Neutral Citation Number: [2022] EWHC 2516 (Ch)

Case No: PT-2020-000842

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

7 Rolls Buildings
Fetter lane, London
EC4A 1NL

Date: 11/10/2022

Before :

MR DAVID HOLLAND KC
Sitting as a Deputy High Court Judge

- -

Between :

JENNIFER YALCINKAYA (AKA JENNY LEE)	**Claimant**
- and -	
METIN HASSAN (1)	
DIMITAR CHIFUDOV (2)	**Defendants**

- -
- -

Sam Brodsky (instructed by **Dumonts Solicitors)** for the **Claimant**
The **First Defendant** appeared in person
The **Second Defendant** did not appear and was not represented.

Hearing dates: 27th June – 1st July 2022

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Approved Judgment

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 11th October 2022 at 10.30am.

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David Holland KC :

Introduction

1. This is the trial of two consolidated cases which relate to the ownership, proceeds of and rental income from five residential properties in South London.

2. The properties are as follows:

    a. 226a Devonshire Road, London SE23 3TQ (registered under title number TGL168570) ("Devonshire Road")

    b. 14 Kashmir Road, London SE7 8QL (registered under title number TGL33402) ("14 Kashmir Road")

    c. 33 Kashmir Road, London SE7 8QN (registered under title number TGL179877) ("33 Kashmir Road")

    d. 38 Highcombe, London SE7 7HR (registered under title number TGL187160) ("38 Highcombe")

    e. 26 Charlton Dene, London SE7 7BZ (registered under title number SGL346917) ("Charlton Dene")

    I shall refer to these properties collectively as "the Properties".

3. The Claimant originally issued proceedings in the County Court at Bromley on 2nd September 2019 seeking an order for possession of 33 Kashmir Road against the Second Defendant who occupies that property under a tenancy granted by the First Defendant. Possession was (and still is) claimed under Ground 8 to Schedule 2 of the Housing Act 1988 on the basis of alleged rent arrears. The proceedings were defended by the Second Defendant on the basis that there were no arrears as he had paid his rent to the person who was his landlord, that is the First Defendant. The First Defendant intervened in the County Court proceedings.

4. In the meantime, on 27th October 2020, the Claimant issued proceedings in this court seeking declaratory and other relief in relation to the Properties. By order of Master Teverson dated 29th January 2021, the County Court proceedings were transferred to this court and consolidated.

The Parties cases in summary

5. In summary, the Claimant claims as follows.

6. She asserts that she allowed the First Defendant to manage on her behalf three of the Properties, being Devonshire Road, 33 Kashmir Road and 38 Highcombe, which were acquired and owned legally and beneficially by her. In breach of trust and fiduciary duty, the First Defendant failed to:

    (i) provide the Claimant with a proper account in respect of his management of those properties;

(ii) pay to her the amount due in respect of the rents and profits from those properties; and

(iii) pay to her the proceeds of sale of Devonshire Road and 38 Highcombe.

In addition she alleges that he sold 38 Highcombe without her knowledge or consent

7. She also alleges that she paid to the First Defendant £80,000 in exchange for a 50% beneficial share in the other two Properties, namely Charlton Dene and 14 Kashmir Road, of which he was already the legal and beneficial owner. This is accepted by the First Defendant (although he asserts that the sum was £85,000). However the Claimant alleges that, in breach of trust and fiduciary duty, the First Defendant has failed to:

(i) provide her with any accounts in respect of his management of those properties;

(ii) pay her share of the rents and profits from those properties;

(iii) pay her proper share of the sale proceeds of Charlton Dene (paying to her instead only the sum of £30,000 despite the sale price being £170,000).

In addition, she alleges that he has now purported to sell 14 Kashmir Road to his daughter at a gross undervalue and without her knowledge or consent.

8. As stated, the Second Defendant is the present occupier of 33 Kashmir Road and the Claimant continues to seek possession of that property from him.

9. The First Defendant denies these claims. His case is, in short, that in late 2002 or early 2003, the Claimant and he entered into a partnership or joint business venture whereby it was agreed that:

(i) The Claimant would re-mortgage her existing property at Devonshire Road;

(ii) The First Defendant would refurbish Devonshire Road, and use his own monies to do so;

(iii) Devonshire Road would then be rented out once refurbished;

(iv) The First Defendant would then hold a 50% beneficial interest in Devonshire Road;

(v) The Claimant would use some of the released sums to invest in properties already owned by Mr Hassan, namely Charlton Dene and 14 Kashmir Road;

(vi) She would pay the First Defendant £85,000 for a 50% beneficial share in Charlton Dene and Kashmir Road;

(vii) They would both then invest and purchase further properties, which would be owned equally. Specifically, they would use their own monies to contribute to the purchase price and/or refurbishment and/or upkeep of any such properties;

(viii) Each would be beneficially entitled to the profits from the properties in equal shares; and

(ix) Since she would have to vacate Devonshire Road, the Claimant could live with Mr Hassan.

10. He alleges that, pursuant to this arrangement or agreement:

(i) He arranged for Devonshire Road to be refurbished in around mid-2003. The refurbishment included, but was not limited to, replacing: the windows and doors; the carpets and flooring; the kitchen units and furniture as well as decoration. He estimates that he spent about £20,000 of his own money on these works.

(ii) Devonshire Road was thereafter rented out to tenants until it was sold.

(iii) A joint bank account was opened into which the rental sums from the Properties were paid and from which various expenses, including the monthly mortgage payments, were defrayed.

(iv) The Claimant re-mortgaged Devonshire Road in the sum of £141,965 of which £85,000 was paid to the First Defendant (for a 50% share in 14 Kashmir Road and Charlton Dene) and £43,069.73 to the Claimant. It is agreed that, following this payment, the Claimant held a 50% beneficial share in 14 Kashmir Road and Charlton Dene.

(v) Whilst 33 Kashmir Road and 38 Highcombe were purchased in the Claimant's sole name with mortgages in her sole name, it was always intended that they should be jointly owned beneficially. The First Defendant asserts that he paid £10,000 from his own funds by way of contribution to the deposit on 33 Kashmir Road and £20,000 from his own funds by way of contribution to the deposit on 38 Highcombe. The reason that these properties were purchased and mortgaged in the Claimant's sole name was, he asserts, because she could obtain a much better mortgage deal if the properties were bought by her alone.

(vi) 33 Kashmir Road and 38 Highcombe were then rented out to tenants and the proceeds paid into the joint account.

11. Thus he asserts that:

(i) The Claimant held Devonshire Road, 33 Kashmir Road and 38 Highcombe on trust for herself and the First Defendant in equal shares.

(ii) He held 14 Kashmir Road and Charlton Dene on trust for himself and the Claimant in equal shares.

12. However, he asserts that, in or around late 2006 or early 2007, the Claimant, having married a Turkish national, wished to move permanently to Turkey and therefore the parties agreed to dissolve or terminate their joint arrangement. He says they came to an agreement as follows (which in his Defence is referred to as "the Dissolution Agreement"):

(i) Devonshire Road was to be sold and was sold in May 2006. The net proceeds were £54,013.86 and were paid into the joint account and then to the Claimant.

She had already received £30,000 as a result of an earlier re-mortgage of that property and this sum was deemed to be hers as well.

(ii) Charlton Dene was to be sold and was sold in February 2007 for £170,000. The net proceeds of sale were £29,000. It was agreed that the Claimant would have these and she was paid £30,000 by way of bankers draft from the First Defendant's son.

(iii) Additionally, a loan of £8000 taken out by the Claimant was to be paid out of the joint funds and the First Defendant agreed to write off £7000 in rent arrears owed by the Claimant's daughter and son on 38 Highcombe.

(iv) He also asserts that he gave the Claimant £20,000 by way of a banker's draft.

(v) The remaining properties, 14 Kashmir Road, 33 Kashmir Road and 38 Highcombe were to be retained and owned beneficially by the First Defendant.

13. The First Defendant asserts that, in effect, the Dissolution Agreement was put into effect. From March 2007 the Claimant has been permanently resident in Turkey and between that date and early 2019, she had little, if anything, to do with the three remaining Properties which have been treated by him as if he owned them. He has retained the rental income from the remaining Properties because, he asserts, he was entitled to do so. At the same time he has paid all the outgoings including the mortgage payments. He did sell 38 Highcombe and retain the proceeds because he was entitled to do so. He has "sold" 14 Kashmir Road to his daughter for the price of £162,000 because the term of the existing interest only mortgage was about to come to an end and that was the sum his daughter could obtain by way of mortgage loan which was sufficient to discharge the capital sum that was due. He accepts that this sum is well below the market value of 14 Kashmir Road but asserts that the whole point of the exercise was to pay off the existing loan and retain the property as a family home.

The facts accepted and disputed

14. I shall hereafter refer to the First Defendant simply as "the Defendant".

15. The Claimant is 70 years of age. Until her retirement (perhaps through redundancy) at some time in the early 2000s, she worked as a patent formalities officer. She is clearly able both to use a computer and to type.

16. She first moved into Devonshire Road in 1978 as a tenant of Lewisham Council. She purchased the long leasehold interest in that property pursuant to the "right to buy" legislation in 1999 with the help of a mortgage of £13,500.

17. The Defendant has worked, and still works, as a bus driver. He has had other part time jobs but has also bought, sold and rented out properties.

18. The Claimant first met the Defendant in 2002 when he was in a relationship with her daughter Gemma. At that time she was considering selling Devonshire Road as she wished to move to Turkey. She says that the Defendant knew this and held himself out as someone who was experienced in property investment. He said that he would advise her as to the best way of going about this. Although there is a dispute as to the extent

of his experience in this regard, it is clear that, at that time, the Defendant did have some experience in the property market and, following discussions, it was decided that the Claimant would not sell Devonshire Road but would, rather, re-mortgage it.

19. As I have stated, there is a dispute as to the exact nature of the relationship between the parties, however it is accepted that the Claimant took out a loan of £141,965 from the Birmingham Midshires Building Society secured on Devonshire Road on 19th September 2003. It is accepted that, of that sum: the Claimant paid £85,000 to the Defendant; £13,495.84 went to discharge the existing mortgage debt; £43,069.78 was paid out to the Claimant.

20. There is a dispute about the work that was carried out to Devonshire Road. The Claimant says that, of the £85,000 paid to him, the Defendant was to spend £5000 on works to the property. She also asserts that, at his request, she gave him a further sum of £17,000 in November or December 2003 to pay for the installation of new windows. She visited the property and saw that some work was being or had been carried out but she now does not believe that the Defendant spent these sums, or anything like them, on renovation work.

21. Following the renovation work (whatever its extent), it is agreed that the property was rented out and the rental income paid into a joint bank account that had been set up. It is the Claimant's case that throughout his dealings with Devonshire Road, the Defendant was simply acting as her agent.

22. The Defendant's account is different. He says that, pursuant to their agreement, the Claimant gave him £85,000 as payment for 50% beneficial shares in properties which he already owned, 14 Kashmir Road and Charlton Dene. The Claimant paid him nothing towards the cost of renovations to Devonshire Road. Rather, he says, he paid for the extensive renovations which included: putting in a new boiler a new kitchen new windows and a new front door; thorough re-decoration and repairs throughout the whole house. These were required before the property could be let out to tenants. He asserts that he spent approximately £20,000 of his own money on these works and that it was agreed that he would be treated as the 50% beneficial owner of Devonshire Road.

23. So far as 14 Kashmir Road is concerned, this property had been owned solely by the Defendant since May 2003. It is agreed that the payment by the Claimant to the Defendant of either £85,000 or £80,000 entitled her to a 50% beneficial share in that property which was rented out at various points but has, for some time, been the Defendant's family home and is his present address.

24. Similarly, Charlton Dene was a property which was already owned in the Defendant's sole name. It is agreed that the payment by the Claimant to the Defendant of either £85,000 or £80,000 entitled her to a 50% beneficial share in that property which was rented out with the rental payments being made into the joint account.

25. 33 Kashmir Road was purchased in the Claimant's sole name for £170,000 on 30th October 2003 with the aid of a buy-to-let mortgage (again in the Claimant's sole name) of £150,000. The property was rented out and the proceeds paid into the joint bank account.

26. It is the Claimant's case that this property was always (indeed still is) legally and beneficially hers. The £20,000 deposit was paid by her out of the funds from the re-mortgage of Devonshire Road. It is the Claimant's case that throughout his dealings with 33 Kashmir Road, the Defendant was, and is, simply acting as her agent.

27. The Defendant's case is that he found the property (which is opposite 14 Kashmir Road) and it was bought in the Claimant's sole name simply because she could get a much better mortgage deal if the property was purchased in her name. This was because of his credit rating at the time. He asserts that he provided £11,000 towards the deposit and points to his bank statements which show three withdrawals in cash of £1000, £5000 and £5000 on 12, 13th and 14th November 2003. He says these were given to the Claimant. He also asserts that he spent a further £4800 on refurbishment works to the property prior to its being let. His case is that this property was always intended to be jointly owned beneficially in equal shares.

28. 38 Highcombe was purchased again in the Claimant's sole name for £175,000 on 28th April 2004 with the benefit of another mortgage again in her sole name.

29. The Claimant asserts that the deposit ultimately came from her funds released by the re-mortgage of Devonshire Road although she cannot remember exactly how the deposit of £25,000 was paid. The property was always legally and beneficially owned by her alone and, as with both Devonshire Road and 33 Kashmir Road, throughout his dealings with 38 Highcombe, the Defendant was simply acting as her agent.

30. The Defendant's case is again different. He asserts that the property was put into the Claimant's sole name simply because she could get a much better mortgage deal if the property was purchased in her name. This was, again, because of his credit rating at the time. He asserts that he provided money towards the deposit and the other acquisition costs. In his witness statement he said that he paid £20,000 to the solicitors Cook Taylor Woodhouse by way of transfer on 9th March 2004. Later on in the same statement, he asserts that he paid a total of £27,932 which represented the deposit, stamp duty and solicitors fees. He originally pointed to his bank statements which show a transfer out of that sum on 20th October 2003. In cross examination, although he maintained that he had paid the deposit, he was forced to concede that: the payment on 20th October 2003 could not have related to the purchase of 38 Highcombe which took place 5 months later and that the sum payable by way of stamp duty would only have been £1750.

31. Nevertheless, it was and is the Defendant's case that 38 Highcombe was on its purchase intended to be jointly owned beneficially in equal shares.

32. Thus, as already set out, the Claimant accepted that there was a joint business in respect of those properties owned legally by the Defendant but in respect of which she had purchased a 50% beneficial interest (14 Kashmir Road and Charlton Dene). Her case in respect of the other properties was that they were each both legally and beneficially owned by her and the Defendant's status was merely that of her agent. The Defendant's case is that all of the properties were jointly owned beneficially and that they were all part of the partnership or joint venture between him and the Claimant.

33. It is agreed that on 5th October 2004 the Claimant (who was at that time in Turkey) executed an Enduring Power of Attorney in favour of the Defendant in respect of

Devonshire Road, 33 Kashmir Road and 38 Highcombe ("the 2004 PoA"). It is also accepted that on 17th July 2007 the Claimant (who was then resident in Turkey) executed another Enduring Power of Attorney in virtually identical form in favour of the Defendant in respect of 33 Kashmir Road and 38 Highcombe (Devonshire Road having by that time been sold) ("the 2007 PoA"). This was done, at least in part, because the Defendant had thought (wrongly as it turned out) that the 2004 PoA had been mislaid or lost. I have seen copies of both documents in which the Claimant's signature is witnessed by a Turkish lawyer whose official stamp appears on the document.

34. It is clear that, by late 2006, the Claimant, having married a Turkish national, wished to relocate permanently to Turkey. In fact she moved there permanently in March 2007. It is agreed that, at some time before its eventual sale, the Claimant took out a further loan of £30,000 secured on Devonshire Road which she used to purchase a property in Turkey.

35. Devonshire Road was then placed on the market and sold, the transaction completing on 10th May 2006 for a price of £250,000. Solicitors Cook Taylor Woodhouse acted for the vendor. It is now accepted that the net proceeds of £54,013.86 were paid by that firm into the joint bank account.

36. The parties gave very different evidence as to the circumstances in which the property was sold. The Claimant asserts that the Defendant took the lead in selling the property and in instructing the solicitors. He told her the sale price was £220,000 and that out of this he had to pay £20,000 to the next door neighbour, Mr Henry, who had purchased it. She says that she was unaware of how much the net proceeds were: indeed she was told by the Defendant that there were none. She thus received nothing, she says, from the sale of the property.

37. The Defendant disputes this. He refers to a number of documents. There is a letter dated 25th January 2021 from Cook Taylor Woodhouse asserting that they never acted on the sale on the property for him as the client. He also refers to a letter dated 6th May 2006 which was admittedly typed and signed by the Claimant on notepaper headed with her then residential address, 25 Bernard Ashley Drive London SE 7. The letter is addressed to Cook Taylor Woodhouse and instructs the solicitors to pay the sale proceeds of Devonshire Road into the joint Woolwich Building Society account. The letter states:

> *Mr Hasan will also hand you my passport and executed papers*

The Defendant also relies on a letter dated 12th May 2006 from Cook Taylor Woodhouse addressed to the Claimant at the same home address. The letter informs the Claimant that the sale has completed and that £54,013.86 has been transferred direct "to your bank account". It encloses a completion statement which clearly shows the sale price as £250,000.

38. The Defendant's case is that the Claimant was well aware of the sale price, signed the contract and received the letter dated 12th May 2006 at her home address. The proceeds were paid into the joint bank account and removed from that account by her. The Claimant denies receipt of the letter dated 12th May 2006. She asserted that it had probably been handed direct to the Defendant, who acted under the 2004 PoA, when he attended the solicitors' offices. She pointed out, as was the case, that the Defendant was, at trial, in possession of the original letter. His response was that the letter was in

a four-drawer filing cabinet of papers kept by the Claimant at her home which she had given him on her departure for Turkey. The Claimant denied that there was any such filing cabinet.

39. Charlton Dene was sold on 2nd February 2007 for £170,000. The Defendant asserts that the net proceeds were £29,000. There is no evidence to contradict that assertion. This sum was paid to the Defendant. It is agreed that, following the sale and as a result of it, the Claimant received a bankers draft from the Defendant's son in the sum of £30,000. It is accepted that this represented some or all of the proceeds of sale of Charlton Dene. The Claimant claims that she was, and is still, owed a further £15,000.

40. The Defendant states that she has received that additional sum by way of set-off or deduction. Firstly he says that he agreed to repay a loan of £8000 which the Claimant had taken out on 4th May 2004 with the Woolwich Building Society. Secondly he said that he agreed to write off or cover £7000 of rent arrears which were due on 38 Highcombe from the Claimant's daughter Gemma and son Dan. He points to documents which he says show that Gemma had made simultaneous claims for housing benefit on two different properties in two different London boroughs and that benefit had been stopped by one borough and reclaimed by another.

41. The Claimant denies that she took out the loan agreement, asserting that her purported signature on it is a crude forgery. Mr Brodsky invited me to compare it with other, admittedly genuine, signatures and note the clear differences. When asked about it, the Claimant appeared effectively to make no admission as to whether Gemma and Dan had been in arears with their rent but asserted that the sums were not due from her and that she had made no agreement to allow them to be set off against the sums owed to her by the Defendant.

42. Indeed the Claimant in evidence originally denied knowledge of there being any arrears in respect of 38 Highcombe. However, the Defendant produced a possession order in respect of 38 Highcombe made by the Woolwich County Court on 10th August 2005 in a possession claim brought by the mortgagee, Mortgage Express, against the Claimant as Defendant in respect of arrears in the sum of £2789.91. The order recites that the Defendant (i.e. the Claimant in this claim) attended in person. Therefore the Claimant must have been there and must have been aware that there were arrears in respect of the mortgage on that property. The Defendant asserted that the only method by which the mortgage could be paid was by way of rental payments and thus there must have been rent arrears of which the Claimant would have been aware.

43. The Claimant left the country to permanently reside in Turkey in March 2007. She has had no income from any of the remaining Properties since that time. Indeed it appears that she has had little to do with them. They have been administered by the Defendant who has arranged for any lettings, paid any outgoings (including the mortgage payments) and collected any rental income.

44. I have seen a letter typed and signed by the Claimant dated 19th March 2007 sent to Mortgage Express about 38 Highcombe. It says:

> *Please note that Mr Hasan will be responsible for all future matters regarding this property and you should take full instructions from Mr Hasan.*

45. In the meantime, the Claimant and Defendant appear to have remained on friendly terms until 2019. Indeed they appear to have holidayed together on a number of occasions over those years.

46. However, it is the Claimant's case that she formally revoked the 2007 PoA in 2010. She produced and relied on a formal document headed "Business Forms: Revocation of Power of Attorney" which is addressed to the Defendant and purports to revoke the 2007 PoA. This document had clearly been downloaded in draft from the web. The document, she said, was signed by her on 12th October 2010 and witnessed by two people Geoffrey Wells and David Jackson.

47. I heard evidence from Mr Wells who stated that the Claimant had indeed visited his residence in Turkey on that date in October 2010 and that he had seen her sign the document and had signed it himself. I accept Mr Wells' evidence. However he was clear that there was no one else present when the Claimant signed. Thus the purported witness Mr Jackson (from whom I did not hear) could not have witnessed the Claimant's signature.

48. The Claimant asserted that she had taken this document to a Turkish solicitor who had formally notarised or stamped it and stated that he would send it to the Defendant. It is the Defendant's case that he never received this. The copy produced by the Claimant was not notarised or stamped and the Claimant said in evidence that, when she tried to contact the Turkish lawyer who had acted for her, she was unable to do so because he had moved office.

49. Her evidence is also that, although she had sent to the Defendant a document formally terminating the power of attorney, she nevertheless expected him to continue to manage the Properties on her behalf as her agent.

50. The Claimant belatedly produced some documents which, she said, date from 2011.

51. There are two letters dated 15th March 2011 typed and addressed by her to Birmingham Midshires Building Society and Mortgage Express respectively. They refer to 33 Kashmir Road and 38 Highcombe respectively and both request "an estimate of how much the above property would be likely to sell for if you were to sell it on my behalf". She then gives her email address in Turkey and a copy of her old and new passports.

52. There are also a series of handwritten notes produced by the Claimant, she said in March or April 2011. These, she says, were produced at a time when she was considering removing the Defendant from his management role in relation to the remaining Properties and either selling them or replacing him with one Terence Blackman. There is an email from Mr Blackman which is undated. It refers to the Claimant contacting her Turkish solicitor to produce a document revoking the power of attorney. That email also refers to changing the locks, contacting the bank and speaking to tenants. He concludes:

> *I have looked at both properties they look v good…I will look at raising 30,000 without selling*

53. In the handwritten notes, there are detailed references to 38 Highcombe and 33 Kashmir Road, the mortgages, their capital and rental values, the solicitors who acted on the

purchase and the possibility of selling those properties. There is reference to revocation of the power of attorney and to the fact that "Capital Gains Tax should be zero" on the sale of either property. There is also a draft letter of revocation and draft letter of instruction to Mr Blackman to "represent me and manage the following properties".

54. There is also the following passage;

> *Power of Attorney*
>
> *Check if legal (not notarised) Can it be revoked at notary must be in English.*

55. There is thus clear evidence that, in or around that time, the Claimant was giving serious and detailed consideration either to selling 38 Highcombe and/or 33 Kashmir Road or purporting to revoke the power of attorney granted to the Defendant and replacing him as manager with Mr Blackman.

56. However there is also repeated reference to the need to pay £30,000, or some greater capital sum, to the Defendant. The following is stated twice:

> *Increment to Martin to be calculated*

Underneath the email from Mr Blackman (which of course expressly refers to "raising 30,000"), the Claimant has written:

> *£30,000 over 6 years*

As well as:

> *£40,000 payback when properties sold*

There is also the following:

> *Wish to break all ties when means backing back £30,000* (sic)

And

> *Give back £30,000*

As well as:

> *...need to pay M 30,000 otherwise have to accept £30,000 when I sell*

The references to "M" and "Martin" are references to the Defendant.

57. There are then two letters dated 11th April 2011 both addressed to her from Mortgage Express and both relating to 38 Highcombe with the mortgage account number at their head. One letter is addressed to her at an address in Turkey and refers to a "recent change of address notification". The gist of this letter is that further documentation is required before the company's records can formally be updated. The other letter is

addressed to her at 25 Bernhard Ashley Drive and refers to a "recent letter regarding your change of name". Again further documentation is requested.

58. When asked about the references to paying £30,000 to the Defendant, the Claimant initially stated that it was what she thought she owed him. However she then stated that she wanted to pay back the £30,000 which had been paid to her on the sale of Charlton Dene because, although that money was owed to her (and indeed she was owed further sums), it had been raised by the Defendant by selling properties in Cyprus (she initially said Turkey but then corrected this) and she felt somehow obliged to pay it back. As I commented at the time, I thought that explanation was, to say the least, rather bizarre. I shall have to decide whether or not I believe it.

59. The Claimant accepted that she had never told the Defendant about her proposals and discussions in 2011 and that these had come to nothing as Mr Blackman was not, in the end, able to do what was required.

60. There is no mention of 14 Kashmir Road in any of these letters or handwritten notes.

61. The Second Defendant has been occupying 33 Kashmir Road as a tenant of the Defendant since on or around 2012. He has paid rent to him. The latest of his tenancy agreements is one dated 12th September 2018.

62. The next event of significance is a letter sent by the Claimant to the Defendant from her address in Turkey dated 5th September 2015. This is typed and is in the most friendly terms. It is headed with the Claimant's address in Turkey and is addressed to the Defendant at 14 Kashmir Road. It states:

> *Hi Martin*
>
> *Greetings from sunny Turkey.*
>
> *Letters to Mortgage Express and Birmingham Midshires enclosed.*
>
> *Also copies of both passports old and new. Confirmation of my Turkish address and a copy of my residents visa if required. Hopefully enough information to sort address.*
>
> *Hopefully you will be able to make it out in October*
>
> *In the meantime stay well and take care.*
>
> *Love to all.*
>
> *Jenny*
>
> *XOXOXO*

63. The letter was clearly in response to a communication from the Defendant. It enclosed the following: a notarised copy of an official document in Turkish (I assume the address confirmation); copies of two different United Kingdom passports (one of which was expired); a copy of a Turkish identity card (the size of a United Kingdom Drivers

Licence). There is also a letter typed by the Claimant and headed "Mrs Jennifer G Lee c/o Mr Metin Hassan 14 Kashmir Road London SE7 8QL" and was addressed to "Mortgage Express/Bradford & Bingley plc". It was headed with the mortgage account number for 38 Highcombe and with that property address. It states as follows:

> *I refer to correspondence with you ending in your letter of 11 April 2011 to my address in Turkey*
>
> *Please note that the 25 Bernhard Ashley Drive address has not been valid since 2007. I reside in Turkey.*
>
> *All affairs regarding the above account are handled by Mr Metim Hassan who has a Power of Attorney in this regard. Accordingly all correspondence should be addressed to:*
>
> *Mrs Jennifer G Lee c/o Mr Metin Hassan 14 Kashmir Road LONDON SE7 8QL*
>
> *It is extremely important that these instructions should be carried out for the smooth running of this account.*
>
> *Please immediately alter your records accordingly.*
>
> *Thank you for your assistance.*
>
> *Yours faithfully*
>
> *Jenny Lee*

I was told that there was originally a letter in identical terms addressed to Birmingham Midshires in relation to 33 Kashmir Road.

64. The only other thing which is worth noting is that, on the copy of the up to date United Kingdom passport, there was written in hand the following:

> *Don't forget you still owe me £7000 XXX*

The Claimant, in her statements, denies that this is her handwriting.

65. When asked why, in the letters addressed to the building societies, she had referred to the Defendant having a power of attorney when, on her case, she had revoked it nearly five years previously, the Claimant said that she had made "a mistake" in the letters that she was "flustered" and "panicked" at the time and what she really meant to say was that: "he has my authority".

66. In July 2018 the Defendant put 38 Highcombe on the market for sale. It was eventually sold on 23rd January 2019 for the price of £408,000 with the net proceeds of £241,205.54 being paid into a Barclays Bank account in the joint names of the Claimant and the Defendant and thereafter paid out to another account in the Defendant's sole name and (according to him) dissipated. The Claimant asserts that she was unaware of this sale. The Defendant states that he spoke to her on the phone about it in January

2019. He admittedly used the 2004 PoA which the Claimant asserts she had long since revoked.

67. Having, she says, only just discovered that the sale had taken place, the Claimant objected to the registration of the purchaser, Well-Living Limited. However, in a letter dated 23rd May 2019 to HM Land Registry, the Claimant withdrew her objection.

68. In the meantime, on 26th March 2019, the Claimant wrote to the Second Defendant asserting that she was the legal and beneficial owner of 33 Kashmir Road. She demanded that he pay any rent to her via a new agent. She wrote, or caused to be written, further letters to him dated 4th and 17th June and 8th July and 13th August 2019.

69. On 28th March 2019 the Claimant executed a further "Revocation of Power of Attorney" document. This was sent by email to the Defendant on that date. In a letter dated 11th June 2019 the Claimant requested that the Defendant return the originals of both the 2004 PoA and the 2007 PoA. This request for the return of the documents was repeated in a solicitor's letter dated 17th June 2019. As made clear by the Claimant's solicitor, Mr Khan, in his statement dated 15th December 2021, the Defendant refused to return the original powers of attorney for many months.

70. On 2nd September 2019, the Claimant issued the possession proceedings in the County Court at Bromley against the Second Defendant in respect of 33 Kashmir Road.

71. As stated, in July 2020, the Defendant claims that he agreed to transfer 14 Kashmir Road to his daughter for the price of £162,000. This was, he says, because the term of the existing interest only mortgage was about to come to an end and this was the sum his daughter could obtain by way of mortgage loan which was sufficient to discharge the outstanding capital sum. He accepts that this sum is well below the market value of 14 Kashmir Road but asserts that the whole point of the exercise was to pay off the existing loan and retain the property as a family home. Solicitors were instructed on both sides. This transaction was apparently completed on 30th July 2020, but it has not been registered.

72. The proceedings in this court were issued on 27th October 2020.

73. By order made on 29th January 2021, Master Teverson transferred the possession proceedings to this court and consolidated them with the High Court proceedings.

74. At that hearing the Defendant, who was at that time legally represented, gave an undertaking to the court:

> *To pay into Court alternatively into a third-party account agreed upon by the parties, until the first day of trial or further order in the meantime, the rental income from 33 Kashmir Road less the contractually specified mortgage repayment*

("the undertaking").

75. At a without notice hearing on 17th February 2021, Falk J granted to the Claimant a freezing order against the Defendant and a proprietary injunction preventing him

dealing with 14 Kashmir Road, 33 Kashmir Road and the proceeds of sale of 38 Highcombe. I have seen a note of Falk J's ex tempore judgment given that day.

76. The return date was on 25th February 2021 before Upper Tribunal Judge Cooke. I have also seen a note Judge Cooke's ex tempore judgment given that day. Both the Claimant and Defendant were represented by counsel. The Defendant applied to discharge the injunctions granted by Falk J. Judge Cooke discharged the freezing order but continued the proprietary injunctions. She ordered the Defendant to pay the Claimant's costs of the application summarily assessed in the sum of £26,400.

77. Neither the order made by Falk J nor that made by Judge Cooke had the effect of discharging the undertaking. Indeed, in his Fourth Statement dated 12th February 2021, the Defendant expressly confirmed that he had given the undertaking and that, as a result, no relief was required in relation to the rental income from 33 Kashmir Road.

Assessment of the evidence

78. The court faces a number of difficulties in assessing the evidence in this case which evidence comes principally from the two protagonists: the Claimant and the Defendant.

79. Firstly, the Claimant and the Defendant are both trying to remember events which happened up to 20 years ago. Their memories must be, of necessity, much more vague than if they were attempting to recollect events which had happened much more recently.

80. Secondly, it seems clear from what both parties have said that their dealings were marked by a striking degree of informality. Arrangements appear to have been made orally and not in writing despite the fact that properties were being purchased and liabilities incurred for hundreds of thousands of pounds. There was, for example, no document or documents which contained or reflected the arrangement between them. No one suggested that there were any formal building contracts for works to the Properties despite it being agreed that substantial works were carried out to various of the Properties.

81. Thirdly, the documentary evidence which has been produced to the court is incomplete. There are, for example, some bank statements but they are "snapshots" only. I have not seen complete statements for the relevant bank accounts for much of the relevant periods. I have seen some correspondence between the parties, on the one hand, and the various mortgage companies and firms of solicitors, on the other, but I am sure that it is by no means complete. Both parties have produced various documents to the court during the course of the trial. Despite the length of time which has expired between the purchase and sale of various of the Properties, I am by no means convinced that either party has fully disclosed all the relevant documentation which is in their possession.

82. The parties give differing accounts of important aspects of the case. They have each repeatedly accused the other of lying and of being guilty of fraud.

83. Finally, and most importantly, having read the parties' statements and heard each of them give evidence, I have come to the clear view that neither the Claimant nor the Defendant is a witness of truth. I have found that significant parts of the evidence of each are unbelievable and, indeed, untruthful.

84. So far as the Claimant is concerned I note the following:

(i) On her own case, and despite her stated impecuniosity, she did nothing, between her departure for Turkey in early 2007 and early 2019, either to inquire as to what sums were being generated by the Properties or to seek to have any such sums paid to her. This is despite the fact that, on her case, the Properties belonged either wholly or partially to her and the Defendant was managing them on her behalf. I simply do not accept that the Claimant was naïve or gullible enough to accept what she says the Defendant was saying: that there was no income being generated. Her account of events in this regard is incredible.

(ii) I do not accept the Claimant's account of herself more generally as being, effectively, overborne or dominated by the Defendant to such a degree that she had little idea of what rental or capital income was being generated. As stated, she had had a clerical job and can type and use a computer. She admittedly typed various letters to solicitors and mortgage companies as well as preparing tenancy agreements. She co-signed cheques drawn on the joint account. Having mortgaged her main, if not sole, asset, Devonshire Road, and invested the proceeds in various properties I simply do not accept that she was as uninvolved in the day to day running of the rental business as she would have the court believe.

(iii) If all the Defendant had been doing was managing her properties for her, I do not understand the secrecy with which she went about her negotiations with Mr Blackman in 2011. There was no reason why, if the arrangement was as she states, she should not have been more open about who was to manage her own properties.

(iv) I do not accept her account of the payment arrangements with the Defendant. She was asked in the witness box why, if all the Defendant had been doing was managing her properties for her, he would do so for free. Her answer, which had not been contained in any of her witness statements, was that she assumed that the Defendant was deducting a reasonable fee from the rental income but that they had never discussed it. This is not credible. It seems to me that, if the Defendant had genuinely been acting as a managing agent properly so-called, then, even given the informal nature of the arrangements between these parties, there would have been some specific discussion and agreement. The fact that this evidence came out belatedly to my mind speaks volumes. The Claimant had just made it up.

(v) I have already described her account of why, in her handwritten notes dating from 2011, there is constant reference to there being a need to repay a sum of £30,000 to the Defendant as bizarre. In fact I found it to be incoherent and unbelievable. I see no reason why she would feel either legally or morally obliged to repay a sum which the Defendant clearly owed to her simply because of the method by which he had raised the sum four years earlier. I do not accept her account of this.

(vi) A prominent feature of her account of events is that she revoked the powers of attorney in favour of the Defendant in 2010. However, that account is directly contradicted by the terms of her own letter dated 5th September 2015 which

explicitly refers to the Defendant having a Power of Attorney. Her explanation in evidence (that the reference to the Power of Attorney was a mistake made whilst she was "flustered" or somehow felt under pressure from the Defendant) is to my mind not credible. That letter of 5th September 2015 was sent under cover of a letter to the Defendant of the same date written in the most cordial of terms at a time when she was in Turkey and he was in the UK. I do not accept either that she made a mistake or was under any kind of pressure when she wrote referring to a power of attorney. She knew exactly what a power of attorney was (having already granted two of them to the Defendant) and she could not have mistaken it for a lesser form of management or agency.

(vii) Indeed the idea that, having formally revoked any Power of Attorney in 2010, the Claimant would have been content to allow the Defendant to continue to manage her properties thereafter pursuant to some form of unagreed and informal agency arrangement, strikes me as fanciful. The idea that the Defendant would have been content with such an arrangement is, again, highly unlikely.

(viii) Further, I find her account of the alleged sending of the revocation dated 12th October 2010 to be unbelievable. I accept that a document in the form of the one I have seen was prepared and signed on 12th October 2010 by the Claimant in the presence of Mr Wells. However, the other stated witness, Mr Jackson was, as I find, not present when the Claimant signed the document. I also find the Claimant's account of the visit to the Turkish lawyer and his undertaking personally to send the revocation to the Defendant to be unlikely to be true. I do not see why, if the document had been notarised or stamped by the Turkish lawyer (as other documents were), the Claimant would not have retained a notarised copy. I do not see why the Claimant could not have sent the document to the Defendant direct. She did, after all, have his address.

(ix) Her evidence was that she **did** type and sign the letter dated 6th May 2006 to the solicitors Cook Taylor Woodhouse directing them to pay the proceeds of sale of Devonshire Road into the joint account. Yet, she said, she did not receive the letter dated 12th May 2006 from those solicitors addressed to her at the address from which the 6th May letter was sent. I find the latter assertion to be highly unlikely. As the Defendant pointed out, if, as the 6th May 2006 letter asserted, the Defendant would hand the Claimant's passport to the solicitors, it is highly unlikely that she would have been abroad on 12th May 2006. Whilst it is true, as she pointed out, that the Defendant was in fact in possession of the original letter, it seems to me that his account of her having left a four-drawer file full of documents when she emigrated is a credible one.

(x) In the circumstances, I find her assertion that she had little or no knowledge of the sale of Devonshire Road, the price and the sale proceeds to be unbelievable.

(xi) As already described, the Claimant in evidence originally denied knowledge of there being any rent arrears in respect of 38 Highcombe. However, when confronted with the possession order for 38 Highcombe made in respect of mortgage arrears on 10th August 2005 which recited that she had attended court in person, she was forced to concede that she must have been aware that there were rent arrears. It might be said that, after all this time, it is understandable

that the Claimant might have forgotten this. Had this been the only criticism of the Claimant's evidence, then no doubt it would not have served to undermine her credibility. However, it is to my mind part of a pattern of evidence by which the Claimant has attempted to paint a picture of herself as naïve and ignorant of the details of, and day to day dealings with, the Properties. This is not an image which I am prepared to accept.

(xii) The Claimant and her legal advisers, in evidence and submissions, sought to portray the Defendant in his more recent dealings with the Claimant as being guilty of conduct amounting to harassment. As I indicated at the hearing, whilst the Defendant may have written some rude emails to the Claimant which threatened legal proceedings, his conduct came nowhere near to amounting to harassment or bullying. Again, I think that this was an attempt by the Claimant to excuse her lack of activity in relation to the Properties between 2007 and 2019 by portraying herself as the meek stooge to the Defendant's overbearing attitude and behaviour. As indicated, this is not a picture of the Claimant which I am prepared to accept.

85. There were also many troubling aspects of the Defendant's evidence, both generally and relating to specific issues. I start with two general points:

(i) At the end of his evidence, the Defendant was asked whether he had paid any Capital Gains Tax on the sale of 38 Highcombe. Whilst it was clear that the Defendant knew exactly what this was and knew that it ought to have been paid, he stated that he had not even thought about declaring the sale of 38 Highcombe to the Revenue and had paid no tax on the sale. Indeed he stated bluntly and openly that he had never had any accounts prepared in respect of the income which he had received over the years from the Properties (he said that the business had been modestly profitable over those years) and had never paid any tax on that income. The Defendant strikes me as intelligent enough to realise that this is thoroughly dishonest behaviour.

(ii) The Defendant was also asked to produce evidence that he had complied with the undertaking. He produced some documents. However a number of things are clear. Firstly he has not paid any sums into court or into an agreed third party account (as specifically requested by the Claimant's solicitors). He had paid sums into the Barclays Bank joint account. When he was questioned about the letters from the Claimant's solicitors which insisted that the sums were to be paid into court or into an account agreed with them, he could give no coherent explanation as to why he had not complied. The total in the account as at 31st May 2022 was £5240.83. Secondly, he has not paid into any account any sum which represented the total rental income from 33 Kashmir Road less the contractually specified mortgage repayment. Instead he has paid in sums after deduction of what he asserts were various invoices for works which he alleges he has carried out to 33 Kashmir Road. He asserted in evidence that he had spent over £10,000 on boilers, windows, doors, fencing and taps. He produced various invoices which he said evidenced that work, one of which was a hand written invoice from the Second Defendant for "painting and decorating". It was pointed out to him that, in his statement dated 12th February 2021, in order to explain how the sale proceeds of 38 Highcombe had been dissipated, he had stated that he had spent some of these proceeds renovating 33 Kashmir Road and that these

> renovations (which are said to have included windows, fencing, having the boiler serviced and installing new taps) had included the very same renovations for which he now purported to deduct sums from the recent rental income. It seems to me that this is a deliberate blatant, and indeed none-too-subtle attempt to avoid the terms of the undertaking. He has clearly breached it in a number of ways. Not only has he failed to pay any sums into court or into an agreed account and made unauthorised deductions from what should have been paid, but I find that he has also purported to deduct sums which he has not spent on 33 Kashmir Road. I do not accept that the deductions which he purports to have made genuinely represent sums spent on that property.

Now I fully accept that, simply because a witness has been held to be dishonest or lying in one respect (or on one aspect of his evidence), does not mean that a court is obliged or entitled automatically to reject the entirety of the evidence which that witness gives. However, these points do emphasise that, no matter how reasonable or plausible the Defendant came across in his evidence and in his submissions, he was and is a man who is quite capable of gross dishonesty in his dealings with others. More specifically:

(iii) As already stated, in relation to the purchase of 38 Highcombe, the Defendant asserted that he provided money towards the deposit and other acquisition costs. In his witness statement he said that he paid £20,000 to the solicitors on 9th March 2004. Later on in the same statement, he asserts that he paid a total of £27,932 which represented the deposit, stamp duty and solicitors fees. He originally pointed to his bank statements which show a transfer out of that sum on 20th October 2003. In cross examination, although he maintained that he had paid the deposit, he was forced to concede that: the payment on 20th October 2003 could not have related to the purchase of 30 Highcombe which took place 5 months later; the sum payable by way of stamp duty would only have been £1750. It was thus clear, and indeed he admitted it, that the Defendant had simply scoured his bank statements in an attempt to find sums which were paid out at or around the same time as the purchase of various of the Properties and then asserted in evidence that there were sums paid by him in respect of their purchase (whether or not they were in fact so paid). He resorted eventually to asserting that various sums were paid in cash.

(iv) He had to accept that he had, despite requests, deliberately and consciously failed to return the originals of the 2004 PoA and the 2007 PoA between June 2019 and February 2021. The excuse he gave for this failure (that he was attempting to preserve evidence for the case) was not in my view credible particularly as he was legally represented for most of this time. I find instead that he was attempting to prolong his ability to use these documents to deal with the remaining Properties.

(v) In his statement dated 14th December 2021 he asserts that, in addition to the sum of £30,000 admittedly paid to the Claimant (by way of bankers draft drawn by his son) following the sale of Charlton Dene, he had paid her a bankers draft of £20,000. However he had to accept in cross examination that there was no documentary evidence of such a payment having been made by him and indeed that there was no mention of such a payment having been made in his Defence, which is a lengthy document pleaded by counsel. His excuse, that he had forgotten to mention it to his lawyers, is not in my view credible. In the context

of the sums admittedly paid to the Claimant in this case, £20,000 is not inconsiderable and I do not believe that the Defendant would simply forget to mention that he had paid such a sum. In my view the assertion that he had paid the Claimant £20,000 by way of a bankers draft is a lie.

(vi) The Defendant's evidence is that, having sold 38 Highcombe and received the net proceeds of £241,205.54 on 28th January 2019, this sum has been dissipated. In his witness statement of 12th February 2021 he states that he has "spent the proceeds of sale on various matters including paying off debts (some of which were connected to repairs done to 38 Highcombe) and renovating 33 Kashmir Road". When cross-examined about this he added that he had: paid £40-50,000 to his four children; bought cars; given money to a former girlfriend; and spent money on "redoing" 14 Kashmir Road. There are two problems as I see it with this evidence. Firstly, it is vague in the extreme. I would have thought that the Defendant, who strikes me as not unintelligent, would have been able to recall exactly what he had done with such a large sum of money paid over to him comparatively recently. Not only was the evidence as to what had been paid to whom very vague, but there are no documents which he could put forward which would evidence where this large sum went. Secondly, of course, the evidence set out in his witness statement differed from that which he gave in the witness box. In conclusion, I do not accept this evidence. I do not accept that the Defendant has spent or dissipated this large sum in the way he asserts. I am sure that the evidence he gave to the court was a smokescreen to hide the true destination of the funds which, I strongly suspect, have either been reinvested or are sitting in another unidentified account.

86. Thus, and in addition to the other difficulties in this case, the court is faced with two main witnesses whose evidence, in large parts, is untrustworthy.

87. When considering the oral evidence given by the various witnesses at the trial, I remind myself of the well-known words of Leggat J (as he then was) as to the weight to be placed upon documentary evidence and the fallibility of oral evidence: GESTMIN SGPS SA V. CREDIT SUISSE (UK) LTD. [2013] EWHC 3560 (Comm.), at [15-23]. At paragraph 22 he concludes:

> *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.*

88. This is not strictly a "commercial case" and, as I have already noted, there are comparatively few documents. However, given my view as to the veracity (or lack of it) of the evidence given by the Claimant and the Defendant, I am forced to make my findings of fact "on inferences drawn from the documentary evidence and known or probable facts".

Findings of fact

89. I find that, contrary to the Claimant's case, the arrangement between the parties was more than simply the Defendant acting as the Claimant's agent for purchasing and letting out Devonshire Road, 33 Kashmir Road, 38 Highcombe. It seems to me much more likely that there was a more general arrangement in line with that asserted by the Defendant and, in particular, that it was intended that properties bought in the Claimant's sole name were to belong to both or were to be business assets of the joint arrangement.

90. There are number of reasons for this.

91. Firstly, it is agreed that the Claimant, by the payment of £80,000 or £85,000 from the mortgage proceeds of Devonshire Road, effectively "bought into" 14 Kashmir Road and Charlton Dene, which were properties previously owned solely by the Defendant. It would seem to me to be odd if the arrangement was that, whilst the Claimant jointly owned those properties of which the Defendant was the registered proprietor, he was to have no interest in those properties which were in her sole name. The fact that she admittedly purchased a 50% beneficial share in the properties owned by the Defendant in my view supports the Defendant's assertion that this was a form of joint venture or partnership in respect of all the Properties.

92. Secondly, if the Defendant had genuinely been acting solely as the Claimant's agent in respect of Devonshire Road, 33 Kashmir Road and 38 Highcombe, then I would have expected there to have been some arrangement for the payment of fees to the Defendant for this service. The Defendant is not a man who would have worked for nothing. However, by the Claimant's own admission, there was no such arrangement. As I have already indicated, I do not accept her evidence to the effect that she assumed that the Defendant was deducting some sort of reasonable fee. That is not credible. To my mind the lack of any agreement or arrangement for the payment of agency fees to the Defendant supports the Defendant's case that he was more than simply the Claimant's agent in respect of those properties of which the Claimant was the registered proprietor.

93. I also think that the fact that the income from, and the expenses of, the Properties were paid into, and from, a bank account in the joint names of both the Claimant and the Defendant tends to indicate that there was an overarching business arrangement between the parties in respect of all of the Properties. The fact that the Claimant prepared tenancy agreements for the Properties and signed cheques on the joint account also supports this finding.

94. Further, whilst I am by no means sure that I can make any finding as to how much time and money the Defendant might have spent in carrying out refurbishment works on various of the Properties, it is clear in my mind that he did carry out more than minimal work to Devonshire Road, 33 Kashmir Road and 38 Highcombe. I think it unlikely that

he would have done this, or arranged for this to be done, if he did not think that he had an interest in those properties.

95. I find that the Defendant's explanation of the reason why 33 Kashmir Road and 38 Highcombe were purchased in the Claimant's sole name is believable (or at least not incredible).

96. I also think that the fact that the Claimant executed both the 2004 PoA and the 2007 PoA supports the Defendant's case. I find that the Claimant knew or must have known the meaning and effect of these documents. They entail giving the donee much more than a mere agency. As is made clear on the face of both the 2004 PoA and the 2007 PoA, the Defendant was effectively given owner's powers in relation to the Properties.

97. Thus, on this aspect of the case, I prefer and largely accept the evidence of the Defendant.

98. Thus I find that:

(i) The £85,000 paid by the Claimant to the Defendant from the mortgage proceeds of Devonshire Road was intended solely to fund the purchase by her of a share in those properties which were already owned by the Defendant: 14 Kashmir Road and Charlton Dene. I reject the Claimant's evidence that £5000 was for works to Devonshire Road.

(ii) The Defendant did carry out or arrange for the carrying out of substantial works to Devonshire Road. These were, I find, at least substantially paid for by the Defendant himself. I reject the Claimant's evidence to the effect that she provided substantial funds to the Defendant to pay for such work.

(iii) The arrangement between the parties was that the three "original" Properties, Devonshire Road, 14 Kashmir Road and Charlton Dene would be jointly owned beneficially. They would be let out to tenants and any profits after payment of the mortgages and expenses would be split equally between the parties.

(iv) The two properties that were subsequently purchased in the Claimant's sole name, 33 Kashmir Road and 38 Highcombe, were also intended to be jointly owned beneficially and let out to tenants under the same arrangement. Whilst I cannot make any finding about what exactly the Defendant may have contributed financially to the acquisition costs of these properties (and I accept that he has been dishonest in his evidence in this regard) I do find that he did contribute. I reject the Claimant's evidence that only she contributed to those acquisition costs. The Claimant's re-mortgage of Devonshire Road had released over £40,000 to her in September 2003. However (and although there is insufficient evidence for me to make a clear finding) I strongly suspect that this was used by her to either purchase or construct property in Turkey. I also strongly suspect that at least some of the acquisition costs of these two properties came from the rental income generated from the other three.

99. As I have stated, I also reject the Claimant's case that she was as ignorant of the day to day administration of the business as she would have the court believe. Whilst I am prepared to accept that the Defendant took the leading role in purchasing the Properties,

refurbishing them and arranging for them to be let out to tenants, I think it likely, and I so find, that the Claimant was well aware of what was being paid into and out of the joint bank account. She admittedly typed letters to various solicitors and mortgage companies. She prepared tenancy agreements. She signed cheques on the joint account. The picture which the Defendant paints of the Claimant being concerned with some or all of the paperwork of the business is, to my mind, believable. I find that it is more likely than not to be true. It seems to me to be overwhelmingly likely that, having mortgaged her major asset, Devonshire Road, and invested a substantial sum with the Defendant, the Claimant would be concerned not only to monitor how her investment was being managed but also to secure the income that was being generated. The detail about 38 Highcombe and 33 Kashmir Road contained in the handwritten notes from March or April 2011 would also tend to give the lie to any assertion that the Claimant was somehow an inexperienced naïf whose lack of knowledge was exploited by the Defendant. I also think that her initial denial of any knowledge of there being mortgage arrears in respect of 38 Highcombe was part of an attempt by her to paint a false picture of herself as uninvolved.

100. For what it is worth, I accept the Defendant's assertion that the Claimant did keep a file or cache of documents relating to dealings with the Properties which she subsequently left to him on her emigration to Turkey.

101. I also accept the Defendant's case that, in or around late 2006 or early 2007, with the Claimant keen to emigrate to Turkey, the parties agreed to dissolve their business arrangement and part company. I thus accept the Defendant's evidence that the arrangements made prior to the Claimant's permanent departure for Turkey in March 2007 were intended to result in a permanent separation of the parties' joint business assets. There are a number of reasons why I think that this is what is likely to have happened.

102. Firstly, as I have already indicated, I simply do not accept that the Claimant would have left the Properties in the hands of the Defendant as her agent and taken no steps between 2007 and 2019 to secure, or attempt to secure, any income from those properties. Her account is particularly incredible given her own evidence as to her impecuniosity at various points throughout this period. One is driven to ask: if she was as impecunious as she says, why then did she not press the Defendant for some of the income from the remaining Properties? I think that the most likely explanation for this is the fact that, having received substantial capital sums in 2006 and 2007 from the mortgage and sale of various of the Properties, she considered that the remaining Properties belonged beneficially to the Defendant who was entitled to deal with them as he saw fit.

103. The fact that she signed the 2007 PoA and the terms of her letters to the mortgage companies dated 19th March 2007 and 5th September 2015 are also entirely consistent with the fact that she was content over the years for the Defendant to treat the remaining Properties effectively as his own. There is no hint, in the typed letter from her to the Defendant dated 5th September 2015, that the Claimant was in any way concerned about not having received any income from what she now asserts were always her properties or that she wanted to have any information about them.

104. A key piece of evidence to my mind is the handwritten notes made by the Claimant in March or April 2011. I accept that, on the one hand, these notes can be seen as clear evidence that the Claimant was contemplating dealing with both 38 Highcombe and 33

Kashmir Road at that time and, thus, that they belonged to her. However the fact that this was all done without the knowledge of the Defendant would tend to undermine this version of events: had the Defendant genuinely been acting only as the Claimant's agent in dealing with these properties and had she been dissatisfied with how he was handling her property, one would have expected there to have been an open discussion particularly as it appears that the parties were on good terms at this time.

105. However, perhaps the most significant element in the handwritten notes is the constant reference to the need for the Defendant to be repaid £30,000. As I have already explained, I do not accept the explanation given for these references by the Claimant. In my view they are a clear recognition by her that she received a substantial capital sum in 2007. To my mind, when coupled with the reference to the sum being given back, the clear inference is that this sum had been paid out to her in return for her interest in those Properties which remained unsold. It is a recognition that, if she wanted to deal with the two properties in the future she would effectively have to buy them back from the Defendant. This inference is strengthened by the matters discussed in the paragraphs immediately above.

106. Further, the lack of any mention of 14 Kashmir Road in these handwritten notes is also clear evidence that the Claimant did not think at that stage that she had any interest in that property in any event.

107. It is agreed that the Claimant had re-mortgaged Devonshire Road for a further £30,000 in April 2006. I find that she received that sum for herself. Devonshire Road was sold on 10th May 2006 for the price of £250,000. Contrary to the Claimant's evidence, I find that she was well aware of the sale price and of the amount of the net proceeds of sale. Having admittedly typed the letter dated 6th May 2006, I find that it is much more likely than not that she received the letter dated 12th May 2006 informing her of the net sale proceeds on completion. It was addressed to her at the same address as she had given in the letter of 6th May. I find it impossible to accept the Claimant's account that she was misled by the Defendant about the sale price and the (lack of) net proceeds. She had access to the joint account and could very easily have discovered what was or was not paid into it. I accept the Defendant's evidence that it was the Claimant who withdrew the net proceeds from that joint account and transferred them out for her own benefit.

108. Thus, if, as I have found, Devonshire Road was treated effectively as a joint asset of the parties' business, then the Claimant had received £30,000 and £54,013.86 from it, whilst the Defendant had received nothing.

109. It is agreed that Charlton Dene was sold on 2nd February 2007 for £170,000. The unchallenged evidence is that the net proceeds were £29,000. It is also agreed that following the sale, the Claimant received a bankers draft in the sum of £30,000 from the Defendant's son (acting on the Defendant's behalf) which represented the sale proceeds. It is also agreed, and I so find, that, in addition to the sale proceeds from Charlton Dene, it was agreed that the Defendant was to pay the Claimant an additional £15,000.

110. As stated, it is the Claimant's case that she has not been paid any sum over and above the £30,000 and that this sum is still owing. The Defendant asserts that the sum has

been paid by agreed set-off: £8000 by repayment of a loan which the Claimant had taken out; £7000 in writing off arrears owed by the Claimant's children.

111. It seems to me that, in the circumstances, the key piece of evidence here is the handwritten note on the copy of the Claimant's passport sent under cover of the letter from her to the Defendant dated 5th September 2015. This states:

> *Don't forget you still owe me £7000 XXX*

The Claimant denied that this was her handwriting but I find that it is more likely than not that it was her that wrote this. I cannot think who else would have written such a thing on that document which was admittedly sent with the letter from the Claimant to the Defendant dated 5th September 2015.

112. Thus, I find that the agreement made by the parties in late 2006 or early 2007 to dissolve their business arrangement was to this effect:

(i) The Claimant had already received £84,013.86 from Devonshire Road;

(ii) Charlton Dene was to be sold;

(iii) The Claimant was to receive the net proceeds of sale in the sum of £30,000 plus an additional £15,000;

(iv) The Defendant was to "keep" the other three Properties as his. In other words, the parties agreed that thenceforth 14 Kashmir Road, 33 Kashmir Road and 38 Highcombe were to belong beneficially to the Defendant.

113. The Claimant received £30,000 plus another £8000 but did not and has not received the additional £7000.

114. Given the assertion made in the handwritten note as to what was then owed, I do not have to decide whether or not the Claimant took out the loan which the Defendant asserts he repaid. For whatever reason, £8000 of the remaining £15,000 was paid by the Defendant, leaving £7000 unpaid.

115. From 2007 onwards (and until 2019) the parties behaved as if the three remaining properties belonged beneficially to the Defendant.

116. I do not accept that the Claimant revoked either the 2004 PoA or the 2007 PoA in 2010 as she asserts. I accept that she downloaded a draft from of revocation from the web and signed it in front of Mr Wells. However I reject her evidence to the effect that she then took it to a Turkish lawyer who stamped or notarised it and undertook to serve it on the Defendant. I accept the Defendant's evidence that he never received any such notice.

117. There are a number of reasons for this.

118. Firstly, as I have already pointed out, the Claimant's case that she had revoked the powers of attorney in 2010 is directly contrary to the assertion in her letters to the mortgage companies dated 5th September 2015. I do not accept the Claimant's assertion that she made a "a mistake" in drafting those letters. Nor do I accept her explanation

that, having formally terminated the power is attorney in 2010, she had assumed that the Defendant would nevertheless continue to manage her properties as agent. That scenario is to my mind highly unlikely.

119. Secondly, I think that if she had genuinely taken the form of signed revocation to a Turkish lawyer both the lawyer and the Claimant would have ensured that she kept a copy of the document as stamped or notarised. After all, the copy of the confirmation of address sent under cover of the letter to the Defendant dated 5th September 2015 was formally notarised and I see no reason why she should not have been given a copy of the final document.

120. Further, and in any event, as the letter dated 5th September 2015 shows, not only did the Claimant have the Defendant's address, but she also maintained cordial relations with him. I think that, had she genuinely revoked the powers of attorney, then she could and would have sent the formal revocation herself, rather than relying on a Turkish lawyer.

121. Finally, and although the court heard no evidence about the practice of Turkish lawyers, I suspect that, had the Claimant genuinely relied on such a lawyer to serve the revocation, some form of formal acknowledgment or receipt would have been forthcoming. The only document which the Claimant could produce, however, was the signed but un-notarised form.

122. I find that the Defendant did have a conversation with the Claimant in January 2019 in which he told her that he had sold 38 Highcombe.

123. I find that, whilst I cannot make any findings about exactly what he has done with the net proceeds of sale of 38 Highcombe, I am prepared to find that he is likely to have dissipated at least some of the funds by either giving them away or spending it.

124. For what it is worth, I accept the explanation given by the Defendant as to why he agreed to "sell" 14 Kashmir Road to his daughter for £162,000: the interest only mortgage had come to the end of its term; the capital had to be repaid; his daughter could get another mortgage which would pay off the capital; the property could thereby be retained as a family home. I accept that, if one was suspiciously minded (and there is much in the Defendant's conduct about which to be suspicious), one might see this as an attempt to put assets beyond the reach of the Claimant. However it would have been a particularly unsubtle and transparent contrivance and, as stated, solicitors were involved on both sides of the transaction. Thus, to my mind, the Defendant's explanation has the ring of truth about it.

The legal consequences

125. As Mr Brodsky for the Claimant points out, there are two particular legal hurdles which the Defendant has to overcome in this case if he is to defeat the Claimant's claim.

126. The first is the burden of proof. The general principle is that, unless proven otherwise, the beneficial interest in property follows the legal interest. This was discussed by the Privy Council in CHEN V NG [2017] UKPC 27 (at paragraphs 41 to 42) where Lord Neuberger and Lord Mance said this:

> *…in her speech in Stack v Dowden [2007] 2 AC 432 , where the freehold of the property concerned was registered in the joint names of the appellant and the respondent, Lady Hale said at para 56:*
>
> > *"Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."*
>
> *Although Portland and Stack were concerned with real property rather than with shares, the observations quoted from both cases are in point. A major virtue of a register of ownership of assets, whether real or personal, whether corporeal or incorporeal, is that it incontrovertibly identifies the person who is, at least prima facie, the owner of an asset, and, subject to any qualifications on the register, throws the onus onto any third party who claims an interest in or right over the asset. This proposition was well established in the cases relied on in Portland where the third party raised a common law right, and the observations in Stack confirm that the position is the same where the third party's claim is equitable*

See also STACK V DOWDEN [2007] AC 432 (at paragraph 4).

127. Thus, as the Claimant was the registered freehold proprietor of 38 Highcombe and still is the registered freehold proprietor of 33 Kashmir Road, the burden is on the Defendant to show that he has acquired the beneficial interest which he asserts.

128. It seems to me that the same principle applies by analogy in relation to 14 Kashmir Road. Whilst it always has been and still is registered in the sole name of the Defendant, it is agreed that in 2003 the Claimant acquired a 50% beneficial interest in that property as well as Charlton Dene. Thus the burden is on the Defendant to show that the Claimant's admitted beneficial interest has been transferred or relinquished.

129. The second hurdle is that contained in sections 53 and 54 of the Law of Property Act 1925. These provide as follows:

> *53.*
>
> *(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol-*
>
> *(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent*

> *thereunto lawfully authorised in writing, or by will, or by operation of law;*
>
> *(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;*
>
> *(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.*
>
> *(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.*
>
> *54.*
>
> *(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.*

130. On the evidence before the court, there is no written document within section 53(1) on which the Defendant can rely to show either the creation of his alleged beneficial interest in 38 Highcombe or 33 Kashmir Road or the transfer of the Claimant's admitted beneficial interest in 14 Kashmir Road.

131. However, Mr Brodsky, in his closing submissions, accepted (rightly in my view) that, if I was to accept the Defendant's factual case as to the basis on which 33 Kashmir Road and 38 Highcombe were purchased, then I could and should find that the Claimant held the legal interest in those properties on trust for herself and the Defendant jointly. In PARAGON FINANCE V THAKERAR [1999] 1 All ER 400 (at 408-9) Millett LJ said this:

> *Regrettably, however, the expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.*
>
> *A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive*

> *the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are McCormick v Grogan (1869) 4 App.Cas. 82 (a case of a secret trust) and Rochefoucald v Boustead [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). Pallant v Morgan [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.*

This case is an example of Millett LJ's "first class of case". There is nothing in principle which prevents the application of the common intention constructive trust in a quasi-commercial (as opposed to a domestic) situation such as this-see KAHRMANN V HARRISON-MORGAN [2019] EWCA Civ 2094 (at paragraphs 98 to 100).

132. The intended effect of the oral agreement that, as a matter of fact, I have held was made by the Claimant and the Defendant in late 2006 or early 2007 is this. The Claimant had already received the £30,000 raised as a mortgage loan on Devonshire Road and, in return for the net proceeds of sale of both that property and Charlton Dene plus £15,000, she would (in effect): relinquish her beneficial interest in 14 Kashmir Road; hold the legal title to 33 Kashmir Road and 38 Highcombe on trust for the Defendant who would be solely entitled to the beneficial interest in those properties. In addition to the £30,000 raised on Devonshire Road, I have held that she received: the net proceeds of sale of Devonshire Road in the sum of £54,013.83; £30,000 representing the net proceeds of sale of Charlton Dene; an additional £8000 out of the remaining £15,000.

133. Further, thereafter, having emigrated to Turkey, she allowed the Defendant to deal with the remaining Properties as his own until 2019. He: organised the lettings; arranged for the upkeep of, and any repairs to, the Properties; paid the mortgage payments; received the rental income. She allowed the Defendant to retain both the 2004 PoA and the 2007 PoA and did not seek to revoke them until March 2019 by which time the Defendant had used one or both of them to sell 38 Highcombe and apply the proceeds elsewhere.

134. It may well be that the effect of the oral agreement in 2006 or 2007 is that the Claimant was to hold any interest which she had in the three remaining Properties on constructive trust for the Defendant. I was not addressed by either party on this but it seems to me that it is at least a possible outcome. If that is right then such an arrangement would not fall foul of either section 53(1) of the LPA 1925 or, for that matter, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see sections 53(2) and 2(5) respectively).

135. However, even if section 53(1) of the 1925 Act or section 2 of the 1989 Act were otherwise to apply, it seems to me that the Defendant is entitled to rely on the doctrine of proprietary estoppel.

136. In THORNER V MAJOR [2009] 1 WLR 776 (at paragraph 15) Lord Scott summarised:

> *…the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third, some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity.*

In the same case Lord Walker (at paragraph 29) said that:

> *…most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance*.

In FISHER V BROOKER [2009] 1 WLR 1764, Lord Neuberger said this (at paragraph 63):

> *…in so far as the respondents' argument is put on the basis of estoppel, they would have to establish that it would be in some way unconscionable for Mr Fisher now to insist on his share of the musical copyright in the work being recognised. As Robert Walker LJ said in Gillett v Holt [2001] Ch 210 , 225 d , "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine" of estoppel. Given that their case at each of the three stages is based on the fact that Mr Fisher did not raise his entitlement to such a share, one would expect the respondents to succeed in estoppel only if they could show that they reasonably relied on his having no such claim, that they acted on that reliance, and that it would be unfairly to their detriment if he was now permitted to raise or to enforce such a claim. As was also said in Gillett v Holt [2001] Ch 210 , 232 d , the "overwhelming weight of authority shows that detriment is required" although the "requirement must be approached as part of a broad inquiry" into unconscionability.*

See also DAVIES V DAVIES [2016] 2 P&CR 10 (at paragraph 38).

137. All three of the elements recognised in BROOKER case are, to my mind, clearly present here. By the terms of the 2006 or 2007 oral agreement (what the Defendant calls the "dissolution agreement") the Claimant clearly agreed, and represented, that the Defendant was to be the sole beneficial owner of 14 Kashmir Road, 33 Kashmir Road and 38 Highcombe. Acting in (perfectly reasonable) reliance on that agreement and representation, the Defendant: allowed the Claimant to retain the £30,000 released by the mortgage on Devonshire Road; allowed her to have the net sale proceeds of that property in the sum of £54,013.86; gave her £30,000 representing the net proceeds of sale of Charlton Dene; gave her £8000 out of the further £15,000 which he had agreed to pay here; (as already discussed) treated those properties as if they were his own between 2007 and 2019; sold 38 Highcombe in January 2019 and utilised at least some of the net proceeds elsewhere. These matters represent substantial detriment to the Defendant in consequence of his reliance on the agreed terms.

138. Put another way, it would in my view be unconscionable in all the circumstances for the Claimant now to be permitted to go back or renege on the terms which she agreed in 2006 or 2007 as a result of which terms she has received substantial sums and on which terms both she and the Defendant acted between 2007 and 2019. She is estopped from: denying that she holds 33 Kashmir Road on trust for the Defendant beneficially; denying that she held 38 Highcombe on trust for the Defendant at the date it was sold; asserting that she has any beneficial interest in 14 Kashmir Road.

139. It is true that there has been some debate in the authorities as to whether estoppel can be relied on to circumvent the requirements of, particularly, section 2 of the 1989 Act. This point was not discussed in submissions to me by either party. However I think it is right that I consider it.

140. That being said, I do not think that there is any caselaw which would prevent the Defendant from relying on proprietary estoppel in this case.

141. In ROCHEFOUCAULD V BOUSTEAD [1897] 1 Ch 196 (at 206) referring to a predecessor to section 53 of the 1925 Act, Lindley LJ said this:

> *…notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.*

142. In relation to section 2 of the 1989 Act, in YAXLEY V GOTTS [2000] Ch 162 Beldam LJ said this (at pages 191 and 193) in relation to the ambit of section 2(5):

> *The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of section 2(5) – "nothing in this section affects the creation or operation*

> *of resulting, implied or constructive trusts" – are not to be read as if they merely qualified the terms of section 2(1) . The effect of section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them….*
>
> *For my part I cannot see that there is any reason to qualify the plain words of section 2(5) . They were included to preserve the equitable remedies to which the commission had referred. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or equitable fraud should be allowed to prevail.*
>
> *In my view the provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.*

In the same vein, Robert Walker LJ said this (at page 180):

> *I cannot accept that the saving should be construed and applied as narrowly as [counsel] contends. To give it what I take to be its natural meaning, comparable to that of section 53(2) of the Law of Property Act 1925 in relation to section 53(1) , would not create a huge and unexpected gap in section 2 . It would allow a limited exception, expressly contemplated by Parliament, for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances of the matter are such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him no more than a restitutionary remedy. To give the saving a narrow construction would not to my mind be a natural reading of its language.*

(emphasis added)

Thus in that case the Court of Appeal held that a party could rely on proprietary estoppel to escape the provisions of section 2 of the 1989 Act.

143. Now it is true that doubt has been cast on the correctness of that case as a result of certain obiter comments made by Lord Scott and Lord Walker in the case of COBBE V YEOMANS ROW [2008] 1 WLR 1752 (see paragraph 29). However there is now a clear line of subsequent cases at Court of Appeal level which have held that proprietary

estoppel can apply in certain circumstances to prevent a party from relying on the strict terms of section 2 of the 1989 Act.

144. In HERBERT V DOYLE [2010] EWCA Civ 1095 Arden LJ considered the meaning and effect of what Lords Scott and Walker said about section 2 and the doctrines of estoppel and constructive trust. She said this (at paragraphs 56 and 57):

> *The distinction between proprietary estoppel and constructive trust must therefore be kept in mind, but it appears from Cobbe that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature. In my judgment, the transaction in the present case should be treated as commercial in nature since the parties were dealing at arm's length, and they had ready access to the services of lawyers had they wished to use them.*
>
> *In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.*

145. There are two points to note here.

146. Firstly, this is not a case in which the Claimant and the Defendant intended to make a formal agreement setting out the terms on which the Defendant was to acquire an interest in the properties; no further terms for that acquisition remained to be agreed; the Claimant and the Defendant expected their agreement to be immediately binding. Thus, this case on its facts falls outside the scope of what Lords Scott and Walker said in the COBBE case.

147. Secondly, in this context, the necessary requirements of a constructive trust are very similar, if not identical, to those of proprietary estoppel - see HERBERT (at paragraphs 41, 56 and 64); DOWDING V MATCHMOVE [2016] EWCA Civ 1233 (at paragraph 29) and GHAZAANI V ROWSHAN [2015] EWHC 1922 (Ch) (at paragraph 187). Thus there is no reason in principle why the exception in section 2(5) of the 1989 Act (and therefore in this context by extension section 53(2)) cannot apply.

148. The passage quoted from HERBERT V DOYLE has been subsequently endorsed by the Court of Appeal in GENERATOR DEVELOPMENTS V LIDL [2018] EWCA Civ 396 and KAHRMANN V HARRISON-MORGAN [2019] EWCA Civ 2094.

149. In FARRER V MILLER [2018] EWCA Civ 172, a party took the point that an amendment to a pleading should not have been allowed to permit reliance on proprietary estoppel because "a proprietary estoppel can never avoid the need to comply with s.2(1) of the 1989 Act". Reference was made to COBBE and YAXLEY V GOTTS. Kitchen LJ said this (at paragraphs 56-63):

> *56. These are powerful submissions but I am not persuaded that they are necessarily correct. In my judgment this ground of appeal raises a difficult question which may depend upon the facts and which is better determined at trial in light of the evidence and full argument. In these circumstances it is neither necessary nor appropriate to attempt a full exposition of all of the relevant authorities, textbooks and academic commentaries. I will, however, explain, as briefly as I can, the reasons for the conclusion to which I have come.*
>
> *57. There are in my view strong arguments for saying that s.2 of the 1989 Act is concerned only with the requirements of a valid contract for the sale or other disposition of an interest in land. Section 2(1) says:*
>
> > *"[a] contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all of the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."*
>
> *58. As [counsel] submits, these words, on their face, refer only to the circumstances in which arrangements between the parties over the sale or disposition of land will give rise to a valid contract. They say nothing to prevent those arrangements giving rise to another cause of action. I recognise that s.2(5) says that the general rule does not affect the creation or operation of resulting, implied or constructive trusts and that no mention is made of proprietary estoppel, but the fact remains that s.2(1) is, on its wording, concerned only with contracts.*
>
> *59. Does a free standing action based upon proprietary estoppel nevertheless frustrate the policy behind s.2 ? A number of matters point to the conclusion it does not. First, as Beldam LJ explained in Yaxley [2000] Ch 162 at 188 to 191, the 1989 Act was intended to implement three reports of the Law Commission, including, of particular importance to this appeal, Report No. 164, "Transfer of Land: Formalities for Contracts for Sale etc of Land", 29 June 1987. This makes it clear at, especially, 4.13-4.15 and 5.1-5.5, that the policy behind s.2 was to increase certainty in contracts and to exclude the uncertainty and complexities in unregistered conveyancing caused by the doctrine of part performance. The Law Commission did not intend to exclude the application in appropriate cases of equitable remedies, including proprietary estoppel.*

60. Secondly, it cannot be contended that s.2 has any application to certain non-proprietary remedies despite the fact that no mention of them is made in s.2(5). In Cobbe , Lord Scott had no difficulty with the notion that Mr Cobbe was at least in principle entitled to pursue claims for unjust enrichment, a quantum meruit and a restitutionary remedy based upon a total failure of consideration.

61. Thirdly, it has never been suggested that it is necessary for there to have been an agreement for a proprietary estoppel to arise. For example, it may arise where there has never been any agreement of any kind between the parties but where one party, the owner of the land, has stood by and allowed the other party to act to his detriment knowing that he mistakenly believes that he has or will obtain an interest in or right over the land. It has not been contended that s.2 of the 1989 Act would preclude a finding of proprietary estoppel in such a case.

62. Fourthly, and while an argument might be developed, based on the foregoing point, that s.2 would only preclude a finding of proprietary estoppel in a case where there was some sort of contractual connection, for example where the agreement was complete but for the necessary formalities, it is hard to see how such an argument could be justified, despite Lord Neuberger's observations in Thorner at [99]. As Lord Neuberger later pointed out extra-judicially in "The stuffing of Minerva's owl? Taxonomy and taxidermy in equity" CLJ, 2009, 68(3), 537-549, it would mean that the more clear and the more precise the defendant's indication or promise, and therefore the stronger the claimant's case in principle, the more likely it would be that s.2 would defeat a proprietary estoppel claim.

63. Finally, if and in so far as it may become necessary to consider in any case whether the claim would or would not frustrate the policy of the 1989 Act, it seems to me that Mr Farrar has a real prospect of establishing that his claim falls into the latter category for, although the agreement was never reduced to writing, it was an agreement which, at least in its essential respects, was complete and which Mr Farrar believed would be honoured. The facts of this case, as alleged by Mr Farrar, are far removed from those of Cobbe where the terms of the agreement had not been finalised and the agreement itself was not intended to be legally binding. It seems to me therefore that a judge at trial might well conclude both that the parties did reach an agreement, at least in principle, and that Mr Farrar had a reasonable expectation that the agreement would be honoured and that he would have a right in relation to Long Stratton and, following its sale, in the proceeds of that sale. Put another way, there is in my view a real prospect that the trial judge will conclude that Mr Miller represented and Mr Farrar reasonably assumed that Mr Miller would ensure that Mr Farrar would secure an interest in Long Stratton through the joint venture and that, despite their failure to satisfy the formality

> *rules, it would be unconscionable for Mr Miller to contend otherwise.*

150. In HOWE V GOSSOP [2021] EWHC 637 (Ch) Snowden J dealt with a claim for possession of land by the Claimant the defence to which was proprietary estoppel by reason of a previous oral agreement between the Claimant and the Defendants for the former to sell the land to the latter. It was said that the Defendants were entitled to an irrevocable licence to occupy the land. The defence succeeded. Snowden J considered the authorities and academic writings on the whether or not proprietary estoppel could be relied on in relation to section 2 of the 1989 Act. He quoted from Snell's Equity as follows (at paragraph 45):

> *[Section 2] provides that contracts for the sale or other disposition of an interest in land must satisfy certain formal requirements, although s.2(5) contains an express saving for constructive trusts. There has been some uncertainty as to the impact of this section on promise-based proprietary estoppel claims. Two principal views are possible. First, it could be said that [Section 2] imposes a prima facie bar on such claims, and therefore they can be made, if at all, only by means of a constructive trust. Secondly, it could be said that no proprietary estoppel claim is caught by [Section 2], as the section regulates the requirements of a contract for the sale or other disposition of an interest in land, and a proprietary estoppel claim, even if promise-based, is distinct from a contractual claim. The better view, it is submitted, is the latter.*

In short, the Judge accepted the second ("better") view. He said this (at paragraph 48):

> *Section 2 is aimed at problems in the formation of contracts for sale of land, whereas the purpose of an estoppel is to remedy unconscionability in the assertion of strict legal rights. Accordingly, there is considerable doubt that Section 2 is intended to affect the operation of proprietary estoppel at all, but even if it did, Section 2 could only operate as a bar to the grant of equitable relief if and to the extent that such relief had the effect of enforcing, or otherwise giving effect to, the terms of a contract for the sale or other disposition of an interest in land that the statute renders invalid and unenforceable.*

He then concluded (at paragraph 64):

> *Pulling those threads together, I consider, first, that the passage upon which [counsel] relied in paragraph 15-020 of Megarry & Wade is directed (as were the judgments in Cobbe and Herbert v Doyle) at a case in which the claimant is seeking to use estoppel to obtain an order enforcing a contract for sale of an interest in land that does not comply with Section 2 . I do not consider that it is intended to undermine the broader point to which I have referred, namely that Section 2 does not inhibit the grant of equitable relief on the basis of a proprietary estoppel*

> *provided that such relief does not amount to enforcing a non-compliant contract*

151. Standing back, I would make two points in this regard.

152. Firstly, I do not think that the authorities described above dealing with the interplay between section 2 of the 1989 Act and the doctrine of proprietary estoppel have any relevance to a case such as the present which involves not section 2 but rather section 53 of the LPA 1925. None of the more recent authorities cited above cast doubt on the statement of Lindley LJ in ROCHEFOUCAULD V BOUSTEAD. The oral agreement made between the parties in late 2006 or early 2007 here was not a contract for the sale or other disposition of an interest in land but was rather a declaration or creation of a trust or the immediate disposition of an existing equitable interest. Thus section 2 of the 1989 Act, and the authorities relevant to it, had no application.

153. Secondly, even if those authorities were of application by analogy or directly and even if section 2 is intended to affect the operation of proprietary estoppel, I think that this is one of those cases, as described in HERBERT V DOYLE, which falls outside the scope of the restriction identified by Lords Scott and Walker in the COBBE case.

154. It is worthwhile in this context citing two further passages from the speeches on THORNER V MAJOR. At paragraph 20 Lord Scott said this:

> *These reflections invite some thought about the relationship between proprietary estoppel and constructive trust and their respective roles in providing remedies where representations about future property interests have been made and relied on. There are many cases in which the representations relied on relate to the acquisition by the representee of an immediate, or more or less immediate, interest in the property in question. In these cases a proprietary estoppel is the obvious remedy. The representor is estopped from denying that the representee has the proprietary interest that was promised by the representation in question… There are many other examples of decided cases where representations acted on by the representee have led to the representor being estopped from denying that the representee had the proprietary interest in the representor's land that the representation had suggested. Constructive trust, in my opinion, has nothing to offer to cases of this sort.*

At paragraph 99 Lord Neuberger said this:

> *The notion that much of the reasoning in Cobbe's case [2008] 1 WLR 1752 was directed to the unusual facts of that case is supported by the discussion, at para 29, relating to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 . Section 2 may have presented Mr Cobbe with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature (see the passage quoted at the end of para 96 above), and section 2 lays down formalities which are required for a valid "agreement" relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a*

> *straightforward estoppel claim without any contractual connection. It was no doubt for that reason that the defendants, rightly in my view, eschewed any argument based on section 2 .*

155. This to my mind is a "straightforward estoppel claim" to which section 2 has no application.

156. However, as Robert Walker LJ stated in GILLETT V HOLT [2001] Ch 210 (at 235) a claim or defence based on proprietary estoppel having been established:

> *...this court must decide what is the most appropriate form for the relief to take. The aim is, as Sir Arthur Hobhouse said in Plimmer v Wellington Corporation (1884) 9 AppCas 699, 714 , to "look at the circumstances in each case to decide in what way the equity can be satisfied". The court approaches this task in a cautious way, in order to achieve what Scarman LJ, in Crabb v Arun District Council [1976] Ch 179, 198 , called "the minimum equity to do justice to the plaintiff". The wide range of possible relief appears from Snell's Equity, 30th ed (2000) , pp 641-643*

157. As Lewison LJ noted in HABBERFIELD V HABBERFIELD [2019] EWCA Civ 890 (at paragraph 25):

> *The exercise performed by a trial judge in deciding how an equity should be satisfied has been authoritatively described as "a wide judgmental discretion": Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P & CR 8 at [51].*

He continued (at paragraphs 61 and 62):

> *To some extent, this part of the appeal raises the unsolved question: what is the objective that the court pursues in deciding how to satisfy an equity of this kind? I discussed this question in Davies v Davies [2016] EWCA Civ 463, [2017] 1 FLR 1286 . It is not necessary to repeat that discussion. In the course of that discussion I referred to Jennings in which Robert Walker LJ referred to a class of case in which the assurances and reliance had a consensual character not far short of a contract. In such a case "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity." He added:*
>
> > *"In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate."*

> *Accordingly, in that kind of case, subject to countervailing considerations, the court is likely to vindicate the claimant's expectations. I added at [40]:*
>
> > *"Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain."*

158. In relation to the form of relief, in GUEST V GUEST [2020] 1 WLR 3480, Floyd LJ said this:

> *The courts have preferred to identify its aim or task as the fashioning of a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result*
>
> (at paragraph 48)
> And:
>
> *One could instead have asked a single question: what is necessary to avoid an unconscionable result?*
>
> (at paragraph 72).

159. In my view this is a "not far short of contract" case. Thus the expectation of the Defendant should be met. He should be entitled to the full beneficial interest in the three properties which remained after 2007 and to the entirety of the rental income from them. However, as I have held, part of the bargain was that the Defendant was to pay the sums agreed. As I have also held, he has not paid £7000 which he owed pursuant to the oral agreement. Whilst of course any contractual claim for the £7000 would be statute barred, it would not be equitable or conscionable for the Defendant to obtain the fruits of the bargain he made with the Claimant in 2006 or 2007 without also paying all of what he agreed to pay.

160. Thus it seems to me that, in order to rely on the equitable doctrine of proprietary estoppel which he seeks to do, the Defendant must pay to the Claimant the £7000 which I have found that he still owes to her. I think that he should also pay interest on that sum at an appropriate rate.

Conclusion

161. Save for ordering the Defendant to pay her £7000 plus interest at a rate to be determined and for a period to be determined, I dismiss the Claimant's claims.

162. I will hear the parties on: the rate and period of interest which the Defendant should pay on the £7000; the relief to be ordered on the Counterclaim; the form of order otherwise; the issue of costs.