PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO. 2014/0859

BETWEEN

SAJJAD HUSSAIN SHAH

Applicant

and

PAMELA OLOYA

Respondent

Property address: 91 Mayhew Crescent, High Wycombe HP13 6DF
Title number: BM183106

Before: Judge Daniel Gatty

Sitting at: Alfred Place, London W1
On: 30, 31 March and 5 April 2016

Applicant Representation: Patrick McMorrow instructed by Eden Solicitors
Respondent Representation: In person

DECISION

Cases referred to:

Bank of Scotland plc v Greville Development Company (Midlands) Limited [2014] EWHC 128 (Ch)

Spiro v Glencrown Properties [1991] Ch 537

1. This matter was referred to the First-tier Tribunal on 17 November 2014. It concerns an application made to HM Land Registry by Ms Pamela Oloya to cancel a restriction in favour of Mr Sajjad Hussain Shah ("the Restriction") that has been entered against the title to Ms Oloya's property, 91 Mayhew Crescent, High Wycombe HP13 6DF, title number BM183106 ("the Property"). Mr Shah objected to Ms Oloya's application and hence the dispute was referred to this Tribunal, where Mr Shah has been named as Applicant and Ms Oloya as Respondent.

2. The hearing of this reference took place before me, sitting at Alfred Place, London W1, on 30 and 31 March and 5 April 2016. Mr Shah was represented by Mr Patrick McMorrow of counsel. Ms Oloya represented herself with some help from her friend, Ms Kim Worthington and her partner, Mr Prince Henshaw.

Factual Background

3. The Property comprises a house (and garden) which the Respondent purchased in June 2006 for £205,000. The Restriction, which was entered on the Register on 16 June 2014 reads:

> "No disposition of the registered estate by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by Sajjad Hussain Shah of 91 Mayhew Crescent, High Wycombe HP13 6DF or their conveyancer that the provisions of clauses 1 to 5 of an Option Agreement dated 1 June 2012 made between (1) Sajjad Hussain Shah and (2) Pamela Oloya have been complied with"

4. The background to the entry of the restriction is as follows. Ms Oloya, a civil servant, and Mr Henshaw have been partners (in the domestic sense) for many years. They have a son whom they wished to attend High Wycombe Royal Grammar School near the Property. Ms Oloya purchased the Property when her son was nine years old with a view to her son attending that school but unfortunately he did not pass the entrance exam. Ms Oloya's son was offered a place at a school in Waddesdon outside Aylesbury

instead. Mr Henshaw was able to obtain a housing association property in Aylesbury and he, Ms Oloya and their son moved in there after their son had started attending the school in Waddesdon. So Ms Oloya no longer needed the Property.

5. Mr Shah owns an estate agency known as Chiltern Hills Estate Agents ("CHEA"), although he said in evidence that nowadays he has taken a back seat and allowed his sons to run it. Ms Oloya and Mr Henshaw approached CHEA in about 2009. According to Mr Shah, this was with a view to letting out the Property. Ms Oloya said that it was initially with a view to selling the Property and later, when it had not sold, with a view to letting it out. There was a dispute between the parties as to the identity of the tenant found by CHEA, and whether a formal tenancy agreement was signed, but no dispute that CHEA found a tenant for the Property.

6. Ms Oloya has a mortgage with Santander UK plc. I have been provided with a copy of her mortgage account from which it can be seen that her mortgage first fell into arrears in July 2007. This led to Santander bringing possession proceedings and obtaining a suspended possession order in 2009. The arrears had been cleared by mid-2009 but began to accumulate again in 2011.

7. In 2011 or early 2012 Ms Oloya approached Mr Shah for help and they reached a verbal agreement. The terms of that agreement are hotly contested. Ms Oloya says that the agreement was for Mr Shah to take over control of the Property, pay the mortgage instalments and pay off the arrears and invest in some improvements to the Property. Mr Shah would let the Property in the short term but the aim was to sell it and to share the profit from its sale. It is not in dispute that Ms Oloya granted Mr Shah a Power of Attorney dated 1 June 2012 ("the PoA") which she maintains was for the purposes of the agreement I have described. The PoA was signed by Ms Oloya at the offices of Fendom Dawson & Towner LLP, solicitors, in High Wycombe ("FDT") before two witnesses who described themselves as respectively a solicitor and a legal assistant. Mr Henshaw was with Ms Oloya when she signed the PoA and there is a dispute whether Mr Shah was there too. It would have assisted me to have heard evidence from one or both of the witnesses to the PoA but neither were called by either party.

8. Mr Shah's case is that the agreement reached was for him to acquire the Property, but not immediately. He agreed that he was to keep up the mortgage and pay off the arrears

and that he was to carry out some work to the Property but this was, according to his witness statement, with a view to his acquiring it for himself at a later date. He may have sold the Property in due course but the profit was to be all his. He states that Ms Oloya granted him on 1 June 2012 not just the PoA but also an option to purchase the Property. He says that Ms Oloya signed an option agreement ("the Option Agreement") at his offices after returning from the offices of FTD with the executed PoA. Mr Shah's evidence during the hearing was that there were three copies of the Option Agreement signed by himself and Ms Oloya, one that he retained, one that she retained and one that was submitted to the Land Registry (notwithstanding that no application was made to the Land Registry with regard to the restriction for a further two years). It is the Option Agreement which is referred to in the Restriction. Ms Oloya denies signing it. She says that she knew nothing about it until she discovered that the Restriction had been entered. She alleges that her purported signature on the Option Agreement is a forgery.

9. Mr Shah and his wife and children moved into the Property during 2012. Mr Shah appears to have granted his wife a tenancy in Ms Oloya's name, pursuant to the PoA. He did bring the mortgage account up to date but it took him until June 2013 to do so. Further arrears built up again after December 2013. On 5 December 2013 Ms Oloya gave notice of revocation of the PoA. On 14 January 2014 she gave him notice to quit the Property. In April 2014 Ms Oloya issued possession proceedings against Mr Shah in the High Wycombe County Court on the footing that he occupied the Property as a licensee. A possession order was made on 24 June 2014 by District Judge Parker at a hearing not attended by Mr Shah. He says that he was abroad at the time and his wife did not understand how to respond to the possession proceedings.

10. Eden Solicitors applied for the Restriction on Mr Shah's behalf by an application dated 9 June 2014. In error, the Land Registry failed to give notice of the application to Ms Oloya, depriving her of the chance to object. After learning of the entry of the Restriction Ms Oloya made an application dated 3 September 2014 to cancel it, the application that has been referred to this Tribunal.

Application to adjourn

11. This matter was due to be tried on 9 and 10 November 2015. That hearing was vacated by consent in the following circumstances. Ms Oloya had obtained and submitted a

letter dated 19 January 2015 from Paul Craddock, a forensic handwriting examiner, concluding that there was moderate evidence that what purported to be Ms Oloya's signature on the Option Agreement was not a genuine example of her signature. However, his opinion was based upon a copy of the PoA submitted to the Land Registry with the application for the Restriction. The Land Registry had not retained the original submitted, merely a digital copy. As Mr Craddock acknowledged, this hampered him in forming his opinion.

12. Directions were given for a jointly instructed handwriting expert to report and Ms Ruth Myers was instructed. She produced a report dated 4 June 2015, also based on a copy of the Option Agreement obtained from the Land Registry. Her conclusion was that the evidence was inconclusive. On the documents available to her, she observed, it was not possible to determine with any degree of certainty whether or not Ms Oloya signed the Option Agreement. Shortly before the hearing scheduled for 9 and 10 November Mr Shah produced what he said was an original Option Agreement signed by Ms Oloya. An adjournment was agreed in order that Ms Myers could reconsider with the benefit of that document. The trial was relisted for February 2016 but shortly before the trial dates a further application to adjourn was received from the Applicant because Ms Myers had not been instructed yet. That application was granted. The trial was relisted to begin on 30 March 2016.

13. Meanwhile, Mr Shah's solicitors fell out with Ms Myers who refused to accept instructions to write a further report. So, the parties agreed to instruct Mr Robert Radley instead. He reported both with respect to the copy document obtained from the Land Registry and the further version provided by Mr Shah in November. His report was inconclusive too. He concluded:

> "I am of the opinion that due to the restriction of comparison material, I am unable to offer an opinion other than to indicate that I consider the evidence currently to be inconclusive as to whether Pamela Oloya signed the two Agreements in question."

14. On the first morning of the hearing Mr McMorrow applied for a further adjournment for essentially four reasons. First, in the hope that further contemporaneous signatures for comparison purposes could be obtained from Ms Oloya, to be supplied to Mr Radley. Secondly, because Mr Shah's two witnesses, Mr Adnan Siddiq and Mr Waqas Zulfiqar,

had not been asked by Mr Shah or his solicitors to attend the hearing and were abroad. Apparently, Mr Shah (and presumably his solicitors) had not realised that they needed to attend. Thirdly, Ms Oloya had sent to the Tribunal in February 2016 revised statements for herself and Ms Henshaw and a statement for Kim Worthington. She had been given permission to rely on them but had not provided copies to Mr Shah until the morning of the hearing. Mr McMorrow's instructing solicitors had failed to prepare an up-to-date hearing bundle.

15. I refused the adjournment for the following reasons (but postponed the start of the hearing proper until the morning of the second day):

a. This was the third last-minute application to adjourn made by the Applicant.
b. It was made on the morning of the hearing
c. Regard has to be had to need for the proper administration of justice and the needs of other users of the Tribunal.
d. I was provided with an email from Mr Radley in which he stated that he would only be able to reach a conclusion if provided with numerous contemporaneous undisputed signatures to compare. Ms Oloya said had she had no more comparisons to provide and Mr Shah thought he had one. So there was no real prospect of more conclusive handwriting evidence being obtained.
e. It was not fair on Ms Oloya to adjourn in order for Mr Shah to arrange for his witnesses to attend. Mr Shah was legally represented throughout and ought to have appreciated that he needed his witnesses to attend the hearing. Ms Oloya consented for the statements to be admitted as hearsay and submissions could be made as to what weight to give to them.
f. The application to cancel the restriction had been pending since September 2014 and there is a need for it to be determined sooner rather than later. Ms Oloya wishes to sell the Property if she is successful and in the meantime is having to make mortgage payments.
g. Mr Shah and his legal team could deal with the amendments to Ms Oloya's and Mr Henshaw's statements if I adjourned the hearing to start on the second day, which I proposed to do. I proposed to, and did, set aside permission to call Ms Worthington, whose statement contained very little of relevance to the main issues in any event, due to the failure to serve the statement before the hearing.

h. A hearing bundle could be prepared that afternoon in time for the hearing to start at the beginning of the second day.

The issues

16. In order to determine whether Mr Shah is entitled to retain the Restriction, it is necessary to decide the following issues:

(1) Whether Ms Oloya signed the Option Agreement.

(2) Whether, as Ms Oloya contends, the Option Agreement is void pursuant to s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 because it does not record all the terms agreed, specifically Mr Shah's obligation to pay the mortgage instalments and arrears (which only arises if Ms Oloya signed it).

(3) If Ms Oloya did sign the Option Agreement and if it complies with the 1989 Act, whether it entitles Mr Shah to the restriction that has been entered (a question I raised at the hearing and on which I invited submissions).

Whether Ms Oloya signed the Option Agreement

17. I was shown two copies of the Option Agreement, a copy of the copy obtained from the Land Registry ("Copy 1") and a copy of the further version produced by Mr Shah in November 2015 ("Copy 2"). I was told that the original of Copy 2 was still with Mr Radley. As Mr Radley confirms, the handwritten parts of Copy 1 and Copy 2 are similar but not identically written. Copy 2 is not a photocopy of Copy 1. The contents of each are identical, however. A copy of Copy 2 is annexed to this judgment.

18. I heard evidence from Mr Shah, Ms Oloya and Mr Henshaw. I also read the statements of Mr Siddiq and Mr Zulfiqar and the expert reports mentioned above.

19. Mr Shah's written evidence recounts that the Property was in negative equity to the tune of about £5,000 and facing repossession in 2011/2012. He says that he agreed to buy the Property but could not get finance to buy it straightaway. So he and Ms Oloya negotiated an option agreement supported by a power of attorney to allow him to manage the Property until he was in a position to buy it. In oral evidence, Mr Shah

stated that the agreement reached was that he would take over the management of the Property until it came out of negative equity. He confirmed that the arrangement agreed with Ms Oloya included that he would pay the mortgage instalments and pay off the arrears (which were only £464.71 as of 31 May 2012).

20. Mr Shah stated in oral evidence that he drafted the PoA and the Option Agreement, basing them on precedents he found on the internet with the advice of (unspecified) friends. He said that he understood Ms Oloya required legal advice about the PoA but not about the Option Agreement. So on 1 June 2012 he directed Ms Oloya and Mr Henshaw first to a firm of solicitors across the road from his office that could not help and then to Easton Street where FDT's offices were located. On their return to his office, the Option Agreement was executed in triplicate in front of two of his employees, Mr Siddiq and Mr Zulfiqar, according to Mr Shah.

21. It was put to Mr Shah that on the morning of 1 June 2012 he had driven Ms Oloya and Mr Henshaw to the offices of Mayfair Solicitors in Hounslow where he met with Ehsan Chaudhry, then of Mayfair Solicitors and now of Eden Solicitors (and who has conduct of these proceedings for Mr Shah), the implication being that Mr Shah had provided the draft PoA. Ms Oloya produced a business card for Mr Chaudhry at Mayfair Solicitors which she said she had been given on that occasion. Ms Oloya suggested to Mr Shah that on the way back they had stopped at a sweet shop he owned and then continued to park at his offices. Then, she suggested, she, Mr Henshaw and Mr Shah went to FDT where she executed the PoA, after which they parted company. Mr Shah denied this account. He denied driving Ms Oloya and Mr Henshaw to the offices of Mayfair Solicitors, or anywhere at all on that day (although he agreed that he owned a sweet shop). He denied attending FDT's offices for the execution of the PoA.

22. Ms Oloya put to Mr Shah that the arrangement reached was in order to sell her property and asked Mr Shah why he did not keep in touch with her after 1 June 2012. His answer was that he was abroad and had other things to do. Mr Shah was asked about some text messages sent to him by Ms Oloya (or possibly by Mr Henshaw in Ms Oloya's name) and his response. There was no dispute that the text message exchange took place. In about early 2013, Ms Oloya texted as follows:

"…can't even get in touch with you in time of important queries. Communications with you was all smooth and nice before we sign the documents [pausing there, I note the reference to documents in the plural] as you wanted me to give you the power to negotiate and sale on my behalf since then I can't remember a time you call to give me an up date on the situation, rather I'm the one making all the effort to contact you with the regards to the property matters especially as the mortgage payment is always late. whereas the idea you gave me was that you were going to improve the property and fine [sic] a buyer and sale it and we share the profit. You said you were going to work on the property in other to gain the full market potentials then sale, but so far no improvements have been made to the property nothing have been done to the back garden since the collapse of the back wall which according to you was a priority repair that will commence once your given the power. the garden was one of the reasons I could not sale the property and if the repair is done would give the property a good selling point. Even then I have found a buyer and I will like us to act on this A.SA.P.

Thank you

Pamela"

23. The response from Mr Shah was as follows:

"Sorry I have been off ill but I have done lots if [sic] work inside b still gave [sic] to do stuff outside. But due to my health probs I been suffering n things slow. However I doing my best

Then I will put it on sale but cold weather does not help god willing I will get it sorted soon."

24. It is apparent that the text message exchange quoted above is more consistent with Ms Oloya's case that there was an agreement to share profit from a sale to a third party than Mr Shah's case that there was an agreement for him to purchase the Property at a point in the future, for which purpose an Option Agreement had been entered into. When asked why he did not respond to the text message from Ms Oloya denying that there was an agreement to share profit from a third party sale as described in Ms Oloya's text message, Mr Shah said that he just wanted to get rid of Ms Oloya and did not bother due to serious health problems he was having at the time. I did not find that a particularly satisfactory answer. In closing Mr McMorrow provided another

explanation for the text message exchange. He suggested that the Option Agreement was only one route available and that the possibility that the Property would be improved and then sold onto a third party was still within the parties' contemplation. The Option Agreement was "another string to the bow" and Mr Shah did not have to exercise the option. The problem with this submission is that it is wholly unsupported by Mr Shah's own evidence which was that the Option Agreement was for the purposes of a (verbally) agreed postponed sale to him and that it was never his intention not to take up the option. He did not suggest in his evidence that, in parallel, a sale to third parties with a split of the profit between himself and Ms Oloya was being pursued.

25. The two witnesses appearing on the Option Agreement were Mr Adnan Siddiq and Mr Waqus Zulfiqar. The hearing bundle contains short statements from them, both dated 24 June 2015. Mr Zulfiqar states that he witnessed Ms Oloya's signature (as the Option Agreement appears to show). Mr Siddiq, who appears from the Option Agreement to have witnessed Mr Shah's signature, states that he saw Ms Oloya, Mr Zulfiqar as witness and Mr Shah all sign the Option Agreement before he signed it to witness Mr Shah's signature. Neither Mr Siddiq nor Mr Zulfiqar refer to the Option Agreement having been signed and witnessed in triplicate. Although Mr Zulfiqar does say he "countersigned the document as the witness to her signatures", i.e. more than one signature, he refers to Ms Oloya signing "the document", not three copies of the document.

26. As discussed above, Mr Siddiq and Mr Zulfiqar did not attend to give oral evidence and so they could not be cross-examined about their statements. In those circumstances, and bearing in mind that neither statement refers to Ms Oloya having signed three copies of the Option Agreement as Mr Shah now alleges, I can place little, if any, weight on their written evidence.

27. Ms Oloya's original witness statement had been prepared by her then solicitors, Blaser Mills. As mentioned above, she produced an amended statement in February 2016. She sought to make a further, one-word amendment to the amended version in the copy that she supplied to Mr Shah's solicitors on the morning of the hearing. The original statement described Ms Oloya and Mr Henshaw having been picked up by Mr Shah on 1 June 2012, remaining in the car while Mr Shah collected some paperwork and brought them some food and then being driven to the offices of FDT to sign the PoA.

28. The key change made in the revised statement (as submitted to the Tribunal in February 2016) is that it records that Ms Oloya walked to FDT's offices and that Mr Henshaw was present when she signed the PoA. In the version served on the first morning of the hearing, it is said that "We walked to the offices of [FDT]" instead of "I walked to the offices of "[FDT]". The significance of that last change became apparent during Ms Oloya's oral evidence which was to the following effect. On 1 June 2012 Mr Shah drove Ms Oloya and Mr Henshaw to the offices of Mayfair Solicitors where a conversation took place between Mr Chaudhry and Mr Shah that she could not understand because it was not in English. Then he drove them back to High Wycombe, stopping off outside his sweet shop to pick up some food for them. He parked outside his offices and Ms Oloya, Mr Henshaw and Mr Shah all walked to FDT's offices where they were all present while the PoA was signed. Mr Shah took the PoA away with him back to his office and Ms Oloya and Mr Henshaw made their own way home (to Aylesbury) without going into Mr Shah's office.

29. Mr Henshaw gave a similar account of the events of 1 June 2012 in his oral evidence, although there is no suggestion in either version of his witness statement that Mr Shah came to FDT to be present when the PoA was signed.

30. Although neither Ms Oloya's statements nor Mr Henshaws's refer to it, there was agreement at the hearing that Ms Oloya and Mr Henshaw first approached CHEA in about 2009 and that CHEA found a tenant for the Property. A tenancy agreement was produced by Mr Shah dated 19 September 2009 between "Mrs Pamella Oloya" and Mrs Mina Hanifi. Mr Shah's evidence was that Mr and Mrs Hanifi were in occupation of the Property from September 2009 until June 2012. The tenancy agreement bears a signature which to my eye appears similar, although not identical, to Ms Oloya's undisputed signatures on the PoA and the deed revoking the PoA. However, Ms Oloya denied recognising the tenancy agreement. Her evidence was that Mr Shah introduced her to a Mr Lethi as potential buyer of the Property in about 2009 and he moved in as tenant with a view to buying it. He moved out when the rear garden collapsed and then the Property stayed empty. Ms Oloya was unable to be clear about for how long the Property was empty and whether anyone lived there after Mr Lethi.

31. Ms Oloya was asked about the terms of her agreement with Mr Shah. Her evidence was that he agreed to take over the Property, pay the mortgage and pay off the arrears and

carry out improvements to the Property. Ms Oloya said that it was agreed that Mr Shah would receive a share of the profit from selling the Property "as a token of appreciation" but not what proportion of the profit would go to him. Mr Henshaw's oral evidence was that Mr Shah had proposed that on the Property being sold he would take back his investment and then they would split the profit.

32. I am afraid that I did not find any of Mr Shah, Ms Oloya or Mr Henshaw to be entirely satisfactory witnesses. As discussed above, I found Mr Shah's explanation for the text message exchange quoted above to be unconvincing. Nor was I wholly persuaded by his explanation for having Ms Oloya go to solicitors to have the PoA witnessed but not having Ms Oloya's signature on the Option Agreement also witnessed by the solicitors.

33. The changes between versions of Ms Oloya's and Mr Henshaw's statements and between the statements and their oral evidence as to events on the crucial day left me doubtful about their accounts. Ms Oloya was unable to give clear evidence about a number of matters (occupation of the Property between 2009 and 2012, payments towards the mortgage, the arrangement with Mr Shah). Mr Henshaw's attempts to explain the divergences between his oral account and the contents of his witness statement, and about the preparation of his statement (and its revision) was also unimpressive.

34. The expert evidence, sadly, is of little assistance. Ms Myer was unable to reach a conclusion about the authenticity of Ms Oloya's signature on Copy 1 (she did not see Copy 2). Mr Radley was unable to reach a conclusion about either Copy 1 or Copy 2. Mr McMorrow relied on para. 5(iii) of Mr Radley's report in which Mr Radley commented that if the signatures on Copy 1 and Copy 2 were copies, they appear to have been copied from two different master styles of signature both seen in authentic examples of Ms Oloya's signature. He observed that this would be extremely unusual. I see the force of that point and take it into account to a degree, but it does not alter Mr Radley's conclusion which was that the evidence is inconclusive.

35. The allegation of forgery made against Mr Shah is, of course, a very serious one. It is an allegation of criminally fraudulent conduct. The standard of proof in these proceedings is the civil one, balance of probability – not the criminal standard of proof. Nevertheless, the seriousness of the allegation is to be taken into account when deciding

whether the allegation has been proved on the balance of probabilities. Cogent evidence is required to prove a forgery.

36. In *Bank of Scotland plc v Greville Development Company (Midlands) Limited* [2014] EWHC 128 (Ch) HHJ Pelling QC (sitting as a High Court Judge) was concerned with allegations of forgery made by the Bank against a Mr Blundell. He said:

> "21 ... Finally I remind myself of two other general principles that need to be borne in mind throughout in a case of this sort. First, whilst the standard of proof in a civil case such as this is always the balance of probabilities, the more serious the allegation or the more serious the consequences of such an allegation being true the more cogent must be the evidence if the civil standard of proof is to be discharged – see ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** [1996] AC 563 per Lord Nicholls at 586, where he said:
>
> > 'The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence…Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation.'
>
> ….
>
> 65 The Bank's case is that the 26 June letter was never sent and that the 3 July letter is a forgery. This is perhaps one of the most serious allegations that can be made in civil proceedings against any party or witness because if true it is a criminal offence; asserting in oral evidence on oath or affirmation a positive case advanced on the basis that the document is genuine will probably constitute the additional criminal offence of perjury; asserting in a witness statement or pleading signed under a statement of truth a positive case on the basis that the document is genuine when it is not exposes the person making the statement to

> the risk of punishment for civil contempt; and such conduct undermines the foundation on which civil dispute resolution rests. In my judgment therefore the principles identified in *Re H* (ante) apply and evidence of the clearest cogency will be required before a court can conclude on the balance of probability that a document relied on by a party is a forgery."

37. Having considered all the evidence before me, written and oral (including evidence which for reasons of brevity I have not discussed above), I conclude that Ms Oloya has not discharged the burden of showing that she did not sign the Option Agreement. Despite my concerns about some of Mr Shah's evidence, and with some hesitation, I conclude on the balance of probabilities that the signatures on Copy 1 and Copy 2 purporting to be made by Ms Oloya were indeed made by her.

38. In the light of the text messages quoted above, I am not entirely convinced that when Ms Oloya signed the document in question she realised that she was signing an option agreement giving Mr Shah the right to buy the Property at any time in the next 5 years for "£205,000 or the mortgage owed"[1]. However, Ms Oloya's case is that she did not sign the Option Agreement, not that she signed it without understanding what she was signing (such a lack of understanding may well have been insufficient to avoid any consequences of having signed in any event).

Law of Property (Miscellaneous Provisions) Act 1989

39. The conclusion that Ms Oloya did sign the Option Agreement is not the end of the matter. As indicated above, it was common ground that the arrangement verbally agreed between Ms Oloya and Mr Shah included that Mr Shah would pay the mortgage in respect of the Property including the arrears. And he did so. Paragraph 3 of the Applicant's statement of case reads:

> 3. The applicant in consideration for paying of [sic] the arrears entered into an option agreement (option agreement) with the Respondent on 1st June 2012 to buy the property as per the terms of that option agreement where (i) payment of £10.00 (the option payment) (ii) time to exercise the option was 60 months (30

[1] £205,639 plus arrears of £464.71 was the amount due as at 31 May 2012

May 2017), (iii) purchase price £205,000 or the mortgage amount owed at the time of purchase.

40. The option agreement does not record Mr Shah's agreed obligation to pay the mortgage instalments, nor does it describe the consideration for the agreement as Mr Shah paying off the mortgage arrears. It states that the option is granted in consideration of payment of £10.00.

41. An option agreement must comply with s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 to be valid and enforceable. See *Spiro v Glencrown Properties* [1991] Ch 537.

42. S. 2 reads (so far as material):

> (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.
>
> (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.
>
> (4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

43. In my judgment, the Option Agreement does not comply with s. 2 of the 1989 Act because it does not record Mr Shah's agreed obligation to pay mortgage instalments as they fall due and pay off the mortgage arrears. That obligation was an express term of the agreement reached between Ms Oloya and Mr Shah and so ought to have been recorded in the Option Agreement. As it was not recorded in the Option Agreement (nor anywhere else), the Option Agreement does not incorporate all the terms which the parties had expressly agreed. For that reason, it does not comply with s. 2 of the 1989 Act and is not enforceable.

44. In his opening submissions Mr McMorrow sought to address s. 2 of the 1989 Act in two alternative ways. First, he suggested that the agreement to pay the mortgage was a collateral agreement, i.e. not a term of the agreement recorded in the Option Agreement.

Secondly, he submitted that the Option Agreement did contain the obligation on Mr Shah to pay the mortgage in the way that the price was defined, namely "£205,000 or the mortgage owed".

45. In his closing submissions, Mr McMorrow did not pursue the collateral agreement argument. He was correct not to do so, in my judgment, because on Mr Shah's own evidence the obligation to pay the mortgage was a part of the agreement to which the Option Agreement was to give effect, not collateral to it, and because the obligation to pay off the arrears is pleaded by Mr Shah to be the consideration for the giving of the option. Mr McMorrow accepted that the Option Agreement had to record the obligation to pay the mortgage if it was to be valid under s. 2, but he submitted that the Option Agreement did so in its definition of the price.

46. I reject the argument that the requirement to incorporate the obligation to pay the mortgage in the Option Agreement was satisfied by recording the purchase price as "£205,000 or the mortgage owed". The option need not have been exercised until five years later and might not be exercised at all. On the evidence, the agreement between the parties was that Mr Shah would pay the current mortgage instalments as well as the arrears, which can only mean pay the mortgagee the current mortgage instalments when they fall due. That is not the same as a right, if Mr Shah should elect to exercise the option, to buy the Property at a price equivalent to the mortgage then owing. One only has to ask the question whether the Option Agreement contains any obligation on Mr Shah to pay the mortgage if he does not ultimately exercise the option to see that.

47. Consequently, I find that the Option Agreement has no legal effect in its current form. I do not comment on whether the Option Agreement might be rectified to include the obligation to pay the mortgage so that it satisfies the 1989 Act, as contemplated by s. 2(4) of the 1989 Act. There was no application for rectification before me and so I have not considered whether the test for rectification is met. It follows that Mr Shah is not entitled to a restriction to protect his interest under the Option Agreement. Since the Option Agreement has no legal effect, Mr Shah has no interest under it capable of protection on the register.

Entitlement to the Restriction as entered

48. In the light of my conclusion regarding the Option Agreement's failure to meet the requirements of the 1989 Act, the question whether the Option Agreement entitles Mr Shah to the form of Restriction actually entered does not arise. However, I would observe that the normal form of protection for an option is a notice, not a restriction. If the option agreement contains an express constraint on dealing with the property during the option period, a restriction may be entered as well as, or instead of, a notice to give effect to that constraint, especially when the option agreement stipulates that the grantor consents to such a restriction.

49. Here, the Restriction applies to all dispositions of the Property but the only constraint on dealings during the option period contained in the Option Agreement is in cl. 5(vi). That provides that:

> "The Seller agrees not to apply for any mortgages or secured loans on the Property at any time during the Option Agreement"

50. Notwithstanding that the form of the restriction was a standard Form L restriction as suggested by the Leicester Office of the Land Registry, I consider that it was more than Mr Shah would have been entitled to if the Option Agreement were valid.

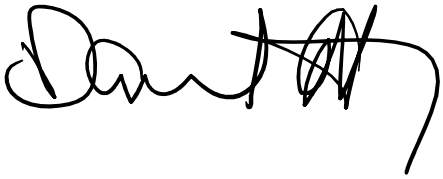
51. If I had found the Option Agreement to be valid, I would have directed the Chief Land Registrar to give effect to the application in part by substituting in the first line of the Restriction the word "charge" for "disposition" to better reflect cl. 5(vi) of the Option Agreement. As it is, I will direct the Chief Land Registrar to give effect to the application to cancel the Restriction in full.

Decision

52. For the reasons that I have sought to explain above, I shall order the Chief Land Registrar to give effect to Ms Oloya's application to cancel the restriction in favour of Mr Shah.

53. The usual rule in this jurisdiction is that costs follow the event. So, subject to the necessary applications and any submissions being made to the contrary, I would be minded to order Mr Shah, as the unsuccessful party, to pay Ms Oloya's costs since the

date of referral to the Tribunal. Any application for costs should be made in writing, accompanied by a schedule of costs and documentary evidence of the costs claimed, within 21 days of the date of this judgment and order. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submission sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party within 14 days of receipt of the submissions.



JUDGE DANIEL GATTY

Dated this 16th day of May 2016