[2017] UKFTT 0713 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2016/0416

BETWEEN

STEPHEN JOHN WILLIAMS

Applicant

and

YOUSRY ONSY NAGI BESAI

Respondent

Property address: 11A Carter Road, London SW19 2DQ
Title number: SGL682496

Before: Judge Hargreaves
Sitting at Alfred Place
15th and 16th June 2017

Applicant representation: James Holmes-Milner instructed by HCB Solicitors, Solihull
Respondent representation: John Lisners, Lisners Law, London NW4

DECISION

Key words – Respondent alleged that he had not signed a contract or TR1 to sell a flat to the Applicant – extent of his participation in conveyancing transaction to be analysed – was it his signature on contract – was the TR1 forged or attested properly – conflict of identification evidence - balance of proceeds of sale after discharge of mortgage paid or diverted into account of third party known to Respondent's close associate to whom he had entrusted

pivotal role in sale but not received by Respondent – innocent purchaser – mortgagee – Shah v Shah and Wishart v Credit and Mercantile considered – Tribunal Rule 40(3)to be applied

Cases cited

Shah v Shah and others [2001] EWCA Civ 527

Briggs and others v Gleeds and others [2014] EWHC 1178 (Ch)

Brocklesbury v Temperance Permanent Building Society [1895] AC 173

Wishart v Credit and Mercantile PLC [2015] EWCA Civ 655

Phillips v (1) Smith (2) National Westminster Bank PLC REF/2014/0164 REF/2015/0001 Judge Owen Rhys Ftt Land Registration 1st November 2016

Rimmer v Webster [1902] 2 Ch 163

Ruoff and Roper Registered Conveyancing

Snell's Principles of Equity 33rd ed

1. For the following reasons I intend to direct the Chief Land Registrar to cancel the Applicant's AP1 application dated 1st September 2015 and made on 1st September 2015 and direct pursuant to Tribunal Rule 40(3) that the Chief Land Registrar enters an agreed notice to protect a contract for sale in favour of Stephen John Williams (the Applicant) dated 13th August 2015. The reference will be stayed for until 5pm 5th October 2017 to enable the parties to make any further submissions on those proposed directions on the basis of the findings set out below, in particular regarding the Rule 40(3) direction. A recent search indicates that the Applicant's solicitors made a new application on 13th March 2017 which may or may not be relevant to my proposed final order, and I have no information about that. The further submissions must be filed and served on each other.

2. The application is to register a transfer of a leasehold title dated 14th August 2015 and a charge executed by the Applicant in favour of Ian Steele and William Slora dated 14th August 2015. The mortgagees did not appear nor were they joined as parties.

3. Before I start the analysis, there are some preliminary points to be made. The Respondent, who is Egyptian by birth, travels on a UK passport and works as a doctor in the NHS. Despite the fact that he is a professional, his response to the

situation in which he finds himself has been woeful, part of that being due to the fact that he appears to have put the matter in the hands of solicitors, more recently Mr Lisners, who did not take his instructions on the Applicant's statement of case or witness evidence. The Respondent said in the witness box that he had not read any of these documents and only knew of Mr Mullaly's evidence (that he had met him twice in 2015) shortly before the hearing when he received an email from Mr Lisners about that. Worse, he had not even read his own statement of case settled by Mr Lisners. He has therefore been curiously disengaged from a dispute which on his case has cost him dearly. Furthermore, his defence centres on two points: (i) he did not sign critical documents and (ii) he was in Egypt on holiday at the time of completion of the relevant conveyancing transaction and never instructed solicitors to complete a sale to the Applicant. He failed to provide a witness statement (though that might be more Mr Lisners' responsibility than his) or any other direct evidence supporting these defences.

4. As to the first, since the original TR1 exists, it would have been relatively straightforward to obtain expert evidence (and arguably cost effective assuming it supported his case) and the evidence that he was in Egypt for five weeks between July-August 2015 could have been so much more informative and helpful to the court than the evidence relied on[1]. In particular point (ii) relates to his contention that he never met the Applicant's employee Mr Mullaly in either June or on 14th August 2015 (as to which events there is a complete conflict of evidence) and it would have been within his power to produce better evidence as to where he actually was on both or either of those alleged meetings (dealt with in greater detail below).

5. Further, Mr Holmes-Milner (counsel for the Applicant) had been hampered in his preparation by difficulties in obtaining the conveyancing file of the firm Michael G. Wooldridge ("MGW"), which was finally disclosed on Friday 9th June electronically. It contained documents which the Applicant had not seen before, and which are in an unpaginated bundle without any explanation or supporting statement from MGW. Though the Applicant could have made matters more

[1] Evidence that he booked flights to and from Egypt and a translation of one page in his passport

straightforward by seeking an order for specific disclosure in these proceedings (as opposed to issuing an application for pre-action disclosure in Birmingham County Court as a preliminary to other proceedings) the Respondent was at all material times under an obligation to disclose this file: he was, on the face of the documents, the client of MGW and no good reason was provided to me as to why this was done so late (reference to MGW's insurers only underlined how unhelpful the response to this obvious disclosure requirement was). It follows that untangling the facts has been more of a protracted exercise than it might have been.

6. As the case progressed, the similarity between the Respondent's approach to the litigation and the transaction were emphasised, and by that I mean this: his failure to get to grips with the matters to be resolved in the litigation were a reflection of his disconnection with the conveyancing transaction and his acceptance of responsibility for his own actions. For example, he said in answer to a question I put that he knew nothing about a potential liability for capital gains tax on the sale of the flat, in a way that suggests indifference to formalities, again curious in the case of a doctor who asserts he is concerned about his reputation. He was also candid about documents he accepts he signed without reading or completing them; even in the witness box it was hard to discern whether he had paid much attention to some of them, except for those which potentially undermine his position when he tended to adopt a position which was somewhat inconsistent with the effect of the document. That raises issues about the credibility of his evidence when it is not corroborated. His failure to attend to detail is emphasised by the fact that he did not realise that he had less than 6 months unexpired on his passport when he travelled to Cairo on the evening of 19th July 2015, which caused difficulties at the airport.

7. It should be stressed at the outset that it is no part of the Respondent's case that the Applicant is implicated in any alleged fraud. What might be the subject of further investigation or proceedings is the role and conduct of MGW, about which I need make no findings. Mr Lisners made several submissions that MGW and the Applicant's solicitors were careless but never really particularised what he meant and such allegations do not assist in this application. These allegations tend to underestimate the role of the Respondent in the factual history.

8. Page references are to those in the trial bundle.

9. With these matters in mind, I turn to the conveyancing transaction which is at the heart of the AP1 application, ie the sale (on the face of it) by the Respondent to the Applicant of a lease of a flat at 11A Carter Road in Wimbledon. The Applicant runs a property company based in Birmingham which buys properties when sellers need cash quickly, and re-sells them promptly. He buys around thirty six properties a year. He says the Respondent answered an advertisement placed in the Metro newspaper in June 2015 seeking to buy properties, at which point the story starts. The solvency of sellers (due to the Applicant's market) is an important issue to be considered by the Applicant, who employs Lee Robinson to manage negotiations and Nick Mullaly to inspect. Both gave evidence. The Respondent lives in Croydon and in 2006 bought the leasehold of 11A Carter Road, both of mortgaged to the Bank of Scotland (Birmingham Midshires Division)[2]. As registered proprietor, his address was given as 11A; again he was unaware of this or the consequences. See eg p17-19. There is a letter in the bundle at p317 addressed to the Respondent dated June 2015 headed "Important information about repaying your interest-only mortgage". The landlord and freeholder is Hany Shoki Zaki Basali (Mr Basali) whose own address as registered proprietor is 11 Carter Road (p191). The Respondent's case is that Mr Basali impersonated him and diverted the balance of the proceeds of sale to himself. Although he counted him as a best friend for about 15 years, and evidently entrusted him ("as a brother") with paperwork in relation to the sale (though he said he never knew where he lived, which is unusual) he has had no contact with him since September 2015. It would be easy for Mr Basali to pick up mail for the Respondent at Carter Road. Looking back at the Respondent's evidence, it appears that he had no questions about the source of the documents he signed in any event ("Basali gave me documents – I didn't ask where they came from – I thought he was going to help me"). Mr Basali, if he planned to defraud the Respondent, had a relatively easy time of it, and that again provides an important background feature to this case.

[2] Documents relating to Birmingham Midshires were provided to MGW by way of supplying identification evidence according to MGW: see p316-7

10. Lee Robinson's evidence is that the Respondent telephoned the Applicant's office to discuss the sale of the property as the result of the Metro advertisement on about 23rd June. See p265. He accepted, fairly, in cross examination, that he could not be sure that (having heard the Respondent give oral evidence) he spoke to the Respondent, who denies making the phone call or ever speaking to Lee Robinson but accepts that he planned to sell the flat in May or June (which ties in with the letter from the mortgagee referred to above) and that Mr Basali knew this. So the phone call could have been made by Mr Basali and probably was. Lee Robinson was told that the purpose of the sale was to buy another flat. The Respondent denies being in debt and no bank statements were produced to establish his financial situation. But the tenants had left on 15th June and the flat was then empty. In cross examination he maintained that he needed the money to buy another flat, but there was no further explanation, and he denied, further, meeting Mr Mullaly at the property on 25th June (see p280) to discuss its sale to the Applicant. I return to Mr Mullaly's evidence below.

11. It is possible that Mr Basali impersonated the Respondent, as he (or the tenants, he was unclear) gave Mr Basali the keys in the second half of June. But what was the Respondent thinking at the relevant time? There is no question that he knew the flat was being marketed. In cross examination he said that Mr Basali *"could deal with it ... I am busy ... I allowed him to market it on my behalf."* The Respondent then contradicted himself to some extent: having said that he allowed Mr Basali to "market" the property, he then maintained that he did not know that a buyer had been found by mid-July and that as to signing various documents, *"I signed forms to facilitate – I didn't know it was on the market."* That latter assertion is unsustainable and I reject it. Again, I note the curious lack of interest in what was happening to one of his assets (despite his decision to sell), but I find that he was content for Mr Basali to take control for him and at no point did the Respondent allege that he had told Mr Basali not to proceed. Later in his evidence, dealing with the declaration of solvency (p70) (for example), he asserted that Mr Basali had his photograph [because] *"he [Basali] said I need [your] passport and photo for MGW – to facilitate sale* ***while I'm in Egypt.***"

12. I emphasise those words taken from my note of his cross examination because they establish, on a balance of probabilities, that the Respondent contemplated a sale while he was in Egypt, not after and that undermines his assertions (i) that he did not know the flat was being marketed (ii) that he did not know that a buyer had been found. In the circumstances, he knew that and authorised Mr Basali to do what was necessary, as the Applicant alleges, and in any event (see below) he signed a document which identifies the Applicant. That finding has a direct impact on the question whether he signed the contract if not the TR1 and what the consequences are, as to which I gave directions on 18th July 2017 requiring further submissions. In re-examination after being recalled on the morning of 16th June, he repeated this evidence, explaining that Mr Basali had said to him *"Sign these – the solicitor can work on it while you are in Egypt."* So, on the question whether I accept the Respondent's assertion that he did not know that there was a sale agreed prior to his departure for Egypt and that he had no intention to transfer the property while he was away, his own evidence contradicts that case. It is also the case that the travel to Egypt was arranged months before the decision to sell the flat: the Respondent's assertion that he booked the holiday about the same time as he decided to sell the flat in about June 2015 is wrong (the balance was due by January 2015: see p196). He decided to sell the flat months after he booked the holiday; that being so, it is fair to infer that he wanted a transaction to proceed, otherwise one would assume that he would market the flat on his return. For reasons not entirely clear (unless there was mortgagee pressure), he wanted to sell the flat, knew he would be abroad, and entrusted the job to Mr Basali.

13. Against this background, it is then necessary to revert to the chronology of the transaction. Whoever spoke to Lee Robinson provided an email address: london500@hotmail.com. The Applicant does not seriously Mr Lisners' research that suggests this belongs to Mr Basali. The Applicant has no evidence that the Respondent himself used this email address, which he himself denies though the Respondent has adduced no evidence to prove that he never did. There is no evidence (electronic or otherwise) one way or the other as to communication between the Respondent and Mr Basali while he was abroad, which the Respondent denies. Whoever spoke to Mr Robinson supplied a mobile phone number which the Respondent confirms is not his and again that is not seriously

challenged by the Applicant. It is therefore entirely possible (and the Applicant accepts this), that Mr Basali conducted the correspondence and telephone calls with Mr Robinson (see eg pages 266-7). However, even the Respondent accepts that Mr Basali did not forge all his signatures and I find that only two are open to doubt. Mr Robinson asked Basali/the Respondent if he had a solicitor and then, being told "no", recommended MGW, who duly sent a bundle of papers, obviously to Carter Road, which were picked up by Mr Basali who then met the Respondent in his car in a Lidl car park in Croydon to arrange for him to sign as required on 17th July (the detail about the Lidl car park only being revealed on the second day of the hearing, which adds to the sense of the Respondent's lack of attention to detail in his evidence). As there is nothing to suggest that the Respondent queried how or why he came to be sitting in his car signing documents, I conclude that he was perfectly happy to do this before he flew to Egypt and moreover, signed them *because* he was going to Egypt a couple of days later and was content for Mr Basali to do what was necessary. Further, as there is no evidence that he made any attempts to contact MGW himself (when he had all their contact details), I also conclude that he was at least indifferent about what was happening to the flat and when: it was entirely within his power to contact MGW to instruct them not to complete a sale before he returned from Egypt, but he did not. In the context of what he signed, that is significant.

14. Everything signed by the Respondent in Lidl car park on 17th July, together with his visit to the offices of GT Stewart[3] on the same day, is consistent with him preparing for a sale to be completed during a five week absence abroad from 19th July[4] subject to the facts relating to the TR1. There is no other explanation which makes sense. When considering the evidence, I am struck by a lack of objection or reference by the Respondent to an important issue: at no point during the hearing or in any of the documents did he suggest any objection to the sale price agreed at £285,000 though there is some suggestion that it was below market value, or a higher price could have been obtained (certainly the Applicant was intending to re-sell it through Foxtons almost immediately for a higher price). It is also notable

[3] A Google map search shows that there are at least 2 Lidl supermarkets in the vicinity of GT Stewart Solicitors in Croydon

[4] Subject to Mr Mullaly's identification evidence which places the Respondent in Wimbledon on 14th August

that when the Respondent instructed Thakrar & Co in September 2015, he was less than frank about the number of documents he now admits signing: see Thakrar's letter at p99 for example, and the Respondent's email of 7th January 2016 (p107) which confirms that he "certified my copy of ID document (passport) in presence of a solicitor on 17/07/2015 .... I did not understand that [MGW] would use my ID document for selling the above flat without acknowledge me or even without identifying a buyer (which indeed has happened)". In the same email he wrote to Thakrar & Co "The freeholder Mr Basali told me that he knows a solicitor in Birmingham who can deal with the procedure of sale [of] the ...flat in case of finding a buyer in future and asked me for my ID documents to avoid travelling to Birmingham as I was very busy and about to travel abroad on 19/7/2015 to 24/8/2015". But of course MGW did correspond with him at the address he gave. It is odd that this email does not refer to the other documents he signed on 17th July. Also inconsistent with the case he is now running is the evidence that he indicated in March 2016 that he would withdraw his objection to the AP1 application (p121), though as he has always denied signing the TR1, HMLR would not give effect to the application, hence this referral.

15. It is certainly the case that on 17th July 2015 the Respondent visited the offices of GT Stewart at 158-162 London Road, Croydon and met a solicitor called Vanya Headley. She did two or three things. First, she certified two pages of the Respondent's passport as a true copy of the original: see p403. Secondly, she certified that a photograph of the Respondent was a true likeness of him (on the basis of the passport): p404. The Respondent wrongly (and consistently) confused the two and insisted all she did was certify his passport. But, thirdly, whether she witnessed the Respondent signing a declaration of solvency is more questionable: there is a very poor photocopy at p70 which does not *appear*, unlike the other documents (in the bundle), bear a GT Stewart stamp. It is also not clear that the declaration of solvency was ever put to GT Stewart as a document she certified: see p113-115. The Respondent denies signing the document at p70 of the trial bundle. As the Applicant points out, it does identify the Applicant as the buyer (but not the purchase price) and therefore if signed by the Respondent, would be cogent evidence that he knew the identity of the buyer before he went to Egypt. However, while it might be a step too far on the basis of the document alone in the

trial bundle to conclude that the Respondent signed it (in the absence of being able to look at an original more closely) and I have to be satisfied on the balance of probabilities, it appears that the Respondent must have attended at the offices of GT Stewart with at least one passport photo and there is evidence that he did take steps to confirm his solvency.

16. In the file of documents released by MGW at p413 just before the hearing, there is another document headed "Special Requirements" in a type face used by the Applicant and which (amongst other things) asks for confirmation of the solvency of the Respondent – this document bears the Respondent's signature and he filled in the answers to the questions as he readily accepted in the witness box. It is hard to imagine why the Respondent would sign the document at p413 and not the document at p70 – the point of both is to confirm solvency/identification. In addition the Respondent confirmed that he gave a photograph to Mr Basali and signed p414. That starts *"I enclose herewith a Statutory Declaration which the proposed purchasers require you to have sworn in front of a Solicitor. Please take the document to a local firm of Solicitors who will deal with this form [for] you for a small charge.*[5] *Please return the form duly sworn as a matter of urgency ..... we require photographic ID either a valid Passport or Driving Licence, or we require a passport sized photograph which has been certified as being a true likeness of yourself by a Doctor or Solicitor accompanying the same with a letter stating that he has known you for a number of years .... Let us have it as a matter of urgency as the file can not continue to completion without this being supplied."* It continues *"**I enclose herewith the Transfer for signature ... please return the transfer duly signed as a matter of urgency.** I enclose herewith an overriding interest questionnaire and utilities form please complete and return to us"* (my emphasis). The simplest way to delay a sale until a return from Egypt would be to delay in carrying out these instructions. On a balance of probabilities I conclude, however, that the declaration of solvency (p70) was in the bundle of documents which the Respondent went through on 17th July. Taking all the evidence together (including the documents the Respondent accepts that he signed: see below), I further conclude that on the balance of probabilities he signed the declaration of

[5] On page 414 as copied this paragraph bears a handwritten tick in the right margin which suggests someone has ticked this job as completed

solvency which was witnessed by Vanya Headley on 17th July and therefore could be reasonably taken to have been on notice that the property was being sold to the Applicant. As Mr Holmes-Milner submits, if a delay in selling the property was so important, why not inform MGW directly?

17. The Respondent accepts, further, that he signed the following additional documents:

(i) the retainer letter dated 14th July 2015 sent by MGW (p38-39)
(ii) a letter of consent to forward information to MGW "who are acting on my behalf in connection with the sale of the property" dated 17th July 2015 (p45)
(iii) the Law Society fixtures and fittings form (p46-53)
(iv) the Law Society Property Information Form (p54-69)
(v) the seller's disclosable interest form (p342-3)
(vi) the sales instruction form (p352): he signed it, completed his address as that of the property, but denies completing the rest of the form. In that case, he must have handed his building society details to Mr Basali, or they were completed because he provided details to MGW (p316-7). MGW had the June 2015 Birmingham Midshires letter on their conveyancing file
(vii) the overriding interest questionnaire (p353)
(viii) the anti money laundering guide (p415-417)
(ix) the additional enquiries (p392-3-4).

18. The Respondent denies signing the Agreement to sell (p75/p345) and the TR1 (p81-83) which was forwarded to HCB by MGW on 14th August (p419), as well as the statutory declaration of solvency (see above). See further below as to the TR1. In addition he denies signing the deed of covenant at p224 and that is possible (but of less consequence) since it was sent to Mr Basali on 4th August (see p221-226) and returned on either 12th or 13th August. It was dated 14th August (p80).

19. On 13th July MGW spoke to "Mr Beshai" (p203). The MGW file (unpaginated) shows that on 14th July 2015 the basic conveyancing documents (and other letters) were posted to the Respondent at the property, including *"your part of the contract*

.... sign ... then return the document to me immediately ... To set your mind at rest I will not exchange contracts on your behalf unless and until I have the opportunity of speaking to you personally and confirming that you still want to proceed." This letter suggests that the contract details were completed: *"Please check the contents carefully and assuming all is correct would you then sign in the position indicated and then return the document to me immediately"*. See Lee Robinson's email to the Respondent (using throughout the london500@hotmail.com address[6]). The Respondent admits that he provided his identification documents and a retainer letter to MGW: see the bottom of p152 (Respondent's statement of case) but this is unsatisfactory because in the light of the list of documents he did sign, it is arguably a misleading and incomplete account of what he signed (which is part of the issue with how the statement of case was prepared: see however para 18(c) p155). On 19th July (the day the Respondent flew to Egypt) an email from the london500 account to MGW asked a number of questions about the transaction (p204) and added *"All the paperwork are completed and signed, including the Declaration of Solvency which has been certified by the solicitors, Once I get all the above required confirmation to my e-mail, I am happy to post them to you with signed for delivery, in order to proceed"*. The second part of this email raises questions about missing details on the *"sale agreement .... The buyer's name!!! and the purchase price!!!"* Confirmation of the purchase price and the purchaser was supplied by MGW's email to london500 dated 21st July: that suggests that the contract was, as claimed, blank in respect of those details (contrary to the Applicant's primary case), though they were known and recorded. This is consistent with all paperwork (though see below as to the TR1) including the contract being signed on 17th July, though on the 19th July the MGW file records that they *"spoke to client – informed him we have to have certified ID, client care letter and protocol forms before we can proceed"*, and it appears that MGW was still awaiting the return of the pack on 21st July (email in MGW file). On 13th August london500 emailed details of the bank account for the destination of the proceeds of sale to MGW (p231).

[6] When required, Mr Basali supplied alternative email and phone number for himself: see eg p72

20. On 24th July london500 emailed HGW *"All my signed paperwork and ID has been sent to you by post, you should receive it in next couple of days."* The MGW file shows that paperwork was then sent to HCB on 27th and 29th July 2015. In my judgment that included the signed contract, even if certain details were blank.

21. However, there is a particular issue about the signing of the TR1 which is as follows. Although it is arguable that a TR1 was included in the original pack of documents, on 4th August MGW emailed HCB: "The forms have come in so am sending them out to you. Just the TR1 to send out to him to sign." This was one of the late disclosed documents. It is hard to discern what "forms" are meant given the evidence about what appears to have been sent to HCB 27th – 29th July unless the exchange of emails 4th-5th – 9th/10th August about the deed of covenant provides an explanation. By 12th August the MGW file had been checked and "all was OK". The reference to the TR1 is then picked up in an email from HCB to MGW dated 12th August: "Please find **enclosed herewith the Transfer Deed for signing** by **your client** in readiness for completion on Friday" (again, my emphasis, to contrast with the earlier emphasis above). A TR1 was emailed by MGW to london500 on 12th August with instructions to "return the **original** to me duly signed and witnessed in time for completion on Friday." See p226. The response from london500 is that it would be signed and returned by special delivery, being received by MGW on 13th August (also p226). The TR1 was posted to HCB by MGW on 14th August "duly signed by our client."

22. Contracts were exchanged on 13th August and the transaction completed on 14th. Unpicking the conveyancing transaction without evidence from the conveyancers begs the question whether there were two TR1s: was one signed in the Lidl car park? Without the August emails about the TR1 it might have been relatively straightforward to conclude that the Respondent signed a TR1 on 17th July, as the Applicant submits and as might have been a reasonable argument prior to the late introduction of the MGW file given the Applicant's case that the Respondent did not go to Egypt. That would leave the question of the witness to be dealt with, who has not been traced and is said by Mr Lisners (as the result of his inquiries: p289-291), not to have lived at the stated address. However, the overall evidence is that

the "operative" TR1 was not signed then, but in August, and if so how and by whom, given the Respondent's case that he was in Egypt.

23. So that then focuses attention on the evidence of Mr Mullaly for the Applicant (p279). His evidence is that he met the Respondent twice. The first time was on 25th June at the property to negotiate the purchase price. In his witness statement he describes the Respondent as *"a foreign male with an overseas accent, of Northern or Middle Eastern heritage. He was smartly dressed wearing chinos and a shirt, approximately 50 years of age with dark hair, average build and approximately 5ft 10 inches in height."* This careful description is given in his statement made on 20th February 2017 ie before the date in April on which Mr Mullaly attended Birmingham County Court where he identified the Respondent as the man he had seen before. It is a good description of the Respondent as he appeared in court before me but he had seen photographs of the Respondent (available on the internet) prior to making the statement. The next meeting is crucial: he says he met the Respondent at the property on 14th August, the day of completion. See paragraphs 10 and 11. If the Respondent was there on the Friday, he could have been in England to sign the TR1 on 12th. Once the Respondent denied he signed the TR1, Lee Robinson downloaded Facebook pictures of the Respondent and Mr Mullaly looked at them and a copy of his passport (p284-8) and concluded *"To the best of my knowledge I am confident that the pictures presented to me is the gentleman that I met at the property on both occasions."*

24. Mr Mullaly gave careful oral evidence. He was fluent and comfortable with his previous identification of the Respondent. When challenged as to the particularity of the written description set out above he said that he *"remembered the chinos – my son wears them a lot and [he wore] a nice shirt as well. He looked a well-dressed man."* That is a particular detail. He refuted Mr Lisners' charge that he was lying, and though I consider that he was wrong about the dates on which he was subsequently shown the Facebook photographs by Lee Robinson (whose date of November 2015 I prefer), his oral evidence was not shaken by Mr Lisners. There is nothing to suggest that Mr Mullaly is a liar or otherwise unreliable. He has worked for the Applicant since 2007. I doubt whether the presence of his employer watching him give evidence was sufficient to make him lie: Mr Mullaly

was confident that his written evidence (February 2017) was supported by his further visual identification of the Respondent on 27th April in Birmingham, though again he would be expecting to see him there. There was no direct attempt to suggest he mixed up Mr Basali with the Respondent, ie there was no cross examination on the lines that Mr Basali looks like the Respondent with the consequence that Mr Mullaly had been easily misled or had been deceived. I still have no idea what Mr Basali looks like: Mr Mullaly was not (for example) shown a photograph of Mr Basali as a means of obtaining an admission that he had been confused and that the man he met twice at the property was, after all, Mr Basali not the Respondent. In other words, the only thing that marks the difference between Mr Mullaly's evidence and the Respondent's is a stark conflict of evidence. I therefore turn to the Respondent's evidence on this point.

25. I have already alluded to the way in which he faced preparing for the case. Apart from the translated passport entries and the evidence of the family flights, he produced no evidence that he was in Egypt over the entire 5 week period at all, and as Mr Holmes-Milner submitted, it would have been relatively easy to provide firm alibi evidence (the Respondent is married and it appears that his wife was also in Egypt). The starting point is that it would have been possible on the evidence before me for the Respondent to return from Egypt to complete the transaction, including signing the TR1 and meeting Mr Mullaly to hand over keys. Given Mr Lisners' requests for details from the Applicant (eg p308) it is odd that no further details were provided by the Respondent in reply though Mr Lisners only emailed him shortly before the hearing about Mr Mullaly's evidence. His evidence was that he used a different sim card for his phone in Egypt, always used cash, kept no records.

26. The Respondent maintained that he did not know the flat was on the market before he went on holiday. Given the number of documents he signed, that evidence is not convincing and I reject it: see paragraphs 10-11 above. Whether or not he signed the documents in blank does not make any difference: this is not pleaded as a case of undue influence or non est factum. To the extent that he left Mr Basali to complete the forms it is because he was happy to do so in my judgment, because selling the flat and attending to the paperwork was Mr Basali's task. I also reject

his case that he did not know that a sale had been agreed (i) because Mr Mullaly alleges he met him in June to agree a price so one had been agreed prior to 17th July and (ii) because the paperwork he signed or saw on 17th July refers to a purchaser. In re-examination he said he signed the documents in July *"To give information about the flat .. not for a sale."* But the documents go further than that. He also said he gave Mr Basali a set of keys to the flat in the second half of June so *"he can deal with it – I am busy – he can market it on my behalf"*. He denied retaining any keys – and if so, that also challenges Mr Mullaly's version of 14th August but also makes it nigh on impossible for the Respondent to maintain that he did not know he had a buyer for the flat or was in the process of selling it through Mr Basali.

27. On the disputed signatures (declaration of solvency, contract, TR1) the Respondent merely insisted they were clearly and obviously not his. Without expert evidence to assist, that is arguably a conclusion beyond me on that basis alone. As to the TR1 in his second cross examination by Mr Holmes-Milner he said this: *"I can't remember signing the TR1. I am not familiar with what a TR1 is. I left everything to the solicitor."* That is not the same as a flat denial about signing it but it does emphasise that the Respondent was content for the deal to proceed in his absence and his insistence about the TR1 is unsatisfactory given his carelessness overall. It also indicates that in leaving matters to a solicitor (not just Mr Basali), he did not communicate any limits on what that solicitor was supposed to do (and never suggested that he did).

28. Another oddity is the Respondent's evidence that he states that he discovered that the mortgage had been paid off on his return when he telephoned the mortgagee on 27th August to pay August's instalment over the phone by debit card. This is an unusual method of payment. No evidence was produced to support it. He maintained that he paid the July instalment early, prior to the Egypt trip. He maintains he discovered the mortgage had been discharged and telephoned Mr Basali to find out what was going on, not MGW. Without evidence that this is how he paid the mortgage every month, it is equally possible that he rang the mortgagee to check that it had been discharged, bearing in mind the Birmingham Midshires letter.

29. The Respondent's evidence is unhelpful and somewhat contradictory about his plans for the flat. Signing documents prior to a five week holiday in a car park, and visiting a solicitor to obtain identity evidence is arguably consistent with time pressure. Pressure is consistent with a sale having been agreed. I am satisfied having heard the Applicant's evidence overall that a deal was agreed before the end of June and that if the Respondent did not know the details, he was remarkably careless or indifferent or both as to the details, and was perfectly content to allow Mr Basali to do whatever he needed to do, including completing the transaction. What he was really vexed about on his return was (unsurprisingly) the whereabouts of the balance of the proceeds of sale, not the fact of sale at the price agreed with the Applicant.

30. Of course, if the Respondent met Mr Mullaly twice as alleged, then he knew full well what the situation was. I have found this a difficult question to answer. As I indicated above, I find that Mr Mullaly was a competent and careful witness who was not shaken by Mr Lisners' cross examination, and was honest in his endeavours to assist the court. He had the opportunity at the end of April this year to realise he had made a mistake but his visual identification only confirmed to him that the man he saw at Birmingham in April 2017 was the man he had met twice before in June and August 2015, with confirmation from photographs in November 2015 – that is a gap of around 18 months, and by April 2017 the question of identity was critical. Whilst it is tempting to accept Mr Mullaly's evidence in full, I hesitate to conclude on the balance of probabilities that he did meet the Respondent twice. On the balance of probabilities I find that he was honestly mistaken. The Respondent's position is consistent with handing the whole deal over to Mr Basali and given that on the balance of probabilities Mr Basali dealt with the paperwork and the contact with the Applicant by telephone and email (as Mr Lisner's researches show) I have concluded that he must have arranged both of the meetings and impersonated the Respondent twice. There is no evidence that he could not and given that he was handling and picking up the paperwork, he had ample scope and opportunity. After all, this is a man who seems to have opened a bank account in order to defraud the Respondent as he alleges: easy for him to pose as the Respondent on the facts before me, and it

makes more sense to conclude that while he went to certain lengths to obtain the Respondent's signature on various documents, he handled the "direct" side of the transaction himself. Indeed, it is arguable that arranging for the Respondent to meet Mr Mullaly twice would have jeopardised any plan to defraud him.

31. Further, the Respondent's complete indifference to paperwork and the sale price, are factors which add weight to the matters I take into account in deciding that he did not meet Mr Mullaly on the balance of probabilities. He maintains he was "busy" prior to his departure for Egypt. Whilst I have concluded that he knew or can reasonably be taken to have known that there was a sale agreed before he went to Egypt I consider that indifference to the practicalities of completing the transaction probably extended to turning up as alleged by Mr Mullaly, including meeting the surveyor from eSurv to provide access (as instructed by the Applicant – there was no useful evidence as to identity on this occasion). Although I consider that the Respondent can be rightly criticised for failing to produce better evidence of his stay in Egypt, and I am unimpressed by his frequent resource to claims that he would not want to damage his reputation as a doctor (in which case, "sort your evidence out better" is a justifiable response), I have finally concluded that it would be stretching the evidence too far and too thinly to conclude that he has lied about meeting Mr Mullaly or his trip to Egypt. Overall, it is more probable than not that he went to Egypt as he claims.

32. That has consequences for the signature on the TR1. If I am right, and the Respondent was in Egypt when the TR1 was sent by MGW to london500 and returned on 13th August by special delivery, there is no evidence that it was returned special delivery from Egypt. If I am right that he was in Egypt as he alleges then on the balance of probabilities the signature on the TR1 is not the Respondent's and there is no useful evidence one way or the other about the witness except to point out that the TR1 was returned in a short space of time so the witness' signature was obtained at or about the same time, though whether the TR1 was "witnessed" at all would be mere guesswork (and is arguably irrelevant if Mr Basali or a third party forged the Respondent's signature). I reach this conclusion only on what the documents (some only disclosed to the Applicant shortly before the hearing) before me indicate about the passage of the TR1

because that is the best evidence I have. The passport evidence (both stamps are on the same page 27) tips the balance in favour of the Respondent, as does the evidence as to the purchase of the flight tickets. The fact that the Respondent's passport was nearly out of date when he set off does not prove that he did not fly to Egypt (see the translated passport stamps, not in the trial bundle).

33. So what are the consequences? As far as the Applicant is concerned, there was nothing wrong with the TR1 he received. On the face of it, it was signed and witnessed in accordance with *s52 LPA 1925* and *s1 LP(MP)A 1989*. In the event that I conclude that the Respondent did not sign the TR1 the Applicant contends I should find that the Respondent is estopped from denying that it is valid, relying on *Shah v Shah.*

34. In *Shah*, the facts were that the deed was properly signed by the parties, it was apparently witnessed properly (it was not), and it was put forward by the defendants on the basis that they would be bound by it (see paragraph 14). In *Shah* the signature was admitted, but attestation was defective: see paragraph 27. Counsel for the claimant, moreover, *"accepts that an estoppel could not defeat the absence of a signature as distinct from a defect in or the absence of its attestation. The signature is fundamental to the validity of the deed"* (paragraph 28). Pill LJ concluded (paragraph 30): *"The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature .... [public policy] should not permit a person to escape the consequences of an* ***apparently valid deed he has signed***[7]*, representing that he has done so in the presence of an attesting witness, merely by claiming that the attesting witness was not present at the time of signature."* The Court of Appeal concluded that the deed could, in so many words, be regarded as a proper deed.

35. I asked Mr Holmes-Milner whether the principle in *Shah* would cover the facts in this case if the signature on the TR1 is not the Respondent's. He submitted that it would. I have my doubts. See *Ruoff and Roper,* 13.010, *Snell* 12-029. In my judgment the principle in *Shah* does not extend to raising an estoppel where the

[7] My emphasis

signature was not that of the Respondent. In *Briggs v Gleeds* Newey J specifically refers to the narrow remit of *Shah* and adds at paragraph 40 *"It seems fair, moreover, to infer that Pill LJ would not have considered estoppel applicable if the defendants had not even signed "the deed"".* His analysis at paragraph 43 confirms my decision that *Shah* does not assist the Applicant.

36. On the basis that the Respondent signed a contract on 17th July in blank (p345 without the additional handwritten insertions), and did not sign the TR1, and *Shah* does not assist, the parties' further submissions are as follows, produced in response to further directions issued on 18th July.

37. The Applicant submits that the contract was valid and complied with *s2 LR(MP)A 1989* in that the signed version was complete as to the relevant details and so far as completed by MGW as to certain details, that was authorised by the Respondent on the facts (see above). On my findings of fact the contract was signed on 19th July, and the details later inserted by MGW. It was valid. I reject the Respondent's argument on the facts that this was not one of the documents signed by the Respondent in the Lidl car park: it was sent back to HGW later when Mr Basali's queries were answered, but the Respondent's signature had been appended: it was not the signature that was an issue, but confirmation that it was in fact the anticipated deal, which had by then been arranged. There is no question that contracts were exchanged by the respective solicitors and the Respondent had authorised Mr Basali to arrange a sale while he was in Egypt and had instructed MGW to complete the formalities. The Respondent never suggested that Mr Basali misrepresented or deceived him as to the content or effect of any of the documents he was asked to and did sign on 17th July.

38. On that basis, the Applicant then argues that he would have been entitled to specific performance of the contract by the Respondent in any event, as well as entitled to protect the contract by the entry of a notice (*s32(2) LRA 1925*). The Respondent's answer to that is that he did not sign the contract, which I have rejected for the reasons given. An order for specific performance is beyond my jurisdiction but is clearly a possible outcome: the Applicant has paid the full price

to MGW as agents for the Respondent and is on the face of it entitled to a signed and properly executed TR1.

39. By contrast, the TR1 sent to HCB was void because I am not persuaded that it was signed by the Respondent or otherwise complies with the requirements of *s1(3) LR(MP)A 1989.* That is on the basis of my findings as to the probability that the Respondent was in Egypt when it was purportedly executed.

40. If the TR1 is void, what are the consequences? In this case it is clear that the Respondent handed the sale of the flat to Mr Basali, instructed solicitors and intended to sell the flat. The Applicant accepts that the Respondent appears to have been defrauded and is out of pocket, as is the Applicant. In the course of providing further submissions the Respondent accepts now that the Applicant is entitled to an interest or protection in respect of the monies paid to discharge the mortgage by way of "subrogation" which can be protected, but denies that there was a valid contract (I have rejected that argument). Subrogation might be a technically inaccurate possibility as the Birmingham Midshires mortgage has now been discharged but it is clear that the Respondent has to recognise the value of the discharge to himself, and now does so.

41. Further submissions were invited on various points including the outcome if I were to find the contract valid but not the TR1 and the potential application of the *Brocklesbury* principle as applied in *Wishart v Credit & Mercantile PLC. Brocklesbury* itself (1895) concerned a son absconding with title deeds, entrusted to him by his father to borrow a certain amount against their security, and borrowing far more, to the ultimate loss of the father, who was held to be liable to bear the burden of the loss on the grounds that as principal, he was responsible for the acts of his agent (son) (so far as the deeds were valid, and not forged), because he empowered his agent to borrow more than he was in fact authorised to do, the mortgagee/s being ignorant of any limits on the instructions to the son. On the facts (use of title deeds to raise money), the case would now not arise and the question of registered land played no part in the decision. The facts in *Wishart*, well summarised by Judge Rhys in *Phillips v Smith* at paragraphs 53-55 are similar to the extent that a friend and colleague was entrusted to implement a scheme for

the purchase of a property to be occupied by Mr Wishart, mortgage free, and the ultimate arrangement was implemented to the advantage of the friend and fixer rather than Mr Wishart, who occupied the property and argued that he had priority (via an overriding interest) over the rights of a mortgagee, which argument was rejected on the application of the *Brocklesbury* principle. The fixer also disappeared without trace, but there was no forgery. In this case there is no question of the Respondent being in occupation or having to consider rights protected by occupation in the context of the *LRA 2002*.[8]

42. Sales LJ, giving the leading judgment, referred (paragraph 51) to Farwell J in *Rimmer v Webster* stating that the principle arises when *"the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee."* In paragraph 52 Sales LJ continued: *"The .. principle is not based on actual authority given to the agent, but rather on a combination of factors; actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with a means of holding himself out to a purchaser or lender as the owner of the asset or having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud."* On the facts Mr Wishart had furnished the fixer with a means of representing himself as a true beneficial owner and was thereby precluded from maintaining a beneficial interest in priority to the mortgagee.

43. Mr Holmes-Milner argues that all these conditions apply to the actions of the Respondent and therefore *"the Respondent's beneficial interest should be*

[8] The *Wishart* decision has been subjected to detailed academic scrutiny and criticism but for the purpose of this decision, it is not necessary to consider its problems in similar detail: see eg article by Andreas Televantos in *The Conveyancer and Property Lawyer* [2016] vol 80 p181

postponed to that of the Applicant" (further submissions 7th August paragraph 21). This rather assumes that he retains any if he is liable to execute a TR1 because of the contract. He further relied (paragraph 25) on *Snell's Equity* at 4-043: *"The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud or estoppel or through his gross negligence."* The Respondent was on the facts grossly negligent about the documents he signed and gave to Mr Basali. He provided him with a straightforward means of disappearing with the proceeds – admittedly, dishonestly. As Mr Holmes-Milne submits, it makes the Respondent bare trustee for the Applicant who paid the purchase price to MGW. But whilst I consider this to be a correct submission to make as regards beneficial interests in the property, it does not provide me with a means of giving effect to a forged TR1 ie the AP1 application. See the conclusion of Judge Rhys in paragraph 55 of *Phillips v Smith* where having distinguished *Wishart* (urged on him by counsel for the National Westminster Bank PLC, Second Respondent) on the facts on the grounds that the Applicant had not authorised the First Respondent to do anything whatsoever (least of all procure her signature on a TR1, held to be void due to non-attestation), he added this: *"Secondly, I cannot see that the* Brocklesbury *principle can possibly rescue a void disposition such as the Transfer in this case. Although a limited estoppel may be set up in the circumstances of a case such as* Shah v Shah, *the* Brocklesbury *principle only operates to postpone an existing beneficial interest to the charge. It may be a form of estoppel in that the beneficial owner is estopped from setting up the prior interest. However it has no application to the formal requirements under the* 1989 Act." I agree: as with the *Shah* argument, I reject any submission that *Wishart* enables me to give effect to a void TR1.

44. Mr Lisners' further submissions (10th and 17th August) are that the Respondent did not authorise Mr Basali to deal with the property. That is not sustainable on the facts. I agree that he did not authorise Mr Basali to defraud him of the net proceeds but he gave him carte blanche to get on with the sale while he was in Egypt, enabled him to make progress by signing most of the documents, and never once contacted MGW with any direct instructions. In my judgment his evidence on the TR1 is indicative of his general approach: it was vague and unsatisfactory and as I stress above, my findings are based on the fact that he was in Egypt when the

actual TR1 was signed. So far as competing interests are concerned, there is no reason why, contrary to Mr Lisners' submission, the Applicant is in a better position to bear the loss rather than the Respondent (and no relevant evidence given either way), and on the whole, given my findings, it is hard to see why, although the application to register the TR1 cannot be effective on the grounds that it is void, the Respondent has a greater claim to an interest in the property (after conceding that the Applicant is entitled to some interest to reflect the discharge of the mortgage at the very least) than the Applicant.

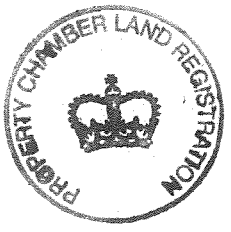
45. It may well be arguable that the application of *Brocklesbury* principles is relevant or useful to a specific performance application, but that is not a matter for me, and arguably *Brocklesbury* is unnecessary if the Applicant is correct about specific performance of the contract.

46. In the light of my conclusions the appropriate way of finalising the reference is as set out in paragraph 1, but to give the parties an opportunity of making such further submissions as they consider relevant. In addition I would invite the parties to provide their outline submissions on costs by the same date.

47. In the light of the Respondent's acceptance that the Applicant is entitled to an interest in the property to reflect the amount required to discharge the Birmingham Midshires mortgage, even if I am wrong about the validity of the contract, I cannot see that the Respondent would have a valid objection to an entry in favour of the Applicant to protect that claim, probably by way of a restriction. This can be dealt with in the parties' further submissions.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves



DATED 15TH SEPTEMBER 2017