Neutral Citation Number: [2024] EWHC 2179 (Ch)

Appeal Reference: CH-2023-000260

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

On appeal from the order of Insolvency and Companies Court Judge Jones made on 13th July 2023 (amended under the slip rule on 19th July 2023) – Case No: BR-2018-001452

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

20th August 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

(1) NIGEL FOX

(2) DAVID BRIDGE

(in their capacity as joint trustees in bankruptcy of Marcus Nathan Bent)

Appellants

and

(1) MARCUS NATHAN BENT
(2) KELLY MARIE CLARK
(3) PERSONS UNKNOWN
(4) ALIYAH MAY BENT

Respondents

- -
- -

Michael Horton KC and Greg Williams (instructed by RSW Law) for the Appellants
The First and Second Respondents appeared in person
The Fourth Respondent did not appear

Hearing dates: 24th and 25th June 2024

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Tuesday, 20th August 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on an appeal against an order of Insolvency and Companies Court Judge Jones (**"the Judge"**) made on 13th July 2023 (amended under the slip rule on 19th July 2023).

2. By this order (**"the Order"**) the Judge declared that a property in Surrey (**"the Property"**) was held by the First Respondent, Marcus Bent, on trust for his daughter, Aliyah Bent, who is the Fourth Respondent. Mr Bent was made bankrupt on 2nd January 2019. The Appellants are his trustees in bankruptcy. The consequence of the Order is that the Property does not form part of Mr Bent's estate in bankruptcy, with the further consequence that the Appellants' claim for possession of the Property and an order for its sale for the benefit of the bankrupt estate fell to be dismissed.

3. The Judge made the Order pursuant to his judgment, on the Appellants' claim, dated 23rd June 2023. For the reasons set out in this judgment (**"the Judgment"**) the Judge decided that Mr Bent, who purchased the Property in 2006, held the Property on constructive trust for his daughter.

4. The Judge refused permission to appeal. By an order made on 19th February 2024 Adam Johnson J granted the Appellants permission to appeal on two of their three grounds of appeal, but refused permission to appeal on the remaining ground of appeal. So far as the remaining ground of appeal is concerned, the Appellants applied to renew their application for permission to appeal at an oral hearing. In response to this application the court directed that the renewed application should be heard at the same time as the two grounds of appeal for which permission had been granted.

5. On the basis of their grounds of appeal, including the ground of appeal for which permission to appeal has not yet been granted, the Appellants say that the Order should be set aside and an order made for possession and sale of the Property for the benefit of the bankrupt estate. At the hearing of the appeal the Appellants also sought to add a further ground of appeal, by way of amendment of their grounds of appeal

6. On the hearing of the appeal, including the renewed application for permission to appeal and the application to add an additional ground of appeal, the Appellants have been represented by Michael Horton KC and Greg Williams, counsel. The First and Second Respondents appeared in person. The Fourth Respondent did not appear. With my permission, and in the absence of objection from the Appellants, I received the submissions of the First and Second Respondents as submissions in their behalf and on behalf of the Fourth Respondent.

7. The First and Second Respondents each confined their submissions to relatively brief statements. Given their unrepresented status, and it will be understood that this is in no way a criticism, the assistance that the First and Second Respondents were able to give me with the issues which I have to decide was necessarily limited. Both Respondents spoke with dignity and clarity. On the Appellants' side I am grateful to Mr Horton and Mr Williams for the clear and helpful assistance which they provided by their written and oral submissions. In particular, and in the light of the fact that the Respondents were unrepresented, I should record that the Appellants' counsel took pains to be fair to both sides in their submissions, drawing my attention to points which might be put against the Appellants' case and dealing fairly with those points. In accordance with the practice which is encouraged in the Business and Property Courts, which I commend, Mr Horton and Mr Williams shared the oral advocacy. Mr Williams dealt with the oral submissions in support of one of the grounds of appeal.

The parties

8. The Appellants, as I have said, are the trustees in bankruptcy of Marcus Bent.

9. Marcus Bent is a former professional footballer. His professional career ran from 1995 to 2012. He was made bankrupt on 2nd January 2019, on the petition of HMRC. His debts are said to have been substantial, and are said to have amounted to a figure in excess of £2.2 million, as at 31st December 2021. The only significant asset which was understood to form part of Mr Bent's bankrupt estate (**"the Estate"**) was the Property. Whether this understanding was correct is, of course, the issue in these proceedings.

10. The Second Respondent, Ms Kelly Clark, is the former partner of Mr Bent and the mother of Aliyah Bent. Ms Clark and Mr Bent were in a relationship from 1995 until 2006. Ms Clark lives in the Property with her daughter and her younger child from a subsequent relationship.

11. Aliyah Bent, the Fourth Respondent, was born in 2004. Ms Bent was therefore a minor when the Property was purchased, and only attained her majority in the course of these proceedings.

12. The Third Respondents are described as persons unknown. My understanding is that this simply reflects the fact that it was unclear to the Appellants, when the proceedings were commenced, whether there were other persons living in the Property together with Ms Clark and Ms Bent. As matters have turned out, there are no additional occupants apart from Ms Clark's younger child.

13. It is convenient to continue to refer to Mr Bent's trustees in bankruptcy as the Appellants. For ease of reference I will refer to the First, Second and Fourth Respondents as, respectively, Mr Bent, Ms Clark and Ms Bent. The Appellants will understand that I intend no discourtesy to them in not using their names. The collective title simply reflects their capacity as trustees in bankruptcy of Mr Bent.

14. Given that there are no Third Respondents, my references to **"the Respondents"** in this judgment mean the First, Second and Fourth Respondents.

The conventions of this judgment

15. All references to Paragraphs in this judgment are, unless otherwise indicated, references to the paragraphs of the Judgment. Italics have been added to quotations.

16. I will refer to the appeal on the two grounds for which permission to appeal has been granted as **"the Appeal"**. I will refer to the renewed application for permission to appeal on the remaining ground of appeal as **"the Permission Application"**. I will refer to the application to amend the grounds of appeal by adding a new ground of appeal as **"the Amendment Application"**.

Summary of the background

17. I can summarise the background to the Appeal, and to the Permission Application and the Amendment Application very briefly.

18. Title to the Property is registered. The registered proprietor of the Property, specifically the freehold interest in the Property, is Mr Bent and has been since 2006. Mr Bent completed the purchase of the Property on 30th June 2006, and was registered as proprietor of the Property on 29th August 2006. The price paid for the Property on 30th June 2006 is recorded on the registered title as £275,000.

19. The Property was purchased with the assistance of a mortgage. The cash contribution to the purchase price was paid by Mr Bent alone. Mr Bent paid the mortgage repayments until the mortgage was redeemed in 2013.

20. The Property was purchased at the time when Mr Bent and Ms Clark were separating, following the break-up of their relationship. Their child, Ms Bent, was two years old. The Property was occupied by Ms Clark and Ms Bent. Mr Bent himself did not occupy the Property.

21. The Judge found that Mr Bent and Ms Clark agreed that the Property was to be purchased in order to ensure that Ms Bent would have a home. They agreed that Mr Bent would purchase the Property and hold it upon bare trust for Ms Bent. I will come back to the findings made by the Judge in this context in more detail in the next section of this judgment. For present purposes, it is sufficient to say that the Judge decided, on the evidence, that Mr Bent purchased the Property on constructive trust for his daughter.

22. Subsequently Mr Bent was made bankrupt and the then trustees of bankruptcy of Mr Bent (there have been changes of trustee) commenced the current proceedings seeking possession and an order for sale of the Property.

23. The proceedings came to trial before the Judge on 19th June 2023, which was a pre-reading day. The trial (**"the Trial"**) commenced in court on 20th June 2023, when the evidence was heard. Closing submissions were made on 21st June 2023. The Judgment was delivered on 23rd June 2023. Although the Judgment was delivered in court rather than being handed down, it is apparent, from the length and detail of the Judgment, that it was the subject of careful preparation. Pursuant to a previous case management order, and given the absence of any personal knowledge of what had occurred prior to their appointment, the two trustees in bankruptcy who had made witness statements in support of the Appellants' case were not required to attend the trial for cross examination. Each of Mr Bent, Ms Clark and Ms Bent made a witness statement, on

which each was cross examined by Mr Williams, who appeared for the Appellants at the Trial.

The Judgment

24. The Judge commenced, at Paragraphs 1-17, by setting out the rival cases of the parties and the issues which he had to decide.

25. The Judge identified the Appellants' case at Paragraph 4:

> *"4. The Trustees' case is straightforward: Mr Bent was made bankrupt on 2 January 2018. The estimated amount owed is in excess of £2.2 million. The main asset of his bankruptcy estate is the property in issue. It is registered at H.M. Land Registry in Mr Bent's sole name and from that the trustee relies upon the presumption of legal and beneficial ownership previously vesting in Mr Bent and, therefore, now belonging to the bankruptcy estate. As to sale, it is the Trustees' case that the interests of the creditors should prevail and there are no exceptional circumstances for the purposes of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") as amended by the Insolvency Act 1986 ("IA"). An online estimate of the property's value in October 2021 was £475,000, it having been purchased on 30 June 2006 for £275,000."*

26. The Judge identified the Respondents' case at Paragraph 6:

> *"6. Ms Bent's opposition is straight forward in fact but less straight forward in law. She relies upon an agreement or understanding between her father and mother in 2006 when they separated as partners, common law husband and wife, that the property would be bought by Mr Bent and held on trust for their daughter so that it would become her property absolutely when (in summary) she reached 18. As her mother put it when explaining the agreement during opening (as her evidence is summarised by me): The contract was that he would buy the house, her daughter and she would live in it. She would maintain it and look after her daughter as the primary responsible parent. He would pay the mortgage and their daughter would be the owner subject to it being held in trust for her by her father until she was 18."*

27. As the Judge noted, at Paragraph 7, this was not a straightforward case in law:

> *"7. This is less straight forward in law because there is no executed declaration of trust. That means the starting point, fixed in law when determining beneficial interests, is that because this domestic property was transferred into and registered in the sole name of Mr Bent there is a presumption that he has sole ownership. That being so the title will have vested in the Trustees under section 306 IA. Ms Bent must rebut the presumption. The burden of proving the existence of a trust lies upon her."*

28. The Judge identified, at Paragraphs 8-11, what it was that Ms Bent had to establish:

> *"8. That leads to the next fixed hurdle: Section 53(1)(b) of the Law of Property Act 1925 ("LPA") requires an express declaration of trust (i.e. when the settlor simply declares themself to be a trustee of the identified property belonging to them) to be "manifested and proved by some writing signed [by the settlor]". This applies not only to the fact of the trust but also to its*

terms, although a document clearly connected to the signed paper may suffice to establish them. It is accepted that this requirement is not met.

9. *However, section 53(2) LPA provides that this requirement does not affect the creation or operation of resulting, implied or constructive trusts. Therefore, to rebut the presumption the question arising within this domestic context Ms Bent must prove that a constructive trust was created.*
10. *That requires it to be proved by Ms Bent on the balance of probability that her father, whether on or after the purchase of the property (as appropriate – there is no reason why a new agreement or arrangement or understanding could not be reached later if the evidence so provides), conducted himself in a manner that would make it inequitable for him to deny that it was held on a bare trust for her.*
11. *For that purpose, there needs to have been some appropriate form of express or otherwise implied/inferred bargain, promise or common intention (i.e. agreement, arrangement or understanding) that his daughter should have the beneficial interest. This is a case relying upon an express agreement between Mr Bent and Ms Clark acting on behalf of Ms Bent. Its circumstance being the settlement of her rights to financial provision from Mr Bent to the limited extent of the provision of housing. There also needs to be detriment or a significant alteration of position in reliance upon the agreement to give rise to a constructive trust."*

29. At Paragraph 18 the Judge turned to the evidence which he had read and heard. The Judge considered and weighed the evidence, and the arguments of the parties at considerable length, in Paragraphs 18-86.

30. At Paragraphs 87-92 the Judge set out his findings and conclusions on the question of whether there had been an agreement or understanding reached between Mr Bent and Ms Clark, at the time when the Property was purchased in 2006, that Ms Bent should have the beneficial interest in the Property. For ease of reference I set out the findings and conclusions of the Judge in full:

"87. As a result, in reaching my decision I am particularly influenced by the contemporaneous evidence. This in my judgment corroborates the evidence of an express agreement through discussion between Mr Bent and Ms Clark who, at the time, was protecting the rights of her daughter to financial provision.

88. The agreement was that the property was bought for Ms Bent by Mr Bent and held on a bare trust for her until she was entitled to call for the legal title once she was eighteen. It is academic to consider whether the intention also included provision for the later of the date she left education as detailed within the draft deed. True that might reflect uncertainty as relied upon by Mr Williams but the uncertainty does not affect the fundamental clarity of the agreement I have identified and found on the balance of probability existed.

89. In reaching that conclusion I have considered with great care the 13 March 2007 Court Order and the later inconsistencies drawn to the Court's attention within the submissions of Mr Williams. However, I am satisfied in the additional context of my overall assessment of the evidence of Ms Clark and Mr Bent that the intention to create the trust has been established on the balance of probabilities. The pan containing the evidence against Ms

Bent's case has insufficient weight bearing in mind in particular the points made qualifying them when they were referred to above and the weight of the evidence in the opposite pan including the contemporaneous documents and the overall view of credibility.

90. Looking at the pan holding the evidence in support of Ms Bent's case: That conclusion is supported by the evidence of Ms Clark and Mr Bent concerning the circumstances giving rise to that agreement, which I accept. Their evidence makes sense within a factual context that is not in dispute. My previously stated conclusion concerning the background to the purchase can be treated as repeated here for the purpose of explaining why it provides supports for their recollections.

91. I also draw attention to the fact that the agreement to purchase the property resolved an issue between them which arose upon their separation. Namely where Ms Bent should live on the basis that the primary carer of the two of them would be Ms Clark. It reflected the evidence that Mr Bent was concerned to avoid of the property being "caught up" (as Ms Clark described it) in any divorce proceedings which might result from a future marriage. That is to say, to ensure that the property was not "lost" in whole or in part to Ms Bent because of Ms Clark's future relationships and their consequences.

92. Therefore, weighing all the matters referred to, I conclude that the intention to create the trust resulted from an agreement between Ms Clark and Mr Bent to resolve the fallout of their relationship breakdown to the extent that it concerned their daughter's housing by Mr Bent buying the property and holding it on a bare trust for Ms Bent but not for Ms Clark. I am satisfied by the evidence that Ms Bent has rebutted the presumption arising from registered, sole ownership and has established the agreement was reached."

31. The Judge then turned to the question of whether there had been detrimental reliance. The Judge dealt with this question at Paragraphs 93-108. The Judge found that Ms Bent had demonstrated detrimental reliance in a number of respects, sufficient to render it unconscionable for the constructive trust to be denied.

32. Finally, at Paragraphs 109-111, the Judge dealt with the argument of the Appellants that, even if reliance and substantial detriment were established, it was not unconscionable to deny Ms Bent and her mother a freehold estate (in the Property) valued at well over £400,000, in return for their having enjoyed rent free accommodation in the Property, whether or not one took into account the consequence that, if the Property was not included in the Estate, the Estate would be worthless and Mr Bent would not have paid any part of his debt to the principal creditor; namely HMRC. The Judge rejected this argument, for the reasons he gave in Paragraphs 110-111.

33. The Judge thus concluded that Ms Bent had succeeded in establishing the existence of a constructive trust, specifically a common intention constructive trust, pursuant to which Mr Bent held the Property on trust for the benefit of Ms Bent. As such, the Judge concluded that the Property had not fallen into the Estate, being held by Mr Bent on trust for a third party. The claim for an order for possession and sale of the Property thus fell to be dismissed.

The grounds of appeal

34. As matters stand there are three grounds of appeal but, as I have explained, permission to appeal has only been granted in respect of two of these grounds.

35. By the first ground of appeal (**"Ground One"**) the Appellants contend that the Judge was wrong to find that there was reliance by or detriment suffered by Ms Bent where, so it is contended, the only detriment was suffered by her mother, Ms Clark. Detriment by proxy will not suffice:

> *"1. The learned judge was wrong in law to hold that a common intention constructive trust arose, even on the facts as found by him, where there was no reliance by, or detriment suffered by, the alleged beneficiary of the trust, the Fourth Respondent Ms Aliyah Bent, and where the only detriment found was suffered by her mother the First Respondent Ms Kelly Clark. A common intention constructive trust requires detrimental reliance by the alleged beneficiary, and detriment by proxy will not suffice."*

36. By the second ground of appeal (**"Ground Two"**) the Appellants contend that the Judge was wrong to find that there was ever a settled common intention that the Property should be held on trust for the benefit of Ms Bent:

> *"2. The learned judge was wrong in fact to find that there was any settled intention (at the time of purchase or subsequently) for the First Respondent Mr Marcus Bent to hold the property on trust for the benefit of the Fourth Respondent Ms Aliyah Bent, or any intention to that effect common to him and the Second Respondent Ms Kelly Clark which was capable of being relied upon, when such an intention was (i) contrary to the contemporaneous documentary evidence, including (in particular) the terms of the family court consent order made on 13 March 2007, and the negotiations leading up to it, including the Second Respondent Ms Kelly Clark's offer of 1 December 2006, and (ii) contrary to the oral evidence of the First Respondent Mr Marcus Bent."*

37. By the third ground of appeal (**"Ground Three"**) the Appellants contend that the Judge was wrong to find that there was sufficient detrimental reliance on the part of Ms Clark if, contrary to Ground One, Ms Bent could rely on the detrimental reliance of Ms Clark:

> *"3. The learned judge was wrong to have found as a fact that there was sufficient detrimental reliance on the part of the Second Respondent Ms Clark, in that (i) the Second Respondent Ms Clark could not have reasonably relied on any common intention relating to the property once the family court consent order had been made;(ii) he failed to have proper regard to the benefits the Second Respondent Ms Clark derived from the terms of the family court consent order; and (iii) wrongly considered that there were any realistic alternative life*

options for the Second Respondent Ms Clark which she had rejected, in circumstances where it was always open to the Second Respondent to return to the family court and to seek further capital and income provision for the benefit of the Fourth Respondent Ms Aliyah Bent."

38. By his order of 19th February 2024 Adam Johnson J granted permission to appeal in respect of Grounds One and Three, but refused permission to appeal in respect of Ground Two. Ground Two is the subject of the renewed application for permission to appeal, which I am referring to as the Permission Application

39. There is also the fourth ground of appeal (**"Ground Four"**), which Mr Horton sought to add to the grounds of appeal, at the hearing of the Appeal, by the Amendment Application. By Ground Four the Appellants seek to make a further challenge to the Judge's finding of a constructive trust, on the basis that the Judge was wrong in law to find that a common intention constructive trust could arise where the alleged beneficiary (Ms Bent) was only two years old at the time when the constructive trust was said to have come into existence:

"Further and/or alternatively, the learned judge was wrong in law to hold that a common intention constructive trust could arise where the alleged beneficiary was aged 2 at the time and therefore could have not been privy to any such common intention."

The Permission Application - analysis

40. It is convenient to start with the Permission Application. As I have explained the Permission Application has been the subject of a direction that it be heard with the Appeal, with the substantive appeal on Ground Two to follow if permission is granted. This is what is often referred to as a *"rolled up order"*. Where rolled up orders are made on applications for permission to appeal, the usual practice is to hear argument on the substantive ground of appeal, and then to make a decision on the permission application and, if the decision is to grant permission to appeal, also to make a decision on the substantive appeal. I adopted this approach at the hearing, with the result that I have heard the Appellants' substantive case in support of Ground Two, while reserving my decision on the Permission Application. In these circumstances, and although I am considering the Permission Application in this part of this judgment, it is convenient to do so following an analysis of the Appellants' substantive case on Ground Two.

41. The starting point is the nature of the appeal on Ground Two. As is apparent from the terms of Ground Two, the argument is not that the Judge went wrong in law. What is said is that the Judge went wrong on the facts. Specifically, the Judge was wrong to make the findings of common intention and agreement, between Mr Bent and Ms Clark, which the Judge did make in the Judgment.

42. The Appellants' counsel acknowledged that they had a significant hurdle to overcome before I could interfere with the Judge's findings of fact. An appeal court will only interfere with the findings of fact made by a trial judge where the relevant findings of fact are unsupported by the evidence or where the decision was one which no reasonable judge could have reached; see the judgment of Hamblen LJ in *Haringey LBC v Ahmed* [2017] EWCA Civ 1861, at [29]-[31].

43. More recently, In *Volpi v Volpi* [2022] EWCA Civ 464, Lewison LJ provided, at [2], the following invaluable restatement of the principles which govern appeals on pure questions of fact:

> ***"2*** *The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:*
>
> *(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*
>
> *(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.*
>
> *(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.*
>
> *(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*
>
> *(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."*

44. The appeal in *Volpi* failed. It is also instructive to note what Lewison LJ said in the concluding section of his judgment, at [65] and [66]:

> ***"65*** *This appeal demonstrates many features of appeals against findings of fact:*
>
> *(i) It seeks to retry the case afresh.*
>
> *(ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").*
>
> *(iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.*
>
> *(iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.*
>
> *(v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.*

> ***66*** *I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. The question for us is whether the judge's finding that the money was a loan rather than a gift was rationally insupportable. In my judgment it was not. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal."*

45. Returning to the present case I am bound to say that the arguments in support of Ground Two, both written and oral, demonstrated each of the features identified by Lewison LJ in his judgment, at [65(i)-(iv)]. I say this for the following reasons.

46. In his oral submissions Mr Horton boldly submitted that the Judge had, in finding that Mr Bent and Ms Clark had agreed that Mr Bent would purchase the Property for the benefit of Ms Bent, reached a decision which no reasonable judge could have reached. No doubt mindful of Lewison LJ's much quoted reference to island hopping in a sea of evidence, in *Fage v UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 [2014] FSR 29 (also referenced in *Volpi* at [65(ii)]), the Appellants' skeleton argument contended that the ocean of evidence in the present case all flowed one way.

47. In his oral submissions Mr Horton took me through seven features of the evidence which, so he submitted, demonstrated that the Judge had made findings which no reasonable judge could have made.

48. There were however three distinct problems with this tour of features of the evidence from the Trial. In relation to the third problem, it is necessary for me to go through the individual features of the evidence. The first and second problems can however be stated without going through the individual features.

49. The first of these problems was as follows. As I have noted above, the Judge devoted a substantial part of the Judgment to his review of the evidence; that is to say the documentary evidence and the oral evidence at the Trial. The Judge considered all the evidence with great care, including the features of the evidence relied upon by Mr Horton. The points made by Mr Horton were essentially the same points which, as one would expect, were made by Mr Williams at the Trial. It is clear from the terms of the Judgment that the Judge had well in mind the parts of the evidence which were said to undermine the Respondents' case. Ultimately, and for the reasons which the Judge set out at length in his analysis of the evidence, the Judge was satisfied that Mr Bent and Ms Clark did agree in 2006 that Mr Bent would purchase the Property for the benefit of their daughter. It is clear from the Judgment that this case was not one where the Judge ignored inconsistencies and other difficulties in the Respondents' evidence. The Judge did what trial judges are supposed to do. He weighed all the evidence, with great care, and made his findings.

50. As so often happens with appeals against findings of fact, it was clear to me that I was being asked to retry the case, without having heard the witnesses and without the Judge's knowledge of all the evidence before him at the Trial. It is equally clear to me that I should not be carrying out an exercise of this kind.

51. The second problem was that the further I was taken into the evidence at the Trial, the more obvious it became that I had only a partial picture of the evidence. By this I mean that when I was taken by Mr Horton and Mr Williams (who addressed me in relation to Ground Three) to specific parts of the evidence, I would frequently come across items of evidence which demonstrated that the evidential picture was considerably more nuanced than the Appellants' case on Ground Two suggested. I give one example (there were many others) of what I mean.

52. As I have just noted, Mr Williams addressed me on Ground Three. In the course of his submissions Mr Williams made extensive reference to the transcript of Ms Clark's cross examination, in relation to the evidence given by Ms Clark on the issue of detrimental reliance. In the course of one of these references, where Ms Clark was giving evidence about the maintenance payments made by Mr Bent, there are to be found the following question and answer:

> *"Q. Let's put it this way then, you have not produced any evidence whatsoever as to how you altered your lifestyle, how you would have spent your money differently, what your costs of living were or anything like that today that would show that you could have bought a property with that money had the promise been genuinely made and had you genuinely relied you on it. That's right isn't it?*
>
> *A. But the promise was that the house was for Aliyah, the promise wasn't anything else, the promise was intended for Aliyah; what was in the legal documentation was very different from what Marcus and I had discussed between us."*

53. This answer was highly material to Ground Two. Ms Clark was saying, in terms, that the Property had been promised to Ms Bent. I am not suggesting that I was being misled by counsel in any way. My point is that the further counsel for the Appellants took me into the evidence, the more obvious it was that the evidential picture was not as it was represented by Ground Two.

54. This brings me to the third problem with the seven features of the evidence highlighted by Mr Horton, which also provide further examples to illustrate the second problem. At this point it is helpful to go through the seven features individually. Before doing so, I should make it clear that Mr Horton's overall submission was that all of these seven features pointed clearly in the direction of no bare trust of the Property having come into existence when Mr Bent purchased the Property. In considering these seven features it is therefore necessary to stand back, and consider whether, cumulatively, they support Ground Two. Before carrying out this exercise however, it is helpful to go through the seven features individually.

55. Mr Horton started with a declaration of trust which was drawn up in draft, but never executed. The draft declaration of trust was drawn up in 2006 at the time when Mr Bent was purchasing the Property. The draft declaration of trust declares that the Property had been transferred to Mr Bent *"as the Trustee for my infant child, Aliyah May Bent of* [the Property] *aforesaid it being my intention to make a gift of my share in the said property to my said daughter"*.

56. The Judge dealt with this draft declaration of trust at a couple of points in the Judgment. By way of introduction, I should start with Paragraphs 34-36:

"34. I then move to consider the background which it is said gave rise to the agreement that is relied upon and ask myself whether it is consistent with the agreement.

35. My first conclusion from the evidence is that the background to the purchase supports the recollections of Ms Clark and Mr Bent. The property was purchased on separation. If Ms Bent had not been born, Ms Clark would have been left to find her own way. It makes potential sense that the property was bought because of the child. That evidence also reflects my impression of Mr Bent as a very loving father who recognises a father's responsibilities and duties for his child because of that love. I appreciate of course that I was viewing him many years later and I bear that in mind but his evidence came across as someone who back in 2006 was thinking of his child in the context of a relationship breakdown with his partner.

36. It also makes sense, bearing also in mind Mr Bent had financial and legal advisers, that he would not want Ms Clark to own the flat. After all, their relationship had broken down, she had no such right herself, and she would probably form new relationships, may have other children and may not (from his perspective at least) pass on the property to their daughter as a result. I accept from Mr Bent's evidence that those are all matters relevant to his state of mind at the time."

57. The Judge then proceeded to make direct reference to the draft declaration of trust, at [37]:

"37. This conclusion as to context is supported by the fact that a declaration of trust was drawn up. Plainly this is an important document. It demonstrates there was an intention to create a trust for Ms Bent but leaves open the question: why was it not executed?"

58. Mr Horton's answer to the question posed by the Judge was that the draft declaration of trust was part of the documentation from 2006 which flatly contradicted the notion that a trust came into existence in 2006. The draft declaration of trust was never executed either because there had never been any intention to create a trust or because Mr Bent changed his mind and decided, for whatever reason, that he was not willing to put the Property into trust for Ms Bent.

59. The Judge addressed this question at Paragraphs 44-47:

"44. That still leaves, however, the fact that the deed was not executed. Mr Blunt [Mr Bent] *did not know why but explained that as a footballer he was used to leaving all legal and business matters to his team. For example, any contracts including those relevant to his playing career. He did not concern himself with such matters and he candidly accepted that he probably never read what he signed if it was presented to him by his team. I accept his evidence that this was the case and also accept that he cannot assist to explain what happened to the declaration.*

45. Interestingly, his solicitor by email sent 20 March 2018 to the Trustees' solicitors stated:

> *"I believe that there was a Declaration of Trust executed by Marcus in 2006 gifting Marcus' share in the property to [Ms Bent]. I am not aware of the whereabouts of the original but maybe we could trace that if necessary".*

46. It is accepted that his recollection was in error and, of course, the weight of this evidence (untested by cross-examination) must be affected by that. However, it is to be footnoted in the context of weight that the solicitor did not recollect that the declaration had been drawn but not signed and, it follows, did not have any recollection of any reason why it was not executed which might be relevant to undermining the evidence of intention to create the trust.

47. The contemporaneous evidence of 2006 therefore strongly supports a conclusion that the recollection of Mr Bent and Ms Clark concerning the intended creation of the trust is reliable. Ms Clark was unable to explain why the declaration was not executed but that is not surprising if it was in the hands of Mr Bent's team, and I have no cause to believe she was hiding an explanation from me."

60. The Judge did not however then proceed to a conclusion on whether Mr Bent and Ms Clark had reached an agreement or understanding in 2006 that the Property would be held in trust for Ms Bent. As the Judge pointed out, in the first sentence of Paragraph 48, before proceeding to consider other evidence:

> *"There is, however, other evidence to be placed upon the scales before a conclusion can be reached."*

61. As I have already noted, the Judge considered all the evidence with great care, The Judge also carried out this consideration at length and in detail. At Paragraphs 87-92 the Judge set out his findings and conclusions on the question of whether there had been an agreement or understanding reached between Mr Bent and Ms Clark, at the time when the Property was purchased in 2006, that Ms Bent should have the beneficial interest in the Property. I have already set out these Paragraphs. The Judge plainly had the draft declaration of trust in mind, as one of the many items of evidence which the Judge had to weigh in the scales. The Judge recorded, at Paragraphs 44 and 47, that neither Mr Bent nor Ms Clark was able to explain why the declaration of trust was executed, but the Judge was also satisfied that this did not mean that no agreement had been reached between Mr Bent and Ms Clark concerning the ownership.

62. I have to confess that I found the Appellants' reliance upon this item of the evidence somewhat baffling. It is clear that the point was squarely before the Judge that the fact that the declaration of trust was left unexecuted contradicted the Respondent's case that agreement had been reached that the Property should be held by Mr Bent for Ms Bent. The Judge considered this point, but came to the conclusion, on a consideration of all the evidence, that the draft declaration of trust did not have this effect. I am completely unable to see how the Judge went wrong in his analysis of this evidence. Even if, which is certainly not the case, I was minded to disagree with the Judge's assessment of the draft declaration of trust, the assessment was a matter for the Judge. There are no grounds on which I can or should interfere with that assessment.

63. The second feature of the evidence was a letter sent by Ms Clark's solicitors to Mr Bent's solicitors on 1st December 2006. The letter contained an offer of settlement in relation to the proceedings for financial provision for Ms Bent brought by Ms Clark against Mr Bent. The proposed settlement was set out in numbered paragraphs in the letter. Paragraph 6 contained the following proposed term of settlement:

> *"6. Our client's home currently in your client's sole name is transferred to our client outright where she will reside with Aliyah. The property was*

purchased in July 2006 for the sum of £275,000 and there is a mortgage secured against it of £245,000 the equity of £30,000 will be transferred to our client but your client would remain jointly or solely responsible for the mortgage. In reality our client's housing claim is significantly higher than the modesty of the [location] *home and this is what will be pursued in litigation. We believe that your client should take a practical view here."*

64. The obvious question which arises on this document is why Ms Clark was proposing an outright transfer of the Property into her own name when, on her case, she had already agreed with Mr Bent that the Property was to be held by Mr Bent for the benefit of Ms Bent. This document could not, so the Appellants contended, be reconciled with the Judge's finding of an agreement between Mr Bent and Ms Clark that such an agreement had been reached.

65. The Judge referred to this document at Paragraph 58, in context of his consideration of the financial provision proceedings. As is so often the case where a judge has carried out a careful and detailed review of evidence, it is not possible to take Paragraph 58 in isolation. It needs to be read in the context of the surrounding parts of the Judgment. Doing the best I can, and conscious of the need to avoid lengthy quotation from the Judgment so far as I can, I set out Paragraphs 56-58:

"56. I mention that it would have been of potential interest for the Court to have been able to read any further documentation that exists concerning the application for financial provision. However, neither side have produced any, and this is not a case where disclosure is a fixed requirement under the Rules. There was no order for disclosure sought. There was no suggestion that Ms Clark or Mr Bent have concealed documents which they know are adverse to themselves and I certainly do not take the view that might be the case.

57. It was open to both sides to ask for a disclosure direction. The Trustees, of course, also have wide powers enabling them to obtain information, at least before deciding whether to start proceedings. There was no complaint during the trial of the absence of disclosure of documentation concerning the application to the Family Court. Therefore, whilst it may or may not have helped the Court, this decision is to be reached on the documentation presented in the trial bundle of the parties (to the extent relied upon at trial).

58. This included a without prejudice letter between the solicitors acting at the time. It was referred to Mr Bent in general terms during his cross-examination but nothing was made of its specific contents by either side whether in examination or submissions."

66. The Judge then went on, at Paragraph 59, to say this:

"59. Taking all those matters into consideration but importantly subject to reviewing the position in the light of the evidence as whole, including that to be specifically referred to after this: My conclusion based upon an assessment of the evidence on the balance of probabilities is that whilst the Order raises questions concerning what had gone before and it would have been of potential interest had there been any further documentation to read concerning the application for financial provision, this on its own comes nowhere near to undermining the evidence of intention referred to above concerning the purchase. I now turn, however, to the further evidence Mr Williams submits leads in addition or on its own to the conclusion that such evidence is unreliable."

67. The Judge clearly had the letter of 1st December 2006 well in mind. The Judge clearly considered the letter as part of his consideration of the evidence *"as a whole"*. It is also to be noted that, as the Judge recorded in Paragraph 58, nothing was made of its specific contents by either side whether in examination or submissions. It is quite impossible to see why the Judge was obliged, as the Appellants contend, to treat the letter as decisive against the Respondents' case. The evidence of the letter was a matter for the Judge to weigh in *"reviewing the position in the light of the evidence as a whole"*.

68. The third feature of the evidence was an order, made by consent by District Judge Million on 13th March 2007, sitting in what was then the Principal Registry of the Family Division, in the Family Court proceedings brought by Ms Clark against Mr Bent. This order (**"the Consent Order"**) was made on the claim of Ms Clark for financial provision for Ms Bent, pursuant to the powers of the court under Schedule 1 to the Children Act 1989. Mr Horton devoted a considerable amount of his submissions to explaining, most helpfully, how claims under Schedule 1 work.

69. I will need to come back to the Consent Order when I come to my analysis of Ground One, but it is convenient to set out at this stage, the provisions of the Consent Order, starting with the first recital to the Consent Order:

> *"**Upon** the Parties agreeing that the payments for the benefit of the Child Aliyah May Bent (born* [date] *2004) set out in paragraph 1 below will be reviewed if the Respondent Father's income changes"*

70. The Consent Order contained the following undertakings on the part of Mr Bent and Ms Clark:

> *"And Upon the Respondent Father agreeing and undertaking to the Court that:*
> *1. he will give the Applicant Mother exclusive occupation of the property known as* [the Property] *("the property") until three months after the date upon which his liability to maintain Aliyah under paragraph 2 of this Order ceases; and*
> *2. he will give the Applicant Mother twenty eight days (28) days written notice of his intention to dispose of or otherwise deal with the said property*
> ***AND UPON** the Applicant Mother agreeing and undertaking to the Court to remove the Restriction registered at the Land Registry on the property with Title Number* [number] *on the expiry of three months from the date upon which the Respondent Father's liability to maintain Aliyah under paragraph 2 of this Order ceases"*

71. The Consent Order then contained the following orders.

> *"1. Pursuant to section 46(1) of the Land Registration Act 2002, the chief Land Registrar shall forthwith enter a restriction against dealings in respect of the property at* [the Property] *(Title Number* [number]*).*
> *2. The Respondent Father do pay the following for the benefit of Aliyah until completion of Aliyah's full time secondary education or attainment of the age of 17 or further order whichever is the later:*
> *2.1 Periodical payments in the sum of £3,500 per month;*
> *2.2 The mortgage in favour of Coutts secured against the property;*

2.3 The water, gas and electricity, buildings insurance premiums and council tax in respect of the property; and

2.4 Nursery fees and reasonable extras of any school Aliyah may attend in the future with the agreement of both parents.

3. No order as to costs."

72. For present purposes the essential point being made by the Appellants was that the terms of the Consent Order, so far as they concerned the Property, were not consistent with the Respondents' case. What Ms Clark achieved by the Consent Order was an undertaking by Mr Bent to give Ms Clark exclusive occupation of the Property for the period of Ms Bent's dependency, together with a series of ancillary provisions to give effect that basic obligation. Again, the obvious point is that what was agreed by the Consent Order was inconsistent with the Respondents' case. The Consent Order was framed on the basis that Mr Bent owned the Property outright. If Mr Bent had already agreed to hold the Property on trust for Ms Bent, the provisions of the Consent Order did not make sense.

73. The Judge was well aware of all this. As he noted, at Paragraph 52:

> *"52. There is no doubt, however, that the terms of this Order raise questions concerning the existence of the constructive trust which, if the evidence relied upon by Ms Bent is accepted, was created as a result of an agreement or understanding reached by the date of its purchase. In particular, there is no reference to the trust in the order and questions arise as to why an exclusive possession undertaking for Ms Clark would be required if the trust existed."*

74. In his findings and conclusions, at Paragraphs 87-92, the Judge returned specifically to the Consent Order. In this context, it is worth repeating Paragraph 89:

> *"89. In reaching that conclusion I have considered with great care the 13 March 2007 Court Order and the later inconsistencies drawn to the Court's attention within the submissions of Mr Williams. However, I am satisfied in the additional context of my overall assessment of the evidence of Ms Clark and Mr Bent that the intention to create the trust has been established on the balance of probabilities. The pan containing the evidence against Ms Bent's case has insufficient weight bearing in mind in particular the points made qualifying them when they were referred to above and the weight of the evidence in the opposite pan including the contemporaneous documents and the overall view of credibility."*

75. The Judge was clearly well aware of the inconsistency between the terms of the Consent Order and the Respondents' case. Ultimately however the Judge made his judgment on the basis of all the evidence and concluded that he could be satisfied, on the balance of probabilities, that Mr Bent and Ms Clark had intended to create the trust in favour of Ms Bent. Again, it is quite impossible to see why the Judge was obliged, as the Appellants contend, to treat the Consent Order as decisive against the Respondents' case.

76. The fourth feature of the evidence was a further declaration of trust in relation to the Property, which Mr Bent instructed his solicitors to prepare in 2017. The draft version of this declaration of trust does not appear to be available. The draft declaration of trust

was expressed to be attached to a letter which was sent to Mr Bent by his solicitors, Black Norman, dated 10th September 2017, but there is no copy of this document attached the copy of the letter which I have seen. The terms of the declaration of trust were however to be that the Property should be held on trust for Ms Bent until she was 21 or ceased full-time education, whichever was the later. Again, the point is an obvious one. These instructions and the subsequent correspondence in relation to these instructions, in 2017 and 2018, were inconsistent with the notion that it had been agreed back in 2006 that the Property should be held by Mr Bent on trust for Ms Bent. As the Appellants put the matter, the obvious inference to be drawn from all this evidence was that there had never been any such agreement, and that the sudden rush to put the Property into trust for Ms Bent was prompted by Mr Bent's financial difficulties and the threat of impending bankruptcy.

77. Once again, the Judge was well aware of this evidence. Although there is, again, the danger of concentrating on particular parts of the Judgment, and ignoring the process of overall assessment carried out by the Judge, I note that the Judge dealt specifically with this evidence at Paragraphs 77-79:

> *"77. Mr Williams raised the observation that during 2017 attempts were made to have a new declaration of trust executed. This would not have occurred if, he proposed, there was already a constructive trust in place. He specifically referred during Ms Clark's cross-examination to a solicitor's memorandum referring to instruction that the property in Mr Bent's name "is to be held in trust for [Ms Bent] until she is 21 or ceases full-time education whichever is the later". This led to a detailed draft declaration of trust which would include an interest in possession for Ms Clark terminable when Ms Bent turned 21.*
>
> *78. This is inconsistent with the existing constructive trust claimed and needs to be weighed on the scale in the pan of evidence against the claim Ms Bent must establish. On the other hand, the form of the draft appears to be solicitor led, meaning that they saw their task (understandably) as being to provide the best possible arrangements they considered they could draft rather than to address what had previously been agreed in 2006. This is apparent from the solicitor's letter to Mr Bent dated 10 September 2017. The other matter to be borne in mind is that Mr Bent was going through a particularly bad time at this stage. It appears that this move was initiated by his then partner who was seeking to assist. In the witness box it is apparent he had no recollection of what had occurred and this whole event is shrouded in an uncertainty as to who was driving this forward and why. Ms Clark's recollection is that she did not know that was happening, although an email from Mr Bent's partner suggests otherwise.*
>
> *79. I did not find this to be an area of fact that was adequately investigated during the trial and, I say that without criticism of the parties. I consider that this reflected the confusion, perhaps chaos that was occurring for Mr Bent at the time. That needs to be borne in mind as I have stated together with the fact that, of course, these events concern an understanding in 2017, which is likely to be better than in 2023 due to the expiry of time but which is itself subject to the consequences of the lapse of some 10 years and to the facts and matters existing in or relevant to 2017."*

78. While the Judge had the advantage of hearing and seeing all the evidence at the Trial, it is illuminating to consider the letter of 10th September 2017, to which the Judge made specific reference. As the Judge pointed out, this letter which, as I have said, was sent to Mr Bent by his solicitors, Black Norman, noted that the office copy entries for the Property revealed the presence of a restriction the wording of which *"would or could indicate the presence of a Trust"*. The solicitors asked whether a trust had been set up previously. I was not directed to the answer to this question, if an answer was provided, but there is a subsequent email sent by Black Norman on 20th March 2018 to Katie Townsend, Mr Bent's partner, which stated as follows:

> *"I refer back to yours of 19th March.*
> *The property is held in Marcus' sole name as per the annexed Land Registry document. There does not appear to be a mortgage on the property but I believe that there was a Declaration of Trust executed by Marcus in 2006 gifting Marcus' share in the property to Aliyah May Bent. I am not aware of the whereabouts of the original but maybe we could trace that if necessary."*

79. These communications were taking place at some distance from 2006, but the email of 20th March 2018 is, to my mind, significant in the context of Ground Two. I say this because it is another example of a piece of evidence which could perfectly well have been treated as supportive of the Respondents' case. Clearly, Mr Bent's solicitors believed that there was a declaration of trust executed by Mr Bent gifting Mr Bent's share in the Property to Ms Bent. There was no such executed declaration of trust, but the Respondents' case was that such a trust had been created. In this sense the email of 20th March 2018 is supportive of the Respondents' case. The relevant point is the same point which I have already made, in the context of the Permission Application. The further one goes into the evidence, the more obvious it becomes that the *"ocean"* or *"sea"* of evidence did not all flow one way in this case.

80. So far as the Judge was concerned however, he gave careful consideration to the attempts to have a new declaration of trust executed in 2017/2018. It seems to me to be quite impossible to fault the Judge's analysis of this part of the evidence.

81. The fifth feature of the evidence related to a supplement to a preliminary information questionnaire which was completed by Mr Bent in relation to his bankruptcy. In this supplement, which was based on information provided by Mr Bent on 2nd January 2019 and was signed by Mr Bent on 26th January 2019, Mr Bent provided the following information to his trustee in bankruptcy in relation to the Property:

> *"*[the Property]. *This was purchased in 2006 for £275,000, paid outright for my daughter, but put in her mothers name. I have never lived there. It was purchased for my daughter, Aliyah Bent. There is a restriction on this property, from 08/05/07 that it cannot be sold without the authority of Kelly Clark (my daughters mother). There is a declaration of trust that states in favour of my daughter. I will provide a copy of this to the Official Receiver. This property is not an asset of mine or never was."*

82. What strikes me about this statement is how much information it contained which was consistent with, or at least supportive of the Respondents' case. Mr Bent may have got some of the details wrong. The Property had not been put into the name of Ms Clark and there was no executed declaration of trust, but the essence of what Mr Bent was saying was consistent with the Respondents' case.

83. The Appellants sought to argue that Mr Bent was also wrong in saying that the Property was paid for outright, when the Property was purchased with the benefit of a mortgage loan. This however seems to me to beg the question of what was meant by *"paid outright"*. It could perfectly well have meant that all of the purchase price, as provided by Mr Bent and the mortgage lender, was paid for the benefit of Ms Bent. I am speculating in saying this, and the point is a small one. I highlight the point for two reasons. First, the point seems to me to illustrate, yet again, that the further one goes into the detail of the evidence in this case, the more obvious becomes the gap between the evidence which was before the Judge, and the evidence as it is presented for the purposes of Ground Two. Second, I note with considerable interest that the Judge made a similar point in the course of Mr Bent's cross examination. I see from the transcript of Mr Bent's evidence in cross examination that when it was put to Mr Bent that he had been wrong in saying that he paid outright for the Property the Judge intervened to make the point that this *"slightly depends on what "paid outright" means"*.

84. What I make of the statement of Mr Bent in the supplement to the preliminary information questionnaire is essentially beside the point however, save in so far as the statement provides yet another example of how the evidence in this case did not all flow one way. What matters is what the Judge made of this part of the evidence. The Judge dealt with this part of the evidence at Paragraphs 60 and 61:

> *"60. Mr Williams referred to errors in a Bankruptcy Preliminary Questionnaire signed by Mr Bent and dated 24 January 2019. It is made as true and subject to section 5 of the Perjury Act 1911. It states that the property was purchased for his daughter but put in her mother's name with a restriction registered from 8 May 2007 so that it could not be sold without her mother's authority.*
>
> *61. Whilst it is true that the reference to the property being placed in Ms Clark's name was incorrect, I do not consider that assists the Trustee as Mr Williams submits. First, I am already taking into consideration memory issues for Mr Bent. Second, Second, although he made an error, he made an error in the context also of making express reference to the restriction. That is in his favour. Third, that suggests the Official Receiver will have had the title at the interview or otherwise Mr Bent has far better recall than I am giving him credit for. Either way, the underlying point is that he also stated, as recorded and signed, that "It was purchased for my daughter" and that it "cannot be sold without the authority of [Ms Clark]". In other words there is consistency not inconsistency, although the weight of this as evidence is obviously affected by the fact that the statement made in 2019 many years after the agreement relied upon. In any event I do not give any weight to the inaccuracies that are relied upon by the trustees for the reasons given."*

85. I note that the Judge's reaction to this evidence was similar to my own reaction. I do not find this surprising. The statement made by Mr Bent in the supplement to the preliminary information questionnaire was obviously capable of being treated as evidence which supported the Respondents' case. The Judge, who had the advantage of hearing and reading all the evidence, was plainly entitled to take the view of this evidence which he did take.

86. The sixth feature of the evidence was what Mr Horton characterised as the multiple choice of claims which were put by the Respondents in correspondence and in their evidence prior to the Trial. It is not necessary for me to address the detail of Mr Horton's submissions in this respect. By reference to the documents which I was shown by Mr Horton it seems to me that it was a fair criticism of the Respondents' case that there were inconsistencies between that case and what had previously been said by or on behalf of the Respondents. It does not however necessarily follow, from the fact that this was a fair criticism of the Respondents' case, that the Judge was bound to reject the Respondents' case.

87. It seems to me that there are two important points to make in this context. First, the Judge was clear in his understanding of what the Respondents' case was, at the Trial. In this context I repeat the Judge's summary of the Respondents' case, at Paragraph 6:

> *"6. Ms Bent's opposition is straight forward in fact but less straight forward in law. She relies upon an agreement or understanding between her father and mother in 2006 when they separated as partners, common law husband and wife, that the property would be bought by Mr Bent and held on trust for their daughter so that it would become her property absolutely when (in summary) she reached 18. As her mother put it when explaining the agreement during opening (as her evidence is summarised by me): The contract was that he would buy the house, her daughter and she would live in it. She would maintain it and look after her daughter as the primary responsible parent. He would pay the mortgage and their daughter would be the owner subject to it being held in trust for her by her father until she was 18."*

88. It is not part of the Appellants' case that the Judge made his decision on the basis of a case which the Respondents had not been entitled to advance. The criticism which underlies Ground Two is that the Judge should not, on the evidence, have accepted the Respondents' factual case.

89. This leads into the second point, which is that it was for the Judge to decide whether the inconsistences between this case and what had previously been said by or on behalf of the Respondents had the effect that the Respondents' case should, on the facts, be rejected. The Judge, following a careful and lengthy review of the evidence, came to the opposite conclusion.

90. It is not necessary, in this context to go through all the documents which were drawn to my attention by Mr Horton in relation to this sixth feature of the evidence. It is however illuminating to make reference to one of these documents, which was Ms Clark's first witness statement dated 20th April 2022. At paragraph 13 of this witness statement, Ms Clark said this:

> *"13. The Property was purchased by Marcus and was registered in Marcus' sole name with the intention of it being held on trust by me and transferred to Aliyah once she reached 18 years old."*

91. As Mr Horton pointed out, the question was why Ms Clark described the Property as her property when her case was that she and Mr Bent had agreed that the Property would be held by Mr Bent for the sole benefit of Ms Bent.

92. The answer to this question can be found in the Judge's analysis, at Paragraphs 63 and 64:

> *"63. Mr Williams referred to paragraph 13 of Ms Clark's statement in which she stated that the property:*
>
> > *"was registered in [Mr Bent's] sole name with the intention of it being held on trust by me and transferred to [her daughter] once she reached 18 years old".*
>
> *I agree that this can be read as meaning that the transfer would not occur until then and that this may mean that the beneficial interest was retained by Ms Clark until that date or, as Mr Williams submitted, Mr Bent because it is accepted she did not have an interest. In those circumstances, he submitted, there would be no trust in favour of Ms Clark until after the bankruptcy.*
>
> *64. On the other hand, the statement must be read at a whole and, if one looks, for example at paragraphs 17 and 18, they make clear her evidence that:*
>
> > *"17. If the Property could have been registered in [her daughter's] name, then it would have been, but it could not because [she] was under 18 years of age.*
> >
> > *18. The purpose of registering the Property in [Mr Bent's] name rather than mine (to hold on trust for [their daughter] until she turned 18) was because if before [she] turned 18, I remarried and subsequently divorced, the Property could be caught up in any divorce settlement. This was not what either me or [Mr Bent] wanted for [her]".*
>
> *Reading the statement as a whole, therefore, the evidence of subsequent recollection is not inconsistent with the contemporaneous evidence."*

93. What this brings out is the importance of (i) reading the evidence in context, and (ii) considering the evidence as a whole. The Judge did both of these things, both in this instance and in his consideration of all of the evidence at the Trial. The reality is that the Judge's analysis cannot be faulted. Nor are there any grounds upon which I can or should interfere with that analysis.

94. The seventh feature of the evidence was the oral evidence given by the Respondents at the Trial. I was referred to various extracts from this evidence and from the opening statement of Ms Clark at the Trial which were said to contradict the Respondents' case. In relation to the evidence of Mr Bent, I was referred to extracts from the transcript of Mr Bent's cross examination, where he was being asked about his statement in the supplement to the preliminary information questionnaire. I am bound to say that I found this part of the Appellants' case particularly baffling. The extracts to which I was referred seemed to me to contain material which was supportive of the Respondents' case. The attempt to isolate particular parts of these extracts as undermining or contradicting the Respondents' case seemed to me, if I may so without disrespect, to be futile. I say this independent of the obvious point that it was for the Judge to consider the overall effect of the evidence and statements which he heard from the Respondents. It is clear from the Judgment that the Judge performed this task, and it is equally clear that there is no basis on which I can or should interfere with the Judge's assessment of this material.

95. In taking time to go through the seven feature of the evidence highlighted by Mr Horton, I have kept in mind that these seven features should not be looked at either individually or in isolation. The seven features need to be considered as a whole, for the purposes of their cumulative effect. Beyond the seven highlighted features of the evidence, it is also necessary to keep in mind the various other points on the evidence and the Judge's findings on the evidence, as set out in Mr Horton's oral submissions and in the Appellants' skeleton argument, all of which I also have in mind in my consideration of Ground Two.

96. Standing back however, my analysis does not change. The seven features of the evidence highlighted by Mr Horton in his submissions do not seem to me to carry any weight, whether considered cumulatively or individually. The problems which I have identified in the Appellants' case, in relation to each of the seven highlighted features of the evidence, do not disappear or reduce if the features are considered together and/or with the other matters relied upon in support of Ground Two. Returning specifically to the third problem which I identified earlier in my analysis of Ground Two, the essential problem is that the further one goes into the seven features of the evidence, the clearer it becomes both that the evidence was very far from being all one way and that the Judge was quite entitled to make the findings on the evidence which he did made. The same applies to all the points on the evidence made by the Appellants in relation to Ground Two.

97. Where does all this leave the Permission Application? The test for the grant of permission to appeal in relation to Ground Two is whether the ground of appeal has a real prospect of success or whether there is some other compelling reason for the ground of appeal to be heard; see CPR 52.6(1).

98. I have set out my analysis of Ground Two at some length both because this hearing was a rolled up hearing in relation to Ground Two, and in deference to Mr Horton's detailed and careful submissions in support of Ground Two. Ultimately however, the conclusion which I draw from my analysis is that Ground Two fails to satisfy the test for the grant of permission to appeal. Standing back, I do not think that Ground Two can be described as having any real prospect of success, notwithstanding that I have heard the ground of appeal in full. Equally, I can see no other compelling reason for the ground of appeal to be heard or, to put the matter more accurately given the nature of this hearing, for the ground of appeal to have been heard.

99. In refusing permission to appeal on Ground Two, on the paper application, Adam Johnson J said this, at paragraph 9 of the Reasons attached to his order of 19th February 2024 (following a reference to *Volpi*):

> *"9. Here, I am not satisfied there is a real prospect of showing the Judge was plainly wrong, in the sense of having reached a decision on the facts that no reasonable Judge could have reached. The argument advanced by the Trustees is essentially that there are parts of the evidentiary record which point in the opposite direction to the conclusion the Judge arrived at. But that is almost always the case, and is why a trial is needed and a decision from a Judge necessary to arrive at a point of certainty. The Judge was plainly aware of the ambiguities and difficulties with the evidence, since he referred to them a number of times in his Judgment. But having heard all the evidence, including oral evidence from Mr Bent and Ms Clark (which*

he found significant: see Jgt at [89]), he reached the view that he did. The proposed appeal on Ground 1 [2] seems to me to be no more than an invitation to the Appeal Court to carry out the same evaluation exercise again, in the hope that it might produce a different result. That is not a proper basis for an appeal, however, because on factual issues it is not enough to be able argue that an alternative interpretation of the facts is possible (which is almost always the case). One must instead be able to say that the view arrived at by the Judge was so plainly wrong that no-one could reasonably have come to it. I am not sufficiently persuaded that the present is that sort of case. The ambiguities in the evidential record only serve emphasise the point that the decision the Judge came to, although at variance with some possible indicators, was no less legitimate that the alternative view, which would necessarily have been at variance with others, including most importantly the evidence of Mr Bent and Ms Clark given on oath which the Judge accepted. There was no sufficiently clear answer to justify the conclusion that the Judge plainly got it wrong."

100. I have not been able to match the admirable succinctness of the analysis of Adam Johnson J but, on the basis of my own analysis, I agree with the above analysis, which sums up the position.

101. I therefore conclude that the Permission Application should be refused. I add, for completeness, that it follows from my analysis that, if I had been persuaded to grant permission to appeal on Ground Two, the substantive appeal on Ground Two would have failed.

Ground Four – the Amendment Application

102. It is convenient next to deal with the Amendment Application. The Amendment Application was required because, without my permission, the Appellants cannot advance Ground Four; see CPR 52.17.

103. In relation to the Amendment Application I should mention that I adopted the same approach as with the Permission Application and Ground Two; that is to say I heard the argument on Ground Four, but without prejudice to the question of whether the Appellants should actually be permitted to introduce Ground Four into the Appeal.

104. The Amendment Application was made orally by Mr Horton at the hearing of the Appeal. It follows that the Amendment Application was made very late. The Amendment Application was opposed by the Respondents.

105. The lateness of the Amendment Application was a matter of particular concern in the present case because the Respondents were unrepresented. As such, it was unrealistic to expect the Respondents to have the ability to say much in response to Ground Four, particularly given that it raises what seems to me to be a point of law.

106. I have however come to the conclusion that the Amendment Application, notwithstanding its lateness, should be allowed, and that the Appellants should have permission to add Ground Four to their grounds of appeal. I have reached this conclusion for the following reasons.

107. First, Ground Four does not seem to me to constitute a new ground of appeal, in the sense that it raises a point which is unrelated to the existing grounds of appeal. To the contrary, it seems to me that Ground Four is linked, at least, to Ground One in the sense that Ground Four engages the question of whether a common intention constructive trust can arise where the alleged beneficiary was a minor at the time when the common intention, or in this case agreement, came into existence. This seems to me to be the key point of law which lies behind the Appeal. If the Appeal was to be decided without a decision on Ground Four it seems to me that this would be an unsatisfactory outcome, and a potential injustice to the Appellants. While it is unfortunate that this key point of law was not articulated in the original grounds of appeal, it seems to me that it would be more unfortunate if the Appeal was to be decided without this key point of law being addressed.

108. Second, and following from my characterisation of Ground Four as raising what seems to me to be a key point of law, the point raised by Ground Four is plainly an arguable one.

109. Third, I accept that Ground Four is not a new point, in the sense of a point which was not taken at the Trial. Mr Horton directed me to the following extract from Mr Williams's submissions to the Judge, on 21st June 2023:

> *"I am not familiar with any case where in this area of law there has been held to be like sub-layers of trustees (inaudible words) and that does not seem to be possible and I submit that any argument that there was a common intention between Mr Bent and Aliyah, whether in 2006 or at any other point prior to her reaching the age of 18, must be doomed to fail. Logically, that must now be their case. That was the evidence yesterday, that it is intended to be for Aliyah, not for Ms Clark but Aliyah was a minor at the time that the trust, on the respondents' case, was said to have been created and I submit there is no authority for the proposition that a minor can be one of the two parties to a common intention which creates an implied trust of land. Can a child and a father have common intention that the child would be the beneficiary? Can the child – and even if the case could survive those difficulties, we would then turn to the detriment by (?) the child."*

110. I agree with Mr Horton that this was an articulation, at the Trial, of the argument which is now constituted in Ground Four.

111. Fourth, and as I have noted, Ground Four raises a point of law. The Appellants are not seeking to introduce any new evidence. Nor, for that matter, are the Appellants seeking to raise a further challenge to findings of fact made by the Judge. Essentially, Ground Four is a point of law, requiring only legal argument.

112. Fifth, there is the question of prejudice to the Respondents. I confess that, in making my decision on the Amendment Application, I have been concerned by the potential prejudice to the Respondents, who are in person, in having to deal with a new point of law at the hearing of the Appeal. Ultimately however I am not persuaded that there is material prejudice to the Respondents. The position might have been different if the Respondents had been represented at an earlier stage in the Appeal, with such representation having come to an end before the hearing of the Appeal. In that situation, the Respondents might well have been able to say that they lost the

opportunity to obtain legal advice in relation to Ground Four, by reason of Ground Four being introduced at such a late stage. As I understand the position however, these are not the facts of the present case. The Respondents were not represented at the Trial and, so far as I am aware, have remained unrepresented between the Trial and the hearing of the Appeal. In these circumstances I am not persuaded that the Respondents have been materially prejudiced by the lateness of the Amendment Application.

113. Sixth, and finally, I have already recorded that Mr Horton and Mr Williams were at pains to be fair in their submissions. As I have explained, I heard the argument on Ground Four, without prejudice to the outcome of the Amendment Application. The argument was fairly put by Mr Horton in relation to Ground Four and I am satisfied that the Respondents were not put at a material disadvantage by the fact that Ground Four was raised at the hearing of the Appeal. Indeed, as I have already explained, Ground Four seems to me to raise the key point of law which lies behind the Appeal. In these circumstances there was a considerable overlap between (i) the legal arguments in relation to Grounds One and Three, and in particular Ground One, and (ii) the legal arguments in relation to Ground Four.

114. For all of the above reasons I conclude that the Amendment Application should be allowed, and that the Appellants should be permitted to advance Ground Four.

Ground Four – analysis

115. Pursuant to my decision to allow the Amendment Application, I come first to Ground Four. I do so because it seems to me that it is logical to deal with Ground Four before Grounds One and Three. Logically, it seems to me that the question of whether a common intention constructive trust could, as a matter of law, arise at all in the present case is the question which needs first to be resolved. If the answer to this question is in the negative, Grounds One and Three do not, strictly, need to be decided.

116. In relation to Ground Four it is convenient to start by reminding myself of the nature of a common intention constructive trust. For this purpose I refer to Lord Diplock's classic exposition of a trust of this kind in *Gissing v Gissing* [1971] AC 886, at 905C-D.

117. In order to put this extract from Lord Diplock's speech into context, it is helpful to set out what Lord Diplock said, by way of introduction to his exposition, at 904H-905B:

> *"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of " resulting, implied or constructive trusts." Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53 (1) of the Law of Property Act, 1925, to be in writing. If it is not in writing it can only take effect*

as a resulting, implied or constructive trust to which that section has no application."

118. Lord Diplock then explained, at 905C-D, how a trust of this kind comes into existence:
"A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

119. The point taken by Ground Four is that a common intention trust of the kind referred to by Lord Diplock cannot come into existence where one of the parties to the common intention was, at the relevant time, a minor. In the present case Ms Bent would have been only two years old at the time, in 2006, when the common intention constructive trust found by the Judge came into existence. Put simply, Ms Bent was not then capable to being privy to such a common intention.

120. Support for this argument can be found in the judgment of Patten LJ in the case of *De Bruyne v De Bruyne* [2010] EWCA Civ 519. The facts of the case, in very brief summary, were that a husband initiated the winding up of a trust in which he and his five children were discretionary beneficiaries. Pursuant to an agreement between the husband and the trustee, on the winding up of the trust, the trustee appointed to the husband certain shares which had been held in the trust. The husband signed the agreement on behalf of himself and the children. The agreement was entered into on the basis that the shares would belong to the children and would be appointed to the husband, out of the trust, for that purpose. In ancillary relief proceedings between the wife and the husband an issue arose as to whether the shares had been transferred to the husband absolutely, or upon trust for the children. The judge at first instance concluded that the husband had taken the shares on the basis of a common intention constructive trust for the benefit of the children or, in the alternative, that the court could impose a remedial constructive trust. The wife appealed against these conclusions. The wife's appeal was unsuccessful. It is however important to understand the basis on which the wife's appeal failed.

121. The substantive judgment in the Court of Appeal was given by Patten LJ, with whom Sir Paul Kennedy and Thorpe LJ agreed. In the relevant part of his judgment Patten LJ considered first the conclusion of the judge at first instance that the husband had taken the shares subject to a common intention constructive trust. He summarised the argument of the wife on the question of whether there could have been a common intention in the following terms, at [43]-[45].
"[43] *Mr Crawford submitted to him, and the judge recognised, that the principles applicable to determining the existence of a so-called common intention constructive trust are not easily accommodated to the facts of the present case. All the children were minors in 1991 and it is artificial in the extreme to attribute to them and their father an agreement or common intention that the shares should be held on trust for them once released from the earlier*

settlement. As the judge put it in para 46 of his judgment, the present case is very different from that involving a matrimonial home or extra-matrimonial home where the party seeking to establish a beneficial interest is sui iuris and says that he or she entered into the arrangement and perhaps carried out work or expenditure on the property in the light of an agreement or understanding that they would have an interest in it.

[44] *The judge recognised that it was somewhat artificial to fix the children with the necessary intention or understanding but was prepared to accept that the husband's stated intention to hold the shares in trust for the children could be attributed to them through his acting as their guardian in relation to the November appointment and that the children had suffered the necessary element of detriment by ceasing to be discretionary beneficiaries under the 1971 trust. He therefore held that the husband took the shares under the appointment on a constructive trust for the children or (if wrong about that) that the court could remedy the situation by imposing what is commonly referred to as a remedial constructive trust in their favour over the remaining assets.*

[45] *Mr Crawford challenges these conclusions on much the same grounds as he did before the judge. He submits that it was legally impermissible for the judge to attribute to children as young as two a common intention of the kind described in cases like Lloyds Bank plc v Rossett given that they were both actually and legally incapable of having any effective intention or understanding in relation to the ownership of the shares. If the father's intentions were sufficient then they should have led in cases like Jones v Lock (1865) 1 Ch App 25, (1865) 35 LJ Ch 117 to the court upholding what it recognised as an incomplete declaration of trust."*

122. Although I am not concerned with the question of detrimental reliance in relation to Ground Four, it is also convenient to set out [46], from the judgment of Patten LJ, where the equivalent argument in relation to detrimental reliance was summarised:

> *"**[46]** His second point was that on the test laid down in Lloyds Bank plc v Rossett the beneficiary must have acted to his detriment in reliance on the common intention. In the present case there was no such detrimental reliance by the children. They did nothing consciously in response to the September 1991 letter. Moreover they were only ever discretionary beneficiaries under the 1971 trust and therefore had no necessary expectation of benefit under it."*

123. Patten LJ dealt with these arguments fairly briefly, at [48], but he was clear in his view that the children could not be regarded as privy to any common intention or understanding in a real way:

> *"**[48]** Much of this argument I agree with. It is, I think, artificial and unrealistic to decide the question whether the husband took the shares in 1991 free of or subject to any trust by reference to a set of principles designed to resolve issues of beneficial ownership between adult cohabitees in a property. The children cannot be regarded as privy to any common intention or understanding in a real way. I also accept that the judge was wrong to rely in the alternative on the imposition of a remedial constructive trust in respect of the disputed assets given the remarks of Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, at 716, and the decision of this court in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391. But, in my view, the judge was nonetheless right to*

conclude that a constructive trust did arise on the making of the November 1991 appointment."

124. Patten LJ went on however to decide that the wife's appeal failed because it was possible to impose a constructive trust on a different basis, which Patten LJ explained at [51]:

> *"**[51]** There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to inter vivos transactions as it does to wills: see Rochefoucauld v Boustead [1897] 1 Ch 196, [1897] 66 LJ Ch 74; Bannister v Bannister [1948] 2 All ER 133."*

125. Patten LJ expressed his conclusion in the following terms, at [54]:

> *"**[54]** I can see no answer to the judge's conclusion that, in these circumstances, he should be bound by the agreement which he made. The fact that the children were not in any real sense party to that agreement is, to my mind, irrelevant. Their interests were protected by the 1971 trust so long as that subsisted and the trustee appointed the shares out of that settlement solely with a view to the children becoming entitled beneficially to the trust property."*

126. A constructive trust of the kind which was found to exist in *De Bruyne* is not available in the present case. The Property was not transferred to Mr Bent on the basis that he would hold the Property for the benefit of Ms Bent. The facts of the case are the other way round. Mr Bent acquired the Property. In the present case therefore it seems to me that a common intention constructive trust, at least as the case was conducted before the Judge, provides the only potentially available route by which Ms Bent can claim the beneficial interest in the Property.

127. On the face of it, what was said by Patten LJ provides support for Ground Four. Clearly, Patten LJ did not think that the children in *De Bruyne* could be regarded as privy to any common intention or understanding in a real way. By parity of reasoning, it can be said that Ms Bent was not capable, in 2006, of being privy to a common intention with her father in a real way.

128. This however brings me on to what seems to me to be the problem with Ground Four; namely that it does not respect the actual findings of the Judge, in relation to the agreement which, as the Judge found, was the basis of the common intention constructive trust in the present case. The Judge's basic finding in this respect was that an agreement was reached between Mr Bent and Ms Clark that the Property was to be bought for Ms Bent by Mr Bent, and was to be held upon bare trust for her until she was entitled to call for the legal title; see Paragraphs 87-92 (quoted earlier in this judgment) and see, in particular, Paragraphs 88 and 92. I will refer to this agreement, as found by the Judge, as **"the Agreement"**.

129. The Agreement was not however simply an agreement reached between Mr Bent and Ms Clark. The Judge was quite clear in finding that Ms Clark was, at all times, acting on behalf of Ms Bent. This included the time when the Agreement was made. It seems to me that the Judge made this clear throughout the Judgment, but if specific reference is needed, a finding to this effect can be found in Paragraph 87, which I repeat for ease of reference:

> *"87. As a result, in reaching my decision I am particularly influenced by the contemporaneous evidence. This in my judgment corroborates the evidence of an express agreement through discussion between Mr Bent and Ms Clark who, at the time, was protecting the rights of her daughter to financial provision."*

130. In addition to this, I should make reference to the final lines of Paragraph 98, where the Judge said this (the underlining is my own):

> *"98. This would be a surprising outcome in law, namely that there can be no constructive trust in favour of a child because as a child they would be incapable of reliance. I reject that proposition. It is to be remembered that whilst the issue of housing resulting from separation required settlement by an agreement between Ms Clark and Mr Bent, the right to financial provision which this settlement concerned and needed to resolve belonged to Ms Bent. Ms Clark had no personal right to further housing. She was at all times acting on her daughter's behalf, as her parent, by obtaining for Ms Bent the rights which were considered to be appropriate to ensure there would be adequate financial provision for her future housing. This was achieved by the agreement she reached with Mr Bent on behalf of Ms Bent. Ms Bent has plainly established reliance through her mother acting on her behalf. Her mother on her behalf accepted the agreement and moved them both to the property as a result."*

131. The Judge was here considering the question of detrimental reliance, but it is quite clear that his reference to Ms Clark acting on her daughter's behalf extended to the Agreement itself.

132. The Judge therefore found that the Agreement was made between Mr Bent, in his own capacity as the party purchasing the Property, and Ms Clark, acting on behalf of Ms Bent. It is important to note that, by reason of the failure of the Permission Application, these findings of fact made by the Judge have to be treated as unchallenged. Grounds One and Three seek to challenge the Judge's findings and decision on detrimental reliance. They do not challenge either the finding that the

Agreement was made, in the terms found by the Judge, or the finding that Ms Clark, when she entered into the Agreement, was acting on behalf of Ms Bent.

133. Ground Four is framed on the basis that the finding made by the Judge was that the Agreement was reached between Mr Bent and Ms Bent. As can be seen, this is not an accurate representation of the Agreement. The Agreement was reached between Mr Bent, acting in his own capacity, and Ms Clark, acting on behalf of Ms Bent.

134. This has important implications for Ground Four. By reference to the findings of the Judge the relevant question is not whether a minor can be privy to a common intention. The relevant question is whether a minor can be privy to a common intention through the agency of a person of full capacity (ie. an adult) acting on behalf of the minor. Putting the matter the other way round, can a common intention, sufficient to found a constructive trust, be formed between two persons of full capacity, where one of the persons is acting on behalf of a minor who is intended to have the benefit of the relevant agreement?

135. The facts of the present case are very different to those of *De Bruyne*. In *De Bruyne* the common intention, said to exist between the father and the children, had to be constructed out of circumstances where the shares had been appointed to the father on terms that he would hold the shares for the benefit of his children. This was obviously problematic, so far as a common intention constructive trust was concerned, in circumstances where the children were not involved in the relevant transaction and had no one representing them in the transaction. As Patten LJ recorded, the judge at first instance attempted to avoid this problem by attributing to the children the husband's stated intention to hold the shares on trust for the children, on the basis that the father was acting as guardian of the children in the transaction. This was obviously artificial in circumstances where the children did not have capacity, and the father was the person with whom the required common intention had to exist.

136. These difficulties do not exist in the present case. On the Judge's findings, the common intention existed between two persons of full capacity, with one of those persons acting on behalf of Ms Bent.

137. Can a common intention or, in this case, agreement found a common intention constructive trust for the benefit of a minor where the common intention or agreement is reached between two persons of full capacity, one of whom is acting on behalf of the minor? This question is not answered by *De Bruyne*. Nor, as it seems to me, is it answered by any of the other authorities to which I was taken by the Appellants' counsel.

138. In order to answer the question, it seems to me that it is necessary to go back to first principles and, in particular, to the basic formulation of the nature of a common intention constructive trust which can be found in a number of authorities, of which I have quoted Lord Diplock's exposition in *Gissing v Gissing*. As Lord Diplock explained, what is required is a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, where the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. The requirement that it be inequitable to deny a beneficial interest in the land is the reason why detrimental

reliance is required. In the present case detrimental reliance is the subject matter of Grounds One and Three. For present purposes however the basis of the constructive trust, as explained by Lord Diplock, is the transaction between the trustee who is acquiring a legal estate in land, and the cestui que trust who is to have a beneficial interest in that land.

139. The cestui que trust is the beneficiary of the trust; that is to say the person who is intended, by the transaction referred to by Lord Diplock, to have a beneficial interest in the land being acquired.

140. In the present case the relevant transaction, namely the Agreement, took place between Mr Bent and Ms Clark. The Judge found however that Ms Clark was acting on behalf of Ms Bent in entering into the Agreement and it was, of course, Ms Bent who was to have the beneficial interest in the Property, not Ms Clark. I cannot see any reason in principle why a transaction of this kind should not fall within the scope of Lord Diplock's exposition of a common intention constructive trust in *Gissing v Gissing* or within the scope of the other explanations of this kind of trust to be found in the authorities which have been cited to me. The common intention is present, in the form of the Agreement. The Agreement itself was reached between two persons of full capacity, namely Mr Bent and Ms Clark. The unusual feature of the present case is that Ms Clark was acting on behalf of Ms Bent, who did not herself have capacity. This deficiency was however made good by the fact that Ms Clark, who did have capacity, acted on behalf of Ms Bent.

141. It seems to me that it would be an odd result in the present case, and contrary to principle, if the Agreement, which was itself a classic instance of what Lord Diplock was referring to as a transaction between trustee and cestui que trust, should be preventing from giving rise to a constructive trust simply because one of the parties to the Agreement was acting not for herself, but for her daughter.

142. The obvious analysis of the position, on the basis of the Judge's findings, seems to me to be this. The person intended to have the benefit of the Agreement was Ms Bent. Ms Bent was not however a third party to the transaction constituted by the Agreement. Ms Bent was a party to the Agreement. This was because Ms Clark, when entering into the Agreement, entered into the Agreement on behalf of and for the benefit of her daughter. The common intention required to found the constructive trust thus existed between Mr Bent and Ms Bent, in Ms Bent's case through the agency of Ms Clark. Another way of analysing the position is to say that Ms Clark took the benefit of the Agreement, namely that Mr Bent would acquire the Property for the benefit of Ms Bent, on trust (effectively a sub-trust) for the benefit of Ms Bent. The result is however the same. The Agreement constituted the required common intention between Mr Bent and his daughter, through the agency and/or trusteeship of Ms Clark.

143. Another way to test this point is to consider what would have happened if Mr Bent had transferred the legal title to the Property to Ms Clark, on terms that Ms Clark would hold the Property on trust for Ms Bent, until the legal title could be transferred to Ms Bent. On this hypothesis Ms Clark would have been in the same position as the father in *De Bruyne* and, applying the analysis of Patten LJ at [51], would have taken the transfer of the legal title subject to a constructive trust in favour of her daughter. It seems to me that it would be very odd if an equivalent constructive trust, albeit a

common intention constructive trust, could not arise simply because Ms Clark, rather than taking a transfer of the legal title to the Property for the benefit of Ms Bent, instead entered into an agreement with Mr Bent, namely the Agreement, that Mr Bent would hold the legal title to the Property for the benefit of Ms Bent.

144. In summary therefore, Ground Four seems to me to be misconceived. The Judge did not make a finding or decision that Ms Bent was, in a direct capacity, privy to the common intention constituted by the Agreement. Given her status as a minor it is difficult to see how she could have been. Instead the Judge found that Ms Bent was privy to the common intention through the agency of her mother, Ms Clark. I cannot see any objection, in principle, to a constructive trust being based upon a common intention which comes into existence by means of an agency of this kind. I do not think that there is anything in *De Bruyne* which prevents this result. Nor have I found anything in any of the other authorities cited to me by the Appellants' counsel which seems to me to prevent this result.

145. I therefore conclude that Ground Four fails as a ground of appeal. In my judgment the Agreement, as found by the Judge, was capable in law of forming the basis of a common intention constructive trust. Whether such a common intention constructive trust did come into existence depends upon whether the Judge was entitled to find the required element of detrimental reliance. This brings me to Grounds One and Three.

Ground One – analysis

146. The complaint in Ground One is that the Judge could not have found a common intention constructive trust because there was no detrimental reliance by Ms Bent. The only detriment, if there was detriment, was suffered by Ms Clark. Such detriment by proxy will not suffice to support a common intention constructive trust.

147. In theory, this argument is well-founded. Going back to first principles, Lord Diplock identified the circumstances in which it would be inequitable for the trustee to deny the interest of the beneficiary in the relevant property in the following terms:

> *"And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."*

148. As Lord Diplock explained, the detrimental reliance must be the detrimental reliance of the cestui que trust; that is to say the person claiming a beneficial interest in the relevant property.

149. Mr Horton drew my attention to *O'Neill v Holland* [2020] EWCA Civ 1583. In very brief summary, the case involved a property which Ms O'Neill had occupied with Mr Holland as their family home, with their three children. The property had been purchased by Ms O'Neill's father, in 1999, who permitted the family to live in the property. Some years later, in 2008, Mr O'Neill, the father, transferred the legal title into the sole name of Mr Holland for no consideration. Following the breakdown of the relationship between Ms O'Neill and Mr Holland, Ms O'Neill sought a declaration that Mr Holland held the beneficial interest in the property for the two of them in equal shares. Ms O'Neill was ultimately successful, in the Court of Appeal, in establishing that Mr Holland did hold the property for the two of them in equal shares, on a common intention constructive trust.

150. In his judgment in the Court of Appeal Henderson LJ (with whose judgment Nugee LJ and David Richards LJ agreed) was concerned with the question of whether Ms O'Neill could demonstrate detrimental reliance, which Henderson LJ described as remaining *"an essential ingredient of a successful claim to a beneficial interest in a residential property under a common intention constructive trust"*; see the judgment at [27]. As Henderson LJ explained, at [37], it was necessary to consider (i) the position between 1999, when the property was purchased by Mr O'Neill, and 2008, when the property was transferred to Mr Holland, and (ii) the circumstances in which the 2008 transfer was made.

151. So far as the first of these periods was concerned, counsel for Ms O'Neill did not pursue the contention that Ms O'Neill had acquired a beneficial interest in the property either as a result of its purchase by her father in 1999 or as a result of her subsequent occupation of the property. Henderson LJ did however explain why a common intention constructive trust could not have arisen out of these events, at [40] and [41]:

> ***"[40]*** *In my judgment, the mere fact that Mr O'Neill, having purchased the Property, intended it to be a family home for his daughter and her family cannot, by itself, have given rise to a constructive trust in her favour. The district judge nowhere found that John O'Neill and Ms O'Neill shared a common intention that she was to take an immediate beneficial interest in the Property, as opposed to occupying it rent-free as her family home, and even if John O'Neill had so intended, Ms O'Neill cannot point to any detrimental reliance by her on the strength of such a common intention. For all practical purposes, she was fully protected while the Property remained vested in her father's sole name and she had continuing permission to occupy it. There may well have been a general intention shared between father and daughter that he would at some future date transfer the Property to her, or to her and Mr Holland jointly, either by lifetime gift or by will upon his death; but a generalised future intention of that nature cannot begin to ground an immediate beneficial entitlement under a constructive trust. Nor can I find anything in the wider circumstances of the case which would even arguably rebut the Stack v Dowden presumption during this initial period.*
>
> ***[41]*** *In the absence of any shared intention that Ms O'Neill should acquire an immediate beneficial interest in the Property during this period, the further question of detrimental reliance does not strictly arise. And even if it did, I have difficulty in seeing how the fact that John O'Neill had provided the funds for the purchase of the Property could possibly have amounted to a detriment upon which Ms O'Neill could rely. When Lewison LJ identified this as 'an important point of principle' (see para [23] above), he must, I think, have had in mind a situation where Ms O'Neill might wish to rely upon that fact in the context of the subsequent transfer of the legal title to Mr Holland in 2008. In other words, the question would be whether the provision of the purchase price by her father, in 1999, could be relied upon by Ms O'Neill, in 2008, as a detrimental reliance by her when seeking to rebut the presumption that Mr Holland was intended to be sole beneficial owner. There would be obvious difficulties with any such analysis, not least the fact that the purchase price was provided by John O'Neill some 9 years before his transfer of the Property to Mr Holland, but at least Ms O'Neill would then be seeking to rely upon the payment of the purchase price by her father against the legal owner, Mr Holland. It would make no sense for Ms O'Neill to rely upon the payment by her father of the purchase price as evidence*

showing that he was not intended to be the sole beneficial owner of the Property when it was acquired in his name."

152. The point made by Mr Horton in this context was that Henderson LJ made it clear, in the above extract, that even if Ms O'Neill had been able to demonstrate the required element of common intention between herself and her father, she could not have demonstrated detrimental reliance because she had not herself suffered any detriment. In their skeleton argument Mr Horton and Mr Williams described this extract as the closest the courts of England and Wales had come to considering detriment by proxy in a constructive trust claim. I am not sure that I would even go that far. It seems to me that Henderson LJ, in this part of his judgment, was doing no more than making the point that it was Ms O'Neill who had to demonstrate detrimental reliance which, in relation to the period between 1999 and 2008, she could not do.

153. In further support of his argument that Ms Bent could not rely upon the detrimental reliance of her mother, for the purposes of establishing a common intention constructive trust, Mr Horton relied upon *De Bruyne*, which I have considered in the context of Ground Four. I have already set out, in my analysis of Ground Four, the relevant paragraph from the judgment of Patten LJ. At [46] Patten LJ recorded the argument of counsel for the wife that there could not have been detrimental reliance on the part of the children. Patten LJ did not deal with this particular argument in terms, but it seems to me, on the basis of what Patten LJ said at [48], that he accepted this particular argument.

154. On the same theme, I was referred to the judgment of Fancourt J in *Archibald v Alexander* [2020] EWHC 1621 (Ch) [2020] 2 FLR 1123, at [31] and [32], and to the judgment of Lewison LJ in *Hudson v Hathaway* [2022] EWCA Civ 1648 [2023] KB 345 in which Lewison LJ reviewed the case law on detrimental reliance and confirmed the need for detrimental reliance, on the part of the alleged beneficiary, as an essential element of a common intention constructive trust.

155. The above submissions do not seem to me to be controversial. It is clear from the case law that detrimental reliance remains an essential element of a common intention constructive trust. It also seems to me to be clear that the detrimental reliance must be the detrimental reliance of the alleged beneficiary, that is to say the person claiming an interest in the relevant property on the basis of the relevant common intention. There is no support in the case law, so far as I can see, for the proposition that the person claiming an interest in the property, pursuant to the relevant common intention, can rely upon the detrimental reliance of a third party or proxy.

156. All this assumes however that, on the facts as found by the Judge, there was no detrimental reliance on the part of Ms Bent, but only detrimental reliance on the part of Ms Clark.

157. As with Ground Four, the Appellants' case on Ground One does not respect the findings of the Judge. The Judge set out his analysis and conclusions on detrimental reliance at Paragraphs 93-108. Whether the Judge was right to find detrimental reliance is the subject matter of Ground Three. For present purposes the important point is that it is quite clear that the Judge, in making his findings of detrimental reliance, was making these findings as findings of the detrimental reliance of Ms Bent, not Ms Clark.

158. It is clear from the outset of the Judge's analysis of the issue of detrimental reliance that he had well in mind that the detrimental reliance had to be that of Ms Bent. At Paragraph 94 the Judge referred to the evidence of Ms Clark on reliance. He continued, at Paragraph 95, in the following terms (the underlining is my own):

> *"95. So there is no doubt, it seems to me, that Ms Clark relied upon the agreement. She settled the issue of housing for Ms Bent on those terms. She took up possession and remained there looking after Ms Bent until she was 18 and in law able to look after herself. It was that agreement which caused her and their daughter to live where they did, grow up together within the location they did and do all they did as a result both individually and together. Ms Clark referred specifically to her work and clients and the same applied to Ms Bent and her schooling, friends and activities. So reliance is clear, but I must emphasise that I am concerned with Ms Clark's position, only insofar as she was acting for – i.e. being the parent of – her daughter."*

159. At Paragraph 97 the Judge summarised the first submission of Mr Williams on the issue of detrimental reliance:

> *"97. Mr Williams raised three submissions to undermine the creation of a constructive trust in 2006/7 even should Ms Brent prove the agreement relied upon. The first being that the reliance required must be Ms Bent's and she could not have had any reliance as a child."*

160. The Judge dealt with this argument at Paragraph 98:

> *"98. This would be a surprising outcome in law, namely that there can be no constructive trust in favour of a child because as a child they would be incapable of reliance. I reject that proposition. It is to be remembered that whilst the issue of housing resulting from separation required settlement by an agreement between Ms Clark and Mr Bent, the right to financial provision which this settlement concerned and needed to resolve belonged to Ms Bent. Ms Clark had no personal right to further housing. She was at all times acting on her daughter's behalf, as her parent, by obtaining for Ms Bent the rights which were considered to be appropriate to ensure there would be adequate financial provision for her future housing. This was achieved by the agreement she reached with Mr Bent on behalf of Ms Bent. Ms Bent has plainly established reliance through her mother acting on her behalf. Her mother on her behalf accepted the agreement and moved them both to the property as a result."*

161. The Judge then reached his conclusion on the first submission of Mr Williams, at Paragraph [101] (the underlining is my own):

> *"101. Therefore, dealing with reliance by Ms Bent in conclusion, through Ms Clark acting on her behalf, Ms Bent settled her claims to the extent of where she should live and through Ms Clark did not seek any alternative or additional financial provision for housing. It was a bargain and she (through her mother acting for her) relied upon that bargain when taking up occupation and no longer pursuing any other claim concerning the type and location of the property to be provided as financial provision."*

162. It seems to me that there are three important points which emerge from this Paragraph of the Judgment. First, the Judge was well aware that the detrimental reliance had to be the detrimental reliance of Ms Bent. Second, the Judge was satisfied that there was such detrimental reliance. Third, the Judge considered that there was such detrimental reliance on the part of Ms Bent, through the agency of her mother.

163. Subject to the question of whether the Judge was entitled to find detrimental reliance, which is the subject matter of Ground Three, I cannot see anything wrong with the Judge's analysis. At the risk of repeating myself unnecessarily, the Judge plainly accepted and had well in mind that the detrimental reliance had to be that of Ms Bent. Ms Bent was however a minor. She did not herself have the capacity to take action to her detriment. On the Judge's findings such action was the action of her mother, on her behalf. I cannot see why such action, taken by Ms Clark on behalf of her daughter, could not qualify as the detrimental reliance of Ms Clark. I can find nothing in the authorities to which I have been referred which prevents detrimental reliance of this kind from constituting the detrimental reliance which is required to support a common intention constructive trust. The detrimental reliance is not the detrimental reliance of a third party. In the present case it is the detrimental reliance of the intended beneficiary, Ms Bent, through the agency of her mother, Ms Clark. Equally, this analysis does not seem to me to be in any way inconsistent with the basic principles which govern the creation of a common intention constructive trusts.

164. The Judge recorded the second submission of Mr Williams on detrimental reliance at Paragraph 102:

> *"102. The second submission of Mr Williams was that the requirement of detriment must be Ms Bent's detriment, and she only gained from the provision of housing, as indeed, if relevant, did Ms Clark. That is to say, there could be no detriment when what was provided was a suitable property to live in."*

165. Again, the point was squarely before the Judge that the detrimental reliance had to be the detrimental reliance of Ms Bent. The Judge accepted that point, and found that there was such detrimental reliance on the part of Ms Bent. The Judge made the following findings at Paragraph 104 (the underlining is my own):

> *"104. <u>In this case there was plainly detriment and/or a significant alteration of position for Ms Bent</u>. First, there was settlement of the issue of how to give effect to Ms Bent's rights to financial provision in the context of providing a place for her to live. It is no answer to submit that this was a good settlement for her and, therefore, she did not suffer detriment. Plainly she significantly altered her position through her mother's acceptance on her behalf of the property subject to the trust as the settlement. It may also be noted looking at the other side of the coin there would certainly have been detriment had the agreement been made but without Mr Bent fulfilling it because he would retain the legal and beneficial interest."*

166. I have already made the point that the question of whether the Judge was entitled to make these findings of detrimental reliance is the subject matter of Ground Three. For present purposes the important point is that the Judge's findings were quite clearly findings of detrimental reliance on the part of Ms Bent. There are similar findings of detrimental reliance on the part of Ms Bent in Paragraphs 105, 106, 107 and 108. It is

not necessary to set out these Paragraphs. The point to be made in relation to each of these Paragraphs is the same point I have made in relation to Paragraph 104.

167. At Paragraphs 109-111 the Judge turned to deal with the submission of Mr Williams that it was not unconscionable to deny *"them"* (which I take to have been a reference by Mr Williams to Ms Clark and Ms Bent) a valuable freehold estate, given the benefit which they had enjoyed in the form of rent free accommodation in the Property. The Judge was not here concerned with detrimental reliance, and this part of the Judgment is not challenged in the Appeal, but it is worth quoting part of the Judge's response to this part of the Appellants' case, at Paragraph 110:

> *"110. This starts with the submission by Mr Williams that this may be seen in 2023 as a boon to a 19 year old and unfair to the creditors of the bankruptcy. However, the Insolvency Act 1986 addresses the circumstances in which fairness should be achieved within the statutory waterfall. It does so by the provisions providing for adjustment of prior transactions and the remedies against debt avoidance, and there is no suggestion that any of these would apply. This is a constructive trust established at a time when there was no suggestion of insolvency or of any steps being taken to avoid payment to current or future creditors. This submission does not aid the Trustees' case."*

168. As can be seen, the Judge had firmly in mind that it was the position of Ms Bent with which he was concerned, even though the submission appears to have been made on the basis that the Judge was concerned with the position of Ms Bent and Ms Clark.

169. In summary therefore, it seems to me that Ground One rests on a false basis. The assertion in Ground One is that, on the Judge's findings, there was no reliance by or detriment suffered by Ms Bent. It is clear, from the relevant part of the Judgment, that this assertion is wrong. On the Judge's findings there was reliance by and detriment suffered by Ms Bent. It is true that this was reliance by Ms Bent and detriment suffered by Ms Bent through the agency of her mother, but I do not see how this converts the detrimental reliance of Ms Bent to the detrimental reliance of her mother, to the exclusion of Ms Bent. Ultimately, the position seems to me to be the same for Ground One as it is for Ground Four. I see no reason, either in principle or in the case law, why Ms Bent cannot demonstrate detrimental reliance through the agency of her mother, just as I see no reason, either in principle or in the case law, why Ms Bent cannot demonstrate that she was a party to the Agreement, through the agency of her mother.

170. Although this point seems to me to belong more in Ground Three than in Ground One, the Appellants relied heavily, in relation to Ground One, on the argument that the Judge had gone wrong in his treatment of the proceedings for financial relief commenced by Ms Clark (**"the Financial Relief Proceedings"**), which resulted in the making of the Consent Order. As Mr Horton explained to me, claims under paragraph 1 of Schedule 1 to the Children Act 1989 (**"Schedule 1"**) are made for the benefit of the child, but they are not made by or in the name of the child. A child cannot make an application under paragraph 1 of Schedule 1. The application must be made by one of the persons specified in paragraph 1(1); namely a parent, guardian or special guardian or any person named in a child arrangements order as a person with whom a child is to live. The relief which the court can grant, pursuant to an application under paragraph 1(1), is set out in paragraph 1(2). If, by way of example, a court makes an order for a lump

sum payment to the applicant for the benefit of the child, pursuant to paragraph 1(2)(c)(i), the lump sum is paid to the applicant and, to that extent, is the property of the applicant; see *Phillips v Peace* [2004] EWHC 3180 (Fam) [2005] 1 WLR 3246, at [27].

171. While I follow the point made by Mr Horton on a claim for relief under paragraph 1 of Schedule 1, I cannot see how this has the effect that the Judge went wrong in law in finding that Ms Clark acted on behalf of her daughter, either in entering into the Agreement or in relation to the reliance which the Judge found that Ms Bent, by her mother, had placed on the Agreement, or in relation to the detriment which the Judge found that Ms Bent had suffered, by her mother, in reliance upon the Agreement. As the Judge found, at Paragraph 98, Ms Clark was, *"at all times acting on her daughter's behalf, as her parent"*. This was not a reference which was confined to the Financial Relief Proceedings. It referred to the Agreement and to the events which followed the Agreement. I cannot see how the fact that the Financial Relief Proceedings had to be brought by Ms Clark prevented the Judge, as a matter of law, from finding that Ms Clark was at all times acting on behalf of her daughter.

172. I say this for two reasons. First, the fact that one of the events following the Agreement, namely the commencement and pursuit of the Financial Relief Proceedings, involved legal proceedings which Ms Clark had to bring in her own name, could not have prevented Ms Clark from acting on behalf of her daughter, either in relation to the Agreement or in relation to those events which followed the Agreement which were not part of the Financial Relief Proceedings. Second, and if one concentrates the Financial Proceedings, I cannot see why the fact that the Financial Relief Proceedings had to be brought by Ms Clark in her own name prevented the Judge, as a matter of law, from finding that Ms Clark acted on behalf of her daughter in the Financial Relief Proceedings. On the Judge's findings Ms Clark plainly was acting on behalf of her daughter in the Financial Relief Proceedings, notwithstanding that she was required to bring the Financial Relief Proceedings and to enter into the Consent Order in her own name.

173. The difficulty with this part of the Appellants' case seemed to me to be brought out by an authority to which the Appellants' counsel, very fairly, referred me in their skeleton argument. The case in question was *M-T v T* [2006] EWHC 2494 (Fam) [2007] 2 FLR 925. The case was concerned with an order for financial provision made pursuant to Schedule 1. The financial provision in question was a payment for educational support by a classroom assistant and a payment towards the mother's legal costs. Amongst other matters the father challenged the order for payment of a sum towards the wife's legal costs, on the basis that the court had no jurisdiction to make an order for financial provision of this kind. This engaged the question of whether a payment towards the legal costs of the mother could be treated as a payment for the benefit of her children, within the meaning of Schedule 1.

174. In his judgment in *M-T* Charles J decided that the court did have jurisdiction to make such an order. The core of his reasoning on this question can be found in his judgment, at [18]:

> *"**[18]** What is the context in Sch 1? It provides that an applicant, usually a parent, can bring an application for the benefit of the child. You stand back and ask how the applicant holds money ordered under Sch 1. The answer is that those moneys, to adopt an analogy, would be held for a purpose and possibly on a*

purpose trust. It seems to me that an overview of Sch 1 shows that the applicant is applying in a representative capacity. I do not use that expression in a technical sense, but the applicant is applying to obtain an order for the benefit of the child or children and therefore somebody else. I confess, therefore, that I simply do not agree with the conclusion reached by Bennett J, if that is its true effect, that, as a matter of construction of Sch 1, legal costs are excluded as a matter of jurisdiction because they are for the benefit of the applicant personally and not for the benefit of the child. I would respectfully agree with the proposition that in the exercise of the discretion – if, as I believe to be the case, there be such a discretion – care needs to be taken to see that the moneys are not being spent to satisfy the applicant's taste for litigation. But that is a matter relating to the exercise of discretion rather than jurisdiction. To my mind, if you stand back and ask yourself, given my conclusion that the applicant is in a representative or quasi-representative capacity: 'would a payment in respect of the costs to be incurred by the applicant in bringing the case effectively on behalf of the children be a payment for the benefit of the children?' the answer, to my mind, is yes. Having that jurisdiction does not mean that it will always be exercised."

175. As Charles J pointed out, the context of Schedule 1 is that an applicant, usually a parent, can bring an application for the benefit of the child. If money is ordered to be paid pursuant to Schedule 1 it is held by the applicant for a purpose, and possibly on a purpose trust. An overview of Schedule 1 shows that the applicant is applying in a representative capacity, not in a technical sense, but in the sense that the applicant is applying to obtain an order for the benefit of the relevant child. As such, a payment towards the legal costs of the applicant is not excluded from Schedule 1. Such a payment can qualify as a payment for the benefit of a child, as opposed to a payment for the benefit of the applicant.

176. It does not seem to me that it is necessary to rely on this analysis, in order to decide that the Judge was not precluded, either by the terms of Schedule 1 or by the Financial Provision Proceedings or by the Consent Order, from finding that Ms Clark was at all times acting on behalf of Ms Bent. The analysis does however seem to me to bring out and support the point there was no conflict, and certainly no legal conflict between this finding and the nature of the Financial Provision Proceedings.

177. There remains the possibility that the Judge went wrong in his finding that there was detrimental reliance, by reason of a failure to understand the true nature of the Financial Provision Proceedings and/or the Consent Order. This possibility falls to be considered however in relation to Ground Three. So far as Ground One is concerned, I do not think that reference to Schedule 1 assist the Appellants.

178. Drawing together all of the above analysis, I conclude that Ground One fails as a ground of appeal. The Judge did not find detrimental reliance on the part of Ms Clark, which he then applied by proxy to Ms Bent. The Judge found detrimental reliance on the part of Ms Bent. Whether the Judge was entitled to find that the matters on which he relied for this purpose actually constituted detrimental reliance is the subject matter of Ground Three. So far as Ground One is concerned, the Judge made no error of law. The Judge asked himself the correct question, which was whether Ms Bent had relied on the Agreement to her detriment. In answering that question the Judge made no error

of law in finding that Ms Bent had relied on the Agreement, to her detriment, through the agency of her mother.

Ground Three - analysis

179. In dealing with Ground Three I have the advantage of a recent decision of the Court of Appeal on detrimental reliance. The case in question is *Winter v Winter* [2024] EWCA Civ 699. The case was concerned with a claim by two of three sons to a share in their late father's interest in the family market garden business and the farm from which it was operated, on the basis of proprietary estoppel. By his will, the father left his interest in the business and the farm to the third son. The issue in the Court of Appeal was however detrimental reliance, and the analysis of Newey LJ in his judgment (with which Falk LJ and Moylan LJ agreed) is equally applicable to detrimental reliance in the context of a claim to a common intention constructive trust.

180. The appeal in *Winter* was against the decision of the judge at first instance that the claimants had suffered detriment in reliance upon assurances given to them by their late parents that they and their brother, the defendant, would one day own everything between them. The judge's findings that the relevant assurances had been given and that the claimants had relied on those assurances were not challenged. What was challenged was the finding of the judge that the claimants had suffered detriment by virtue of their reliance on their parents' assurances. In his judgment Newey LJ explained the respective cases on the parties in the following terms, at [22] and [23]:

> *"22. The appeal has not involved any challenge to the Judge's findings as to the assurances which were made to Richard and Adrian and their reliance on them. The focus of the appeal has been on the Judge's conclusion that there was detriment. Mr Alex Troup KC, who appeared for Philip, accepted that the Court might be able to infer detriment where a claimant has pursued an inherently unfavourable course of action (for example, working on a farm for low wages over a long period without any right to an interest in the farm). In other cases (including this one), Mr Troup argued, it is incumbent on a claimant to plead and prove that he forewent an opportunity which, overall, would have put him in a better position (financially or otherwise). In the present case, Richard and Adrian pleaded that, if they had not relied on the assurances to them, they would have pursued a career in the military (in Richard's case) and sought site/demolition work and probably have become an independent contractor (in Adrian's). The Judge, however, found that they would not then have accumulated as much wealth as they did by working in the family business. That being so, there can have been the requisite net detriment only if working in the family business had non-financial disadvantages outweighing its financial benefits. The Judge saw "the lifetime commitment by Richard and Adrian to working on the farm" as an unquantifiable detriment, but he did not explain why it was detrimental and in any event failed to weigh any such detriment against the financial benefits. He instead proceeded on the basis that there could be no meaningful comparison and, rather than assessing where the balance between benefit and disadvantage lay, jumped to considering unconscionability.*
>
> *23. In contrast, Mr Hugh Sims KC, who appeared for Richard and Adrian with Mr Michael Selway, supported the Judge's decision. The appeal, Mr Sims said, is essentially against findings of fact and evaluations and this Court is slow to interfere with such matters. Here, the Judge applied the right test and arrived at conclusions which were properly open to him. While a Court must weigh non-*

financial disadvantages against financial benefits however difficult that might be, the Judge can be seen to have done so. He was, moreover, entitled to find that the lifelong commitment to the family business of Richard and Adrian had been detrimental. While such reliance may not in every case mean that there has been net detriment, it typically will do so and the Court is not obliged either to try to put a figure on the non-financial disadvantages or even to identify a specific alternative course of action which would have been more beneficial. The exercise is not a computational one."

181. Newey LJ then went on to consider the case law on detrimental reliance. After noting the requirement for detrimental reliance as an element of proprietary estoppel, Newey LJ considered the case law on what is capable of constituting detrimental reliance and how the question of whether there has been detrimental reliance has to be evaluated. As he noted, at [28], the detriment does not have to be financial:

> *"28. Some detriment may be difficult or impossible to quantify in financial terms. Thus, in Jennings v Rice Lord Walker commented in paragraph 51 that "the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms". In Habberfield v Habberfield [2019] EWCA Civ 890, 22 ITELR 96, where the trial judge had found that the claimant had suffered detriment as a result of "position[ing] her working life" on assurances, Lewison LJ commented in paragraph 47 that "[t]hat detriment was incapable of reduction to pounds and pence". In Guest v Guest, Lord Briggs, having observed that detrimental reliance cannot necessarily or even usually be valued, said in paragraph 9:*
>
> > *"In the present case, as in many where the promisee is a young person who gives up other career opportunities to work for their parents on the family farm, a measure of the supposed wages differential to date, coupled with interest, will not begin to recognise the improvement in life which further education, an independent career and the opportunities to develop their own farming or other business might have generated."*
>
> *In a similar vein, Lord Briggs said in paragraph 12 that detriment is not fairly capable of being monetarised when it consists of "decisions about education, training and career which (as here) have life-long consequences". In paragraph 84, Lord Briggs said:*
>
> > *"There was ... little uncertainty about the nature and extent of [the claimant's] detrimental reliance. He had worked full time at Tump Farm from 1982 until 2015 (33 years) and from 1993 onwards in the expectation of inheritance encouraged by David. His was plainly a form of reliance with whole-life consequences, starting when he left school at 16 and lasting until he was almost 50. So, however precisely it might be described, its lifetime consequences were extremely difficult to value."*

182. Newey LJ went on to identify, at [29] and [30], the balancing exercise which is required, where a claimant's reliance on an assurance has resulted in both disadvantages and benefits:

> *"29. Where a claimant's reliance on an assurance has resulted in both disadvantages and benefits, the Court must have regard to both. In Henry v Henry [2010] UKPC 3, [2010] 1 All ER 988, Sir Jonathan Parker, giving the judgment of the Privy Council, said in paragraph 53 that the trial judge "should*

have weighed any disadvantages which [the claimant] had suffered by reason of his reliance on Geraldine Pierre's promises against any countervailing advantages which he had enjoyed by reason of that reliance". In Davies No 1, Floyd LJ said in paragraph 55 that the trial judge had "had to determine whether there was substantial detriment by contrasting the rewards of the job at Genus with its better lifestyle with those of working on the farm (including the free accommodation at Henllan) with its greater burdens in terms of working hours and more difficult working relationships", adding in paragraph 56 that the judge's conclusion that there was a "net detriment" was the result of "a classic evaluative exercise" which was "not flawed in a way which would justify this court in interfering".

30. The fact that a disadvantage may not be susceptible to quantification does not make it a trump card. In a case where reliance has produced both a disadvantage and a financial benefit, the judge must balance the two regardless of whether it is possible to put a figure on the disadvantage. Davies No 1 provides an illustration of the point. Comparing something that can be expressed in money with something that cannot may not, of course, be easy, but the exercise is nonetheless required. In particular, a claimant who has derived a financial benefit from reliance on an assurance cannot necessarily satisfy the requirement for detriment by showing that he has suffered an unquantifiable non-financial disadvantage. Notwithstanding the difficulty, the Court must weigh the one against the other."

183. Newey LJ then turned, at [31]. to the question of when an appellate court can interfere with a finding of detriment:

> *"31. There are only limited circumstances in which this Court can interfere with a finding of detriment. In Davies No 1, Floyd LJ said in paragraph 33:*
>
> > *"Whether there is detrimental reliance in any given case is an evaluative judgment on the facts, which normally lies within the exclusive province of the trial judge. This court can only interfere with the judge's assessment of that issue if it is perverse or clearly wrong: Suggitt v Suggitt [2012] EWCA Civ 1140 per Arden LJ at [37]."*
>
> *The grounds on which it is open to an appellate Court to interfere with an evaluative assessment were more fully explained in R (R) v Chief Constable of Greater Manchester [2018] 1 WLR 4079, at paragraph 64, and In re Sprintroom [2019] 2 BCLC 617, at paragraphs 76 and 77. It can be seen from such cases that an appellate Court will interfere only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."*

184. As Newey LJ explained, the ability of the appellate court to interfere with a finding of detriment is limited. The question of detriment is an evaluative exercise for the trial judge. The appellate court can only interfere if it considers that the decision under appeal was unreasonable or wrong as a result of an identifiable flaw in the reasoning such as a gap in the logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion.

185. The conclusion reached by Newey LJ in his judgment was that the Court of Appeal could not interfere with the finding of detriment by the trial judge. I note, in particular, the following extract from Newey LJ's discussion, in his judgment, of the challenge to the trial judge's decision that the claimants had suffered detriment. At [52] Newey LJ

considered the question of how far a court should go in trying to work out what would have happened if the relevant assurances had not been given:

> *"52. While Morgan J's comments may have been appropriate in the context of the case before him, I do not think they should be taken as laying down a test of general application. My own view, as I have indicated earlier in this judgment, is that, to succeed in a proprietary estoppel claim, a claimant needs to show sufficiently substantial net detriment of whatever kind. Where, however, a claimant has made a life-changing choice and over many years undertaken work in reliance on an assurance, the Court will probably be prepared to treat loss of opportunity to lead a different life as itself detrimental without requiring the claimant to prove, or itself trying to determine, quite what the claimant would have done and with what consequences. The fact that the claimant "deprived [himself] of the opportunity of trying to better [himself] in other ways" (to adapt words of Lord Walker in Gillett v Holt) will itself be taken to amount to detriment; the Court will not be inclined to attempt the (probably unrealistic) exercise of "recreat[ing] an alternative life ... without the assurances" (to adapt words of Lewison LJ in Habberfield v Habberfield). In practice, therefore, as Rajah J said in Spencer v Spencer, detrimental reliance is likely to be found to exist where "a parent promises a child a farm if they work on the farm until the parent dies, and the child does what they were asked to do, giving up the possibility of other options, and positioning their working life based on the assurances". That will not automatically be the case, however. If, say, it can be seen that the claimant has derived considerable financial benefits from working on the farm, those must be weighed against the loss of the "possibility of other options"."*

186. Also useful in this context is the discussion of what is required to establish detriment by Lewison LJ in *Hudson v Hathaway*, at [154]-[158]:

> *"155 He also made the point at p 233 that allegations of detrimental reliance are not to be examined at a granular level but that it is necessary to "stand back and look at the matter in the round".*
>
> *156 Although that was a case of proprietary estoppel, I do not consider that there is any significant difference between the kind of detriment required in that kind of case, and that required in the context of a common intention constructive trust.*
>
> *157 In Kelly v Fraser [2013] 1 AC 450 (a case of estoppel by representation), Lord Sumption JSC, giving the advice of the Privy Council said at para 17:*
>
> > *"the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain . . ."*
>
> *158 In O'Neill v Holland [2021] 2 FLR 1016 (which was a common intention constructive trust case) Henderson LJ said at para 62:*
>
> > *"Detriment" in this context is a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant. Although the facts which constitute the detriment need to*

be pleaded, their characterisation is ultimately a matter for the court, in the light of all the evidence adduced at trial."

187. Returning to the present case, the Judge set out his analysis and conclusions on the question of detrimental reliance at Paragraphs 93-108. I have already set out some of these Paragraphs. The Judge found that detrimental reliance had been established for several reasons. While it does not do justice to the careful analysis of the Judge to quote extracts from the Judgment, the following is a summary of the Judge's findings on detrimental reliance.

188. The starting point is Paragraph 94, where the Judge summarised the evidence of Ms Clark on the issue of detrimental reliance:

> *"94. During cross-examination on this matter Ms Clark responded that she had based her whole life around Mr Bent having purchased the property for their daughter. Her work and Ms Bent's schooling were all results of the location of the property. If there had been no agreement that it was her daughter's and instead the offer had been that it would always be Mr Bent's property, she could instead have bought a property investing her own money, not just the maintenance money but the money she earnt for her self-employed business, from about 2008. She and her daughter would then have a home to live in now which would not now be taken from them."*

189. The Judge accepted this evidence. This is clear from Paragraph 95, which I have already quoted, but which I repeat for ease of reference:

> *"95. So there is no doubt, it seems to me, that Ms Clark relied upon the agreement. She settled the issue of housing for Ms Bent on those terms. She took up possession and remained there looking after Ms Bent until she was 18 and in law able to look after herself. It was that agreement which caused her and their daughter to live where they did, grow up together within the location they did and do all they did as a result both individually and together. Ms Clark referred specifically to her work and clients and the same applied to Ms Bent and her schooling, friends and activities. So reliance is clear, but I must emphasise that I am concerned with Ms Clark's position, only insofar as she was acting for – i.e. being the parent of – her daughter."*

190. The Judge was here dealing specifically with reliance. His findings were however clearly also relevant to the question of detriment.

191. The Judge went on to deal with the arguments on the question of whether there was detrimental reliance on the part of Ms Bent, which I have considering in my analysis of Ground One. So far as detriment was concerned, the Judge summarised his findings at Paragraph 104, which I have also already quoted, but which I repeat for ease of reference:

> *"104.In this case there was plainly detriment and/or a significant alteration of position for Ms Bent. First, there was settlement of the issue of how to give effect to Ms Bent's rights to financial provision in the context of providing a place for her to live. It is no answer to submit that this was a good settlement for her and, therefore, she did not suffer detriment. Plainly she significantly altered her position through her mother's acceptance on her behalf of the property subject to the trust as the settlement. It may also be noted looking at the other side of the*

coin there would certainly have been detriment had the agreement been made but without Mr Bent fulfilling it because he would retain the legal and beneficial interest."

192. The Judge supplemented these findings of detriment in Paragraphs 105-108, which need to be quoted in full:

"105. It can also be added that it is not right in principle or on the facts of this case to base the existence of a constructive trust upon an assessment of whether she should or could have got more or less as a settlement as Mr Williams's submission inherently does. It is not right in principle because Ms Bent through her mother settled her rights and, as a result, changed her position when giving up the option of seeking greater consideration for those rights. It is often the nature of the resolution of rights that the parties settle on a solution instead of arguing for alternatives. In this case, in practice, it is also plain from the nature of his employment and the value of the house Mr Bent purchased, that he could have provided more and there is no cause to doubt that he would have done so bearing in mind his love for his daughter if this solution had not been agreed.

106. There is the second matter, which I do not actually think is necessary with regard to establishing detriment or significant alteration of position because of what I have previously said, but it is that the family proceedings will have been settled in the context of the trust understood to be protected by the registered restriction. Ms Clark, again acting for her daughter, will have acted on the basis and understanding of the agreement reached in 2006. She changed her daughter's position through that settlement and no doubt would have addressed the process differently had the agreement been thought not to exist or been unenforceable. If there had been no constructive trust, it would have been potentially open to Ms Clark to negotiate for more and/or different relief.

107. The fact that this did not occur does not establish that there was no detriment or significant alteration of position. There was a trust protected by the registered restriction. Ms Bent, by her mother, will have changed her position through that settlement knowing of and inevitably in reliance upon the fact of the agreement previously reached with Mr Bent. She through her mother settled her financial provision claims in the context of having a beneficial interest and without considering settlement in the context of her not having an interest. Whilst there was no recollection of how the settlement was reached or reference to the trust in the Order, the accepted evidence is that Ms Clark had reached the agreement creating the trust and that will have been within her knowledge at all times.

108. There is also, the third point, Ms Clark's evidence, which I accept, explained how the future life style including the fact that she stayed at the property and did not purchase a property was connected to and flowed from the decision to settle on the basis of the property being her daughter's. I do not consider this is needed to establish detriment or change of position but there is no doubt it evidences the significant alteration of position for Ms Bent that resulted from her agreement with Mr Bent on behalf of their daughter."

193. In their skeleton argument counsel for the Appellants contended that the Judge's finding of reliance was flawed for various reasons:

(1) Ms Clark had, by the letter of 1st December 2006 from her solicitors to Mr Bent's solicitors, sought the transfer of the Property from Mr Bent to Ms Clark, which had been refused.
(2) Ms Clark had wanted the terms of an agreement between herself and Mr Bent to be recorded in a formal court order.
(3) The Consent Order did not preclude Ms Clark from returning to court and obtaining further financial relief.
(4) The claims made in the Financial Provision Proceedings were the claims of Ms Clark, for the benefit of Ms Bent.
(5) The Judge misunderstood, in Paragraph 99, how those claims could be compromised.
(6) The Judge wrongly considered that Ms Clark gave up the ability to seek any alternative or additional financial provision for housing or gave up the option of seeking greater consideration for the housing claim.
(7) Ms Clark still took Mr Bent to court, by the Financial Provision Proceedings, notwithstanding the Agreement.
(8) Ms Clark settled the Financial Provision Proceedings, by the Consent Order, albeit she retained the ability to seek further financial relief.

194. These various submissions seem to me to confuse a number of separate questions and issues.

195. The first point is that the governing hypothesis in relation to Ground Three is that the Judge was right to find that the Agreement was made. As it happens, this now represents the reality of the position, because the Appellants have failed in the Permission Application, so that Ground Two has thereby failed. Independent of this however, Ground Three necessarily proceeds on the footing that the Agreement was reached between Mr Bent and Ms Bent, with Ms Clark acting on behalf of Ms Bent. Ms Clark was of course acting on behalf of Ms Bent at all times, as the Judge found, but in order to avoid unnecessary repetition of this qualification, references to Ms Clark in the remainder of my analysis of Ground Three mean Ms Clark acting on behalf of Ms Bent, whether this is spelt out or not.

196. What follows from this first point is that, in considering the questions of reliance and detriment, the relevant counter-factual is a situation where the Agreement was not reached between Mr Bent and Ms Clark in 2006. In terms of reliance, this means that it is relevant to consider what the position of Ms Clark would have been, and what Ms Clark would have done if one assumes a situation where Ms Clark did not have the benefit, for her daughter, of the Agreement. The Agreement secured the Property as a home for Ms Bent and for her mother. A relevant question, in the context of reliance, if not the relevant question, is what the situation of Ms Clark would have been, and what Ms Clark would have done, if she had not had the security of the Agreement.

197. What this also means is that items of evidence such as the letter of 1st December 2006 and what happened in the Financial Provision Proceedings have to be put in their proper context. Such items of evidence do not demonstrate that the Judge was wrong to find that the Agreement was made. The Permission Application and, with it, Ground Two have failed. Such items of evidence are only relevant if and so far as they may demonstrate, in the Appeal, that the Judge was wrong to find reliance.

198. The answer to the question of what the situation of Ms Clark would have been, and what she would have done, if the Agreement had not been made, was given by Ms Clark in her evidence, which the Judge summarised in Paragraphs 94 and Paragraphs 104-108. The Judge accepted this evidence, and was satisfied that reliance had been established; see Paragraphs 95 and 101. I find it quite impossible to see how it can be said that the Judge was not entitled to find reliance. On the Judge's findings it was plainly open to him to make the finding of reliance. Indeed, on the Judge's findings, I find it difficult to see how any other finding than reliance could have been made. Putting the Agreement together with Ms Clark's evidence as to what her situation would have been and what she would have if she had not had the security of the Agreement, the Judge's finding of reliance seems to me to have been inevitable.

199. Matters such as the letter of 1st December 2006 and Ms Clark's conduct in the Financial Provision Proceedings were part of the evidence before the Judge. It was for the Judge to decide whether the evidence established reliance. The Judge was satisfied, on the evidence, that reliance was established. The Judge had all of this evidence well in mind; see my analysis of Ground Two in the context of the Permission Application. For the same reasons which I have set out in my analysis of Ground Two, I have no ability to interfere with the Judge's findings on the evidence, in relation to reliance.

200. The position would be different if the Judge had made some error, in dealing with the evidence on reliance, which would entitle me to interfere with his finding of reliance. The Appellants attempted to achieve this by the argument that the Judge had gone wrong in his understanding of the workings and effect of the Financial Provision Proceedings and the Consent Order. In this respect, various points were stressed to me by Mr Horton and Mr Williams, in the context of Ground Three:
    (1) Although the Consent Order was made, Ms Clark had the ability to return to the court, in order to seek further financial provision for the benefit of Ms Bent; see paragraph 1(5) of Schedule 1. It therefore followed that the making of the Consent Order did not shut out Ms Clark from seeking further financial provision.
    (2) Ms Clark was not able to reach a binding contract with Mr Bent for the settlement of the Financial Provision Proceedings. Any agreement had to be approved by the court, in a formal order of the court, as occurred with the Consent Order.
    (3) Orders for the transfer of property are rarely, if ever made in financial provision proceedings, and it is unlikely that one would have been made in the present case, if it had been sought.

201. These various points seem to me to be misconceived, on two separate levels.

202. First, these various points seem to me to miss the critical question, in the context of reliance. What the Judge had to consider was what Ms Clark would have done, both in relation to the Financial Provision Proceedings and otherwise, if she had not had the security of the Agreement. Ms Clark's evidence was to the effect that her approach, both to the Financial Provision Proceedings and otherwise, would have been completely different if she had not had the security of the Agreement. By way of example, part of that evidence was that Ms Clark would have sought alternative or additional financial provision from Mr Bent in order to secure housing for herself and her daughter. The precise means by which this would have been achieved seems to me to be of peripheral relevance. Unless it is being said by the Appellants that it would have been legally impossible to obtain greater financial provision than was in fact

achieved by the Consent Order, and I do not understand this to be the Appellants' case nor can I see any basis for such a case, I do not follow the relevance of the precise workings of Schedule 1. The fact that Ms Clark could have sought further financial provision from Mr Bent, notwithstanding the Consent Order, misses the point. The point is that Ms Bent did not seek such further financial provision, either for housing or for any other purpose. The Judge found that this was because Ms Clark relied upon the Agreement. I cannot see how the Appellants' points on the precise workings of Schedule 1 are capable of undermining this finding.

203. It is worth adding, although this is more relevant to the question of detriment than the question of reliance, that the Judge was satisfied that if further financial provision had been sought from Mr Bent, it would have been provided by Mr Bent; see the last sentence of Paragraph 105.

204. Second, I cannot see that the Judge did misunderstand the position, in relation to the operation of Schedule 1 and the effect of the Consent Order. The argument that Ms Bent would never have been granted a beneficial interest in the Property was considered by the Judge in Paragraph 100:

> *"100. Mr Williams sought to avoid that conclusion by disputing in his submissions that that Ms Bent would ever have been granted a beneficial interest in a property by the Family Court under Schedule 1 of the Children Act 1989. However, there is no dispute that the parents were able to agree such a result, that the Court would have made an order to that effect if asked, and that there was every reason for Mr Bent to want that to happen. I have already explained that."*

205. I fail to see how the Judge went wrong in this analysis. The parties could have agreed the grant of a beneficial interest in a property, if they had wanted to. On the Judge's findings Ms Clark did not pursue this result because she had the security of the Agreement. Whether she would have pursued this result, if she had not had the security of the Agreement, and what the prospects were of achieving such a result were matters for the Judge, who heard all the evidence, to decide.

206. The Appellants have contended that the Judge went wrong in his analysis in Paragraph 99:

> *"99. Whilst it appears this was conducted amicably, though I may be wrong when this was in 2006, that does not mean that there was no contractual settlement (subject to the issue of enforceability being addressed by the constructive trust issue). Plainly there was when it was agreed that the property would be purchased by Mr Bent, be registered in his name but be held on a bare trust for his daughter. In law there was a covenant to settle identified property for an identified beneficiary. That covenant was relied upon when it was acted upon."*

207. Again, I fail to see how the Judge went wrong in this analysis. All the Judge was saying was that Ms Clark and Mr Bent reached a settlement in 2006, by the Agreement, the enforceability of which depended upon establishing that it gave rise to a constructive trust. I see nothing wrong with describing the Agreement as a covenant to settle identified property for an identified beneficiary. Whether that description was technically correct or not, the point the Judge was conveying was that Ms Clark and Mr

Bent had, so far as they were concerned, reached an agreement which settled the issue of housing for their daughter. This analysis was not undermined by the point, which I will assume to be correct, that orders for the transfer of real property are rarely, if ever made pursuant to Schedule 1.

208. I have already explained that the fact that Ms Clark could have returned to the court to seek further financial provision, beyond what was provided for by the Consent Order, misses the point. The point is that Ms Clark did not do so because, on her evidence which the Judge accepted, she had the security of the Agreement. The Judge was well aware of this point. The Judge made this clear at a number of points in Paragraphs 94-108. By way of example, I refer to the findings of the Judge at Paragraph 106, which I have already quoted but repeat for ease of reference:

> *"106. There is the second matter, which I do not actually think is necessary with regard to establishing detriment or significant alteration of position because of what I have previously said, but it is that the family proceedings will have been settled in the context of the trust understood to be protected by the registered restriction. Ms Clark, again acting for her daughter, will have acted on the basis and understanding of the agreement reached in 2006. She changed her daughter's position through that settlement and no doubt would have addressed the process differently had the agreement been thought not to exist or been unenforceable. If there had been no constructive trust, it would have been potentially open to Ms Clark to negotiate for more and/or different relief."*

209. The Judge did not misunderstand the qualified nature of the settlement reached by the Consent Order. The Judge's finding was that Ms Clark would have addressed the process of the Financial Provision Proceedings differently, if she had not had the security of the Agreement.

210. In summary, I can see no basis upon which I can or should interfere with the Judge's finding that Ms Bent, through her mother, did rely on the Agreement.

211. This leaves the Judge's finding of detriment. In their skeleton argument, the Appellants' counsel summarised the detriment found by the Judge as falling into the following three categories:
    (1) Ms Clark gave up the opportunity of seeking greater provision from Mr Bent.
    (2) Ms Clark based her whole life on Mr Bent having purchased the Property for Ms Bent.
    (3) Ms Clark lost the opportunity to safeguard her own interests by buying a property investing her own money.

212. On its own terms, this summary is unsatisfactory as a summary of the relevant findings of the Judge:
    (1) Ms Clark did not give up the opportunity of seeking greater provision from Mr Bent. This distorts the evidence given by Ms Clark and the findings of the Judge on that evidence. Ms Bent, through her mother, significantly changed her position by accepting a settlement of her rights against her father, rather than seeking greater consideration for her rights which, on the Judge's findings, Mr Bent would have been willing to provide; see Paragraphs 94-108, in particular at Paragraphs 104-108. The precise classification of Ms Bent's rights, and questions as to the person in whom those rights were technically vested miss the

point. Ms Clark was acting on behalf of her daughter, in seeking support from Mr Bent for the benefit of their daughter.

(2) Ms Clark did not base her whole life on Mr Bent having purchased the Property for Ms Bent. Again, this distorts the evidence given by Ms Clark and the findings of the Judge on that evidence. The evidence of Ms Clark, which the Judge accepted, was that her life style following the Agreement, including the fact that she stayed at the Property and did not purchase a property was connected to and flowed from the decision to settle with Mr Bent on the basis of the Property being her daughter's property; see Paragraphs 94-108, in particular at Paragraph 108.

(3) Ms Clark did not lose the opportunity to safeguard her own interests by buying a property investing her own money. Again, this distorts the evidence given by Ms Clark and the findings of the Judge on that evidence. The evidence of Ms Clark, which the Judge accepted, was that, in the absence of the Agreement, Ms Clark could instead have bought a property investing her own money, not just from the financial relief which could be obtained from Mr Bent but also using the money Ms Clark had earned from her own business from about 2008. If Ms Clark had taken that step, she and her daughter would have had a home to live in which would not now (on the hypothesis of there being no Agreement and no constructive trust) be taken from them; see Paragraph 94.

(4) What I have said above seeks to correct the Appellants' characterisation of the findings of the Judge on detriment. My summary does however share one deficiency with the Appellants' summary, which is that it does not do justice to the extensive findings of detriment made by the Judge in Paragraphs 94-108.

213. Even if however one takes the Appellants' summary on its own terms, I do not think that there is merit in the points made by the Appellants by reference to that summary.

214. It is said that the Judge was wrong in law to find that Ms Clark gave up the opportunity of seeking greater provision from Mr Bent. As I have already explained, in the context of my analysis of the challenge to the Judge's finding on reliance, this misses the point. The Judge found that Ms Clark did not seek further relief because she believed that she had the security of the Agreement. The fact that she had the ability to do so was irrelevant.

215. So far as the purchase of another property was concerned, the Appellants seek to argue, on the evidence, that Ms Clark would happily have moved into the Property and remained there, whether or not the Agreement had been made. It is said that there was no evidence that Ms Clark ever intended to live anywhere else, let alone had the funds to do so. It is said that there was no evidence of any realistic alternative course being available to Ms Clark, other than moving into the Property. It is said that Ms Clark has had the great benefit of living in the Property rent free. These arguments are untenable for essentially the same reasons as Ground Two proved untenable. The Judge read and heard all the evidence. The Judge carried out the evaluation exercise which was required, on the basis of the authorities, in order to consider whether Ms Bent had suffered detriment. The outcome of that evaluation exercise was the conclusion of the Judge that Ms Bent had suffered substantial detriment, in reliance upon the Agreement. It is not open to the Appellants to stage, before me, a retrial of the issue of detriment.

216. Although this is not strictly relevant, because this was a matter for the Judge rather than me, it strikes me as obviously wrong to suggest that Ms Bent' occupation of the

Property on a rent free basis comes anywhere near being equivalent to actual ownership of the Property. If the Agreement is ineffective, Ms Bent has now lost her home. If the Agreement is effective Ms Bent has a home and a property of her own. The argument that the two situations can be equated, because Ms Bent has not had to pay rent for many years, strikes me as obviously wrong. What also strikes me as obviously wrong, if the Agreement is assumed to be ineffective, is the argument that Ms Bent could not, through her mother, have achieved a far better outcome than this assumed state of affairs if she had not been relying upon the Agreement to secure her home. Putting the matter another way, it seems to me that the Judge was clearly right in his finding of substantial detriment.

217. The Appellants contend that the Judge repeatedly rejected any consideration of the countervailing benefits, which are said to have been the permission given by Mr Bent to live in the Property rent free, while he paid the mortgage, while also paying Ms Clark child maintenance. The Judge did not repeatedly reject these alleged countervailing benefits. In carrying out his evaluation exercise the Judge did not consider that the benefits accruing to Ms Bent from the terms of the Consent Order and from being able to occupy the Property with her mother on a rent free basis came anywhere near being equivalent to what Ms Bent could, by her mother, have achieved if she had not been relying upon the security of the Agreement. As it happens, it seems to me that the Judge was plainly right in coming to this conclusion. This is however beside the point. There is no basis upon which I can or should interfere with the evaluation exercise carried out by the Judge.

218. In his oral submissions Mr Williams sought to elaborate on the arguments in the skeleton argument, by taking me to extracts from the evidence before the Judge. This exercise suffered from the same problems as Mr Horton's tour of parts of the evidence in relation to Ground Two. It is not necessary for me to go through the individual items of evidence to which I was taken by Mr Williams. As with Ground Two, the exercise was an exercise in island hopping. Mr Williams was unable to point me to anything in the evidence or in the Judgment which demonstrated that the Judge had made an error of the kind which would permit me to interfere with the Judge's finding of reliance or with the evaluation exercise carried out by the Judge in relation to detriment. Beyond this, and again as with Ground Two, the further I was taken into the evidence, the clearer it became that the evidence came nowhere near (to borrow the expression used by the Appellants' counsel) to all flowing one way.

219. Mr Williams also sought to criticise the terms of the Judgment. He submitted that the Judge had failed to carry out the balancing exercise which is required in determining whether there has been detriment. He also submitted that there was a lack of flesh on the bones of the Judgment, in which context he referred me specifically to Paragraph 108 as an example of this alleged problem.

220. I do not think that these criticisms can be justified. It seems clear to me, from the terms of Paragraphs 94-108, that the Judge had well in mind the need to compare what the position would have been if Ms Bent had not, by her mother, relied on the Agreement, with the benefits which Ms Bent did receive, from being permitted to occupy the Property rent free and from the financial provision which was provided by Mr Bent. The Judge concluded that Ms Bent, by reason of her reliance upon the Agreement, suffered substantial detriment. There is no basis on which I can or should interfere with

that conclusion. For what it is worth, and as I have already indicated, I add that it seems to me that the Judge was plainly right in this conclusion.

221. So far as the alleged lack of flesh on the bones of the judgment is concerned, I do not accept this criticism of the Judgment. I can see no deficiency of detail in Paragraphs 94-108, independent of the point that these Paragraphs do not stand in isolation, but follow the detailed review and analysis of the evidence in the earlier parts of the Judgment.

222. In summary, I cannot see that the Judge's conclusion on detriment comes anywhere near being an unreasonable conclusion. Nor can I see any identifiable flaw in the Judge's reasoning on detriment, such as a gap in the Judge's logic, or a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the Judge's conclusion on detriment.

223. Mr Williams' submissions in support of Ground Three were well-organised and well-presented but ultimately, as with Mr Horton's equally well-organised and well-presented submissions in support of Ground Two, I was being asked to conduct a rehearing of an issue in the Trial, by reference to a selection of the evidence before the Judge. It is clear from *Volpi* that an exercise of this kind is not permitted on appeal.

224. Drawing together all of the above analysis, I conclude that Ground Three fails as a ground of appeal.

<u>The outcome of the Appeal, the Permission Application and the Amendment Application</u>

225. The outcome of the Appeal, the Permission Application and the Amendment Application is as follows:
    (1) The Permission Application is refused.
    (2) The Amendment Application is allowed.
    (3) The Appeal (here meaning the appeal on Grounds One, Three and Four) is dismissed.