[2017] UKFTT 0183 (PC)

REF/2016/0357 and 2016/0358

LAND REGISTRATION DIVISION, PROPERTY CHAMBER
FIRST – TIER TRIBUNAL

IN THE MATTER OF TWO REFERENCES FROM HM LAND REGISTRY

REF/2016/0357

BETWEEN

SOFIA HOURIA BENOUDA

Applicant

- and -

(1) KATHERINE JANE WHITE
(2) CHRISTOPHER DAVID ARNOLD WHITE

Respondents

Property address: flat 1, 4 Aldringham Road, London SW16 1TH
Title numbers: TGL427490, SGL240658, and LN178160

REF 2016/0358

BETWEEN

SOFIA HOURIA BENOUDA

Applicant

- and –

MICHAEL RICHARD ELLIS

Respondent

Property address: flat 3, 4 Aldringham Road, London SW16 1TH
Title numbers: TGL427493, SGL243665 and LN178160

Made by: Judge Stephen Jourdan QC

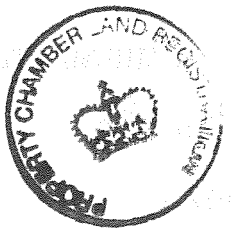
ORDER

IT IS ORDERED as follows:

The Chief Land Registrar is to give effect to the two applications made by the Applicant as if the Respondents' objections to those applications had not been made.

Dated this 30th day of January 2017

BY ORDER OF THE TRIBUNAL



STEPHEN JOURDAN QC

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Property address: flat 3, 4 Aldrington Road, London SW16 1TH
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Before: Judge Stephen Jourdan QC

Sitting at: 10 Alfred Place, London
On: 23 and 24 January 2017

Applicant's Representation:	Simon Brilliant of counsel, instructed by Grower Freeman
Respondents' Representation:	Jacqueline Samuels, solicitor, of Samuels & Co

DECISION

Application for order that Applicant not be permitted to appear by an advocate who is a Judge of this tribunal because of actual or apparent bias rejected - House converted into 4 flats each held under leases with about 60 years unexpired, lessees also jointly owning freehold – they decide to grant 999 year leases of each flat for £1 –one lessee then sells his existing lease to Applicant who also becomes joint freeholder – 999 year leases of the other flats are registered after the date on which the Applicant was registered as joint freeholder – the other joint freeholders then refuse to grant 999 year lease to Applicant except on payment of substantial premium – the Applicant then applies to alter register by cancelling registration of two of the 999 year leases and reviving the title to the previous leases – Argued by Respondents that the 999 year leases were delivered as escrows prior to transfer of freehold and therefore were valid leases; argument rejected — Held that Respondents caused mistake by lack of proper care; they should have ensured their solicitor was aware of freehold transfer, in which case the new leases would not have been entered into or submitted for registration –If that was wrong, held that it was unjust for another reason to refuse rectification; it was unjust for Respondents to retain their 999 year leases for £1 while insisting that the Applicant was charged a substantial premium for hers – No exceptional circumstances – Downgrading title to good leasehold not appropriate – Applications succeeded

Cases referred to

Porter v Magill [2002] 2 AC 357
Lawal v Northern Spirit Ltd [2003] UKHL 35, [2003] I.C.R. 856
Smith v Kvaerner Cementation Foundations [2007] 1 W.L.R. 370
Resolution Chemicals Ltd v H Lundbeck A/S [2014] 1 W.L.R. 1943
Bank Of Scotland Plc v King [2008] 1 EGLR 65
Silver Queen v Persia Petroleum [2010] EWHC 2867 (QB)
Bishop of Crediton v Bishop of Exeter [1905] 2 Ch 455.
Lady Naas v Westminster Bank [1940] AC 366
Sinclair v IRC (1942) 24 TC 432
Browne v. Burton (1847) 5 Dow & L 289
Fulham Leisure v Nicholson Graham & Jones [2007] P.N.L.R. 5

Introduction

1. This is my decision on two references relating to registered leasehold titles to 999 year leases of two flats in 4 Aldrington Road, London SW16 1TH. The Applicant, Ms Benouda, has applied to cancel those leasehold titles and to re-open previous leasehold titles to leases with about 60 years unexpired, which were closed when the 999 year leases were registered. The Respondents, the registered proprietors of the relevant titles, have objected to the applications.

Application to adjourn based on actual or apparent bias

2. At the hearing, the Respondents were represented by their solicitor, Jacqueline Samuels, and the Applicant by counsel, Mr Brilliant, who is a Judge of this Tribunal. At the start of the hearing, Ms Samuels applied for me to adjourn the hearing, and to direct that the Applicant not be permitted to appear by Mr Brilliant or any other advocate who is a Judge of this Tribunal. She submitted that there was a real risk that I would be biased in favour of Mr Brilliant, or that there was the appearance of a risk of bias, because he is a Judge of this Tribunal. She argued that there is a risk, or the appearance of a risk, that I would be inclined to accept his submissions for that reason.

3. I rejected that application. There is no risk of any such bias, nor is there the appearance of any bias. The test for apparent bias is whether a fair minded and informed observer, knowing all the relevant facts, would conclude there was a real possibility that the Tribunal is biased: *Porter v Magill* [2002] 2 AC 357. In the case of a tribunal where there are lay members with a legally qualified chairman, this means that it would be wrong for a lay member who has sat with a legally qualified chairman to hear a case where that chairman appears as an advocate: *Lawal v Northern Spirit Ltd* [2003] I.C.R. 856. That is because a lay member will look to the chairman for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the chairman, and therefore a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the lay member may be subconsciously biased in favour of the chairman's submissions when appearing as an advocate.

4. However, the situation is quite different here. A fair minded and independent observer would know that any legally qualified member of a tribunal will understand that an advocate is not there to put forward their opinion of the facts or the law, but rather to put

forward their client's case as persuasively as they can, and would not be influenced in any way by the identity of the person making submissions, or any judicial office held by the person, in deciding whether to accept or reject those submissions. The situation here is, in my view, analogous to that considered in *Smith v Kvaerner Cementation Foundations* [2007] 1 W.L.R. 370 at [17-19]. The Court of Appeal there rejected the suggestion that an appearance of bias arose by reason of the connection between a part time judge and counsel through being members of the same barristers' chambers: [17]-[19]. In *Resolution Chemicals Ltd v H Lundbeck A/S* [2014] 1 W.L.R. 1943 at [46], the Court of Appeal regarded as obviously untenable the idea that a deputy judge could not hear a case in which a more senior member of his or her chambers was acting for one of the parties. The same is, in my judgment, true where a Judge of this Tribunal hears a case in which another Judge of this Tribunal is appearing for one of the parties, something which is not uncommon.

The facts

5. 4 Aldrington Road is a house converted at some point in the past into 4 flats. In the late 1970s, leases were granted of each of the flats, in each case for 99 years from 25 December 1976, and the title to each was registered. I will refer to those as "the existing leases". In 2001, the four lessees acquired the freehold.

6. By 2013, the lessees of the four flats were:

   (a) Flat 1, Katherine and Christopher White, who are the Respondents in one of the references before me.

   (b) Flat 2: Carl John.

   (c) Flat 3: Michael Ellis, who is the Respondent in the other reference before me.

   (d) Flat 4: Charlotte Dove.

7. By 2013, the registered freehold title was held jointly by Mr John, Ms White, Mr Ellis and Ms Dove. I will refer to them jointly as "the original freeholders".

8. In August 2013, by which time there were 62 years unexpired of the terms of the original leases, Ms Dove proposed to her fellow lessees and freehold owners that they should grant themselves new 999 year leases for a nominal sum of £1 and this proposal was agreed to. It is not suggested that this created a binding contract.

9. They instructed Ms Samuels to act for them. She prepared draft leases of each of the four flats in similar form. The leases each included separate signature pages for each of the four joint freeholders. The draft leases were not in evidence, and nor were any of the letters or emails under cover of which Ms Samuels sent out the drafts.

10. By 12 May 2014, she had received back those signature pages signed by each of her clients in the presence of a witness. In the case of Mr Ellis's signature, it was witnessed in Hong Kong. In the case of Ms White's signature, it was witnessed in Stratton Audley in Oxfordshire. In the case of Mr John, his signature was witnessed in Grenada.

11. On 12 May 2014, Ms Samuels sent an email to her clients confirming receipt of the signed pages of the leases from all of them. This email was disclosed during the hearing, without objection from Mr Brilliant. In the email, Ms Samuels said: "We can now move on to the next stage of the lease extension process, which is to obtain the consent of your lender". She asked for details of the lenders. It is apparent from later correspondence that Mr John never supplied her with the details of his lender.

12. In April 2014, Mr John, put flat 2 on the market. The estate agents' particulars said: "… property comes with brand new 999 year Lease and share of freehold on completion of sale". The Applicant, Ms Benouda, agreed with Mr John, subject to contract, to pay £220,000 for the flat.

13. Ms Benouda instructed Convey Law to act for her. She has put in evidence a letter from them to her dated 16 April 2014, in which they advised her that the lease only had 61 years remaining, and this might be a problem when she came to sell the property. They could not confirm the cost of acquiring a lease extension, but after 2 years she could require the freeholder to grant one. The cost would increase as the term decreased. They said that they enclosed the contract and transfers and gave instructions on how they should be executed. They made no reference to the possibility of a new 999 year lease being granted.

14. In her witness statement, Ms Benouda said she had never received this letter, and saw it for the first time long after she had purchased the flat. That evidence was challenged by Ms Samuels, and I do not accept it. I think it improbable that Ms Benouda received the contract and transfers without the covering letter sent by Convey Law, without which I do not think she would have known how to deal with the draft contract and draft transfers that she had to execute in order to enable the sale to take place. I think it more likely that Ms Benouda has forgotten receiving the letter in April 2014.

15. On 6 August 2014, in return for paying £220,000, Ms Benouda received a transfer of the existing lease of flat 2. She also received a transfer of the freehold from the four original freeholders to Ms Benouda, Ms White, Mr Ellis and Ms Dove, for £1. The transfer stated that the transferees were to hold the property on trust for themselves as tenants in common in equal shares. There is no evidence about how the original freeholders came to execute that transfer.

16. Following completion, Convey Law applied for the transfer of the existing lease to be registered, and it was registered on 2 September 2014 . They did not apply to register the freehold transfer at that time. The effect of the transfer of the freehold title was that the original freeholders held the freehold on trust for Ms White, Mr Ellis, Ms Dove and Ms Benouda, with each entitled to a 25% beneficial interest in the freehold.

17. Ms Benouda did not move into flat 2 and, in the summer of 2015, decided to sell flat 2. She said that she and her family had originally intended to move into the flat but changed their minds. Ms Samuels challenged that evidence, suggesting that the flat was only ever purchased as an investment. I accept Ms Benouda's evidence on this point, which seems to me to be entirely plausible.

18. Ms Benouda found a buyer and instructed a new firm of solicitors to act for her on the sale. Her new solicitors, RMNJ Solicitors, told her that the freehold was still registered in the name of the original freeholders. After some chasing, Convey Law agreed to rectify the situation.

19. In the meantime, on 15 July 2015, Ms Samuels obtained an official copy of the freehold title, showing the original freeholders as registered proprietors. She did not know anything about the freehold transfer, as none of the original freeholders told her about it.

20. On 20 July 2015 Ms Benouda, Ms White, Mr Ellis and Ms Dove were registered as proprietors of the freehold title. This must have been pursuant to an application made by Convey Law received by the Land Registry on 20 July 2015. I will refer to them jointly as "the new freeholders".

21. On 21 July 2015, Ms Samuels, who was unaware of the change in the identity of the freeholders, prepared leases of flats 1, 3 and 4 bearing the typed date 21 July 2015 and stating that the term was "from the date hereof until 20 July 3014" i.e. 999 years from the date that the lease bears. The premium recorded as paid for each lease was recorded as being £1. The yearly rent reserved was a peppercorn, if demanded. The recitals recorded that the tenant had requested the landlord to grant the tenant a lease of the flat for an extended term in substitution for the existing lease and the landlord had agreed to do so. It was provided that the existing lease was deemed to have been surrendered by the date of the new lease. Ms Samuels attached to those leases the signature sheets she had held since May 2014. I will refer to those leases as "the new leases".

22. On 24 July 2015, the Land Registry closed the titles to the existing lease of flats 1, 3 and 4 and opened new titles to the new leases. The titles stated that the new leases had been granted on 21 July 2015. That must be because, on 24 July 2015, the Land Registry received from Ms Samuels applications to close the titles to register the surrender of the existing leases and the grant of the new leases.

23. On 17 August 2015, RMNJ wrote to Ms Samuels' firm, Samuels & Co, saying that Ms Benouda's buyer had requested that the lease of flat 2 be extended as a condition of the sale and they had been informed that Samuels & Co were dealing with registration of the extensions for the other flats, and asked for details of the extension paperwork.

24. On 3 September 2015, Ms Samuels replied saying that Ms White, Mr Ellis and Ms Dove would grant an extended lease on payment of a premium, with Ms Benouda paying their fees and for a valuation. Ms Benouda then paid for a valuation, after which she was asked to pay a premium of £32,886.75.

25. Ms Benouda then instructed her current solicitors, Grower Freeman, who wrote on 27 October 2015 saying that the other lessees had not paid a premium when their leases were

extended, and asking for an explanation of "this apparent discrimination". No reply to that question was supplied.

26. Enquiries were then made of Mr John, and in July 2016, Ms Samuels wrote to Mr John saying that the reason no 999 year lease was granted to him was that he had failed to provide the name and address of his mortgage lender so that she could write to the lender to ascertain their requirements; the new lease could not be granted without the lender's consent.

27. On 19 January 2016, Ms Benouda applied to the Land Registry to alter the register by cancelling the registration of the new leases of flats 1 and 3. No similar application was made in the case of the new lease of flat 4. This was because Ms Benouda's solicitors were told by the Land Registry that, in the case of flat 4, there had been an official search with priority made prior to the application to register the new lease, and they considered that justified distinguishing the position of flat 4 from that in relation to flats 1 and 3.

28. The applications were objected to by the Whites and Mr Ellis, and the registrar then referred the matters to this Tribunal, under s.73(7) of the Land Registration Act 2002.

The conditions for altering the register to correct a mistake

29. The Land Registration Act 2002 Sch 4 para 5(a) gives the registrar power to alter the register for the purpose of correcting a mistake. There is no doubt that if a title is opened to a lease purportedly granted by persons who did not have title to the land in question, that would be a mistake that the registrar would have power to correct under para 5(a).

30. Alteration to correct a mistake will constitute "rectification" if it "prejudicially affects the title of a registered proprietor": Sch 4 para 1. Para 6(2) provides that, in the case of rectification:

> "No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless—
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
> (b) it would for any other reason be unjust for the alteration not to be made."

31. Para 6(3) provides: "If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration."

The issues

32. The issues are:

(a) Was the registration of title to the new leases a mistake?

(b) If it was a mistake:

(1) did the Respondents, by lack of proper care, cause or substantially contribute to the mistake; or

(2) would it be unjust, for some other reason, to refuse to alter the register?

(c) If so, are there exceptional circumstances which justify not making the alteration?

(d) If the register should be altered, how should that be done?

33. At the start of the hearing, there was also an issue as to whether the Respondents were in "possession" for the purposes of Sch 4 para 6(2). However, during the hearing, Ms Samuels applied for permission to put in further evidence on that issue, which I allowed, as I considered it consistent with the overriding objective to do so. Having considered that evidence, Ms Brilliant conceded that the Respondents were in possession. Even without that evidence, I would have concluded that the Respondents were in possession, but it is unnecessary to say more about that issue as it is no longer live.

Was the registration of title to the new leases a mistake?

34. A document which is signed by a person in the way required for it to be a deed and given to his solicitor will generally fall into one of three categories. First, it may be delivered as a deed on being given to the solicitor, in which case it has immediate effect. Second, it may be delivered as an escrow. An escrow is a document which will take effect as a deed when some condition is fulfilled. If a document is an escrow, the person who signed it may

not revoke it until the condition is satisfied, or until a reasonable time has elapsed without the condition being satisfied. If the condition is then satisfied within a reasonable time, the document takes effect as a deed. Third, it may be given to the solicitor on terms that the solicitor has authority to deliver the deed on completion of the transaction, but that authority may be revoked at any time. In that case, the document has no effect until completion, and the person who signed it may revoke his authority to deliver it at any time until completion. Which of those three categories a document falls into depends on the intention of the person signing it, which is to be deduced objectively from all the facts and circumstances: see *Megarry & Wade: Law of Real Property* (8th ed) [8-038], *Bank Of Scotland Plc v King* [2008] 1 EGLR 65; (Morgan J) at [49-66], and *Silver Queen v Persia Petroleum* [2010] EWHC 2867 (QB) (Lindblom J) at [107-118].

35. Ms Samuels' submission was that the new leases were delivered by the original freeholders as escrows. She said that this was to be inferred from the fact that the original freeholders each executed their signature page for the new leases and sent those pages to her. That meant, she argued, that the condition of the escrow was that, on her receiving the signature of the last of the original freeholders to reach her, and the lenders granting their consent to the new leases, the new leases took effect as deeds immediately. The fact that they had been dated 21 July 2015 was immaterial.

36. Mr Brilliant submitted that the new leases had not been delivered as escrows. He pointed out that the conveyancing file had not been disclosed and that neither Ms Samuels nor the Respondents had given any evidence about the communications between them relating to the execution of the new leases. It was for the Respondents to prove delivery as escrows and they had failed to provide the evidence needed to prove that. His position was that so long as the original freeholders remained the registered proprietors of the freehold title, they had power to grant the new leases, so that if the new leases had been completed after the execution but before the registration of the freehold transfer, they would have been valid leases. However, that had not happened, and by the time the new leases were completed, on 21 July 2015, it was too late, as the freehold title was no longer vested in the original freeholders.

37. Ms Samuels relied on a passage in a textbook published by the Law Society, *Execution of Documents* by Mark Anderson and Victor Warner. This says at p.197:

> "Where several parties need to execute the deed to be valid the deed is delivered on the execution of the last party. For a deed delivered in escrow, the deed takes effect from the date of delivery in escrow and not the fulfilment of the condition. If no date is added to a deed, the validity of the deed is not usually affected, and external evidence can be called to indicate the correct date … There is a rebuttable presumption that the date stated in a deed is the date when it took effect".

38. The second sentence is correct, although there are exceptions, not material here. The third and fourth sentences are also correct. In *Browne v. Burton* (1847) 5 Dow & L 289 at 292-3, Patteson J said: "… a deed or other writing must be taken to speak from the time of execution, and not from the date apparent on the face of it. The date, indeed, is to be taken primâ facie as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded".

39. However, the first sentence is not a complete statement of the law, and as stated, it is incorrect. Where several parties need to execute the deed to be valid, the deed will only be delivered on the execution of the last party if that is what the parties intend. If, but only if, that is what they intend, then the document will be delivered as an escrow by the first person to execute it, with the condition of the escrow being execution by all the other parties within a reasonable time. If, however, the first person to execute it intends it to be immediately binding on him, then it will be. If he intends that it will only be binding as and when he authorises it to be delivered as a deed, it will not take effect until he gives such authority.

40. The authors cite three cases in support of the proposition in that sentence. The first is *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455. In that case, a deed was executed to vest the patronage of a new church in a vicar and certain trustees. The applicable legislation required for this purpose an agreement in writing between various persons, including the bishop of the diocese. The agreement was drawn up as a deed and in October 1899 was signed by everyone except the bishop. It bore a space to be dated, which said: "In witness hereof the said parties to these presents have hereunto set their hands and seals this _____day of _____ , one thousand eight hundred and ninety-nine." The law report says: "It was intended by the parties who so executed that the deed should be dated as of the day on which it should be executed by" the bishop. The bishop did not sign until 26 January 1900, and the document was then dated with that date, an alteration was made to the year as follows: "one thousand ~~eight~~ nine hundred ~~and ninety-nine~~." It was then argued

that this alteration rendered the deed void. Swinfen Eady J held it did not. He said: "In the first place the alteration was only made to carry out the intention of all parties that the deed should be dated and take effect on the day it was executed by the bishop. Substantially, therefore, it was not an alteration, only a filling in the date which all parties intended to be the date; and, secondly, it was not a material alteration."

41. That case, then, is no authority for the proposition in the textbook. It was a case where the intention of the parties executing the document was that it should become a deed on execution by the Bishop.

42. The second case is *Lady Naas v Westminster Bank* [1940] AC 366. That case too does not support the proposition in the textbook. The case concerned a settlement document, which had been executed by the settlor but not by the beneficiary. In the High Court, Morton J rejected a contention that it was settlor's intention that he should not be bound by the settlement document unless and until all parties had executed it. He was not satisfied on the evidence, nor was he prepared to infer, that the settlor had any such intention. The majority of the Court of Appeal disagreed, holding that upon the true construction of the deed no trust was to come into being except if, and when, the deed had been executed by the beneficiary as well as by the settlor, and that accordingly the non-execution by the beneficiary left the deed wholly inoperative. The House of Lords overruled that decision and held that the deed was effective immediately. Lord Wright said, at p.399:

> "... the respondents have conceded that it was not delivered by the settlor as an escrow, but as his deed. In my opinion, the concession was right and indeed inevitable. Whether an instrument was delivered as an escrow is a question of fact. The old law as stated in Sheppard's Touchstone, p.58, that an instrument could not be held to be an escrow unless it was delivered with express words so declaring, and was delivered to some person other than the person executing it, has now been abandoned. The character of the act of delivery depends on intention, which must be ascertained by considering the nature and all the circumstances of the case... In this case there are no circumstances which could justify a finding of fact that the instrument was delivered as an escrow".

43. The last case cited by the textbook is *Sinclair v IRC* (1942) 24 TC 432. This was a Scottish appeal from a decision by the Special Commissioners that a son had held some shares and property as nominee for his father. Nothing in the judgments in that case was concerned with the execution of deeds, or gives any support to the proposition in the textbook.

44. Accordingly, I consider that the question here is whether the facts relied on by Ms Samuels are sufficient to justify the inference that the original freeholders intended the new leases to take effect as soon as Ms Samuels received the signed signature page from the last of them, and the relevant lender gave consent to the new lease, and that they would have no right to withdraw from the proposed transaction once they had sent their signed signature page to Ms Samuels.

45. In my view, in agreement with *Megarry & Wade,* when a person gives his solicitor an executed conveyance or lease in advance of completion, there should be no presumption that he intends it to be an escrow. On the contrary, the most natural interpretation of his conduct is that he is authorising his solicitor to deliver the deed on completion, which authority may be revoked. If that is right, then there is nothing in the facts of the present case which are in evidence to indicate that the original owners intended to deliver the new leases as escrows.

46. Even if that is wrong, and even if one should start with a rebuttable presumption that a client who sends his solicitor a signed document intends it to be an escrow, I think that there is one fact which makes it clear that there was no such intention in the present case. As Mr Brilliant pointed out, the term of the new leases is stated to be: "from the date hereof until 20 July 3014", which was 999 years from the date that each of the new leases bears. Ms Samuels said that the drafts of the new leases did not have that date in, as it could only have been calculated once the date that the new leases would bear was known, and that did not happen until 21 July 2015. Rather, she said, the drafts would have had a blank, saying: "from the date hereof until ….".

47. She submitted that the insertion of the date was mere conveyancing mechanics, but I consider that it makes it clear that there was no intention for the new leases to take effect until they were dated by Ms Samuels, at which point it would be possible for the first time to ascertain the term of the new lease. A term is one of the essential requirements for a lease: *Woodfall* [5.072], and until the commencement and expiry of the term had been decided on, there could be no lease.

48. In any event, I consider that I would not be able to find that there was delivery in escrow without disclosure of the conveyancing file. It is not possible to make a finding as to whether the new leases were delivered as escrows without considering the communications

between Ms Samuels and the Respondents about the new leases. Those communications are privileged, and they are under no obligation to disclose them. However, if they do not, I do not think it is open to them to invite the Tribunal to make a finding of fact which could only properly be made by considering those communications. Where a claimant can only succeed on a claim by proving a fact which he needs to refer to privileged documents to prove, he must choose to either disclose them, or accept that he cannot prove the fact: see *Fulham Leisure v Nicholson Graham & Jones* [2007] P.N.L.R. 5 (Mann J) at [308].

49. Accordingly, I find that the new leases were not intended to take effect until 21 July 2015, by which time the original freeholders no longer held the freehold. Therefore the registration of title to the new leases of flats 1 and 3 was a mistake.

50. Even if that is wrong, and even if Ms Samuels is right to say that the new leases were delivered as escrows with the condition of the escrows being the giving of the lenders' consent, my conclusion would be the same. There is no evidence as to when the lenders who had legal charges over the Respondents' original leases gave consent to the new leases. Ms Samuels put certain dates in her skeleton argument. I said I could not place any weight on those dates without evidence in the form of documents showing when consent was given, and she said she did not propose to adduce any such evidence. Therefore, even if I had found that the new leases were delivered as escrows as submitted by Ms Samuels, I would not have accepted that the condition of the escrows were satisfied before 21 July 2015.

51. In his closing submissions, Mr Brilliant put forward an additional point on the mistake issue. He said that if Ms Samuels had only sent off signature sheets to the original owners for signature, and not a full copy of the draft lease (as it appears from her email of 12 May 2014 may have been the case), then the new leases were not deeds at all. He said it was not open to Ms Samuels to put together the signature sheets with a lease which she prepared on 21 July 2015 to create a valid deed. This point had not been pleaded, understandably, as the facts needed to support it only emerged during the hearing; the email of 12 May 2014 was only disclosed on the second day of the hearing. It would have required consideration of additional authority in order to determine this point. I said that, on the evidence and having regard to both parties' submissions, I was satisfied that the new leases were not delivered as escrows and therefore did not take effect until 21 July 2015, and on that basis Mr Brilliant did not press the point.

Did the Respondents by lack of proper care cause or substantially contribute to the mistake?

52. It was a mistake for the registrar to register title to the new leases when the original landlords had no title to grant the new leases at the date they were entered into. The question is whether the Respondents caused or substantially contributed to that mistake being made, and if so whether that was due to a lack of proper care on their part.

53. The immediate cause of the mistake was Ms Samuels, acting on behalf of the Respondents, sending to the Land Registry an application to register title to the new leases, despite the fact that, by the time the new leases came to be entered into, the original landlords no longer had title to the demised premises. When an application is made to the Land Registry to register a lease, that does, I think, constitute an implicit representation that the applicant believes that the lease was validly granted. If the application succeeds, and the applicant knew that the lease was not validly granted, the mistake will have been caused by fraud. If the applicant did not know that the lease was invalid, but that was due to lack of proper care on the part of the applicant, then the mistake will have been caused by that lack of proper care.

54. I consider that the phrase "proper care" in para 6(2) requires the application of an objective standard of reasonable conduct, having regard to the facts and circumstances in which the mistake came to be made. "Proper care", I think, refers to the care which is appropriate in the circumstances in which the mistake came to be made. In circumstances where a reasonable person would instruct a solicitor, I think that question is what instructions a reasonable person would give to their solicitor, and what steps a reasonably competent solicitor would take having regard to those instructions.

55. In the present case, the position of the Respondents at the time of the freehold transfer, on 6 August 2014, was that they had agreed with Mr John and Ms Dove that each of them would be granted a new 999 year lease in return for a nominal payment of £1, they had instructed Ms Samuels to arrange for the new leases to be granted, and she had asked them for details of their lenders in order to obtain their consent to the new leases, which was necessary in order for them to be granted.

56. In my view, a reasonable person in the position of the Respondents would have told Ms Samuels about the freehold transfer. It was obviously a significant document affecting the

property. Ms Samuels submitted that they were lay people who did not appreciate its significance. However, I consider that a reasonable person in the position of the Respondents would have appreciated that they ought to tell Ms Samuels about the fact that they had executed a formal legal document relating to the property in connection with a sale by Mr John of his flat to Ms Benouda, something they must have been made aware of when they were asked to execute the transfer.

57. A reasonable solicitor in Ms Samuels' position would then have appreciated that, the freehold transfer having been executed, an application to register it could be made at any time, and as soon as it was registered, it would no longer be possible to prepare the new leases using only the signature pages she had; she would need Ms Benouda to be a party to the new leases and to execute them, rather than Mr John. Such a solicitor would therefore not have proceeded to simply prepare and date the new leases and send them to the Land Registry for registration. Rather, she would have assumed that the freehold transfer was likely to be registered at any time, and would have told her clients that the new leases would have to be granted by the new freeholders, unless the new leases could be completed before an application to register the freehold transfer was received by the Land Registry. It is most likely in that case that Mr John would have said that she was not to proceed with the new leases using his signature page, and if the new leases were to be proceeded with, it would have to be done in co-operation with Ms Benouda.

58. In the unlikely event that the instructions from the original freeholders to their solicitor had then been that, if she was able to complete and register the new leases before the freehold transfer was registered, she should do so, any reasonable solicitor would have carried out a search of the freehold title immediately before doing completing the new leases, to ensure that the freehold transfer had not been registered. If she had then found that the freehold transfer had been registered, or that there was a pending application to register it, she would not have proceeded to complete the new leases.

59. In fact, the Respondents did not tell Ms Samuels anything at all about the freehold transfer. I consider that failure constituted a lack of proper care. If they had done, I consider that the new leases would never have been entered into and the mistake would not have been made. Therefore I am satisfied that the Respondents, by lack of proper care, caused the mistake to be made.

60. There was an allegation, in Ms Benouda's statements of case, that the Respondents failed to exercise proper care because neither of the Respondents had made a priority search prior to applying to register their new leases. However, after discussion of the point, Mr Brilliant abandoned that contention, and it was thereafter common ground that the presence or absence of a priority search could make no difference to the outcome of the applications. I will say no more about that issue, as it would be important if an application was made to cancel the new lease of flat 4, where a priority search was made, and it would be wrong of me to express a view on whether that might make a difference in the absence of any submissions from Ms Dove.

Would it be unjust, for some other reason, to refuse to alter the register?

61. This issue does not arise, but I think I should express my view on it, in case I am wrong on the proper care issue.

62. Although Ms Samuels cross-examined Ms Benouda on two aspects of her evidence, as recorded in paragraphs 14 and 17 above, in her closing submissions she attached no importance to that evidence, rightly in my view.

63. The starting point here is, in my view, an assumption that Ms Benouda had no right to a new 999 year lease of flat 2 in return for a payment of £1. If she did have such a right, then there would be no injustice in allowing the Respondents to retain their 999 year leases. Justice would be given effect to by Ms Benouda asserting her claim to a new lease in court proceedings.

64. I have doubts as to whether this assumption is correct. Mr John signed the signature pages on the new leases and sent them to Ms Samuels with authority to complete the new leases, on the basis of an agreement by his fellow freeholders that he, too, would be entitled to have a new lease of flat 2 granted to him. There is an argument that this gave rise to a proprietary estoppel equity which passed to Ms Benouda under s.63 of the Law of Property Act 1925 when she acquired the lease of flat 2 and Mr John's interest in the freehold title, and that she is entitled to be granted a new lease in satisfaction of that equity. There is also an argument that Ms Benouda is entitled to an order from the Court under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 directing the new freeholders to grant a 999 year lease to her, in order to ensure equality among the beneficiaries.

65. However, both sides presented their cases on the basis that there Ms Benouda had no right to a new 999 lease for £1, and I think I must, therefore, determine the applications on the basis of that common assumption.

66. On that assumption, I consider that it would be unjust to allow the Respondents to retain their 999 year leases in circumstances where Ms White, Mr Ellis and Ms Dove have refused to join in granting one to Ms Benouda except on payment of a substantial premium.

67. Once the freehold transfer had been executed, the original trustees held the freehold title on trust for Ms White, Mr Ellis, Ms Dove and Ms Benouda, with each entitled to a 25% beneficial interest in the freehold. I do not think they could properly grant 999 years leases for £1 to the Respondents and Ms Dove, and then refuse to do so in the case of Ms Benouda. I can see no justification for this differential treatment of four beneficiaries each equally entitled to the freehold. Either they should all have been granted new 999 year leases for £1 or none of them should have been granted such leases. Therefore it would be unjust to allow the Respondents to retain their 999 year lease in circumstances where they have refused to grant one to Ms Benouda.

68. There are two points that caused me some hesitation in reaching that conclusion. First, it can be said to be fortuitous that the freehold transfer was registered the day before the new leases were completed. If it would not have been unjust for the new leases to have been validly granted on 19 July 2015, why should it be regarded as unjust two days later? I think the answer to that is that is the one given by Mr Brilliant. It would have been unjust on 19 July 2015, but in that case Sch 4 para 5 would not have provided a remedy for the injustice.

69. Second, the result of granting the applications is that the Respondents will lose their 999 year leases, but Ms Dove will not. However, that is because no application has so far been made to cancel the title to Ms Dove's 999 year lease; it is at least possible that, having regard to my decision, such an application will be made. In any event, even if it is not possible to correct an injustice in the case of Ms Dove, I do not think that is a valid reason for refusing to do so in the case of the Respondents.

If so, are there exceptional circumstances which justify not making the alteration?

70. Ms Samuels argued that there were exceptional circumstances. She said that cancelling the titles to the Respondents' 999 year leases would not confer any practical benefit on Ms Benouda. There was no reason to suppose Ms Dove would be willing to join in granting 999 year leases to Ms Benouda and the Respondents for £1. It was much more likely that she would simply insist that the Respondents paid a substantial premium as well as Ms Benouda. She also submitted that the Respondents could bring a collective enfranchisement claim to acquire the freehold, and so acquire 999 year leases in that way.

71. I do not think either of those are good points. Ms Benouda owns a 25% interest in the freehold. The freehold will be substantially more valuable if the Respondents hold leases with about 60 years unexpired than if they hold 999 year leases. It may be that the Respondents will not seek to acquire extended leases in the immediate future, but at some point they, or their successors in title will probably do so, at which point they will have to pay a substantial premium to the freeholders, and Ms Benouda will be entitled to 25% of that premium. If there is a collective enfranchisement, the price payable for the freehold will be higher if flats 1 and 3 are held under leases with about 60 years unexpired than if held under 999 year leases and Ms Benouda will be entitled to 25% of the price.

If the register should be altered, how should that be done?

72. Ms Samuels submitted that if I am minded to alter the register, I should do so by altering the class of title to the new leases to good leasehold, rather than cancelling those titles and restoring the titles to the existing leases.

73. Under s.10(3) of the 2002 Act: "A person may be registered with good leasehold title if the registrar is of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept". That is not the case here. The original landlords had no title when the new leases were granted. Therefore the title of the Respondents to the new leases was not such as a willing buyer could properly be advised by a competent professional adviser to accept. Accordingly, it would not be appropriate to alter the register to retain the registration of the new leases but with good leasehold title.

Conclusion

74. For the reasons given above, I will direct the Chief Land Registrar to give effect to the two applications made by the Applicant as if the Respondents' objections to those applications had not been made.

Costs

75. I give the following directions in relation to costs:

(a) If Ms Benouda, as the successful party wishes to apply for her costs, she must, by 17 February 2017 serve on the Respondents a summary of the costs claimed in form N260.

(b) If the Respondents dispute Ms Benouda's entitlement to costs, or the amount claimed, they must, by 10 March 2017 serve on Ms Benouda a response giving their reasons and the amount, if any, they consider that they should pay.

(c) If the parties agree on costs, and Ms Benouda wishes an order to be made embodying that agreement, I should be notified. If the parties cannot, by 31 March 2017, agree the issue of costs, then either party may thereafter apply to me to determine the matters in dispute, sending me copies of the costs summary, the response, and any additional submissions Ms Benouda wishes to rely on, with a copy to the Respondents. I will then issue a determination as to costs. If no such application has been made by 30 April 2017, then there will be no order as to costs.

DATED THIS 30th DAY OF JANUARY 2017

BY ORDER OF THE TRIBUNAL

PROPERTY CHAMBER LAND REGISTRATION

STEPHEN JOURDAN QC