[2021] EWHC 1403 (Ch)

Claim No: 3BS30104

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Date: 7 June 2021

Before :

Mr James Pickering QC
(sitting as a Deputy Judge of the High Court)

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Between :

FRANCES ELIZABETH WOOD **Claimant**

and

(1) COMMERCIAL FIRST BUSINESS LIMITED (DISSOLVED)
(2) BUSINESS MORTGAGE FINANCE 5 PLC
(3) BUSINESS MORTGAGE FINANCE 7 PLC **Defendants**

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Stephen Meachem (instructed by **LawTribe**) for the **Claimant**
Stuart Cutting (instructed by **Moore Barlow LLP**) for the **Second and Third Defendants**

Hearing dates: 17, 18 December 2020

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APPROVED JUDGMENT

I direct that 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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MR JAMES PICKERING QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 7 June 2021 at 10:00 am.

Mr James Pickering QC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. In my judgment handed down on 23 October 2019 (reported at [2019] EWHC 2205 (Ch)), I held that while certain other of her claims failed, Mrs Wood's claims based on secret commissions and under the unfair relationships legislation succeeded. I further held that, as a result, she was entitled to (amongst other things) rescission in respect of three disputed mortgages. Importantly, however, that entitlement was subject to counter-restitution as a result of which I also directed the taking of an account to determine the sum to be repaid by Mrs Wood. It is that account which is before me now.

2. The broad structure of the account was as follows. On 21 September 2020, the Second and Third Defendants (together, "**the Defendants**") produced their account. On 25 October 2020, Mrs Wood produced her account in response. On 16 November 2020, the Second and Third Defendants produced their account in reply.

3. The net effect of these various accounts is that while (sensibly) many matters have been agreed between the parties, a number of important issues remain unresolved and fall to be determined as part of the account. These unresolved matters can be summarised as follows:

(1) issues relating to repayments,

(2) interest,

(3) payment for use and occupation, and

(4) account of profits.

4. After a brief overview of the relevant principles applicable to the taking of an account such as this, I will deal with each of the above unresolved matters in turn.

PART II: THE RELEVANT PRINCIPLES

5. The relevant principles relating to the taking of an account were helpfully set out in the skeleton argument of counsel for the Second and Third Defendants and then expanded upon in oral submissions during which I was referred to various extracts from ***The Law of Rescission*** by O'Sullivan, Elliott and Zakrzewski (2nd Edition) as well as to a number of authorities. For present purposes, the position can be summarised as follows:

(1) The basic objective of equitable rescission is to restore the parties as near to their original positions as may be possible. Restoring the parties to their original positions (or as near as possible) does not involve restoring them to those positions in all respects, but only "*as regards the rights and obligations which have been created by the contract"*[1]. The exercise is simply one of unravelling the transaction[2] whereby the immediate consequences of the contract itself are reversed.

(2) The court should be mindful of the fact that exact *restitutio in integrum* may not be possible due to the passage of time and changing circumstances. In such circumstances the court may often facilitate rescission by making discretionary adjustments of various types, moulded in accordance with the particular circumstances of the particular case so

[1] ***Smith v Cooper*** [2010] 2 FLR 1521 (CA) at [91]-[93]; [101]; [110]
[2] ***The Law of Rescission***, paragraph 13.06

as to achieve a result which is "*practically just*"[3]. This means that the parties should be placed in positions sufficiently equivalent to their original positions that no injustice is suffered.

(3) In exercising its discretion to achieve a practically just result, the court should keep firmly in mind the basic objective of restoring both parties (as near as possible) to their original positions[4]. The court should not use its discretion effectively to reshape the parties' bargain along lines which the court may consider to be fair. Indeed, although equitable rescission is a discretionary remedy, that discretion should be exercised on restitutionary principles and not by reference to the judge's personal conception of what would be fair as between the parties. As Coleman J said in ***De Molestina v Ponton*** [2002] 1 Lloyds Rep 271 at 288 at [6.7]:

> "The scope of the equitable discretion in a rescission claim is confined to adjustments to achieve substantial restitution to accommodate events that have occurred after the contract has come into force and does not extend to the general reconstruction of the bargain to achieve an objectively fair result."

(4) It is well established that the fraudulent behaviour of a party does not entitle the innocent party to be unjustly enriched or to receive some form of windfall without returning what he or she received under the contract from the fraudulent party. Indeed, the object is not to punish the defendant even in the case of fraud. As Lord Wright said in ***Spence v Crawford*** [1939] 3 All ER 271 at 288-289:

> "Restoration… is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return."

[3] ***O'Sullivan v Management Agency and Music Ltd*** [1985] QB 428 (CA) at 457A-H and 458B-C
[4] ***Cheese v Thomas*** [1994] 1 WLR 129 (CA) at 136B, F & H; 137B-C & E-F

(5) The general rule is that the party seeking to rescind is entitled to set aside the transaction and receive back the benefits conferred only if he or she returns all the benefits received under the transaction. In other words, there must be mutual restitution[5]. In cases when the account leaves a balance due from the rescinding party, the relief may be made conditional upon the rescinding party paying the balance so determined[6].

6. With these principles in mind, I now turn to consider the above mentioned unresolved matters between the parties.

PART III: ISSUES RELATING TO REPAYMENTS

(a) Introduction

7. In general terms, where a rescinding borrower seeks to rescind a mortgage, the starting point is that the rescinding borrower:

(1) will be required to repay to the lender the capital advances (excluding any penalties, charges or costs which may have been added to the mortgage balance) received from the lender, and

(2) will be entitled to receive credit for any mortgage repayments made by him or her to the lender.

8. In the present case, the parties are in agreement as to the amount of the capital advances made by the lender. Two issues, however, have arisen as to the amount of credit which Mrs Wood should receive in respect of payments made by her or on her behalf.

[5] ***Independent Trustee Services Ltd v GP Noble Trustees Ltd*** [2013] Ch 91 (CA) at [54] & [55]
[6] ***The Law of Rescission***, paragraph 15.03

(b) The first issue

9. The first issue relates to some 10 payments made by Mrs Wood (between 31 December 2012 and 2 May 2014) totalling £17,500 which have been identified in a schedule prepared by her bookkeeper and, so Mrs Wood argues, have not been taken into account by the Defendants.

10. In their account in reply, however, the Defendants point out that the amount which they say was repaid by Mrs Wood in relation to the Higher Alham Farm mortgage is in fact more than the amount relied on by Mrs Wood in the statements of account – and indeed, it is more by precisely the same sum of £17,500. This being the case, the Defendants invite me to infer that the £17,500 of payments which Mrs Wood suggests have not yet been taken into account *have* in fact been taken into account and indeed have been applied in full against the Higher Alham Farm mortgage.

11. Even leaving aside the fact that Mrs Wood's bookkeeper's schedule has not been introduced into evidence in any meaningful way[7], it seems to me that by far the most likely explanation for this double discrepancy is that the so-called missing payments have not in fact been missed and, as the Defendants have suggested, have instead been applied to the Higher Alham Farm mortgage. On this point, therefore, I accept the Defendants' version of the account.

(c) The second issue[8]

11. The second issue relates to the treatment of a lump sum overpayment of £232,963.63 which arose following the sale of the Wagon House. On behalf of Mrs Wood, it was argued that she was entitled to credit for this sum but had not been given it.

[7] The bookkeeper has not produced a witness statement explaining and/or verifying the schedule; instead, the schedule has simply been exhibited to Mrs Wood's account in answer with little explanation as to its provenance and no underlying documentation to support its content.

[8] Initially, there was a further dispute as to whether or not Mrs Wood should be entitled to credit for certain payments (largely professional fees and disbursements) which had been incurred when taking out the various mortgages. Following Mrs Wood raising these matters in her account in response, the Defendants revised their calculations in their account in reply by deducting the disputed sums from the relevant capital advance. Although at the start of the hearing the matter appeared to remain in issue, by the end of the hearing it had been resolved between the parties.

12. In reply, however, the Defendants explained by reference to the documents that the Wagon House had sold for £249,000 and that of the above sum, some £232,963.63 had indeed been received by the First Defendant and applied as follows:

Apportionment	**Amount (£)**
Capital Reduction DSF Mortgage	188,178.90
Early Repayment Charge DSF	11,490.73
Arrears Reduction DSF	12,908.00
Arrears Reduction HAF	20,386.00
TOTAL	**232,963.63**

13. I was then shown, again by reference to the documents, how the above figures had in fact been taken into account in the Defendants' analysis. In short, therefore, while Mrs Wood is correct to say that she should have received credit for the above sum of £232,963.63 it seems to me that she has indeed received such credit. On this point too, therefore, I prefer the Defendants' account.

PART IV: INTEREST

(a) Introduction

14. As explained above, the basic objective of equitable rescission is to restore the parties as near to their original positions as may be possible. This being the case, on rescission, the general rule is that money will be returned together with interest. This is not by way of damages but instead to reflect the fact that the receiving party has been kept from his or her money and that to restore them to their original position they ought also to receive interest on that money.

15. In the present case, despite broad agreement between the parties as to the above principle, various issues arose as to how it should be applied in practice.

(b) Interest on what? And from when?

16. On behalf the Defendants, it was submitted that:

(1) they were entitled to interest on each of their capital advances[9] from the date of each such advance, and

(2) Mrs Wood was entitled to interest on each repayment made by her from the date of each such repayment.

17. Although Mrs Wood's position was never made entirely clear, it does seem to me that the approach proposed by the Defendants – that each party should be entitled to interest from the date that each paid out the sums in question – must be the appropriate starting point and is the basis on which I will direct that interest should be calculated and paid.

(c) Simple or compound interest

18. The Defendants submit that both parties should be entitled to simple interest. On behalf of Mrs Wood, however, it was submitted that while the Defendants should be entitled only to simple interest, she should be entitled to compound interest. In short, this was because of the findings I had made in the main judgment to the effect that the First Defendant had paid secret commissions (or a bribe) which in the authorities has often been considered as a species of fraud.

19. As for the jurisdiction to order compound interest, a useful summary of the position (as it then was) was set out in the judgment of the Court of Appeal in ***Black v Davies*** [2005] EWCA Civ 531 at [81]-[87] in which Waller LJ said:

> "81. Being of the opinion that the decision of Mr Justice McCombe was correct, we propose to deal with the matter relatively briefly. In his judgment, having given a brief summary of the facts, the judge identified (para 5) the two questions to be resolved and (para 6) three basic principles of law accepted by both sides. The first question was the general

[9] Taking into account the deductions made by them in the account in reply as referred to in footnote 8 above

question whether the court has jurisdiction to award compound interest in respect of a judgment for damages for deceit; the second was, if so, should the court exercise its discretion to do so on the facts of the present case. The basic principles of law are, first, that at common law the courts have no powers to award interest, whether simple or compound, by way of damages on a money claim; second, that under statute (s 35A of the Supreme Court Act 1981) the courts have only a power to award simple interest on a debt or damages; third, that courts of equity have a power to award interest in certain specified types of case as part of their general jurisdiction. The judge added that it was agreed that the present case turned on the extent of the court's power under the third principle and, in particular, the extent of the power to award interest, simple and compound, in cases involving "fraud".

82. The leading decision on the power to award compound interest is that of the House of Lords in ***Westdeutsche Landesbank Girozentrale v Islington LBC*** [1996] AC 669 . The judge considered that decision with great care and also earlier authorities including ***Johnson v R*** [1904] AC 817 (PC), ***Wallersteiner v Moir (No.2)*** [1975] QB 373 (CA), and ***President of India v LaPintada Compania Navigacion SA*** [1985] AC 104 (HL)…

83. In the ***LaPintada*** case, Lord Brandon of Oakbrook, at p 116A, having observed that the chancery courts had regularly awarded simple interest as ancillary relief in respect of equitable remedies, continued:

> "Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest when they thought that justice so demanded, that is to say in cases [(1)] where money had been obtained and retained by fraud, or [(2)] where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position."

At p116E, he added:

> "Two points of importance are to be observed about the law relating to the award of interest by courts of law [in 1981]. The first point is that neither the Admiralty Court nor Courts of Chancery, have awarded interest, except in respect of monies for which they were giving judgment. The second point is that the Admiralty Court never, and Courts of Chancery only in two special classes of case, awarded compound, as distinct from simple, interest."

It is evident that the two special classes of case referred to in the second passage were those we have enumerated in the first."

20. In ***Sempra Metals Ltd v Inland Revenue Commissioners*** [2008] 1 AC 561 the position with regard to interest in equity was changed by the House of Lords to allow the general award of compounded interest as restitutionary damages[10], but in ***Prudential Assurance Co Ltd v Revenue and Customs Commissioners*** [2018] UKSC 39, [2018] 3 WLR 652[11] the decision in ***Sempra*** was overruled by the Supreme Court stating that the award of interest in equity is simple interest unless either of the above two traditional categories above applies.

21. In short, therefore, it is clear from the authorities that in the context of equitable rescission (such as the present case), the court has jurisdiction to order compound interest (as opposed to simple interest) only where:

(1) money had been obtained and retained by fraud; or

(2) money had been withheld or misapplied by a trustee or anyone else in a fiduciary position.

22. So should I award Mrs Wood simple interest (as the Defendants say) or compound interest (as she says)? As was the case in ***Black***[12], first I have to consider whether I have jurisdiction to award compound interest and then, if so, whether in the circumstances of the case I should exercise my discretion to do so.

23. As for jurisdiction, as explained above, I can only award compound interest where money has been (1) <u>obtained and retained</u> by fraud or (2) withheld or misapplied <u>by someone in a fiduciary position</u>. As to the former, while it is true that many of the authorities have treated the payment of a secret commission or bribe as a species of fraud, in the present case the First Defendant <u>paid</u> (as opposed to received) the secret

[10] See in particular at [48] and [49]
[11] See in particular at [55]-[79]
[12] See at [81] as set out in paragraph 19 of this judgment

commission. In these circumstances, it cannot be said that the First Defendant has "obtained and retained" money by fraud. As to the latter, while (for the reasons set out in my main judgment) the broker owed Mrs Wood a fiduciary duty, I made no such finding in relation to the First Defendant so it seems to me that this category cannot apply either. In short, therefore, I find that neither of the categories apply to the present case such that I do not have jurisdiction to order compound interest.

24. In case I am wrong about that, I should add that if I had considered that I had jurisdiction to award compound interest, I would have exercised my discretion against doing so in any event. I remind myself that the purpose of the restitutionary exercise is not to punish the paying party (even where the paying party has acted fraudulently) but instead is to restore the parties as near to their original positions as may be possible. While it is right that in order to put her back in the position she would have been in, Mrs Wood should have interest on the sums to be repaid to her, it seems to me that ordering anything other than simple interest would enrich her (while punishing the Defendants) unnecessarily. Accordingly, even if I did consider that I had jurisdiction to award compound interest, I would have declined to do so in any event.

(d) Rate of interest

25. The final issue in relation to interest is the appropriate rate which I should order.

26. The first difference between the parties is whether the same rate of interest should be applied to both (1) the capital advances to be returned to the Defendants, and (2) the mortgage payments to be returned to Mrs Wood. The Defendants submit that as a matter of principle the same interest rate should be applied to both. Mrs Wood disagrees and says that as a matter of principle there is no reason why two different interest rates cannot be applied.

27. On this point, I agree with Mrs Wood. As stated above, I remind myself that the basic objective of equitable rescission is to restore the parties as near to their original positions as may be possible. To do this, a sensible starting point is the cost at which that recipient would have had to borrow that money. Importantly, however, different recipients may face different costs to borrow money. Accordingly, in a case such as the

present where payments are to be returned both ways, it seems to me that there is no reason in principle why those receiving parties should not be awarded interest at different rates to reflect those differing borrowing costs.

28. As to what interest rate I should apply in each case, the Defendants submitted that the appropriate interest rate to be applied to both the capital advances to be returned to them and the mortgage payments to be returned to Mrs Wood is the average conventional commercial interest rate for a person with the same financial profile as Mrs Wood. As to what that interest rate was, they relied on the expert evidence of Adrian Bloomfield, a mortgage banking expert, who concluded that the average conventional commercial interest rate for a person with the same financial profile as Mrs Wood was a margin of 4% above the 3-month LIBOR rate. On that basis, so the Defendants submitted, the above interest rate should apply to all payments going both ways.

29. The relevant part of Mr Bloomfield's report states (with underlining added):

> "5.1.3 In my opinion the methodology for determining the Conventional Commercial Interest rates in this matter would have been to apply a suitable margin over LIBOR as reward for the risk. The ultra simple model of any lending institution be it a clearing bank or a sub-prime lender is to charge a borrower a rate in excess of the cost of funds to a lender. In this case I would assume that the Defendant would have been required itself to pay a margin over LIBOR for its funds. <u>There are no hard and fast rules but in my experience, for this type of transaction, the cost of funds to a lender would have been in the region of 1-2% over LIBOR. Applying that and adding a margin to bring the rate to the borrower to 3-4% over LIBOR would seem reasonable and in line with the market as I recall</u>.
>
> 5.2 (b) Identifying the average margin at the date of the inception of each of the mortgages.
>
> 5.2.1 In my opinion the average margin obtainable at the date of the inception of each of the mortgages would have been 4% (and the rate charged to the Borrower would therefore have been in the region of 4% over LIBOR)."

30. I am satisfied on the basis of this expert evidence that the appropriate interest rate in respect of the mortgage payments which are to be returned to Mrs Wood is indeed 4% above the 3-month LIBOR rate. In relation to the capital advances which are to be returned to the Defendants, however, for the reasons given above it seems to me that I am not bound to apply the same rate and, with a view to restoring them to as near their original positions as may be possible I should award a lower rate of interest to reflect its ability (as confirmed in the above expert evidence) to borrow at a lower cost. In the light of the figures put forward in the above report, I consider this to be 2% over the 3-month LIBOR rate and will order accordingly.

PART V: PAYMENT FOR USE AND OCCUPATION

31. The Defendants submit that where under a contract a party has enjoyed the actual use or occupation of land, then on rescission of that contract, the court may direct that he or she pay a reasonable user or occupation rent in respect of that use or occupation.

32. Accordingly, given that Mrs Wood used the mortgages obtained from the First Defendant to redeem pre-existing mortgages which allowed her to retain the use and occupation of land, similar equitable principles should apply, so the Defendants submit, such that Mrs Wood should be responsible for paying a user or occupation rent. In short, in order to ensure that Mrs Wood is not unjustly enriched, so the Defendants submit, the court should deduct from the mortgage repayments made by Mrs Wood an appropriate user or occupation rent.

33. As to this, ***The Law of Rescission*** provides:

> "**(1) Benefits derived from land and chattels**
>
> 17.03 Upon rescission, in addition to returning the assets they received under the contract, each party is usually required to account for the benefits they have gained from ownership of those assets…
>
> 17.05 Equally where a party has enjoyed the actual use or occupation of an asset he gained under a contract, upon rescission the court may direct he pay a reasonable user

> or occupation rent. Such awards have often been made in respect of the occupation of land, but the same principle applies where the use of chattels is concerned. For example, where the purchaser of a motor vehicle rescinds after using the vehicle for a period of time, the court will typically require that he give an allowance for the use he has had."

34. While the principles outlined above are clearly sensible, I do not think that they do or should apply to the present case. If under the relevant contract, Mrs Wood had bought land and then used and occupied that land, on rescission, it can be seen how a court may wish to require her to pay for that use and occupation. Here, however, the land was already hers. It is true that she used and occupied her land thanks to her pre-existing mortgages. In return for those pre-existing mortgages, however, the pre-existing mortgagees required interest which Mrs Wood paid. Those pre-existing mortgages were then redeemed using monies advanced by the First Defendant. In return for the use of those monies, the First Defendant required contractual interest. As a result of the rescission which I have ordered, that contractual interest falls away but, as I have already held, the Defendants are entitled to interest at the rate which I have directed above to reflect Mrs Wood's use of that money and in order to restore the parties as near as possible to their pre-contractual position. If I were to hold that, in addition to that interest, Mrs Wood should also pay the Defendants an occupation rent, it seems to me that Mrs Wood would be paying twice for her use of the Defendants' money and, equally, that the Defendants would be over-recovering.

35. In short, therefore, rather than it being the case that if I do not order Mrs Wood to pay an occupation rent she would be unjustly enriched, it seems to me that if I were to order her to pay such an occupation rent, she would be penalised and it would be the Defendants which would be unjustly enriched. I therefore decline to direct any such occupation charge. For the sake of completeness, however, I should add that if I had been prepared to make such a direction, I would have been content to apply the figures put forward by the relevant expert, there having been no serious challenge to the same.

PART VI: ACCOUNT OF PROFITS

36. The final unresolved matter relates to an account of profits. In short, Mrs Wood claims that the First Defendant made a profit from the securitisation of her mortgages and that, in the circumstances, it ought to be disgorged of such profits.

37. A fundamental complication, however, is that in December 2019 the First Defendant was dissolved and, although an application to restore has or will be made, at present its status remains as such. This being the case, during the course of submissions counsel for Mrs Wood sensibly accepted that an account of profits was not a matter that could be pursued at the hearing before me as part of the present account. I make no comment either way as to Mrs Woods' entitlement to seek any such account at a later stage in the event of the First Defendant being restored.

PART VII: SUBSEQUENT WRITTEN SUBMISSIONS

38. When I sent out to the parties the first draft of this judgment, in addition to asking for a list of typographical corrections and other obvious errors in the usual way, I also invited counsel to inform the court if it was thought that there were any issues which had not been covered in the judgment which they thought ought to have been covered. The result was a note from counsel on behalf of Mrs Wood which then resulted in the production of a note in reply from counsel on behalf of the Defendants and then a yet further note in answer from counsel on behalf of Mrs Wood.

39. The short point raised on behalf of Mrs Wood was that, irrespective of my findings generally in relation to the account and how restitution should be appropriately effected, the conduct of the Defendants was such that they ought to be barred from restitution and in particular should not be entitled to recover the sums advanced by them as either an exercise of what was described as the "clean hands" doctrine or alternatively under the unfair relationship legislation contained in sections 140A to 140C of the Consumer Credit Act 1974 ("**CCA 1974**").

40. I will deal with this briefly. First, the conduct on which counsel for Mrs Wood now appears to rely goes, so it seems to me, beyond the findings which I made in my main

judgment following the trial. I was not asked to make any further findings as to conduct as part of the present account and I do not do so. Second and in any event, the purpose of the restitutionary exercise is, as I have already held, not to punish the paying party (even where the paying party has acted fraudulently) but instead is to restore the parties as near to their original positions as may be possible; this being the case, even if had made findings of fact as counsel for Mrs Wood was effectively inviting me to do, I would not have been prepared to vary the relief which I would otherwise have granted, whether on the basis of the "cleans hands" doctrine, the provisions of the CCA 1974 or otherwise.

PART VIII: CONCLUSION

41. In conclusion, therefore:

(1) **Repayments:** In respect of the two unresolved matters outlined above, I prefer the Defendants' account of the figures.

(2) **Interest:**

(a) The Defendants are entitled to interest on each of their capital advances from the date of each such advance, and Mrs Wood is entitled to interest on each repayment made by her or on her behalf from the date of each such repayment.

(b) The above interest in both cases will be simple interest (as opposed to compound interest).

(c) In respect of the mortgage payments which are to be returned to Mrs Wood, these will attract interest at the rate of 4% above the 3-month LIBOR rate. In relation to the capital advances which are to be returned to the Defendants, interest will be at 2% over the 3-month LIBOR rate.

(3) **Payment for use and occupation:** There is to be no occupation rent.

(4) **Account of profits:** There is to be no account of profits as against the Second and Third Defendants (and I make no comment as to Mrs Wood's entitlement to seek an account of profits as against the First Defendant in any future application).

42. Finally, I conclude by expressing my gratitude to both legal teams for the clear and helpful submissions made in the skeleton arguments and orally at the hearing.

JPQC June 2021