the terms of s12(1) are such to write limitations into all

LPAs which confer authority in relation to property and affairs. Second, the prohibition in s12(1) has as its focus the subject matter of the transaction – the gift itself – rather than seeking to regulate the conduct of, or prescribe the consequences for, the attorney. Third, such an approach properly addresses the mischief which the prohibition in s12 of the 2005 Act is designed to address. The reasons why attorneys should have only a limited authority to make gifts were discussed by the Law Commission: see paragraphs 4.24 and 4.83(viii) of *The Incapacitated Principal*, cited above. In reaching this conclusion, I have borne well in mind (as Kerr LJ pointed out in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216 at 273-275) that rendering transactions void affects both guilty and innocent parties. It follows that the purported transfer of the Property on 4th June 2018 into the joint names of Concetta and Ms Lombardi, as tenants in common and in equal shares, was void and I shall make a declaration to that effect.

Third issue: what relief, if any, ought to be granted?

48. There remains the issue of rectification of the register. Pursuant to paragraph 3(2) of Schedule 4 to the 2002 Act, in the case of an alteration which affects the title of a proprietor of a registered estate in land in his possession, an order for rectification can only be made without the registered proprietor's consent if he has by fraud or lack of care caused or substantially contributed to the mistake or it would for any other reason be unjust for the alteration not to be made. It is for the party seeking rectification to prove these conditions: *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd* [2005] EWHC 125 (Ch) at [90]. Rectification is subject to these special conditions because (i) a proprietor is generally entitled to rely on the accuracy of the register and (ii) for that reason, where there is rectification which prejudicially affects the title of the registered proprietor, the proprietor is generally entitled to an indemnity under Schedule 8 to the 2002 Act.
49. In my view Mr Chandler has more than made out a case that Ms Lombardi's lack of care caused or substantially contributed to the mistake that led to registration. The duties of an attorney under an LPA in respect of property and financial affairs are very clear. They are set out in the Mental Capacity Act 2005 and the Mental Capacity Act Code of Practice. They include the prohibition on gifts in s12 of the 2005 Act. When she signed the LPA in respect of property and financial affairs on 20th October 2016, Ms Lombardi signed an acknowledgement that stated *inter alia* "By signing this section I understand and confirm the following...I have a duty to act based on the principles of the Mental Capacity Act 2005 and have regard to the Mental Capacity Act Code of Practice". Whilst I accept that Ms Lombardi did not know about (and was not advised as to) the need to seek authorisation from the Court of Protection in respect of a gift such as this, that does not mean that she was acting with care. Indeed, quite the opposite: this was a gift very significantly in excess of that permitted by s12 of the 2005; it was made without consideration; if effective, it would have had the effect of substantially affecting the extent of Concetta's estate in the event of her death; and, in the light of the circumstances of the last two years of Concetta's life, it was a controversial and contentious step for Ms Lombardi to have taken (and, in my judgment, known by her to be such a step). For all of these reasons, Ms Lombardi should have taken steps to inform herself

of the true position in law, whether by taking specific legal advice on the issue (which on the evidence she did not do), or otherwise. Her failure to take these steps amounted to lack of care on her part. That led directly to the mistake which led to registration.

50. Were it necessary to do so, I would additionally that, for the same reasons, it would be unjust for the alteration to the register not to be made: This was a disposition that ought never to have been made in the way that it was.
51. By reason of paragraph 3(3) of Schedule 4 to the 2002 Act, once satisfied (as I am) that Mr Chandler has established the conditions in paragraph 3(2), I must make an order for rectification of the register unless there are exceptional circumstances which justify not doing so. There are no exceptional circumstances present in this case.

E. Outcome

52. I shall therefore make a declaration that the transfer on 4th June 2018 of the Property into the joint names of Concetta Chandler and Janet Lombardi, as tenants in common and in equal shares, was void.
53. I shall order rectification of the Land Register pursuant to paragraph 2(1)(a) of Schedule 4 to the 2002 Act. Rule 127(1) of the Land Registration Rules 2003 provides that “An order for alteration of the register must state the title number of the title effect and the alteration that is to be made, and must direct the register to make the alteration”. Accordingly, the form of order for rectification will require the rectification of the Proprietorship Register of the property at 34 Mallaby Close, Shirley, Solihull, B90 2PW, under Title Number WM 557163, pursuant to paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002 and will require copy of the Order to be served on the Registrar.