

Neutral Citation Number: **[2022] EWHC 621 (Ch)**

Case No: HC-2017-000642

Appeal No. CH-2020-000020

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

In the matter of an appeal by the Claimant/Appellant against the order of Deputy Master Lloyd dated 18 th December 2019 (Appeal No. CH-2020-000020)

And in the matter of applications by the Fifth and Sixth Defendants for summary judgment and/or striking out orders (Case No. HC-2017-000642)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 21 st March 2022

Before :

MR JUSTICE EDWIN JOHNSON

Between :

SEEMA ASHRAF

(the personal representative of the estate of SYED UL HAQ deceased)

Claimant

- and -

(1) LESTER DOMINIC SOLICITORS (a firm)

(2) MR L. KAN

(3) MR ATTARIAN

(4) ~~MR BAVINDER SINGH NIJJAR AND MRS SONIA NIJJAR~~

Defendants

(5) THE CHIEF LAND REGISTRAR

(6) THE BANK OF SCOTLAND PLC

(7) REES PAGE (A FIRM)

Edward Brown (instructed by Simons Muirhead & Burton LLP) for the Claimant

Miles Harris and Melody Ihuoma (instructed by DWF LLP) for the First and Second Defendants

Nicholas Trompeter QC (instructed by the Government Legal Department) for the Fifth Defendant

Jonathan Allcock (instructed by Walker Morris LLP) for the Sixth Defendant

Jeremy Cousins QC (instructed by Mills & Reeve LLP) for the Seventh Defendant

Hearing dates: 5th and 6th October 2021 and 27th and 28th January 2022

(Remote hearing by MS Teams)

Approved Judgment

Mr Justice Edwin Johnson:

Introduction

1.This judgment deals with two matters which have arisen for decision in this action.

2.The first matter is an appeal (“the Appeal”) by the Claimant in this action, Mrs Seema Ashraf. The action was commenced by Mr. Syed Ul Haq, but he sadly died in 2017, and the action has since been pursued by Mrs Ashraf, in her capacity as executrix of the estate of Mr. Ul Haq. For ease of reference I will refer to the estate of Mr. Ul Haq, as represented by the Claimant, as the “Estate”. I will refer to Mr. Ul Haq himself as “the Deceased”.

3.The Estate appeals, with the permission of Marcus Smith J., against an order made by Deputy Master Lloyd on 13th December 2019 (sealed on 18th December 2019). By his order (“the Order”) the Deputy Master acceded to the applications of, respectively, the First and Second Defendants and the Seventh Defendant for summary judgment on the claims brought against them by the Estate in this action, and dismissed those claims. The Estate was also ordered to pay the costs of the First and Second Defendants, and of the Seventh Defendant, and of the Fifth Defendant which also attended the hearing of the summary judgment applications. In the case of the First Defendant and the Second Defendant the Estate was ordered to pay the costs on the indemnity basis. In the case of the Seventh Defendant the Estate was ordered to pay the costs on the indemnity basis as from 2nd July 2018.

4.The second matter comprises applications (“the Applications”) made by the Fifth and Sixth Defendants respectively for summary judgment on the claims made against them by the Estate in this action, and/or for orders striking out the statements of case by which those claims are made, and for consequential dismissal of the claims. The Applications were both made subsequent to the bringing of the Appeal. By an order of 7th April 2021 Deputy Master Hansen directed that the Application of the Fifth Defendants should come on for hearing and determination immediately after the Appeal.

5.In the event the Appeal was listed for hearing with a time estimate which did not permit the hearing of either of the Applications. In these circumstances I proceeded, at the first hearing, to hear only the Appeal, while adjourning the hearing of the Applications to a separate hearing. The facts and arguments in the Appeal and the Applications have common areas. For this reason it was agreed that I should deliver one judgment, dealing with both the Appeal and the Applications. This is my combined judgment on the Appeal and the Applications.

6.There was something of a gap between the hearing of the Appeal, which took place on 5th and 6th October 2021, and the hearing of the Applications, which took place on 26th and 27th January 2022. While this was not ideal, it was not in fact a problem because it was necessary to refresh my memory of the arguments and documents relevant to the Appeal, as part of my preparation for the hearing of the Applications. In addition to this, I was provided, for the second hearing, with transcripts of the hearing of the Appeal. Such transcripts are always helpful, and were helpful in revisiting the detail of the argument in the Appeal. The same applied to the transcripts of the hearing of the Applications, which were made available to me following that hearing.

7.This judgment, dealing as it does with the Appeal and the Applications, is necessarily a rather lengthy judgment. For this reason I provide the following guide to the judgment:

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The Appeal and the Applications

8. The action concerns a property known as 91 Argyle Road, Ealing, London W13 0LZ (“the Property”). The freehold title to the Property is registered under title number MX389787. Until 23rd June 2011 the registered proprietor of the Property was the Deceased. The registered proprietors of the Property then became the Fourth Defendants, Mr. Bavinder Singh and Mrs Sonia Nijjar, who acquired the Property from the Bank of Scotland plc in 2013, selling as mortgagee of the Property. As at 19th April 2021 the registered ownership of the Property changed again, to new proprietors.

9. The First Defendant is a firm of solicitors, and the Second Defendant is a solicitor within that firm. The Seventh Defendant is also a firm of solicitors.

10. In 2010 the Property was the subject of what may or may not have been a valid transfer of the Property by the Deceased to the Third Defendant. I will refer to this transfer, without making any decision on whether it was or was not a validly executed transfer, as “the 2010 Transfer”. I will use the expression “the 2010 TR1” to refer to the actual form of transfer by which, whether validly or not, the 2010 Transfer was expressed to be effected. Pursuant to the 2010 Transfer the Third Defendant was registered as the proprietor of the Property. Thereafter the Property was transferred to the Fourth Defendants.

11. In summary, the Estate’s case is that the 2010 Transfer was never a valid transfer because the 2010 TR1 was not executed by the Deceased, but by someone else impersonating the Deceased, who forged the Deceased’s signature on the 2010 TR1. The Second Defendant witnessed the signature of the person who signed the 2010 TR1 in the name of the Deceased. I will refer to the person who signed the 2010 Transfer in the name of the Deceased as “the Signatory”, again without making any decision as to whether the Signatory was the Deceased or some other person impersonating the Deceased.

12. As against the First and Second Defendants the Estate’s case, in essence, is that the Deceased was owed a duty of care in tort by the First and Second Defendants, which they breached by failing to take reasonable care to verify the identity of the Deceased. The Estate’s case is that the Deceased thereby suffered loss and damage, in respect of which the Estate is now entitled to recover damages.

13. As against the Seventh Defendant, the Estate’s case, in essence, is that the Seventh Defendant, which was responsible for procuring the registration of the Third Defendant as the proprietor of the Property pursuant to the Transfer and the registration of the Sixth Defendant as the registered proprietor of the charge over the Property, owed a duty of care in tort to the Deceased, which they breached. The Estate’s case is that the Deceased thereby suffered loss and damage, in respect of which the Estate is now entitled to recover damages.

14. The First and Second Defendants made an application for summary judgment against the Estate on its claim, by application notice dated 5th February 2019. The application notice also included an application, made on a further or alternative basis, for an order striking out the claim. The Seventh Defendant made an application for summary judgment against the Estate on its claim, by application notice dated 15th January 2019.

15. The applications came before the Deputy Master for hearing on 28th and 29th October 2019. The Deputy Master reserved his judgment, which was handed down on 13th December 2019. For the

reasons set out in his judgment (“the Judgment”) the Deputy Master decided (i) that the Estate had no real prospect of establishing that the Seventh Defendant owed any duty of care to the Deceased, and (ii) that the Estate had no real prospect of establishing that the First and Second Defendants owed any duty of care to the Deceased. In the result the Deputy Master gave summary judgment in favour of the First and the Second Defendants and the Seventh Defendant, and accordingly summarily dismissed the claims in the action against these Defendants.

16. The Estate now appeals against the Order. The Estate contends that its claims against the First, Second, and Seventh Defendants were unsuitable for summary judgment, that the Deputy Master made extensive findings of fact which were not open to him on a summary judgment application, and that the Deputy Master was in no position to decide and should not have decided that there was no real prospect of the Estate establishing, at trial, that the relevant Defendants did not owe any duty of care to the Deceased. As such, the Estate seeks an order dismissing the applications which were before the Deputy Master, and its costs of the applications and the Appeal. There is also a separate appeal against the costs orders made by the Deputy Master, so far as the Deputy Master awarded costs on the indemnity basis against the Estate, and so far as the Deputy Master required the Estate to pay the Fifth Defendant’s costs of attending the hearing of the applications before the Deputy Master (“the Hearing”). For the avoidance of doubt, my use of the expression “the Appeal” includes the separate appeal on costs, unless otherwise indicated.

17. The First, Second, Fifth, and Seventh Defendants all resist the Appeal. There is also a respondent’s notice filed by the First and Second Defendants, seeking to uphold the Order on various grounds (no real prospect of establishing a duty of care, or reliance, or causation), so far as additional to the grounds relied upon by the Deputy Master.

18. Turning to the Applications the Estate seeks, in the action, an indemnity against the Fifth Defendant arising out of what it says are the losses sustained as a result of the mistaken (on the Estate’s case) registration of the 2010 Transfer, which removed the Deceased as the registered proprietor of the Property. As against the Sixth Defendant the Estate seeks a declaration that the signature purporting to be that of the Deceased on the 2010 TR1 was a forgery. By the Applications the Fifth and Sixth Defendants seek, respectively, summary judgment on the claims made against them in the action and/or the striking out of these claims.

The parties and their representation

19. There are a number of parties to this action, so I start with a formal identification of the various parties and their part in this action. It is also easier to identify the various Defendants by their names.

20. So far as the First Defendant is concerned, it is, as I have said, a firm of solicitors. In strict terms Lester Dominic Solicitors are not a firm, in the sense of being a partnership or an LLP. Lester Dominic Solicitors is the trading name of Lester Dominic Solicitors Limited. The Second Defendant, Mr. Kan, is a solicitor, and an employee and director of the company. I will use the expression “LDS” to mean both the First and the Second Defendant, unless it is necessary to refer individually to Mr. Kan. As I have said, the claim against LDS is a claim for damages in the tort of negligence.

21. The Third Defendant is Mr. Attarian, to whom I will refer by his name. Mr. Attarian originally agreed to purchase the Property from the Deceased, and was registered as proprietor of the Property pursuant to the 2010 Transfer. Mr. Attarian has taken no part in the action.

22.The Fourth Defendants, who became the registered proprietors of the Property following their acquisition of the Property in 2013, are no longer parties to the action. The Estate originally sought alteration (which it seems to me would have been alteration in the form of rectification) of the registered title to the Property, to restore the Estate as registered proprietor of the Property, against the Fourth Defendants. By an order of 4th April 2018 Master Clark granted summary judgment to the Fourth Defendants in respect of this claim, and dismissed the claim. Accordingly, the Fourth Defendants are no longer parties to the action.

23.The Fifth Defendant is the Chief Land Registrar (“the CLR”). As against the CLR the Estate seeks an indemnity in respect of what are said to have been the Deceased’s losses as a result of what is said to have been the wrongful registrations which took place in consequence of the 2010 Transfer. The indemnity is sought pursuant to Section 103 of the Land Registration Act 2002, and paragraph 1(1)(b) of Schedule 8 to that Act. In response to this claim, the CLR, if and to the extent held liable on the indemnity claim, makes its own additional claim for contribution against the LDS and the Seventh Defendant, on the basis of an entitlement to enforce any rights of action which the Estate may be found to have against LDS and the Seventh Defendant.

24.The Sixth Defendant is the Bank of Scotland plc (“the Bank”). The Bank was the mortgagee of the Property pursuant to a registered charge over the Property dated 5th April 2007. The Bank was also the mortgage lender which provided funds to Mr. Attarian for the intended purchase of the Property by Mr. Attarian in 2008. The 2010 Transfer was registered on 23rd June 2011, whether rightly or wrongly. A new charge, to secure the mortgage loan to Mr. Attarian, was registered in favour of the Bank. It was pursuant to this charge that the Bank was subsequently able to sell the Property to the Fourth Defendants.

25.The Seventh Defendants are a firm of solicitors known as Rees Page (“Rees Page”), who acted for the Bank and were instrumental in procuring, in the form of the 2010 TR1, what may or may not have been the valid execution of a form of transfer transferring the Property from the Deceased to Mr. Attarian. As I have said, the claim against Rees Page is a claim for damages in the tort of negligence.

26.At the hearings the Estate was represented by Edward Brown, LDS by Miles Harris and (in relation to the preparation of the skeleton argument in support of the Appeal) Melody Ihuoma, the CLR by Nicholas Trompeter QC, the Bank by Jonathan Allcock, and Rees Page by Jeremy Cousins QC. I am most grateful to all counsel and those instructing them for their assistance in the hearings.

The evidence

27.So far as the Appeal is concerned, the application of LDS was supported by a witness statement of Mr. Kan, dated 4th February 2019. The application of Rees Page was supported by a witness statement of Michael Kilvert, dated 9th January 2019. Mr. Kilvert was, at the relevant time, a solicitor and a consultant with Rees Page. There was no evidence filed in response to either application by the Estate.

28.Turning to the Applications, evidence was filed on both sides. The Application of the CLR was supported by a witness statement of Preeya Rajani, a solicitor with the Litigation Group of the Government Legal Department, dated 11th March 2021. The Application of the Bank was supported by a witness statement of Sandip Singh, of the Bank’s solicitors (Walker Morris LLP), dated 1st April 2021. In response to these two witness statements there was a witness statement of Wasif Mahmood, of the Estate’s solicitors (Child & Child), dated 16th September 2021. There was a further witness statement in reply from Mr. Singh, for the Bank, dated 28th September 2021.

Narrative

29. It is not necessary for me to set out the relevant history of this case in full detail. The Judgment sets out the relevant history in some detail, subject to certain criticisms made in the Appeal of the Deputy Master's treatment of the facts of the case. I also keep firmly mind that I am dealing with applications for summary judgment and strike out orders, where the Court is normally not in a position to resolve disputed or uncertain factual matters, and where the Court is required, where disbelieving the evidence of a particular witness, to explain with reasonable particularity what it is about the contemporary record or other evidence which justifies the rejection of the relevant evidence; see Floyd LJ in *Optaglio v Tethal* [2015] EWCA Civ 1002, at [32].

30. The Deceased acquired the Property in 2007 with the assistance of a mortgage loan from the Bank, secured by the registered charge dated 5th April 2007 ("the Original Charge"). The Bank also held a charge over a property at 35 Inglis Road, Ealing, London W5 3RL, which was also owned by the Deceased. In 2008 the Deceased agreed to sell the Property to Mr. Attarian for £1.25 million, plus £8,000 for fixtures and fittings. Mr. Attarian was purchasing the Property with the assistance of a loan from the Bank, to be secured by a registered charge over the Property ("the Attarian Charge"). The loan documentation identifies the amount of this mortgage loan, which was to have been secured by the Attarian Charge, as £1.125 million.

31. There is some doubt as to whether contracts were actually exchanged for the agreed sale of the Property. The pleaded case of the Estate, in paragraph 10 of its Amended Particulars of Claim, is that contracts were purportedly exchanged. There is however a draft Re-Amended Particulars of Claim, which has been produced by the Estate, but which has not been and is not the subject of any application to re-amend, in which it is accepted that contracts were exchanged; see paragraph 12 of the draft Re-Amended Particulars of Claim ("the RPOC"). Before me, Mr. Brown's position was that the Estate did not know whether contracts had actually been exchanged, that this was one of many areas where the factual position was uncertain, and where disclosure was required in order to get a better idea of what actually happened at the material times.

32. The Deceased did sign a form of transfer of the Property to Mr. Attarian, but the signature of the Deceased was not witnessed on the form of transfer, with the result that the transfer was ineffective to transfer the legal estate in the Property to Mr. Attarian. As part of the intended purchase, the Bank did provide a mortgage loan to Mr. Attarian to fund the purchase, which was intended to be secured by the Attarian Charge.

33. It is the Estate's case, at paragraph 17 of its Amended Particulars of Claim, that approximately two days prior to the completion date the Deceased agreed with Mr. Attarian that £30,000 of the purchase price would be settled as to £11,000 by the transfer of a Mercedes car by Mr. Attarian to the Deceased, and as to £19,000 by a promissory note providing for payment on or before 30th September 2008, to be secured by a legal charge over the Property. The actual intended completion date is uncertain. Paragraph 14 of the Amended Particulars of Claim identifies the completion date, assuming that completion took place, as 10th March 2008.

34. I will use the expression "the 2008 Transaction" to refer to the transaction (the intended sale and purchase of the Property) which took place between the Deceased, Mr. Attarian, and the Bank in 2008. It will be appreciated that I use this expression without prejudice to the question of whether the 2008 Transaction actually took effect as a transaction with any legal effect.

35.The solicitors instructed to act on the 2008 Transaction were a firm called FLP Solicitors (“FLP”). FLP acted in the 2008 Transaction for all the parties; meaning the Deceased, as vendor, Mr. Attarian, as purchaser, and the Bank, as mortgage lender. An important consequence of this is that the funds provided for the purchase were dealt with by FLP. There was no other firm of solicitors involved in the 2008 Transaction, through whose hands the purchase funds also passed.

36.What appears to have happened is that the Bank remitted to FLP the funds being lent to Mr. Attarian, for the purposes of completing the purchase. Paragraph 18e of the Amended Particulars of Claim pleads that “mortgage funds of 1,250,000 were paid by the Sixth Defendant into FLP’s client account and credited to the Third Defendant’s client ledger.” (I have added italics to quotations in this judgment). I am not sure that this figure is correct, given that the mortgage loan was £1.125 million. For present purposes however the relevant point is that while the mortgage monies were under the control of FLP in their client account, the monies were misappropriated. It is said that the mortgage monies were misappropriated by a Mr. Uddin, an employee of FLP, who was subsequently sent to prison for this offence. For the Estate, Mr. Brown’s position was that this was the first of two frauds, in relation to both of which the Deceased was the victim.

37.In terms of documents actually signed in respect of the 2008 Transaction, in paragraph 24 of his witness statement Mr. Kilvert refers to certain documents sent to him by FLP on 18th September 2009. They included the following documents:

(1)An undated contract for the purchase of the Property signed by Mr. Attarian.

(2)Three transfers of the Property from the Deceased to Mr. Attarian, all three of which were undated. Two of these transfers were signed by the Deceased only. One was signed by both the Deceased and Mr. Attarian. All the signatures were unwitnessed.

(3)An undated mortgage deed whereby Mr. Attarian charged the Property to the Bank. The mortgage deed was signed by Mr. Attarian and his signature was witnessed.

(4)A promissory note signed by Mr. Attarian (with a witness to the signature), promising to pay the Deceased the sum of £19,000.

38.It is also to be noted that the Estate accepts that the Deceased did receive the sum of £98,307, which was passed to him by FLP, on what was supposed to be completion of the 2008 Transaction, on or about 7th March 2008; see paragraph 20eii of the Amended Particulars of Claim. This sum is said to have been paid to the Deceased from the mortgage monies (intended to be secured by the Attarian Charge) provided by the Bank to FLP. Paragraph 20eiii of the Amended Particulars of Claim pleads that the sum of £1,122,751.52 from these monies was transferred to a company called Misba Properties Limited, which was a company said to be under the control of Mr. Uddin.

39.Moving on to the involvement of Rees Page, according to paragraph 5 of his witness statement, Mr. Kilvert became involved with the Property when he was instructed by the Bank, by letter dated 29th April 2008, in respect of the misappropriation of various mortgage advances made by the Bank to FLP. At that stage the relevant transactions which were the subject of the instruction did not include the purchase of the Property by Mr. Attarian.

40.On 14th May 2008 the Bank wrote to Mr. Kilvert specifically in relation to the 2008 Transaction. The letter enclosed correspondence from Chequers, solicitors acting for Mr. Attarian, which stated that the purchase of the Property and the charging of the Property to the Bank by Mr. Attarian had never actually been completed. On 14th May 2008 Mr. Kilvert wrote to FLP recording that they, FLP,

had received mortgage funds in relation to a number of transactions which involved potential mortgage frauds. The letter concluded with the following PS.:

“Since dictating the above our Client has notified us of a further case where instructions were issued from the Leeds Office involving a Borrower by the name of Attarian and a property at 91 Argyle Road, London W13 0LZ where there was a mortgage advance of £1,125,000. We are presently awaiting papers but again please let us know what information you have in relation to that particular matter.”

41. The Bank wrote further to Mr. Kilvert on the 15th May 2008, stating as follows:

“I refer to our conversation on 15 th May. I mention the above case, on which I sent you copy correspondence on 14 th May. I am now in a position to let you have the application papers; copy valuation; copy instructions to FLP. I have requested the Certificate on Title and I will send this as soon as possible. However as confirmed in our recent conversation I can confirm that the advance amounts to £1,125,000 it was purportedly completed on 7 th March this year. It would seem that the borrower is perhaps genuine, based on the fact that he has now instructed fresh solicitors to look into this situation on his behalf. Please include in this file in your investigations and also in your claims against the compensation fund/insurers of FLP.”

42. At this stage therefore, and so far as the Property was concerned, the instructions from the Bank to Rees Page, by Mr. Kilvert, appear to have been to investigate what had happened in relation to Mr. Attarian’s intended purchase of the Property (the 2008 Transaction).

43. There then followed correspondence and other communication, which it is not necessary to go through in detail, in the course of which Mr. Kilvert continued to investigate, on behalf of the Bank, what had happened in relation to the Property, and with other matters dealt with by FLP.

44. Moving forward in time, on 9th January 2009 a firm of solicitors called JR Jones wrote to Mr. Kilvert, identifying themselves as acting on behalf of Mr. Attarian and asking for confirmation that the Bank would consent to the registration of Mr. Attarian’s interest in the Property. The letter stated that Mr. Attarian was continuing to pay the monthly mortgage instalments and had ongoing losses as a result of what was described as the negligence of FLP. On 16th January 2009 Mr. Kilvert replied to that letter in the following terms:

“Thank you for your letter dated the 9th January in connection with the above and we note your interest in this case. We should however tell you that other Solicitors, on behalf of your Client, registered a Unilateral Notice on the 24th April of last year in respect of a contract for a sale in his favour. We are pursuing a claim against the former conveyancing Solicitors FLP and are presently waiting to hear from Indemnity Insurers as to whether they will provide cover. We have in addition also put the Compensation Fund on notice and we shall let you know when we have any further information.”

45. After something of a hiatus, JR Jones wrote again to Mr. Kilvert on 7th May 2009 asking either for Mr. Attarian to be registered as owner of the Property or for the mortgage payments to be suspended. The letter pointed out that there would be serious consequences all round if the Property was not urgently registered in the name of Mr. Attarian. This resulted in further communications between Mr. Kilvert and a Ms. Popat at JR Jones concerning the Property, Mr. Attarian, and the Deceased.

46. I can pick up the story again on 15th April 2010, when Mr. Kilvert spoke further to Ms. Popat. Mr. Kilvert’s attendance note of that conversation contains the following reference to the registration position:

“There was also the issue of tracing Mr Ul Haq to obtain his execution to a Transfer Deed. There was a Transfer Deed signed but not witnessed and so it would not operate as a Deed and we didn’t have a copy only a photocopy which had been provided by FLP. I did however also provide her with the address for Mr Ul Haq and she would immediately contact her client and see if Mr Ul Haq could be traced.”

47. On 11th May 2010 Mr. Kilvert spoke to Mr. Attarian on the telephone. Mr. Kilvert’s attendance note of the conversation records the following:

“I then telephoned and spoke with Mr. Attarian and advised him of the outstanding documentation that was needed so that we could hopefully affect registration. I was having to obtain a copy of the form of Bank of Scotland’s Mortgage Deed but hopefully subject to that what we needed was a replacement of that Deed plus a replacement of the Transfer Deed from Mr. Ul Haq. He said that he would use endeavours to obtain the replacement Transfer and that he would be able to sign the replacement Charge Deed. Once I had a copy of the form of charge I would write to him. Any correspondence should be sent to him at the property.”

48. There is a further attendance note of Mr. Kilvert recording a further telephone conversation with Mr. Attarian on 25th May 2010. So far as the Deceased was concerned, the attendance note states as follows:

“I rang him back and told him that we now had a replacement Charge Deed which I had completed together with a Transfer Deed and I advised him of the letter which I had dictated and would be in the post tomorrow. He told me that there would be no problem with Mr. Ul Haq because he had already made contact with him and that he was at the address which we had for him of 35 Inglis Road. Mr. Ul Haq was perfectly happy to sign the replacement Deed. I explained that the Deeds would need to be signed in the presence of a Solicitor. He told me that his former Solicitor Mr. Popat had now in fact joined another firm and that he would be asking her to continue with the matter and he would be providing me with details.”

49. On 26th May 2010 Mr. Kilvert wrote to Mr. Attarian, following up on their telephone conversation. In terms of registration of the 2008 purchase of the Property, Mr. Kilvert said this:

“We have recovered from FLP before their offices closed a copy of a Transfer Deed which was signed by both Mr. Ul Haq and yourself but this is insufficient to transfer the legal estate since it is merely a photocopy and neither of the signatures on the Deed has been witnessed which is essential to create an effective Deed. In addition there is no original Mortgage executed by you in favour of Bank of Scotland Plc.

We have now obtained a copy of the Form of Mortgage Deed and accordingly enclose herewith a replacement Transfer and a replacement Mortgage Deed. Provided these can be duly executed and returned to us then we should be in a position to make progress towards the completion of registration at the Land Registry.

However, because issues of identification have to be dealt with when making application to the Land Registry it is essential that the Deeds are signed by you and Mr. Ul Haq respectively in the presence of Solicitors who are instructed by you and we shall need the full names and addresses of those Solicitors when the Deeds are returned.”

50. The 2010 TR1 was returned to Mr. Kilvert on 13th July 2010. It bore what purported to be the signatures of Mr. Attarian and the Deceased, each duly witnessed by a solicitor. The 2010 TR1 was

dated 7th March 2008, thereby backdating the 2010 Transfer to what was assumed to have been the intended completion date of the original purchase of the Property in 2008. The signature of the Signatory on the 2010 TR1 was witnessed by Mr. Kan. Mr. Kilvert recorded the receipt of the 2010 TR1 in an attendance note made on 13th July 2010 in the following terms:

“When I arrived at the office this morning we had received in the post, but without any covering letter, a Transfer Deed in respect of 91 Argyle Road executed by Mr. Ul Haq and Mr. Attarian with Mr. Ul Haq's signature witnessed by a Lester Kan of Lester Dominic Solicitors of 85/87 Ballards Lane, London W3 1XT and Mr. Attarian's signature witnessed by an Olga Marsh of Steven Dean-Magac & Co. Solicitors of 159 High Street, Barnet, Hertfordshire EN5 5SU, together with a Bank of Scotland Mortgage Deed executed by Mr. Attarian as well and where the signature on that Deed was also witnessed by Olga Marsh. This is something of a comfort and I did go through the documents which I had on the Attarian file and the only document which I have bearing the signatures of Ul Haq and Attarian is a photocopy of an undated and unwitnessed Transfer and the signatures on the original Deeds which I now have do appear to be the same. However, I have to be careful about this case and I first of all telephoned Lester Dominic Solicitors to speak with Mr. Kan who had witnessed the Ul Haq signature. He wasn't immediately available but I was told that someone would ring me back.”

51. Later the same day (13th July 2010) Mr. Kilvert spoke to Mr. Kan. According to Mr. Kilvert's attendance note of that conversation, Mr. Kan confirmed that he had witnessed the signature of the Deceased on the 2010 TR1, but stated that the Deceased was not known to him and that he had merely witnessed the signature of the Deceased, without having seen any evidence of identity. The same attendance note also records a separate conversation that day between Mr. Kilvert and Mr. Attarian, in which the question of confirming the identity of the Deceased was again discussed. According to the attendance note Mr. Kilvert said that he would write to Mr. Kan to see if he could obtain evidence of identity in relation to the Deceased.

52. Also on the same day (13th July 2010) Mr. Kilvert telephoned Steven Dean-Magac Solicitors, whose Olga Marsh had witnessed the signature of Mr. Attarian on the 2010 TR1. Mr. Kilvert was able to speak to a partner at the firm who confirmed that the firm acted for Mr. Attarian in respect of other matters and were satisfied as to his identity.

53. On 14th July 2010 Mr. Kilvert wrote the Deceased at 35 Inglis Road. The letter identified Mr. Kilvert's client as the Bank. As the letter is important in the claim against Rees Page, I set out the letter in full:

“You will be aware that you completed a sale of the above property to Mr. Attarian some considerable time ago in March of 2008 and that both you and Mr. Attarian were represented in the conveyancing transaction by FLP Solicitors. That firm has been intervened upon by the Solicitors Regulation Authority and there has been considerable impropriety in relation to the manner in which they dealt with the transaction and no file, so far as we are aware, has to date emerged.

We did prepare a replacement of the Deed of 7th March 2008 by virtue of which you transferred the property to Mr. Attarian and this has now been returned to us duly signed and witnessed by both of you with your signature witnessed by Mr. Lester Kan of Lester Dominic Solicitors of 85/87 Ballards Lane, London N3 1XT. In view of the conduct of your former Solicitors, FLP, in dealing with any application to register the Transfer of the property by you the Land Registry may require that Mr. Kan has evidence of your identity by way of, for example, having sight of your Passport. The writer has spoken with Mr. Kan who would be more than happy to deal with that aspect and we should be grateful if you would therefore make contact with him and attend his offices to produce evidence of

identity. As you may know his telephone number is [telephone number]. It is also in your interests that all outstanding issues should be dealt with at the earliest possible time since there are issues over the fact that FLP Solicitors did not repay the amount outstanding on mortgage out of the proceeds of sale and consequently until these issues are resolved you of course continue to have a liability in that respect.”

54. On the same date Mr. Kilvert also wrote to Mr. Kan, further to his telephone conversation with Mr. Kan on 13th July 2010, noting that Mr. Kan would attempt to obtain from the Deceased evidence of his identity. Mr. Kilvert enclosed with this letter his letter to the Deceased of 14th July 2010.

55. There was no response from the Deceased to the letter from Mr. Kilvert of 14th July 2010.

56. I will come back, in the next section of this judgment, to what happened in relation to the actual signing of the 2010 Transfer by the Signatory. Mr. Brown referred to this event as “the Signing Event”, and I will use the same expression.

57. On 23rd July 2010 Mr. Kilvert made a further call to Mr. Kan and asked whether he had been able to make contact with the Deceased and obtain evidence of identity. According to Mr. Kilvert’s attendance note, Mr. Kan informed him that he had written to the Deceased, but had not received a reply. There was then something of a hiatus, in terms of contact between Mr. Kilvert and Mr. Kan, until 24th January 2011, when Mr. Kan wrote to Mr. Kilvert reporting that he, Mr. Kan, had had no success in terms of getting in touch with the Deceased.

58. The next material event occurred on 9th March 2011 when, according to an attendance note made by Mr. Kilvert, he received “somewhat surprisingly out of the blue”, a telephone call from the Deceased. As the content of this telephone call is important, I set out in full Mr. Kilvert’s record of the conversation.

“Later in the afternoon I received, somewhat surprisingly out of the blue, a telephone call from Mr. Ul Haq. He sounded extremely concerned and he told me that he had tried to contact me at this office many times. This is absolutely of course untrue as I have left messages to which he has not responded and I have written letters which he has ignored and I pointed this out to him and he didn’t dispute this. He then changed his tune saying that he had made many telephone calls to the Bank and it was the Bank who had given him our details.

I then explained the position to him that an employee of FLP Solicitors, as he was already aware, had committed what appeared to be criminal offences and run off with very large sums of money belonging both to my Client Bank and to other Banks as well and the Indemnity Insurance cover available had been exhausted. FLP had failed to discharge the Charge and pay the redemption monies due on Mr. Ul Haq’s Account and he thus remained liable on his personal covenants. Consequently it seemed to me that he ought now to be considering making an application to the Compensation Fund. It was not for me to advise him but he had to know what his liabilities were and if he was intending to do that he may well need the services of a Solicitor. He had previously seen Lester Kan who witnessed his signature on the replacement Transfer Deed and I am wanting him to make arrangements to see Mr. Kan again and produce evidence of his identity by way of for example his original Passport. I didn’t know of course whether he would be instructing Mr. Kan or if Mr. Kan will want to take instructions on a claim on the Compensation Fund but I would be happy to liaise with any Solicitors whom he might instruct.

I asked him to confirm his current address, telephone numbers etc. and the details he gave me were as follows:-

35C Inglis Road,

London W5 3RL

Telephone (home) — [telephone number]

Mobile — [mobile number] [there is a manuscript note at this point recording that the number was “not recognised”]

E Mail Address — [email address]

He also told me that Mr. Attarian owed him money which he claimed to be in the region of £30,000.00 to £40,000.00 and part of it related to a car and part, as far as I could ascertain from him what from what he was saying, appeared to relate to an alleged loan and he also said that he was being chased for about £20,000.00 in alleged Council Tax arrears which were due from Mr. Attarian. He did actually say one positive thing which was that I was the first person who had been able to explain to him everything that he [had] happened and put him in the picture as what the position was. Consequently I am cautiously hopeful that he may be prepared to be a little more co-operative now.”

59. On 11th March 2011 Mr. Kilvert followed up this telephone call with a letter to the Deceased addressed to 35C Inglis Road. This letter again set out Mr. Kilvert’s explanation of the current position in relation to the Property. The letter concluded in the following terms:

“You have previously seen a Mr Lester Kan of Lester Dominic Solicitors of 85/87 Bollards Lane, Finchley Central, London, N3 1XT and indeed it was Mr Kan who witnessed your signature on a replacement Transfer Deed which was forwarded to us last year. However, when the present difficulties have been resolved and we are able to apply for registration to the Land Registry, we expect that the Land Registry may require evidence of your identification to be produced. We are aware that Mr Kan has written to you requesting that you attend his offices to provide such identification but you have not done so. We should be grateful if you would therefore kindly make arrangements to see him to produce evidence of identification by way of for example your original Passport so that he can take a copy and provide it to us.

If you are intending to utilise Solicitors in connection with a claim on the Compensation Fund then we do not know whether you will be instructing Mr Kan's firm but it would be helpful if you would please arrange for any Solicitors whom you instruct to contact us so that we may liaise with them and in particular there is probably a considerable amount of information which we would be able to provide and which is likely to be of considerable assistance. We are sure you will appreciate that it is in your interest to now take some positive steps with a view to assisting in resolving the difficulties which have been created by FLP.

We await hearing from you/your Solicitors and also we await hearing with evidence from Solicitors as to identity to satisfy the Land Registry.”

60. There was no response to this letter from the Deceased.

61. The pleaded case of the Deceased, in the Amended Particulars of Claim, contains a somewhat different account of the events of 2010 and 2011. In paragraph 24 of the Amended Particulars of Claim it is stated that the Deceased was contacted by Rees Page in the spring of 2010, and in

particular by Mr. Kilvert, and that Mr. Kilvert told the Deceased that the Bank wanted him to sign a fresh or replacement transfer, and that he should attend at the offices of LDS to see Mr. Kan and should take identification evidence with him. In paragraph 25 of the Amended Particulars of Claim it is stated that, during the course of a telephone conversation or conversations, the Deceased told Mr. Kilvert that he did not know LDS or Mr. Kan and did not wish to go to their offices, but would come to the offices of Rees Page. According to paragraph 25, Mr. Kilvert said words to the effect that he did not wish to see the Deceased and that the Deceased should go to the offices of LDS, which the Deceased refused to do.

62. In paragraph 32 of the Amended Particulars of Claim it is stated that the Deceased attempted to contact the Bank on several occasions after receiving Mr. Kilvert's letter of 14th July 2010, but without success. Paragraph 32 goes on to state that the Deceased discussed the position with Mr. Kilvert on 9th March 2011 and that, in the course of that conversation, the Deceased told Mr. Kilvert that he had never been to the offices of LDS and Mr. Kan and had not signed the 2010 TR1.

63. All of this is denied by Mr. Kilvert in his witness statement (paragraph 29). The evidence of Mr. Kilvert is that he and the Deceased spoke once, on 9th March 2011, and had the conversation recorded in Mr. Kilvert's attendance note of the telephone call from the Deceased. I will need to come back to this particular conflict in a later section of this judgment.

64. Moving forward in time, on 13th June 2011 Linda Hind of the Bank sent an email to Mr. Kilvert asking him to take urgent steps to register the Bank's charge over the Property; which I take to be what would then have been the still unregistered charge which was intended to secure the Bank's mortgage loan to Mr. Attarian; namely the Attarian Charge. Ms. Hind explained that the Bank had been holding back until Mr. Attarian had co-operated with his application for compensation to the Solicitors Compensation Fund, that this had now happened, and that the Bank needed to press on with registration because Mr. Attarian's account was seriously in arrears.

65. In response to this instruction Mr. Kilvert wrote to the Land Registry on 21st June 2011 enclosing an application for registration of the 2010 Transfer. Box 12 of the application form stated that evidence of identity was required where a person signing a disposition such as a transfer was not represented by a conveyancer. In box 13 of the application form Mr. Kilvert identified the Deceased as having been represented by a conveyancer. The conveyancer was identified as FLP. This had the consequence that the second part of box 13, which required confirmation of identity in relation to a party not represented by a conveyancer, was left blank.

66. Pursuant to this application form, both the 2010 Transfer and the Attarian Charge (the charge granted to the Bank by Mr. Attarian) were registered. I believe that these registrations were completed on 23rd June 2011.

67. There is a further attendance note from December 2011 which records that the Deceased telephoned Rees Page on 15th December 2011 and "asked which date the transfer took place and also asked what is happening with the Bank money.". Mr. Kilvert was not in the office that day. There is a manuscript note on the attendance note, made by Mr. Kilvert, recording Mr. Kilvert's decision not to speak to the Deceased because "he has previously ignored [letters?] and tel message[s?]". As I have noted in this quotation, parts of the manuscript note are difficult to read.

68. In October 2013 the Bank, acting as mortgagees, sold the Property to the Fourth Defendants. This action was commenced by the Deceased in June 2016. Following the death of the Deceased the action has been continued by the Claimant, as executrix of the Estate.

69.As I have already noted, paragraph 20eii of the Amended Particulars of Claim states that the Deceased was paid £98,307 in March 2008, when the purchase of the Property by Mr. Attarian was supposed to have been completed. Paragraph 23 of the Amended Particulars of Claim states that the Deceased was credited with the sum of £335,714.64 by the Bank, as part of the amount said to have been recovered by the Bank from the Solicitors Compensation Fund and/or FLP in respect of the misappropriation of the Bank's mortgage funds in March 2008. Paragraph 47 of the Amended Particulars of Claim states that the Deceased made his own claim against FLP, which was settled in consideration of a payment of £225,000 to the Deceased.

The Signing Event

70.The pleaded case of the Estate is that the Deceased never signed the 2010 TR1. Instead, and on an unknown date, inferred by the Estate to have been in June 2010, a person unknown to the Deceased attended at the offices of LDS, purporting to be the Deceased, and forged the signature of the Deceased on 2010 TR1, with Mr. Kan witnessing the forged signature; see paragraph 28 of the Amended Particulars of Claim.

71.This case is supported by an expert report which the Estate has obtained from Ellen Radley, a forensic handwriting & document examiner, which is dated 27th April 2018. The central conclusion of this report ("the Report"), at paragraph 62, is that there is very strong evidence to support the proposition that the questioned signature on the 2010 TR1 was not written by the Deceased, but was a simulation of his general signature style. Putting the matter more simply, the central conclusion of Ms Radley is that there is very strong evidence to support the proposition that the signature on the 2010 TR1 is a forgery.

72.In his witness statement Mr. Kan sets out his recollection of the Signing Event. Mr. Kan is unable to recall the Signing Event specifically, but confirms that the signature on behalf of LDS on the 2010 TR1 is his signature. Mr. Kan says that he has no doubt that he witnessed the signature made in the name of the Deceased on the 2010 TR1 and that, therefore, the Signatory must have presented himself to Mr. Kan as the Deceased and signed the 2010 TR1 in the presence of Mr. Kan.

73.Mr. Kan also says that he and his firm had no prior knowledge of the Deceased at the time of the Signing Event. His belief is that there had been no prior contact by the Deceased with his firm, prior to the Signing Event. Mr. Kan explains that, at that time, his firm provided a service whereby a member of the firm would witness a signature on documents such as a TR1 in return for a fee of £10.

74.Mr. Kan also says, as a matter of his firm belief, that before witnessing the 2010 TR1 he would have required the Signatory to produce evidence of identity, such as a passport or driving licence. Mr. Kan says that this was his habitual practice. This evidence conflicts with the evidence of Mr. Kilvert's attendance note of his conversation with Mr. Kan of 13th July 2010, which records the following:

"I received this afternoon a return telephone call from Mr. Kan of Lester Dominic Solicitors and he confirmed that he had witnessed the signature of Mr. Ul Haq on the Transfer Deed but Mr. Ul Haq was not known to him and he had merely witnessed his signature and hadn't actually seen any evidence of identity. He did say, however, that if I could drop him a line with details of his address etc. then he would use his best endeavours to contact Mr. Ul Haq and ask him to attend his offices to produce evidence of identity. I said that if he was able to do so I would be happy to meet his reasonable costs although he indicated that he was unlikely to make a charge for this."

75. Mr. Kan accepts that he spoke to Mr. Kilvert on 13th July 2010, but does not accept that the account of the conversation in Mr. Kilvert's attendance note is accurate. The recollection of Mr. Kan is that he told Mr. Kilvert that he did not have any evidence of identity, in the sense of retaining such evidence. Mr. Kan does accept that the attendance note represents what Mr. Kilvert believed had been said by Mr. Kan.

76. Mr. Kan's evidence is that he did write to the Deceased, following his conversation with Mr. Kilvert, asking the Deceased for evidence of identity. Mr. Kan has not been able to find a copy of the relevant letter. There is however a file note of Rees Page recording that Mr. Kilvert's assistant spoke to Mr. Kan on 23rd July 2010. Mr. Kan is recorded as confirming that he had written to the Deceased, but had not received a reply. That Mr. Kan did write to the Deceased seeking evidence of identity is also confirmed by Mr. Kan's letter of 24th January 2011 to Mr. Kilvert, which I have mentioned above.

77. The most relevant points, so far as the Signing Event is concerned, are these. First, and on the basis of the Report there is clearly a real prospect of it being decided, at trial, that the signature purporting to be that of the Deceased on the 2010 TR1 is a forgery, and that the Signatory was a person impersonating the Deceased. Second, there is clearly a real prospect of it being decided, at trial, that Mr. Kan merely witnessed the signature of the Signatory on the 2010 TR1, without calling for or being provided with any evidence of identity.

The RPOC (the Re-Amended Particulars of Claim)

78. Before coming to my decision on the Appeal and the Applications, I should make further mention of the RPOC, which figured prominently in the arguments before me. The RPOC comprise a substantial re-draft of the Amended Particulars of Claim, settled by Mr. Brown. The statement of truth on the RPOC is unsigned, so the RPOC have been and remain a draft re-amended statement of case.

79. The RPOC were originally provided to the Defendants under cover of an email from the Estate's then solicitors sent on 21st June 2019. The email sought the consent of the Defendants to the draft re-amendments. Such consent was not forthcoming. There was however no application to re-amend, either before the Deputy Master or before me. Mr. Brown explained to me that the RPOC required further clarification, and would require further amendment. The application to re-amend would be made at the case management conference in the action, which had originally been listed for 13th December 2019, but had yet to take place by reason of the summary judgment applications made by LDS and Rees Page.

80. Mr. Brown's position on re-amendment is recorded in the following exchange on the first day of the hearing:

"MR. JUSTICE EDWIN JOHNSON: Are you saying it is your intention, assuming that the decision of the Deputy Master is set aside, is it your intention to apply for permission to re-amend at the future CMC in the terms of the Re-Amended Particulars of Claim?"

MR. BROWN: No, because they "required yet further clarification". As is not unusual, we circulate the draft document and the parties via the defendants have provided observations on that. Bear in mind that this is litigation that is already on foot so we do not go back to pre-action correspondence whereby we set out a case and it is dealt with in that way. We only set out a draft document. The defendants can say why it is objectionable or not for various reasons. We are entitled to consider, as indeed one would expect, their observations in respect of all of that. I am not wedded to this draft Particulars of Claim. If indeed there are points that need properly to be clarified, then we will clarify

them. Our interest is ensuring that my client's case is properly put forward rather than them being effectively seeing these are technical objectors as to this, that, and the other, all of which are capable of resolution by way of case management. That was a long answer but my short answer to my Lord's question is, yes, we intend to apply to amend. Is it going to be identical to the format of this draft: no, it will be clarified further, in due course, and we will circulate that, and we will move that application at the CMC, and I have consistently said that."

81. This position struck me as unsatisfactory. There is an extensive draft re-amendment of the Estate's pleaded case in existence, in the form of the RPOC, but there is no application to re-amend, and the actual final form of the re-amended statement of case of the Estate is not known, and cannot yet be known. I do not directly criticise Mr. Brown for reserving the Estate's position in this respect, but the net result of this is that if and when application for permission to re-amend may come to be made, the proposed re-amendments could, in theory, be in a very different form to the RPOC. It also struck me as significant that elements of the RPOC had been seized upon by the Defendants, in support of their various summary judgment/strike out applications. It was hard to avoid the impression that the Estate's reluctance to pin its colours to the mast of the RPOC was, at least in part, because parts of the RPOC had turned out to be unhelpful in its resistance to the summary judgment/strike out applications.

82. Be all this as it may, it seems to me that I must approach the Appeal and the Applications on the basis that the Estate's case is as pleaded in the Amended Particulars of Claim. It seems to me that I can, so far as I think this appropriate, take into account the RPOC, as a document settled by the Estate's counsel, and as a document which was, at least originally, intended to be the re-amended statement of case of the Estate, and as a document which may form the basis of the Estate's re-amended statement of case (subject to the outcome of the Appeal and the Applications). It does not seem to me that I can treat the RPOC as the actual re-amended case of the Estate.

The summary judgment and strike out jurisdictions

83. The correct approach to the exercise of the summary judgment jurisdiction is well-known, and was not materially in dispute before me. The dispute before me, as is usually the case, concerns the application of that approach to the facts and arguments in the present case. I need only set out briefly therefore the correct approach to this jurisdiction.

84. The test for summary judgment is well-known. The court may give summary judgment where it considers that the claimant has no real prospect of succeeding on the relevant claim or issue or, as the case may be, that the defendant has no real prospect of successfully defending the relevant claim or issue and that, in either case, there is no other compelling reason why the relevant claim or issue should be disposed of at a trial. The criterion which the court has to apply is not one of probability, but absence of reality; see Lord Hobhouse in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 A.C. 1 at [158].

85. Three other points are worth noting in relation to the summary judgment jurisdiction, all three of which are engaged, or potentially engaged in the present case, and all three of which featured prominently in the arguments of Mr. Brown for the Estate.

86. First, it is not generally open to a court to resolve disputed questions of fact on a summary judgment application. As Floyd LJ said, in *Optaglio v Tethal* [2015] EWCA Civ 1002, at [31] and [32].

“31. It is well settled that an application for summary judgment should not be allowed to develop into a mini-trial of disputed issues of fact. On the other hand:

“ ...that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable”

see *ED&F Man Liquid Products Ltd v Patel and another* [2003] EWCA Civ 472 at paragraph 10.

32. Given the nature of the summary judgment test, the court can only dispose of factual issues in this way when there is no real prospect of the evidence of one side on that issue being accepted. I would add that it is incumbent on a judge giving summary judgment on the basis that an account of a witness is to be disbelieved to explain with reasonable particularity what it is about the contemporary record or other evidence which justified rejecting his evidence.”

87. Second, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial; see *Aldous LJ in Royal Brompton NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550 at [19]. The articulation of this principle in this authority was relied upon strongly by Mr. Brown.

88. Third, the fact that there is going to be a trial in the relevant action, whatever the outcome of the relevant summary judgment application may provide a compelling reason why summary judgment should not be granted. This is illustrated by *Iiffe v Feltham Construction* [2015] EWCA Civ 715 [2015] CP Rep 41. The case arose out of a fire which occurred in a luxurious timber house which was under construction. The fire caused substantial damage. The building owners sued the main contractor, who in turn commenced third party proceedings against another party, who in turn commenced fourth party proceedings against another involved party, who in turn commenced fifth party proceedings against another involved party. The action was therefore a multi-party action. The building owners sought summary judgment against the main contractor. One of the arguments deployed by the main contractor was that it was inappropriate to give summary judgment for the claimants in multi-party litigation, when the factual evidence was unclear and the position of other parties down the line was unknown. At first instance the building owners were successful in obtaining summary judgment on liability, for damages to be assessed, but this result was overturned by the Court of Appeal on several grounds. In explaining his decision to allow the appeal, *Jackson LJ*, with whose judgment the other members of the Court of Appeal agreed, said this in the concluding part of his judgment:

“72. When I stand back from the detail and look at this case in the round, I conclude that as at 20 June/3 July 2014 the position as to causation of the fire was not so clear as to justify the grant of summary judgment on liability in favour of the claimants. Also I think it was inappropriate to do so when similar issues remained to be determined at a full trial as between the other parties. In the particular circumstances of this case that constitutes a “compelling reason” not to enter summary judgment within the meaning of CPR r.24.2(b) . A judge in multi-party litigation must aim to do justice as between all parties involved in the case.

73. A further significant feature is that summary judgment in this case achieves much less in terms of saving costs and court time than is normal. There is going to be a trial anyway at which extensive factual and expert evidence will be called in order to establish: (a) what caused the fire; and (b) who is

responsible. The claimants will have to participate in the trial, because they need to prove the quantum of their damages.

74. I wish to emphasise that whilst, after some hesitation, I am differing from the judge in the circumstances of this case, I am certainly not discouraging robust case management or the use of summary judgment under CPR Pt 24 . In appropriate cases Pt 24 provides a valuable mechanism to avoid holding a trial, with all the expenditure of time and costs which that entails. My conclusion is simply that, for a collection of reasons as stated above, this case falls short of satisfying the requirements of CPR r.24.2 .”

89.Turning to the strike out jurisdiction, CPR 3.4(2) provides as follows:

“(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.”

90.An obvious, but important point to make about the jurisdiction in CPR 3.4(2) is that, at least where the application is made under paragraph (a), what is required is a focus on the terms of the relevant statement of case, as opposed to the wider investigation which is (to the extent established by the authorities) permitted on a summary judgment application.

91.With the above guidance in mind, I turn to the arguments in the Appeal and the Applications. I will take the Appeal first, and then the Applications. In dealing with the Appeal, I will follow the same course as the submissions in the hearing of the Appeal, and deal with the claim against Rees Page first, then the claim against LDS, then the appeal on costs. References to paragraphs in the Judgment (the judgment of the Deputy Master) are given as J1, and so on.

Discussion - the Appeal

(1)The claim against Rees Page

92.The pleaded claim against Rees Page is that they owed a duty of care to the Deceased, when submitting the 2010 TR1 and the Attarian Charge for registration, to take reasonable care to establish that the 2010 TR1 had been properly executed by the Deceased; see paragraph 58 of the Amended Particulars of Claim. Various alleged facts and matters are then set out in the sub-paragraphs of paragraph 58, which are said to support the case that Rees Page owed the duty of care to the Deceased. The duty of care is alleged to have arisen only in the tort of negligence. There is no claim in contract or for breach of trust or on the basis of any other cause of action. The basis and content of the duty of care are further pleaded in paragraphs 59-60 of the Amended Particulars of Claim.

93.Breach, causation, and loss are pleaded in paragraphs 61-65 of the Amended Particulars of Claim. In summary, it is alleged that Rees Page breached the duty of care which they owed to the Deceased by making the application for registration without taking adequate steps to obtain evidence as to the identity of the person who had signed the 2010 TR1 and/or without informing the Deceased of the application when it was made. The pleaded case is that if this negligence had not occurred, the forgery of the 2010 TR1 would have come to light, the Deceased would have objected to the registration of the 2010 Transfer, the 2010 Transfer would not have been registered, and the

Deceased would have remained as owner of the Property, with the benefit of an unpaid vendor's lien. As such, so it is alleged, the negligence of Rees Page caused the Deceased to lose the value of the Property, subject to credit being given for money credited to the Deceased by the Bank and (subject to a claim for this money which is said to have been made by the Bank) money received as a result of the claim made by the Deceased against FLP.

94. The position in terms of this alleged duty of care seems to me to be straightforward. For this reason I find it easiest to proceed first by considering this part of the Appeal without specific reference to the Estate's grounds of appeal, and then to turn specifically to the grounds of appeal.

95. Rees Page were never instructed to act on behalf of the Deceased. Rees Page were instructed to act for the Bank. Rees Page were initially asked to include the 2008 Transaction in their investigations of various mortgage loans made by the Bank. Subsequently Rees Page were instructed by the Bank to procure the registration of the Attarian Charge. This in turn required the execution and registration of a valid form of transfer as between the Deceased and Mr. Attarian, which Rees Page were also instructed to procure. In the exercise of procuring a valid form of transfer Rees Page were acting for the Bank. The position of the Deceased, in relation to Rees Page, was that of a third party. In a conveyancing transaction a solicitor acting for one party will not normally owe a duty to a third party; see the decision of Donald Nicholls V-C, as he then was, in *Gran Gelato v Richcliff (Group) Ltd* [1992] Ch 560, at 570D:

"In my view, in normal conveyancing transactions solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like."

96. My attention was drawn to two more recent cases in which *Gran Gelato* has been treated as good law. The first of these is *NRAM Ltd v Steel* [2018] 1 W.L.R. 1190, in which the Supreme Court decided, in a Scottish case, that a solicitor acting for a borrower would not be held to have assumed responsibility in making a misrepresentation to the lender for which it was not instructed. Judgment in the Supreme Court was given by Lord Wilson, with whose judgment the other members of the Supreme Court agreed. At [24] and [25], Lord Wilson noted that the concept of an assumption of responsibility remained the foundation of liability in tort for a negligent misrepresentation. As Lord Wilson explained:

"24 In July 1994, in *Spring v Guardian Assurance plc* [1995] 2 AC 296, the House held that, in writing a reference for the claimant who had worked for them and who was now seeking work elsewhere, the defendants owed a duty of care to him. Lord Goff of Chieveley explained at p 316 that the basis of his conclusion was that the defendants had assumed responsibility to the claimant in respect of the reference within the meaning of the *Hedley Byrne* case [1964] AC 465. Weeks later, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, the House held that underwriting agents at Lloyd's owed a duty of care to a member in their conduct of his underwriting affairs even in the absence of any contract between them. In a speech with which the other members of the House agreed, Lord Goff held at p 181 that the case should be decided by reference to the concept of an assumption of responsibility. In *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. Lord Steyn remarked at p 837 that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability.

25 The legal consequences of Ms Steel's careless misrepresentation are clearly governed by whether, in making it, she assumed responsibility for it towards Northern Rock. The concept fits the present case perfectly and there is no need to consider whether there should be any incremental development of it. Nevertheless the case has an unusual dimension: for the claim is brought by one party to an arm's length transaction against the solicitor who was acting for the other party. A solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party: *Ross v Caunters* [1980] Ch 297, 322. The absence of that duty runs parallel with the absence of any general duty of care on the part of one litigant towards his opponent: *Jain v Trent Strategic Health Authority* [2009] AC 853. Six authorities, briefly noticed in chronological order in what follows, may illumine inquiry into the existence of an assumption of responsibility by a solicitor towards the opposite party."

97. Lord Wilson then proceeded to consider the six authorities to which he had made reference. The fourth case was *Gran Gelato*, where Lord Wilson said this:

"29 Fourth, the decision of Sir Donald Nicholls V-C in the High Court in *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560. The claimant wished to purchase an underlease from the first defendant. The claimant's solicitors inquired of the second defendants, a firm of solicitors acting for the first defendant, whether any provisions in the headlease might affect the length of the underlease. The negative answer of the second defendants was a misrepresentation, which, following its purchase of the underlease, caused loss to the claimant. The Vice-Chancellor held that it had a valid claim against the first defendant but that the second defendants had themselves owed no duty of care to it. He observed at pp 571—572 that only in special cases, such as the *Allied Finance* case [1983] NZLR 22, would a solicitor owe a duty of care to the opposite party and that there was nothing special about the case before him."

98. Two further points on two others of the six cases deserve specific mention. First, *Allied Finance and Investments Ltd v Haddow* [1983] NZLR 22 was a case in which solicitors provided a certificate to a lender as to the binding nature of security, whilst they knew that it was not binding. The solicitors were held liable, on the basis that they had provided the certificate in circumstances where they must have known that it was likely to be relied upon by the lender. Secondly, in *Al-Kandari v JR Brown* [1988] QB 665 liability was established on the basis that solicitors had stepped outside their role as solicitors by agreeing to a court order, which they then breached, to retain passports in their possession.

99. The second of the two more recent cases referred to above is the decision of the Court of Appeal in *P&P Property Ltd v Owen White, Dreamvar (UK) Ltd v Mishcon De Reya* [2018] EWCA Civ 1082 [2018] 3 W.L.R. 1244. The two cases before the Court of Appeal both concerned the purchase of properties from a fraudster, who impersonated the true owner of the relevant property, and made off with the purchase monies when they were paid. In each case the claimant purchaser brought proceedings against the solicitors who acted for the fraudsters and, in one case, also against the estate agents involved in the sale. While there were several causes of action relied upon by the claimants in the proceedings, the case is relevant for present purposes by reason of what was said as to liability in negligence.

100. In his judgment in the Court of Appeal Patten LJ turned, at [62], to the question of whether the solicitors and agents who acted for the vendor owed any duty of care in negligence to the purchaser. In one of the cases, the claim in negligence had been dismissed by the judge at first instance. In the second case, a claim in negligence had not been pleaded at first instance, but was the subject of an application for permission to amend to include the claim in negligence. At [63] Patten LJ explained

why the claim in negligence had failed, in the case in which this claim had been made at first instance (P&P):

“63 The judge rejected the existence of a duty of care primarily because he considered himself bound to follow the decision of Sir Donald Nicholls V-C in *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 and there were no special circumstances in the context of the particular transaction to justify the imposition of a duty of care in favour of the claimant who was not OWC’s client and was the counterparty to the transaction with its own solicitors.”

101. Patten LJ then proceeded to a review of the relevant case law in this area, including *Gran Gelato* and *NRAM*. The entire review is valuable, and repays study. For present purposes it is most relevant to cite what Patten LJ had to say about the concept of assumption of responsibility, at [76].

“76 As Lord Wilson JSC explains in his judgment, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.”

102. Patten LJ then proceeded, at [78], to point out that the Money Laundering Regulations 2007 (“the MLR”), do not create a statutory duty, breach of which gives rise to a cause of action:

“78 The MLR do not, as I have said, create a statutory duty which if breached gives rise to a cause of action at the suit of the claimants. That is because the statutory duty was imposed for the benefit of society at large and not for any particular class of persons, such as the purchasers in these cases, who are likely to suffer loss if the vendor turns out to be an imposter. In part, this is because the principal purpose of the MLR is to deter money laundering and terrorism rather than to combat identity fraud. The fact that the AML checks may have a deterrent effect on would-be fraudsters is not enough in itself to create a private law right of action for the benefit of a protected class: see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731.”

103. At [79]-[82] Patten LJ came to his decision on the facts of the two cases before him (the underlining is my own):

“79 If one adopts the incremental approach starting from the general rule in the *Gran Gelato* case [1992] Ch 560 that a solicitor in a conveyancing transaction does not normally owe a duty of care to anyone but his own client then it seems to me that there is a material distinction between cases like *White v Jones* [1995] 2 AC 207 and *Dean v Allin & Watts* [2001] 2 Lloyd’s Rep 249 and the situation in the two present appeals. In both those cases the instructions which the solicitor received were intended to benefit both the solicitors’ own client and the third party. For that reason there was no conflict of interest between the two parties and an expectation that the arrangements the solicitor was instructed to put in hand would enure for their mutual benefit. The third party was in as proximate a position to the solicitor as he would have been had he been their client. It was what is referred to in some of the cases as a situation equivalent to contract.

80 But in the transactions with which we are concerned the vendors and the purchasers were very much at arm's length and their solicitors owed no duties to anyone but their client when acting in relation to the sales. Mr Blaker made the point I have mentioned about the need for the vendor's solicitors to complete the AML checks before accepting instructions but that does not alter the fact that the checks are carried out in order to satisfy the requirements of the MLR and not as a part of a transaction designed to benefit the purchasers.

81 The solicitors and agents in the present appeals did not voluntarily assume responsibility to the purchasers for the adequacy of the due diligence which they carried out. They were not asked to give undertakings or assurances that they had properly carried out the AML checks and, had they been asked to do so, they would have had the opportunity to refuse or to limit their liability in some way by a suitable disclaimer. Nor is there anything in the nature of the particular transactions (unlike in *Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249) which can be treated as having created a relevant assumption of responsibility or to have made it reasonable in itself for the purchaser to have relied on the vendor's solicitors and agents to have acted competently in that regard. More particularly, there is nothing in the way that these transactions were conducted which made it objectively reasonable to assume that the AML checks would be complete and that the defendants should be legally accountable to the purchasers for the consequences. I find it difficult to see how the imposition of such liability can be justified in this case where it is common ground that Parliament did not intend a breach of the MLR to create a private law cause of action in favour of the claimants. In *Dreamvar* there was also, as I mentioned earlier, positive evidence that the purchaser's solicitors did not even consider that MMS were warranting that they acted for the true owner.

82 Taking all these matters into account, these are not cases in which it would be fair and reasonable to treat the solicitors and agents as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity. The judge was therefore right in *P&P* to dismiss the claim in negligence against *OWC* and *Winkworth*. For the same reasons, I would dismiss the application for permission to amend which is made by the claimant in *Dreamvar*."

104. *Floyd LJ* agreed with the judgment of *Patten LJ*, as did *Gloster LJ*, save for one point of difference on a separate issue to the negligence claims.

105. I have quoted from *P&P/Dreamvar* at some length because it seems to me to be decisive against the Estate's case that *Rees Page* owed a duty of care to the Deceased. *Rees Page* were not instructed to act for the Deceased, and did not agree to do anything for the Deceased. To the contrary, Mr. *Kilvert* made it clear, as recorded in his note of his telephone conversation with the Deceased on 9th March 2011, that he could not advise the Deceased. I agree with the Deputy Master (J40) that the interests of the Bank and the Deceased were distinct, and analogous to the positions of the seller and buyer in *Gran Gelato*. I would go further. It seems to me that the positions of the Bank and the Deceased were, on the case of the Estate, in conflict. The interest of the Bank was in securing registration of the 2010 Transfer and the *Attarian Charge*. The interest of the Deceased, on the Estate's case, was in preventing this happening. If the Estate is correct in its case, there was a conflict of interest between the parties. *Rees Page* were instructed by the Bank. I cannot see how, in these circumstances, *Rees Page* could have owed a duty of care to the Deceased; see *Patten LJ* in *P&P* at [79].

106. The Amended Particulars of Claim seek to get round this difficulty by alleging that Mr. *Kilvert* knew, or ought to have known that the signature purporting to be of the Deceased on the 2010 TR1 was a forgery. This of course raises an issue of fact, which might be thought unsuitable for summary

determination. On the facts of the present case however this does not seem to me to be the position. There is nothing in the documents to support the case that Mr. Kilvert knew or ought to have known that the signature on the 2010 TR1 was forged, and Mr. Kilvert denies having any such knowledge.

107. The Estate's case in this respect essentially rests upon the allegations in the Amended Particulars of Claim that the Deceased had certain dealings with Mr. Kilvert, which are alleged to have taken place in the following terms, in paragraphs 24, 25 and 32 of the Amended Particulars of Claim:

"24. In the spring of 2010 ~~the Claimant~~ the Deceased was contacted by the Seventh ~~the~~ Defendant and in particular by Mr Michael Kilvert, a consultant at the Sixth [Seventh] Defendant firm which was then acting for the Sixth Defendant. Mr Kilvert told ~~the Claimant~~ the Deceased that his clients wanted him to sign a fresh or replacement transfer document and that he should attend the offices of the First Defendant to see the Second Defendant and should take identification evidence with him.

25. During the course of the telephone conversation or conversations ~~the Claimant~~ the Deceased told Mr Kilvert that he did not know the First and Second Defendants and did not wish to go to their offices to discuss or transact any business in relation to the Property and offered to travel to the Seventh Defendant's offices in Wolverhampton to see Mr Kilvert in connection with any documents that needed signing and to discuss the matter with Mr Kilvert but Mr Kilvert said words to the effect "no, I do not want to see you." and insisted that ~~the Claimant~~ the Deceased should go to the First and Second Defendants' office but ~~the Claimant~~ the Deceased refused to do so."

"32. ~~The Claimant~~ The Deceased attempted to contact the Sixth [Seventh?] Defendant on several occasions after receipt of the letter of 14 July 2010 but without success. On 9 March 2011 ~~the Claimant~~ the Deceased discussed the position with Mr Kilvert. In the course of that conversation ~~the Claimant~~ the Deceased told Mr Kilvert that he had never been to the First and Second Defendant's offices and that he had not signed the 2010 transfer."

108. These allegations are however completely inconsistent with the documents in the case. I refer, in particular, to Mr. Kilvert's letter to the Deceased, dated 14th July 2010, which was neither answered nor challenged by the Deceased. I also refer, in particular, to Mr. Kilvert's note of his telephone conversation with the Deceased on 9th March 2011 and to Mr. Kilvert's subsequent letter to the Deceased of 11th March 2011, which was neither answered nor challenged by the Deceased.

109. It is not clear what evidence the Estate has to challenge the evidence of Mr. Kilvert and the contemporaneous documents to which I have referred. The Deceased cannot give evidence. There is no sign of any witness statement, or indeed any statement made by the Deceased, prior to his death, which provides any basis for such a challenge. There is no identification of any other witness or document which supports such a challenge.

110. There are points which can be made in relation to the evidence of Mr. Kilvert and the evidence of the contemporaneous documents. In his note of his telephone conversation with the Deceased on 9th March 2011 Mr. Kilvert refers to having left messages for the Deceased. Mr. Kilvert also says however, in paragraph 29 of his witness statement, that he had no telephone number for the Deceased. In the same note Mr. Kilvert refers to having written letters to the Deceased, when it appears that there was only one previous letter to the Deceased (the letter of 14th July 2010) which had been sent. Mr. Kilvert sought from Mr. Kan confirmation of the identity of the Deceased as the Signatory, but proceeded with the application to register the 2010 Transfer and the Attarian Charge in circumstances where he knew that this evidence had not been provided.

111. It is also possible to be critical of the way in which Mr. Kilvert completed the application for registration. I take the points made by Mr. Brown that the Land Registry was not informed that the 2010 TR1 had been backdated, and that the requirement to provide evidence of identity was avoided by specifying FLP as the conveyancers acting for the Deceased, when FLP had acted in relation to the 2008 Transaction, and had not been involved in the 2010 Transfer. In oral submissions Mr. Cousins argued that the application form should not be seen as speaking at the time the application form was lodged, but was rather providing information in relation to the relevant transaction; namely the 2008 Transaction. For what it is worth I doubt that this argument is correct. It seems to me that the application form was concerned with, or at least included the transaction constituted by the execution of the 2010 Transfer, in respect of which the Deceased appears to have been unrepresented.

112. I cannot however see that any of these matters assist the Estate either in establishing the existence of a duty of care owed by Rees Page to the Deceased, or in establishing the Estate's factual case that Mr. Kilvert knew or ought to have known that the signature on the 2010 TR1 was or might be a forgery.

113. It is also important to note that there is no allegation of dishonesty or professional misconduct made against Mr. Kilvert in this case. Given this position, if Mr. Kilvert is wrong, either in his witness statement or in the documents which he wrote (meaning both letters and attendance notes) at the relevant times, this would have to be because Mr. Kilvert got the factual position wrong, both in what he wrote at the relevant times and in his witness statement. It is however fanciful to suggest that Mr. Kilvert made the sort of wholesale factual errors which would be required in order to explain how his evidence and his documents completely contradict the Estate's case.

114. It is also important to keep in mind that if Mr. Kilvert did submit the 2010 TR1 to the Land Registry, knowing that it contained a forged signature, that would be a serious matter for a solicitor. This seems to me yet another reason why the Estate was required, at the Hearing, to produce evidence to back up its allegation of knowledge or assumed knowledge of the forgery on the part of Mr. Kilvert. The Estate signally failed to do this.

115. In my view the present case is one where it is possible to say, in advance of a trial, that the Estate has no real prospect of establishing its factual case in paragraphs 24, 25 and 32 of the Amended Particulars of Claim. There appears to be no evidence, either from a witness or in the documents, to support this case. No reason has been identified for thinking that some further document or documents might emerge on disclosure which would provide support for this case. The evidence of Mr. Kilvert and the contemporaneous documents contradict this case. In my judgment the Estate's case in paragraphs 24, 25 and 32 of the Amended Particulars of Claim has no real, or indeed any prospect of success. I think that it is possible to make the finding, on a summary basis, that Mr. Kilvert neither knew, nor had grounds to know, in his dealings with this case on behalf of the Bank, that the signature on the 2010 TR1 was or might be forged.

116. In oral submissions Mr. Brown sought to widen the argument that the present case was an unusual one, which presented a number of red flags to Mr. Kilvert, which Mr. Kilvert should have picked up. Mr. Brown also referred to the case as being one where alarm bells were ringing loudly, to the effect that the Deceased might not be a willing participant in the execution of a valid form of transfer. While accepting that Mr. Kilvert had been instructed by the Bank to procure a validly executed transfer from the Deceased, so that the Attarian Charge could be registered, Mr. Brown went so far as to submit that Mr. Kilvert should have declined to follow the Bank's instruction to procure the required transfer from the Deceased. It seems to me however that once the Estate's case

in paragraphs 24, 25, and 32 falls away, as in my judgment it does, there is nothing left to support the case that Mr. Kilvert was obliged to act contrary to his instructions, and decline to see through the process of procuring a validly executed form of transfer from the Deceased. Things might have been different if, at the relevant time, the Deceased had ever communicated to Mr. Kilvert that he had not signed the 2010 TR1, or was not prepared to do so. There is however no evidence to establish that either of these things was ever done nor, in my judgment, any prospect of any evidence turning up at a later stage in this action to establish that either of these things was ever done. Beyond this, it is important to keep in mind that any such communication from the Deceased would have been a matter for Mr. Kilvert to report to his own client, the Bank, because such information would have had a bearing on Mr. Kilvert's performance of his duty to the Bank as his client. This in turn seems to me to bring out, again, the central point that the interests of the Deceased, on the Estate's case, were not aligned with the interests of the Bank, which in turn fatally undermines the argument that Rees Page could have owed a duty of care to the Deceased.

117. Turning to the RPOC they are not, as I have already pointed out, the subject of any application to re-amend. So far however as it is relevant to consider the RPOC, I do not think that they alter the position as it stands on the Amended Particulars of Claim. In the RPOC the claim against Rees Page is fleshed out to a considerable degree. In particular, in paragraphs 30-43 an attempt is made to establish that there was a direct assumption by Rees Page of responsibility to the Deceased, sufficient to found a duty of care. The attempt includes a repetition of the factual case in paragraphs 24, 25 and 32 of the Amended Particulars of Claim which, as I have already explained, is a case which can be seen to have no real prospect of success in advance of trial. In my judgment the attempt to establish a duty of care in the RPOC also fails, essentially for the same reasons as the attempt fails in the Amended Particulars of Claim.

118. Turning specifically to the grounds of appeal, the first ground of appeal is that the Deputy Master failed to apply P&P/Dreamvar correctly. The essential argument of Mr. Brown in this respect was that the facts of the present case and the duty of care alleged in the present case were very different to P&P/Dreamvar. In order to decide whether a duty of care was owed in the present case, it was necessary to take all the facts and circumstances of this case into account. As such, and in advance of disclosure and the service of evidence in this case, the question of whether a duty of care was owed was not suitable for summary determination.

119. It seems to me that this argument is misconceived. There is nothing in the evidence in the present case to which the Estate can point which puts the case into that category of cases where, contrary to the usual rule, a solicitor owes a duty of care to a third party; see Lord Wilson's analysis of the six cases in NRAM, and see Patten LJ in P&P/Dreamvar, particularly at [79]. This is essentially what the Deputy Master decided, at J38-46. In my judgment, and for the reasons which I have also set out above, the Deputy Master was right to reach this decision.

120. References to what might turn up in disclosure or in subsequent evidence seem to me to be of no assistance to the Estate, unless the court is given some reason for thinking that something is going to turn up, either in disclosure or in evidence, which will change the position. In the present case, both before the Deputy Master and in the Appeal, no such reason has been identified. I therefore conclude that the first ground of appeal fails.

121. The second ground of appeal is that the Deputy Master was wrong to determine facts which were in dispute on a summary basis. I understood this ground of appeal to be referring the Estate's factual case in paragraphs 24, 25 and 32 of the Amended Particulars of Claim. The essential argument of Mr.

Brown was that the Deputy Master, in his recitation of the facts of the case, ignored the Estate's pleaded factual case, when he was obliged to proceed on the basis that the Estate's pleaded factual case should be treated, for summary judgment purposes, as true.

122.If one is considering the second ground of appeal from the point of view of a strike out application, I can see that one would be obliged to take what is pleaded in the Amended Particulars of Claim as true. The position is however not necessarily the same on a summary judgment application. As Floyd LJ explained in *Optaglio*, the court is not obliged to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable. In such a case the court must however explain, with reasonable particularity, what is about the contemporary record or other evidence which justifies rejecting the account of a particular witness.

123.In the context of the present case it does seem to me to be important to keep in mind that the Estate's case as to the Deceased's dealings with Mr. Kilvert is set out in its pleaded case. That pleaded case is not supported by a witness statement from any witness. The Deceased, sadly, is no longer able to give evidence in support of the pleaded case. Nor is there anything in the documents to support the pleaded case. It seems to me therefore that the factual conflict in the present case is one between a pleaded case, confirmed by a statement of truth, on the one side, and the evidence of the relevant witness and the relevant documents, on the other side. As such, it does not seem to me that the factual conflict in the present case is actually on all fours with the factual conflict envisaged by Floyd LJ in *Optaglio*.

124.If however one does apply the approach in *Optaglio* it seems to me that there are good reasons, to support the rejection, at summary judgment stage, of the Estate's case in paragraphs 24, 25 and 32 of the Amended Particulars of Claim. I have explained those reasons earlier in this section of this judgment. This is essentially what the Deputy Master decided, at J42, where he accepted the "substantial accuracy" of the evidence of Mr. Kilvert and the relevant file notes. It may be said, with due respect to the Deputy Master, that the reasoning in J42 was only briefly expressed, but it seems to me that the Deputy Master was right to accept this evidence, and right to take the view that nothing had been put before him which offered any real prospect of success at trial for the factual case which the Estate was seeking to establish.

125.At the risk of repeating myself, I come back to the points that (i) there is no challenge to the honesty of Mr. Kilvert, (ii) the contemporaneous documents contradict the relevant part of the Estate's case, and (iii) the Estate is unable to point to the evidence of any witness or any document which contradicts the evidence of Mr. Kilvert and the contemporaneous documents. I therefore conclude that the second ground of appeal fails.

126.The third ground of appeal is that the present case is one where there will be a trial, come what may, with the consequence that there is a compelling reason for keeping Rees Page in the action. In this context Mr. Brown relied upon the *Iliffe* case, which I have made reference to in an earlier section of this judgment.

127.It is of course the case that this ground of appeal assumes that the outcome of the Appeal and the Applications is that the Bank and the CLR will, at the least, be left in the action. That assumption depends upon my decision on the Applications, which is for later sections of this judgment. It seems to me however that the *Iliffe* point fails, whether or not any other party remains in the action. If the

position is that it can be decided now that Rees Page owed no duty of care to the Deceased, I can see no reason whatsoever why Rees Page should remain in the action by reason of the fact, if it is a fact, that the action will go to trial so far as the other Defendants or some of them are concerned. I have already set out the essential facts of the Iliffe case. They were very different to the present case. There is also the point that, in Iliffe, the causation of the fire was not, in any event, sufficiently clear to justify the grant of summary judgment. That is not the position in the present case, so far as the duty of care issue in the claim against Rees Page is concerned. If one assumes a trial involving the Estate's claims against the CLR and the Bank, I cannot see why Rees Page must continue to be a party in order to ensure a fair trial of those claims. The same seems to me to be the case if one assumes that LDS remain a Defendant to the action.

128. Nor can I see any compelling need to proceed to disclosure in relation to the claim against Rees Page. As I have already noted, there has been no identification of any document which might be expected to appear, on Rees Page providing disclosure, which would change the position as it stands in the claim against Rees Page. In any event if one assumes, contrary to what seems to me to be the case, that Rees Page do have under their control a document or documents which is important to the claims against the other Defendants or some of them, there is the option of seeking third party disclosure against Rees Page.

129. Accordingly, it seems to me that the third ground of appeal fails.

130. The fourth ground of appeal only relates to the claim against LDS, and does not therefore fall to be dealt with at this stage.

131. Drawing together all of the above discussion I conclude that the Deputy Master was correct to decide (J46) that the Estate had no real prospect of succeeding on its claim against Rees Page, on the basis that Rees Page owed no duty of care to the Deceased. It seems to me that the Estate had and has no real, or indeed any prospect of succeeding, at trial, in its case that Rees Page owed a duty of care to the Estate. I also agree with the Deputy Master that there is no other compelling reason why the claim against Rees Page should go to trial.

132. This is sufficient to dispose of the Appeal, so far as it concerns the claim against Rees Page. If no duty of care was owed, there is no claim against Rees Page. It follows from what I have decided that the Appeal fails, and that the Order should be upheld, so far as the Deputy Master gave summary judgment for Rees Page and dismissed the Estate's claim against Rees Page.

133. Rees Page did however argue that there were other grounds upon which summary judgment could be granted against the Estate on its claim against Rees Page. I will deal with these additional grounds, both in case this matter goes further, and because one of the grounds is relevant to the Appeal, so far as it concerns LDS, and to the Applications.

134. By a respondent's notice in the Appeal Rees Page contended that the Appeal should be dismissed for a number of reasons, if and in so far as those reasons were not identified by the Deputy Master in the Judgment. Leaving aside duty of care, which I have dealt with, and costs, to which I shall come, these reasons were as follows:

(1) If any duty of care, such as alleged by the Estate, was owed by Rees Page, it was discharged by Mr. Kilvert, on behalf of Rees Page, by his taking appropriate steps to be satisfied that Rees Page should act as it did.

(2)By reference to the RPOC, and the assertions therein that contracts were exchanged in the 2008 Transaction and the purchase monies paid to the Deceased, in discharge of the Original Charge, it can be seen that the purchase monies were actually credited to the Deceased by FLP, before they were stolen by Mr. Uddin. As such, so it is contended on behalf of Rees Page, the Deceased cannot have been caused any loss by Rees Page because the 2008 Transaction left him with no vendor's lien (the purchase monies having been credited to him by FLP), and no more than a bare legal interest in the Property.

(3)The conduct of the Deceased in his dealings with Mr. Kilvert, and his inaction following those dealings was the cause of the Deceased's loss, if the Deceased suffered any loss.

135.The first of the above arguments, which is that there was no breach of the duty of care (if a duty of care was owed), rested on the contention that Mr. Kilvert dealt with matters with proper care. In support of this contention Mr. Cousins relied upon the letters which Mr. Kilvert sent to the Deceased, dated respectively 14th July 2010 and 11th March 2011, and upon the note which Mr. Kilvert made of his telephone conversation with the Deceased which took place on 9th March 2011. The Deceased did not challenge anything said in the letters or the telephone conversation. As such, so it was argued, there was nothing to put Mr. Kilvert on notice that he needed to do anything more than he did.

136.As I read the Judgment, this argument was not a matter which the Deputy Master dealt with in the Judgment. I do not think that the argument provides a good reason for upholding the dismissal of the claim against Rees Page, if one assumes that a duty of care was owed. It is true, for the reasons which I have already explained, that the Estate has no real prospect of challenging, at a trial, Mr. Kilvert's account of his dealings with the Deceased. To this extent therefore, the factual basis for the argument is in place. Mr. Kilvert had only the dealings with the Deceased which he describes, his letters of 14th July 2010 were not answered or challenged by the Deceased, and his only conversation with the Deceased was the telephone conversation of 9th March 2011, which can be assumed to have taken place in the terms described by Mr. Kilvert.

137.If however one assumes that Rees Page did owe a duty of care to the Deceased of the kind alleged by the Estate, whether as set out in the Amended Particulars of Claim or in the RPOC, the question of whether that duty of care was breached seems to me to raise fact sensitive questions which I do not regard as suitable for determination on a summary judgment application. This seems to me to be so even if one approaches the question of breach on the basis, which seems to me to be correct, that Mr. Kilvert's knowledge of the situation at the relevant time did not include knowledge that the signature on the 2010 TR1 was or might be a forgery. Once one assumes the existence of a duty of care owed to the Deceased, it seems to me that the question of what Mr. Kilvert should and should not have done, in discharge of that duty of care, raises questions which are not suitable for summary determination.

138.The same considerations seem to me to apply to the argument that the Deceased was the author of his own loss. At this stage of the argument one assumes that Rees Page did owe a duty of care to the Deceased, and breached that duty of care. The argument that the chain of causation was broken by the Deceased's silence and inactivity seems to me, again, to raise fact sensitive questions which are not suitable for summary determination.

139.This leaves the additional argument of Rees Page in relation to causation. The additional argument relies principally upon the RPOC. Paragraph 12 of the RPOC pleads that contracts were exchanged between the Deceased and Mr. Attarian in the 2008 Transaction, for the price of £1.25 million. Paragraph 15 of the RPOC pleads a number of steps which are said to have been taken towards purported completion of the 2008 Transaction. Those steps include the allegations that (i) the

intended purchase monies were advanced by the Bank to FLP, in FLP's capacity as solicitors for the Bank and Mr. Attarian, (ii) on the same day FLP allocated the purchase monies to the credit of the Deceased, and (iii) on the same day FLP, as solicitors for the Deceased, arranged to allocate the purchase monies to FLP, in their capacity as solicitors for the Bank, for the purposes of discharging the Original Charge.

140. The point made by Mr. Cousins, on behalf of Rees Page, is that if Rees Page were in breach of a duty of care which they owed to the Deceased, they cannot have caused the Deceased any loss because the Deceased in fact received, by FLP, the purchase monies on the 2008 Transaction. As such, the Deceased cannot have had any unpaid vendor's lien as a consequence of the 2008 Transaction and, for the same reason, cannot have had the right to any further payment in respect of the 2008 Transaction. On this hypothesis the 2008 Transaction left the Deceased with no more than a bare legal title to the Property, which the Deceased was bound to transfer to Mr. Attarian. Mr. Cousins also pointed out that if one puts the purchase monies credited to the Deceased together with the sums which the Estate accepts were received by the Deceased, by way of part of the purchase monies and subsequent compensation payments, the Deceased in fact had the benefit of the receipt of monies substantially in excess of what he would have received if the 2008 Transaction had completed as a normal transaction. All this was reiterated to me, in a supplemental submission sent to me by Mr. Cousins in a letter dated 20th December 2021.

141. This additional causation argument commended itself to the Deputy Master as an additional reason for granting summary judgment for Rees Page; see J47. In the remainder of this judgment I will refer to this additional causation argument as "the Causation Argument".

142. The question of whether the Deceased was credited with the purchase monies by FLP in the 2008 Transaction, and the question of whether the Original Charge was redeemed in the 2008 Transaction came to assume central importance in the hearing of the Applications, and were the subject of a great deal of argument and analysis at that hearing. For this reason, I will defer my consideration of the Causation Argument, as advanced by Rees Page, to my consideration of the Applications.

143. In conclusion, and so far as the claim against Rees Page in this action is concerned, the Appeal falls to be dismissed, and the Order stands, so far as the Deputy Master gave summary judgment for Rees Page and dismissed the Estate's claim against Rees Page. The basis of this result is my decision that the Deputy Master was correct to decide (i) that the Estate had no real prospect of establishing that Rees Page owed any duty of care to the Deceased and (ii) that there was no other compelling reason for the claim against Rees Page to go to trial. Whether this result can also be based on the Causation Argument, as advanced by Rees Page, will be considered when I come to the Applications.

(2) The claim against LDS

144. LDS (here not including Mr. Kan in this expression) has been sued in the action as a firm, rather than in its correct corporate personality. In oral submissions Mr. Harris sensibly accepted that this was a technicality, which would need to be addressed if the Appeal was successful, and LDS and Mr. Kan remained Defendants to the action.

145. The pleaded claim against LDS is that LDS owed a duty of care to the Deceased to take reasonable steps to verify the identity of the Signatory at the Signing Event; see paragraph 53 of the Amended Particulars of Claim. As with the claim against Rees Page the duty of care is alleged to have arisen in the tort of negligence only. Several matters are relied upon in paragraph 53 in support of this alleged duty of care, which it is easiest to quote from paragraph 53:

“a.It was reasonably foreseeable that if the person signing the document was [s]not the person named as [t]he transferor in the document then that person would suffer loss

b. The fact that the Second Defendant believed that he was dealing with and intended to witness the signature of ~~the Claimant~~ the Deceased gave rise to a sufficient degree of proximity between them

c. In all the circumstances of the case circumstances it is fair just and reasonable to impose such a duty.”

146.It is then pleaded in paragraph 54 that this alleged duty of care required LDS to take the same steps, in terms of the identity of the Signatory, as were required by the MLR “(or if those regulations did not in fact apply to take the steps that would have bene [been] required if they had applied)”.

147.Breach, causation, and loss are pleaded in paragraphs 55-57 of the Amended Particulars of Claim. In summary, it is alleged that LDS breached the duty of care which they owed to the Deceased by failing to take sufficient or any steps to verify the identity of Signatory. The pleaded case is that if this negligence had not occurred, the 2010 TR1 would not have been created, and the Deceased would have remained as owner of the Property, with the benefit of an unpaid vendor’s lien. As such, so it is alleged, the negligence of LDS caused the Deceased to lose the value of the Property, subject to credit being given for money credited to the Deceased by the Bank and (subject to a claim for this money which is said to have been made by the Bank) the money received as a result of the claim made by the Deceased against FLP.

148.As with the claim against Rees Page, the position in terms of this alleged duty of care seems to me to be straightforward. For this reason I again find it easiest to proceed first by considering this part of the Appeal without specific reference to the Estate’s grounds of appeal, and then to turn specifically to the grounds of appeal.

149.This part of the Appeal has to be approached on the basis most favourable to the Estate; namely that Mr. Kan did not take any steps to verify the identity of the Signatory, and that Mr. Kilvert’s attendance note of his conversation with Mr. Kan of 13th July 2010 is accurate in recording Mr. Kan’s admission to this effect. These are however matters which are primarily relevant to breach of duty of care, if a duty of care was owed.

150.It is, at first sight, a surprising proposition that a person who, in good faith, acts as a witness to a signature can be held liable to anyone who suffers loss if that person turns out not to be who they claim to be. The Deputy Master described this proposition as “startling” (J50) and, at least at first sight, I am inclined to agree. It is not alleged that Mr. Kan was dishonest in his witnessing of the 2010 TR1. At worst, Mr. Kan failed to carry out an identity check on the Signatory.

151.In this context it is important to have in mind what was said by Pill LJ, as to the purpose of requiring a deed to be witnessed, in *Shah v Shah* [2001] EWCA Civ 527 [2002] QB 35. In that case the question before the Court of Appeal was whether estoppel could be relied upon, in a case where a deed had not been witnessed, to overcome the statutory requirement for the deed to have been witnessed, as set out in Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. For present purposes however the relevance of the case is confined to Pill LJ’s explanation of the purpose of attestation, at [29]:

“29 I bear in mind the clarity of the language of section 1(2.) and (3) and also that the requirement for attestation is integral to the requirement for signature in that the validity of the signature is stipulated to depend on the presence of the attesting witness. I also accept that attestation has a

purpose in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed. The beneficial effect of the requirement for attestation of the signature in the manner specified in the statute is not in question. It gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation. It gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary. A person may aver in opposition to his own deed that he was induced to execute it by fraud, misrepresentation or, as was unsuccessfully alleged in the present case, duress and the attestation requirement is a safeguard.”

152.As Mr. Harris submitted, a person who witnesses a signature agrees to assist for an evidential purpose; namely to act as a witness to the relevant signature in the event of a query being raised. Such a person, even if a professional person such as a solicitor and even if charging a fee for the act of witnessing the relevant signature, does not agree to do more, in the absence of any evidence of agreement to do more. Such a person does not agree to have any further involvement in the transaction, or to act for any person in the transaction, or to protect any person from loss which may result from the transaction, either because the transaction is ill-advised or because fraud is involved.

153.Given the limited nature of the role of a person acting as a witness to a signature, it is difficult to understand how such a person, whether or not a solicitor and whether or not charging a modest fee such as that charged by LDS, could come to owe a duty of care of the kind alleged in the Amended Particulars of Claim. Mr. Brown was not able to point to any authority which provided specific support for this case. It thus becomes necessary to approach the matter by reference to the general principles which emerge from the case law which was cited to me.

154.I have already cited extensively from NRAM and P&P/Dreamvar. I add to this citation only what Patten LJ said at [74] in P&P/Dreamvar, as follows:

“74 The imposition of liability in negligence towards a third party who is not the solicitor’s client clearly requires something more than it being foreseeable by the solicitor that loss will be caused to the third party by a lack of care on the solicitor’s part in carrying out whatever is the relevant task. Nor is it sufficient that the test of proximity is satisfied whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party (as in *Dean v Allin & Watts*) in the product of the solicitors’ instructions. The incremental approach approved in *Caparo* requires all these and any other relevant factors to be taken into account and globally assessed including any relevant policy considerations. In deciding whether it is just or reasonable to recognise a duty of care, the approach enshrined in the case law requires the court to take account of the contractual framework and any other factors bearing on liability.”

155.Applying the principles which emerge from the passages which I have cited from NRAM and P&P/Dreamvar I cannot see, on the facts of the present case, how the incremental approach identified in the case law justifies the imposition upon LDS of a duty of care of the kind alleged by the Estate. All that LDS agreed to do, for a modest fee, was to witness the signature of the Signatory on the 2010 TR1. Given this limited role I find it impossible to see how such a duty of care could have arisen. It is important to keep in mind that a solicitor acting in a property transaction owes no duty in tort to protect a potential victim of fraud from foreseeable economic loss by verifying the identity of his own client, even where there is a statutory obligation to carry out a verification process; see Patten LJ in P&P/Dreamvar, at [81]. If this is the case, it is difficult to see how a solicitors whose role in the relevant transaction is confined to witnessing a deed in the transaction can be held to have owed a

duty to protect any party from the consequences of the person signing the relevant deed turning out to be a fraudster.

156. I cannot see that the MLR assist the Estate in this respect. Looking at the provisions of the MLR which have been included in the authorities for the Appeal, I do not think that the MLR did in fact apply to the performance by LDS of the act of witnessing the signature of the Signatory on the 2010 TR1. Even if however the MLR did apply to the act of witnessing the signature, I cannot see that this would give rise to any duty of care of the kind alleged by the Estate. It is clear from P&P that the statutory duty of carrying out money laundering checks does not give rise to a private law cause of action.

157. What I have said above essentially reflects the reasoning of the Deputy Master at J48-53, with which I agree. It seems to me, as it seemed to the Deputy Master, that the Estate has no real prospect of establishing that LDS owed a duty of care to the Deceased to verify the identity of the Signatory.

158. The position might be different, bearing in mind that this question is being considered in the context of a summary judgment application, if there was some reason for thinking that consideration of this question at trial might produce a different decision. By way of example, there might be reason for thinking that LDS agreed to do something more than merely witness the signature of the Signatory to the 2010 TR1, which had a bearing on the question of whether the alleged duty of care was owed. There might be reason for thinking that Mr. Kan had some special knowledge of the case, which had a bearing on the question of whether the alleged duty of care was owed. I cannot however see any such reason for thinking that this will or might be the case. The relevant facts concerning the Signing Event are already established. The Deceased is not available to give any evidence to contradict the evidence of Mr. Kan and Mr. Kilvert. The Estate has served no evidence in response to the evidence of Mr. Kan. The Estate is unable to point to any document or documents relevant to the Signing Event which might change the factual landscape of the claim against LDS. The assumption falls to be made, at this stage, that Mr. Kan did not take any steps to verify the identity of the Signatory, but that assumption does not seem to me to be relevant to the threshold question of whether a duty of care was owed.

159. In this context the Estate has attempted to salvage its case against LDS in the RPOC. In paragraph 48.2 of the RPOC it is pleaded that Mr. Kan failed to witness the signature of the Signatory at all. The basis for this allegation is that the Report states that the signature of the Signatory was retouched using a different pen and that there are repeated practice indentations on the 2010 TR1. It is said that Mr. Kan has not advanced any coherent explanation regarding the circumstances of the signature.

160. There are a number of problems with this attempt to revise the Estate's case. The first is that this allegation is not actually pleaded against Mr. Kan. It exists only in a draft pleading, which the Estate has avoided making the subject of an application to re-amend. In addition to this, the Estate has chosen not to identify to me the re-amendments for which it is said that the Estate will seek permission to re-amend at a later stage in the action, possibly at the delayed case management conference, or possibly following disclosure in the action, or possibly at some other time. The timing of such an application has been left up in the air, along with what the Estate might actually be saying in any such re-amended case. In my judgment this was not and is not an acceptable way for the Estate to defend the summary judgment application made by LDS. If the Estate is alleging that Mr. Kan did not witness the 2010 TR1 at all, the Estate should be prepared to make this allegation as part of its pleaded case. I am not prepared to entertain, as a ground of defence to the summary judgment

application, an allegation against Mr. Kan, namely that he did not witness the 2010 TR1 at all, which the Estate has not pleaded and remains unwilling to plead. In my judgment this is an abuse of the process of the court, which the court should not permit.

161. Beyond this however, there is no convincing evidence nor the likelihood of any convincing evidence to establish that Mr. Kan did not actually witness the 2010 TR1. Mr. Kan's evidence is perfectly clear that the relevant signature on the 2010 TR1 is his signature. This evidence is supported by the contemporaneous documents, which are consistent with Mr. Kan signing the 2010 TR1 as witness of the signature of the Signatory. If Mr. Kan did not in fact witness the signature of the Signatory on the 2010 TR1 the obvious questions which arise are how Mr. Kan came, at the relevant time, to believe that he had witnessed the signature of the Signatory, and how the 2010 TR1 comes to contain a signature which purports to be the signature of Mr. Kan, overlaid with the formal stamp of LDS.

162. All that is pleaded in the RPOC, in support of this allegation, is the allegation that the Report states that the signature of the Signatory on the 2010 TR1 was retouched using a different pen and that there were repeated practice indentations on the 2010 TR1.

163. In the Report Ms. Radley does express the opinion that the questioned signature has been written in ballpoint ink, with retouches made to the signature using a different non-ballpoint ink. Ms. Radley also records the results of applying the ESDA technique to the 2010 TR1. She says that the ESDA findings are consistent with practice simulations made on a piece of paper while resting on the 2010 TR1. Ms. Radley also makes the point, on the basis of the ESDA results, that the questioned signature was written while the second page of the 2010 TR1 was resting on page 1 of the same document. This was not however the case with other ballpoint entries on page 2. Ms Radley also points out that the entries on page 2 in relation to LDS were appended using a non-ballpoint pen ink, which often does not leave good ESDA impressions "and therefore I cannot determine whether or not these entries were made whilst resting on page 1."; see paragraph 10(vii) on page 3 of the Report.

164. While the content of the Report is interesting, and requires the assumption, for the purposes of the Appeal, that the signature of the Signatory on the 2010 TR1 was not that of the Deceased, I cannot see how the content of the Report either supports the contention that Mr. Kan did not witness the signature of the Signatory on the 2010 TR1, or contradicts the evidence of Mr. Kan that he did witness the signature of the Signatory on 2010 TR1. It seems to me that there is no real factual conflict in this respect, let alone any factual conflict which needs to go to trial. Although the situation is not all fours with *Optaglio*, because I am not deciding to reject the evidence of any witness, it does seem to me that the present case is one where the attempt to rely on the Report to make good the case that Mr. Kan did not witness the signature of the Signatory on the 2010 TR1 is one which can, at this stage, be seen to have no real prospect of success.

165. Beyond this however, there is also this puzzling feature of paragraphs 48 and 49 of the RPOC. If Mr. Kan did not in fact witness the signature of the Signatory on the 2010 TR1 at all, what is the case against LDS? If it is said that Mr. Kan colluded with the Signatory, so as to allow the Signatory to forge the Deceased's signature on the 2010 TR1, and then proceeded to pretend to witness the signature by signing the 2010 TR1 on a separate occasion, this needs to be pleaded, not least because it would engage an allegation of serious professional misconduct against Mr. Kan. No such case is however pleaded. If this is not said, one comes back to the question of how Mr. Kan's signature ended upon on the 2010 TR1. An answer to this might be that what purported to be Mr. Kan's signature on the 2010 TR1 was in fact a forgery, and that Mr. Kan somehow managed to persuade himself, contrary

to the fact, that he had witnessed the signature of the Signatory on the 2010 TR1 when he had not done so. This however is an absurd hypothesis, and one which would, in any event, appear to destroy the claim against LDS because, on this basis, it would appear that LDS were never engaged in witnessing the signature of the Signatory on the 2010 TR1.

166.I therefore conclude, in common with the Deputy Master at J54, that the proposed re-amendment of the claim against LDS in the RPOC cannot save the claim. The only qualification to add to my own conclusion is that, for the reasons which I have explained, I do not think that it would have been right to take the RPOC into account in this context, even if the RPOC would otherwise have been able to save this claim.

167.I should add that if the claim could, in theory, have been saved by the RPOC, it might have been appropriate to allow the Estate one final opportunity to save the claim against LDS by applying to re-amend the pleaded claim against LDS, with a default order for summary judgment in favour of LDS in the absence of a successful application to re-amend. In the event this question does not arise.

168.I turn next to the specific grounds of appeal, which I can take fairly shortly, as they are essentially dealt with in my discussion above.

169.The first ground of appeal, namely that the Deputy Master failed to apply P&P/Dreamvar correctly, concentrates upon the position of Rees Page. If and in so far as this first ground of appeal is directed against LDS it seems to me to fail for essentially the same reasons as it fails against Rees Page.

170.The second ground of appeal is that the Deputy Master was wrong to determine facts which were in dispute on a summary basis. Again, this second ground of appeal does not appear to be directed against LDS. If and in so far however as the second ground of appeal is directed against LDS, it also seems to me to fail. The reason for this is that in determining whether LDS owed a duty of care of the kind alleged by the Estate, it is not in fact necessary to resolve any conflicts of fact. For the reasons which I have set out, there is nothing to contradict the evidence of Mr. Kan, in paragraph 8 of his witness statement, that he believes that he did witness the signature of the Signatory on the 2010 TR1, and did so in the belief that the Signatory was the Deceased, even if (contrary to his belief) he failed to verify the identity of the Signatory. As I have also explained, it is necessary to assume, for summary judgment purposes, that the Signatory was not the Deceased. This assumption does not however interfere with the ability of the court to decide, at summary judgment stage, that there is no real prospect of success for the argument that LDS owed a duty of care to the Deceased of the kind alleged by the Estate, either as currently pleaded or as pleaded in the RPOC. Indeed, it may be said that there is this point of difference between Rees Page and LDS in the Appeal. In the case of the claim against Rees Page, consideration of the claim of a duty of care requires going into the facts of the case to a certain degree. In the case of the claim against LDS, consideration of the claim of a duty of care can be dealt with on a strike out basis, by which I mean that the claim can be dealt with on the basis that what is pleaded in the Amended Particulars of Claim is insufficient to establish the pleaded duty of care.

171.The third ground of appeal is that the present case is one where there will be a trial, come what may, with the consequence that there is a compelling reason for LDS in the action.

172.As I have noted, this ground of appeal assumes that the outcome of the Appeal and the Applications is that the Bank and the CLR will, at the least, be left in the action. That assumption depends upon my decision on the Applications, which is for later sections of this judgment. It seems to

me however that the Iliffe point fails against LDS as it fails against Rees Page, whether or not any other party remains in the action. If the position is that it can be decided now that LDS owed no duty of care to the Deceased, I can see no reason whatsoever why LDS should remain in the action by reason of the fact, if it is a fact, that the action will go to trial so far as the other Defendants or some of them are concerned. As I have already explained, the facts of the Iliffe case were very different to the present case, and involved an issue of causation which was not, in any event, sufficiently clear to justify the grant of summary judgment. As I have explained, the position in the present case, so far as the duty of care issue in the claims against Rees Page and LDS are concerned, is very different.

173. As with the claim against Rees Page, I can see no compelling need to proceed to disclosure in relation to the claim against LDS. There has been no identification of any document which might be expected to appear, on LDS providing disclosure, which would change the position as it stands in the claim against LDS. I also repeat my point as to the option of seeking third party disclosure against LDS, should it turn out that LDS does have control of a document relevant to a claim against another Defendant in the action, assuming any other Defendants are left in the action.

174. Accordingly, and as with the claim against Rees Page, it seems to me that the third ground of appeal fails.

175. The fourth ground of appeal rests on the argument that although Mr. Kan has stated that he witnessed the signature of the Signatory on the 2010 TR1, the Report points towards the conclusion that he could not have done so. I have already dealt with this argument in my consideration of the RPOC, so far as they relate to the claim against LDS. For the reasons which I have already set out, the fourth ground of appeal fails.

176. Drawing together all of the above discussion I conclude that the Deputy Master was correct to decide (J53 and 54) that the Estate had no real prospect of succeeding on its claim against LDS, on the basis that LDS owed no duty of care to the Deceased of the kind alleged by the Estate. It seems to me that the Estate had and has no real, or indeed any prospect of succeeding, at trial, in its case that LDS owed a duty of care to the Estate of the kind alleged. I also agree with the Deputy Master that there is no other compelling reason why the claim against LDS should go to trial. I would only add that, in the case of the claim against LDS, I consider that it was open to the Deputy Master to have decided the duty of care question pursuant to his jurisdiction to strike out, in addition to his jurisdiction to grant summary judgment to LDS on this point.

177. This is sufficient to dispose of the Appeal, so far as it concerns the claim against LDS. If no duty of care was owed of the kind alleged by the Estate, there is no claim against LDS. It follows from what I have decided that the Appeal fails, and that the Order should be upheld, so far as the Deputy Master gave summary judgment for LDS and dismissed the Estate's claim against LDS.

178. In common with Rees Page, LDS did argue that there were other grounds upon which summary judgment could be granted against the Estate on its claim against LDS. As with Rees Page, I will deal with these additional grounds, both in case this matter goes further, and because one of the grounds is also relevant to Rees Page, and to the Applications.

179. Leaving aside duty of care, which I have dealt with, and costs, to which I shall come, the other grounds relied upon by LDS are as follows:

(1) LDS argues that if it did owe the alleged duty of care, and breached that duty of care, there was a breach in the chain of causation, either by reason of the unreasonable conduct of the Deceased or, if

the Estate's pleaded case is accepted in this respect, by reason of the unreasonable conduct of Rees Page in registering the 2010 Transfer when Mr. Kilvert had been informed by the Deceased that the Deceased had not signed the 2010 Transfer.

(2)LDS also adopts the same additional causation argument pursued by Rees Page; namely the Causation Argument. It will be recalled that the Causation Argument relies on the RPOC, and the assertions therein that contracts were exchanged in the 2008 Transaction and the purchase monies paid to the Deceased, in discharge of the Original Charge. As such, so it is contended on behalf of LDS, the Deceased cannot have been caused any loss by LDS because the 2008 Transaction left him with no vendor's lien (the purchase monies having been credited to him by FLP), and no more than a bare legal interest in the Property.

180. So far as the arguments of break in the chain of causation are concerned, I do not think that those arguments would be suitable for summary determination. At this stage of the argument one assumes that LDS did owe the pleaded duty of care to the Deceased, and breached that duty of care. The argument that the chain of causation was broken by the Deceased's silence and inactivity seems to me, again, to raise fact sensitive questions which are not suitable for summary determination. The same would, in my judgment, also hold good in relation to the role of Rees Page in the registration of the 2010 Transfer, if one assumes that Rees Page were still in the action, and had been found to have breached the duty of care which they are said to have owed to the Deceased.

181. This leaves the Causation Argument. I have already explained this argument in the previous section of this judgment. As with the claim against Rees Page, the Causation Argument commended itself to the Deputy Master as an additional reason for granting summary judgment for LDS; see J53. In the case of the claim against Rees Page I have explained why my consideration of the Causation Argument falls to be deferred to my consideration of the Applications. The same applies to my consideration of the Causation Argument, in relation to the claim against LDS.

182. In conclusion, and so far as the claim against LDS in this action is concerned, the Appeal falls to be dismissed, and the Order stands, so far as the Deputy Master gave summary judgment for LDS and dismissed the Estate's claim against LDS. I repeat, for the avoidance of any doubt, that my references to LDS include Mr. Kan, and thus include the claim against Mr. Kan. The basis of this result is my decision that the Deputy Master was correct to decide (i) that the Estate had no real prospect of establishing that LDS owed a duty of care to the Deceased of the kind alleged by the Estate and (ii) that there was no other compelling reason for the claim against LDS to go to trial. Whether this result can also be based on the Causation Argument, as adopted by LDS, will be considered when I come to the Applications.

(3)The costs appeal

183. I can take the costs appeal more shortly. By the Order the Deputy Master awarded LDS their costs of their application on the indemnity basis. The Deputy Master awarded Rees Page their costs of their application on the standard basis, to 2nd July 2108, and thereafter on the indemnity basis. The Estate's case, in this part of the Appeal, is that there was nothing in the Estate's conduct of the case to take the case out of the norm, and that no costs should have been awarded on the indemnity basis.

184. The Deputy Master gave a separate judgment on costs. There is no transcript available of this judgment, but I have been provided with a note of the judgment, prepared from notes made by a trainee solicitor acting for LDS.

185. Dealing first with Rees Page, the Deputy Master decided to award costs on the indemnity basis essentially for two reasons. The first was that the Deputy Master took the view that there had been a failure by the Deceased, prior to the commencement of the action, to comply with the Pre-Action Protocol for professional negligence claims. This was of particular importance in the present case because, in the view of the Deputy Master, the whole point of the Protocol was to prevent costs being run up in relation to claims which had no reasonable prospect of success, into which category, so the Deputy Master had decided, fell the claim against Rees Page. Second, the solicitors for Rees Page had made a without prejudice save as to costs offer, by letter dated 7th July 2018, which had offered a drop hands settlement to the Estate. The Deputy Master saw the failure of the Estate to take up this offer as the crucial point taking the case outside the norm, because the offer afforded the Estate a way out of the litigation against Rees Page. As such the Deputy Master decided that it was appropriate to order costs on the indemnity basis as from 7th July 2018 (the reference to 2nd July 2018 in the Order appears to be an error).

186. Turning to LDS the Deputy Master took the view that the claim against LDS was an extremely novel action, arising out of an involvement in the case, on the part of LDS, which had lasted a matter of minutes only, when the 2010 TR1 was witnessed. The Deputy Master went on, in this context, to criticise the pre-action conduct of the Deceased, which he characterised as “quite extraordinary” and “improper”, in terms of the extent of its non-compliance with the Protocol. The Deputy Master continued this criticism into the period after commencement of the action, and concluded this part of his costs judgment with the point that if there had been compliance with the Protocol, there was a reasonable prospect that the claim against LDS would not have been made. Drawing all of this together, the Deputy Master concluded that LDS should have their costs on the indemnity basis from the outset.

187. Mr. Brown drew my attention to the Note 44.3.8 in the White Book (pages 1482-1483 of Volume 1 of the 2021 Edition). As the editors explain, an award of costs on the indemnity basis is appropriate in circumstances where the conduct of a party or other particular circumstances of the case (or both) are such as to take the situation out of the norm in a way which justifies an order for indemnity costs. The discretion to award costs on the indemnity basis is a wide one, given that there is an infinite variety of situations which might justify the court in making such an order. Mr. Brown’s essential point was that there was nothing out of the norm in the conduct of the action. The claims made in the action did not lack probity, and the fact that the claims had been found to have no real prospect of success did not, in and of itself, justify an award of costs on the indemnity basis.

188. The difficulty with this part of the Appeal seems to me to be that the Deputy Master did not award costs on the indemnity basis against either of LDS or Rees Page on the basis that the claims against these parties had failed at the summary judgment stage. Rather the Deputy Master was critical and, in the case of LDS, acutely critical of the pre-action conduct of the Deceased. In both cases the Deputy Master was of the view that the claims might never have been commenced if they had been the subject of proper consideration at the pre-action stage. In the case of LDS the Deputy Master was of the view that this conduct continued into the period after commencement of the action. In the case of Rees Page there was the offer of a drop hands settlement, which would have avoided the Estate incurring the costs of defeat on the summary judgment application.

189. In his decisions to award costs on the indemnity basis, to the extent that he did so, the Deputy Master was exercising his discretion, which was a wide one. It follows that it would only be open to me to interfere with the relevant parts of the Order if I was persuaded that the Deputy Master had stepped outside the wide ambit of his discretion, and made a decision which no reasonable judge

could have made, or had gone wrong in law or principle in some manner. I do not think that the Deputy Master did any of these things. It seems to me that the matters relied upon by the Deputy Master in deciding to award costs on the indemnity basis were matters upon which the Deputy Master was entitled to rely for the purposes of his decision. In other words, it seems to me that the Deputy Master made a decision, in this respect, which he was entitled to make. Indeed, I would go further. Given the failures in the pre-action conduct of the Deceased and given the offer of settlement made by Rees Page, it seems to me that the Deputy Master was right to see the relevant circumstances of the case as justifying the awards of costs on the indemnity basis which he made.

190. This leaves the remaining element of the Appeal in relation to costs, which concerns the relatively small amount of costs awarded to the CLR as its costs of attending the hearing of the summary judgment applications before the Deputy Master.

191. In this context the essential argument of Mr. Brown is that there was no need for the CLR to attend the hearing of the summary judgment applications, to which the CLR was not a party. As however Mr. Trompeter explained to me, the CLR had grounds for concern as to whether a costs order might be made, at hearing of the summary judgment applications, which would adversely affect the position of the CLR.

192. It will be recalled that the Estate's claim against the Fourth Defendants, the purchasers of the Property from the Bank in 2013, was dismissed at an earlier hearing, which took place before Master Clark. The order of Master Clark, which is dated 4th April 2018, included the following costs provision:

"4. As between the Claimant and the First, Second, Third, Fifth, Sixth and Seventh Defendants the costs ordered to be paid pursuant to paragraph 2 above [which ordered the Estate to pay the Fourth Defendants' costs of their application and the claim against them] are to form part of the Claimant's costs of the claim."

193. The CLR did not attend this earlier hearing, and had no input into this costs order. The Estate's skeleton argument for the hearing of the summary judgment applications of LDS and Rees Page included a paragraph seeking an equivalent order, in respect of the Estate's costs, to that made by Master Clark at the earlier hearing.

194. The position of the CLR was, and remains that the costs order made by Master Clark, which I have set out above, was not one which should have been made, and that the order sought by the Estate on the hearing of the summary judgment applications was also one to which the Estate was not entitled. As such, the CLR attended the hearing of the summary judgment applications in order to protect itself against the risk of such a costs order being made.

195. In the final part of his judgment on costs the Deputy Master accepted the argument of Mr. Trompeter that it was justifiable for the CLR to have attended the hearing of the summary judgment applications, given the concern of the CLR that a further order might be made in the same terms as the earlier costs order of Master Clark. I note that the Deputy Master also made an express decision that the Order should not contain a costs order equivalent to that made by Master Clark, as set out above.

196. I can see nothing wrong with the Deputy Master's decision that the CLR should have its costs of attendance at the summary judgment applications. Given the costs order which the Estate had obtained from Master Clark, in relation to the earlier summary judgment application of the Fourth

Defendants, and given the indication of the Estate that it would seek an equivalent order on the hearing of the summary judgment applications, it seems to me to have been perfectly reasonable for the CLR to attend the hearing of the summary judgment applications. Given that the Deputy Master declined to make the threatened costs order, it seems to me that the Deputy Master was quite entitled to order that the Estate should pay the CLR's relatively modest costs of attendance.

197. Accordingly the Appeal fails, and the Order should be upheld, so far as the costs orders made by the Deputy Master are concerned.

Discussion – the Applications

(1) The Application of the CLR

198. The claim of the Estate against the CLR, as pleaded in the Amended Particulars of Claim, is now a claim for an indemnity pursuant to Section 103 of, and Schedule 8 to the Land Registration Act 2002.

199. In this section of the judgment references to Sections and Schedules are, unless otherwise indicated, references to the Sections of and Schedules to the Land Registration Act 2002.

200. There also remains pleaded in the Amended Particulars of Claim a claim for alteration or rectification of the register. The alteration sought was the removal of the Fourth Defendants as registered proprietors of the Property, the entry of the Estate as registered proprietor of the Property, restoration of the Original Charge, and entry of the Bank as registered proprietor of the Original Charge; see paragraph 41 of the Amended Particulars of Claim. It seems to me that this alteration would have constituted a rectification of the register, within the meaning of paragraph 1 of Schedule 4, as such alteration would prejudicially have affected the title of the Fourth Defendants as registered proprietors of the Property.

201. It seems to me that the claim for rectification of the register, so far as it is still maintained against any of the remaining Defendants to the action, must fail. I say this because, as long ago as 4th April 2018, Master Clark made an order dismissing the rectification claim against the Fourth Defendants, on the basis that the claim had no real prospect of success against the Fourth Defendants, and on the basis that there was no other compelling reason for the claim against the Fourth Defendants to go to trial. Given this position, I do not see how the claim for rectification can now be maintained against any of the remaining Defendants in the action. I say this independent of the fact that, as I understand the position, the Fourth Defendants do not themselves now retain the registered title to the Property.

202. This leaves the claim for an indemnity against the CLR. The claim is made pursuant to Schedule 8, and specifically pursuant to paragraph 1(1)(b) of Schedule 8. For present purposes, the material parts of paragraph 1 of Schedule 8 are as follows:

“(1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of—”

“(b) a mistake whose correction would involve rectification of the register,”

“(3) No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision.”

203. The pleaded case of the Estate is that a mistake was made; namely the registration of the 2010 Transfer and the Attarian Charge in circumstances where the 2010 TR1 was forged. The claim for an indemnity is put on the following basis, in paragraph 45 of the Amended Particulars of Claim:

"45. In the event that the Court decides that the register should not be altered or rectified then ~~the Claimant the Deceased~~ is entitled and ought to be indemnified against ~~his her~~ losses ~~and those of the Deceased~~ pursuant to section 103 and paragraph 1(1)(b) of schedule 8 of the Land Registration Act 2002."

204. The losses in respect of which an indemnity is claimed are set out in paragraph 46 of the Amended Particulars of Claim, in the following terms.

"Particulars of the Claimant's losses are:

a. The effect of the mistake and the entries made as a result of it is that ~~the Claimant the Deceased~~ has lost the value of ~~his interest~~ the Estate's in the property and of his unpaid vendor's lien.

b. ~~The Claimant's~~ The Estate's interest in the property and/or his lien would have provided ~~the Claimant the Deceased~~ with the means to discharge the 2007 Mortgage and the Inglis Road Mortgage

c. Discharge of those mortgages would have prevented interest from continuing to accrue on them at the rates specified in the mortgage documents ("the Mortgage Rates").

d. The total amount of the Claimant's loss is a matter for expert evidence but will be at least £787,036.88 being (£1,122,751.52 less the £335,714.64 credited by the Sixth Defendant) together with interest at the Mortgage Rates.

e. If the Claimant succeeds in mitigating ~~his~~ the loss of the Estate by obtaining an order for the correction of the register so that ~~s he is re~~ instated as proprietor and the 2007 Charge is also restored or he is fully indemnified by the Fifth Defendant then the Claimant will still have suffered loss in as follows:

i. Costs of the claim against the Fourth and Fifth Defendants (in so far as they are not actually paid by any other party)

ii Interest at the Mortgage Rates from the time when the mortgages could or should have been redeemed."

205. As can be seen, the basis of the loss claimed by way of indemnity is the contention that, as a result of what is said to have been the mistaken registration of the 2010 Transfer, the Deceased lost the value of his interest in the Property and his unpaid vendor's lien. This in turn begs the question, also raised by the Causation Argument, of whether the Deceased did in fact have an unpaid vendor's lien at the time when the 2008 Transaction was supposed to have completed. This question also overlaps with the question of whether the Original Charge was or was not redeemed at the time when the 2008 Transaction was supposed to have completed.

206. In relation to these questions there was a significant breaking of ranks, as between the Defendants. Both Rees Page and LDS advanced the Causation Argument, as part of their resistance to the Appeal. The CLR advanced a similar argument, in support of the Application of the CLR. The Bank did not support these arguments. The Bank's position was that the Original Charge had not been redeemed. The result of this was that Mr. Brown, in resisting the Causation Argument and the associated argument of the CLR, found that he had a certain measure of support from Mr. Allcock, on behalf of the Bank.

207. The first ground relied upon by the CLR, in support of the application of the CLR for summary judgment/striking out, was based upon the RPOC. The point was a simple one. Paragraph 15 of the

RPOC pleads a series of steps which occurred on 10th March 2008 “towards (purported) completion” of the 2008 Transaction. These steps, as pleaded in paragraph 15 of the RPOC, are as follows:

“15. It is averred that the following steps towards (purported) completion occurred on 10 March 2008:

15.1. On 7 March 2008, the Bank advanced the purchase monies to FLP qua solicitors for the Bank and Mr Attarian;

15.2. On the same day, and in accordance with ordinary conveyancing practice, FLP allocated the purchase monies to the credit of the Deceased (i.e. FLP treated the purchase price as having been paid);

15.3. On the same day, and in accordance with ordinary conveyancing practice, FLP qua solicitors for the Deceased arranged to allocate the monies to FLP qua solicitors for the Bank for the purpose of repaying the Argyle Road Mortgage (i.e. FLP applied the purchase monies received by the Deceased from Mr Attarian to the discharge of his indebtedness to the Bank as a necessary step to completion);

15.4. FLP accordingly and thereafter held the monies qua solicitors for the Bank;

15.5. By letter dated 27 March 2008, FLP qua solicitors for the Bank confirmed to the Bank that completion had occurred and that the Argyle Road Mortgage had been redeemed and that the Bank should proceed to discharge his charge with HM Land Registry.”

208. What is said to have been the legal effect of these steps is then set out in paragraph 17 of the RPOC, in the following terms:

“17. Notwithstanding the defective completion, the legal effect of the steps stated in paragraph 15 above was that the Argyle Road Mortgage was redeemed upon payment to the Bank (received by its agent, FLP, as confirmed by its letter dated 27 March 2008

to the Bank).”

209. The RPOC thus plead both that the Deceased was paid the purchase monies in the 2008 Transaction, because the purchase monies were allocated to the credit of the Deceased by FLP, and that the Original Charge was redeemed, because FLP applied the purchase monies, as received by the Deceased, to the discharge of the indebtedness of the Deceased to the Bank secured by the Original Charge.

210. The argument of the CLR was that if, on the Estate’s case, the Deceased was paid on the intended sale of the Property to Mr. Attarian, the claim for an indemnity falls away. On this basis, the Deceased had no unpaid vendor’s lien, and could not have resisted a claim by Mr. Attarian for the Deceased to be required to execute a transfer of the Property to Mr. Attarian. As such there was no mistake made, either in the registration of the 2010 Transfer or in the registration of the Attarian Charge, which prejudicially affected the Deceased. Even if the 2010 Transfer was the result of a forgery, all that the Deceased lost as a result of the registration of the 2010 Transfer was a bare legal title to the Property, which the Deceased was obliged to transfer to Mr. Attarian in any event.

211. In theory, this argument seems to me to be a good one. If the Deceased was paid the purchase price in 2008 Transaction, he had no unpaid vendor’s lien, and was not prejudicially affected by the subsequent registration of the 2010 Transfer, if one assumes that the registration of the 2010 Transfer was the result of signature of the Deceased being forged on the 2010 TR1.

212.The problem with this argument however is that it assumes that the Estate's case is that the Deceased was paid the purchase price in the 2008 Transaction. This is what the RPOC say, but the RPOC are not the pleaded case of the Estate. The pleaded case of the Estate remains as set out in the Amended Particulars of Claim. As I have already noted, the Estate has rowed back from the RPOC. The Estate says that it intends to re-amend the Particulars of Claim, but the Estate is not prepared to specify, now, these re-amendments. Instead, and so far as the 2008 Transaction is concerned, the Estate's case is now that it does not know what happened to the purchase monies after they came into the hands of FLP.

213.It seems to me that, in the absence of an application to re-amend the Estate's case in the terms of the RPOC, it is not open to me, at least for the purposes of the CLR's Application, to treat the Estate's case as being set out in the RPOC. As I have already explained in a previous section of this judgment, it seems to me that I must approach the Appeal and the Applications on the basis that the Estate's case is as pleaded in the Amended Particulars of Claim. I can, so far as I think this appropriate, take into account the RPOC, as a document settled by the Estate's counsel, and as a document which was, at least originally, intended to be the re-amended statement of case of the Estate, and as a document which may form the basis of the Estate's re-amended statement of case (subject to the outcome of the Appeal and the Applications). What I cannot do is to treat the RPOC as the actual re-amended case of the Estate.

214.Mr. Trompeter emphasized to me that the RPOC were settled by counsel, who was subject to the following professional obligation, in version 4 of the BSB Handbook (which was then in force):

"r.C9 Your duty to act with honesty and integrity under CD3 includes the following requirements:

...

.2 you must not draft any statement of case ... containing:

.a any statement of fact or contention which is not supported by your client or your instructions ..."

215.As such, so Mr. Trompeter contended, there must have been material before counsel which satisfied counsel that it was correct to plead that the Deceased had been paid the purchase monies. I accept the point, but I do not know what the material was which was before counsel when settling the RPOC, and I do not know what judgment counsel made of that material. It must be kept in mind that the Application of the CLR is an application for summary judgment or a striking out order. I do not think that it is right, either by virtue of counsel's professional obligations when settling the RPOC or for any other reason, to treat the Estate as formally bound by what appears in the RPOC, for the purposes of my decision on the Application of the CLR. The relevant content of the RPOC is undoubtedly a factor to be taken into account in considering the Application (and the Appeal), but I do not think that this relevant content can, on its own, be treated as decisive of the question of whether the Deceased was paid the purchase price in the 2008 Transaction.

216.Mr. Trompeter also drew my attention to a request for further information which was served by the CLR on the Estate, by letter dated 11th December 2019. The response was made by letter dated 17th December 2019. The first request, and its answer were in the following terms:

"1. Please confirm that, by providing the First Party (and the other parties to this litigation) with a copy of the draft Re-Amended Particulars of Claim, the Second Party had satisfied herself that the draft statement of case was factually accurate and faithfully represented the Second Party's instructions to her solicitors in relation to each and every averment contained therein"

“Yes. The Claimant interprets these requests as a means of requiring the Claimant to say that redemption definitely occurred. The Claimant does not in fact know whether redemption has definitely occurred as the Bank appears to object to this averment ... Accordingly, for the avoidance of doubt, the Claimant’s position is that redemption may have occurred but that it will be necessary for there to be disclosure.”

217.Mr. Trompeter argued that this was a confirmation of the factual accuracy of what was pleaded in the RPOC. The reality seems to me to be however that the response to the request for further information was equivocal, in much the same way as the Estate’s approach to the re-amendment of its currently pleaded claim is equivocal. This is confirmed by the answers to the other requests raised by this request for further information, which are all equally equivocal, with the exception of the sixth and final request, which was not answered at all.

218.In summary, I do not think that the RPOC can, on their own, justify either the striking out of the claim for an indemnity or the grant of summary judgment so as to dismiss that claim. I therefore conclude that the first ground relied upon by the CLR in support of the Application fails.

219.It follows from this, returning to the Appeal, that I do not think that the Causation Argument can stand on the RPOC alone. This does not necessarily mean that the Causation Argument fails. Rather, if the Causation Argument is to succeed it seems to me that this can only be the result of the relevant claims against Rees Page, LDS, and the CLR in the Amended Particulars of Claim being shown either to be bad on their face, by reason of the Causation Argument, or to have no real prospect of success, by reason of the Causation Argument.

220.I should mention that I have considerable sympathy for all four of the Defendants engaged in the Appeal and the Applications, so far as the RPOC are concerned. It seems to me unsatisfactory for the Estate to have produced the RPOC, with the expression of a clear intention to re-amend its case in the terms of the RPOC, and then to retreat to a position where the question of re-amendment is left up in the air. As I have said, it is hard to avoid the impression that the Estate decided to abandon the RPOC once it appreciated that its content was actually destructive of its case. I do not think however that the sorry procedural history of the RPOC is sufficient to justify a striking out order on the basis of abuse of process. My attention was drawn to case law in which the repeated changing of a claimant’s case was held to justify striking out the claimant’s proceedings; see the decision of Chief Master Marsh in *Nekoti v Univilla Ltd* [2016] EWHC 556 (Ch). In that case the Chief Master was persuaded to strike out the claimant’s re-amended particulars of claim on the basis that the claim was, to use the Chief Master’s expression, “endlessly mutable”. The Chief Master expressed his conclusion on the strike out application in the following terms, at [76]:

“76. The position might be different if the claim were now in a position to move forward. However, at the time of the hearing, two years after issue of the claim, the case was still being developed by the Claimant despite the Claimant [Claimant] having been in a position from the outset to plead its claim. Taken with the remaining lack of coherence and changing shape of the claim supported by statements of truth about which there is real cause for concern I am satisfied that in the exercise of my discretion the right course of action is to strike out the re-amended particulars of claim relying on both CPR 3.4(2)(a) and (b).”

221.I do not think that the history of the Estate’s claims in this action is such as to put the case either on all fours with the circumstances which justified a strike out order in *Nekoti*, or to render the case sufficiently close to *Nekoti* to justify a strike out order.

222.This brings me to the second ground relied upon by the CLR in support of the Application. This ground concentrated on the claim as it is pleaded in the Amended Particulars of Claim. The essential argument was that, on the evidence currently before the court, it could safely be concluded that the Deceased was paid the purchase monies in the 2008 Transaction. As such, and even without the RPOC, it could safely be concluded that the indemnity claim was bound to fail.

223.This second ground falls to be considered with the Causation Argument. The essential argument is the same. The Deceased suffered no loss because he had no unpaid vendor's lien following the crediting to him of the purchase monies in the 2008 Transaction. Although this argument overlaps with the question of whether the Original Charge was redeemed in the 2008 Transaction, Mr. Trompeter was at pains to stress that what mattered was whether the Deceased had been paid the purchase monies in the 2008 Transaction. If he had, it mattered not whether the Original Charge was redeemed or not.

224.In his submissions Mr. Trompeter sought to persuade me that, for a number of reasons, I could be confident now that the Deceased was paid the purchase monies in the 2008 Transaction. Mr. Trompeter sought to persuade me of this by reference to various matters pleaded in the Amended Particulars, and also by reference to the available evidence.

225.Starting with the Amended Particulars of Claim Mr. Trompeter referred to me to a number of paragraphs therein. Without being exhaustive, I mention specifically the following references:

(1)Paragraph 15 is clearly incomplete in the Amended Particulars of Claim, but there is, interestingly, an early draft of the Amended Particulars of Claim which was sent to the Bank's solicitors by the Deceased's solicitors under cover of an email sent on 14th September 2016. In this early draft paragraph 15 read as follows:

"15. As well as redeeming the 2007 Mortgage FLP was instructed by the Claimant to pay a further £132,782 out of the proceeds of sale to the Sixth Defendant in or towards redemption of a mortgage on another property owned by the Claimant at 35 Inglis Road London W5 3RL ("the Inglis Road Mortgage"). "

The underlined section is missing from the Amended Particulars of Claim, so that paragraph 15 is left incomplete.

(2)Paragraph 19 makes reference to the Deceased being told that the 2008 Transaction had been completed and to the keys to the Property being handed over by the Deceased to Mr. Attarian.

(3)Paragraph 20eii refers to the sum of £98,307, which looks to be some kind of balance of the purchase monies due to the Deceased after discharge (whether actual or intended) of his obligations to the Bank, being paid to the Deceased.

(4)Paragraph 21 identifies the Deceased as the victim of a substantial fraud perpetrated by Mr. Uddin, which could only have been the case if the purchase monies had reached the Deceased before they were stolen by Mr. Uddin.

(5)Paragraph 47 is in the following terms:

"47. The Claimant The Deceased made a claim against FLP and received the sum of £225,000 in settlement of that claim (including costs) for which the Claimant will give credit. The Sixth Defendant has asserted that it is entitled to that sum either under the 2007 Mortgage (which has been

discharged) or under the Inglis Road Mortgage. No admission is made to whether the Sixth Defendant's contention is correct."

There is therefore, so it was submitted, an actual reference to the discharge of the Original Charge in this paragraph. The point was also made that the Deceased could only have made a claim against FLP if FLP, by Mr. Uddin, had misappropriated monies belonging to the Deceased.

226.If one concentrates only on the Amended Particulars of Claim, I do not think that it can be said that the Amended Particulars of Claim contain a statement that the Deceased was paid the purchase monies in the 2008 Transaction. It is certainly the case that the Amended Particulars of Claim contain a large amount of pleaded material which suggests, it may be said strongly suggests that the Deceased was credited with the purchase monies by FLP. That is not however the same as being able to conclude, in advance of a trial and from what is pleaded in the Amended Particulars of Claim, that the Deceased was so paid.

227.The closest the Amended Particulars of Claim seem to me to come to a statement of the kind which would be required is in paragraph 47, where there is reference to the Original Charge as having "been discharged". On first reading this statement, I took it to be a statement that the Original Charge had been redeemed. Mr. Allcock submitted however that this was simply a reference to the fact that the Original Charge was removed from the registered title to the Property. It is certainly possible to read paragraph 47 in this way, and such ambiguity seems to me to render it impossible, at least in the context of the Application of the CLR, to read paragraph 47 as confirmation that the Deceased was paid the purchase monies.

228.Turning to the available evidence Mr. Trompeter drew my attention to various documents and to the conduct of the Deceased, in support of his argument that it was clear that the Deceased was paid the purchase monies. This evidence included the RPOC which, I accept, can be considered as part of an inquiry into whether the position is clear, in terms of the payment of the purchase monies to the Deceased.

229.In this endeavour Mr. Trompeter was supported by Mr. Cousins. In his supplemental submission in support of the Causation Argument, Mr. Cousins also made reference to the application of the mortgage funds provided by the Bank to the discharge of the borrowing secured by the Original Charge, following the allocation of the purchase monies to the Deceased's account, as pleaded in paragraph 15 of the RPOC. Mr. Cousins made the point that this pleading was supported by a letter from FLP to the Bank, which is dated 27th March 2008, and reads as follows:

"Roll Number; A/35195248-7

Property: 91 Argyle Road, London, W13 OLZ

Borrower: Syed Ahtram UI Haq

Further to completion in the sale of the above secured property and redemption of the mortgage account we now enclose form END1 for your sealing and return.

Please ensure that the discharge is lodged with HM Land Registry as soon as possible.

We await hearing from you."

230.This letter is contained in the exhibit to Mr. Kilvert's witness statement. Other relevant documents can be found in the same part of the exhibit. My attention was drawn to a statement of

account which was said to demonstrate the allocation of the purchase monies by FLP referred to above. I was also referred to a draft of a letter to the Deceased, prepared by FLP, which appears to have been intended to secure the approval of the Deceased to a set of estimated calculations concerning the allocation of the purchase monies. The calculations in the draft letter show an intended allocation of the purchase monies which would have resulted in the sum of £98,307 being payable to the Deceased. The calculations also include an estimated sum of £984,000 to redeem the Original Charge and an estimated sum of £133,000 to “redeem loan”; which may be a reference to the discharge or partial discharge of the mortgage lending secured against 35 Inglis Road.

231. It is not necessary for me to go through all the evidence to which I was referred by Mr. Trompeter and Mr. Cousins. The problem with all this evidence seems to me to be this. If this was the trial of this action, the evidence to which I have been referred, when put together with the Amended Particulars of Claim and the RPOC, could be said to provide strong support for a finding, on the balance of probabilities, that the purchase monies were credited to the Deceased by FLP and, save for the balance paid to the Deceased and the expenses of the sale, were then credited to the Bank in redemption of the Original Charge and in redemption or partial redemption of mortgage lending secured on 35 Inglis Road.

232. This is not however the trial of this action. Nor is the situation one where it can be said that, by reason of the Causation Argument and the associated argument of the CLR, the relevant claims of the Estate can, on the face of the Amended Particulars of Claim, be seen to be doomed to fail. As such, the question becomes whether the Causation Argument and the CLR’s associated argument are suitable for determination on a summary basis. I have to be satisfied that there is no real prospect of the Estate being able, at trial, to refute the Causation Argument, and the associated argument of the CLR. On the evidence I do not think that I can be so satisfied.

233. As this is not the trial of this action, I do not regard it as appropriate to conduct a detailed analysis of the evidence to which I was taken in the hearing, and the arguments on that evidence. I therefore confine myself to a short statement of my reasons for reaching the conclusion set out in my previous paragraph.

234. My principal reason for reaching the conclusion set out above is that the position still seems to me to be opaque, in terms of what FLP did with the purchase monies, prior to their misappropriation by Mr. Uddin. I agree with Mr. Cousins that what matters in this context is the allocation of the funds received by FLP, in their capacities as trustee and agent of all parties concerned. For this purpose, what one would want to see are the accounting records (or ledgers) of FLP. In this context there is a tantalising reference to client ledgers in paragraph 20e of the Amended Particulars of Claim, where it is stated that “On 7 March 2008 mortgage funds of £1,250,000 were paid by the Sixth Defendant into FLP’s client account and credited to the Third Defendant’s client ledger”. This is however as far as the reference to client ledgers go. The basis on which this statement is made is not clear, but it looks as though someone on the Estate’s side has, at some point, had access to the internal accounting records of FLP. I find it difficult to believe that there is not more to emerge, by way of those accounting records, which would throw light on how the purchase monies were allocated by FLP.

235. I also keep in mind that the 2008 Transaction is one where it is not in dispute that a substantial fraud did occur, when Mr. Uddin misappropriated the bulk of the purchase monies. It seems to me that one needs to be cautious in dealing with contemporaneous documents such as letters, internal drafts, or statements of account, which may have been prepared by a person who was unaware of the fraud and assumed that the purchase monies either were going to be distributed or had been

distributed in accordance with what that person expected to happen, as opposed to what actually happened.

236. I also have a separate concern in this respect. By reference to the Amended Particulars of Claim it is not accepted that there was a valid exchange of contracts in the 2008 Transaction. Paragraph 10 of the Amended Particulars of Claim refers to a purported exchange of contracts. A valid exchange of contracts is stated in paragraph 12 of the RPOC, but the RPOC do not constitute the pleaded case of the Estate. It is not clear, on the available evidence, whether there was a valid exchange of contracts. One might infer, on the balance of probabilities, that there was such an exchange of contracts, but the drawing of such an inference would be for trial. If there was no valid exchange of contracts in the 2008 Transaction, this does seem to me to raise some questions, which it is not appropriate for me to go into in this judgment, as to whether the Deceased could be considered as a person with no more than a bare legal interest in the Property following the allocation of the purchase monies by FLP, regardless of how those purchase monies were allocated.

237. Beyond this, there is also the position between the Estate and the Bank. One of the points which emerges from the Bank's evidence in support of its Application is that the Deceased and, subsequently, the Estate have been engaged in litigation with the Bank in which the Bank has sought and obtained an order for possession of 35 Inglis Road. According to the second witness statement of Mr. Singh, it has been common ground in those proceedings that the Original Charge was not redeemed in the 2008 Transaction, so that the mortgage loan secured by the Original Charge remained due and outstanding. Mr. Singh's evidence is that this common position dates back as far as 23rd March 2008, which is the date of a letter written to the Bank by Middlesex Law Chambers, acting as solicitors for the Deceased, which states as follows:

"We act for the above named client. We wish to inform you that due to unforeseen circumstances the above mortgage was not redeemed by the conveyancing Solicitors acting for the above. The Solicitors dealing with the transaction were FLP Solicitors.

Legal completion took place on the 10th of March 2008 however money has gone missing from the Solicitors client account.

We are now acting as independent Solicitors against FLP to expedite the matter. We will keep you informed of the progress in the matter."

238. I note that this letter refers to legal completion, but it is unclear what was meant by this. So far as the Bank's possession proceedings are concerned, I know no more of them than what I have read in Mr. Singh's evidence. It does strike me that what has been said by the Deceased and the Estate about the 2008 Transaction in the proceedings concerning 35 Inglis Road is at least of some relevance in considering the question of how the purchase monies were allocated by FLP. At the very least, it strikes me as unsafe to conclude that it is clear that the Deceased was paid the purchase monies in the 2008 Transaction, in circumstances where the Bank is saying, based on its own possession proceedings in relation to the 35 Inglis Road, that there was no redemption of the Original Charge in the 2008 Transaction. The situation seems to me to call for some further investigation.

239. For all of the above reasons I conclude that the second ground relied upon by the CLR in support of the Application raises a causation issue which is not suitable for summary judgment. I do not think that I am able to say, at this stage, that the Estate has no real prospect of establishing a loss for the purposes of its indemnity claim. I therefore conclude that the second ground relied upon by the CLR in support of the Application fails.

240. For the same reasons, I also conclude that the Causation Argument is not suitable for summary judgment. As such I do not think that the Causation Argument can be relied upon as an additional ground for the decision of the Deputy Master to dismiss the claims against Rees Page and LDS.

241. The third ground relied upon by the CLR in support of the Application was the doctrine of approbation and reprobation. The essential argument was that the Estate has so far presented a series of different and inconsistent cases, in the Amended Particulars of Claim, in the RPOC (which also contained internally inconsistent claims), and in the unspecified re-amendments for which, according to Mr. Brown, permission would be sought at the long delayed case and costs management conference in the action. The argument was that the situation had sufficient generic similarities to the Nekoti case to justify the striking out of the indemnity claim.

242. I have already effectively dealt with this argument in my consideration of the first ground of the Application. Sympathetic as I am to the position of the CLR, I do not think that the position in the present case is sufficiently similar to that in Nekoti to justify striking out the indemnity claim as an abuse of the process of the court. So far as the doctrine of approbation and reprobation is concerned, the doctrine applies to prevent a party from blowing hot and cold. The doctrine usually applies where one party pursues a particular case in proceedings, and then seeks to do an about face, in the same proceedings or in other proceedings, for the purposes of pursuing an inconsistent case. In the present case it does not seem to me that this or anything comparable has occurred. The Amended Particulars of Claim, which set out the Estate's case, did not significantly change the original pleaded case. For better or for worse the Amended Particulars of Claim remain the Estate's pleaded case, and it is by reference to that pleaded case that I am deciding the Appeal and the Applications. In these circumstances I do not think that the doctrine of approbation and reprobation prevents the Estate from pursuing its pleaded claim against the CLR for an indemnity.

243. The fourth and final ground relied upon by the CLR is a more technical point, although none the worse for that. The point taken is that, by paragraph 1(3) of Schedule 8, a condition precedent to the making of a claim for an indemnity is that "a decision has been made about whether to alter the register for the purpose of correcting the mistake". Paragraph 1(3) then goes on to stipulate that "the loss suffered by reason of the mistake is to be determined in the light of that decision".

244. Mr. Trompeter pointed out that neither the Amended Particulars of Claim nor the RPOC plead the existence of such "a decision" or otherwise assert that this statutory precondition to an entitlement to an indemnity has been satisfied. The point was the subject of one of the requests made in the request for further information which I have mentioned. The relevant exchange was in the following terms:

"6. Does the Second Party accept that, for the purposes of paragraph 1(3) of Schedule 8 to the Land Registration Act 2002, the First Party has not yet made a decision about whether to alter the register for the purposes of correcting the or any alleged mistake?"

"The Claimant does not understand which issue between the parties the information is being sought of and requests clarification of the request by reference to the pleadings."

245. It seems to me that the reply to this request was singularly unhelpful. The subject matter of the request was clearly identified as the "decision" which is required by paragraph 1(3), before an indemnity can be paid. The obvious step for the Estate to have taken would have been to identify its case on paragraph 1(3), but instead the Estate obfuscated, and the opportunity to clarify this part of the Estate's case was ignored.

246. In my judgment the point raised by the fourth ground is a good one. I agree with Mr Trompeter that existence of the decision referred to in paragraph 1(3) is a pre-condition to the payment of an indemnity and, as such, needs to be pleaded. I also agree that whatever is claimed to be the relevant decision for this purpose is not pleaded in the Amended Particulars of Claim. This gap in the pleaded case might have been filled, at least in practical terms, by a proper reply to request 6 in the request for further information, but this opportunity was not taken. The RPOC might also have been of assistance in identifying, albeit indirectly, what might be the Estate's case in this respect, but the RPOC do not assist.

247. It might be said that the relevant decision in the present case was the decision of Master Clark, as embodied in the order of 4th April 2018, whereby the Master dismissed the claim for rectification against the Fourth Defendants. That however is only speculation on my part, and my speculation may be wrong. I am in no position to decide the question of whether there was such a decision in the present case and, if so, what it was. I have heard no argument on what is meant by the reference to "a decision" in paragraph 1(3), and I do not know what issues might arise between the Estate and the CLR in this respect. This is of course why it is so important that a pleaded claim sets out a claimant's case on all the elements which are required to establish that claim. If this requirement is not observed, the court is left to guess at what the issues may be on a particular element of the claim, which in turn hinders effective case management and determination of that claim.

248. It seems to me therefore that the fourth ground relied upon by the CLR is established. The Amended Particulars are required to plead, but do not plead an essential element of the claim to an indemnity; namely the decision referred to in paragraph 1(3) of Schedule 8 which is a pre-condition to the indemnity claim.

249. In summary therefore, and so far as the claim for an indemnity is concerned, I conclude that the first three grounds, relied upon by the CLR in support of the Application, fail. I conclude that the fourth ground is established. I will consider the consequences of these conclusions for the Application of the CLR after I have dealt with the Application of the Bank.

250. For the sake of completeness it seems to me that the claim for rectification, so far as it may be maintained against the CLR or any other Defendant to the action, should formally be dismissed. In the light of the decision of Master Clark on the claim for rectification against the Fourth Defendants, the claim for rectification clearly has no prospect of success, so far as maintained against any other Defendant to the action, and should be dismissed.

(2) The Application of the Bank

251. The Amended Particulars of Claim identify, by the use of headings, the specific claims made against certain of the Defendants. This is not however the position with the Bank. The claims against the Bank are not separately identified in the Amended Particulars of Claim, and the prayer for relief only separates out the claims for damages against, respectively, LDS and Rees Page. The claim for indemnity is clearly only available against the CLR, which leaves the claim for rectification of the register, and a claim for a declaration in the following terms:

"1. A Declaration that what purports to be the Claimant's Deceased's signature [on] the 2010 Transfer is a forgery."

252. Given that I have concluded that the claim for rectification now falls to be dismissed, this leaves, as against the Bank, only the claim for the declaration.

253. In relation to this claim Mr. Allcock argued that it should be struck out, as an abuse of the process of the court, on the basis that the claim for a declaration served no useful purpose, as between the Estate and the Bank. As Mr. Allcock explained, once the claim for rectification had been dismissed, as against the Fourth Defendants, there was no need for the declaration against the Bank. There was no need to bind the Bank into a decision that the signature on the 2010 TR1 was forged because, with the rectification claim gone, there was no prospect of the transfer of the Property to the Fourth Defendants being reversed, or of the Original Charge being reinstated. Mr. Allcock drew my attention to *The Bank of New York Mellon v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), in which Marcus Smith J explained, at [21], the matters to be taken into account in a decision by the court as to whether to exercise its discretion to make a declaration. Prominent amongst these was the question of whether the relevant declaration sought would serve any useful purpose.

254. If one concentrates solely upon the Amended Particulars of Claim, it seems to me that Mr. Allcock is right in his argument. I cannot see what useful purpose would be served by the declaration, now that the claim for rectification is no longer viable. It seems to me that allowing the claim for this declaration, in isolation, to proceed against the Bank would be an abuse of process, rendering it appropriate to strike out the claim for the declaration pursuant to the court's powers under CPR 3.4(2)(b) and/or pursuant to the inherent jurisdiction of the court.

255. Mr. Brown did not particularly oppose this argument. This was because the real battleground between the Estate and the Bank lay elsewhere, in relation to the question of whether the Estate's claim against the Bank could be saved on the basis that there would be a re-amendment of the Estate's case against the Bank. Mr. Brown's essential case was that, in due course, either at the CMC in the action or following disclosure, there would be such a re-amendment, once the Estate had had the opportunity to establish the factual position in relation to the question of whether or not the Original Charge was redeemed in the 2008 Transaction. This was of course consistent with Mr. Brown's stance, on the question of re-amendment, in relation to the other claims challenged in the Appeal and the Application. Re-amendment would come in due course, and would not necessarily be in the terms of the RPOC.

256. So far as the RPOC are concerned, there is a distinct section of the RPOC which contains a claim pleaded against the Bank, in paragraphs 21-24. The claim is pleaded in paragraphs 21 and 22, in the following terms:

"21. Wrongly, the Bank has demanded and continues to demand payment from the Deceased and the Claimant pursuant to the redeemed Argyle Road Mortgage.

22. Further:

22.1. The Bank has purported to charge interest upon the alleged outstanding debt under the Argyle Road Mortgage without any contractual right to do so following redemption;

22.2. The Bank has purported to aggregate the purported outstanding sum under the Argyle Road mortgage with the Inglis Road Mortgage (contrary to the terms of the Inglis Road Mortgage and despite the redemption of the Argyle Road Mortgage);

22.3. The Bank has purported to charge interest on the Inglis Road Mortgage by reference to purported arrears on the Argyle Road Mortgage without any contractual right to do so (there being no Argyle Road Mortgage following redemption, and contrary to the terms of the Inglis Road Mortgage);

22.4. The effect of the Bank's actions as summarised herein is to result in arrears arising under the Inglis Road Mortgage, which, but for the Bank's wrongful acts in breach of contract would not have arisen;

22.5. The Bank has purported to claim possession of the Inglis Road Property by reason of the aforesaid arrears;

22.6. The Bank has no entitlement to possession as the said arrears are not valid in law."

257.Paragraph 23 then sets out a series of declarations sought, the first of which is a declaration that the Original Charge was redeemed by the Deceased on or around 10th March 2008. There is then the following claim for relief in paragraph 24:

"24. Further, the Claimant claims an account and/or inquiry into all payments made by the Deceased and/or Claimant and all charges and/or demands levied by the Bank pursuant to the Argyle Road Mortgage and/or Inglis Road Mortgage and/or damages to be assessed."

258.In the prayer to the RPOC, sub-paragraph (5) identifies the claim against the Bank as one for "Damages".

259.As I have already noted, Mr. Brown was unwilling to commit the Estate to the terms of the RPOC, so far as the future re-amendment of the claims in the action is concerned. Thus, the argument between the Estate and the Bank essentially boiled down to whether the Estate's claim against the Bank in the action could avoid strike out or summary dismissal on the basis that the claim would be subject to re-amendment in the future, once the Estate had better knowledge of what happened in the 2008 Transaction, in terms of redemption or non-redemption of the Original Charge.

260.Mr. Allcock protested that this approach was novel, unprincipled, and unfair. He accepted that, in principle, an application to strike out could be met with an application to amend the relevant statement of case, which might sufficient to avoid the strike out, depending upon the terms of the amendment. In this acceptance Mr. Allcock was plainly correct. As Tugendhat J observed in *Kim v Park* [2011] EWHC 1781 (QB), at [40]:

"40. However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right. In para 19 of his Judgment the Master recorded that the Claimant had informed him that he already had witnesses. On 17 January 2011 the Claimant demonstrated that that was not wishful thinking, or a bluff, by submitting the statements that he did submit."

261.Mr. Allcock also pointed out however that, in the present case, there was no application to amend. Nor was there even a draft re-amendment in existence which could be the subject of an application to re-amend. All there was, in this respect, was an intention to re-amend, on terms which might or might not reflect the RPOC. Mr. Allcock drew my attention to cases in which this sort of approach to the conduct of litigation had been considered unacceptable; see the decision of Mr. Bompas QC (sitting as a Deputy Judge of the High Court) in *Spencer v Barclays Bank plc* (unreported 30th October 2009), at [34]-[36], see the decision of the Competition Appeal Tribunal in *Forrest Fresh Foods Ltd v Coca-Cola European Partners Great Britain Limited* [2021] CAT 29, at [26]-[32], and see the decision of Mr Recorder Klein (sitting as a Judge of the High Court) in *Newman v Clarke* [2016] EWHC 2959 (Ch), at [38] and [39] (distinguishing *Kim v Park*).

262. In answer to this case Mr. Brown submitted that the Estate did have at least an arguable claim against the Bank because, so he submitted, the Bank's position was the reverse of the CLR. The Bank was saying that the Original Charge had not been redeemed, while the CLR was saying that the Original Charge had been redeemed. As such, so Mr. Brown submitted, there was no basis for a strike out or summary dismissal of the Estate's claim against the Bank. The question of whether there was a redemption needed to go to trial.

263. As I have noted, the CLR's argument was that the Deceased had been paid the purchase monies in the 2008 Transaction not, or at least not necessarily that the Original Charge had been redeemed. This however misses the essential point. The central problem with Mr. Brown's argument is that there currently no viable pleaded claim against the Bank, nor any application to amend the Amended Particulars of Claim to plead a viable claim against the Bank, nor even any draft re-amendment which might form the basis of an application to re-amend. In this last respect the RPOC are disclaimed. As I have said, it is hard to avoid the impression that the Estate's reluctance to commit itself to the RPOC arises out of the problems this would have created for the Estate in the Appeal and in meeting the Application of the CLR.

264. It seems to me that it is not acceptable for the Estate to resist the Application of the Bank on the basis there will, at some unspecified point in the future, be a re-amendment to plead a viable claim against the Bank. I agree with the Bank that this is not an acceptable way for the claim against the Bank to be pursued. In particular, I accept the submission of Mr. Allcock that it would neither be feasible nor acceptable to try to conduct the case management conference in this action on the basis of a claim against the Bank which remained unpleaded.

265. In this context I reject the argument of Mr. Brown that it is not possible for the Estate to re-amend now to plead the claim which it says it has against the Bank. In his response to the Application of the CLR Mr. Brown cited authority which establishes that it is permissible for a party to plead claims on alternative and inconsistent factual bases. In *Binks v Securicor* [2003] 1 WLR 2557 the Court of Appeal accepted that the requirement in CPR Part 22 for a statement of truth in a statement of case did not exclude the possibility of a party pleading inconsistent factual alternatives; see Maurice Kay J at [8]. In the present case therefore it seems to me, at least in principle and all other things being equal, that it would have been open to the Estate to plead its case against the CLR on the factual hypothesis that the Original Charge was not redeemed (if this was a necessary element of the claim for an indemnity), and against the Bank on the alternative factual hypothesis that the Original Charge was redeemed.

266. This being so, the question arises as to what I should do, in relation to the Application of the Bank. As matters stand the remaining claim for a declaration against the Bank in the Amended Particulars of Claim serves no useful purpose, and should be struck out. So far as the Estate has a claim against the Bank on the factual hypothesis that the Original Charge was redeemed, that claim is not before the court, either by way of application to re-amend or by way of draft re-amendment which could be the subject of an application to re-amend.

267. As the question of what I should do is not an easy one and engages, at least potentially, the question of what I should do about the Application of the CLR, I will consider these two questions together, in the next section of this judgment.

(3) What order should be made on the Applications?

268.I start with the Application of the CLR. The CLR has established one of the grounds upon which it relied in support of the Application. The Amended Particulars are required to plead, but do not plead an essential element of the claim to an indemnity; namely the decision referred to in paragraph 1(3) of Schedule 8 which is a pre-condition to the indemnity claim. The other grounds upon which the Application was made failed.

269.What this means is that the claim for an indemnity pleaded in the Amended Particulars of Claim falls to be struck out, unless it is appropriate to give the Estate an opportunity to retrieve the position.

270.It seems to me that the failure of the Estate to plead its case on the required decision, within the meaning of paragraph 1(3) of Schedule 8, is a defect which falls within the scope of the normal practice identified by Tugendhat J in *Kim v Park*, at [40]. By this I mean that the defect seems to me to be one which, in fairness, the Estate should be given the opportunity to put right, by an appropriate application to re-amend its case against the CLR. The situation does not seem to me to be one where it can be said that the defect cannot be made good. Mr. Trompeter's submission was that the required decision had not been pleaded or otherwise identified by the Estate. The submission was not that it was clear that there was no such decision upon which the Estate could rely, or that the defect was incapable of being made good.

271.I can see the argument that, in a situation where the Estate has failed to plead its case on the required decision, both prior to the Application and also in the face of the Application, and has also failed to apply to re-amend in order to plead its case on the required decision, the Estate should be denied the opportunity to retrieve the position. It might be said that it is not for the court to assist the Estate, if the Estate will not assist itself. It seems to me however that the situation is not as simple as this. The argument of the Estate, in the Appeal and the Applications, has been that it cannot be required, and should not be required, at this stage, to re-amend its case, and that re-amendment should wait. I have firmly rejected that argument. Given this position, it seems to me that it would be wrong not to follow through the logic of my decision, which is that if the Estate wishes to re-amend to save its claim for an indemnity against the CLR, it should do so now. As such, I think that *Kim v Park* applies, and that the Estate should be given the opportunity to correct the defect in the pleading of its case against the CLR.

272.What I have in mind, subject to the drafting of the appropriate order, is a form of unless order, which will provide for the claim for an indemnity against the CLR in this action to be struck out unless (i) within a certain period of time the Estate applies to re-amend the Amended Particulars of Claim in order to put right the defect in the pleading which I have identified, and (ii) thereafter permission is granted, on the application, for a re-amendment which puts right the defect.

273.I therefore conclude that the order which should be made on the Application of the CLR is an order striking out the claim for an indemnity, but on the conditional terms outlined in my previous paragraph.

274.I then turn to the Application of the Bank. The question which arises is whether the Estate should be granted a similar opportunity to retrieve its case against the Bank.

275.This question is much more difficult to answer. In the case of the claim for an indemnity against the CLR there is a viable pleaded claim, but for the absence of a pleaded case on the required decision. It is not unreasonable, as I have decided, to give the Estate the opportunity to retrieve the position. In the case of the Bank the Estate starts some way further back. There is no viable pleaded claim against the Bank in the Amended Particulars of Claim. Nor is there is any clear identification of

what a viable pleaded claim would look like. There is only the claim set out in the RPOC, which the Estate has declined to identify as its proposed re-amended claim against the Bank.

276. Given this position, there is considerable force in the argument, advanced by Mr. Allcock, that the Estate has now run out of road, and should not be given any opportunity to try to retrieve the position.

277. I have however come to the conclusion, in the unusual circumstances of this case, that the Estate should be given a final opportunity to retrieve the position as against the Bank. I have reached this conclusion for essentially the following three reasons.

278. First, there is the point which I have already made, in the context of the Application of the CLR. As I have said, the argument of the Estate, in the Appeal and the Applications, has been that it cannot be required, and should not be required, at this stage, to re-amend its case, and that re-amendment should wait. I have firmly rejected that argument. If the Estate wishes to re-amend to put a re-amended case against the Bank, it should do so now. In that sense the Estate has now run out of road. Any re-amendment cannot be further deferred. There is however logic in the argument that, with the Estate in this position, the Estate should be allowed a final opportunity to re-amend in order to put its case against the Bank.

279. Second, and this seems to me a point of distinction between the present case and cases such as Forrest Fresh Foods, Spencer, and Newman, the present case is not one where the case which the Estate wishes to put against the Bank is unknown, or obviously hopeless. In this context it seems to me that it is legitimate to take the RPOC into account, as a document which, at least, shows the likely nature of the re-amended claim against the Bank. With due respect to those responsible for the RPOC, I am bound to say that the re-amended case pleaded against the Bank is somewhat deficient in setting out clearly the causes of action against the Bank, and how it is that the Estate comes to have a right to damages against the Bank. Nevertheless it is apparent from the relevant paragraphs of the RPOC (which I have quoted above) that the Estate is asserting that the Original Charge was redeemed and that, for that reason, the Bank has charged interest, claimed arrears, aggregated the lending secured by the Original Charge and the charge on 35 Inglis Road, and pursued possession proceedings without having had the rights to do so. The only cause of action which I can see identified, at least in express terms, in paragraph 22 of the RPOC is breach of contract. It strikes me that there might be other causes of action, on the hypothesis that the Original Charge was redeemed. By way of example there might be a claim or claims in restitution. The relevant point is this. The RPOC do disclose a potentially (I put the matter no higher) viable claim against the Bank.

280. Mr. Allcock sought, by various arguments, to demonstrate that any claim which could be discerned from the RPOC was doomed to fail in any event. Mr. Allcock pointed to the fact that the RPOC were internally inconsistent, in the sense that they pleaded a claim against the Bank on the basis that the Original Charge had been redeemed, while pleading claims against the other Defendants which depended upon the factual hypothesis that the Original Charge had not been redeemed. I accept this point, as the RPOC are currently drafted but, as I have explained, it seems to me that the factual inconsistency in the claims against the CLR and the Bank could be managed by a pleading of the claims on alternative factual bases, in accordance with what was said to be acceptable in *Binks v Securicor*.

281. Mr. Allcock also pointed to the conduct of the Deceased and the Estate since 2008, in their dealings with the Bank, which had all been on the basis that the Original Charge was not redeemed, including the compensation which the Deceased had received in respect of the 2008 Transaction. He reiterated the arguments of his instructing solicitors, when first presented with the RPOC, that a

claim against the Bank on the basis that the Original Charge had been redeemed was not open to the Estate, given the past history of the case and given, in particular, the basis on which the possession proceedings in respect of 35 Inglis Road had been conducted. Arguments of this kind may or may not be a good answer to a claim based on what is drafted in the RPOC. It seems to me however that I am not in a position, hearing the Application of the Bank, safely to conclude that the Estate cannot make a claim against the Bank on the basis that the Original Charge was redeemed.

282.Mr. Allcock also argued that the indebtedness of the Estate to the Bank was such that any claim made by the Estate against the Bank would be pointless, in the sense that it would not be capable of generating a sum sufficient to equal or overtop the Estate's indebtedness to the Bank. Again however, I am not in a position, hearing the Application of the Bank, to make a decision on whether this argument is correct. Even if it was, it would not necessarily follow that the Estate's claim against the Bank was incapable of pursuit.

283.In summary on my second reason, I can see a potentially viable claim against the Bank which could be the subject of an application to re-amend the Estate's case against the Bank, assuming such application is made now, and not at some indeterminate point in the future.

284.Third, I think that it is important to keep in mind that the hearing of the Applications brought out a distinct difference between the CLR and the Bank. The CLR's position is that the Deceased was paid in the 2008 Transaction. The question of whether that is right is plainly bound up with, or at least related to the question of whether the Original Charge was redeemed in the 2008 Transaction. The Bank's position is that the Original Charge was not redeemed. The order which I have decided to make on the Application of the CLR gives the Estate the opportunity to save its claim for an indemnity against the CLR, and to pursue that claim to a trial. If that happens, a key question at the trial, if not the key question will be what happened to the purchase monies once they came into the hands of FLP. That is a question in which the Bank also has a substantial interest. It strikes me that it would be unsatisfactory if the question came before a court for trial without the Bank being involved in the trial. In this context it does seem to me that Iliffe has some relevance. The redemption/non-redemption question is one in which both the CLR and the Bank are substantially interested. The position is not the same as it is in the Appeal, where the question of whether a duty of care was owned by either firm of solicitors does not overlap with the claims against the other Defendants. In summary, it seems to me that the mutual interest of the CLR and the Bank in the redemption/non-redemption question provides an additional reason for keeping the Bank in the action, if the Estate can obtain permission, now, to put a re-amended case against the Bank.

285.I recognise that my decision to give the Estate a final opportunity to retrieve the position may be said to be an exceptional one. I have considerable sympathy for the Bank's complaints about the conduct of the Estate, in relation to the proposed re-amendment of its case. The giving of a final opportunity to the Estate to retrieve the position may be said to lie at the limit of what is permissible, in terms of the practice of the courts when dealing with strike out applications. The Estate may be said to have been lucky to escape from a simple strike out of its case against the Bank. All that said, it seems to me that the decision on what to do on a strike out application is necessarily sensitive to all the facts and circumstances of the relevant case. In the unusual circumstances of the present case, and considering and balancing all the relevant arguments and factors, I have come to the conclusion that the Estate should have a final opportunity to retrieve the position, in terms of its case against the Bank.

286. What I have in mind, subject to the drafting of the appropriate order, is a form of unless order, similar to that which I have in mind for the Application of the CLR. The order will provide for the existing claim against the Bank in this action to be struck out unless (i) within a certain period of time the Estate applies to re-amend the Amended Particulars of Claim in order to plead its re-amended claim against the Bank, and (ii) thereafter permission is granted, on the application, for a re-amendment which pleads such re-amended claim against the Bank.

287. I therefore conclude that the order which should be made on the Application of the Bank is an order striking out the existing claim against the Bank, but on the conditional terms outlined in my previous paragraph.

Conclusions

288. The outcome of the Appeal is as follows:

(1) So far as the Appeal is concerned with the claim against LDS, the Appeal is dismissed. For the avoidance of any doubt, this dismissal includes the dismissal of the Appeal in respect of the claim against Mr. Kan personally.

(2) So far as the Appeal is concerned with the claim against Rees Page, the Appeal is dismissed.

(3) The costs appeal is dismissed.

(4) I assume that a further consequence of the dismissal of the Appeal is that the additional claim made by the CLR, against LDS and Rees Page, falls away.

(5) The need for the correction of the name in which LDS (here not including Mr. Kan) has been sued does not arise.

289. The outcome of the Applications is as follows:

(1) The claim for rectification of the register, so far as it continues in existence against any of the remaining Defendants in the action, is dismissed.

(2) The claim for an indemnity against the CLR will be struck out unless (i) within a certain period of time the Estate applies to re-amend the Amended Particulars of Claim in order to put right the defect in the pleading which I have identified, and (ii) thereafter permission is granted, on the application, for a re-amendment which puts right the defect.

(3) The existing claim against the Bank will be struck out unless (i) within a certain period of time the Estate applies to re-amend the Amended Particulars of Claim in order to plead its re-amended claim against the Bank, and (ii) thereafter permission is granted, on the application, for a re-amendment which pleads such re-amended claim against the Bank.

290. I will hear the parties, at a separate hearing, on the terms of the order (including costs) which I should make consequential upon this judgment.

291. In relation to the terms of the orders to be made on the Applications, and by way of guidance to the parties, I would expect the period of time within which the Estate would be required to make application for permission to re-amend to be a short one. It is reasonable to assume that at least some of the work of preparing the draft of the Re-Amended Particulars of Claim, to be attached to the application to re-amend, has already been done in the drafting of the RPOC. Subject to hearing any argument on this question, I have in mind a period of no longer than 28 days.

292. The parties are encouraged to agree as much as possible between themselves, as to the terms of the order to be made. I will hear the parties separately on any terms which remain in dispute.