PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO. 2016/1089

BETWEEN

MAN CHING YUEN

Applicant

and

LANDY CHET KIN WONG

Respondent

Property addresses: **17 Bunning Way, Islington, London N7 9UN**
Title number: **NGL714173**

Before: Judge Daniel Gatty

Sitting at: Field House, London
On: 11-13 November 2019

Applicant Representation: Tricia Hemans of counsel instructed by DKLM LLP
Respondent Representation: Chris Bryden of counsel instructed by William Kateny Legal.

DECISION

Cases referred to:

Silkstone v Tatnall [2011] EWCA Civ 801, [2012] 1 WLR 400
Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] EWCA Civ 151, [2002] [2002] Ch 216

Swift 1st v Chief Land Registrar [2015] EWCA Civ 330, [2015] Ch 602
Wood v Commercial First Business Ltd (in liquidation) [2019] EWHC 2205 (Ch)
Wright v Wakeford (1812) 4 Taunton 213
Netglory Pty Ltd v Caratti [2013] WASC 364
Shah v Shah [2001] EWCA Civ 527

1. This case concerns ownership of a house known as 17 Bunning Way, Islington, London N7 9UN, title number NGL714173, ("the Property"). It was purchased, and registered, in the joint names of the Applicant, Mr Man Ching Yuen, and the Respondent, Ms Landy Chet Kin Wong, in 1993. At that time they were in a romantic relationship and in business together. Their romantic and business relationship was over by 2006. On 5 November 2012 the Property became registered in the Respondent's sole name, giving effect to a Form TR1 transfer dated 30 September 2010 ("the Transfer") purportedly conveying the Property from the Applicant and the Respondent to the Respondent alone. The primary factual dispute in this case is as to whether the Applicant signed the Transfer. He denies doing so, alleging that his purported signature on it was a forgery.

2. On 30 June 2016 the Applicant lodged a unilateral notice against the title of the Property in respect of what, on his case, was his continuing interest in it ("the Notice"). The Register describes the Notice as being "in respect of a claimed beneficial interest and right to alter the register to correct a mistake". On 21 July 2016 the Respondent applied in form UN4 to cancel the Notice. The Applicant objected to the application to cancel the Notice and it was the dispute arising from that objection which was referred by the Land Registry to this Tribunal, on 6 December 2016. Although the application to cancel was made by Ms Wong, it was Mr Yuen who was made Applicant by the Tribunal to reflect the burden that lies on him to prove a continuing interest in the Property notwithstanding registration of the Transfer.

3. For various reasons the proceedings made slow progress but eventually the hearing of the dispute took place before me on 11 to 13 November 2019. The Applicant was represented by Ms Tricia Hemans of counsel and the Respondent by Mr Chris Bryden of counsel. I am grateful to them for their assistance in what was by no means a straightforward case.

The Tribunal's powers and the scope of the issues before it

4. The Applicant's statement of case in para. 1 asserts an interest in the Property "by virtue of having the right to apply for alteration of the register". The Applicant has not, however, applied to the Land Registry to alter the register to reinstate himself as a co-proprietor of the Property. That notwithstanding, Ms Hemans submitted that it was open to me to order alteration of the register should I accept the Applicant's case that the Transfer was not executed, or not validly executed, by him. I do not agree with that submission.

5. The Tribunal's jurisdiction is a statutory one arising under s. 108 of the Land Registration Act 2002. S. 108(1)(a) provides for the strand of the Tribunal's jurisdiction that is material here. It states that the First-tier Tribunal "has the following functions – (a) determining matters referred to it under section 73(7)…". S. 73 of the 2002 Act deals with objections to applications made to the Land Registry. S. 73(5) provides for notice of an objection to be provided to the party who made the application and stipulates that the registrar must not determine the application until the objection has been disposed of (unless the registrar is satisfied that the objection is groundless). S. 73(7) reads as follows:

> "(7) If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the First-tier Tribunal"

6. It was held by the Court of Appeal in *Silkstone v Tatnall* [2011] EWCA Civ 801, [2012] 1 WLR 400 (decided when disputes were referred under s. 73(7) to the Adjudicator to the Land Registry, before the Adjudicator's function was transferred to this Tribunal) that:-

> "48. A reference to an adjudicator of a "matter" under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 [i.e. an application to cancel a unilateral notice] to which an objection has been raised,

the relevant issue will be the underlying merits of the claim to register the unilateral notice."

7. By s. 32(1) of the 2002 Act "A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge". Hence, only a person with an interest affecting a registered estate is entitled to enter a notice (unilateral or agreed) against the title of that estate; the function of the notice is to protect the interest in question from losing priority to the interest of a subsequent registered disponee in respect of that estate. Interests under trusts of land and some other categories of interests cannot be protected by notice, by s. 33 of the 2002 Act. Thus, the issue to be determined whenever an application to cancel a unilateral notice is referred to the Tribunal is whether the beneficiary of the notice has an interest in the relevant property (other than one excluded from the ambit of notices by s. 33).

8. In this case, as an interest under a trust of land cannot be protected by a notice even if one were asserted by the Applicant, the only interest that the Applicant can and does rely upon is an interest arising from a claimed right to seek alteration of the register. It was held, obiter, in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] [2002] Ch 216 that a right to seek rectification of the register under the Land Registration Act 1925 was itself an interest in registered land (specifically an overriding interest where the beneficiary was in actual occupation of the land). In *Swift 1st v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602 it was held that a different aspect of the decision in *Malory* would have applied equally under the 2002 Act but was decided per incuriam. In respect of the finding in *Malory* that a right to seek rectification of the register (or alteration as it is more generally called under the 2002 Act) was itself an interest in registered land, Patten LJ observed at [37]:

> "Although the court's determination that the right of the BVI company to obtain rectification of the register was capable of taking effect as an overriding interest has generally escaped criticism and is not challenged on this appeal..."

9. In its 2018 report "Updating the Land Registration Act 2002", the Law Commission was heavily critical of that aspect of the decision in *Malory*. The Law Commission states at para. 13.30, "we agree with Professor Dixon that the ability to seek rectification cannot coherently be construed as a proprietary right". The report recommends amending the 2002 Act to "explicitly confirm that the ability of a person to seek

alteration or rectification of the register to correct a mistake should not be capable of being a property right.". For the time being, while the Act remains unamended in that respect, the question whether the ability of a person to seek alteration or rectification of the register to correct a mistake is a property right and hence an interest capable of being protected by a notice is a moot point, in my view.

10. It was not argued before me that the Applicant's right to seek alteration of the register was not the sort of interest capable of being protected by a unilateral notice. Mr Bryden submitted that the "matter" before me included consideration of whether the register was liable to alteration but that the remedy of ordering alteration was not within my powers. So, I will assume, without deciding, that a right to seek alteration of the register is an interest capable of being protected by a unilateral notice.

11. I agree with Mr Bryden that I do not have the power to order alteration of the register in these proceedings even if I conclude that the Transfer was void. To do so would go beyond determining the matter before me, whether the Applicant has an interest entitling him to retain a notice on the register, and would be to determine an application that has not been made.

12. Furthermore, it does not follow as a matter of course that the register must be altered if the transfer was void. The alteration sought would qualify as rectification under the 2002 Act because it would be an alteration to correct a mistake that prejudicially affects the Respondent's title. The Respondent is a proprietor in possession of the property and so by para. 6(2) of Sch. 4 of the 2002 Act, the register can only be rectified against her if she has by fraud or lack of proper care caused or substantially contributed to the mistake, or it would for any other reason be unjust for the alteration not to be made. Even if one of those conditions are met there is a discretion under para. 6(3) not to order rectification if there are exceptional circumstances justifying not making the alteration. None of those considerations were raised in the statements of case or properly canvassed at trial, although some submissions were made about them after I raised them.

13. Since, as I have concluded, I am unable to order alteration of the register in these proceedings whatever finding I make about execution of the Transfer, it would not be appropriate for me to decide whether the register is liable to be altered in proceedings

where I cannot so order and in which not all of the considerations relevant to that question were raised in the statements of case or the subject of full evidence before the Tribunal.

14. I should add for completeness that I have asked myself whether I could order alteration, if appropriate, under rule 40(3)(a) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and concluded that I could not. I do not consider that alteration of the register to add a registered proprietor comes within the scope of that procedural rule, when it is properly the subject of an application under Sch. 4 to the Act; and for the reasons given in para. 12 above such a course would not be appropriate in this instance even if rule 40(3)(a) could be stretched that far.

15. It would have been far preferable if the Applicant had made an application to alter the register which could have been referred to the Tribunal and heard with the Respondent's application to cancel the unilateral notice. Had he done so, the outcome of the Respondent's application to cancel the notice would have simply been the mirror image of whatever was the result of the Applicant's application to alter the register. Regrettably, that is not how proceedings have progressed and I must determine the application to cancel the notice alone.

16. It should be noted that the relevant interest as asserted in the Applicant's statement of case and as described in *Malory* is a right to seek alteration/rectification of the register, not a right to alteration/rectification of the register. This characterisation must be correct. There can be no right to rectification before the Tribunal (or a court) has determined that it is appropriate to exercise the power to order rectification, a power which includes a discretion not to order rectification where there are exceptional circumstances; there can only be a right to seek rectification. That has consequences for the test to be applied when considering whether to cancel a notice entered to protect a right to seek rectification. In one sense there will always be a right to seek rectification of the register, in that there are no restrictions on anyone making an application to alter the register, however unmeritorious and doomed to rejection the application might be. Indeed, an application to rectify the register can be made by someone who will not obtain any interest in the relevant property if the application succeeds, for example someone who would prefer that land be unregistered and of unknown ownership than

that it be mistakenly included in a neighbour's title. But it cannot be the intention of Parliament that a registered title should be blighted by a unilateral notice in respect of a right to seek rectification where the beneficiary of the notice has no prospect of obtaining a property interest in or over the relevant estate if the application succeeds or in respect of a claim to rectification that has no realistic prospect of success. A prospective applicant for rectification in either of those circumstances would not have an interest affecting the registered estate for the purposes of s. 32 of the Act, in my view. Alternatively, it would not be a proper exercise of the Registrar or the Tribunal's discretion for a notice to be registered in those circumstances. In my judgment, sections 34(1) and 35(1) of the Act indicate that the registrar does have some discretion as to whether to enter a unilateral notice.

17. Consequently, in this case, I consider that the right approach (on the assumption that I am making that a right to seek rectification is in principle capable of being protected by a notice) is to ask myself whether the Applicant has a claim to alter the register with realistic prospects of success. If not, I should direct that the application to cancel the notice succeeds. If I conclude that the Applicant has realistic prospects of succeeding on an application for alteration, I should either direct dismissal of the Respondent's application to cancel the notice outright or direct its dismissal if the Applicant makes an application to alter the register within a specified period of time. It is on that basis that I approach this decision.

18. In this respect the approach to be taken when the claimed interest is a right to seek rectification of the register must differ from the usual approach taken by the Tribunal where the claimed interest is not to a right to seek a remedy but is instead a property interest in the conventional sense. That usual approach is for the Tribunal to determine whether the beneficiary of the notice has a property interest or not, as *Silkstone* suggests. The nature of the interest asserted here does not allow such an approach to be taken, especially when some of the issues relevant to whether rectification should be ordered were not addressed in the statements of case nor in the witness statements.

19. That is not to say that it is not necessary for me to make a finding on the balance of probabilities on the key factual question as to whether the Applicant executed the Transfer. I have heard the same evidence on that point as a Tribunal or Court hearing a

rectification application would be likely to hear and it is appropriate for me to make a finding on the point. That finding will be a necessary component of my assessment of whether the Applicant has a claim to rectification of the register with realistic prospects of success, as would be my conclusions on the question whether the Transfer was not validly executed as a deed even if signed by the Applicant. Furthermore, the parties attended the hearing expecting findings to be made on these issues. It would be a dereliction of judicial duty for me not to make them.

The background

20. The parties are both business people. They each have adult children from other relationships. In November 1993 when they purchased the Property they had been romantically involved for a few years and were in business together in Hong Kong and in the UK importing and exporting goods. A company named Full Cup (UK) Ltd ("FC(UK")") was incorporated in 1994 and became the vehicle for the parties' UK business. The Respondent was company secretary and the Applicant a director. The Respondent, but not the Applicant, was a shareholder. The Applicant states that he only became aware that he was not a shareholder during the course of this litigation. It should be said that he speaks little English and gave evidence through an interpreter. The Respondent also gave evidence with the assistance of an interpreter but her English is better than the Applicant's.

21. There was also a Hong Kong business named Full Cup Industrial Company Ltd ("FC(HK)") which the Applicant alleges was his alone and which the Respondent alleges was co-owned by both of them. I was not provided with evidence allowing me to make any finding in respect of that point of dispute although I gained the impression that both of them were involved in in FC(HK) in practical terms.

22. It was the Respondent's evidence that she and the Applicant agreed to purchase the Property together, and that they would bear in equal shares the part of the purchase price not obtained by mortgage, the mortgage instalments and all other outgoings. She alleges that in fact she bore the whole of the initial payment towards the purchase price and that the Applicant promised to repay her but did not do so.

23. Latterly the mortgage payments were made from FC (UK)'s bank account which the Respondent alleges she had to subsidise with her own money because the business was not generating enough income. The Respondent did not produce any documentary evidence showing transfers from her own bank account to FC (UK)'s account, saying in cross-examination that nobody had asked her to produce them.

24. It was the Applicant's evidence that the initial purchase monies and the earlier mortgage instalments were made out of a joint bank account in his and the Respondent's names and were funded by FC(HK). Again, there was no documentary evidence to corroborate that claim. He accepted that latterly the mortgage payments were made from FC(UK)'s bank account. He said that neither of them had any separate money or income out of which to pay the mortgage instalments other than money generated by the Full Cup businesses.

25. During the 2000s the Applicant became wholly based in Hong Kong. The Respondent dates this to 2001 following repossession proceedings brought by Barclays Bank plc, the mortgagee of the Property. I understood the Applicant to date this to a little later in the decade. He said in his statement that it was a joint decision that he spend more time in Hong Kong because the businesses manufactured and sourced products in Hong Kong and China.

26. The parties jointly acquired a residential property in Hong Kong in April 2004.

27. During or by 2006 relations between the parties broke down. The bundle includes a letter to the Applicant dated 25 July 2008 from solicitors acting for the Respondent seeking the sale of the Hong Kong property and the repayment of the deposit to the Respondent before division of the rest of the proceeds of sale, which the letter alleges she wholly funded. It also includes a writ issued by the Respondent in Hong Kong in July 2016 in respect of the Hong Kong property.

28. The Applicant accepted that he did not pay anything towards the mortgage or other running costs of the Property after the parties separated in 2006. He said that he was owed payment by the Respondent or FC(UK) for goods worth about £6m. It was the Respondent's evidence, denied by the Applicant, that she repeatedly demanded repayment from him of his share of expenditure on the Property. She said in cross-examination that the Applicant told her that he was not coming back to the UK, that she

could decide what to do about the Property but that she should not ask him for any more money.

29. The Respondent explains the transfer of the Property which she alleges the Applicant and she entered into in September 2010 with reference to the demands for repayment that she claims to have made. Her case is that the Applicant agreed to transfer the Property to her in discharge of money she says he owed her in respect of it but required that she come to Hong Kong to deal with the transfer.

30. It is apparent from a letter dated 17 February 2017 from Cathay Pacific Airways to the Respondent's former solicitors that the Respondent flew to Hong Kong on 23 September 2010 and returned to London on 3 October 2010. It appears from documents produced by the Applicant that he was in Hong Kong between 23 September 2010 and 30 September 2010 but crossed into mainland China at 13.21 on 30 September 2010.

31. The Applicant denies any meeting took place with the Respondent in Hong Kong during the visit that the letter from Cathay Pacific shows she made. The Respondent claims to have met with the Applicant at her office in Hong Kong during that visit in order to execute the Transfer. In her statement of case she states that the meeting took place on 30 September 2010 but her oral evidence is that this was a mistake – a misunderstanding between her and her then counsel. She said in evidence that she could not remember the exact date but it would have been before 30 September 2010 which was the date inserted in the Transfer by her then solicitor, Ms Cleo Ginga (formerly Parillon), when Ms Ginga received the signed Transfer in London. Ms Ginga gave evidence before me and stated that she inserted the date and would have inserted that day's date, i.e. would have inserted 30 September 2010 on 30 September 2010. The Respondent stated that she mailed the Transfer from Hong Kong to London following her meeting with the Applicant. If that is all correct, it would follow that the meeting could not have taken place after about 28 September 2010.

32. The Respondent's evidence was to the effect that a meeting took place at her office where a Skype connection was established between a PC in her office and a PC in her London office at which Ms Ginga had attended for the purposes of witnessing the signing of the Transfer. She said that the Applicant had refused to incur the cost of having a Hong Kong solicitor involved in or witness the execution of the Transfer, and

it was more cost effective for her to fly to Hong Kong and involve Miss Ginga via Skype than to pay for a Hong Kong solicitor herself. The Respondent's evidence was that she translated for Miss Ginga and the Applicant and that the Applicant showed his Hong Kong identity card and a bank card to the webcam to prove his identity to Ms Ginga before signing the Transfer. As already noted, the Applicant's evidence is that no such meeting took place. The Applicant's account of the meeting was supported by Ms Ginga in her evidence. Ms Ginga said that she received the Transfer at her office (she was then one of two partners in a small firm of solicitors named Jacob Forbes) through the post a few days after witnessing its signing by Skype whereupon she signed it as witness and inserted the date of 30 September 2010.

33. The Transfer was not immediately registered at the Land Registry. As noted above, it was not registered until 2012. The AP1 form applying to have the Respondent registered as sole proprietor is dated 24 August 2012. It is signed "Full Cup (UK) Ltd". In panel 14 where details of the conveyancer who represented the parties in relation to the transfer must be inserted, the name of Jacob Forbes Solicitors is inserted against both parties' names. Miss Ginga said in evidence that she completed the AP1 form at a time when she no longer had her own firm but was assisting the Respondent and FC(UK).

34. The explanation given by the Respondent for the delay in registration is a request allegedly made by the Applicant that the Respondent should hold onto and not act on the Transfer for two years to give him a chance to raise money and repay her, and also so that his daughter would have somewhere to stay in London. The Applicant denies making any such request; of course, if he did not sign the Transfer it would follow that he did not request that it not be acted on.

35. The Respondent says that she spent nearly £200,000 renovating the Property, financed by selling her Hong Kong office. The bundle includes a document dated 23 February 2017 with the heading "Paul Allen Loft Conversions". It is signed in the name Paul Allen and records that the author carried out works for the Respondent at the Property "in 5-2013 to 1-2014" including a loft conversion, new UPVC windows, bathroom installation and kitchen extension". Mr Allen was not called to give evidence.

36. On 22 March 2016 the Respondent redeemed the mortgage over the Property by paying £179,120 to Barclays Bank plc which she says she raised by selling her London office.

37. As mentioned above, the Applicant's application for a unilateral notice is dated 30 June 2016. At that time the parties were also actively in dispute over their property in Hong Kong.

The witnesses

38. I heard evidence from the Applicant and the Respondent. The Respondent also called Ms Ginga and Ms Diane Graham, a business associate and friend of hers who said she was acquainted with the Applicant.

39. As already mentioned, the Applicant gave his evidence through an interpreter. He was adamant in response to cross-examination that he did not meet with the Respondent in Hong Kong in autumn 2010 and sign the transfer. He also denied signing any of the company documents within the bundle that apparently bore his signature. He denied ever having met Ms Graham or Ms Ginga (Ms Ginga did not say she had met him except over Skype on the one occasion in issue).

40. The Respondent also gave evidence through an interpreter although her grasp of English is such that she was less dependent on the interpreter than the Applicant. Like the Applicant she was ardent in her evidence but unlike him she did make some important concessions, which might be regarded as to her credit in some respects, but discredit in others. Most importantly, she conceded that the mortgage payments made by FC(UK) out of company funds were made on behalf of both herself and the Applicant, although she maintained that she personally subsidised the company's bank account when it was short of cash. She clarified that the money she claimed the Applicant owed her in respect of the Property was in respect of mortgage payments and other expenditure on the Property after the Applicant had moved to Hong Kong. She said that she told him following the repossession proceedings in 2001 that the Property was old and needed refurbishing and that a lot of money was owed to the Bank, and he replied that he was not coming back to the UK and she could decide what to do with it but she should not ask him for any more money in respect of it.

41. Mss Ginga was evidently nervous when giving evidence. I formed the impression, however, that this was because she was aware that her conduct in relation to the Transfer fell short of what was to be expected of a solicitor purportedly acting for both sides in a transaction, and that she may be criticised for it, rather than because her evidence was

untrue. It is right to say that her conduct of the matter as she described it was less than ideal but this is not a professional negligence case. On the Applicant's case, of course, Ms Ginga was not acting for him at all and he had no dealings with her. In autumn 2010 the Solicitors Regulation Authority was investigating Ms Ginga's firm (for matters relating to poor governance rather than dishonesty). It would have been foolish of her, to put it lightly, to become involved in a conspiracy to defraud the Applicant while those investigations were continuing. At present she has a practising certificate which she told me she needs because she is working as an international student consultant which involves doing some immigration law work. So, to have come before me and perjured herself would be doubly dangerous for her. I did not form the view that she was giving dishonest evidence before me. I do not consider that her failings in the conduct of the matter from the point of view of any duty of care owed to the Applicant nor the SRA investigation into her firm cast any doubt on the honesty of her evidence, whatever they may say about her competence as a solicitor in 2010.

42. I accept Ms Ginga's evidence that she attended at the Respondent's London office on a day in late September 2010 and participated in a Skype videoconference call with the Respondent and a person that Ms Ginga believed to be the Applicant whom she observed sign the Transfer via Skype (I will turn below to the question whether it was the Applicant). I accept her evidence that she received the Transfer at her office on 30 September 2010 when she inserted that date in it and signed it as a witness. It follows that I find that the Skype conference took place on a date in late September 2010 which was earlier than 30 September 2010. The Transfer could not have reached London on the same date on which it was signed.

43. Ms Graham could not give any specific evidence about the Transfer. However, I found her to be a forthright and honest witness. In particular, I accept her evidence that she had met the Applicant on a number of occasions including at the Happy Valley racecourse, the Jockey Club and the opening of an Evergreen shop. Ms Graham is a big personality who would not easily be forgotten. So, I consider that the Applicant's denial that he had ever met her not only incorrect but likely to be knowingly untrue. That is something which casts doubt on other aspects of his evidence.

44. As is usual when there is a dispute as to the authenticity of a signature, a forensic document examiner, Mr Stephen Cosslett, was instructed to give his opinion. He was

jointly instructed on behalf of the Applicant and the Respondent and produced a report dated 7 December 2018. Unfortunately, that report is of no assistance at all. Because of the poor quality of the copy of the Transfer provided to him and the wide range of variation in specimen signatures provided to him for comparison, he was "unable to offer any reliable opinion at to whether or not [the Applicant] signed [the Transfer]".

Discussion

45. The Applicant challenges the effectiveness of the Transfer on the following grounds, which I will discuss in turn:

(1) He denies signing it.

(2) If he did sign it, his signature was not attested in accordance with s. 1 of the 1989 Act.

(3) If he did sign it, the Transfer was not delivered for the purposes of s. 1 of the 1989 Act.

Did the Applicant sign the Transfer?

46. In the light of my finding above that Ms Ginga participated in a Skype conference at which the Transfer was signed by someone purporting to be the Applicant, the remaining issue to be decided is whether it was the Applicant or someone impersonating him who was present in the Respondent's Hong Kong office and signed the Transfer during that conference. It was the Respondent's evidence, of course, that it was indeed the Applicant but on its own the Respondent's evidence is not decisive. Ms Ginga's evidence was that she asked to see proof of identity and was shown a Hong Kong identity card in the Applicant's name with a photograph on it matching the person on the Skype conference. She said that she was concerned that the identity card had no expiry date and was then shown a bank card with a signature which matched the one on the Transfer. She said that the identity card and the bank card were both held up to the camera so that she had a clear view. Ms Ginga had not met the Applicant but said that there were photographs of him in the Respondent's office and that the Respondent had previously pointed him out to her in those photographs. Her evidence was that the man she saw over the Skype conference looked similar to the man in the photographs. I accept her evidence in those respects.

47. It is theoretically possible that the Respondent had found a look-alike for the Applicant and obtained a forged identity card and bank card in the Applicant's name, in order to be able to deceive Ms Ginga. I consider that to be unlikely. It would have required a level of cunning and criminal organisation that would be beyond most people and in my estimation would have been beyond the Respondent. It is far more likely that it was the Applicant whom Ms Ginga saw sign the Transfer via Skype, and that his denial of having signed it is untrue.

48. I therefore find on the balance of probabilities that the Applicant did attend a Skype conference at the Respondent's office in Hong Kong on a date between 24 and 29 September 2010 and did sign the Transfer during that conference.

49. I make that finding notwithstanding that there were curiosities about the Respondent's evidence and her case generally, in particular with regards to the financial arrangements between the parties and the Applicant's motive for signing the Transfer, and the delay in registration of the Transfer. It is, however, for the Applicant to satisfy me that he did not sign the Transfer and for the reasons I have sought to explain above he has failed to do so.

Was the signature adequately witnessed?

50. By s. 52 of the Law of Property Act 1925, transfers of land must be made by deed. By s. 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989:

> (3) An instrument is validly executed as a deed by an individual if, and only if—
> (a) it is signed—
> (i) by him in the presence of a witness who attests the signature; or
> (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and
> (b) it is delivered as a deed.

51. Ms Hemans submits that even on the Respondent's factual case the Transfer was not validly witnessed because it was not signed in Ms Ginga's physical presence and/or she did not sign to attest the signature until the Transfer arrived in London in the post a couple of days later (the exact period of delay is not clear but is unlikely to have been less than two days).

52. The question whether the requirement for the witness's 'presence' in s. 1(3)(a) is satisfied if the witness observes the deed being signed over a video-link has recently

been discussed by the Law Commission in its report on Electronic Execution of Documents (Law Com No. 386). The Law Commission's provisional view expressed in its earlier consultation paper on electronic execution of documents was that actual physical presence was probably required by the present law but that the law ought to be reformed to permit attestation via video-link. That view was, apparently, supported by the majority of consultees. It is evident, though, that the Law Commission considered that the point had not yet been decided. In para. 5.35 of its report the Law Commission observes:

> "Some consultees argued that it would be open for a court to decide that remote or virtual witnessing would satisfy the statutory requirements. Although we agree that may be the case, we are not persuaded that parties can be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform, without being physically present. This conclusion is based on the combination of the restrictive wording of the statutory provisions and the serious policy questions underlying any extension to accommodate technological developments."

53. One factor relied on by the Law Commission as supporting the need for physical presence is a requirement for the signature of the witness to be affixed at the same time as execution of the deed. The question whether attestation must accompany execution has recently been considered by Mr James Pickering sitting as a Deputy Judge of the High Court in *Wood v Commercial First Business Ltd (in liquidation)* [2019] EWHC 2205 (Ch), a judgment handed down 6 days before the hearing in this matter began. The decision did not come to my or either counsel's attention until after the hearing but when it did come to my attention shortly afterwards I invited, and was provided with, written submissions on it from both parties. In *Wood* a borrower challenged the validity of a mortgage deed on the ground, amongst others, that it was not properly attested because the witness to her signature had not signed to attest in her presence but rather in her absence at some later time.

54. The borrower's case in *Wood* was not put on the basis that the attesting signature was insufficiently contemporaneous as Ms Hemans put her case here. It was based upon the proposition that the person whose deed it is must be present when the witness signs to attest the deed. However, it was the borrower's case that because she did not see the witness sign the deed he must have signed it later.

55. The Judge held that "while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the

presence of the person executing the deed (or indeed of anybody else)". Accordingly, he dismissed that challenge to the validity of the deed.

56. Mr Bryden relies on the decision as authority for the proposition that there can be a temporal lapse between the witness observing the maker of the deed signing and the witness signing by way of attestation. He submits that so long as the witness can recollect the maker signing it does not matter when they themselves sign the deed. Ms Hemans submits that *Wood* does not decide that the witness's signature need not be contemporaneous as the point was not argued in that way. She argues that the case is distinguishable.

57. No authority appears to have been cited to Mr Pickering in *Wood* but there is some old authority on the question of whether attestation had to be contemporaneous at common law. In *Wright v Wakeford* (1812) 4 Taunton 213 the majority of the Court of Common Pleas held that a requirement in a trust for a consent to be attested by two or more witnesses was not satisfied where one of the witnesses attested the consent many years later. The majority (Heath, Lawrence and Chambre JJ) held at 225-226:

> "And we are further of opinion, that the attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing the writing testifying the assent and approbation of Thomas Wood and his son; such being the usual and common way of attesting the execution of all instruments requiring attestation; which, we think, the parties creating the power had in their contemplation, and intended, and not an attestation to be written at a distance of time after all the parties had testified their assent and approbation

58. In *Netglory Pty Ltd v Caratti* [2013] WASC 364, Edelman J sitting in the Supreme Court of Western Australia applied the approach of the majority in *Wright* in holding that a deed witnessed 7 years after the event was not validly attested under the relevant Australian statute (which is not in the same terms as s. 1 of the 1989 Act but which does required a deed to be "attested").

59. There is nothing in the judgment in *Wood* to suggest that Mr Pickering was referred to either *Wright* or *Netglory* but that does not render his decision per incuriam, in my view. Neither were binding on him as to whether s. 1 of the 1989 Act requires attestation to be contemporaneous.

60. It seems to me that *Wood* is authority binding on me for the proposition that it is not a requirement of s. 1(3) that the witness's attesting signature must be made on the exact same occasion as the maker of the deed's signature. It is permissible for it to be made in the future to some degree, when the maker of the deed is no longer present. If that is correct, I can see no good reason why the time gap should not be a few days, as it was here. If there is no necessity for execution and attestation to be part of the same continuous event, there is no principled reason for distinguishing between, say, later the same day and later the same week. There is no need for me to express a view on the limit of the permissible time gap.

61. The conclusion in the light of *Wood* that attestation does not have to be exactly contemporaneous with execution also undermines one, but only one, of the Law Commission's justifications for the view that remote presence via video-link would not or may not suffice.

62. Needless to say, nineteenth century authorities on what attestation involves can throw no useful light on the question whether 'presence' can include 'virtual presence' via a video-link. Virtual presence would not have been within the contemplation of nineteenth century courts. Ms Hemans made an ingenious but stretched comparison with someone in the nineteenth century viewing an execution of a deed through a telescope from the top of a hill but I did not find that useful. Even when the 1989 Act was enacted video-conferencing was in its relative infancy, involving expensive proprietary systems. Skype itself, probably the first mass use videoconferencing program, is a creation of the early 21st century. So, it is not clear whether Parliament would have had the possibility of virtual presence in mind when the 1989 Act was enacted.

63. The question whether attestation of a deed via video-link should be allowed is one of policy – a balancing of risk and convenience. The question whether it is permissible under the present law permits of more than one conceivable answer, as the Law Commission acknowledged. I return, therefore, to the test which I am applying to this application: whether the Applicant has a claim to alter the register with realistic prospects of success. Given the uncertain state of the law, I consider that the Applicant has a realistic prospect of persuading a court or Tribunal hearing a rectification

application that, even though the Applicant signed the Transfer, it was not validly executed as a deed because Ms Ginga was not physically present when it was signed.

Delivery

64. My conclusion in the preceding paragraph makes it unnecessary to reach a firm conclusion on whether the Transfer was delivered if validly attested. It is realistically arguable that it was not, as the Applicant did nothing to indicate an intention to be bound by the deed (the essential component of delivery) after it was completed by attestation. That said, it may be that by handing the Transfer to the Respondent for sending back to Ms Ginga, the Applicant could be said to have authorised Ms Ginga to deliver it on his behalf.

65. Having reached the conclusions that (1) the Applicant signed the Transfer but (2) he has realistic prospects of persuading a Tribunal or court hearing a rectification application that the Transfer was not executed in accordance with s. 1 of the 1989 Act, does it follow that the Applicant has a claim for rectification with realistic prospects of success? Not necessarily. He must also demonstrate a realistic prospect of overcoming the restriction on rectification against a proprietor in possession and of persuading the Tribunal or Court to order rectification as discussed in paragraph 12 above.

66. Mr Bryden posits two answers to any formal invalidity of the Transfer which are material to that latter question: (1) that the Applicant is estopped from denying its validity and/or (2) that if the register were rectified the Applicant and the Respondent would hold the Property on constructive trust wholly for the Respondent. I turn now to those two arguments.

Estoppel

67. Mr Bryden relies on the Court of Appeal's decision in *Shah v Shah* [2001] EWCA Civ 527. In that case the defendants signed a deed promising to pay the claimant £1.5m. Their signatures were attested by someone who was not present when the defendants signed. The deed was provided to the Claimant's solicitor after it had been signed by the attesting solicitor. The defendants denied the validity of the deed on the ground that

their signatures had not been attested in accordance with s. 1 of the 1989 Act. The Court of Appeal upheld the trial court's conclusion that the defendants were estopped from denying the validity of the deed. Pill LJ, with whom the other members of the Court agreed, said the following when explaining his reasons for upholding the finding of estoppel:

> "33...the delivery of the document in my judgment involved a clear representation that it had been signed by the third and fourth defendants *in the presence of the witness* and had accordingly been validly executed by them as a deed. The defendant signatories well knew that it had not been signed by them in the presence of the witness, but they must be taken to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on."

68. I do not consider that *Shah v Shah* assists the Respondent. A key element in the decision was reliance on an implied representation that the deed had been validly executed, i.e. signed in the presence of the attesting witness, by someone who did not know that it had not been. In contrast, the Respondent was well aware of the circumstances of the execution of the Transfer. She may not have known of the legal consequences of Ms Ginga being thousands of miles away (if that has any consequence) but she knew that Ms Ginga was not in the room when the Applicant signed and the circumstances in which Ms Ginga signed to attest the signatures. The Respondent, therefore, cannot be said to have relied on any representation of fact made by the Applicant relevant to the validity of the deed.

69. Mr Bryden described the estoppel he asserted as one estopping the Applicant from denying the effectiveness of a means of execution that he agreed with. He submitted that equity should hold the Applicant by estoppel to representations that he made that he was willing to execute the Transfer with Ms Ginga witnessing via Skype. In my judgment, *Shah v Shah* does not assist in establishing an estoppel of that nature. *Shah v Shah* decided that an estoppel by representation can arise to prevent someone from denying the validity of a deed which he has impliedly represented, as a matter of fact, had been validly executed, where that representation of fact is relied upon. The estoppel that Mr Bryden contends for is not an estoppel by representation of fact as in *Shah*. Rather it is a form of proprietary estoppel - an assurance made by the Applicant by executing the Transfer that the Respondent would acquire his interest in the Property

which, on the Respondent's case, she relied upon by paying off the mortgage. I consider that such a proprietary estoppel may arise on the facts I have found, but *Shah* cannot be relied on in support of it.

Constructive trust

70. The facts that may give rise to a proprietary estoppel as described in the preceding paragraph are essentially the same facts that Mr Bryden contends would give rise to a constructive trust in favour of the Respondent: an agreement to transfer the Applicant's interest in the Property to the Respondent as represented by his signature to the Transfer on which the Respondent relied by repaying the mortgage in the understanding that she was sole owner and, Mr Bryden submits, foregoing repayment of monies from the Applicant. It might also be said that the works that the Respondent claims to have done to the Property after the Transfer - something on which she was not challenged in cross-examination - also qualify as acts of detrimental reliance. It is the Respondent's case that such a constructive trust would defeat any interest the Applicant might have in the Property pursuant to his claim to alter the register.

71. Ms Hemans submitted that there was no foundation for a constructive trust, or estoppel, which had not been pleaded. The Applicant was not properly advised and may have signed but without the intention of transferring the Transfer out of his hands. The difficulty with that submission is that the Applicant's factual case was that he did not sign at all. So there is no evidential foundation for a submission that in signing he did not intend to transfer his interest in the Property to the Respondent or did not understand what he was doing. On the Respondent's case the Applicant did not intend immediately to transfer his interest, but he did intend to do so in two years' time if he had not paid money to her first. So, on the Respondent's case the signing of the Transfer was intended to convey the Applicant's interest to her after two years if nothing was paid in the meantime; and there can be no basis on my findings for holding that that he had any different intention. There is no suggestion that the Applicant did pay anything to the Respondent after September 2010. I find, therefore, that by signing the Transfer the

Applicant did intend/agree to transfer his interest in the Property to the Respondent after two years and she understood him to have so intended/agreed.

72. Ms Hemans further submitted that the Respondent could not establish detrimental reliance by the Respondent, a key element of a constructive trust (and also a proprietary estoppel). By the date when the mortgage was repaid the Respondent was already the sole registered proprietor of the Property so the Applicant could not hold the Property on trust for her. There is no proper evidence of what, if anything, the Applicant owed to the Respondent and hence of reliance by foregoing payment.

73. In my view, the question is not whether the Applicant held the Property on trust for the Respondent when she repaid the mortgage. The question is whether he would hold it on trust for her (or more accurately whether they would together hold it on trust for her) if the register were rectified to reinstate him as joint legal proprietor. If so, it would not be unjust not to alter the register and, even if the Respondent could be said to have substantially contributed to the mistake by lack of proper case (which I do not decide) there would be exceptional circumstances justifying the registrar in not making the alteration, for the purposes of para. 6(3) of Sch. 4. There would be no point altering the register to reinstate the Applicant as proprietor if the Respondent would then be entitled as of right to a court order requiring the Applicant to transfer it back to her pursuant to a constructive trust. That would be a compelling exceptional circumstance justifying the registrar in not making the alteration in the first place. So, if the Property would be held on constructive trust for the Respondent if the register were altered, the Applicant would not have a claim to alteration of the register with realistic prospects of success in my view.

74. In my judgment, the Applicant and the Respondent would hold the Property on trust for the Respondent if the register were rectified to reinstate the Applicant as co-proprietor. They would do so because the Respondent suffered detriment by incurring the cost of repaying the mortgage and of improvement works to the Property in reliance on the Applicant's agreement and intention, as demonstrated by his signing the Transfer in 2010, to convey his interest in the Property to her in 2012. I do not consider the fact that

the Respondent was sole registered proprietor when she incurred those costs would prevent the trust arising as soon as the Applicant were restored as joint legal owner.

75. So, in my judgment the Applicant does not have a claim to alteration of the register with reasonable prospects of success and accordingly does not have an interest in the Property entitling him to a unilateral notice over it.

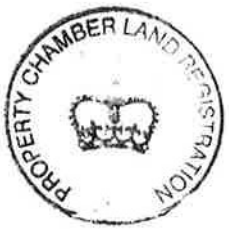
Decision

76. For the reasons that I have sought to explain above, I will direct that the Chief Land Registrar give effect to the Respondent's application to cancel the unilateral notice in favour of the Applicant. It is right to point out that my decision does not prevent the Applicant from going ahead and applying to alter the register. And it is not for me to decide to what extent my findings in this decision will bind the parties should he do so. Nevertheless, in my view it is not appropriate to leave a unilateral notice on the register to protect a claim to alteration of the register which has not been made in the 3½ years since the notice was lodged and which I do not consider has realistic prospects of success.

77. The usual rule in this jurisdiction is that costs follow the event: the loser pays the winner's costs since referral to the Tribunal. However, that is not the invariable rule. By para. 9.1 (b) of the Practice Directions, Property Chamber, First-Tier Tribunal, Land Registration I can make a different or no order as to costs.

78. I have not yet heard any submissions on costs, which I propose to decide with reference to written submissions. So, if either party wishes to apply for costs they should make a reasoned application in writing, accompanied by a schedule of costs within 28 days. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submissions sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party or parties within 14 days of receipt of the submissions.

Daniel Gatty



JUDGE DANIEL GATTY

Dated: 8 January 2020