Neutral Citation Number: [2019] EWHC 915 (Ch)

Case No: D31BS660

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BRISTOL DISTRICT REGISTRY**

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 29 April 2019

**Before** :

**HHJ PAUL MATTHEWS**
**(sitting as a Judge of the High Court)**

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**Between :**

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| **(1) Sarah Knight** | **Claimants** |
| **(2) Gordon Gregory** | |
| **- and -** | |
| **(1) Richard Knight** | **Defendants** |
| **(2) Lesley Anne Knight** | |
| **(3) Megan Knight** | |

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**Richard Dew** (instructed by **Samuels**) for the **Claimants**
**Alex Troup** (instructed by **Beviss & Beckinsale**) for the **Defendants**

Hearing dates: 18-20 March 2019

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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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## HHJ Paul Matthews :

## Introduction

1. This is my judgment on the trial of a claim brought by the claimants by claim form issued on 2 October 2017 for a declaration that the proceeds of sale of a property known as Close Court, Eddys Lane, Newport, Barnstaple, Devon ("Close Court"), amounting to £204,442 plus accrued interest, are held on trust by the first two defendants for the benefit of the claimants as administrators of the estate of the late Ralph Stephen Knight ("Stephen"). The first claimant is the divorced former wife of Stephen, who died on 22 March 2014, aged only 66 years. The second claimant is her father. The first defendant is her former brother-in-law, Stephen's brother, Richard. The second defendant is Richard's wife, Lesley-Anne. The third defendant is the daughter and only child of the first claimant and Stephen. She is now aged about nine years. Her litigation friend is the first claimant's mother (and the second claimant's wife), Elinor Gregory.

2. The first and second defendants have two children, Jason and Josephine, both now adult. By virtue of an order of District Judge Watson dated 11 April 2018, notices under CPR rule 19.8A were directed to be served upon them. I assume that the direction was complied with. They have however not sought to be joined to the proceedings or to take any formal part in them (and so by rule 19.8A(6) each is bound by my decision as if he or she were a party), although each gave a witness statement in support of the defendants' case. Stephen and Richard had another brother, Martin, who had died in 1994, leaving a widow, Dawn, who also gave a witness statement. Martin, Stephen and Richard were the sons of Denis Knight and his wife Joan. Joan died in 1999, and Denis died in April 2008.

3. The dispute is about Close Court, which Stephen purchased in 1976 jointly with his then girlfriend, but with the aid of a mortgage loan. Close Court is an original nineteenth-century house on two floors, enlarged in the twentieth century and possessing also a double garage with direct access to the public highway. When the relationship with the girlfriend broke up, he bought out her interest, and the property (with the mortgage) was transferred into Stephen's name alone. There are then three dealings with the property which are of particular significance in this case.

4. First, in June 1995, when Stephen was facing the prospect of being made bankrupt, he sold Close Court to a friend, Trevor Steel, for the sum of £56,000. Trevor Steel took out a mortgage loan in order to buy it. Stephen continued to live in the property, paying sums from time to time to Trevor Steel in respect of his occupation. The second was in 2000, when Trevor Steel wished to emigrate to America permanently. He eventually sold Close Court to the defendants jointly for £59,500. The defendants obtained a mortgage loan from Nationwide Building Society for £48,000. Stephen continued to live at Close Court and paid sums from time to time to the defendants in respect of his occupation. The third dealing took place following the death of Denis Knight in April 2008. Probate of Denis Knight's will was granted on 11 July 2008 to Stephen and Richard jointly, as his executors. On 21 May 2010 the mortgage granted by the defendants over Close Court was redeemed and the loan repaid using monies from Denis Knight's estate. Questions have arisen as to the terms on which that was done. There was also an abortive attempt at a "property swap" between Stephen and

the defendants in early 2009, but in the end nothing came of it. Finally, after Stephen's death, there were discussions between the claimants and the defendants.

## Witnesses

5. The trial of the claim took place between 18 and 20 March, with written closing submissions which were filed and served on 25 March 2019. At the trial, the following witnesses were tendered for cross examination: Sarah Knight (the first claimant), Elinor Gregory (her mother), Gordon Gregory (her father, the second claimant), Michael Ashworth, Richard Knight (the first defendant), Lesley-Anne Knight (his wife, the second defendant), Josephine Kinght and Jason Knight (their children), Elaine Stokes, Ian Budge and Alan Schofield. I give here my impressions of those witnesses.

6. Sarah Knight was a businesslike and precise witness, quick to pick up on ambiguities in the questions put to her, and to correct any small errors. As her cross-examination proceeded, she became more guarded. I think she is convinced that she is in the right, and that she did not tell me anything which she knew to be untrue. But I am not sure that she told me the whole story. Whilst I treat the essentials of her evidence as true, and generally prefer her evidence to that of the defendants, I exercise some caution nonetheless.

7. Elinor Gregory is the mother of the first claimant. She was calm and collected witness, giving her evidence in a straightforward way. I accept her evidence. However, except in relation to a particular meeting, she had limited evidence to give on the issues arising in this claim.

8. Gordon Gregory is the second claimant, and the father of the first claimant. He was a quiet but determined witness. He also gave his evidence in a straightforward way, and I accept it. Again, his evidence was limited.

9. Michael Ashworth was an accountant friend of Stephen's, whom Stephen asked for advice in 1995. He was also a straightforward witness, although understandably his recollection of events over 20 years ago was not the best. Moreover there were some hints of difficulty in understanding complex issues. In cross-examination, he accepted without any hesitation that in 1996 he had been convicted on charges relating to the possession and production of cannabis and counterfeit banknotes and had gone to prison for 4½ months. But I see no reason to disbelieve his evidence merely on that account. Just because a person is shown to have behaved dishonestly on one occasion (over 20 years ago) does not mean that he must be lying now. His evidence, in any event, was both plausible and limited. He was also one of the few witnesses called with no axe to grind or interest in the result.

10. Richard Knight, the first defendant, was, I am sorry to say, a very unsatisfactory witness. From the very beginning of his cross-examination he was constrained to accept that evidence in his witness statement was wrong, although he had just confirmed its truth and completeness to his own counsel. Sometimes he gave oral evidence directly contrary to that in his witness statement, so that one or the other must be untrue. Sometimes he gave entirely new evidence, not mentioned in his witness statement (or anywhere else), but clearly intended to strengthen it. He was frequently evasive in his answers, going off at tangents, and in some cases he did not

answer the question at all. On a number of occasions during his cross-examination he changed his evidence, sometimes from one sentence to another. I am satisfied that he was making up much of it as he went along.

11. He made a great deal of his repeated assertions, both in the papers and in oral evidence, that he was an honest and an honourable man. Given that he has chosen to put his character in issue in this way, I assume in order to support his case, I regret to have to say that, on the basis of the evidence he (and others) gave before me, that is not my impression. For example, in cross-examination he said that he did not see it as a lie to tell the mortgage lender from whom he was proposing to borrow a large sum of money that they were buying the house for almost £60,000, when in fact the true price paid was just over £50,000. Unless supported by a reliable, independent source, I can place no reliance on his evidence at all.

12. Josephine Knight is his and the second defendant's daughter. She was a forthright, confident and open witness, but quite evidently very loyal to her parents. I am satisfied that she was telling me what she believed to be the truth, although in fact she had no direct evidence of her own to give, having derived her knowledge of the material facts from others, and in particular her parents.

13. Jason Knight is the first and second defendants' son. He too was a forthright and open witness. He was also loyal to his parents. Once again I am satisfied that he was telling me what he believed to be the truth, but like his sister he had no direct evidence of his own to give.

14. Lesley-Anne Knight is the second defendant, and the wife of the first defendant. She was very firm and clear in her evidence, and knows her own mind. She had a need to be in control in the process, not only by correcting the questioner, but also by asking him questions. I found it difficult to accept her evidence in relation to some meetings at which she was present. It may be that, firm and clear as she was, she has convinced herself that she and her husband are in the right, and that therefore the facts must be those which support their case. However, on a number of other important issues she told me that she had no direct knowledge herself, but was relying on what she was told by her husband, the first defendant. Even on her case, therefore, those parts of her evidence add nothing to his. Overall, I am unable to place any reliance on her evidence where it is not supported from an independent and reliable source.

15. Elaine Stokes is a close friend of the second defendant, having been a work colleague for many years in the past. She was a clear, straightforward and transparent witness. I accept that she was telling me the truth. However, in cross-examination she accepted readily that her only source of information about the subject matter of this case is what the second defendant has told her. On all the crucial matters, therefore, her evidence adds nothing to that of the second defendant.

16. Ian Budge is a solicitor, previously a partner in but now a part-time consultant with his firm. He has known the first defendant for a long time, having been at school with him. He acted for the defendants in conveyancing matters in 2000 and 2009-10. He was careful and precise witness, who stated only what he knew and did not indulge in speculation. He was clearly telling the truth, and I accept his evidence. However, he was not party to the crucial conversations and meetings, and was therefore not in a position to assist in relation to these. In addition, important information was

deliberately withheld from him by his clients, which meant that to some extent he was asked to advise and act on a false basis.

17. Alan Schofield was a straightforward and open witness. He was a friend of the deceased and also for some time his landlord of business premises. But his involvement in these matters was very slight, and did not cover any of the crucial events. Nevertheless, in my view he was telling the truth so far as he knew it, and I accept his evidence, limited as it was.

18. In addition to these witnesses, the defendants served hearsay notices in relation to other written statements. One is a notice in relation to a witness statement dated 3 August 2018 of Gaynor Thrush, who lived with the deceased as his girlfriend in Close Court in the 1990s. Mrs Thrush had been asked to attend the hearing, but Mr Dew, on behalf of the claimants, indicated that he did not wish to cross examine her, and so she did not after all attend court. The second hearsay notice referred to three documents written by the deceased, dated 16 January 1996, 29 February 1996 and 23 February 1997. The third hearsay notice related to a document made by Gordon Gregory, in case Mr Gregory did not attend to give evidence. In the event, of course, he did. A fourth notice was not in the bundle, but supplied to me after the trial was over. This related to the witness statement of Dawn Knight. the widow of Stephen's and the first defendant's deceased elder brother.

19. As to Gaynor Thrush, the evidence in her short witness statement is very limited, and I have taken it into account in coming to my conclusions on the facts.

20. As to Stephen Knight himself, of course there were a number of documents written by him in the trial bundle, and I had the benefit of second-hand evidence from him via other witnesses. It is curious that the defendants served a hearsay notice in relation to three of those documents, and yet in their closing submissions attacked Stephen as "an unreliable source of information", referring to a schedule of examples of what was said to be false or misleading statements. I make clear that I reject the notion (relied on frequently by the defendants in their closing) that because a person says something at one point which is not true, therefore what that person says elsewhere must also be untrue. As a general proposition, I accept that Stephen appears often to have been unreliable, but that does not mean everything he says is untrue, and in particular when it is in his own favour. His "unreliability" seems to have been directed at others.

21. In relation to Dawn Knight, her evidence was also limited. Nevertheless, I have taken it into account.

22. In addition to the above, David Northridge, a surveyor, was appointed single joint expert on valuation, and prepared a report dated 29 June 2018. His expert evidence was not challenged and he was not called. I accept his evidence.

**How civil judges decide**

23. The present case is one in which there is an acute conflict of evidence as to what happened at various times and in particular in certain meetings, indeed, whether some meetings took place at all. That conflict has raised great emotions which were quite visible in court during the trial. It is important therefore that the parties (who are not lawyers) understand how I am going to proceed to resolve these questions.

24. In order to do this, I will quote the following passage from a recent judgment of mine in a case called *Dobson v Griffey* [2018] EWHC 1117 (Ch):

> "26. I must shortly consider the evidence adduced in this case in support of the parties' respective cases. However, before I do so, I will say something shortly about how judges in civil cases decide cases of this kind. The lawyers involved will know all this. But the parties themselves may not. First of all, an obvious point. Judges are not superhuman, and do not possess supernatural powers. They listen to the evidence and other materials presented to them and the arguments made, and then make up their minds. However, they decide according to certain important procedural rules. I will mention three of them here.
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> 27. The first is the burden of proof. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. As a general rule in English law, the person who asserts something has to prove it: *Robins v National Trust Co Ltd* [1927] AC 515, 520. On most of the issues in this case, they are alleged by the claimant. So she bears the burden of proving them. The significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does not so satisfy the court, then it did not happen. The system of fact-finding is binary. It is either one thing or the other. There is no room for *maybe*: see *Re B (Children)* [2009] 1 AC 11, [2], per Lord Hoffmann.
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> 28. However, a judge will consider the evidence first, and only resort to the burden of proof where he or she is unable to resolve an issue of fact or facts after having unsuccessfully attempted to do so by examination and evaluation of the evidence. In such a case, there is nothing left but to conclude that the claimant has not proved his or her case: *Verlander v Devon Waste Management & Anr* [2007] EWCA Civ 835, [19], [24].
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> 29. Secondly, the standard of proof in a civil case differs significantly from that in a criminal case. In a civil case it is *the balance of probabilities*. This means that, if the judge considers that a thing is more likely to have happened than not, then for the purposes of the decision it did happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did not happen. It is not necessary for the court to go further than this.
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> 30. Thirdly, a court must give reasons for its decisions: *Bassano v Battista* [2007] EWCA Civ 370. That is the primary purpose of this written judgment. But the judge's reasons must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowska* [1999] 1 WLR 1360, 1372. And, although judges must take into consideration all the evidence presented and weigh all the arguments made, they are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered: *Weymont v Place* [2015] EWCA Civ 289, [6]. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always

> surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation: *Biogen Inc v Medeva plc* [1997] RPC 1, 45. What follows must be read in that light."

25. So decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are *the judge's assessment* of the *most likely facts* based on the *materials which the parties have chosen* to place before the court. And, whilst judges give their reasons for their decisions, they cannot and do not explain every little detail or respond to every point made.

26. I should also refer to the comment by an experienced commercial judge, Leggatt J (as he then was), on the question of the unreliability of memory, in *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [16]-[20]. There he makes various comments about modern research into the nature of memory and the unreliability of eyewitness evidence. Then he continues, at [22]:

> "In the light of these considerations [about the unreliability of memory], the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

27. This is not a commercial case, but the events which are its subject took place over the last 25 years. Even good memories will have faded over that time. There are a number of events (especially conversations and meetings) which have to be the subject of fact-finding and then analysis. Some of them have no witness able to give first-hand evidence. So it seems appropriate to adopt in this case the same approach as Leggatt J suggested for his. However, the judge in that case made clear that the court was entitled, in considering the documentary material, to have regard to the impressions made by the witnesses in cross-examination. Even if documents point one way, to a particular conclusion, the court may still take the view that that conclusion is either more or less likely to be correct in light of the assessment of the witnesses who have given live evidence. As in many non-commercial cases, the documents are by no means the whole of the story.

## Facts found

28. On the basis of the evidence and other admissible material before me, I find the following facts.

*Background*

29. Stephen's and the first defendant's grandfather was Ralph (RL) Knight, a well-known professional photographer, with several shops and a fleet of vans in the south-west of England. Ralph Knight was followed in the business by his son Denis, who however had to give up work at an early age because of ill-health. Denis had three sons: Martin, Stephen and the first defendant. Martin and Stephen followed their father into the photographic business, but it declined with the advent of digital photography. Sadly, Martin died of cancer in 1994. Stephen continued as a freelance photographer, but never earned a great deal from it, preferring to spend time on his hobbies, which included rebuilding classic cars. Until he met the first claimant, he never married, having a series of long-term girlfriends, some of whom lived with him. As I have said, with one of them (Elaine Maytum), he bought the house at Close Court on mortgage. When the relationship broke up he bought out her interest and continued as sole beneficial owner. He obtained three further advances from the mortgagee, which were added to the security. These were (i) to enable him to buy out his girlfriend, (ii) to build an extension, and (iii) to pay off a business overdraft.

30. In addition to having a limited income, Stephen was not very good with money. He was frequently in debt, in particular to pay the rent on his photographic studio or the mortgage instalments on Close Court. By 1993 he had arrears of over £3000 on his mortgage. He borrowed money from banks, his family and friends. By 1995 there was a second charge on the house to support borrowing from a second bank, he was in arears of over £5,000 with his mortgage, and he owed considerable sums of money to his mother, the first defendant, Martin's widow and to various friends (including girlfriends) as well. But Stephen seemed to manage.

*The pre-bankruptcy transaction*

31. In 1995, however, Stephen got into more serious financial difficulty. In March of that year the landlord of his photography studio in Barnstable (not Mr Schofield) served on him a notice under section 146 of the Law of Property Act 1925, together with a schedule of dilapidations which required work. Stephen could not afford this work. As I have said, he had already borrowed significant sums from his family and friends. In April 1995 the landlord issued and served a writ of summons upon him in respect of the claim under his lease. Stephen evidently acknowledged service but did not defend this claim, and on 15 May 1995 default judgment was entered against Stephen, in the sum of £15,113.05, plus £216 costs.

32. Stephen feared that he would be made bankrupt and lose his home, Close Court, and that he would be made homeless. He asked Michael Ashworth, an accountant friend, for some advice. This advice was in substance that, if there was little or no equity in the property, he could 'sell' it to a friend whom "he could trust" for the market value, the friend could take out a 100% mortgage loan secured on the property, and make an arrangement for Stephen to continue to live there on the basis that he paid a rent equivalent to the cost of servicing the loan. Then, when the risk of bankruptcy was past, or Stephen came out of bankruptcy, the property could be transferred back to him. The point about the lack of equity in the property was that, if there was no equity at the time of sale, and the purchase price went simply to pay off creditors secured on the property, the sale was unlikely to be capable of being impugned as a fraud on creditors, whilst leaving the property itself in friendly hands, to be recovered later.

33. Stephen persuaded a very good friend of his, Trevor Steel, to fall in with the plan. Trevor lived at home with his parents, and did not have a mortgage. So it was possible for him to apply to a mortgage lender for a mortgage loan to be granted in order to purchase Close Court. Mr Ashworth's "plan" involved taking out a 100% mortgage. It is not certain what was the value of the mortgage loan that Trevor Steel took out. There is a much later (though undated) note in the bundle, apparently signed by Trevor, in which he says that his loan was for £39,000. However, the purchase price for Close Court was stated to be £56,000 (apportioned £55,000 for the land and £1,000 for "fixtures and fittings"), which compares with the then market value given by the joint single expert of £53,000 (which I accept).

34. There is no evidence as to the source of the funds for the difference between £56,000 and £39,000 (if that really was all that was borrowed). It is a pity that Trevor Steel did not give evidence, but (as I have said) I must decide on the basis of the evidence which the parties have chosen to place before me, and the only evidence of the loan is for a value of £39,000. The purchase completed on 23 June 1995. Stephen's own mortgage at that stage stood at £39,783.75, and there was a second charge in favour of Barclays Bank plc in the sum of £2,349.73, totalling £42,133.48. That left a balance after the discharge of the two charges of £13,866.52. Costs of the transaction amounted to £1,036.94, so leaving a balance due to Stephen of £12,829.58.

35. Accordingly, it was not in fact true that there was no equity in the property at the time. Indeed, Stephen's father Denis was determined that this balance should be used to repay *family* creditors in priority to any others. Stephen's first name (not used, in practice) was either Ralph or Rupert (some of the witnesses said 'Ralph', but the copy of his passport in the trial bundle said 'Rupert'; the grant of letters of administration to his estate gave *both* versions). The solicitors were prevailed upon to provide a cheque in that sum, made out to "Mr R Knight", which was given to the first defendant (whose first initial is also 'R'). The first defendant, accompanied by his father Denis, took the cheque across the road from the solicitors to the Britannia Building Society, where it was paid into *Denis's* bank account, having been altered or endorsed (it is not clear which) under the direction of the cashier at the building society. Denis then used this money to discharge debts due to friends and family, and in particular to his wife, Stephen's mother, who was the largest of his family creditors. £1,000 of it was given to Stephen in cash.

36. Stephen remained in occupation of Close Court as if he were still the owner, and Trevor Steel never took possession, although he was registered as proprietor in the Land Register. Stephen was supposed to pay Trevor monthly sums equivalent to the interest payments, but frequently did not do so. I am in no doubt that, although Trevor did indeed become the legal owner of Close Court, neither he nor Stephen ever intended him to become the beneficial owner of the property. This is clear not only from the contemporary surrounding circumstances, and from the evidence of Michael Ashworth as to the advice which he had given to Stephen, but also from facts and matters arising at the time when Trevor transferred the property to the defendants in 2000. Where, as here, subsequent events shed light on the intentions of the parties at an earlier time, they are admissible evidence of those earlier intentions.

37. In 2000 Trevor "sold" Close Court to the defendants for a published price of £59,500. On the expert evidence (which I accept) that the property was then worth £83,000, this was a significant undervalue. In addition, Trevor agreed that the sum needed to

bridge the gap between what the defendants could themselves raise on mortgage and the published purchase price (£9,369) would be returned by him to them. That meant that the defendants were in fact only paying about £50,000, which is less even than Trevor paid some five years earlier. There was no reason why Trevor should make a present of more than £30,000 to the defendants. But, if it was Stephen's house beneficially and the purchasers were to hold it for him, then it was no present. There was also in evidence before me a typed note signed "Trevor" in manuscript (referred to above, at [33]), from which it is clear that important facts relating to the provision of the deposit were to be hidden from the conveyancing solicitors. This reinforces my view that that Trevor considered and intended from the beginning that it was and would remain Stephen's house.

38. The defendants rely on the witness statement of Gaynor Thrush which (in summary) says that Trevor Steel bought Close Court from Stephen, and allowed Stephen and her to live there with Stephen as tenant. She describes this as an act of kindness, and says that Trevor had no qualms about having Stephen as a tenant. I accept that this is what Gaynor Thrush understood. But if Stephen did not disclose his earlier bankruptcy, and the reality of his property situation, to his *wife* until several months after they were married, he was not likely to do so with a live-in girlfriend.

39. As for the statement of Dawn Knight, she gives evidence that she was approached by Stephen in 1999, when Trevor wished to emigrate to the United States, and was asked to buy Close Court from him. This has no evidential value for the transaction of 1995. In any event, Dawn Knight may not have understood what was involved. Or she may not have been able to raise a mortgage. She says that buying it "was just not possible for me". I do not think that her evidence takes the matter any further.

*The bankruptcy*

40. As Stephen had feared, he was thereafter made bankrupt. A bankruptcy petition was presented by his landlord against him on 14 August 1995, and on 6 October 1995 he was adjudged bankrupt. Only a limited portion of the bankruptcy file was available to the court during the trial. However, this shows that, during the currency of the bankruptcy, the Official Receiver investigated the sale of the house, including what happened to the balance of the proceeds of sale, and the first defendant was interviewed by the investigating officer. He explained that the money was used to pay debts to family members secured on the "fixtures and fittings" at Close Court. Whatever the merits of this, in 2016 the Insolvency Service confirmed that the Official Receiver had investigated the transaction concerning Close Court at the time of the bankruptcy order "and determined that it did not constitute an asset that had a value to the bankruptcy estate and took no further action with regard to it".

41. At that time, a bankrupt would normally be discharged automatically from his bankruptcy after three years. Although it is not evidenced in the papers, there is nothing to show that Stephen was not discharged from his bankruptcy in October 1998. However, the distribution to proving creditors was completed only in April 2016. In the end there was actually a return to Stephen's estate of £2,581.05, but this was not because all creditors were paid in full. Instead, it was because only one of six listed creditors proved the full amount of the debt claimed.

*The transfer to the defendants*

42. As I have said, Stephen was not punctual or regular with payments to Trevor to fund the interest on the loan. But there is no evidence that Trevor Steel ever did anything to regularise the position. Finally, in 1999, Trevor moved to the United States of America to work and live. Although he gave Stephen written authority to deal with all matters relating to Close Court, the arrangement between them in relation to Close Court could not continue as it was. Trevor informed Stephen that he would have to find someone else to take on the arrangement instead of him. At that time the defendants were in Australia, teaching for a year. Stephen nevertheless telephoned the first defendant on several occasions to ask if he would do so. It was a difficult time for other reasons too. Their mother had died earlier that same year, and their father Denis was busy selling up so that he could move to be nearer his two surviving sons. According to the second defendant, Denis had already refused to take on Close Court. The defendants – and especially the second defendant – were reluctant to do so.

43. Although there were discussions by telephone and by letter during the remainder of 1999, it was only in January 2000, once the defendants had returned to the UK, that it was agreed that the defendants would in fact take over Close Court. The defendants say that this was an investment by them, intended ultimately to benefit their own children. They gave evidence of a meeting with Stephen at which he emphasised how sensible it was, so that they could leave the property to their children. They point to the fact that at this time their own children needed help in buying their homes themselves, but they were unable to assist, because they were fully committed to helping Stephen.

44. This story does not stand up to scrutiny. They would not be putting any of their own money into the property, merely taking out a mortgage. Indeed, the second defendant made clear during cross examination that they took on *only* the mortgage liability. And yet, on their case, with Stephen paying the mortgage instalments, they would obtain the property effectively for nothing. Indeed, since they were paying far less than the property was worth, on their case Trevor would actually be giving them more than £30,000 in value. Stephen, far from obtaining security in his home, would occupy it at the whim of the defendants or (should they become insolvent) their creditors. In addition, the defendants' children would not want this house to live in. They were independent adults making their own way in the world, not in Barnstaple but in London or elsewhere. Events have borne this out. The house is now sold and this litigation is simply a fight over the proceeds of sale. The first defendant said in cross-examination that he had no reason to lie. With the proceeds of sale of over £200,000 at stake, I cannot accept this.

45. The defendants' reluctance to get involved in the scheme was real, however, because they would have to take out a mortgage to finance the transfer from Trevor Steel to themselves, with only Stephen's promise to pay the mortgage instalments as financial comfort. On the other hand, they did not want to see him made homeless. I do not doubt that there was at least one meeting at which Stephen urged the defendants to help him by taking over from Trevor, or that Stephen told them they would be able in due course to leave the property to their children. At that time, Stephen was 53 years old, unmarried and without children. The likelihood was that he would not marry or have children before he died, and that his father would pre-decease him. In that case his younger brother, the first defendant, or failing him his children, would be his next of kin and inherit the house, without the need for Stephen to make a will (and in fact

he died intestate). In my judgment *that* was the convincing argument, and it was duly passed on as the explanation for the transfer of Close Court to their children and to third parties such as Elaine Stokes. The defendants did not have to put in any money of their own, but would obtain the property free in the end. It was not a commercial investment at all. It was a family project, to help Stephen keep his home, but also in the longer term to keep the increasing value of that home in the family.

46. As I have already said, there was a difference of £9,369 between the published purchase price of £59,950 (conveniently, just below the stamp duty threshold) and the sum of just over £50,000 which the defendants were able to raise, almost all by mortgage. The defendants managed to borrow this sum from Denis, and paid it to the conveyancing solicitors. The transaction completed on 22 March 2000, Stephen having entered into the usual deed of postponement of any interest he might have to the mortgagee. Afterwards, Trevor returned the sum of £9,369 to the defendants, who in turn repaid Denis. This meant that they had paid just over £50,000 for a house then worth (on the expert evidence) some £83,000. The defendants explained this by saying that Trevor did not wish to make a profit (which itself suggests that the property was not his beneficially). But that will not do. Not making a profit, or helping your old friend Stephen, is one thing. But giving away more than £30,000 *to the defendants* is quite another.

47. In my judgment, both defendants knew full well that the property already belonged, and was to continue to belong, *beneficially* to Stephen, and that they – like Trevor – were to be purely nominal owners. Their reward was to be their expectation of inheriting in due course when Stephen died. This conclusion is supported by both the defence and the evidence of both defendants that they did not charge Stephen rent exceeding their mortgage instalments. (In fact, there is some slight documentary evidence that they actually sought to charge a higher rate, *ie* £400 pcm. But this was explained by the second defendant in cross examination as intended to cover the mortgage interest, taking into account the expected erratic nature and amount of payments. The first claimant however suggested that £400 pcm referred to rent received from lodgers. I am doubtful that either of these explanations represents the truth, or at any rate the whole truth.)

48. In case I were wrong, and the defendants did *not* know that Trevor held the property for Stephen, I need to make additional findings. One is that Stephen was in actual occupation of the property at the time of the transfer to the defendants, that this was obvious, and that the defendants were well aware of it. Another point is that I am not satisfied on the evidence that any inquiry was made by them of Stephen as to whether he had an interest in the property or that (if any such inquiry were made) he failed to disclose it. The burden of establishing that there was such an inquiry or that Stephen failed to disclose an interest resting on the defendants, I find that neither took place.

49. In any event, even if (unknown to the defendants) Trevor Steel had been the absolute beneficial owner of Close Court, and was therefore acting philanthropically in allowing Stephen to stay there, paying only the interest on the mortgage, I find that the defendants in any event intended that they would hold the property for the benefit of Stephen, he indemnifying them against the mortgage liability, and in particular the interest payments.

50. The defendants have no doubt seen it as a small step from having the *expectation of inheriting* the house, in the then likely event of Stephen's dying without marring or having children, to convincing themselves that Stephen and/or Trevor was *giving* them the property, so long as they allowed Stephen to live there rent-free for the rest of his life. They have no doubt persuaded themselves that it is what Stephen would really have wanted. But it in my judgment it is not so. Stephen thought of it throughout as *his* house. And by the end of his life he had a daughter. Again there are subsequent emails shedding light on his view at an earlier time.

51. One is an email to Michael Ashworth dated 11 February 2014, barely a month before his untimely and unforeseen death. In that email, Stephen asked for advice:

> "At some time I would like to get some advice on how we can transfer 'my' house, back to myself, or 4yr daughter – who will inherit ? from my brother 64yr – who took on the mortgage 10+ years ago (now paid off) He owns 1 or 2 other houses / one may be on a mortgage
>
> This is from my bankrupt days when Ricky's status got us a better rate of interest / saving me £££ over 10 years.
>
> He is worried about the transfer tax issues/and his 'reputation' as an honest green councillor !!
>
> He seems unconcerned – as indeed does his wife – thinking her family will get my house – even though they have not paid one penny for the property: now £250000. "purchased" by them for £64,000 (I think) – very undervalued for all the reasons…"

52. In a subsequent email to Mr Ashworth, on 14 February 2014, Stephen made an appointment to telephone him. He added this:

> "At the time our solicitor advised; and would set up: '**a declaration of trust'** being the best way (actually the truth) where my brother / Richard held ?? my house until which time I was able to reassume responsibility.
>
> Richard thought that as a pillar of society with a golden career in politics, and Euro MP ?, he thought he would be open for scrutiny when the newspapers got hold of the story
>
> And they kept my house."

53. These emails make clear that in Stephen's eyes his brother and sister in law were nominal owners, just as Trevor had been, and that the house had belonged beneficially to Stephen all along. Even if, contrary to my view, the defendants never themselves intended to agree to hold Close Court as trustees, they nonetheless knew that Trevor had held it for the benefit of Stephen. The lengthy delay by Trevor in disposing of the property until someone could be found to continue the existing scheme, the gross undervalue at which it was "sold" to them, the balance of £9,369 that went round in a circle, the defendants' intention of charging of rent at a rate simply to cover the interest on the mortgage, all made this plain. In cross examination, the second defendant said that these emails looked "very odd". The first defendant said that he

did not recognise his brother in them. But in my judgment they correctly describe how Stephen saw the position. Although Stephen could be unreliable on some things, on this point (which was in his own favour) in my judgment he was telling the truth.

*The discharge of the mortgage on Close Court*

54. In 2007, Stephen and the first claimant met, and formed a relationship. On 13 April 2008 Denis Knight died. After certain legacies, the residue of his estate was left equally to Stephen and the first defendant. His largest single asset had been his house, Hilton. This was valued for probate at £250,000. The residue (after deduction of the outstanding mortgage loans and other debts) was valued for probate purposes at £177,206.20. Stephen and the first defendant obtained probate of Denis's will on 11 July 2008, but were unable to sell Hilton easily or quickly. At that time the financial crisis of 2008 was beginning to have effect, and the property market was affected. Not long thereafter Stephen informed the defendants that he was marrying the first claimant. The wedding took place on 20 December 2008. The claimant already owned her own house, which she had let on moving into Close Court with Stephen shortly before their marriage. At that stage Stephen had not told her about the ownership of Close Court. It was only 3 or 4 months after the marriage that Stephen disclosed that he had previously been bankrupt. But he assured her that Close Court was his, even though he had put it into the names of others to keep it out of the bankruptcy.

55. The sale of Hilton was agreed, subject to contract, for £222,750 in late September 2008. Unfortunately, it had fallen through by early November. The defendants, but in particular the second defendant, were unhappy with the situation, as Stephen rarely paid his 'rent' on time, and the defendants had to fund the mortgage instalments from their own resources. They looked for ways to resolve the problem. Stephen and the defendants (but mostly the second defendant, as the first defendant was away from home at this time) discussed the possibility of a 'property swap'. The idea was that Stephen would give up his half share in Hilton to the first defendant, and the defendants would discharge the mortgage on Close Court and transfer the property to Stephen. From March 2009, Ian Budge, the conveyancing solicitor who had been involved in the purchase by the defendants of Close Court, and had been involved in the abortive sale of Hilton, became involved in this proposal.

56. A telephone attendance note of 5 March 2009 records a conversation between the second defendant and Ian Budge's secretary. In part it reads:

> "1. Hope by the end of this month to pay off the Mortgage on Ricky's brother's property in Newport and sign the house over to Stephen.
>
> "2. Bishops Tawton property left to Ricky and his brother which has a Northern Rock charge on it – having trouble selling and thinking of taking off the market, paying off the mortgage (by taking out a Mortgage with Nationwide I think), transferring the property into Lan and Ricky's joint names and taking Stephen out of the equation altogether.
>
> Could IB please have a word with her as to how to proceed. Would like to do this by end of this month if at all possible."

This attendance note has at the bottom (undated) annotations handwritten by Ian Budge, setting out the arithmetic needed to calculate the equity in each of Hilton and Close Court.

57. On the same day (5 March) the second defendant sent an email to Stephen and the first claimant. Part of this email read as follows:

> "I have contacted Ian Budge's (solicitor) office and waiting for him to get back to us with an appointment
>
> The two things we need him for is to sign Close Court over to you and Hilton over to us – think we need to meet at dead of night on a bridge somewhere!
>
> I have also spoken to Nationwide and the closing sum for the mortgage at this point is £48,543.54 – it does include an early redemption fee. We can go in as soon as we are ready and just hand over the dosh.
>
> [ … ]
>
> Hope you are okay with the plan – we're happy if you are and we can sort by the end of the month."

58. It is thus clear that the scheme involved the redemption of the mortgage over Close Court, by the defendants' raising money on a mortgage over Hilton. At the same time Stephen would give up his half share in Hilton and the defendants would transfer Close Court to Stephen. On 19 March 2009, Ian Budge's secretary made a further telephone attendance note that the first defendant had called, leaving a message for Mr Budge:

> "Reminder to IB that house to be transferred into his and Lan's joint names".

59. On 31 March 2009 Ian Budge's secretary made a telephone attendance note recording a voicemail message from the second defendant, which in part read (filling out contractions):

> "Ian Budge to please call back as to how transfers going."

60. Ian Budge made a further manuscript attendance note on the same day (31 March) of a telephone conversation with the second defendant. In part it read (again filling out contractions of words):

> "<u>Declaration of trust</u>.
>
> That Stephen holds his share for Ricky, and Transfer.
>
> <u>Newport</u>.
>
> Ricky to transfer to Stephen. Ricky to pay off £40,000 and redeem mortgage £8,000 from Stephen."

A line is drawn so as to connect the reference to "£40,000" and the word "Nationwide", together with a telephone number. At the side of the note, written

obliquely are the figures "£48,543.54". As explained in cross-examination, the part of the note under "Declaration of Trust" refers to Hilton, and the part under "Newport" refers to Close Court. The figures "£48,543.54" refer to the amount outstanding under the mortgage loan secured on Close Court.

61. The second defendant gave evidence that during that conversation Mr Budge advised her that the transfer of Close Court to Stephen would constitute a disposal for capital gains tax ("CGT") purposes, and perhaps create a charge to CGT. Mr Budge's evidence in cross-examination was that he probably gave the advice on CGT during this telephone conversation. The news of a possible charge to tax appears to have come as a bombshell, and to have put the defendants off the scheme. Of course, Mr Budge's advice was postulated on the basis that the defendants were the beneficial owners of Close Court, rather than that they were trustees of it for Stephen. In giving evidence, he agreed with a suggestion from the bench that in the latter case there might not have been a problem. But that was not the case which had been put to him. He was not told, for example, that part of the defendants' purchase money went round in a circle, that the price was much less than the market value, and that the defendants were not putting any of their own money into it.

62. A typewritten attendance note dated 1 April 2009 records a telephone conversation between Mr Budge and the second defendant. It read:

> "IB calling Lan Knight on my calling to discuss the transfer of the property at Eddys Lane and Hilton.
>
> She indicated that after all, we might as well delay the matter until June when they will be dealing with Northern Rock and so I have agreed not to do anything until they give me further instructions."

The reference to Eddys Lane is to Close Court. The reference to Northern Rock is to the mortgagee whose loan was secured on Hilton. it is clear from this attendance note that the "property swap" had been abandoned, at least for the moment. I infer that this was because of the supposed CGT problem.

63. In the meantime, the relationship between the first claimant and Stephen had been deteriorating. In the autumn of 2009 they formally separated, although they continued to cohabit at Close Court. When the self-contained bedsit flat became available, the first claimant moved into it. By that time, however, the first claimant was pregnant with Stephen's child. Megan (the third defendant) was born on 29 March 2010. The petition for divorce was presented on 12 September 2011, based on two years' separation. The decree nisi was made on 26 October 2011, and the decree absolute on 8 December 2011. Stephen made no claim for financial provision against the first claimant, although she was in employment and owned her own (let) house, because, as the first claimant said in evidence (which I accept) Stephen believed that he beneficially owned Close Court.

64. On 28 April 2010, the sale of Hilton to a third party purchaser was finally agreed, at a price of £225,000. It completed on 14 May 2010. Then mortgage redemption figure for Northern Rock was £83,073.42, which was apparently paid on 18 May 2010. Mr Budge's secretary made a manuscript attendance note dated 20 May 2010 of a further voicemail message left by Stephen. Filling out contractions, it read:

> "Dithering over what to transfer re the moneys – Ricky Knight may give other instructions – Please give another 4 hours if possible before doing anything."

65. The same day Ian Budge gave instructions for a telegraphic transfer of £140,895.21 to the defendants' bank account, to be made on 21 May. He was not involved in dealing with or dividing the funds thereafter. On 21 May, the first defendant sent an email to Stephen which said in part:

> "I have just paid off Close Court mortgage – final payment: £47,786.21. The paperwork will be through soon enough and I will then give you all the stuff we have here, deeds etc.
>
> Your cut of Hilton is £70,447.60. Out of which comes £3000 + £250 + misc.
>
> That leaves you with a cool £19,400, baby – ENJOY!"

There is then a mention of the legal costs involved, and a request for bank details to transfer money to Stephen.

66. From this email it is clear that the first defendant, having received the net proceeds of sale of Hilton from Mr Budge, has deducted the outstanding debt secured by the Close Court mortgage from Stephen's half share (so that *Stephen* has paid off the mortgage), as well as some other expenses, leaving Stephen with £19,400, which he (the first defendant) will remit to Stephen on being given bank details. But there is another important detail and that is the reference to "the stuff we have here, deeds *etc*." In May 2000, when Trevor had transferred the legal title to Close Court to the defendants, Mr Budge had written to the defendants to say that he held various pre-registration deeds relating to the property which were not required by the Nationwide and which he could hand over to the defendants if they would like them. The evidence at the trial was that the defendants did indeed collect them at the time and had retained them ever since.

67. As Mr Budge said in writing to the defendants in 2000, these deeds were no longer part of the legal title, which was now registered. So handing them over from one person to another is not in itself legally significant. When it was put to the defendants at trial that the offer to hand over the deeds showed that Stephen was the beneficial owner, the defendants denied this, saying that they simply thought that Stephen would be interested in the conveyancing history of his home. It did not show that he had become the beneficial owner of the property. In my judgment, this proves too much. If there was a reason for offering the deeds to Stephen purely as a historical curiosity (because on the defendants' case he had no beneficial interest in it) then that reason existed in 2000, as Stephen was living there then, and there was no reason to wait until 2010, when Stephen's own money was used to pay off the mortgage on the property. Moreover, the reference to handing over the deeds is tied to the paperwork relating to the paying off of the mortgage: "The paperwork will be through soon enough and I will *then* give you…" (Emphasis supplied). But why *then*? In my judgment this email shows that the first defendant himself thought that something significant had just happened which changed their relationship.

68. Indeed, the payment of the mortgage out of Stephen's share of his inheritance did effect a change in their relationship. If, as the defendants alleged, Close Court

belonged legally and beneficially to them, and they were, of course liable for the mortgage loan, then, absent an agreement with Stephen, they had no business using Stephen's money to pay off that mortgage loan. If, on the other hand, they held Close Court for the benefit of Stephen, but obviously subject to the Nationwide mortgage, paying off that mortgage *with Stephen's own money* gave him a clear beneficial title, and relieved him of the obligation to pay (or indemnify the defendants against) any interest in future. It made him the absolute beneficial owner. It was the moment when Stephen finally became free of obligations to others in relation to his home. That was a good moment to hand over the old deeds.

69. Only the supposed problem of the CGT charge prevented transfer of the legal title, as Stephen himself said in a letter to Trevor Steel, much later, in December 2011, and as the first defendant himself admitted in a letter to the first claimant dated 4 June 2014. I say "supposed problem" because it appears that, if the defendants were bare trustees for Stephen there would be no CGT problem about a retransfer: see the Chargeable Gains Act 1992, s 60(1). But Mr Budge was never informed that the defendants were other than full legal and beneficial owners of Close Court. I accept the first claimant's evidence that, when shortly after the mortgage had been paid off Stephen told the first claimant about the problem, and that he could not afford to pay the tax to get the title back in his own name, the first claimant offered to pay it herself, provided Close Court was transferred to Megan's name. Stephen was happy with this.

70. The first claimant's evidence is that there was then a meeting, in the conservatory at the defendants' house, between the four of them to discuss the matter. When the first claimant told the defendants what she and Stephen had agreed, the first defendant told her that it was a waste of money to pay the tax, as he was an honest and honourable man, and would ensure that Megan received the property on Stephen's death. I am sure that Stephen, with his troubled debt history, would see the advantage of his not being the legal owner of his own home. The first claimant's evidence is that he accepted what the first defendant said, although the first claimant had reservations. But, on her evidence, that is how the matter was left.

71. The defendants' evidence is that, instead of the meeting attended by all four of them, there was an agreement, originally between the two brothers, *before* the mortgage on Close Court was paid off, but confirmed between the two brothers and the second defendant, that Stephen would pay off the Close Court mortgage with his inheritance, and that the defendants would allow him to live in the property rent free for the rest of his life, and that it would be held as to one third for Megan (and two thirds for the defendants' children) after his death. Megan was born on 29 March 2010, so if this were right the agreement would have to have been made between then and 21 May 2010, when the Close Court mortgage was paid off.

72. Neither (i) the promise claimed to have been made by the first defendant to hold the property for Megan after Stephen's death nor (ii) the claimed agreement to allow Stephen to live in the property rent free and give one third to Megan after his death is in writing. These two accounts of what happened are incompatible. I therefore have to choose between them. Oddly, the fact of the meeting was put in cross-examination only to the first defendant (who called it "a complete fabrication"), but not at all to the second defendant.

73. The defendants say it is unfair as a result for the claimants to pursue the point at all. They rely on *Chen v Ng* [2017] UKPC 27, [51]-[61], but that was a very different kind of case, being about the grounds for disbelieving a witness not being put to him, rather than the events themselves. In any event in the present case it was both clear from the outset that the two cases were incompatible on this point, and the meeting itself *was* put squarely in cross-examination to the first defendant, from whom the second defendant said she had obtained much of her information: *cf Chen v Ng*, [54]. In my judgment it is not unfair for the claimants to pursue the point in this case.

74. The defendants say in their closing that the meeting is inconsistent with the first claimant's letter to the first defendant of 2 July 2014. In my judgment, it is not. The first defendant did not want to hand back Close Court, because he wanted to keep it. Stephen's letter to Trevor Steel in December 2011 does not take the matter any further.

75. I prefer the account given by the first claimant. First and foremost, I have already accepted what the claimant says about being told by Stephen of the CGT problem and of her reaction to it. In my judgment, the meeting which she then describes at the defendants' house follows naturally from that. I have no reason to doubt the truth of what the first claimant says happened at it. It is both plausible and consistent with what I know of the parties, and especially of Stephen, from the evidence in this case. By contrast, this meeting does not appear at all in the defendants' written evidence. On their case, her offer to pay any CGT has no follow-up at all.

76. What does appear instead is the alleged agreement *earlier*, with Stephen, for his money to be used to pay off the *defendants'* mortgage on what they assert to be *their own property*, in return for the right to live there rent free for the rest of his life and a one third share for his daughter after his death. That strikes me as a very poor, unnecessarily complicated and indeed implausible bargain for Stephen to have made. If it had happened that way (and if so the first claimant would not have been involved in its making), I find that Stephen would have told her of it. I cannot believe that she would not have kept on at him until he explained to her *what* he had agreed with the defendants in order to give himself and his daughter some financial security.

77. But I also accept that the first claimant did *not* know that this was what the defendants alleged had happened until the meeting with the defendants after Stephen's death in 2014 (with which I deal further below). Until that time, she still thought that the defendants would honour the promise which I find to have been made to hold the property for Stephen, and then after his death for Megan. My findings as to what happened at and before the meeting in 2014 also support my decision as to what had happened earlier. In any event, and as I have said, I am not prepared to rely on the evidence of the defendants, except where supported by reliable independent evidence. There is no such evidence of this alleged agreement.

78. Moreover, in the relatively few documents available to assist the court, Stephen made plain to the first claimant as well as to others his view, which lasted right up until his death, that he considered himself to be the beneficial owner of the house, and not merely a (rent-free) tenant of the defendants: see for example the emails to Michael Ashworth in February 2014, referred to at [50]-[51] above. In this respect, I do not regard the email from Stephen to the first defendant dated 12 January 2011 as demonstrating a different view. In that email, he asks his brother to confirm to the

authorities that the first defendant is the legal owner of Close Court but Stephen lives there rent free, apparently in order to enable Stephen to claim pension credit. In my judgment, it is no more than a simple request in the alternative to the first defendant, either to help him out financially, or to be economical with the truth (for it is not actually a lie) on his behalf, and thereby to conceal the true nature of their relationship (which no doubt would have jeopardised his application for pension credit).

79. In my judgment, therefore, there *was* a meeting at the defendants' house at which the first claimant and Stephen were present, at which the first (and impliedly the second) defendant promised to hold Close Court for the benefit of Stephen, and after his death for the benefit of Megan, so that it was unnecessary for the first claimant to pay the supposed CGT charge on a transfer into the name of Megan. (As it happens, that would have presented a different legal difficulty, because of her age, but it is unnecessary to deal with that.) Conversely, I find that there was no such agreement as the defendants allege between Stephen and them to pay off the mortgage on Close Court in return for rent-free occupation for life and a one third share for Megan after his death.

*Stephen's death, and events thereafter*

80. As I have already said, Stephen died unexpectedly on 22 March 2014. He suffered from diabetes, and had been in ill health. He was found at Close Court by the first claimant and his friend Des Hamill when they called to leave Megan with him on an agreed visit at about midday. The death being sudden and unexpected was referred to the coroner, who after investigation (but without inquest) recorded the cause of death as ischaemic heart disease. Stephen left no will. Initially the first defendant thought that he, as Stephen's surviving brother, was his next of kin, but the first claimant reminded him that in fact it was Megan, Stephen's daughter. On 10 December 2014, the claimants obtained letters of administration to Stephen's estate for Megan's benefit, until she became 18 years old.

81. A number of allegations have been made as to events happening after Stephen's death, but only one of them is important for my purposes. This is a meeting which took place in May 2014. It took place at the first claimant's house, purchased after she separated from Stephen. According to Mrs Elinor Gregory, whose account is expressly confirmed by both claimants, the meeting was in about the second week of May 2014. The first claimant had asked her parents to accompany her to this meeting, to discuss the finances of Stephen's estate, in preparation for the application for letters of administration. The first claimant wanted to give the defendants an opportunity to deal with the question of the beneficial ownership of Close Court. But at the meeting they did not mention it.

82. According to Mrs Gregory's account, she therefore asked the first defendant what were his intentions regarding the house. Her evidence was that he indicated that it was the *defendants'* house, but that as he was an honest, honourable and moral man he would "leave something for Megan in his will". Mrs Gregory challenged him on this, and the first defendant (according to her) responded that perhaps he would put the house or its proceeds into trust, or an "ethical bank account" until Megan reached 21 years old. On being questioned as to how much of the value would be for Megan, the first defendant responded "about a third". Mrs Gregory challenged that too, saying that was unfair.

83. She also asked the first defendant why Stephen's money had been used to pay off the mortgage loan if it was not his house. According to her, the first defendant was "unsettled by this question and said he had forgotten about that". Mrs Gregory showed the first defendant an earlier (draft) version of the email sent to Michael Ashworth before Stephen died. The second defendant said that they would have to take legal advice. The first defendant, according to Mrs Gregory's recollection (but specifically repeated in the second claimant's witness statement), said that he had paid "hard cash" for the house.

84. The first defendant's written evidence agreed that the meeting took place "some weeks after Steve's death when we agreed to meet Sarah's recently purchased house nearby". He also agreed that Mrs Gregory asked him what they were going to do with the house. According to his account, he said "sell it". When pressed further, on how the purchase proceeds will be divided, he said his intention was to split it three ways, one for each of the three children. He confirmed that Mrs Gregory then said that this did not seem fair, and referred to the fact that part of Stephen's inheritance had been used to pay off the mortgage. Rather surprisingly, the second defendant's written evidence does not refer to this meeting at all, although the first defendant's does.

85. There are not many differences between the accounts of Mrs Gregory and the first defendant as to this meeting, but I am satisfied that, where they differ, the account given by Mrs Gregory is the correct one. This is first of all because I accept the truth of Mrs Gregory's evidence generally in preference to that of the first defendant. Secondly, it is because the first defendant was, in his own words, "quite confused and perturbed" at the meeting, and his account is less likely to be reliable on that account too. Thirdly, although this is less important, it is because Mrs Gregory, although the mother of the first claimant, and therefore understandably trying to do her best for her daughter and granddaughter, had not been directly concerned in matters relating to the house before, and was still in effect at one remove from events, compared to the first defendant. She is therefore more likely to remember accurately what was said.

86. This means that I find (amongst other things) that, when Mrs Gregory pressed the first defendant about his intentions regarding Close Court, (i) he changed his mind twice about how Megan was intended to benefit, saying first by a legacy in his will, then saying by a trust, and finally saying by an "ethical bank account", (ii) when asked as to the amount by which Megan would benefit he said "*about* a third", rather than the exact one third share the defendants say they agreed with Stephen, and (iii) he could not answer the question why, if Stephen's money had been used to pay off the mortgage, it should not be Stephen's house, saying only that he had "forgotten about that." I also find that he told Mr and Mrs Gregory that the defendants had paid "hard cash" for the property, which was simply untrue, and the defendants knew it.

## Law

87. Having concluded my findings of fact, I now turn to the questions of law which arise. I must consider what was the effect of the events described above on the ownership of Close Court. This depends largely on the law of property, and in particular the law of trusts, although this is subject to the operation of the rules of illegality and public policy. I will deal first with the position without considering the impact of those latter rules, and then consider how far, if at all, the position is altered once they are taken into account.

88. The first, and quite noncontentious, point is that, in considering whether an express trust has been created, it is not necessary that the word "trust" be used, or indeed that any words be used at all, if the intention to create a trust is expressed or implied in some other way: see *Paul v Constance* [1977] 1 WLR 527, CA. It is true that, where (as here) the trust argued for is of land or of an interest in land, section 53(1)(b) of the Law of Property Act 1925 requires that the trust be evidenced by signed writing. But that formality never applies to constructive or resulting trusts (section 53(2)), and, as I say below, does not always apply even to express trusts.

89. I have already described what happened in 1995, and the intentions of the parties to the "sale" to Trevor Steel. Subject to the new mortgage, therefore, Stephen was intended to and remained the beneficial owner of the property. The parties (who were non-lawyers) did not use the term "trust" to describe the legal situation, but that is what it was. The legal mechanism involved was however not a conventional express trust (although it was clearly intended to separate legal and beneficial ownership) because there was no signed writing as required by section 53(1)(b) of the Law of Property Act 1925. But it would have been a fraud by Trevor to set up the lack of writing against Stephen, and therefore, subject to any question of public policy or illegality (which I deal with later), the express trust nonetheless takes effect: see *eg Re Duke of Marlborough* [1894] 2 Ch 133.

90. If I were wrong about the express trust, then an alternative analysis would be one of resulting trust. Trevor obtained a mortgage loan instead of Stephen, but did so in effect as his nominee, and Stephen impliedly agreed to indemnify him against the liability (*cf Hardoon v Belilios* [1901] AC 118, 124-25). So, subject to that indemnity, Stephen was in effect contributing the purchase price, and it is therefore a case of purchase in the name of another: see *eg Dyer v Dyer* (1788) 2 Cox 92. Stephen would be the beneficial owner subject only to the mortgage and to Trevor's indemnity. As I have already said, a resulting trust of land needs no writing.

91. The defendants rely on the investigation carried out into the sale by the Insolvency Service after Stephen's bankruptcy, as a result of which the Official Receiver took no further action. The defendants say that this shows that there was no trust for Stephen. I disagree. If there was no benefit to the creditors in attacking the transaction, then the Official Receiver would not do so. As has been shown, in fact the creditors did not lose out. All the proving creditors were paid in full, and there was even a return to the estate.

92. In 2000 Trevor transferred the property to the defendants. I have found that they knew that Stephen was and was intended to remain the beneficial owner of Close Court, and that they were to be nominal owners. So the trust created in 1995 was to continue. Even if I were wrong and they did not know, they took the legal estate in Close Court subject to Stephen's beneficial interest, by virtue of section 29 and Schedule 3 of the Land Registration Act 2002.

93. So far as material, these provide as follows:

> "29 (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before

the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected-

(a) in any case, if the interest-

(i) [ … ],

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) [ … ]"

"SCHEDULE 3

UNREGISTERED INTERESTS WHICH OVERRIDE REGISTERED DISPOSITIONS

2. An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for-

(a) [ …];

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest-

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

[ … ]"

94. Stephen was in actual occupation of Close Court, which the defendants well knew, and no inquiry was made of him before the transfer, so as a result his interest in it was protected by para 2 of Schedule 3 to the 2002 Act. Therefore s 29(1) of the Act could not have the effect of postponing his interest to that of the defendants in taking a transfer of the legal estate.

95. Even if I were wrong about that, I have held that the defendants intended to hold the property for Stephen's benefit. Hence, subject to the mortgage, an express trust for Stephen was created at that point, and, in the same way as with Trevor, it would be a fraud in the defendants to rely on the lack of signed writing as against him.

96. When in May 2010 part of Stephen's share of the inheritance from his father was used to pay off the mortgage on Close Court, this could have been part of an agreement to vary the beneficial ownership of the property from what it had been before. Indeed, that was exactly the defendants' case. They said that Stephen agreed to pay off the mortgage in return for being allowed to stay there rent free for the rest of his life, and

with a one third share being paid to his daughter Megan after his death. I have rejected that allegation. In my judgment no such agreement was reached, and the repayment of the mortgage was effected out of Stephen's share of their father's estate because it was his house beneficially to begin with. If I were wrong about that, and it was not Stephen's house, but also there were no agreement at all, then at the very least it would nonetheless result in Stephen being subrogated to the Nationwide mortgage, and his estate would therefore be entitled at least to be repaid the amount used to replay the loan, together with interest: see *eg Boscawen v Bajwa* [1996] 1 WLR 328, CA; *Bank of Cyprus v Menelaou* [2016] AC 176, SC. In the view I take of the matter, however, this does not matter.

97. Lastly, in my judgment the meeting in May 2014, after Stephen's death, did not result in any agreement between the claimants on the one hand and the defendants on the other as to the beneficial ownership of Close Court. It sheds some evidential light on what went before, and in particular supports the claimants' case, but it does not itself change anything. The beneficial ownership position before the meeting was not different after it.

**Public policy and illegality**

98. Having dealt with the legal consequences of the events affecting Close Court without considering the impact of the rules of illegality and public policy, I must now turn my attention to those rules. The defendants argue that any such trust of Close Court as could be established by the claimants against the defendants and in favour of Stephen is tainted by illegality, and therefore cannot be enforced. The illegality contended for is that of shielding Close Court from the Official Receiver, contrary to the relevant principles of bankruptcy law. The defendants rely on *Barrett v Barrett* [2008] BPIR 817 and *Patel v Mirza* [2017] AC 467.

99. The former case concerned two brothers, Thomas and John. Thomas became bankrupt, and his house vested in his trustee in bankruptcy. The trustee eventually sold the house to John whilst Thomas was still a bankrupt. Subsequently Thomas was discharged from his bankruptcy, and John later sold the property at a profit. The litigation concerned the ownership of those proceeds of sale. Thomas alleged that John had held the house on trust for him from the time of the purchase from the trustee, and that therefore the proceeds of sale were his too. John argued that any such trust for Thomas would have been illegal, and therefore unenforceable, as the beneficial interest for Thomas would have had to be reported to the trustee in bankruptcy as after-acquired property under s 333(2) of the Insolvency Act 1986, and it was not.

100. David Richards J (as he then was) held that the trust arrangement was illegal. He said:

> "14. Thomas accepts that, by enabling him to conceal his interest, the agreement's effect and purpose was to deprive his trustee of the opportunity to acquire Thomas' interest in the property. In substance the estate was defrauded of that opportunity. That was clearly the whole purpose of the alleged agreement that John would hold the property on trust for Thomas. Far from being too remote from the agreement, it was its essence. As Mr Croally for John put it, the illegal purpose shaped the whole form of the transaction. In his reply, Mr Maynard submitted that the transaction had a dual purpose, first to keep the property from

> the trustee in bankruptcy and secondly to preserve the family home. Even if I accept the premise of a dual purpose, it would not assist Thomas, but in any event, the only purpose of the trust arrangement, as opposed to the purchase from the trustee in bankruptcy, can have been to conceal Thomas' interest from the trustee in bankruptcy."

101. David Richards J considered the pleadings in the case, and went on to say:

> 25. Given that Thomas must rely on the pleaded agreement or arrangement that he was to be the beneficial owner and was to pay the mortgage instalments, can he avoid reliance on its unlawful purpose? In my judgment, he cannot. He has in effect pleaded the unlawful purpose in paragraph 15(1)(a) of his particulars of claim: the purpose of purchasing the property in the name of John was 'to avoid its being repossessed by the Trustee in Bankruptcy'. Without that purpose, the agreement or arrangement has no rational explanation. Thomas needs to allege and prove it in order to establish the agreement, but in doing so he relies on his own illegal purpose and thereby renders his interest unenforceable.

102. In reaching his decision in *Barrett v Barrett*, David Richards J referred to and relied on the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340. But more recently the Supreme Court has departed from the reasoning of that decision in *Patel v Mirza* [2017] AC 267. I therefore turn to consider that case.

103. *Patel v Mirza* [2017] AC 467 was a case in which A paid B a large sum of money for B to use in 'insider trading' in company shares (a criminal offence). In fact the money was never used because the necessary 'inside' information was never forthcoming. A sued B for the return of the money. The judge held that A failed because he had to rely on the criminal purpose with which he had paid the money in order to recover it. The Court of Appeal reversed his decision on the basis that public policy did not prevent a party who had withdrawn from an illegal purpose from recovering the money he had paid in pursuance of that purpose. The Supreme Court unanimously affirmed that decision, though the court was divided on the reasoning.

104. For the majority, Lord Toulson (with whom Lady Hale, and Lords Kerr, Wilson and Hodge, agreed) said:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified,

> rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

105. Lord Neuberger took a similar, but not identical approach to Lord Toulson. Lords Mance, Sumption and Clarke reached the same decision (*ie* to dismiss the appeal), but by a different route. I will therefore consider the effect of illegality and public policy by reference to the majority view of Lord Toulson. A number of questions arise.

106. The first question is *as at what time* the court should consider the potential effect of illegality or public policy objections. Is it to be considered as at the time of the transaction itself or is it to be considered as at the time the matter is decided by the court? Since this is to be a fact sensitive exercise rather than the application of bald principles, in my judgment this question must be decided as at the time of the hearing, rather than at the time of the events in question. Otherwise relevant facts may not be taken into account.

107. The public policy underlying the rules of bankruptcy is to protect the interests of creditors. But the different bankruptcy rules protect those interests in different ways. For example, in *Barrett v Barrett* the relevant rule was one requiring the bankrupt to report after acquired property to the trustee. This would alert the trustee in bankruptcy to its existence and enable it to be possessed by the trustee and applied for the benefit of the creditors. In the present case, however, the relevant rules relate to the setting aside of transactions, *before* the bankruptcy, which are (i) made at an undervalue or in fraud of creditors, or (ii) unlawful preferences to creditors.

108. If there had been no equity in the property at the time of the "sale" to Trevor, and no balance to be paid to Stephen, in my judgment it is hard to see why, at least in the absence of an application to set aside the transaction by a person affected, there should be any public policy reason to treat the trust as unenforceable. Even though the parties might have had the intention of defeating creditors, no creditors could in fact have been defeated, because there was no value in the property being put beyond the reach of the insolvency regime, or used unlawfully to prefer some creditors over others. In the ordinary case, there would be no reason why in such circumstances the law should require that such a trust be rendered unenforceable. However here there was some equity in the property at the time of the "sale", and a balance was payable. It is therefore necessary to consider the matter further.

109. In *Barrett v Barrett* the problem was that the after acquired property was never reported to the trustee, and therefore it is not possible to know what would have happened in the counterfactual situation that it had been reported. The position in the present case is different. After the bankruptcy, the Official Receiver, in the usual way, investigated the circumstances leading up to the bankruptcy and in particular looked into the sale of Close Court, and the payment of the balance of about £12,000. Having done that the Official Receiver took no further action, and in particular did not attack any part of the transaction as a transfer at an undervalue, a fraud on creditors, or an unlawful preference. Indeed, as I have said, all the proving creditors in Stephen's bankruptcy were paid in full.

110. If, therefore, the court considers all the circumstances of the present case in the fact-sensitive way required by *Patel v Mirza*, the court may well ask itself why trust law should take a hard line in aid of bankruptcy law and invalidate or make unenforceable

the trust, when bankruptcy law, after the event, has investigated the events in question and done nothing, and no proving creditor has actually been harmed. The denial of the claimant's claim in the present case will not enhance creditors' rights at all. In all the circumstances, to hold the initial trust unenforceable would in my judgment be a disproportionate response to the illegality involved, and I will not do so.

111. That is enough to dispose of the present case. There is no need to hold that the trust intended to be created of Close Court in 1995 is unenforceable on grounds of illegality or public policy. But in fact there is more. What is unusual about the present case (and also distinguishes it from cases like *Barrett v Barrett*) is that there is more than one set of events which could have given rise to a trust in favour of Stephen. The initial transaction, which I have been discussing, took place in 1995. But a transfer from Trevor Steel to the defendants took place in 2000. And then there was the discharge of the mortgage on Close Court, using Stephen's own money, in 2010, and the meeting between the parties after Stephen's death. If I were wrong about 1995, it would not be enough, therefore, to say that a trust could not have been enforced if it had been created *then*. It would be necessary to go on and see whether it also could not have been created by virtue of the events which followed.

112. The point can be tested in this way. If the transfer to Trevor Steel had taken place in 2000, rather than in 1995, no objection could have been made on the grounds of public policy. By 2000, Stephen had been discharged from his bankruptcy. So, if (contrary to my view) the trust intended to be created in 1995 could not then have been enforced against Trevor, by reason of public policy, but, Trevor (believing that the trust was valid, or even just being an honourable man and a good friend of Stephen's) had wanted to hand on the property in 2000 to someone who would hold the property for Stephen's benefit, there could be no objection on the grounds of public policy or illegality to a trust based on the events which took place in 2000. The position in relation to a trust based on events after 2000 is the same.

## Conclusion

113. In the result, I hold that this claim succeeds. At the time of his death Close Court belonged beneficially to Stephen, and after his death to his estate, and therefore its proceeds of sale so belong now. The defendants were and are trustees, and now hold those proceeds on trust for the claimants as personal representatives of that estate.

114. This was not a straightforward case to try. I am therefore all the more grateful to both counsel for their efficient conduct of the examination of witnesses, and their careful and measured arguments, both oral and written, and the assistance of their solicitors in preparing this case. I will hear counsel as to the terms of the order to give effect to this judgment, and as to consequential matters, unless these can be agreed.