Neutral Citation Number: [2020] EWHC 3348 (QB)

Case No: QA/2020/000031

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM
THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2020

Before:

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

DEAN RALPH	**Claimant**
- and –	
DAVID RALPH	**Defendant**

- -
- -

George Woodhead (instructed by **Verisona Law Solicitors**) for the Claimant
Riccardo Calzavara (acting **Pro Bono**) for the Defendant

Hearing dates: 5 and 6 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 8 December 2020.

Mr Justice Morris:

1. This is an appeal against the order of His Honour Judge Monty QC sitting at Central London County Court dated 6 January 2020 ("the Order"). By the Order, the judge dismissed the claim of Dean Ralph ("the Claimant" or "Dean") against David Ralph ("the Defendant" or "David") for a declaration as to the beneficial ownership of 6 Homedale House, 3 Brunswick Road, Sutton ("the Property") and for an order for sale. The claim was brought under the Trusts of Land and Appointment of Trustees Act 1986. After a two-day trial on 16 and 17 December 2019, the judge formally handed down written judgment on 6 January 2020 ("the Judgment"). The Claimant now appeals, with permission granted by Mr Justice Cavanagh dated 10 March 2020.

The background facts

2. The following background facts are undisputed and were found in the Judgment (see paragraphs 3 and 4).

3. The Claimant is the eldest son of the Defendant. The Defendant has four other children. The case concerns the ownership of the Property. The Property is the Defendant's home where he resides with his wife and two of their children. The Claimant lived in the Property between 2003 and 2007 but has not lived there since then.

4. The Property was purchased in the parties' joint names on 13 October 2000. The Claimant was included on the title because the Defendant did not have sufficient income to justify so substantial a mortgage and the Claimant agreed to be named in order that their joint incomes could be taken into account. The parties borrowed £76,050 with the Defendant alone paying the balance of the purchase price of £8,450.

5. In the TR1 form recording the conveyance bearing the same date, in box 11 an "X" was inserted next to the text "the transferees are to hold the property on trust for themselves as tenants in common in equal shares". Whilst the rest of the contents of the form were computer-generated, that "X" alone was added in manuscript. It is not known precisely when, and by whom, the "X" was inserted.

6. While he gave a conflicting account under cross-examination, the Claimant's case before the judge was that that was an accurate reflection of the parties' intentions. He asserted that the Defendant had said to him that it would be "a good investment for me". The Defendant responded that there was no such agreement and that the sole reason for the Claimant's name being on the title register was to assist him in securing the mortgage.

7. By these proceedings the Claimant seeks a declaration that the Property is held by the parties as tenants in common in equal shares and an order for sale. The Claimant relies upon the express declaration of trust as to joint beneficial ownership contained within the TR1 form. The Defendant's case is that that express declaration of trust was made under a common mistake and that the parties never intended joint beneficial ownership. The judge found in favour of the Defendant, accepting that it was never intended by either party that they should be joint owners in equity; there was no intention on either side that they would be co-owners in equity. The judge concluded

that the declaration of trust in the TR1 form was completed by mistake and that the Property is held beneficially for the Defendant alone.

8. By the Order, the Claimant's claim was dismissed. Reflecting paragraph 37 of the Judgment, the recitals to the Order recorded that the court had found "that the Property … is held by the parties on trust for the Defendant alone".

9. The question on this appeal is whether, on the evidence and findings of fact made by the judge, and in the light of the procedural history of the case, the judge was entitled to conclude that the property was not held jointly beneficially, and that the Defendant was the sole beneficial owner.

The Proceedings below

Pre-trial

The Part 8 claim and the Claimant's first witness statement

10. The Claimant commenced proceedings by Part 8 claim form issued on 8 September 2017, claiming an order for sale of the property and a declaration that the property and that the net proceeds of sale thereof belong to the Claimant and the Defendant in equal shares. The claim was supported by the Claimant's first witness statement dated 25 August 2017. The Defendant responded by his first witness statement dated 10 January 2018.

First order for directions: 16 March 2018.

11. On 16 March 2018, Deputy District Judge Aswani made an order for directions ("the March Order") which included a direction that if the Defendant wished to counterclaim he had to do so by 20 March 2018 and that if such counterclaim sought a declaration as to the trusts upon which the Defendant contended that the Property was held particulars of the counterclaim should give precise details of the declaration sought and the terms of the trust. There was no reference to a need specifically for a counterclaim for rectification of the TR1. The Defendant was also directed to file and serve any additional witness statement by the same date.

The Defendant's second witness statement: April 2018

12. The Defendant did not file such a counterclaim. On 3 April 2018 he filed and served his second witness statement. That statement commenced by stating:

> *"I wish the Court to accept this Witness Statement as the basis of my counterclaim setting out the basis on which my understanding is of how the legal estate is to be held by the Claimant and myself."*

The statement continued as follows:

> *"3. ...*
>
> *At all material times it was intended that the Claimant would have no interest whatsoever in the property notwithstanding the*

> *fact that it was bought in our joint names and that the property was effectively held on trust either constructive or implied trust for the benefit of myself my wife and my children and that I my wife and my children could live at the property during our lifetimes and that on my demise the property would be for the benefit of the children during their lifetimes.*
>
> *4. There was no intention between the Claimant and myself that he had any interest in the property. He had not made any contributions towards the mortgage payments since the property was purchased all being paid for by myself and my family who live at the property.*
>
> *5. In the circumstances I therefore seek a declaration in my favour that notwithstanding the property is in joint names of the Claimant and myself it is in fact held on trust for the benefit of myself and my family during our lifetimes and during the lifetimes of my children. Secondly a declaration that the Claimant has no interest in the proceeds of sales in the property and that such proceeds of sale belong to me entirely."*

Whilst, by paragraph 5, the Defendant positively seeks relief by way of a declaration in his favour, that paragraph also contains contradictory indications as to the Defendant's case on the nature of the beneficial interests held under the trust.

The Claimant's second witness statement: June 2018

13. On 13 June 2018 the Claimant filed and served his second witness statement. He there stated that he did not expect to contribute to the cost of the mortgage instalments or other outgoings of the Property while he was not living there, though if his father found himself unable to pay the full mortgage instalments, he appreciated that he would have to make up the shortfall. He stated that in 2008 he had made inquiries about obtaining a mortgage to acquire a home for himself and his wife and had been told that he could not get a loan because of his liability under the mortgage of the Property. He further stated that in 2012 he had wanted to sell his interest in the Property to his father and be released from the mortgage, but that his father had refused to take the matter further.

Further directions: May 2019

14. By order dated 31 May 2019 ("the May Order"), the judge confirmed the transfer of the case to the Business and Property List at Central London County Court and made a number of directions including that the claim was to continue as a Part 8 Claim and that "the Defendant has permission if so advised to file and serve Particulars of Counterclaim by 4pm 21 June 2019", with consequential permission for the Claimant to file and serve a Defence to Counterclaim. In the Judgment (paragraph 13), the judge commented that, when making that order, he had taken the view that the Defendant had not complied with the March Order.

15. At a pre-trial review on 20 November 2019, the judge noted that no particularised counterclaim had been served by the Defendant (see Judgment paragraph 14). The

Claimant asserts that the judge further noted that the evidence in the case is limited to the issues between the parties by reference to the witness statement.

The trial

16. At the commencement of the trial on 16 December 2019 counsel for the Claimant contended that, absent any pleaded case on mistake, there was no scope for the court to go behind the express declaration of trust. The judge then enquired of the Defendant's solicitor, Mr Long, as to the Defendant's case in the absence of any counterclaim. Mr Long explained that there was no counterclaim because it was itself contained within the second witness statement. The judge responded that the court had not accepted that because the court had subsequently made an order to serve particulars of a counterclaim (in the May Order). Mr Long responded that the objection to the TR1 that would come out in evidence was that it (i.e. the declaration of trust) was never intended. The judge then said that the evidence was difficult to follow and that was the whole point of asking for it to be particularised. Mr Long pointed out that the cross on the TR1 form was never signed by the parties; it was never discussed, or the solicitor put it there in error. The judge responded that that was unpleaded speculation and that if the Defendant was saying that the cross was *a mistake* that had to be pleaded. The judge then pointed out that it was far too late to adjourn the trial for the purpose of an amendment and that the Defendant's position was "a little difficult", but he continued:

> *"we will have to see what happens in the evidence. You have certainly raised a number of issues in relation to the TR1 in the evidence, and I expect Mr Woodhead will cross-examine about it."*

17. The trial proceeded. The Claimant and the Defendant both gave oral evidence. There were closing submissions by each party. In the course of closing submissions, questions of common mistake, setting aside and rectification, and constructive trust and resulting trust were canvassed (albeit with Mr Woodhead maintaining that there had been no pleaded case to that effect).

The Judgment

18. After setting out the undisputed factual background (at paragraphs 3 and 4), at paragraph 5 to 7, the judge summarised the parties' contentions. At paragraph 8 he pointed out that, because the proceedings were in Part 8 form, there were no pleadings. At paragraphs 9 to 14 the judge summarised the procedural position between issue of the claim form and the trial (as set out in paragraphs 11 to 15 above), concluding by pointing out that no particularised counterclaim had been served and that that remained the position. At paragraphs 15 and 16 the judge summarised the evidence given by the parties.

19. At paragraph 17 to 22, the judge set out the relevant legal principles. There is no criticism of his directions as to the law. I do not set out those paragraphs in detail, as I refer below to most of the authorities cited. In summary the judge directed himself as follows (I leave out for the time being certain nuanced issues referred to in paragraphs 46 to 50 below):

(1) In the absence of a declaration of trust, it is for the court to decide in what proportion the beneficial interests in property are held: see *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53.

(2) However, the position is different where there is a declaration of trust in a TR1 form.

(3) There is no requirement for the TR1 to have been signed by the transferee.

(4) A properly completed and executed TR1 is and remains conclusive as to the parties' beneficial interests in property unless and until either a new declaration is made or unless the TR1 can be impeached on the ground of fraud, undue influence, mistake or proprietary estoppel: see *Goodman v Gallant* [1986] Fam. 106 and *Pankhania v Chandegra* [2012] EWCA Civ 1438. Where there is an express declaration of trust and no grounds for going behind it, no question of an implied trust under *Stack v Dowden* and *Jones v Kernott* can arise.

(5) Where one of these vitiating factors is established, it may lead to the setting aside or rescission of the document or transaction or to the rectification of the document so as correctly to record the intended transaction: see *Taylor v Taylor* [2017] EWHC 1080 (Ch).

20. Having set out the relevant legal principles, the judge identified the question in the present case as whether the Defendant had shown that the declaration of trust in the TR1 was of no effect for one of those reasons namely fraud, undue influence, mistake or proprietary estoppel. He continued that (at paragraph 24):

> *"…it would appear that David's contention is based on the cross in box 11 of the TR1 having been placed there at a later date… and that putting a cross in box 11, and thereby making a declaration as to the beneficial interests, did not truly represent the parties' understandings or intentions. I take this to be an allegation of mistake.*
>
> *25. It is unfortunate that David - and his legal team (he has been represented by solicitors throughout) - did not serve a properly particularised counterclaim, as ordered by the court on two occasions. The second witness statement is a poor substitute for a properly pleaded counterclaim. However, it is not really open to Dean to assert that he has been taken by surprise by David's contentions about the cross in box 11, because that assertion has been there since David's first statement. Further, the skeleton argument served on behalf of Dean deals with the issue of alleged mistake. It is impossible to see that the case would have been run differently on either side, in relation to mistake, had there been a proper pleading." (emphasis added)*

He then pointed out that the burden of impeaching the TR1 on the grounds of mistake was on the Defendant and that convincing proof was required. He continued:

> *"27. If there has been a mistake which is common to both parties to a document, and if the parties' prior agreement (which continued at the date of the document) was not reflected in the document because of that mistake, the court has a discretion to rectify the document to reflect the parties' true intentions.…*
>
> *28. Whether there has been a mistake here is a pure question of fact". (emphasis added)*

21. At paragraphs 29 to 37, the judge addressed the facts and made his findings. At paragraph 31 and 32, he addressed the Claimant's evidence, including that he found his evidence "to be unreliable". He did not accept that his evidence that cash withdrawals he had made had been used to make mortgage payments. Nor did he accept that (in the absence of supporting independent evidence) in 2012 the Claimant had, as he had said, tried to get his name off the mortgage and sell his interest to his parents. He rejected the evidence that the Claimant had ever said that he wanted to realise his share in the Property. At paragraph 33 he turned to the Defendant's evidence about intention and understanding, pointing out that that was a little confused. The judge concluded however "*David was certain that it was not intended that Dean would be a co-owner in equity and that the matter had never been discussed*."

22. The judge then made the following findings of fact:

> *"34. I am entirely satisfied, having heard the evidence, that it was never intended by either Dean or David that they should be joint owners in equity. In my judgment, the position was this. Dean became a joint owner purely to assist with the purchase, so that the mortgage advance could be obtained. There was no discussion with the solicitor about how the property should be held. However, and whenever the cross in box 11 came to be placed there, it did not represent the true intention or understanding of the parties. I do not accept that Dean would not have become a joint owner unless he was acquiring a beneficial interest; I do not accept that David told him that it was a good investment **for him** (emphasis added), although it may have been that he agreed to be a joint purchaser because the purchase was a good and sensible investment for the family as a whole. I do not accept that Dean made payments towards the mortgage. It is right of course that Dean was liable for the mortgage, but I am not convinced that he would not have become an owner unless he was acquiring a beneficial interest. Dean made no contribution to the purchase price and no contribution to the mortgage (save indirectly). There is no evidence of any legal advice having been given by the solicitor; neither Dean nor David say that any was given. In my judgment, the cross in box 11 was placed there because it was assumed that since this was a joint purchase, the property would be held jointly in equity. In fact, that assumption was plainly a mistake; it did not represent the true and enduring*

> *intention of the parties. This is not a case of the parties simply being mistaken as to the consequences of their agreement, as in Gibbon v Mitchell ... ; this is a case where there was no agreement as to sharing the beneficial interests, and no intention on either side that they would be co-owners in equity.*
>
> *35. In my view, it is wholly improbable and unlikely that David would have been making an immediate gift to Dean of half of the property, to the exclusion of any interest which Dean's siblings or their mother might otherwise have, giving Dean the immediate right to a half share and to an occupation rent from his parents. If it was intended that Dean was acquiring an interest because of his liability under the mortgage, then Dean would have paid a share of the mortgage from the outset; in my view, his payments whilst he was living at the property were not payments towards the mortgage at all.*
>
> *...*
>
> *37. In my judgment, David has satisfied me on the facts on balance of probabilities, to the necessary convincing standard, that the TR1 was completed by mistake. The declaration in the TR1 cannot stand. It must follow from my factual findings that Dean has no beneficial interest in the property; in my judgment, the property is held beneficially for David alone. David's contention that it should be held on trust for "his family" is too vague and amorphous to result in any other finding. The claim for an order for sale is dismissed."*
> *(emphasis added)*

The grounds of appeal

23. The Claimant puts forward four grounds of appeal as follows:

(1) The parties were bound by the express declaration of trust in the TR1 in the absence of *any claim* for rectification or rescission. The judge erred in finding that the Defendant was not bound by that declaration of trust, in the absence of a *pleaded* claim for rescission for rectification. ("Ground 1")

(2) Procedural impropriety: the judge acted improperly and/or irregularly in dismissing the claim on the grounds that the Defendant was not bound by the terms of the TR1 when there was no pleaded claim before him for rescission or rectification of this deed. There was no basis for the Defendant to challenge the TR1 without a particularised pleading of such a claim. ("Ground 2")

(3) The legal test for rescission or rectification of a TR1: the facts found by the judge were, as a matter of law, insufficient for the court to rescind or rectify the TR1. Those facts did not establish either a "common mistake" or an "outward expression of accord" sufficient to establish a claim in law for rectification. The judge made no finding of a *positive* commonly held

agreement or intention at the time of the execution of the TR1 form. ("Ground 3")

(4) Relief consequent on the completion of a TR1 by mistake: the judge failed to consider whether, as a matter of equitable relief, the deed should be rescinded or rectified. It was in any event inequitable to grant such relief, having regard to a number of factors. ("Ground 4")

The Claimant's arguments

24. The Claimant's overall case can be summarised as follows:

(1) The judge did not find that the TR1 should be rectified.

(2) The judge was not entitled to find that the TR1 should be rectified, because the Defendant did not plead a counterclaim for rectification.

(3) The judge made no positive finding as to the true common intention of the parties as to beneficial ownership and thus his findings were insufficient to form the basis of any claim for mistake/rectification.

(4) The judge failed to consider whether equitable relief by way of rectification should be granted.

(5) In any event, the judge was not entitled to proceed to make a finding on the basis of an implied trust.

The Defendant's arguments

25. The Defendant's overall case can be summarised as follows:

(1) The judge found not only that the TR1 did not reflect the parties' true common intention, but also, implicitly, found positively that the common intention was that the Property was to be held beneficially by the Defendant alone.

(2) The judge, effectively, found that the TR1 should be rectified to reflect that positive agreement.

(3) There is no requirement as a matter of law for a claim for rectification to be pleaded; the judge was entitled to approach the matter in the way he did; and the Claimant suffered no prejudice as a result of absence of a formally pleaded counterclaim against the law.

(4) It was not inequitable, and would not be inequitable, to direct that the TR1 should be rectified, so to provide for an express declaration of trust in favour of the Defendant alone.

(5) If contrary to the foregoing, the matter was decided on the basis of constructive trust, the judge was entitled to do so.

26. There was considerable overlap in the parties' arguments as between the different grounds and separating out and putting in order the various strands of argument is not

straightforward. Nevertheless, I address the issues by reference to the four grounds of appeal. I address grounds 1 and 2 together. As regards the issue of an implied trust, although aspects were raised underground 2, and although logically it might be said that ground 4 should come before, I address it under ground 3.

Grounds 1 and 2: the absence of a claim for rectification

The Parties' arguments

The Claimant's case

27. As regards ground 1, the Claimant contends that an express declaration of trust must stand in the absence of a claim to set aside or rectify it. Absent any *pleaded* claim for rectification it was simply not open to the judge to determine the beneficial ownership of the Property on the basis of the doctrine of common intention constructive trust. He submits:

    (1) the case authorities require a counterclaim (as that term is defined in the CPR).

    (2) CPR Rule 8.7 requires the grant of permission to bring a counterclaim in Part 8 proceedings.

    (3) Here there is no pleaded counterclaim for rectification

28. As regards the need for a claim, in the absence of any claim for rectification and in the absence of any order directing rectification, the sanctity of the contemporaneous written instrument must be preserved: see *Goodman*, supra. at 117C-E. As regards the need for a *pleaded* claim (or counterclaim), the Court of Appeal decision in *Blay v Pollard and Morris* [1930] 1 KB 628 at 634 is authority for the proposition that there must be not only a claim, but a pleaded claim, for rectification. Further the judge did not hold that the TR1 was to be rectified and there was no order for rectification in this case.

29. As regards ground 2, the Claimant contends that there was no basis for the Defendant to challenge the TR1 without a particularised pleading of a claim for rescission or rectification. Given the procedural history and what was said at the outset of the trial, it was procedurally improper for the judge to allow a case of mistake to be advanced. The Defendant was given several opportunities to put a properly pleaded counterclaim but did not do so. The Claimant relies on two recent Court of Appeal decisions, which he contends emphasise the critical importance of pleadings in civil litigation: *UK Learning Academy Limited v Secretary of State for Education* [2020] EWCA Civ 370 at §47 and *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619 at §19. The Claimant was prejudiced by the Court simply considering the matter as if the Defendant had brought a particularised claim in mistake seeking rectification. Had the Claimant been given the opportunity to plead to a proper counterclaim, he would have put his case on the legal test for mistake. He was not able to put forward fully his case on the appropriate shares of beneficial ownership in the absence of an express declaration of trust, under a common intention constructive trust under *Stack v Dowden*. Documents were not included in the trial bundle and Mr Woodhead was not able fully to develop his arguments on constructive trust. In fact, he would have wished to argue for a resulting trust and further to rely on the case of *Huntingford v*

Hobbs (1992) 24 HLR 652 to support his submission that merely putting your name on the conveyance would be likely to give rise to some beneficial interest, by dint of having undertaken liability on the mortgage.

30. In these circumstances, the judge erred in his conclusion at paragraph 25; he should either have ruled out any case of mistake or acceded to a request for an adjournment.

The Defendant's case

31. It was neither necessary for the Defendant to file a counterclaim nor improper in the circumstances for the judge to proceed without one.

32. As to ground 1, first, there is no requirement in law to plead a counterclaim for rectification. Secondly, and alternatively since this was a part 8 claim, the rules as to pleadings (statements of case) are far less stringent and it was sufficient for the Defendant's case to be set out in his second witness statement. As regards the first submission, the Defendant relies on *Butler v Mountview Estates Ltd* [1951] 2 KB 563 at 570-571, as the only direct authority on the point. The court may grant rectification even though it is neither detailed nor sought in a statement of case if the circumstances require it. *Blay* is not authority to the contrary. It is not necessary to bring a counterclaim in order to assert a case of mistake. The judge was entitled to rectify the TR1 form in the absence of a pleaded counterclaim.

33. As regards the second submission, the Defendant relies upon the contrast in the rules applicable to Part 8 claims and those applicable to Part 7 claims. In the former there is no requirement for pleadings or statements of case. It was sufficient for the Defendant to set out his case in his witness statement. The judge had before him a document from the Defendant which was said to contain the basis of his attempts to upset the TR1 and he had the Claimant's substantive response. Further the Claimant had dealt with the issue in his skeleton argument. In the circumstances it was appropriate for the judge to have dealt with the issue which was central to the dispute between the parties. Essentially the Claimant was asserting no more than that the second witness statement document should have had a different title on its front page. i.e. counterclaim rather than witness statement.

34. As to Ground 2, in substance, it adds nothing to ground 1. The cases of *UK Learning Academy* and *Dhillon* can be distinguished. As regards unfairness and prejudice, the Claimant had full opportunity to put his case on the law and to lead evidence in relation to showing that he was entitled to a share in the equity, which he did. The Claimant did deal with the legal position in his skeleton argument; the Claimant's second witness statement responded in detail to the factual assertions. (The question of equity is covered by ground 4). It is not clear what other evidence the Claimant might have submitted to show that he was entitled to a share in the equity. There was sufficient material before the judge to enable him to deal with the constructive trust issue. The case of *Huntingford* does not assist the Claimant.

Discussion and analysis

35. I address Grounds 1 and 2 together. There are two essential questions:

(1) As a matter of law, was the Defendant required to make a pleaded claim (or any claim) for rectification (or rescission) of the TR1?

(2) If the answer to (1) is no, or if the Defendant met the relevant legal requirement, was it nevertheless procedurally improper for the judge to allow the Defendant to pursue his case challenging the validity of the express declaration of trust, in the absence of a (pleaded) claim for mistake and/or rectification?

(1) Legal requirement to make a claim or pleaded claim for rectification/mistake? (Ground 1)

36. The Claimant's case here appears to be put in a number of ways: does there need to be a claim based on mistake or a claim for rectification; and in either event does the claim needs to be formally pleaded? I deal with the latter point first.

(a) The need for a pleaded claim/defence of vitiating factor (i.e. mistake) or a pleaded claim for rectification or rescission

37. On the facts there was no formally *pleaded* defence of a vitiating factor and no formally *pleaded* claim for rectification or rescission.

38. There are two directly relevant authorities on this issue: *Blay* and *Butler*. (I do not consider that *UK Learning* or *Dhillon* are directly relevant to this issue (rather than issue (2) below)). Mr Woodhead says that *Blay* is clear and binding authority for the proposition that a claim for rectification for common mistake must be pleaded and that *Butler*, a first instance decision, should not be relied upon, not least because *Blay* was not cited. For ease of exposition, I consider the two cases in reverse chronological order.

39. In *Butler*, specifically a rectification case, it was held that an assignment of a lease could, and should, be rectified to reflect the actual agreement, even though no question of counterclaim was raised in the defence by the vendor. Danckwerts J said this:

> *"In Borrowes v Delaney a defective lease was rectified although there was no counterclaim to rectify. If a point is to be taken that a document should be rectified, it should normally be raised in the pleadings. That has not been done in this case, but, having regard to the fact that, if the plaintiff's claim were to succeed, he would be getting something to which he would have no right whatever, I accede to the [vendor's] submission .."*

40. In *Blay v Pollard and Morris*, the defendant advanced three defences to a claim made under a written agreement: non est factum; unilateral mistake and fraud; and mutual (or common) mistake. For present purposes the second and third defences are relevant. The judge below found in favour of the defendant on the second defence and, of his own accord, rectified the written agreement, on that basis. The Court of Appeal allowed the plaintiff's appeal.

41. Scrutton LJ said this in relation to the second defence:

> *"This rests on unilateral mistake in one party, fraud or conduct equivalent to fraud in the other party. But no fraud is alleged in the pleadings; no application to amend has been made; and I cannot think a judge should find fraud or conduct amounting to fraud when it has never been pleaded. Further, I cannot see any evidence to justify the judge's finding that Pollard senior knew that there was no agreement as to past rent. The judge also rectified the agreement signed, although rectification was not claimed on the pleadings. This defence also fails."*
> *(emphasis added)*

He then continued, addressing, at least in part, the third defence:

> *"Lastly, mutual mistake was alleged, not as a ground for rectification, but as a defence. But (1) I see no evidence of any mutual mistake, and (2) the mutual mistake pleaded was never proved, and if proved, was quite irrelevant. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion, he was not entitled to take such a course."*
> *(emphasis added)*

Scrutton LJ thus rejected the second defence because fraud had not been pleaded, emphasising the importance of pleading fraud, and on the further ground that there was no evidence of fraud. It was in that context of the second defence that he added his observation about there being no pleaded claim for rectification. As regards the third defence (common mistake), that was pleaded as a defence (although not as a ground for rectification). Scrutton LJ rejected that defence, not because it was not pleaded, nor because there was no claim for rectification, but because on the facts there was no evidence to support it.

42. Greer LJ made it clear that the judge below had decided the case on the second defence; concluding that the judge was not entitled to consider it because fraud was not pleaded and because it is "absolutely essential" to plead a charge of fraud with particularity. As regards the third defence, it failed on the facts, because the plaintiff did not share the mistake. He concluded (at 637): "*It was a case of unilateral mistake which by reason of the state of the pleadings cannot be relied upon for the purposes of rectification or rescission"* i.e. the defence (and not a claim for rectification) was not pleaded. Slesser LJ confirmed that mutual mistake was pleaded. He rejected the third defence because there was no evidence of mutual mistake and the judge did not base his judgment on it. Neither Greer LJ nor Slesser LJ made observations on the need to plead a claim for rectification, even where mutual mistake has been raised as a defence.

43. In my judgment, *Blay* is not authority for the proposition that a claim for rectification for common mistake must, as a matter of law, be formally pleaded. The position in *Blay* in summary is as follows. First, the judgment below was based on fraud and

unilateral mistake (and not common mistake). Secondly, fraud and unilateral mistake were not pleaded and should have been, because of the essential need to plead any allegation of fraud; for that reason, the judge was not entitled to deal with it. Thirdly, as to mutual mistake/common mistake, it *was* pleaded as a defence; the Court considered it, but found on the facts there was no evidence on the facts of mutual mistake and to the extent relevant to the outcome of the appeal, that was the basis of rejection of mutual mistake

44. As to Mr Woodhead's suggestion that the two passages in the judgment of Scrutton LJ set out above are authority for the proposition that a claim for rectification for common mistake must be pleaded (even if common mistake as a defence has been pleaded):

(a) That is not a fair reading of those passages. The last sentence of the first paragraph is addressing the claim for fraud – the key point there is that fraud as a defence was not pleaded at all. The second part of the second paragraph is in fact also dealing with the fraud (unilateral mistake) issue – the issue on which the judge decided the question was the fraud issue – this is plain from Slesser LJ at 640 – and not the common mistake issue.

(b) In any event, even if those observations could be said to apply to a claim for rectification for a pleaded common mistake, those observations are obiter; first failure to plead rectification for common mistake was not Scrutton LJ's reason for rejecting the pleaded case of mutual mistake; secondly those observations were not adopted by the other two judges.

45. I conclude that, whilst normally it should be raised in the pleading, there is no absolute rule that the court will not rectify a document in the absence of a pleaded counterclaim. It will do so where not to allow rectification would mean that the other party would be getting something to which he would have no right.

(b) The need for a claim/defence of vitiating factor (e.g. mistake) and a claim for rectification

46. Even if there is no requirement for a *pleaded* claim, *Goodman v Gallant* suggests that, not only must there be the assertion of a vitiating factor by way of defence, but that there must be at the least a *claim* for rectification. At 110H-111B, Slade LJ stated first:

> *"If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself." (emphasis added)*

At 117D, in a passage cited by the judge, Slade LJ said this:

> *"In the absence of any claim for rectification or rescission, the provision in the conveyance declaring the plaintiff and the defendant were to hold the proceeds of sale of the property*

> *'upon trust for themselves as joint tenants' concludes the question of the respective beneficial interests of the two parties insofar as that declaration of trust, on its true construction, exhaustively declares the beneficial interests."*
>
> *(emphasis added)*

47. However, subsequently the Court of Appeal in *Pankhania* appears to put the matter in somewhat less stringent terms. Patten LJ said at §§16 and 17 (and largely cited by the judge).

> *The judge's imposition of a constructive trust in favour of the defendant was therefore impermissible unless the defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer. He seems (in paragraph 2) to have misunderstood the significance of the transfer which not only made both claimant and defendant legal owners of the property but also spelt out their beneficial interests. The whole of his judgment proceeds upon the footing that he had a free hand to decide what was the common intention of the parties at the relevant time, but that inquiry was simply not open to him unless the defendant had established a case for setting the declaration of trust aside.*
>
> *A declaration of trust can be set aside for fraud, mistake or undue influence but nothing of that kind is alleged in this case ... there is no claim for rectification in this case and Mr Small for the defendant has not advanced a case that the transfer could be rectified so as to omit the declaration of trust. There was no evidence at trial that it was inserted by mistake or that the parties intended to execute a transfer in materially different terms..." (emphasis added)*

Mummery LJ said at §27

> *"In the absence of a vitiating factor, such as fraud or mistake, as a ground for setting aside the express trust or as a ground for rectification, the court must give legal effect to the express trust declared in the transfer. In the absence of such claims the court cannot go behind that trust". (emphasis added)*

48. Thus, both Patten LJ and Mummery LJ concentrate upon the existence of a substantive ground to vitiate the express declaration of trust, rather than the requirement for the making of a formal claim, let alone an order, for rectification or setting aside.

49. In *Taylor v Taylor*, HH Judge Matthews sought to summarise the position in the following terms (again in a passage cited by the judge):

> *"The selection of the words 'they are to hold the property on trust for themselves as joint tenants' in box 11 in my judgment*

> *amounts to an express declaration of trust of the land being conveyed. So long as such a declaration is valid and unimpeached, it is conclusive: see Lord Upjohn in Pettitt v Pettit [1970] AC 777, 813; Griffiths LJ in Bernard v Josephs [1982] Ch 391, 403; Goodman v Gallant [1986] Fam 106, CA; Re Gorman [1990] 1 WLR 616, 621.*
>
> *...*
>
> *Once the beneficial ownership of the land is determined by the documents, it is conclusive in the absence of fraud, mistake or some other vitiating factor: see Pankhania v Chandegra [2012] EWCA Civ 1438, [15]-[17], [27]-[28]. Such a factor may lead to the setting aside or rescission of the document or transaction (see Lord Upjohn in Pettitt v Pettitt [1970] AC 777, 813), it may lead to the rectification of the document so as correctly to record the intended transaction (see Wilson v Wilson [1969] 1 WLR 1470), or it may lead to a finding that the declaration of trust was a sham (see Hitch v Stone [2000] EWCA Civ 63; though this category maybe only a subset of the second). In the present case, no suggestion has been made that the declaration of trust in box 11 was affected by any vitiating factor, and no claim has been made to set it aside or rectify it. It must therefore stand." (emphasis added)*

50. In my judgment, whilst the precise language used in these authorities varies, I am not satisfied that there is a requirement for a *formal* claim for rectification or rescission to be made, let alone for an order for that remedy to be made, in order for the court to go behind the express declaration of trust. It is sufficient that the defendant has raised, as a defence, (and the court has adjudicated upon) a vitiating factor and a ground for impeaching the validity of the express declaration of trust. In summary, it is necessary to assert a vitiating factor impeaching the express declaration of trust; there is no need to make a *claim* for rectification or setting aside.

51. On the facts here, the Defendant asserted a positive claim that the Property was held on trust for himself and his family (and in closing submission that it was held on trust for the Defendant solely) and sought a declaration that the Claimant had no interest in the proceeds of sale and those proceeds belonged to him entirely. In my judgment this is an asserted defence to the Claimant's claim to enforce the express declaration of trust. In closing, Mr Long asserted a defence of mistake as the basis for impeaching the declaration of trust The judge interpreted the Defendant's case as amounting to such an allegation of mistake (Judgment, paragraph 24) and also understood the case to be that the declaration of trust was of no effect (see transcript of hearing at pp. 42, 48 and 105). In my judgment, the judge was entitled to do so. For these reasons the Defendant satisfied the requirement of asserting a defence of a vitiating factor.

52. However, on the facts, there was no claim made for *rectification* or rescission, although the claim made for a contrary declaration might be said to amount to a claim not to uphold the express declaration of trust. Moreover, in closing submissions (transcript pp. 58-59) the Claimant recognised that rectification might be in issue; and

the judge considered that the claim made, if established, would give rise to a discretion to rectify (Judgment, paragraph 27).

53. In summary, there was a claim (or asserted defence) of mistake, but no claim for rectification on the ground of mistake.

Conclusion on Ground 1

54. Whilst it should normally be pleaded, there is no rule of law that a claim for rectification for common mistake must be pleaded. Nor is there a rule that where common mistake has been pleaded (or raised) as a defence, there must be a counterclaim for rectification. A party must put forward a vitiating factor and a ground for impeaching the validity of the express declaration of trust, and in this case, the Defendant did so sufficiently. The issue of rectification was also sufficiently raised. (In these circumstances the Defendant's alternative argument based on CPR does not fall to be decided). For these reasons, Ground 1 fails.

(2) Procedural impropriety in allowing the defence to be considered (Ground 2)

55. First, given my conclusion on the first issue (Ground 1), in principle the judge had a discretion to allow the Defendant to put forward a defence (and counterclaim) impeaching the express declaration on the basis of mistake, in the absence of a claim, pleaded or otherwise.

56. Secondly the Claimant's submission amounts in substance to an argument that effectively the March Order and the May Order are each to be construed as an unless order i.e. that unless the Defendant *pleaded* a counterclaim, the Defendant is debarred from advancing any case on mistake and rectification. However, that was not what those orders provided for, nor was it so contended at the outset of the trial. No such order was made; rather the Defendant was given permission to plead a counterclaim.

57. Thirdly, in exercising his discretion (in the absence of a pleaded counterclaim), the judge gave full and careful consideration to the detailed history of the proceedings, both at the outset of the trial, and in the Judgment. He was well aware of, and critical of, the Defendant and his then legal team. Nevertheless, at the outset of the trial, he considered it was appropriate to proceed (see paragraph 16 above); and in the Judgment he concluded (at paragraph 25) that, as matters turned out, there had been no prejudice to the Claimant, in so doing.

58. In my judgment, the cases of *UK Learning Academy* and *Dhillon* are distinguishable on the facts. In both cases a party was seeking to move away from its already pleaded case. In the present case the Defendant was not seeking to make a new and different case. His case had always been that the TR1 did not reflect the parties' intention. Moreover, those cases do not lay down an invariable rule: as David Richards LJ pointed out in the former case, ultimately the requirement is to ensure "the just disposal of the case".

59. As regards prejudice to the Claimant, the Claimant did address the legal issue of mistake in his skeleton for the trial; and in the Judgment, the judge addressed in some detail the key authorities on express declarations of trust, mistake and rectification. As regards the issue of implied trust (i.e. constructive and/or resulting trust), this is

addressed in more detail in paragraphs 82 to 91 below. As to whether it was considered by the judge, both *Stack v Dowden* and *Laskar v Laskar* (resulting trust) were referred to by Mr Woodhead in closing submissions. Again, the judge took account of *Stack v Dowden* (Judgment, paragraph 17). I address *Huntingford* below. As regards *evidence* relevant to the question of constructive/resulting trust, the Claimant put in a witness statement dealing with the factual assertions made by the Defendant and seeking to undermine the case of mistake. He had the opportunity to put in evidence which he did. He put in evidence about the expenses he had incurred, and bank statements and the judge looked at those and found no contribution to the mortgage. It is not clear what other evidence the Claimant might have submitted to show that he was entitled to a share in the equity. There was sufficient material before the judge to enable him to deal with the constructive trust/resulting trust issue. The judge did go into the issue of contributions to the mortgage and did consider the effect, if any, of the Claimant merely being on the mortgage.

60. On this issue of prejudice, the judge found, at paragraph 25, that it was impossible to see that the case could have been run differently. In my judgment, whilst recognising the difficulties arising from the absence of a "properly particularised counterclaim", the judge exercised his discretion to allow the defence to be considered; he did so on a pragmatic basis, having considered the risk of prejudice to the Claimant. In my judgment, this was an exercise of discretion which he was entitled to make. It was not procedurally improper for him to allow a case of mistake to be advanced. Ground 2 of the appeal fails.

Ground 3: findings insufficient to establish rectification for mistake

The parties' contentions

The Claimant's case

61. First, the facts found by the judge were insufficient as a matter of law for the court to rescind the TR1. Rectification will be ordered where the parties have reached an agreement but the document which they have executed does not properly express the terms of that agreement: see *Lewin on Trusts* §4-083. It is not possible to rectify a document at all where there was no positive common agreement or intention as to the matter, and no outward expression of accord, at the time: see *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2020] Ch 365 at §176. There has to be an alternative positive agreement. It is not enough to show that the parties did not intend what was recorded; they also have to show what they did intend with some degree of precision: *Giles v RNIB* [2014] EWHC 1373 Ch at §25(3). It is necessary to show exactly and precisely the form to which the deed ought to be rectified see *Chitty on Contracts* (33rd edn) §3-089 and *Fowler v Fowler* (1859) De G & J 250, 265.

62. In the present case, whilst the judge found positively that the parties did not agree to joint beneficial ownership, he made no positive finding as to what they did positively agree as regards beneficial ownership and made no finding of outward expression of any such accord. The parties did not agree as to how the Property should be held beneficially - as reflected in paragraph 33 and 34 of the Judgment. The judge went on to find that beneficial ownership was held by the Defendant alone, but without finding that that was expressly agreed at the time.

63. There was no evidence that the parties said or agreed that box 11 should be left blank. If the TR1 were to be rectified by the deletion of the "X" from box 11, that could only mean that the parties positively agreed at the time that there was no express declaration of trust. Further, even if the "X" were to be deleted, the position would then be that there was a presumption of beneficial ownership as joint tenants.

64. Secondly, as to the position in the absence of an express declaration of trust, there is an important distinction between a common intention constructive trust (under *Stack v Dowden*) and a resulting trust (*Laskar v Laskar)*. The former arises commonly where there are cohabiting partners in a romantic relationship; the latter arises in the case of investment style purchases – the present case falls into the latter category. There was no detailed consideration by the judge on the facts either on a Stack *v Dowden* basis or on the resulting trust basis. If the Court was to find that there was no express declaration of trust at all, then the matter should be remitted to the County Court for evidence to be given in relation to the implied trust issues.

The Defendant's case

65. The Defendant contends that there is little dispute between the parties as to the relevant principles of law. The only question of law is whether the sort of mistake here is capable of being subject to rectification. It was so capable, because of the judge's finding that the contents of box 11 arose by mistake in that it they did not accord with the parties' common intention at the time of the execution.

66. As to the facts, the finding at paragraph 34 that the TR1 did not represent the true intention of the parties cannot be impugned. The Claimant must accept that the parties never intended that he should have any such beneficial share.

67. By ground 3, the Claimant alleges that the judge made two errors of reasoning. These are said to be found at paragraph 31 and 32 of the Claimant's skeleton. First, the judge did not come to any conclusion as to the parties' common intention. Secondly the judge did not find any outward expression of the accord. Both of these assertions are incorrect.

68. As to the first, on careful analysis of the Judgment, if it was found that the parties did not intend to be joint owners in equity, it must follow, in the circumstances, that it was intended that the Defendant would be the sole owner in equity. Based on the judge's findings, the Claimant does not, and cannot assert that the fact that he was to have no beneficial share was not his intention. He must accept that the common intention was that he was to have no beneficial share. The judge found (implicitly and as a necessary corollary of his findings) that the common intention was that the Defendant should have sole beneficial ownership. The concluding sentence in paragraph 34 stated that *"there was no agreement as to sharing the beneficial interest, and no intention on either side that they would be co-owners in equity".* That finding ought not to be interpreted to mean that he found that the parties did not apply their minds to the question of beneficial ownership. Rather, in the context of the judgment as a whole, the judge clearly meant that their joint intention was that the equity would not be shared but would be held solely by the Defendant.

69. As to the second, the outward expression of accord is manifested in the Defendant being the only person who made any payments (see Judgment, paragraphs 35 and 37).

The outward expression may be tacit. The Defendant paid (and was to pay) the deposit and all the mortgage payments. The outward expression of accord is evidenced by the Defendant having been the sole contributor of both the deposit and to repayment of the mortgage thereafter. Repayments made after the TR1 are evidence that this position must have been agreed beforehand. In that way the parties outwardly expressed their common intention that the Defendant should have sole beneficial ownership.

Discussion and analysis

70. Under Ground 3, two essential questions fall to be determined: first was the Judge correct to find that the express declaration of trust in the TR1 "cannot stand"? Secondly, was the Judge correct to find that the Property is held beneficially for the Defendant alone? In so far as it concerns implied trust, the second question logically arises after the issues under Ground 4. However, for convenience and in the light of the parties' submissions, I deal with it under Ground 3. Before turning to these questions in turn, I analyse first of all what the judge found in the Judgment. I then consider in turn, mistake and rectification (legal principles and application to the facts) and then issues as to implied trust (legal principles and application to the facts).

(1) What the Judge found

71. At paragraph 37 of the Judgment, the judge concluded as follows:

(1) The declaration of trust in the TR1 was completed by mistake.

(2) The declaration of trust in the TR1 "cannot stand".

(3) The Claimant has no beneficial interest in the Property.

(4) The Property is held beneficially for the Defendant alone.

(5) The claim for an order for sale is dismissed.

As to (2) above, the judge did not state expressly that the TR1 was to be rectified (or alternatively that the declaration of trust should be "set aside"); (although at paragraph 27 he stated that *if* the parties' agreement was not reflected in the document as a result of mistake, the court has a discretion to rectify). As to (3) above, the judge did not state the basis upon which the Property was held beneficially for the Defendant alone; (although at paragraph 17, he stated that in the absence of a declaration of trust, it is for the court to determine beneficial interests, under *Stack v Dowden* principles.)

72. Whilst not easy to identify from the Judgment, I consider that there are two possible analyses of the legal basis of these conclusions.

(1) As at the time of the conclusion of the TR1, it was the express common intention of the parties that the beneficial interest was to be held by the Defendant alone; and on that basis, the TR1 should and/or could be rectified by way of *variation* of the declaration of trust in box 11 to reflect that the Defendant's 100% beneficial interest; or

(2) As at the time of the conclusion of the TR1, there was no express common intention of the parties as to the beneficial interest in the Property; and on that basis the TR1 should and/or could be rectified by way of *deletion* of the declaration of trust in box 11 (i.e. no express declaration of trust); with a subsequent finding that, in the absence of an express declaration of trust, the Property was held on implied (i.e. constructive or resulting) trust for the Defendant beneficially alone.

Given the terms of paragraph 27 of the Judgment, the judge was not considering the remedy of "setting aside" or "rescission" for mistake.

73. Mr Woodhead for the Claimant favoured the latter analysis, whilst of course contending that this was not a permissible conclusion. For the reasons given in paragraphs 68 and 69 above, Mr Calzavara favoured the former analysis. My conclusion on which analysis is correct is at paragraph 80 below.

(2) Mistake and rectification

(a) Relevant legal principles

74. In relation to rectification for common mistake, the leading authority is *FSHC Group Holdings*, supra. I have also been referred to the well-known case of *Joscelyne v Nissen* [1970] QB 86 at 95D-G and 98C-D. From these two cases the following propositions are derived:

(1) A written contract (or other document) may be rectified on the basis of a common mistake, where it can be shown that, when they executed the document

(a) the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record;

(b) there was an "outward expression of accord" i.e. as a result of communication between them, the parties understood each other to share that intention.

(2) The common intention must be "continuing" i.e. held up to the moment when the document is executed.

(3) There must be convincing proof that the document does not represent the parties' common intention.

(4) As regards the element of "outward expression of accord", whilst a shared understanding might not need to be spelled out in words (i.e. it might be tacit or "go without saying"), nevertheless the court is concerned with what the parties actually communicated to each other: *FSHC*, supra, at §§80 to 87.

75. In the specific context of joint beneficial interests in real property *Pink v Lawrence* (1978) 36 P & C R 98 was a case where it was sought to impugn an express declaration of trust in favour of joint owners. The judgment of Buckley LJ at 101-102 supports two further propositions:

(1) Where in an instrument of transfer, the declaration of trust as to the beneficial ownership of property does not reflect the underlying agreement as a result of mistake, the court may rectify that instrument so as to *delete (or omit)* or vary in some way the declaration as to the equitable interests of the parties (see also *Pankhania* at §17 cited at paragraph 47 above).

(2) The court may be able to grant relief to the party asserting mistake without actually employing the machinery of rectification; if the document is rectifiable, the court may be able to give effect to the true position without actually going through the machinery of rectifying the document in question, as long as the circumstances which would justify rectification are established.

(b) Application to the facts

76. Having found a relevant mistake i.e. that the box 11 in TR1 did not record the parties' true intentions, I conclude that, nevertheless, it was not, and would not be, possible to rectify the TR1 by way of *variation* i.e. by substituting the words "on trust for David Ralph alone" for the words "on trust for themselves as tenants in common in equal shares" (or by deleting the "X" from the second box, and by inserting an "X" into the third box and adding the words "on trust for David Ralph alone"), for two reasons:

(1) On the findings of fact made by the judge, there was no clear positive finding that there was or could be an express agreement or common intention shared by the parties at the time of the conveyance that the Property was to be held for the Defendant alone. The judge found that, not only was there no agreement as to sharing of beneficial interests, but he also held that there was "no discussion" about how the Property should be held. I do not consider it possible to spell out of or imply from the lack of common intention as to co-ownership in equity, that there was a positive jointly held intention that the Defendant was to be sole owner in equity.

(2) In any event, there was no "outward expression of accord" of such a positive common intention. Even if it were possible to conclude that the judge made an implicit finding in paragraphs 34 and 35 that the common intention was for the Defendant to be sole beneficial owner, there is no sufficient finding that there was "an outward expression of accord" at or prior to the conveyance/execution of the TR1. The fact that, subsequently, the Claimant made no contribution to the mortgage payments is not of itself evidence of outward expression of accord; whilst it might possibly be inferred from that fact that there was such an agreement at the time of the TR1, it is not possible to infer from that fact the requirement of outward expression of accord. Mr Calzavara accepted that he could not point to any finding in the Judgment suggesting or stating that the parties communicated to one another that the Defendant was to pay for everything or that they agreed that he would be sole beneficial owner. There is no finding in the Judgment of the parties having communicated to the effect that only the Defendant would pay the purchase price and the mortgage.

77. On the other hand, on the basis of the judge's findings, it is appropriate to conclude that the TR1 could be rectified by *deletion* i.e. by removing the "X" from the second box in box 11, with the effect that there is no subsisting express declaration of trust at

all. First, the judge found clearly that the express declaration of trust in the TR1 did not reflect the parties' agreement or common intention. Secondly, the judge did not make a positive finding of a common intention at the time of sole beneficial ownership held by the Defendant. In my judgment, his finding on the facts was that (a) the parties agreed to joint legal ownership (issue A) and (b) the parties reached no agreement as to beneficial ownership (issue B) – they simply did not discuss it. The document records an agreement covering issues A and B; in fact, the agreement reached by the parties covered issue A only. Rectification by "deletion" is possible in principle: see *Pink v Lawrence*, supra.

78. Mr Woodhead's objections to this course are not well founded. First, I do not accept that in principle, it is always necessary for there to be an alternative positive agreement as to issue B. The question is what the parties agreed overall and not what they agreed as to issue B. Secondly, Mr Woodhead submitted that this was not possible because the parties did not positively agree to leave box 11 blank; rectifying by deleting the X in box 11 is tantamount to saying that the parties positively agreed that there should be no declaration of trust. However, the purpose of rectification is to reflect the underlying agreement between the parties; it is not to reflect what the parties agreed to go into the document, because by definition the document is wrong. The correct approach is first to enquire what the parties did agree and then, secondly, how the document in question should best reflect what they did agree.

79. In my judgment, the position is that the agreement between the parties contained effectively no agreement as to beneficial interests. The best way then to reflect what they did actually agree (i.e. joint legal title only) is to remove the cross in box 11. It is not a question of what the parties agreed about what should go into box 11; it is a question of what they substantively agreed about the beneficial interest and whether what is in box 11 properly reflects that agreement i.e. that the document conforms to the agreement. *Fowler v Fowler* does not support Mr Woodhead's case. That case is concerned with the form of the rectified document being precise and not the precision as to the agreement.

80. In the light of the foregoing, on a careful reading of the Judgment, I consider that the basis of the judge's conclusions is that set out in paragraph 72(2) above. The Judgment proceeds on the following basis:

(1) In the absence of a declaration of trust, it is for court to decide the beneficial interests under *Stack v Dowden* and *Jones v Kernott* principles i.e. common intention constructive trust (paragraph 17)

(2) Here, the declaration of trust in the TR1 cannot stand by reason of mistake (paragraph 37). The judge did not find that there was an alternative express agreement as to beneficial ownership. Thus, there was no declaration of trust at all. In these circumstances the judge implicitly held that the TR1 should or at least could be rectified by deletion of the X in box 11. The absence of a formal order for rectification is no bar to his conclusion that the declaration of trust could not stand.

(3) The judge found that the Claimant has no beneficial interest and that the Defendant is sole beneficial owner (paragraph 27) i.e. applying paragraph 17

of the Judgment, the Court has determined, under *Stack v Dowden* principles, what the beneficial interests are.

81. In my judgment, on the basis of his findings of fact, these were conclusions which he correctly reached.

(3) Constructive/resulting trust

82. The next question is what is the consequence of "deleting" the "X" from TR1. The position then is that there is an "absence of a declaration of trust".

(a) Relevant legal principles

83. Where there is no express declaration of trust and there is joint legal ownership, it is for the court to decide in what proportion the beneficial interests are held – as the judge held correctly at paragraph 17 of the Judgment. These are to be determined under principles relating to an implied trust. An implied trust may take one of two forms: a common intention constructive trust (*Stack v Dowden*) or a resulting trust *(Laskar v Laskar*). In the former case, there is a presumption of equal beneficial ownership, but this presumption can be rebutted by evidence arising from the parties' conduct, in particular and by reference to the respective financial contributions of the joint legal owners. In the latter case, the beneficial ownership will in general be determined in the ratio of contributions to the purchase price – so that if one party has made no contribution, he will have no beneficial interest. However, where a parent has purchased the property to enable a child to live in it, there is a presumption of advancement in favour of the child.

84. The common intention constructive trust approach applies in a domestic consumer context – most usually matrimonial or quasi matrimonial homes, or family homes where both parties intend to live see *Laskar v Laskar* §16. On the other hand, the resulting trust approach applies where the property is purchased, as an investment for rental income and capital appreciation, even where the relationship between the joint legal owners is a familial one: *Laskar v Laskar* §17. What is not clearly established is which of these two approaches, as a matter of principle, applies where the property is purchased neither as an investment, nor to provide a home for both of the joint legal owners, but rather as a home for the parent (rather than the child).

(b) Application to the facts

85. That in turn raises two issues

    (1) Did the judge make findings on a constructive trust basis, and if so, was he entitled to?

    (2) If he did not make findings on a constructive trust basis, or he was not entitled to do so, what should this court do?

86. In my judgment, on the best possible analysis of the conclusions, I consider that the judge did decide that the Defendant was sole beneficial owner, on the basis of a common intention constructive trust under *Stack v Dowden*.

87. As to whether the judge was justified in reaching such a conclusion, he heard relevant evidence about contributions to the purchase price, and contributions to the mortgage. The Claimant had ample opportunity to make his case for a beneficial interest under a constructive or resulting trust. The Claimant knew all along that the Defendant was contending for a different beneficial ownership. He could have put in further evidence on constructive trust; in argument his counsel referred to *Stack v Dowden* and *Laskar v Laskar*. However, it is not clear what further evidence he would wish to adduce.

88. Against this background, at paragraphs 34 and 35 the judge found, on the basis of that evidence, that the Claimant made no contribution to the purchase price and no contribution to the mortgage. His payments whilst living there were not payments towards the mortgage. He found that undertaking liability under the mortgage was not done with the intention that he should have a beneficial interest.

89. As to two particular points now made by Mr Woodhead, first, in *Huntingford,* the mere fact that Mrs Hobbs was named on the mortgage was not enough for her to be entitled to a beneficial interest. She was found to have a beneficial interest because of her cash contribution at the outset (see judgment at p. 660). Indeed, Mr Huntingford agreed to pay all sums due under the mortgage and it was held that his share was to be proportionate to the entire sum borrowed on the mortgage. Nor does *Laskar v Laskar* support his contention: see §§27 to 29. In that case, unlike the present case, there was no understanding between the parties that one or other of them would be responsible for mortgage repayments. Secondly, in my judgment, regardless of the issue as to whether the present case falls into a domestic consumer context (thus common intention constructive trust) or an investment context (resulting trust), on the findings of fact made by the judge the result would be the same on either basis. The Claimant made no contribution to the purchase price, made no payments under the mortgage, and undertook no practical liability under the mortgage; and since it was not purchased for him to live there, no presumption of advancement would arise.

90. In my judgment the judge's conclusion of sole beneficial ownership on *Stack v Dowden* constructive trust principles was justified on these findings of fact.

91. Even if the foregoing analysis is wrong, and the judge did not make findings on a constructive trust basis or was not entitled to, the question remains for decision (given the absence of declaration of trust). That matter could be remitted to the County Court for determination, but on this appeal this court has the power to deal with that issue: see CPR 52.20. If I had been satisfied that there might be further evidence relevant to that issue, then I would have remitted it. However, I am not persuaded that there is such further evidence. There is sufficient evidence before me to make that finding and if the judge did not make a finding of constructive trust, I do so – on the basis of the material set out in paragraph 88 above.

92. For these reasons, ground 3 fails.

Ground 4: rectification as a discretionary remedy

The parties' contentions

93. *The Claimant* contends that the judge did not consider whether rectification should be granted as discretionary equitable relief. Examples of matters which could and should have been raised, had the judge done so include the following:

    (1) The passage of time since the execution of the TR1 in 2000.

    (2) The contribution which the Claimant made towards the purchase of the Property by his assumption of a joint and several liability for the mortgage.

    (3) The Claimant's assumption that he was a co-owner of the Property.

    (4) The fact that the passage of time meant that there was no contemporaneous documentation which would have shed light on the parties' intentions.

    (5) The inability of the Claimant to obtain a further mortgage in his own name so as to fund the purchase of a property for his young family and to step onto the property ladder at the earliest opportunity. The Claimant had left home in about 2007, married and wanted to purchase the property. His case would have been that if he had been told in 2007 that he had no beneficial interest in the Property, he would have been able to purchase a property on his own. He could have adduced evidence such as a letter from a building society saying that they would not lend him because he was already the owner of the Property.

    (6) His liability for increased Stamp Duty Land Tax in circumstances where the Claimant remained joint owner of the Property; he could have adduced a letter from a solicitor saying that the stamp duty payable on a new purchase was going to be higher because it was a second home.

    (7) The Defendant's refusal to remove the Claimant from the mortgage.

94. In this way the Claimant was unfairly prejudiced by the Defendant's delay in challenging the TR1 and this prejudice ought to have led to the refusal of any order for rectification. The reason that the Judge did not address these matters is all due to the fact that the Defendant did not plead his case properly.

95. *The Defendant* contends that on careful analysis of the Judgment, and in particular paragraphs 26, 27 and 37, the conclusion that the declaration of trust cannot stand amounts to a finding that it was right to rectify the TR1. It was not inequitable to determine rectification, particularly where the judge found that the parties never intended the outcome that the TR1 provided for. As regards discretionary factors, he submitted that none of the points made by the Claimant were sufficient reason not to rectify the TR1. This court can consider the questions of whether it is an equitable under CPR 52.20.

Discussion and analysis

96. First, I consider that the effect of the Judgment was that the TR1 was to be rectified (or rectifiable) by way of deletion of the express declaration of trust: see *Pink v Lawrence*, supra, paragraph 75 above.

97. Secondly, the Claimant did raise before the judge some of the matters relied upon now by the Claimant (in particular points (4) to (7) above). To the extent that those matters were not raised, they could have been raised before the judge, in circumstances where the issues of mistake and constructive trust were being considered. In any event, these are matters which this Court can deal with on appeal. This court can consider, under CPR 52.20, the question of whether it is inequitable to allow rectification.

98. Thirdly, as regards the specific matters raised by the Claimant, most if not all of them are predicated on the contention that the Defendant ought to have raised his case on mistake earlier, and that rectification should be refused on grounds of delay. However, whilst the court has a residual discretion to refuse to grant rectification, mere lapse of time without more is not a bar to an equitable remedy. Relevant delay is delay, on the part of the party seeking rectification, between his discovery of the mistake and seeking rectification: *Chitty,* supra §§3-093 and 3-095. In this respect, the judge made important findings at paragraph 32 of the Judgment. The judge did not accept the Claimant's evidence that he had sought to assert, and realise, his joint beneficial interest in the Property in 2012. The judge expressly did not accept that the Claimant had ever said he wanted to realise his share in the property. In these circumstances, there is no evidence that the Defendant was aware of "the mistake" in the TR1 until the Claimant brought the present proceedings and, in these circumstances, it is hard to characterise the matter as being delay on the part of the Defendant.

99. Fourthly, turning to the Claimant's specific points in paragraph 93 above, as regards point (2), as I have found above the contribution merely from having his name on the mortgage does not entitle the Defendant to the benefit of the Property. It is hard to see why this would be a reason to refuse to rectify so as to reflect the true position or to give the Claimant a beneficial interest to which he was not otherwise entitled.

100. As regards point (3), the "Claimant's assumption" that he was the owner is contrary to the judge's finding of fact at paragraph 34 that *the Claimant* himself never intended that he would have a beneficial interest.

101. As regards point (4), contemporaneous documentation, since there is no basis for the contention that the mistake should have been raised earlier in time, no question arises as to earlier discovery of such documentation.

102. As regards his claimed inability to obtain a further mortgage in his own name, (points (5) and (7)), this has two aspects: first, his inability to realise his alleged beneficial interest in the Property and secondly, regardless of that beneficial interest, his request to have his name removed from the mortgage. As regards the former, and as pointed out above, the judge did not accept the premise: the Claimant did not seek to sell - or even assert - his beneficial interest. As regards the latter, based on the mere fact that the Claimant might have asked earlier for his name to come off the mortgage (but

without any claim to realise his alleged share in the Property), this point was in evidence before the Judge and could have been raised. Moreover, assuming such a request (but without any associated attempt to realise his beneficial interest) there is no basis to suppose that when that request was made, the Defendant understood that the Claimant was asserting a beneficial interest, nor that there was a "mistake" in the TR1 i.e. no basis for concluding that the mistake was "discovered" earlier.

103. Finally, as to point (6), the concern about higher rates of Stamp Duty Land Tax is misplaced. This is a concern which the Claimant expressed about the position as at the date of his second witness statement (and not identified as historic difficulty). It was not put forward as a reason why he could not purchase a property earlier. He was found by the judge to have no ownership interest in the Property. Accordingly, he would not now be liable for any higher rate of Stamp Duty Land Tax.

104. For these reasons Ground 4 of the appeal fails.

Conclusions

105. In the light of my conclusions in paragraphs 54, 60, 92 and 104 above, none of the Grounds are established and this appeal is dismissed.

106. I will hear the parties on matters consequential upon this judgment. Finally, I am grateful to counsel for the helpful way in which this appeal has been dealt with, not least in the circumstances of the present Covid-19 situation.