Neutral Citation Number: [2021] EWCA Civ 1106

Appeal No: A2/2021/0108
Claim No: F10CL247

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
The Honourable Mr Justice Morris
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH Judge Monty QC

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 22/07/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE POPPLEWELL

BETWEEN:

DEAN RALPH

Claimant/Appellant

and

DAVID RALPH

Defendant/Respondent

- -

Mr Clifford Darton QC and **Mr George Woodhead** (instructed by **Verisona Law**) for the **claimant/appellant, Dean Ralph**

Mr Robin Green and **Mr Riccardo Calzavara** (instructed by Porter & Co Law Ltd on a pro bono basis) for the **defendant/respondent, David Ralph**

Hearing date: 13 July 2021

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JUDGMENT

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Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. The bulk of the cases that have concerned common mistake rectification have been between commercial parties and related to commercial contracts. The question here, however, is whether a Land Registry transfer form TR1, signed by the transferors but not by the transferees, should be rectified so as to remove a manuscript cross from box 11 that said that "the transferees are to hold the property on trust for themselves as tenants in common in equal shares", on the grounds that, as HH Judge Monty QC (the trial judge) held on the evidence, no such thing had actually been agreed between the defendant father (David) and the claimant son (Dean) who were the transferees.

2. The essential background can be taken from the trial judge's judgment at [2]-[3]:

> "2. This is a claim by Dean for a declaration as to the beneficial ownership of 6 Homedale House, 3 Brunswick Road, Sutton, and for an order for sale … under the Trusts of Land and Appointment of Trustees Act 1986.
>
> 3. Dean and David are registered as the owners of the property, which was bought in their joint names in 2000. It is common ground that David, who was then living at the property with his partner (who later became his wife) and their five children, of whom Dean is the eldest; in 2000, the youngest child was around 11 years old, and Dean was 19 years old. David could not obtain a mortgage advance – which he needed to buy the property – on his income, and he asked Dean to help out, as Dean was working and earning. The property was bought in October 2000 for £84,500, of which £76,050 was borrowed from Halifax, and David paid the balance. Dean did not contribute to the purchase price. Dean and David both used the services of a firm of solicitors to act for them in connection with the purchase and the mortgage. There was, apparently, one meeting with the solicitor, when the contract was signed …".

3. The essential findings of fact can also be taken from the trial judge's judgment at [34]-[35]:

> "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.
>
> 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."

4. Against this background, the trial judge dismissed Dean's claim on the basis that "David has satisfied me on the facts on balance of probabilities, to the necessary convincing standard, that the TR1 was completed by mistake", "[t]he declaration in the TR1 cannot stand", and that it followed from his factual findings that Dean had "no beneficial interest in the property", which was "held beneficially for David alone".

5. A first appeal to the High Court was dismissed by Mr Justice Morris, who, at the risk of over-simplification, founded his approach on the decision of the

Court of Appeal in *Pink v. Lawrence* (1978) 36 P & C R 98 (*Pink*) where it was sought to impugn an express declaration of trust in favour of joint owners. Buckley LJ (with whom Eveleigh LJ and Sir John Pennycuick agreed) had said that "once a trust has been effectively declared, it can only be got rid of either by rescinding the document containing the declaration of trust on the ground of fraud or mistake or rectifying it in the appropriate manner to vary or delete the declaration of trust" (see *Pankhania v. Chandegra* [2012] EWCA Civ 1438 (*Pankhania*) at [17] per Patten LJ and [27] per Mummery LJ).

6. Morris J held that, whilst it was not appropriate to vary the declaration to say that the property was held on trust for David alone, since that had not been agreed at the time [76], it was "appropriate [on the evidence] to conclude that the TR1 could be rectified by *deletion* i.e. by removing the "X" from the second box in box 11", so that there was no express declaration of trust at all. The trial judge had clearly found that "the express declaration of trust in the TR1 did not reflect the parties' agreement or common intention", and had not made "a positive finding of a common intention at the time of sole beneficial ownership held by [David]". In those circumstances, the trial judge had correctly decided the beneficial interests under the principles enunciated in *Stack v. Dowden* [2007] UKHL 17 (*Stack*) and *Jones v. Kernott* [2011] UKSC 53 (*Jones*).

7. The main ground of Dean's second appeal (for which Bean LJ gave limited permission) is that the rectification permitted by the judges below was inadmissible because there was no positive subjective common agreement between Dean and David at the time of the declaration of trust, and no sufficient outward expression of accord, as required by the Court of Appeal's recent

decision in *FSHC Group Holdings Ltd v. GLAS Trust Corpn Ltd* [2020] Ch 365 at [176] ("*FSHC*"). David relies in his Respondent's Notice on the contention that there can, in law, be a sufficient outward expression of accord without express communication, at least in the family context.

8. In addition to the central question of an outward expression of accord, Dean also challenges Morris J's conclusions, contending them to amount to an impermissible partial rescission of a contract for which consideration had been paid, a failure to consider whether it would be inequitable to grant the relief claimed, and a misapplication of the doctrine of common intention constructive trusts.

The procedural background

9. There were a number of unsatisfactory features to the procedural background to this case.

10. First, David's claim for rectification of the declaration of trust contained in the TR1 was never pleaded.

11. Secondly, the notes to the version of form TR1 that was being used in 2000 were never produced. The current edition suggests that "[i]f there is more than one transferee and panel 10 [box 11 in 2000] has been completed, each transferee must also execute this transfer to comply with the requirements in section 53(1)(b) of the Law of Property Act 1925 [section 53(1)(b)]". Section 53(1)(b) provides "(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol - … (b) a declaration of trust respecting any land … must be manifested and proved by some writing signed

by some person who is able to declare such trust …". The trial judge proceeded (at [18] and [21]) on the basis that HHJ Paul Matthews had decided in *Taylor v. Taylor* [2017] EWHC 1080 (Ch) (*Taylor*) that it made no difference to the validity of the declaration of trust in this situation if the TR1 was signed by the transferor, but not by the transferees, because a properly completed TR1 could only be impeached on the grounds of fraud, undue influence, mistake or proprietary estoppel (see *Pankhania*). I confess to some doubt about the correctness of HHJ Matthews' decision on that point, but since it was not raised or argued by David, I shall assume the validity of the declaration of trust for the purposes of this appeal, and leave the point to be considered again if appropriate in a case in which it does arise.

12. Thirdly, the parties seem to have assumed before Morris J and this court that the principles relevant to the rectification of commercial contracts enunciated in *FSHC* are applicable in law to the question of whether this TR1 can be rectified. I also harbour doubts about the correctness of that proposition for reasons I will elaborate in due course, but since it appears to have been common ground and the latter position was not argued by David, let alone made the subject of a Respondent's Notice, I will deal with the appeal on the working assumption, without deciding, that those *FSHC* principles apply to this case. I should note that David's Respondent's Notice raises a different point about *FSHC* concerning whether the necessary prior outward expression of accord in a case of this kind can be satisfied without express communication between the parties.

13. I will deal first with the most relevant authorities, then with my doubts as to the application of the full rigours of *FSHC* here, before turning to the points raised by the grounds of appeal and the Respondent's Notice.

The main authorities on rectification

14. In Leggatt LJ's seminal judgment in *FSHC*, he explained at [72]-[87] how and when rectification could be granted in the event of a "tacit agreement". Space does not permit reproduction of the entire passage. The elements critical to the decision in this case were as follows.

15. First, Leggatt LJ explained that *Joscelyne v. Nissen* [1970] 2 QB 86 (*Joscelyne*) clearly and authoritatively established that a common intention continuing at the time when a contract was made was sufficient for rectification, subject only to the qualification that some outward expression of accord was required, spelling out what Simonds J had said in *Crane v. Hegeman-Harris Co Inc (Note)* [1971] 1 WLR 1390, who had used the phrase "common intention" to refer to what he also called the "common agreement" of the parties or the "true consensus of their minds" (and see Buckley LJ in *Lovell & Christmas Ltd v. Wall* 104 LT 85, 93: "[w]hat you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain").

16. Secondly, despite criticism of *Joscelyne* by Leonard Bromley QC in *Rectification in Equity* (1971) 87 LQR 532, and in *Munt v. Beasley* [2006] EWCA Civ 370 at [36] per Mummery LJ, Leggatt LJ held at [77], subject to the pension cases, that the requirement for an outward expression of accord was sound in principle: the power of the court to rectify a contractual document is

not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed.

17. Thirdly, in relation to the pension scheme cases, rectification of amendments to the rules, which the trustees of the scheme have power to alter subject to the employer's consent, did not require an agreement between trustees and employer: see Lawrence Collins J in *AMP (UK) plc v. Barker* [2001] Pens LR 77, and later cases where it was sufficient that the intentions of the trustees and the employer coincided. Warren J in *IBM United Kingdom Pensions Trust Ltd v. IBM United Kingdom Holdings Ltd* [2012] Pens LR 469 described the pension case as a "different animal from the agreement or consensus which is relevant in a contractual case".

18. Fourthly, the important point to emerge from *JIS (1974) Ltd v. MCP Investment Nominees I Ltd* [2002] EWHC 1407(Ch) (Hart J) and [2003] EWCA Civ 721 per Carnwath LJ at [33]-[34], was **not** that an outward expression of an accord is unnecessary for rectification, but rather that the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms (see also Campbell JA in *Ryledar Pty Ltd (trading as Volume Plus) v. Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [281]). An accord could include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words: see Chitty on Contracts, 33rd edition (2018) at [3-064]. Leggatt LJ accepted that there could be cases where, depending on the circumstances and the context, the fact that

an intention or understanding is shared may be apparent from the fact that nothing is said.

19. At [146], Leggatt LJ explained that the basis for rectification was entirely concerned with the parties' subjective states of mind, because the justification for rectifying a contractual document to conform to a continuing common intention was found in the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed.

20. Leggatt LJ concluded at [176] by holding that common mistake rectification based on a common intention when the parties executed the document in respect of a particular matter, which by mistake the document did not accurately record, required not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention.

21. Counsel for David argued that, on the facts of *FSHC* itself (referring to [182]-[193]), there had simply been no agreement upon the clauses which the claimant sought to delete by rectification. In fact, however, Henry Carr J found (and the Court of Appeal upheld) that the parties had understood and intended that the deeds in question would **do no more** than provide the missing security, when in fact their effect was to impose additional onerous obligations on the claimant. As Leggatt LJ said at [182] "on the judge's factual findings [the parties']

common intention was the legally specific one of binding the Parent to particular contract terms, but not to other specific terms which were contained in the same document", and at [189]: "[i]t was clearly implicit in that explanation that … the stated purpose was the only purpose of executing the deeds and that there was no intention that the deeds should, in addition, commit the Parent to new and onerous obligations which it was not contractually required to undertake".

22. It is true that Leggatt LJ also said at [192] that "parties entering into a contract do not spell out the fact that they lack intentions which no reasonable counterparty or observer would imagine them to have. Rather, it was the complete absence of any reference to the Additional Obligations in any of the relevant communications which, in this particular context, spoke louder than words". This passage seems to me to epitomise what Leggatt LJ meant when he said that an accord can include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words. In this case, however, as will appear below, there was, in fact, no accord between David and Dean as to how the beneficial interest in the property should be divided.

23. In *Re Butlin's Settlement Trusts* [1976] Ch 251 (*Butlin's*), Brightman J rectified a voluntary settlement which the settlor had intended to contain a clause 9 providing for an express power for a majority of the five trustees to exercise any of the powers given to them by the settlement over the capital and income of the trust fund. At least two of the trustees were ignorant of the settlor's intention, and one later opposed rectification. Brightman J decided that he had power to

rectify, notwithstanding "the absence of proof of any mistake on the part of any of the trustees except Mr. Stokes".

24. Brightman J described the problem facing him as not being adequately covered by any authority. The question was: "to what extent does a settlor, seeking rectification of a voluntary settlement to which trustees are parties, have to establish that the mistake was mutual? Is it enough for the settlor to prove that he alone made a mistake?". He pointed out, pertinently for this case, that a similar question could arise in the case of a settlement for value, as to whether a mistake on the part of the trustees needed to be proved as well as a mistake on the part of the contracting parties.

25. Brightman J answered the questions he had posed by saying:

i) "If a settlement involves an actual bargain between the settlor and the trustees, it would be surprising if the settlement could be rectified quoad that bargain unless the mistake were mutual. That point does not seem to call for elaboration". But the point did not arise in *Butlin's* itself, because there the trustees were "cognisant of the terms of the proposed settlement before execution but [did] not strike any bargain with the settlor as to those terms".

ii) There were cases which said that a document could not be rectified unless all the parties had acted by mistake: *Fowler v. Fowler* (1859) 4 De G & J 250, and cases there cited. But those cases did not consider "the position of persons who were parties to the document only in the capacity of trustees".

iii) It was assumed in *Hanley v. Pearson* (1879) 13 ChD 545 that a post-nuptial settlement made by a wife could be rectified on the evidence of the wife and perhaps the husband without evidence from the trustee, who had been a party to the settlement.

iv) If a settlor sought to rectify a settlement, where figures in it had been miscopied so as to multiply them by 10, where the trustees were ignorant of the settlor's intentions, it seemed likely there would be jurisdiction to do so.

v) But, a settlor could probably not rectify a duly executed settlement to insert a power enabling him to dismiss a trustee at his pleasure, where the trustees knew nothing of the settlor's intention, and merely on his evidence that such a clause had been mistakenly excluded (see also the decision of Mr Colin Birss QC in *Lawie v. Lawie* [2012] EWHC 2940 (Ch), where he rectified a voluntary settlement notwithstanding that it was a voluntary settlement and not the result of a bargain).

vi) The question of where the line was to be drawn was to be answered by the fact that rectification was a discretionary remedy: "[i]n other words, in the absence of an actual bargain between the settlor and the trustees, (i) a settlor may seek rectification by proving that the settlement does not express his true intention, or the true intention of himself and any party with whom he has bargained, such as a spouse in the case of an ante-nuptial settlement; (ii) it is not essential for him to prove that the settlement fails to express the true intention of the trustees if they have

not bargained; but (iii) the court may in its discretion decline to rectify a settlement against a protesting trustee who objects to rectification".

Do the principles applicable to rectification of commercial contracts apply in this situation?

26. Neither side fully advanced the argument that the principles applicable to rectification of commercial contracts did not apply here. I include this section in this judgment because it seems to me that the question should be left open in case it arises again in future. I say that for the following reasons, which must be regarded as preliminary, since they have not been informed by argument.

27. First, the rules relating to rectification of a commercial contract assume that the parties have, in some sense, negotiated that contract. This point is made good in the passages that I have cited from *Butlin's*. Negotiation may take many forms, but the rationale of the authorities is that there will have been exchanges or discussions that lead to the written agreement in question. In this case, there were, on the trial judge's findings, no such exchanges or discussions, and more importantly there could not have been. Had the single solicitor acting for David and Dean known that they disagreed about how the beneficial interest in the property was to be divided, he would have been required by best professional practice to advise that separate representation was sought.

28. Secondly, and by way of a related but more general point, it must be relatively common for family members buying property jointly not to discuss openly how the beneficial interest is to be held. Plainly if the TR1 is signed by the transferees, such a discussion is more likely, but still not inevitable.

29. Thirdly, whilst the situation in this case is not at all the same as the situation in the pension scheme cases, which Leggatt LJ singled out for special treatment, it has features that distinguish it from a commercial context. *Butlin's* makes clear that different considerations will apply to settlements and declarations of trust. It may be that declarations of trust of the kind in issue in this case would also demonstrate special features.

30. Fourthly, the joint purchasers of properties hold the legal estate as trustees. *Butlin's* makes clear, at least, that the trustees' intentions may be relevant to rectification if they have themselves made a bargain. The bargain could mean that the beneficial interests would be held by persons other than or in addition to the trustees. In this case, for example, on one analysis David intended the property to be held for "his family".

31. Despite these distinctions, the parties did not suggest what adjustments to the *FSHC* approach might be appropriate in a case of this kind (apart from the contention in the Respondent's Notice). It would be undesirable for me to speculate on what arguments might have been advanced.

32. In these circumstances, I propose to deal with the grounds of appeal and Respondent's Notice on their own terms.

The main ground of appeal and the Respondent's Notice

33. Dean submits, in essence, that the principles to be derived from *FSHC* did not permit Morris J to order the deletion of the cross from box 11 on the basis of the findings made by the trial judge. David submits that when a provision that neither party intended is included in a contract, the court may rectify the contract

so as to delete that term. He relies on *Wilson v. Wilson* [1969] 1 WLR 1470 (*Wilson*), where Buckley J made such an order in similar circumstances to these. Buckley J relied at page 1473G-H on the evidence that the common intention of the brothers (who bought the property) was that the beneficial ownership of the property should be vested in one brother, and that the other brother had joined the transaction merely to assist the first to obtain a mortgage loan (see also *Pink* at pages 101-102 and *FSHC* at [182]ff). David also contends that the requirement for an outward expression of accord can be satisfied in a case of this kind without express communication between the parties.

34. In my judgment, it is not necessary in order to decide this case to consider whether or not there is a need for an outward expression of accord, or whether in this case such an expression was to be taken to have occurred tacitly. That is because, as I see the facts found by the trial judge, he did not find any continuing common intention shared by David and Dean at the time of the completion of the purchase of the property as to the beneficial interest that each was to hold.

35. In *Wilson*, there was an express finding that the common intention of the brothers was that the beneficial ownership of the property should be vested in one brother. In *FSHC*, as I have already explained, Henry Carr J and the Court of Appeal held that the parties had intended that the deeds would **only** provide the missing security, so that the additional onerous obligations included by mistake could be deleted by rectification.

36. Here, the trial judge found on the evidence that (a) "it was never intended by either Dean or David that they should be joint owners in equity", (b) "Dean became a joint owner purely to assist with the purchase, so that the mortgage

advance could be obtained", (c) "[t]here was no discussion with the solicitor about how the property should be held", (d) it may have been that [Dean] agreed to be a joint purchaser because the purchase was a good and sensible investment for the family as a whole, and (e) David's contention that it should be held on trust for "his family" was too vague and amorphous to result in any other finding but that the property was to be held for David alone.

37. There is no suggestion in any of these findings that the trial judge thought it had been proved that Dean and David had a continuing common intention that the property should **not** be held for themselves in equal shares. The most that can be said is that the trial judge found that Dean and David had not agreed that the property should be held in equal shares. As was established in *Joscelyne*, rectification can be ordered where a continuing common intention of the parties can be established. Leggatt LJ made clear in *FSHC* that rectification "is a power to correct mistakes in recording what the parties have actually agreed" [77], and "required not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention" [176].

38. In this case, the trial judge's findings simply do not admit of the conclusion that Dean and David actually agreed anything, nor that they had the same intention. In fact, it appears that nothing was actually discussed, apart possibly from the fact that the purchase would be a good and sensible investment for the family. David's intentions were unclear. He may have intended it to be held variously for the family with Dean, for the family without Dean, or for himself. No

findings were made as to Dean's actual intentions at the time, save that he had become involved to enable David to get a mortgage. If there was no continuing common intention, the question of whether an outward expression of accord was required in a case of this kind does not need to be decided.

39. Morris J held at [72] that there were two possible analyses of what the trial judge had found. Either it was the express common intention of the parties that the beneficial interest was to be held by David or there was no express common intention of the parties as to the beneficial interest in the property. He rightly rejected the first analysis at [76], which left him with the question of whether form TR1 could be rectified so as to delete the cross in box 11. He held at [77] that, on the basis of the trial judge's findings, it was appropriate to conclude that it could. He said that (i) the trial judge found clearly that the express declaration of trust in the TR1 did not reflect the parties' agreement or common intention, (ii) the trial judge did not make a positive finding of a common intention at the time of sole beneficial ownership held by David, (iii) the trial judge had found that the parties had agreed to joint legal ownership, but had reached no agreement as to beneficial ownership - they simply did not discuss it. On the basis, however, that rectification by deletion was possible in principle (see *Pink*), he rejected Dean's submission that it was always necessary for there to be an alternative positive agreement as to beneficial ownership. Morris J added this:

> "78. … The question is what the parties agreed overall and not what they agreed as to issue B [beneficial ownership]. 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.
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> 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.

40. I can see no finding by the trial judge that Dean and David agreed "joint legal title only", even if that may, by deduction, be the correct legal analysis of what occurred. Morris J had already said at [76(1)] that the trial judge had "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". In those circumstances, it was impossible to find a sufficient, or any, continuing common intention that there should be no declaration of trust in the TR1.

41. I fully understand why Morris J may have reached the conclusion he did. In one sense, it is the just result. But in another sense, either outcome would produce a result that neither party expected. David never expected to be 100% owner of the beneficial interest, and Dean had no expectation that he would get a full 50% either. The law does not make contracts[1] for people unless they have, in the way explained in *FSHC*, agreed to them or shown a continuing common intention as to the term or terms in issue. Here Dean and David, on the evidence found by the trial judge, simply gave no thought to the matter at all. For the avoidance of doubt, nor is this a "goes without saying case". Had the matter been raised,

[1] On the slightly dubious premise that box 11 reflected some agreement between Dean and David, even though it was in fact a declaration of trust to which they were not parties (see [11]-[12] and [26]-[32] above).

David would have said "this is for my family (perhaps including Dean)", and Dean would have said: "I want a share" – what share is not clear, but there was no finding that he was happy to have the same share as his siblings.

42. Finally, it is worth mentioning in relation to this conclusion that the merits are not all one way. Despite the fact that the trial judge rejected Dean's evidence, he has in fact been lumbered with legal liability under a mortgage that has prevented him buying a house of his own.

43. For these reasons, I would allow the appeal on this ground, and refuse rectification of the TR1.

Other grounds of appeal

44. In these circumstances, I do not need to deal with the other grounds of appeal. Neither partial rescission nor the exercise of the court's discretion to grant rectification arise in this case, since a common mistake was not established. I do not need to deal either with the way in which Morris J concluded on the basis of *Stack* and *Jones* that David should have a 100% beneficial interest. Suffice it say, however, that I do not think, if it were relevant, that Morris J's reasoning on the point would have been faulted in the light of the trial judge's findings.

Conclusion

45. I should not finish this judgment without mentioning that this was a case that cried out for the parties to reach a mediated settlement. It may be hoped that such a solution can still be found. I do not wish to suggest that one or other party was at fault in failing to attempt mediation, but the case demonstrates how important it is for the courts to be able to direct mediation in appropriate cases

(see the report of the Civil Justice Council on compulsory alternative dispute resolution at https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/).

46. For the reasons I have given, I would allow this appeal and dismiss the claim to rectify the TR1.

Lord Justice Peter Jackson:

47. I agree.

Lord Justice Popplewell

48. I also agree.