Neutral Citation Number: [2024]EWHC 187 (Ch)

Case No: PT-2022-000312

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st day of February 2024

Before:

Deputy Master Rhys

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Between:

(1) John Baylis **(2) Elena Kreuder**	**Claimants**
- and -	
(1) Syed Ali Haider **(2) PG Solicitors (t/a Edward Marshall Solicitors) (a firm)** **(3) Together Commercial Finance Limited**	**Defendants**

Mr Barnaby Hope (instructed by Boys & Maughan) for the Claimants
Mr George Symes (instructed by Santers Solicitors) for the 1st Defendant
Mr John Beresford (instructed by DAC Beachcroft LLP) for the 3rd Defendant

Hearing dates: 4,5,6,7 & 8 December 2023

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APPROVED JUDGMENT

Introduction

1. On 12th April 2022 the Claimants issued proceedings against three Defendants – an individual, Mr Syed Ali Haider ("Mr.Haider"); a firm of solicitors with the trading name Edward Marshall Solicitors ("Edward Marshall"); and a commercial lender known as Together Commercial Finance Ltd ("Together"). The claim concerns the sale or purported sale of the property known as 19 Bromstone Road, Broadstairs, Kent CT10 2HJ ("the Property"), of which the Claimants had been registered as joint proprietors (under title number K81240) until the events that give rise to this claim. It is and was their family home. On 9th April 2021 Mr Haider became registered as proprietor of the Property in their place, pursuant to a Land Registry transfer in form TR1, dated 19th December 2019 ("the TR1"). The Claimants seek to set aside the transaction with Mr Haider, on the grounds of *non est factum* or mistake, and rectify the register pursuant to Sch.4 of the Land Registration Act 2002 ("LRA 2002") so as to reinstate themselves as proprietors. They have an alternative claim under the Financial Services and Markets Act 2000 ("FSMA 2000"). Depending on the outcome of their primary claims they also raise issues of unjust enrichment. Edward Marshall, the Second Defendants, were the solicitors retained by Claimants in the impugned transaction. Edward Marshall is a trading name of PG Solicitors, a practice whose principals were a Mr Prince and a Mr Goba. The Claimants seek damages against this firm for negligence and/or breach of fiduciary duty and various accounts. In November 2021 the Solicitors Regulation Authority intervened in the practice, and ultimately some of its partners were struck off on various grounds including offences of dishonesty. The firm no longer exists. Although indemnity insurers initially instructed solicitors, and filed a Defence, they have withdrawn from the proceedings and disclaimed liability. The former partners in the firm have taken no part in these proceedings, although they have been served. The Third Defendant, Together, provided a loan to Mr Haider at the time of his purchase, and it has a Legal Charge ("the Charge") over the Property as security. The claim against Together is for alteration of the register under Sch.4 LRA 2002, consequential upon relief being granted against Mr Haider.

2. I heard this case over a period of 5 days. The Claimants were represented by Mr Barnaby Hope, Mr Haider by Mr George Symes, and Together by Mr John Beresford, all of Counsel. As I have mentioned, the Second Defendants have not participated in the proceedings since the withdrawal of the indemnity insurers' solicitors in March 2023. No partner in the firm has given a witness statement. I heard oral evidence from Mr Baylis, Ms Kreuder, Mr Haider, a Ms Toni Armstrong, a former employee of Edward Marshall[1], and Mr Graham Eldred, an insolvency consultant, who had been retained by the Claimants in 2019. All the witnesses apart from Mr Eldred had made witness statements, on which they were cross-examined. Mr Eldred had declined to provide a statement and was the subject of a witness summons issued by Together. In the absence of a witness statement, Mr Beresford examined him in chief, and he was then cross-examined by Mr Hope and Mr Symes, in that order.

3. The evidence in this case includes a substantial number of documents, largely in the form of emails, which were generated as the transaction progressed. Although the documentation is not comprehensive, it does provide an invaluable real time

[1] And current employee of Boys & Maugham, the solicitors who are acting for the Claimants in this Claim

commentary on the material events. The witnesses, particularly Mr Baylis and Mr Eldred, have of course given their oral evidence in which they seek to explain the meaning and significance of these events, and to put their own gloss on the documentation. I shall consider this evidence, and my assessment of the witnesses, in due course. For present purposes, however, I shall attempt to provide an account of the events leading up to the execution of the TR1, and the background to it, largely by reference to the documents themselves, or by reference to facts and events which are agreed or at least uncontroversial.

The background – bankruptcy and the attempts to refinance July to October 2019

4. On 14th September 2017 Mr Baylis was made the subject of a bankruptcy order in the Canterbury County Court. His liabilities were in the region of £162,151, the greater part being sums owed to HMRC by way of tax, interest and penalties. His principal asset was his half share in the Property. Mr Baylis's trustee in bankruptcy, Ms Adelle Firestone ("the Trustee"), was appointed on 26th June 2018. On 29th October 2018 she made an application to the Canterbury County Court, to which the Claimants were Respondents, for a declaration as to her interest in the Property. By Order dated 29th January 2019 it was declared that as Mr Baylis's trustee she was entitled to 50% of the beneficial interest in the Property. By para. 1 of the order it was ordered that unless Mr Baylis paid his debts in full by 29th April 2019, the Property would be sold forthwith, without further reference to the Court. By para.2 the Claimants were ordered to deliver vacant possession of the Property no later than 20th May 2019. The Trustee was to have conduct of the sale. In the event, Mr Baylis did not pay his debts by the due date, and the Claimants failed to deliver vacant possession. Accordingly, on 13th June 2019 the Trustee applied to the Court for a warrant of possession, and a notice of appointment with a bailiff was issued with a date of eviction of 11th July 2019.

5. The possession order and imminent eviction seems to have induced Mr Baylis to try and raise funds to discharge his liabilities. According to his evidence, by researching on the internet he became aware of a company called London Property Investments (UK) Ltd ("LPI"), trading as "LPI Emergency Finance". As the trading name suggests, LPI advertised itself as arranging finance with third-party lenders to assist financially distressed individuals (such as undischarged bankrupts). A meeting was arranged at an hotel in London between the Claimants and a Mr Stevens of LPI. At the same time and place as the meeting with Mr Stevens of LPI, another individual introduced himself to the Claimants. This was Mr Graham Eldred, an FCA-regulated insolvency consultant. An insolvency consultant is not the same as an Insolvency Practitioner. The consultant acts for the bankrupt, negotiates with the trustee with a view to reaching a settlement and ultimately obtaining an annulment or discharge of the bankruptcy. Mr Eldred told them that he had been asked by Edward Marshall to join the meeting to see if he could offer any assistance to Mr Baylis in connection with his bankruptcy. The Claimants thought that the meeting took place in late June, but the email from Mr Stevens to Mr Eldred dated 8th July suggest that the meeting took place on 9th July, which is the date given on the documents referred to below. Incidentally, although Mr Eldred was at pains to stress in his oral evidence that he had no involvement with the

funding exercise, the fact that he was in communication with Mr Stevens prior to the meeting in July 2019 suggests otherwise.

6. Crucially, by no later than 9th July 2019 the Claimants had signed a number of documents in favour of LPI. First, an "*Irrevocable Fee Agreement*", being an agreement to pay LPI's fees, and second a "*Restriction Entry Consent",* being an agreement that LPI could enter a restriction against the title to the Property to secure payment of the agreed fees. They also signed a document described as "*Emergency Funding and Property Fee Sale Agreement",* whereby the Claimants agreed to pay (a) all outstanding fees owed to LPI whether or not they proceeded with the funders introduced by LPI, and (b) an agreement that *"should I/we ever need to sell our above named property after LPI have been appointed …. I/we accept and agree that I/we are still fully liable to pay LPI the fully irrevocable fee of 5% plus VAT of the sale contract price."* On or around the same date the Claimants also signed a document authorising Edward Marshall to act on their behalf in the proposed transaction. At the meeting, it appears that Mr Stevens informed the Claimants that LPI would be able to arrange third party funding to allow Mr Baylis to pay off his bankruptcy debts in full. On this occasion, and certainly no later than 9th July 2019, Mr Baylis signed two more documents. First, an agreement to retain Mr Eldred as his consultant, and to pay his fees, and secondly an "*Authority to Act",* whereby he confirmed that "*Graham Eldred has my/or full authority to act on my/our behalf."*

7. On 8th July Mr Eldred wrote to the Trustee, introducing himself, and informing her that he was due to meet Mr Baylis "*tomorrow afternoon*". He also enclosed "*the Authority to Act supplied to LPI FINANCE*" and asks that they could have a discussion "*with a view to deferring the repossession listed for Thursday…".* On 9th July he further wrote to the Trustee: *"Further to our conversation yesterday I have now met the debtor and his partner (Authority to Act attached) together with Mr Stevens from LPI. As a result it has now been agreed that Mrs Kreuder would like to purchase your beneficial interest in 19 Bromstone Road and the necessary finance has been approved subject only to valuation (Letter attached). In light of this, I would be grateful if you would agree to a suspension of the Warrant for 28 days to enable agreement of price and payment in line with the letter."* The enclosed letter appears to be dated 8th July and sent by Azure Mortgage & Asset Management Services Ltd, and offers Ms Kreuder a bridging loan. It can be inferred that LPI had effected the introduction. On 10th July 2019 LPI registered an agreed restriction at HM Land Registry against the Property's title, to secure its fees and other payments pursuant to the Irrevocable Fee Agreement. Execution of the possession order – due to take place on 11th July – was stayed by agreement with the Trustee, to allow time for Ms Kreuder to buy out the Trustee's interest in the Property.

8. For reasons which are unknown, the proposed purchase by Ms Kreuder was not taken any further. Instead, LPI introduced the Claimants to another lender, Gemini Finance Limited ("Gemini"). On 22nd July Gemini issued a "*Decision in Principle*" which records a proposed loan of £347,000 to Ms Kreuder alone, to be secured on the Property, for a term of 6 months. Ms Kreuder's address is given as "*38 Beach Walk, Whitstable, Kent CT5 2BP".* On 29th July MSB Solicitors, acting for Gemini, emailed Edward Marshall and asked them to confirm that they acted for the proposed borrower. It was not until 10th September that Edward Marshall confirmed that they acted for Ms Kreuder. It is apparent from the documents provided by

Gemini, and the responses to the MSB's "*Enquiries and Instructions for a Refinance*" (sent to Edward Marshall on 11th September) that: (a) the loan was stated to be for the purposes of Ms Kreuder's business (so that there was no protection under FSMA 2000) [113]; (b) Ms Kreuder represented (through Edward Marshall) that she "*does not and will not reside at the property*"; (c) she and Mr Baylis signed a form ("*Disclosable Overriding Interests*") stating that there was no-one "*in actual occupation of the property with an interest in the property";* (d) Ms Kreuder's address in all the documents was consistently given as "*38 Beach Walk, Whitstable, Kent CT5 2BP";* (e) Ms Kreuder's Halifax bank statement for July 2019 is included in Edward Marshall's files, as part of her ID documentation which was sent to MSB (see the emails at pp 37 and 38 of the Supplemental Bundle) – her address had been updated on 21st July 2019 to give the Whitstable address. The Gemini loan was a buy to let mortgage, although it is clear from the Claimants' evidence that it was never their intention to move out of the Property.

9. No doubt due to the fact that Edward Marshall did not respond to Gemini's solicitors until 10th September, the Gemini transaction had not completed within the timeframe given by Mr Eldred to the Trustee. Through her solicitors the Trustee applied to Court for and obtained another warrant for possession of the Property, to be executed on 12th September. Mr Eldred had asked the Trustee for a further stay of the eviction on the basis that the refinance was imminent, but the Trustee had refused. In the event a hearing took place on 12th September at which the Claimants (in person) sought a further stay, which was opposed by the Trustee. At this hearing the Trustee's Counsel informed the Judge that the Claimants had told them that they had a house in Whitstable so they would not be prejudiced if the possession order were executed. Mr Baylis was present in court when this was said, and in his evidence says that he told the Judge that it was untrue. In the event the Court adjourned the hearing to 20th September and required the Claimants to file evidence of a mortgage offer by that date. They did not do so, but on 20th September the Court nevertheless gave the Claimants further time to file evidence that funds were available and in the meantime execution of the warrant was stayed.

10. On 22nd October 2019 MSB sent Gemini's signed counterpart of the Legal Charge and Facility Agreement to Robert Jones of Edward Marshall, who was the fee earner instructed on Ms Kreuder's behalf. By this time, MSB had been provided with the office copy entries relating to the Property, from which of course it was apparent that Mr Baylis was a co-owner. On 23rd October 2019 MSB asked Mr Jones *"whether it is Elena Kreuder's intention to buy John Bayliss out of the property with this refinance? If so, can you please let us have a copy of the transfer in this regard please."* Since Mr Baylis was a joint owner of the Property, and it was proposed that the loan would be provided to Ms Kreuder alone, and that she alone would execute the Legal Charge, necessarily this transfer would be required. There was then a further exchange between Mr Jones and MSB, in which Mr Jones indicated that there would be a transfer of the half share, at a consideration of £230,700, "*and this is the figure we propose to put in the TR1*". This was the sum required by the Trustee to permit the transaction to proceed. The Trustee had registered a protective notice against the title to the Property on 23rd October 2019, which took priority to Gemini's priority period. Included in Edward Marshall's file is a draft TR1, which has been executed by the Claimants and witnessed by Mr Eldred, whereby Mr Baylis purported to sell his half share to Ms Kreuder at a price

of £230,700. This was no doubt prepared with a view to facilitating the Gemini transaction.

The background - November to December 2019 - the sale to Mr Haider

11. This was the position as at the end of October 2019. However, the Gemini buy-to-let mortgage did not proceed to completion. Instead, a wholly different transaction came about, whereby the Claimants sold or at least purported to sell the Property to Mr Haider at a price of £460,000. It is this transaction which forms the subject-matter of this claim. The critical events in this case occurred between 12th November and 19th December 2019.

12. I accept the evidence of the Claimants and Mr Eldred that they were invited to a meeting at the Gants Hill offices of Edward Marshall, which took place on 12th November 2019. In addition to the Claimants and Mr Eldred, there were present Mr Yawar Ali Shah ("Mr Shah") and another individual who was referred to as "Del" and is identifiable as Mr Ahdel Hussein. Mr Shah is a former barrister who in 2013 was convicted of conspiracy to defraud and disbarred in 2016. He appears to have controlled the firm of Edward Marshall despite not being a qualified solicitor. It is not known if Mr Hussein had any formal role within Edward Marshall. However, he does have an association with Mr Shah in a number of companies, and he is also associated with Mr Haider, in that he is a co-director of Delshaw & Higgins Ltd, through which accountancy services are provided. Delshaw & Higgins provided bookkeeping services to Edward Marshall. Mr Eldred knew Mr Shah (as "Ali") and had had prior dealings with him, but he was unknown to the Claimants.

13. In the course of this meeting, Mr Shah advised the Claimants that they should not proceed with the Gemini transaction, because Mr Stevens of LPI was dishonest and unreliable and could not be trusted. According to Mr Eldred, in his "Without Prejudice" letter to the Claimants' solicitors dated 24th February 2022, Mr Shah said that "*the LPI based mortgage offer would be impossible to settle subsequently due to the excessive fees and interest being charged and he then offered to arrange alternative finance with his colleague Del. This was initially going to be via a limited company which I was informed by Ali would be Sharsons Ltd. I therefore emailed The Trustee on the 12th November 2019 confirming the intention of Sharsons Ltd to purchase the property within the next 20 days … I also confirmed this with Mr Baylis and Edward Marshalls while clarifying the subsequent buy back arrangement to be completed immediately on obtaining the Annulment. Ali assured us that Edward Marshalls would remove the LPI restriction prior to the buy back. It was necessary to do the transaction this way as Mr Baylis could not be party to a mortgage or any other borrowing whilst still an undischarged bankrupt and any discharge would still take several months to obtain, at the same time the funds paid to the Trustee needed to be secured on the property."* The reference to "Sharsons" must be a reference to a company known as "Shahsons Ltd" of which Mr Shah was then a director and the majority shareholder.

14. This meeting on 12th November is referred to in two contemporaneous emails, both from Mr Eldred. At 16.51 he emailed the Trustee and her solicitors (Mr Tim Symes of DMH Stallard) as follows: "*Further to our conversation of last week and my meetings today I can now confirm the following proposal: Sharsons Ltd have agreed*

to purchase 19 Bromstone Road and pay you the £230,700 required by the original Court Order in the next 20 days. I will immediately apply for Mr Baylis's annulment on the basis of Payment in Full having obtained the figure from Adelle and your holding the necessary funds. In order to save Ad Valorum fees we would be grateful if you would retain the surplus over the PiF in your client account to cover the trustee should any further claims arise prior to the Court hearing after which it can be returned to Mr Baylis All these transactions including the removal of the Restriction will be dealt with by Edward Marshalls….." "*The Restriction"* appears to refer to the restriction entered on the register in favour of LPI, which formed the subject of a complaint by the Trustee's solicitors[2]. Indeed, on 5th November they wrote to LPI alleging that the restriction was invalid and threatening to bring proceedings to have it removed. They give a deadline of 12th November for a response from LPI – this might conceivably explain why Mr Shah took the steps that he did. The Trustee's file, which has been disclosed, contains no response from LPI to the letter.

15. By way of further background, LPI was the subject of High Court proceedings brought by the Financial Conduct Authority in 2020, alleging that LPI were in breach of the Financial Services and Markets Act 2000 ("FSMA") in a number of respects. Judgment was given in November 2022. The following is taken from the FCA website:

> *"The judgment found that the defendants arranged high-interest, unaffordable bridging loans for consumers about to be evicted from their homes, taking huge fees. In some cases, the defendants bought homes for less than their value from owners who were facing repossession and then rented the properties back to these consumers. The defendants were not authorised to arrange mortgage contracts or sale and rent back agreements. The Judge described these breaches as 'exploitative of vulnerable individual consumers' and found that they were undertaken 'to obtain significant personal gain'. LPI will now be required to remove around 22 restrictions registered against individuals' properties. These restrictions were used by the defendants to force the individuals to pay exorbitant fees to LPI. If these were not paid, then the individual could not sell or re-mortgage their property. In some cases, this trapped individuals into high interest bridging loans."*

This was precisely the method adopted in relation to the Claimants. By the time that this judgment was issued, LPI's Restriction on the Property had been removed (by Mr Haider) and accordingly this is not one of the 22 restrictions that LPI was required to discharge.

16. At 16.57 on 12th November Mr Eldred emailed Mr Baylis and Edward Marshall as follows, forwarding to them the email he had sent at 16.51: *"Further to today I have now emailed Tim Symes and Adelle below. The plan is for Sharsons to raise £260,000 and pay the Trustee, stamp duty and fees etc Once the Annullment [sic] has been granted John and Elena will be able to borrow from Age Partnership and*

[2] *"For the record, I am extremely unhappy on behalf of my client that Mr Baylis as an undischarged bankrupt would take a step such as he had to frustrate the realisation of this asset by his trustee in bankruptcy for the benefit of his creditors, and fully reserve my client's position on that*." – email from Mr Symes sent at 11.09 on 4th [486]

in conjunction with John's pension and the surplus returned by Tim Symes they will be able to repay Sharsons and thereby get property back again. Sorry it seems so complex but no simpler option is available". Mr Eldred had effected the introduction to Age Partnership – who provide equity release funding – in late October 2019.

17. Nothing much appears to have happened following this meeting, save that Mr Eldred was in correspondence with the Trustee with a view to finalising the amount of Mr Baylis's indebtedness, and therefore the amount required to achieve a Payment in Full and consequent annulment. However, on 27th November the Trustee's solicitors wrote to both Claimants by special delivery letter (and email to Mr Baylis) to notify them that they had obtained a further order for the execution of the warrant for possession, namely 3rd December 2019. The letter records that any further application for a stay will be resisted. The letter refers to the abortive Gemini transaction and continues: "*A new proposal has been put to our client (on 12 November 2019) with a new apparent proposal lender, Sharsons Ltd, who have purportedly agreed to purchase the Property and pay our client the sum of £230,700 by 2 December 2019."* However, "*Our client holds no reasonable expectation that this latest promise of funds will in fact materialise, as it comes after numerous earlier promises which both our client, and subsequently the Court relied on in providing you with more time before enforcement of the Possession Order."*

18. On 28th November Edward Marshall emailed Mr Tim Symes as follows and copied in Mr Eldred: "*The buyers solicitors have informed us that they are in a position to exchange contracts tomorrow with a 5% deposit. Completion likely to be around the 18th of December. We have received your final redemption amount of £230,700. This will be forwarded to you on completion by way of payment in full to annul the bankruptcy. If the above is in order and exchange of contracts can take place tomorrow we would kindly require the eviction listed for the 3rd of December to be cancelled."* There then ensued further correspondence between Edward Marshall and DMH Stallard regarding the precise wording of an undertaking from Edward Marshall to pay over the proceeds of sale of the intended transaction. This correspondence, and the final agreed form of undertaking to be given by Edward Marshall, was all on the basis of a sale of the Property to a third party. The final form of undertaking was agreed at 3.25 pm on 2nd December – the day before the warrant of possession was due to be executed and was in these terms: *"Upon completion we, Edward Marshall Solicitors, hereby undertake to pay you, as acting solicitors for Mr Baylis's trustee in bankruptcy (Adelle Firestone), a sum of £230,7000 in consideration of the trustee in bankruptcy's share in the subject property 19 Bromstone Road, Broadstairs, CT10 2HJ. For completeness this undertaking is provided on the basis that once these monies are paid, you would remove your restriction from the property which will enable us to provide a clear title to the propose [sic] purchaser."*

19. At some point between 12th November and 18th December the identity of the buyer changed, from Shahsons Ltd to Mr Haider, the First Defendant. According to Mr Eldred's Without Prejudice letter referred to above, he was contacted by Mr Shah on or about 17th December and informed that Shahsons would not be proceeding with the purchase, but another client of his would take it over. However, in his oral evidence he said that he was informed some time in November. I shall consider this

issue when making my findings, although in one sense the timing is not of great significance.

20. According to the agreed Chronology, contracts between the Claimants and Mr Haider were exchanged on 29th November 2019. On 28th November at 14.50 Edward Marshall emailed TTS solicitors (who acted for Mr Haider) with a draft contract, office copy entries and EPC, with "*AST to follow*". At 16.56 on the same day Edward Marshall emailed an Assured Shorthold Tenancy dated 19th January 2019 whereby the Claimants had purported to let the Property to a Neil Jamierson for a period of 12 months at a rent of £1875 per month. Mr Baylis's initials appear as the landlord's signature, and the signature is witnessed[3]. A form of contract has been produced, initialled by TTS "*on authority of the Buyer",* which identifies the Claimants as vendors and Mr Haider as purchaser, at a price of £460,000, with a 5% deposit payable. The Property is tenanted, according to special condition 6. The document contains a number of uninitialled manuscript amendments, is dated 29th November 2019 and appears to record an exchange of contracts effected by Peter Bastiampillai (of TTS) and "*Del Petrou*"[4] of Edward Marshall under Law Society Formula B at 17.05. The sum of £23,500 was paid to Edward Marshall by TTS Solicitors on or around this date. In view of the subsequent documents referred to below, however, there is doubt as to the actual date of exchange, and I shall consider this point further when I come to my findings**.**

21. There then ensued a flurry of correspondence between 17th to 19th December 2019. This commences with a letter from TTS solicitors (who acted for Mr Haider, and also for the proposed mortgagees Together) to Edward Marshall (no reference given) dated 17th December, sent by email. The letter begins as follows: "*We confirm receipt of your recent correspondence enclosing draft contracts and supporting documentation and return one part of the Agreement duly amended, TR1 for your approval and requisitions on title."* In this letter TTS Solicitors raise a number of detailed Enquiries before Contract, and in another email sent at 16.02 they ask for the filed plan. Mr Jones of Edward Marshall replied to TTS Solicitors by email timed at 16.15: "*The TR1 is approved as drawn and we are having the same executed by our clients in readiness for completion. We will let you have replies to the Enquiries before Contract raised in the morning together with replies to Requisitions on Title*." Mr Jones forwarded the TTS letter to Mr Eldred at 16.31 and wrote: "*Please find attached letter from TTS and would ask you to get the client to reply to the highlighted enquiries by return. Also attached is TR1 for them to sign as indicated on the "where to sign attachment". If the clients have difficulties printing documentation they are welcome to call at our Broadstairs office anytime between 9 and 5 but excluding 1 to 2 and ask for Antoinette (Toni)."* The TR1 attached to this email included the name of the purchaser, Mr Haider, and a consideration of £460,000 in the relevant box. Mr Eldred forwarded this email with attachments to Mr Baylis at 16.57 on the same day. At 18.53 on 17th December Mr Eldred emailed both Edward Marshall and Mr Baylis with another attachment. The

[3] Mr Baylis denies that he signed this document.

[4] It is likely that this was Ahdel Hussein, referred to above.

email is headed "*Corrected TR1*" and the text reads: "*Here is corrected TR1 for signing*".

22. On the same day, for his part Mr Haider signed a Legal Charge over the Property in favour of Together, and also a secured loan agreement for a facility of £271,980 (to include fees etc.) TTS Solicitors provided a Report on Title to Together, also dated 17th December, which identified the purchase price of the Property as £460,000. In the box described as "*Balance (please confirm who holds the balance of funds and that it is made up of Borrower's own monies)"* the solicitors wrote: *"£195,000 We confirm that (i) we hold the balance of funds: – Yes (ii) the balance is made up of the Borrower's own monies: Yes*". The proposed completion date is given as 18th December 2019. On the last page of the Report on Title there is a section headed "Completion", which contains the following text – *"We now request you to pay us the Advance Amount and undertake that if you pay to us this sum ….. we shall use it only to effect the purchase of the Property by the Borrower .. by ensuring payment is made to the seller's solicitors bank account;"*

23. On 18th December at 9.37 Mr Eldred sent an email to Edward Marshall (which he forwarded to Mr Baylis) with replies to some of TTS Solicitors' Enquiries, concluding (in capital letters) as follows: "*WE NEED TO KNOW CONFIRMATION OF AGREED BUY BACK PRICE AND UNDERTAKING TO SELL INCLUDING COSTS TO ENSURE VIABILITY OF ROUTE".* This was the response from Edward Marshall sent at 10.59 on 19th December*: "The buy back arrangement is that it will be £20k on top of whatever expenses and disbursements are incurred by the buyer e.g stamp duty, fees etc. Mr Baylis and Ms Kreuder will pay the mortgage payments from completion till buy back. We must do the buy back within 3 months of completion on these terms. You must note that by doing the mortgage in his personal name , the buyer is saving Baylis/Kreuder around £15k in stamp duty and he is also losing his first time buyers discount which he'd never be able to use again. So the deal cannot be better for B & K."*

24. In the meantime, on the morning of 19th December, the Claimants had attended at the Broadstairs office of Edward Marshall, where they were seen by Toni Armstrong. It appears that they were given a TR1 form to sign, which for some reason was not identical to the form of TR1 which had been emailed to Mr Eldred (and forwarded to Mr Baylis) in that the consideration box had been left blank. Also, the address of the Property had been given as "*Broadstaires*" but this had been changed to "*Broadstairs*" in the signed TR1. It may be that this mistake had been corrected by Mr Eldred in the corrected TR1 which he sent to Edward Marshall and Mr Baylis late on the evening of the 17th December – I shall consider this point further below. In other respects it is the same in that Mr Haider is named as the purchaser, his address is given, and the "*limited title guarantee*" box has been ticked. At some point, the Claimants had been given a letter on Edward Marshall letterhead dated 19th December in this form: *"We hereby confirm that the TR1 being signed by you for the sale of the above property will be held strictly to your order until buy back terms have been agreed between yourselves and the purchaser and you authorise us in writing to complete the matter."* Mr Baylis said that this was given to them on the morning of 19th December by Ms Armstrong, but she did not recall doing so, but clearly at some point it must have come into the Claimants' possession. At 11.29 on 19th December Mr Eldred forwarded Edward Marshall's

email of 10.59 and wrote: "*Funds now available Give me a ring to discuss Graham*". At 11.59 on the same day Mr Eldred emailed Edward Marshall as follows*: "Spoke to client and OK to proceed."*

25. On this day, the sum of £437,000 was paid by TTS into Edward Marshall's client account, the deposit of £23,000 having already been paid on 29th November. This makes a total of £460,000, being the sale price provided by the TR1. Mr Haider's completion statement indicates that of the total purchase price, £273,000 was obtained by the secured borrowing from Together and the balance of £181,626.97 was payable by Mr Haider himself. The deposit of £23,000 had already been paid on 29th November. Of this sum £230,700 was eventually paid to DMH Stallard, the Trustee's solicitors, in discharge of Mr Baylis's bankruptcy liabilities and pursuant to the undertaking given by Edward Marshall on 2nd December 2019. The balance received by Edward Marshall was never paid to the Claimants, but some part of it was used to discharge the LPI Restriction (see below).

Events following completion on 19th December 2019

26. On 29th December TTS Solicitors wrote to Edward Marshall with a memorandum of exchange of contracts for sale on that day, at a price of £460,000, and another letter with the same date enclosing a copy of the signed contract. This provides for completion on 19th December 2019 – which date was of course now in the past. They requested the vendors' signed contract, but if it exists no such copy has been produced in the evidence, nor is it on either the TTS or Edward Marshall file. On 8th January 2020 Edward Marshall wrote to TTS Solicitors as follows: *"Following completion of this matter on 19th December last please find enclosed TR1".* On 15th January 2020 Edward Marshall emailed Mr Eldred as follows: "*Hi, need to pay the mortgage instalment. It's around £1,500 (roughly). Can we get this from John Baylis & Co. Please. Thanks*." This email (which formed part of a chain which included the email of 19th December setting out the agreement that the Claimants "*will pay the mortgage instalments from completion until buy back.")* was forwarded to Mr Baylis on 16th January 2020 with the text: "*Morning John Can we sort this out later today when I get back".* Until October 2020 Mr Baylis did indeed pay the sum of £1500 per month to Mr Elder, who remitted £1480 per month to Edward Marshall. It appears that he retained £20 out of the payment as a handling charge.

27. On 17th January 2020 Mr Baylis made an application to Court to annul the bankruptcy order, on the grounds that the liabilities had been paid in full. The application was supported by the Trustee, and both of them made witness statements in support. The Trustee's statement includes the following (at para 2): "*The Applicant's sole asset comprised an interest in a property being 19 Bromstone Road, Broadstairs Kent CT10 2HJ ("the Property"). The Property was sold on or about 19 December 2019 realising the sum of £230,700 for the benefit of the bankruptcy estate."*

28. As mentioned, Mr Baylis ceased to make the monthly payments of £1500 in October 2020. This led to a complaint from Mr Haider – see his email dated 17th December 2020 in which he says this: "*The amount required to redeem my mortgage with Together is made as follows… Total Redemption Figure as at 17/12/20 : £298,046.88. In addition I am owed 2 months mortgage repayments totalling*

£3,000. The original Agreement was for a term of 3 months and this has turned out to be 12 months and I therefore require in addition to the above the sum of £60,000." In April 2021 Mr Haider became registered as sole proprietor of the Property pursuant to the TR1 signed in December 2019. The delay in registration was attributable, in part, to the existence of the LPI Restriction which was only discharged in April 2021 upon payment (by Edward Marshall) of the sum of £53,500. It appears from subsequent correspondence between Mr Baylis and LPI's solicitors that this sum was in part based on the purchase price under the TR1 and was said to be payable under the terms of the onerous "*Emergency Funding and Property Fee Sale Agreement"* signed by Mr Baylis in July 2019. In November 2021 Edward Marshall was intervened in by Law Society. In December 2021 Haider sued for possession of the Property – which the Claimants still occupied – in Canterbury County Court, the claim being based on an alleged "*verbal common law tenancy"* commencing on 19th December 2019. The Claimants denied the existence of any tenancy and repeated their version of events. On 8th February 2022 Mr Haider discontinued the possession proceedings. On 9th March 2022 he issued fresh possession proceedings in the Thanet County Court, alleging that the Claimants were in possession of the Property pursuant to an AST and claiming possession of the Property on the grounds that they were in arrears of rent. The Claimants' defence (as set out in Mr Baylis's witness statement) was a repetition of the defence in the earlier claim. These High Court proceedings were issued on 12th April 2022. By a consent order made in May 2022, the second possession claim has been consolidated with the High Court claim. In effect it has been transferred to the High Court to be dealt within as part and parcel of this claim.

The Claimants' case

29. The Claimants' case, in a nutshell, is as follows. The Claimants contend that they never intended to sell the Property to Mr Haider. They say that they never met Mr Haider, but he was put forward by Mr Shah as a person who was prepared to make an unsecured loan to them sufficient to discharge the bankruptcy, for a premium of £20,000. They accept that they signed a TR1 which named Mr Haider as a purchaser, albeit that the document did not specify a consideration for the sale. Mr Baylis says that prior to 19th December Mr Eldred asked him to sign the TR1, because "*Mr Shah wanted to show the proposed lender that we were acting in good faith as Mr Shah had, apparently, been through this before and had been let down at the last moment and didn't want his time wasted again*." He says that he was unhappy with this, and therefore asked for and received the letter from Edward Marshall dated 19th December in these terms: *"We hereby confirm that the TR1 being signed by you for the sale of the above property will be held strictly to your order until buy back terms have ben agreed between yourselves and the purchaser and you authorise us in writing to complete the matter."* They say that they relied on the letter and Mr Eldred's explanation, and although they applied their signatures to the TR1 they never intended it to be effective and never authorised Edward Marshall to release the TR1 to Mr Haider's solicitors. They believed that they were going to receive an unsecured loan of £230,700 from Mr Haider sufficient to discharge Mr Baylis's liabilities and obtain an annulment of the bankruptcy. Once the annulment had been obtained, they would raise sufficient funds through an equity release scheme to repay Mr Haider, together with an additional £20,000, and that would be the end of the matter. They say that they had no idea that they had

effected a sale of the Property until a year after the event, and never received any additional consideration over and above the £230,700 paid to the Trustee. Importantly, they do not plead any allegation of fraud against Mr Haider, save for the following allegation[5] pleaded in support of their claim under FSMA 2000: "*The First Defendant took advantage of the Claimants and/or was otherwise involved (to one degree or another) in a suspicious and questionable association with the Second Defendant*."

The legal issues (as between the Claimants and Mr Haider)

30. Whether the transfer to Mr Haider (and the underlying contract):

    a. is void on the basis of *non est factum*. Mr Hope cites Emmett on Title at 3.008 and the leading case of Saunders v Anglia Building Society (aka Gallie v Lee) [1971] A.C.1004 HL. (see paras.18 to 19 of Mr Hope's Skeleton Argument ("the Skeleton").

    b. is void or voidable on the grounds that the parties were at cross-purposes, or on the basis of the Claimants' unilateral mistake. Mr Hope cites Emmet on Title at 3-001 to 3-008 in support. (see paras. 20 to 23 of the Skeleton).

    c. If void or voidable, should the Court exercise its power to alter or rectify the register pursuant to Sch.4 LRA 2002 and reinstate the Claimants as proprietors of the Property? (see paras. 32 to 35 of the Skeleton).

31. If the case under para.30 above ("the Primary Case") does not succeed:

    a. Whether the Claimants are entitled to restitution of the Property or its value? This is on the grounds that Mr Haider was unjustly enriched by acquiring the Property in circumstances where he only paid partial consideration (the £230,700) to the Claimants. As such, the Claimants say that they are entitled to a return of the Property by way of restitution, alternatively, damages representing its value. (see paras. 24 to 25 of the Skeleton).

    b. If any relief is awarded to the Claimants in respect of issues 30 (a) or (b) above, have the Claimants have been unjustly enriched and should they repay Mr Haider the £230,700 paid to the Trustee and/or the £53,500 paid to LPI to discharge the LPI restriction? (see paras. 26 to 27 of the Skeleton).

32. If the Claimants' primary case fails, they allege that:

    a. the sale contracts (and TR1) are unenforceable under s26 FSMA 2000. This potentially renders void any contract for a sale and lease-back arrangement, where the purchaser is acting in the course of a business. Even if Mr Haider was acting in that capacity, whether it would be just and equitable for the court to enforce under s28 FSMA 2000 and if so on what terms. (see paras. 28 to 29 of the Skeleton).

    b. Subject to the above, the Claimants are entitled to recover the monthly payments to Mr Haider, an indemnity in respect of prospective losses arising from

[5] See para.16.2.4 of the Reply and Defence to Counterclaim

Together's valid security (if determined as such) and/or the costs of the Possession Claim. (see paras. 30 to 31 of the Skeleton).

33. An additional issue, raised by the Court during the course of the hearing, concerns the mode of execution of the TR1, in that it is possible that the page signed by the Claimants was added to a different draft document. One possible effect would be to render the TR1 void ab initio, in accordance with the decision in R (Mercury) v HMRC [2008] EWHC 2721 (Admin). Further submissions on this point were sought from the parties, and a supplementary bundle of authorities was produced and referred to in closing. In this event, the Court's powers under Sch.4 LRA 2002 would be engaged.

Issues as between the Claimants and Edward Marshall

34. See paras.36 to 42 of the Skeleton:

    a. The scope of duty owed to them by Edward Marshall (the duty to exercise reasonable care and skill being admitted).

    b. Whether Edward Marshall breached its duty of care to the Claimants in the circumstances surrounding the execution of the TR1.

    c. If so, the extent of any losses taking into account the findings in the claims between the Claimants and Mr Haider.

Issues as between the Claimants and Together

35. See paras 44 to 50 of the Skeleton -

    a. Whether the Charge falls to be deleted as a mistake, or whether it continues to bind the Property even if the Court finds that the Claimants are entitled to be registered as proprietors as against Mr Haider. This requires consideration of the Court's powers to alter or rectify the register pursuant to Sch.4 LRA 2002.

    b. If the Charge continues to bind the Property, whether any rights enjoyed by the Claimants rank in priority to the Charge on the basis that they have at all material times been in actual occupation of the Property.

36. There might also be issues as between Mr Haider and Edward Marshall, depending on whether the Claimants' Primary Case succeeds.

The principal factual dispute

37. The Claimants' pleas of non est factum and unilateral mistake require the court to analyse the nature of the transaction between the Claimants and Mr Haider, the circumstances surrounding the execution of the TR1 and the mode of execution itself. The pleas based on FSMA 2000 also requires the same analysis, in order to

establish whether this was a regulated sale and rent back agreements within the meaning of Article 63J of the FSMA (Regulated Activities) Order 2001/544.

The evidence and the approach to it

38. Before I set out my findings, I shall make some preliminary observations on the evidence, and the way that the case has been presented.

    a. First, although disclosure has been inadequate in some respects, fortunately there is still available a substantial body of contemporaneous email correspondence that in my judgment provides a helpful cross-check on the oral evidence. There are gaps, however. It does not appear that either the TTS files or the Edward Marshall files are complete. Mr Haider's disclosure consisted of the TTS file and no more, which is surprising to say the least.

    b. Second, Edward Marshall as a firm has been closed down by the Law Society, and its partners have been struck off. They have failed to participate in these proceedings, notwithstanding that they have been served. Although a Defence was pleaded at a time when the firm's insurers were involved, they ceased to be so involved and therefore the firm itself gave no disclosure and the partners gave no evidence. Although the Edward Marshall file was disclosed, it appears incomplete in that, for example, there is no client care letter and not one attendance note.

    c. Third, Edward Marshall appears to have been controlled by a person who was not himself a qualified solicitor, namely Mr Yawar Ali Shah, a struck off barrister who had been convicted of mortgage fraud in 2013 and sentenced to prison. It is apparent from documents obtained from the Law Society that he controlled at least some of Edward Marshall's bank accounts and was present at the firm's offices on 12th November 2019 as per the evidence of Mr Baylis and Mr Eldred. It was Mr Shah who was instrumental in setting up the purported purchase of the Property, in the light of the meeting that took place on 12th November according to the evidence of the Claimants and Mr Eldred, which I accept in this respect. Mr Shah has not been called to give evidence by any party.

    d. Fourth, the documentation shows that the sale transaction was conducted in a most unconventional manner, on both sides.

    e. Fifth, in my judgment the events of June to December 2019 must be viewed in the context of the bankruptcy of Mr Baylis, and the Claimants' imminent loss of and eviction from the Property. It is evident that they were extremely anxious to find a way of avoiding this outcome – desperation might be a more accurate description. For example, the documents presented by LPI which Mr Baylis signed in July 2019 were onerous in the extreme – indeed extortionate as the FCA subsequently characterised them. The fact that Mr Baylis was prepared to sign the documents demonstrates the desperation of his position. He had no room for manoeuvre at this point. This was particularly the case by the end of November 2019, after the Trustee's letter sent on 27th November. It would have been clear to Mr Baylis and Mr Eldred that no further extensions of the eviction

would be possible, and the Claimants would, in the absence of an injection of funds, lose their house on 3rd December.

f. Sixth, the Claimants have throughout the proceedings, and at the hearing itself, made sustained attacks on the bona fides of Mr Haider. However, a perusal of the pleadings shows that the allegations made against him are nebulous in the extreme. It is put at its highest in the context of the FSMA 2000 claim, when it is pleaded that: "*The First Defendant took advantage of the Claimants and/or was otherwise involved (to one degree or another) in a suspicious and questionable association with the Second Defendant*". Whilst it is unclear exactly what this is intended to mean, it is clear that the Claimants are not alleging fraud against Mr Haider. However, considerable time and energy was expended at the hearing and in disclosure on seeking to establish a connection between Mr Shah and Mr Haider – as to which I shall make certain findings. However, as a matter of legal analysis, it is difficult to see how the Claimants' pleaded case against Mr Haider would be improved by establishing that connection.

g. Seventh, and on the other side of the coin, Mr Haider tried his utmost to distance himself from Mr Shah, denying that there was any meaningful connection between them. Even though the Claimants were able to demonstrate that they were associated as officers of a number of companies, he continued to deny the connection. Further connections emerged in cross-examination, for example that Mr Shah was the landlord of the premises occupied by Mr Haider's accountancy business. The evidence of Ms Armstrong was that Mr Haider was to all intents and purposes an Edward Marshall employee and acted as its bookkeeper. Mr Eldred and Ms Armstrong believed that Mr Haider was related to Mr Shah, and was possibly his son. Mr Haider did not in any way improve his defence to the claim by seeking to deny the connection. His reticence simply fuelled the flames of suspicion.

h. Finally, it must not be forgotten that the impugned transaction involves three parties, in that Together lent a substantial amount of money to Mr Haider, to fund the purchase of the Property, and he has signed a Legal Charge in their favour. Further, whilst the Claimants in particular have given evidence as to their subjective understanding of the critical documents**,** ultimately the case turns on the objective meaning and effect of the transaction documents, and not on any subjective interpretation.

39. In relation to the fact-finding exercise that I must undertake, Counsel both for the Claimants and Together have invited the court to adopt the approach explained by Leggatt J (as he then was) in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) at paras. 15 to 23, as follows:

"22. …the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical

scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Although this is not a commercial case in the way that the term would be understood in the Commercial Court, nevertheless the guidance is in my view no less useful in regard to a case of this nature. Fortunately, at the critical moments of the impugned transaction, there is available to the Court a body of documentation and correspondence which provides an objective cross-check on the witnesses' attempts to recollect the events of some four years ago, and their state of mind at that time. Furthermore, the parties' subjective intentions and beliefs when entering into a formal transaction are of secondary importance – the nature and effect of the transaction is to be derived primarily from the documents themselves.

40. As explained above, it is not the Claimants' case that they have been the victims of any fraud practiced by Mr Haider. However, it appeared to me that the Claimants intended to hint at fraud on the part of Mr Haider, without directly alleging it. I therefore have in mind that the burden of proving an allegation of fraud is a high one, and cogent evidence commensurate with the seriousness of the allegation is required. The correct approach is set out in paragraph 259 of Rix LJ's judgment in AIC Ltd v ITS Testing Services (The Kriti Palm) [2007] 1 Lloyd's Rep 555 (as cited by Mr Beresford in his skeleton argument).

The witnesses

41. My assessment of the witnesses is as follows:

    a. Mr Baylis. Mr Baylis is a forceful and confident individual, but presented as the classic case of a witness who has convinced himself that a certain version of events was correct and refused to deviate from that version in any respect. He was sure of his ground, sometimes interrupted Counsel and many of his replies strayed into advocacy of his own case. Although he was taken through a long series of emails and documents which clearly referred to a proposed sale of the Property, he constantly repeated the mantra that no sale was ever contemplated, and all he had ever agreed to was an unsecured loan. When asked to comment on the critical emails on 19th December 2019, he responded that he could not recall having seen them or having spoken to Mr Eldred to authorise the transaction. He was complicit in the fiction that the Claimants were not residing in the Property to facilitate the buy to let mortgage from Gemini but tried to pass the responsibility off on to Mr Stevens of LPI (see para.17 of his main witness statement) because he trusted him. Overall, I find myself unable to rely on his evidence save where it is corroborated by the documentation or other more reliable witnesses. Undoubtedly, the Claimants have suffered the great misfortune of having engaged with LPI, whose modus operandi was *'exploitative of vulnerable individual consumers'* and undertaken *'to obtain significant personal gain'*. At the same time they engaged a firm of solicitors whose conduct was such that the firm's principals have been struck off the Roll and the firm closed down. It is perhaps inevitable that Mr Baylis feels that he

has been the victim, even though the Claimants' situation is the result of their own decisions.

b. Ms Kreuder. To be fair to her, it is clear, and I think accepted on all sides, that she was only peripherally involved in the material events. She said that she left everything to Mr Baylis, and relied on what he told her. However, there were unsatisfactory aspects of her evidence. For example, she denied that certain signatures were hers when it suited her, when they were seemingly identical to others that she admitted. I do not think that her evidence is of any real assistance to the Court. Like Mr Baylis, she too was prepared to deceive the lender in the Gemini transaction.

c. Mr Haider. I also found Mr Haider to be an unsatisfactory witness. Quite apart from the inadequate disclosure to which I have already referred, he was not prepared to admit to the obvious and documented connection between himself and Mr Shah, and any admissions had to be dragged out of him in cross-examination. Although, as I pointed out during Counsels' closing submissions, having regard to the legal issues there was no real need to disguise the relationship, he was determined to obscure and conceal the fact that he did have a close connection to Mr Shah. Given that Mr Shah had been convicted of mortgage fraud in 2013, that is perhaps understandable. However, I have concluded that I cannot safely rely on his evidence save where it is clearly corroborated by an independent witness or contemporaneous documentation**.**

d. Mr Eldred. Mr Eldred was an engaging and personable witness, but one who manifestly found himself in an extremely difficult and delicate position. I think he was trying his best to assist the Claimants, for example by putting the most favourable gloss on the documents which are generally quite clear in their meaning. Some of his answers did not ring true – for example, he must have known that the references to the buyer incurring stamp duty referred to SDLT on a purchase, not on a mortgage. Overall, however, I found that his evidence could be relied on, save where he was obviously trying to place an untenable gloss on documents which spoke for themselves. I have also relied on the contents of the letter he wrote to the Claimant's solicitors on 24th February 2022. This appears to give an unvarnished account of the relevant events, without the tendency to fight Mr Baylis's corner which was evident during the course of his oral evidence.

e. Ms Armstrong**.** Her evidence did not take the matter very much farther. She was adamant that Mr Haider has a close connection to Mr Shah – she believed that he was a relative, possibly even Mr Shah's son – and spent a great deal of time working at or for Edward Marshall. I consider that her evidence was honest and straightforward, and despite now working for the Claimants' solicitors, she has no reason to lie.

Findings of fact

42. The Gemini transaction**.** I need make no findings with regard to the abortive Gemini transaction, save for the following. This was structured as a buy to let mortgage to Ms Kreuder alone, in the sum of £347,000. This proceeded a long way towards completion, until Mr Shah's intervention on 12th November 2019. Necessarily,

however, the loan application necessitated a misrepresentation to the lender. I have set out at paragraph 8 above the various documents emanating from the Claimants which misrepresented the nature of the transaction. It was never intended that the Claimants would vacate the Property, and there was no actual or proposed tenancy to a third party. It is in my judgment no accident that the address given for Ms Kreuder on the Gemini documentation is *"38 Beach Walk, Whitstable, Kent CT5 2BP"*. The Claimants sought to explain the various references to the Whitstable address as attributable to Mr Eldred who had, in effect, told them to lie. I do not accept this explanation. I find that the Claimants were perfectly well aware that this loan was based on the deception that Ms Kreuder would not be resident at the Property and that it would be let at a market rent. The Whitstable address was suggested to them by Mr Eldred and they made use of it. It may be noted that Ms Kreuder's address on the Halifax bank statement, tendered to Gemini's solicitors as part of her identification documents, had been updated on 21st July 2019 to show the Whitstable address. Clearly this must have been done by Ms Kreuder herself. This was not the only occasion when the Claimants – Mr Baylis in particular – sought to portray themselves as dupes, blindly following the advice of their advisers. The underlying reality was that they were (quite understandably) desperate to raise sufficient funds to obtain an annulment of the bankruptcy and to keep their home. They were faced by imminent eviction and they therefore were prepared to do whatever it took to secure funding.

43. The meeting on 12th November 2019**.** I find that this meeting took place at the offices of Edward Marshall in Gants Hill, and was attended by Mr Shah, Mr Ahdel Hussein (Mr Haider's business partner), the Claimants and Mr Eldred. I find that Mr Shah represented that he was acting as a member (of unspecified capacity) of Edward Marshall. He did advise the Claimants in no uncertain terms that they should not proceed with the Gemini transaction, and he used forceful and intemperate language to describe LPI. It is unknown what triggered this *volte-face* and for present purposes it matters not. It may be that Mr Shah realised that it could not proceed, since in late October 2019 Gemini (through their solicitors MSB) had raised the point that Mr Baylis would have to transfer his half share to Ms Kreuder if the transaction was to proceed. This was not a point which seems to have occurred to Edward Marshall prior to this. According to Mr Eldred's February 2022 letter, Mr Shah advised that "*the LPI based mortgage offer would be impossible to settle subsequently due to the excessive fees and interest being charged*" and that another method of raising funds was required. Of course, Mr Baylis had already signed the LPI documentation and was therefore liable to pay these "*excessive fees"* whether or not the Gemini transaction proceeded to completion.

44. Accordingly, at the meeting Mr Shah proposed a different form of transaction. The Claimants were adamant when giving their evidence that he proposed to them an unsecured loan from a client of his, a limited company known as Shahsons Ltd. However, Mr Eldred's evidence was very different. He said that "*My understanding was that money would be raised by a limited company, a client, and secured on the house, to be paid off after annulment… This was an alternative source of funding, there were conversations between him and Del [Hussein] – Sharsons would raise the funds, buying the Property and selling it back – for technical reasons it could not be done without security. Sale was said as a matter of fact by Mr Shah. They [the Claimants] accepted it – there was the threat of losing their home – this was a*

route out of the hole that had been LPI. There was mild fear and trepidation." When asked if an unsecured loan was ever mentioned, he said that no lender would possibly contemplate making an unsecured loan of £230,000 to a bankrupt. I find that the transaction proposed by Mr Shah at the meeting, and agreed to by the Claimants, took the form of a sale to Shahsons, funded or part funded by a loan to be secured on the Property. There was no mention or discussion of an unsecured loan. I reject the Claimants' evidence to the contrary.

45. Mr Eldred, in cross-examination by Mr Symes, went on to say that he never thought that the sale would complete. Although the transaction was expressed as a sale, that mechanism was designed to facilitate the necessary borrowing, rather than to lead to "*completion*" – by which, presumably, he meant registration. He said that the buyer "*was sitting on the TR1 – it would not be lodged. …. To be a sale it would have to complete. It would only occur if money not paid back – it was designed to facilitate loan – it was security*." It is difficult to see how this can have been his belief at the time. Given that, as I find, all parties knew that part of the consideration would be raised on mortgage from a third party lender, it would have been obvious to a professional such as Mr Eldred that the sale would have to be carried through to completion and registration. Incidentally, I reject Mr Eldred's evidence under cross-examination to the effect that he and the Claimants did not know that a third party lender would be providing funds to the buyer. These answers were quite inconsistent with the evidence he gave in chief, some of which is set out above, and is in any event it would have been obvious that secured funding was required. I find that the Claimants were well aware that the funds would be raised by the purchaser from a third party by way of mortgage secured on the Property, and that necessarily this meant that the purchaser would have to be the legal owner of the Property in order to grant security to the lender. Hence the Claimants' *"mild fear and trepidation"* at the proposal. However, they had no room for manoeuvre at this point and will have realised that they had no alternative but to adopt this proposal.

46. Furthermore, the Claimants, through Mr Eldred (their agent) and Edward Marshall, expressly represented to the Trustee that there was to be a sale of the Property: See Mr Eldred's email of 12th November: "*Sharsons Ltd have agreed to purchase 19 Bromstone Road and pay you the £230,700 required by the original Court Order in the next 20 days.",* and 28th November: "*The buyers solicitors have informed us that they are in a position to exchange contracts tomorrow with a 5% deposit. Completion likely to be around the 18th of December."* The undertaking given by Edward Marshall to the Trustee, which induced the Trustee to withdraw the eviction due on 3rd December, was expressly on the basis of a sale of the Property, to include the Trustee's 50% interest. Mr Eldred, Mr Baylis's agent, was intimately involved with the negotiations with the Trustee and her solicitors.

47. Although Mr Baylis insisted that he was kept in the dark for much of the time, I find that he was kept fully informed by Mr Eldred throughout the transaction. I accept Mr Eldred's evidence in this respect. Mr Baylis had of course specifically appointed Mr Eldred to act on his behalf as his agent, by the document of 9th July 2019. It is clear from the evidence that Mr Eldred took it upon himself to act as the principal

conduit between the Claimants and Edward Marshall, and the Trustee, and the Claimants were well aware of this.

48. I find, therefore, that the Claimants were made aware at the meeting on 12th November 2019 of the overall structure of the proposed transaction; namely, that it involved a sale of the Property, to be funded or part funded by a mortgage on the Property. At this stage, they were told that the buyer would be a limited company, Shahsons Ltd. This company was incorporated in March 2019 and Mr Shah was a director of it at the time of the November meeting.

49. Given the inadequacy of the disclosure, and the incomplete nature of the solicitors' files, it is not possible to say what occurred between 12th and 28th November 2019. Although a sum equivalent to the 5% deposit was paid by TTS on this day, I have concluded that contracts were not exchanged until much later – indeed, post-completion. This must in my judgment be the case, in view of the letters from TTS dated 17th December[6], and 29th December 2019[7].

50. At some point Mr Shah informed Mr Eldred that the buyer would not be Shahsons Ltd but Mr Haider. The date on which Mr Eldred was informed is unclear. In his oral evidence, he said it was around 18th November. He recalled that Mr Shah told him that his son would take over the transaction and buy the Property. He was not sure if Mr Haider was mentioned by name on that occasion, or whether it was on a subsequent occasion. However, in his "*without prejudice*" letter dated 22nd February 2022 to the Claimants' solicitors, he stated that he was only informed of this on 19th December 2019 – when the transaction was due to complete. This seems more consistent with the fact that TTS only sent Edward Marshall the draft contract on 17th December and at the same time raised Enquiries before Contract, and Mr Eldred asked this question on 18th December: "*WE NEED TO KNOW CONFIRMATION OF AGREED BUY BACK PRICE AND UNDERTAKING TO SELL INCLUDING COSTS TO ENSURE VIABILITY OF ROUTE".* The response from Edward Marshall at 10.59 on 19th December [521] suggests that this information was new*: "The buy back arrangement is that it will be £20k on top of whatever expenses and disbursements are incurred by the buyer e.g stamp duty, fees etc. Mr Baylis and Ms Kreuder will pay the mortgage payments from completion till buy back. We must do the buy back within 3 months of completion on these terms. <u>You must note that by doing the mortgage in his personal name , the buyer is saving Baylis/Kreuder around £15k in stamp duty and he is also losing his first time buyers discount which he'd never be able to use again</u>. So the deal cannot be better for B & K."* (my emphasis). This suggests that the change from a company purchaser to an individual purchaser was only flagged up at a late stage. On the other hand, it seems that Mr Haider paid the deposit on 29th November 2019, and he is named in the purported signed contract of the same date. The correspondence passing between TTS and Edward Marshall does not actually identify the buyer. I cannot therefore make a definitive finding as to when the identity of the buyer was notified to the Claimants.

51. In reality, the exact date on which the identity of the buyer changed is not critical. The real question is whether the nature of the transaction remained the same.

[6] See paragraph 21 above
[7] See paragraph 24 above

Although Mr Baylis attempted to deny that he had seen the emails of 18th and 19th December 2019, I find that he did receive them – including the draft TR1 (and corrected version) which identified Mr Haider and the consideration of £460,000 – and that he spoke to Mr Eldred and specifically authorised him to instruct Edward Marshall to complete the sale. The email chain from Mr Eldred – culminating in the email at 11.59 "*Spoke to client and OK to proceed*" – is self-explanatory. I accept Mr Eldred's evidence on this point, namely that he discussed the proposal with Mr Baylis, who authorised him to contact Edward Marshall as above. It is inconceivable that Mr Eldred would have sent the email without first discussing it with Mr Baylis. I reject Mr Baylis's evidence that he did not authorise the letter. This is one of the many examples of Mr Baylis's unconvincing attempts to explain away the clear meaning of the contemporaneous correspondence and documentation. I should also point out that Together has raised concerns about the manner in the Claimants have disclosed these emails. This is how it is put in Mr Beresford's Skeleton Argument: *"Despite their obvious relevance, despite the fact that Together had the right to disclosure of these emails in a form which preserves source metadata and despite an order made at the PTR requiring metadata for these emails to be provided, the Claimants have still failed to provide copies of these emails in a manner which preserves their metadata. Whilst the metadata has not been provided, the Claimants solicitors have since confirmed that the email referred to at para. 44[8] above was received in Mr Baylis' inbox on 19 December 2019, but that he apparently has "no recollection of seeing them or reading them"*.

52. As to whether the Claimants understood the transaction they were entering into, I find that they did. Quite apart from their understanding derived from the meeting on 12th November, in which Mr Shah proposed, and they agreed to, to a sale, it would be impossible to read the emails on 18th and 19th December without realising what was proposed. The references to the buyer's mortgage, and payment of stamp duty, are entirely clear. Equally, the use of the phrase "*completion to buy back*", and "*We must do the buy back within 3 months of completion on these terms"* can only be read as indicating an actual sale to the buyer. Nor were they misled by Edward Marshall or Mr Eldred as to the true nature of the transaction. It must have been obvious to the Claimants that the Enquiries and Requisitions raised by TTS prior to completion related to a sale of the Property and not an unsecured loan.

53. The Claimants place great store by the terms of the comfort letter from Edward Marshall in these terms: *"We hereby confirm that the TR1 being signed by you for the sale of the above property will be held strictly to your order until buy back terms have been agreed between yourselves and the purchaser and you authorise us in writing to complete the matter."* Mr Baylis complains that within a matter of hours of receiving this letter Edward Marshall had released the TR1 to TTS, Mr Haider's solicitors. However, as the email from Mr Eldred makes clear, Mr Baylis did authorise this to be done – his agent, Mr Eldred, specifically authorised Edward Marshall to complete in an email, thus: "*Spoke to client OK to proceed*". The buy back terms had been agreed by this point – Mr Haider would receive £20,000 on top of repayment of the sum borrowed plus costs, expenses and stamp duty. Once

[8] This refers to the email from TTS, forwarded to Mr Baylis on 19th December, which sets out the buy back terms.

agreement had been reached, there was no reason to withhold the TR1 and the condition of the letter had been fulfilled.

54. As to the execution of the TR1 at the Broadstairs office of Edward Marshall & Co, the facts are not free from doubt. (a) I have found that Mr Baylis had received by email on 18th December a copy of the draft TR1 prepared by TTS Solicitors, from which the identity of the purchaser and the sale price are apparent. (b) It may be noted that the address is given as "Broadstaires" as opposed to "Broadstairs". This may have been the subject of the correction made by Mr Eldred and referred to above. (c) For unknown reasons, however, the document that had been printed out at the Broadstairs office of Edward Marshall did not include the provision as to consideration.". (d) The Claimants signed this document and their signatures were witnessed. (e) This document was then subsequently returned to Mr Haider's solicitors. At some point before the TR1 was returned to TTS, the consideration had been inserted.

55. I find, therefore, that the consideration box has been completed after the Claimants had executed the TR1.

Events following completion on 19th December 2019

56. It is not clear how the TR1 reached TTS Solicitors but shortly after 19th December a complete TR1, signed by the Claimants, and showing a consideration of £460,000, was sent to them. This is the document that was eventually submitted to HM Land Registry and resulted in Mr Haider being registered as proprietor. On 19th December a sum of £437,000 was sent by TTS to Edward Marshall, being the completion monies, the deposit having already been paid. Although Edward Marshall has not accounted to the Claimants for the balance of the purchase price, it is clear that Mr Haider, through TTS, paid the Claimants' solicitors the full purchase price. Although Mr Haider did not explain how the balance was raised, nor did he disclose any documentation to evidence his payment to TTS, his payment of the purchase price is manifest from the Edward Marshall bank statements. I am entitled to and do accept this at face value, and the Claimants have not suggested any alternative explanation. I also have in mind the declaration by TTS Solicitors in their Report on Title to Together that the balance of the purchase price was derived from Mr Haider's own funds.

57. On 29th December 2019 there was an exchange of contracts effected by TTS for Mr Haider and Edward Marshall for the Claimants. This post-dated the execution of the TR1, and the contract specified 19th December as the completion date. It can be inferred that the terms of the contract are the same as the terms of the draft document purportedly exchanged on 29th November.

58. There was a delay, until April 2021, before Mr Haider became registered as proprietor of the Property and Together's Legal Charge was registered in the Charges Register. This delay was due to the presence, on the register, of the LPI Restriction, and the need to discharge it. The documents show that TTS Solicitors, on behalf of Mr Haider and Together, were pressing Edward Marshall to effect its removal, which they had undertaken to do on behalf of the Claimants. Indeed, in

early 2021 TTS threatened litigation against Edward Marshall. Eventually, the LPI Restriction was discharged on payment of some £53,500.

59. Mr Baylis made payments of £1500 per month to Mr Eldred from January 2020 onwards, and Mr Eldred paid these on to Edward Marshall (less £20). This was done in fulfilment of the agreement set out in the emails on 18th and 19th December, by way of payments towards Mr Haider's mortgage instalments. It was only in October 2020 that he ceased making the payments. That the monthly payments were related to Mr Haider's mortgage repayments was also his understanding, as is apparent to his email to Mr Eldred of 26th October 2020, referred to above.

60. In view of the claim advanced by the Claimants under FSMA 2000, and the Thanet County Court possession proceedings which have been consolidated with this claim, it is necessary to make findings as to what, if any, agreement was reached between the Claimants and Mr Haider with regard to their occupation of the Property post-completion. The FSMA 2000 claim depends on the Claimants being able to establish that under an agreement reached with Mr Haider the vendor *"is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so".* Mr Haider has issued proceedings on two occasions, first alleging a "*common law tenancy*" commencing on 19th December 2019, and latterly relying on "*an AST tenancy*" commencing on the same date. His case in this Claim is that the Claimants are occupying under the terms of a tenancy. The Claimants rely on these assertions as demonstrating that there was an agreement whereby they were entitled to occupy the premises post-completion. In the light of the parties' evidence regarding the agreement relating to the Property, and, more importantly, having been able to consider and analyse all the available documentation, it is possible to reach the following conclusions as to the nature of that agreement:

    a. I find that Mr Haider never met the Claimants prior to completion. I reject his evidence that he visited the Property and met them there. There were no direct communications between them. The only communications between them were channelled through their respective solicitors – TTS for Mr Haider and Edward Marshall for the Claimants. Communications between Edward Marshall and the Claimants were almost invariably channelled through their agent, Mr Eldred.

    b. In the absence of any separate side agreement between vendor and purchaser, necessarily any agreement between them must derive from the formal documents. The formal documents consist of the contract and the TR1. The form of contract that can be found in the TTS file – purportedly exchanged on 29th November but in reality exchanged on 29th December 2019 – provides that the Property is sold with the benefit of an Assured Shorthold Tenancy, a copy of which was sent to TTS solicitors in late November. The enquiries raised by TTS in their letter of 17th December assume that the vendors will vacate – see enquiries 8 and 13. The documentation sent by TTS to Together indicates that Claimants are out of possession. Accordingly, there is nothing in the formal

documents to suggest that the Claimants have a right to occupy the Property after completion.

c. Although the parties intended that there should be a sale of the Property to Mr Haider, they all seem to have made the assumption that the transaction would be reversed within a matter of months, once the monies (derived from Mr Haider's mortgage) were paid to the Trustee and Mr Baylis's bankruptcy was annulled. Once this happened, Mr Baylis could raise sufficient funds through equity release to repay Mr Haider who would transfer the Property back to the Claimants. It may be noted that Mr Haider, in his email dated 12th December 2020, refers to a 3-month agreement period within which the Claimants would buy the Property back.

d. This may well have been an unrealistic assumption on the part of the Claimants. They had to repay Mr Haider the £230,000 paid to the Trustee, but also his costs and stamp duty of around £10,000. In addition they would have to discharge the monies owing to LPI, in order to remove the Restriction. Eventually, the sum of £53,500 was paid by Edward Marshall in order to obtain registration. LPI claimed to be entitled to such a large amount by reference to the extortionate terms of the agreement signed by Mr Baylis in July 2019 – before Edward Marshall were instructed. Accordingly, the Claimants would have needed to raise approaching £300,000 to effect the buy back from Mr Haider. Nevertheless, they were confident that they could do it, as was Mr Eldred. Although the Claimants had signed the agreement with LPI, they do not seem to have been aware that the Restriction secured such a large amount, nor did Edward Marshall advise them of this fact.

e. However, because the Claimants, and Mr Haider, assumed that the buy back would take place within a few months, they do not seem to have given any thought to the legal basis for their continued occupation of the Property after completion. There was certainly no mention of a tenancy, and the monthly payments that they agreed to pay were specifically related to Mr Haider's mortgage instalments.

f. TTS do not seem to have been involved in the discussion of the buy back agreement. Given the terms of the draft contract dated 29th November, TTS solicitors would have been under the impression that the vendors – the Claimants – were vacating the Property. Accordingly, there were no contractual terms agreed regularising the Claimants' continued possession post-completion.

g. In both sets of County Court possession proceedings, and in his Defence to the Claim, Mr Haider contends that the Claimants are in possession in some capacity as tenants. He has also pleaded, and given evidence, that he spoke to the Claimants prior to completion and agreed that they could remain in possession after completion. This is denied by the Claimants. I reject Mr Haider's evidence in this regard. I find that they never met, and therefore there

was no discussion between them as to the Claimants' remaining in possession after completion.

h. As a matter of legal analysis, therefore, in my judgment the Claimants had no formalised right to remain in possession after completion. The Claimants' assumption was that they would retain possession pending buy back, making the mortgage repayments. It may be inferred (see his email of December 2020) that this was also Mr Haider's assumption. At best, they remained in possession as tenants at will pending the reversal of the transaction. If they were unable or unwilling to buy the Property back, they could not expect to be able to remain in occupation. However, the possibility never seems to have occurred to them, nor did their solicitors Edward Marshall advise them to this effect.

The findings as they relate to the pleaded issues

61. Non est factum. The essence of the plea is summarised thus at Emmett at para.3-008: "…… *what is essential, for the plea to succeed in this respect, is merely that a radical or fundamental overall difference be shown between the document as it is and as it was believed to be."*

62. In the present case, I have found that the Claimants knew perfectly well that they were signing a TR1 that effected a sale of the Property. The fact that they may have hoped that the sale would never complete, or at least that it would be reversed in short order, would be insufficient to support a plea of non est factum as to the fundamental characteristics of the TR1. Even confusion as to the legal effect of a document would not suffice, as is made clear Saunders v Anglia BS at [1970] 3 WLR 1078. The plea therefore fails.

63. Mistake – the parties at cross-purposes, or unilateral mistake. The evidence does not support either claim. The parties were not at cross-purposes. Mr Haider intended to purchase the Property, and the Claimants intended to execute a TR1 that, once registered, would transfer the Property to him. The parties may have believed that the intended buy back would be speedily effected once the bankruptcy was annulled, but in the first instance they knew that there would be a transfer of the Property. In any event, this species of mistake would render the TR1 voidable rather than void, and therefore the power of the court (under Sch.4 of the Land Registration Act 2002) to alter or rectify the register on the grounds of mistake would not be engaged. This is the effect of the decision in NRAM Ltd v Evans and another (Chief Land Registrar intervening) [2017] EWCA Civ 1013.

64. The Claimants' execution of the TR1. My findings on this issue, insofar as any definitive findings can be made, can be found at paragraphs 54 and 55 above. In summary: (a) the Claimants admit that they executed a form of TR1 which identified Mr Haider as the purchaser; (b) the form that they signed did not show any consideration in box 8. (c) This form was not therefore identical to the form that Mr Baylis saw on 18th December, and at some point before the TR1 was presented for registration the consideration of £460,000 must have been inserted into the document. It seems to me that there are two possible explanations. First, the figure of £460,000 was inserted into the same document that had been signed by the

Claimants. Alternatively, the signature page of the form was added to another document which showed the consideration. I shall deal with these points in turn.

65. Amendment after execution. Whether or not an amendment to a deed after execution invalidates it depends on a number of factors. This issue is discussed in Emmet on Title at 20-027 and 20-028. On the face of it, under the rule in Pigot's Case (1614) 11 Co. Rep. 26, any material alteration to a deed made after execution without consent renders the instrument void. In the present case, if the amount of the consideration was added to the TR1 after execution, presumably by Edward Marshall before they sent it on to TTS Solicitors, it will not invalidate the document if (a) the amendment was done by consent of all parties, or (b) *absent* consent, if the amendment is not regarded as "material". The Court of Appeal in Raiffeisen Zentralbank v Crossseas Shipping Ltd [2000] 1 W.L.R. 1135 had to consider the materiality of an amendment. Potter L.J (at 1148B) held that an amendment is material where "*the would-be avoider should be able to demonstrate that the alteration is one which is potentially prejudicial to his legal rights or obligations under the instrument*." In my judgment, the Claimants must be assumed to have consented to the amendment. Mr Baylis had seen and approved the draft TR1 that was forwarded to him on 18th December, which contained the figure of £460,000 in Box 8. Inserting this figure did no more than give effect to the parties' intentions. Alternatively, since the Claimants had agreed to the figure, the amendment is not "material" by reference to Potter LJ's test referred to above. Accordingly, on this basis the validity of the TR1 is not affected by the post-execution alteration.

66. Attaching signature pages to a different document. It is possible that, rather than inserting the consideration amount in the document signed by the Claimants, Edward Marshall printed off a new form and simply added the signature page. If this is what happened, the TR1 will be a nullity, on the basis that the document had not been validly executed in accordance with the requirements of the LRA 2002 and the rules made thereunder. This is the effect of the decision in R (Mercury) v HMRC [2008] EWHC 2721 (Admin). If the TR1 is void, the provisions of Sch.4 LRA 2002 will be engaged, and paragraphs 67 to 71 below deal with the consequences.

Alteration/rectification of the register under Sch.4 LRA 2002

67. The Claimants have applied for alteration of the register against Mr Haider pursuant to Sch. 4 LRA 2002, in the event that the TR1 is held to be void on the grounds of *non est factum* or mistake. In that event, they also seek alteration of the register as against Together, by deleting the Charge from the Charges Register. I have already decided that the plea of *non est factum* and mistake fail on the facts, but in case I am wrong in this conclusion, I shall consider whether the Claimants would have been entitled to alteration of the register in any event. Further, if the TR1 is void and of no effect on the basis of the Mercury decision, it is necessary to consider

whether the Claimants are entitled to alteration of the register on this basis. Para.2 of Schedule 4 LRA 2002 is in the following terms:

"(1) The court may make an order for alteration of the register for the purpose of –(a) correcting a mistake

(b) bringing the register up to date

(c) giving effect to any estate, right or interest excepted from the effect of registration

(2) An order under this paragraph has effect when served on the registrar to impose a duty to give effect to it."

68. Not every alteration of the register will amount to rectification of the register. As is clear from para. 1 of sch. 4, an alteration will amount to rectification where it "*involves the correction of a mistake*" and "*prejudicially affects the title of a registered proprietor*". Here, in the event that the TR1 is void for any reason, the Claimants seek alteration of the register under para. 2(1)(a) of sch. 4, that is, on the grounds of a mistake. The alteration in this case amounts to rectification, because the alteration would prejudicially affect Mr Haider (in that his name would be removed as freehold proprietor) and Together (in that they seek to have the Charge deleted). If the TR1 is void and of no effect for any reason, the Claimants say that they are entitled to rectification of the register (a) to have themselves restored as owners of the Property and (b) unencumbered by the Charge. Since Mr Haider is not in physical possession of the Property, he is not entitled to the enhanced protection afforded to proprietors in possession under para. 3(2) of Sch.4. The position is therefore governed by Para. 3(3) of sch. 4, which provides that in case of rectification of the register: *"If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so."* Mr Haider, and Together, both submit that there are present in this case factors which amount to "*exceptional circumstances"* justifying the Court in refusing to rectify the register.

<u>The meaning of exceptional circumstances</u>

69. The classic exposition of the meaning and application of para. 3(3) of sch.4 is to be found in the judgment of Morgan J in <u>Paton v Todd</u> [2012] EWHC 1248 (Ch)[9] (relating to the equivalent power of the registrar to rectify the register under para.6(3) of sch.4):

66 …Thus, in a case within para.6(3),[10] the court must ask itself two questions: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? The first of these questions requires one to know what is meant by 'exceptional circumstances' and then to establish whether such circumstances exist as a matter of fact. Thus the process

[9] This passage was approved by the Court of Appeal in *Dhillon v Barclays Bank Plc* [2020] 2 P. & C.R. 19

involved in the application of para.6(3) of schedule 4 to the 2002 Act is not identical to the exercise of the discretion involved in section 82(1) of the 1925 Act.

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

Exceptional circumstances – Mr Haider

70. Mr Symes, on behalf of Mr Haider, relies on the following factors as constituting exceptional circumstances:

    a. This is not a case of an innocent proprietor whose title has been lost as a result of fraud, forgery or some other wrongdoing. In this case, the Claimants fully intended to execute a TR1 in the form that was eventually presented for registration. The jurisdiction to rectify only arises because (on this hypothesis) Edward Marshall committed a technical error in finalising the TR1 on completion. The insertion of the price of £460,000 was not part of a fraudulent design. It simply regularised the document to accord with the draft that Mr Baylis had approved.

    b. By the same token, the Claimants have benefited from the transaction, in that the sums raised by Mr Haider and paid to Edward Marshall have been used to discharge Mr Baylis' bankruptcy debts and obtain an annulment of his bankruptcy. As the undertaking to the Trustee's solicitors makes clear, if not for the payment of £230,700 to the Trustee, she would not have agreed to release the Bankruptcy Restriction and co-operate in the annulment application.

    c. Apart from being exposed to the liability to repay Together for the sums borrowed to fund the purchase, Mr Haider has also procured the removal of the LPI restriction against the Property, which was necessary in order to obtain registration. The liability to LPI, of £53,500, arose because Mr Baylis had signed the "*Emergency Funding and Property Fee Sale Agreement*", which contained extremely onerous terms. It appears that this amount was paid by Edward Marshall (under threat of litigation from TTS) to LPI's solicitors to procure the removal of the Restriction. It must be inferred that the funds used to pay LPI ultimately derived from Mr Haider, in the form of the purchase price

paid by TTS to Edward Marshall, since no other monies would have been available.

d. Altogether, therefore, the Claimants have benefited substantially from the sale to Mr Haider.

71. In my judgment, the factors set out above (a) amount to exceptional circumstances, and (b) in the circumstances of this case, justify the Court not rectifying the register against Mr Haider.

Exceptional circumstances - Together

72. In view of my findings regarding Mr Haider, strictly there is no need to consider whether the register should be altered/rectified so as to delete the Together charge. If I am wrong, and for any reason the register is rectified as against Mr Haider, there remains the issue whether it should also be rectified as against Together, by removing the Charge from the Charges Register. had been required to consider this issue, I would also have held that there were exceptional circumstances present in this case which justified not altering the register. The factors are those identified by Mr Beresford at paragraphs 73 to 75 of his Skeleton Argument. I have made the findings which are specified in paragraph 75(1), (2) and (3).

Overriding interest

73. The Claimants put forward an alternative argument against Together, on the basis that the Charge is subject to their overriding interest. The relevant interests claimed are mere equities, protected under section 116 LRA 2002, arising either from the Claimants' right to apply for rectification of the register under Sch. 4 LRA 2002, or alternatively from a declaration as against Mr Haider (under FSMA 2000) that the sale transaction is unenforceable. Since the Claimants were in actual occupation as at the date of the execution and subsequent registration of the Charge, it is their case that Together took the Property subject to their interest "*essentially rendering the security valueless*."[11] I have of course found against the Claimants in regard to both of the claimed mere equities, so strictly this point does not need to be decided. However, for the sake of completeness, I shall do so. Essentially, I agree with the overarching submission made by Mr Beresford at paragraphs 89 to 91 of his Skeleton Argument. I have found that the Claimants were aware that the Haider purchase would be funded by borrowing money on mortgage, and accordingly it is not open to them to assert an overriding interest. Mr Beresford cites the following passage in the speech of Lord Collins in Southern Pacific Mortgages Ltd v Scott [2015] A.C. 385 "*where a person, who might otherwise have rights which could be*

[11] See para.50 of Mr Hope's Skeleton Argument

asserted against a mortgagee, agrees to funds being raised on the property by way of mortgage, the mortgagee will have priority."[12]

Restitution

74. No case for restitution arises. Mr Haider paid full value for the Property pursuant to the TR1 – see the finding at paragraph 56 above. Mr Haider is not liable for the failure by Edward Marshall to account to the Claimants for the balance of the purchase price, which is of course a breach of the duty owed by Edward Marshall to their clients.

The claim under section 26 FSMA 2000.

75. The Claimants' case on this issue is as follows. FSMA 2000 prohibits certain types of regulated activities, one of which is a sale and rent back agreement. The Claimants rely on the terms of FSMA and FSMA (Regulated Activities) Order 2001/544 ("RAO"). In summary, under Article 63J RAO, a sale and rent back agreement is an agreement where one party to an agreement acquires land and the other party is entitled to and intends to continue occupying the land. The Claimants contend that this is the case here, given that Mr Haider's positive case in the two County Court Possession Claims was that he immediately let the Property to Claimants upon purchase. Under s19 FSMA 2000, carrying out regulated activities (including entering into a sale and rent back agreement) is prohibited and therefore unenforceable (under section 26), as the Claimants contend that Mr Haider was not an exempt person. However, under s28 FSMA 2000, the Court may enforce a sale and rent back agreement if it is just and equitable to do so. The section outlines certain specific considerations, and the Claimants cite Kinled Investments Ltd v Zopa Group Ltd [2022] EWHC 1194 (Comm) (and the authorities cited therein) in this regard.

76. Mr Symes, on behalf of Mr Haider, makes a number of points – see paras. 32-40 of his skeleton argument. His principal argument is that Mr Haider, when he purchased the Property, was not acting in the course of his business. He cites a passage from the speech of Lord Neuberger MR in Helder v Strathmore [2011] EWCA Civ 542, at 30 as follows: *"Section 19 of FSMA bars anyone but an 'authorised person' or an 'exempt person' from carrying on a 'regulated activity' in the United Kingdom (the 'general prohibition'). Section 22(1) provides that an activity is a 'regulated activity' if, among other things, it is 'an activity of a specified kind which is carried on by way of business'..."* If the arrangement was not an activity carried on by Mr Haider in the way of business, the prohibition under section 19 FSMA 2000 is not engaged. As a fallback position, and if it is held that Mr Haider was acting in the course of his business, Mr Symes relies on section 28(3) FSMA 2000, and contends that the Court should allow the agreement to be enforced

[12] Para. 88. *Cann* [1991] 1 AC 56, 94, *Bristol and West Building Society v Henning* [1985] 1 WLR 778 and *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244 were cited in support of this proposition.

because it would be "*just and equitable"* to do so. He deals with this point at paras. 36 to 38 of his skeleton argument.

77. The first issue to decide is whether or not the "arrangement" between the Claimants and Mr Haider, as vendor and purchaser, is one under which the Claimants are *"….. entitled ……. to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so".* In view of the findings I have made, in my judgment the Claimants were not entitled to occupy the Property post-completion. I have described them as tenants at will in the absence of any better description.

78. If I am wrong, and this is a sale and rent back agreement within the scope of FSMA 2000, it falls to be considered (a) whether Mr Haider was acting in the course of a business, at the time of the sale, and (b) if so, whether it would be just and equitable for the agreement to be enforced. In this context the agreement means the sale and rent back agreement, however constituted. As to the first point, there is no evidence to suggest that Mr Haider was acting in the course of his business when he agreed to and did purchase the Property. He is an accountant, and owns an accountancy business, he is not a professional landlord or developer. It appears that he was a first-time buyer (Edward Marshall informed the Claimants that he would be using his SDLT discount). Nothing in the evidence indicates that this was part of a business activity on Mr Haider's part.

79. I am wrong on this issue, I must deal with Mr Symes's argument that the otherwise prohibited arrangement should be enforced on "just and equitable" grounds. The starting point, under section 28(5), is that the Court must have regard to whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement. There is some discussion as to whether ignorance of the requirement is sufficient, but as Lord Neuberger said (*obiter)* at 48:

> *"…there is some force in the point that it is unlikely that Parliament could have intended that a person who wrongly, but reasonably, believes that he is not contravening a statute should be better off than a person who was, reasonably, unaware that the statute applied."*

As was the case in Helder (at 44) it was reasonable for the parties not to appreciate FSMA 2000 was in point, not least because in this case the Claimants' entitlement (if such it was) to remain in occupation was never spelled out in the documentation or expressly agreed, and can only have arisen through some sort of implication.

80. Helder v Strathmore gives useful guidance as to the type of consideration that persuade a court to enforce an otherwise prohibited arrangement on just and equitable grounds. In the present case, I consider that the following matters are relevant:

    a. Primarily, that the Claimants have benefited from the arrangement, in that they have received an injection of funds from Mr Haider which they would otherwise not have been able to access. They have used these monies (in part) to discharge

Mr Baylis's liabilities and obtain the annulment, and also cleared the LPI Restriction from the title to the Property.

b. By the same token, Mr Haider has borrowed substantial sums from Together and remains liable to repay the capital and interest.

c. The Claimants have had the use of the Property, which the First Defendant's purchase enabled, for which (after November 2019) no payments in rent or interest were made. Without Mr Haider, they would have been evicted from the Property on 3rd December 2019.

d. The First Defendant has lost the opportunity to invest the purchase monies elsewhere.

e. The purchase price of the Property was at least the full market value, without any discount to reflect the Claimants' continued occupation thereof.

f. The Claimants have not identified, and cannot identify, respects in which they would have been better placed if Mr Haider had been an "*authorised person"* for FSMA purposes. Essentially, they would have received a windfall by taking advantage of the FSMA 2000 point.

81. For all these reasons, and on the hypothesis that the agreement between the Claimants and Mr Haider engages sections 19 and 26 FSMA 2000, in my judgment it would nevertheless be just and equitable within the meaning of section 28(3) to enforce it.

The Possession Claim

82. The possession proceedings, commenced by Mr Haider in the Thanet County Court under title J0PP 8826, have been consolidated with this claim. Mr Haider's claim is based on non-payment of rent arising under an AST commencing on 19th December 2019, the rent reserved being £1480 per month. In view of my findings at paragraph 60 above, this claim cannot be sustained. There was no tenancy agreement and the monthly payments of £1480 were specifically referable to Mr Haider's mortgage repayments. I am therefore minded to dismiss the possession proceedings.

Claims against Edward Marshall

83. I have found that Mr Haider, through TTS, paid Edward Marshall the entire consideration payable under the TR1, namely £460,000. Of that sum, £230,700 was paid to the Trustee's solicitors in order to secure the annulment. A further sum of £53,500 was paid to LPI to obtain a release of its Restriction. I infer that this was derived from the purchase monies held by Edward Marshall. This reflected a liability voluntarily assumed by Mr Baylis. Approximately £175,000 remained in Edward Marshall's hands after these sums were paid out, but the firm did not account to the Claimants for this balance. Edward Marshall, if it still remained in

existence, would have no defence to a claim by the Claimants to recover that sum, held on trust for them in the solicitors' client account.

84. The Claimants have invited me to make other findings as to the firm's alleged breaches of duty. I am able to find that Mr Shah did represent that he was associated with the firm of Edward Marshall, to the knowledge of the principals of the firm, and his actions and advice to the Claimants can be treated as binding the firm. It might be said that the entire buy back arrangement was fraught with danger, and Edward Marshall should have advised the Claimants accordingly. However, I do not think that I am in a position to make findings as to what the Claimants would have done had they been so advised. For reasons explained in this Judgment, they had run out of time in terms of the threatened eviction, and the Haider agreement represented their only viable method of raising funds.

85. I have also been asked to make findings in relation to the sum of £53,500 used by Edward Marshall to discharge the LPI Restriction. Edward Marshall will have given an undertaking to TTS (acting for Mr Haider and Together) to discharge the Restriction to enable the TR1 to be registered, as part and parcel of completion. In the event, this was not done until 2021, under threat of litigation from TTS. Given the comments about LPI made by Mr Shah in the 12th November meeting, and in view of the manifestly unfair terms of the "*Emergency Funding and Property Fee Sale Agreement",* Edward Marshall ought to have advised the Claimants that LPI would have difficulty in enforcing its terms, as indeed proved to be the case as a result of the FCA's action (referred to at paragraph 15 above). Failure to so advise, and in any way challenge the recovery by LPI of monies under the Restriction, was a clear breach of duty. Indeed, by April 2021 when Edward Marshall paid out £53,500 to discharge the Restriction, the FCA proceedings were already on foot. If Edward Marshall had acted promptly and in accordance with their duty to the Claimants there is every chance that LPI would not have been able to recover the sum.

<u>The claims against Together.</u>

86. I have dealt with these above.

<u>Mr Haider's claims against Edward Marshall</u>.

87. In view of my findings, this does not need to be considered.

<u>Judgment</u>

88. I would draw to the parties' attention that I have added a new paragraph 85 which does not appear in the draft judgment. I am grateful to Counsel for their corrections. I propose to list a short further hearing to consider costs and other consequential matters, and a final form of order. The parties have been asked to provide a time estimate and their dates to avoid.