Neutral Citation Number: [2020] EWHC 1743 (QB)

Appeal No: QA-2019-011327

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH Judge Wulwik
Claim No E10CL333

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

(1) HITESH KUMAR GANDESHA **(2) JAYESH MAGANLAL GANDESHA**	**Appellants**
- and -	
(1) NARENDRA MAGANLAL GANDESHA **(2) SAILASKUMAR GANDESHA** **(3) AMIT GANDESHA (on behalf of the Estate of SURENDRA MAGANLAL GANDESHA, deceased)** **(4) VINESH GANDESHA (on behalf of the Estate of SURENDRA MAGANLAL GANDESHA, deceased)**	**Respondent**

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Mr Richard Power (instructed by **Thirsk Winton LLP**) for the **Appellants**
Ms Hermione Rose Williams (instructed by **Dominic Levent**) for the **Respondents**

Hearing date: 24 June 2020

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Approved Judgment

COVID-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on Thursday 2 July 2020.

Mrs Justice Andrews:

INTRODUCTION

1. This is an appeal against part of the order of HH Judge Wulwik dated 25 October 2019 refusing the Appellants' application for an order for the sale of a substantial freehold property at 22 Northumberland Avenue, Wanstead, London E12 5HD ("the Property") under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"), and a claim for occupation rent. The order was made on delivery of judgment following a 7-day trial in the Central London County Court.

2. TOLATA contains the following relevant provisions:

Section 14

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order –

(a) relating to the exercise by the trustee of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions)…

Section 15

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include –

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

3. The discretion of the Court under s.14 is a wide one, and when exercising it, it is entitled to take into consideration any circumstances that it considers relevant besides those to which it is obliged to have regard under s.15(1).

4. An appeal court will rarely interfere with the exercise of judicial discretion, especially where the judge has had regard to any mandatory statutory considerations and is apprised of all the relevant facts. In the present case, however, it is contended by the Appellants that the judge erred in his construction of the relevant Declaration of Trust, and this led him to exercise his discretion on a fundamentally erroneous basis. For the reasons that will appear, I have concluded that a failure to construe the Declaration of Trust as a whole, and by proper reference to its underlying purposes, regrettably led the judge into error, and that the correct approach leads to a very different result.

FACTUAL BACKGROUND

5. The Appellants, Hitesh Kumar Gandesha and Jayesh Maganlal Gandesha, are the younger brothers of the first and second Respondents, Narendra Maganlal Gandesha and Sailaskumar ("Sailas") Gandesha. The third and fourth Respondents, Amit and Vinesh Gandesha, are the sons of a fifth brother, Surendra Maganlal Gandesha, the second eldest, who sadly died on 13 April 2018, and they represent his estate. For ease of reference I shall follow the practice of HH Judge Wulwik and, without intending any disrespect, refer to each of these individuals by their first names.

6. At the onset of this judgment I must pay tribute to HH Judge Wulwik for the clarity of his detailed exposition of this unfortunate family dispute. Since this appeal largely turns on the construction of the Declaration of Trust in respect of the Property which was signed by the five Gandesha brothers in June 2015, it is unnecessary for me to repeat that level of detail here. The following summary will suffice.

7. The Property, a 14 bedroomed freehold house on a large plot, was purchased in February 1991 for £350,000 and initially registered in the names of Jayesh and Surendra. It was common ground that it has always been held in trust for all five brothers equally, and at the pre-trial review HH Judge Gerald granted a declaration by consent that the four surviving brothers and the estate of Surendra own the Property on trust for themselves as tenants in common in equal shares of 20%. In April 2019 it was valued by a joint expert at £1.9 million.

8. Although, unlike their older brothers, Jayesh and Hitesh made no financial contribution to the £100,000 deposit for the Property, they did make regular contributions to the £250,000 mortgage, which was converted from an interest-only to a full repayment mortgage, and paid off in March 2011. They also contributed to the outgoings on the Property (including the premiums on endowment policies taken out by Jayesh and Surendra as security for the mortgage).

9. It was intended from the outset that the Property should be a home for all the brothers and their families and for their late mother and father, who died in 1997 and 2000 respectively. Until what the judge euphemistically described as "the family rift" in 2016, the five brothers and their families lived together in harmony in the Property for many years. At one time there were 23 members of the family living there. In 1996 and 1998 there were attempts to formalise these arrangements, in that draft deeds of trust were prepared, but these were never signed.

10. After the mortgage was paid off, there was increasing concern among those brothers whose names were not on the title to the Property to ensure that their rights and those of their families were protected. Surendra's son Amit took the lead in dealing with the preparation of the Declaration of Trust that was executed in June 2015. It appears from correspondence between Amit and his uncles Hitesh and Jayesh at around that time, that Hitesh and Jayesh were concerned about the prospect of one of the brothers (or his estate) attempting to force the sale of the property against the wishes of the others.

11. The solicitors who were instructed came up with different proposals to meet that concern. They said that they could add a clause to state that the Property is not to be sold until the death of the last brother, or a provision that on the death of one brother,

his share would automatically revert to the remaining brothers. They explained that a clause preventing the sale of the house until the last brother passes away "*would protect the brothers as well as all spouses and children in the event of one of the brothers passing away and their spouse/children wanting their share from the property*."

12. In the event, the Declaration of Trust was executed in the following terms:

"(1) The Parties hereto DECLARE that they hold the property UPON TRUST to sell the same with power to postpone the sale and all the proceeds of sale (after deducting therefrom the costs of sale) and the net rents and profits until sale UPON TRUST for the Parties as tenants in common in the following proportions:

(a) as to the balance to divide the same:

a. as to 20% for Surendra Gandesha absolutely

b. as to 20% for Jayesh Maganlal Gandesha absolutely

c. as to 20% for Hitesh Kumar Gandesha absolutely

d. as to 20% for Narendra Kumar Maganlal Gandesha absolutely

e. as to 20% for Sailaskumar Gandesha absolutely.

(2) The Parties hereby declare that they have purchased the Property as a home for all of the 5 brothers in clause 1 (a) above and for their respective families and during such period as it shall be the home for all of those persons.

(3) The Property is to be kept in good and substantial repair by the Parties jointly who agree to pay equally for the general maintenance, upkeep and for the usual outgoings of the Property.

(4) (a) The Parties hereby declare that the Property shall not be sold whilst any of the Parties remain alive except if all the Parties that remain alive agree unanimously in writing to the sale of the Property.

...

(c) no sole party or their family shall have a right to demand that the Property be sold.

(6) for the avoidance of doubt, the Parties hereby reserve the right to transfer their share of the Property onto whomsoever they wish."

13. In August 2015, following the signing of the Declaration of Trust, the Property was registered in the names of Jayesh, Hitesh, Surendra and Sailas on trust for all five brothers equally as tenants in common. The reason why the eldest brother Narendra's name does not appear is that only four names could be noted on the title to the Property.

14. Tensions between Narendra and Surendra on the one hand, and Jayesh and Hitesh on the other, which had been growing for some time, came to the fore in the spring of 2016, chiefly as a result of proposals to raise finance for one of the family businesses, Milestar Ltd ("Milestar"). Hitesh was responsible for the day to day management of Milestar, which trades both as a dispensing chemist and pharmacy, and as a perfume retailer and wholesaler. He wanted the company to extend its overdraft by £1 million to enable it to finance some £660,000 of orders that it had taken at the NEC spring fair, but the bank was seeking additional security in the form of personal guarantees from the directors, which Narendra and Surendra were not prepared to give. Neither of them was in good health, both were thinking of retirement, and their children were understandably very protective of them.

15. A family meeting convened on 7 April 2016 to discuss this matter, which appears to have begun amicably enough, degenerated when Narendra's daughter Sonia arrived and swore at Jayesh. A physical altercation ensued between Hitesh's three sons and Jayesh's son, Jay, on the one hand, and Amit and Sonia on the other, which led to Sonia and Amit being injured, and to criminal proceedings being brought against their cousins. In January 2017 two of Hitesh's sons and Jay were convicted of common assault, and either fined or given conditional discharges. The charges against the third of Hitesh's sons were dropped. During the period when they were on bail, the young men were unable to live at the Property.

16. The judge found that the events of 7 April 2016 "more than any other" contributed to the rift in the Gandesha family, being exacerbated by the subsequent criminal proceedings taken by the CPS and supported by the evidence of Sonia and Amit. This finding accorded with Sonia's evidence that "*the brother/sister relationship between my father and Kirti* (a sister of the 5 brothers) *and between my father and Hitesh does not exist anymore and this has been the case since 7th April 2016"*.

17. Not long after those events, at around the end of May 2016, a decision was made by or on behalf of Narendra and Surendra to appoint a new firm of accountants to act on behalf of the family in place of Davis Grant Ltd, the firm in which Jayesh is a partner and which had acted in that capacity for over 25 years, ostensibly on the basis that the criminal charges had given rise to a conflict of interest. Irrespective of whether that stance was justified, that decision seems to have added fuel to the growing animosity and drawn the older adult members of the family further into the argument between their offspring.

18. Jayesh and his family left the Property on 7 November 2016 and moved into another property which he had purchased after borrowing some money from his brother in law. The judge found that he had left voluntarily, but he made no specific findings as to the reasons *why* he left (other than that neither he nor Hitesh were asked to leave). Jayesh's evidence was that the situation at the Property had become intolerable by June 2016, and that he was very concerned about the effect that this was having on his wife and 16-year-old daughter, who he said were being treated with hostility. He said that the situation had worsened between June and November, and that a family meeting in September 2016 had failed to resolve matters. None of this was challenged in cross-examination, though it was rightly pointed out that other matters of which Jayesh complained (including accusations of fraud and forgery that were made against him by Narendra and Surendra) occurred after he had left the Property and therefore could not have contributed to his decision to leave.

19. As the judge recorded in paragraph 36 of his judgment, Hitesh and Jayesh sent a letter to Narendra, Surendra and Sailas on 16 December 2016 which stated:

"*We have spoken, and you are all fully aware that in recent months the situation in the family home has become untenable for all parties to remain living there. We do not propose going into detail in this letter as we are all aware of the background.*

Regrettably, the family circumstances are now radically different to the circumstances at the time of execution of the Declaration of Trust detailing our respective interests in the property. The situation envisaged by the Declaration of Trust and that which the Trust was designed to protect was that the property should be a family home for all of us and our families but that situation no longer exists…"

20. The letter went on to allege that they and their families had been excluded from the Property, principally due to the conduct of Narendra and Surendra and their children; that Jayesh and his family had moved out of the Property as a direct consequence of that situation, and that Hitesh and his wife merely slept at the Property, whilst living elsewhere for most of the time with their sons in a rented property. The suggestion was made that the Property should be sold or that the other three brothers should buy out Hitesh and Jayesh's shares in it.

21. There was no response to that letter. Significantly, nothing was said to contradict the description it contained of the family situation at that time.

22. Hitesh's evidence was that it was financially draining for him to sleep at the Property whilst spending most of his time in the small property that he and his wife had rented for their sons, and he corroborated Jayesh's evidence that the two of them told the other brothers that they felt they had no choice but to move out. He said that after Jayesh left, he felt significantly outnumbered by the three defendants, Amit and Sonia, and he also felt that he and his wife had no support in the house. He felt excluded and was very unhappy with the way he was treated. If he walked into a room, other family members would walk out of it.

23. These proceedings were not commenced until July 2018. In the intervening period, the relationship between Narendra and Surendra, on the one hand, and Jayesh and Hitesh, on the other, degenerated still further, though it appears that Sailas has managed to remain on cordial terms with both factions. After Jayesh moved out, extremely serious allegations were made against Jayesh and Hitesh by or on behalf of Narendra and Surendra (with the active involvement of Amit and Sonia) and the rift spilled over into litigation. On 15 February 2017, solicitors acting on behalf of Narendra and Surendra, who had been raising various issues relating to the accounts of Milestar prepared by Davis Grant, wrote alleging that Jayesh had forged Surendra's signature and could face a claim in fraud, which would have had serious consequences for his ability to practice as an accountant.

24. Hitesh and his family moved out of the Property not long afterwards, on 6 March 2017, and went to live in a property he had purchased in January that year. He said in his evidence that he was in two minds about leaving, and the judge accepted this. Again, the judge found that he left voluntarily. Hitesh and his family left some of their possessions in two of the rooms they had previously occupied. There was some dispute at trial as to how many of the six rooms in total previously occupied by Jayesh

and Hitesh were accessible to anyone remaining in the Property. The judge found that that Jayesh and Hitesh still had control of five of the rooms, and keys to four of them.

25. On 3 July 2017 Narendra and Surendra presented a petition pursuant to section 994 of the Companies Act 2006 alleging unfair prejudice in connection with Milestar against Hitesh and Kirti, who was the 4th of the shareholders in that company (though she accepted in those proceedings that she held her 25% of the shares as trustee for Narendra, Surendra and Hitesh). Milestar is in deadlock, in consequence of which no accounts have been filed since those for the year ending August 2015. The petition was ultimately dismissed, with the judge in that case, ICC Judge Jones, favouring the evidence of Jayesh and Hitesh over that of Narendra and Amit. He found that Narendra was an unreliable witness who had made serious allegations which had not been made out and indeed, never did have evidence to support them. Those allegations included the suggestion that the reasons given for the proposed increase in the overdraft facility were fictitious.

26. In September 2017 Surendra and Narendra started proceedings in the County Court against Hitesh and Milestar for possession of two flats in Hackney in which they claimed a beneficial interest, which were immediately above the commercial premises used by Milestar. That claim was heard before the s.994 petition, and an order for possession was granted. The district judge in that case found that all the witnesses were doing their best to assist the court, but she preferred Narendra's evidence on the basis that he had a "good recall of events" and his evidence was more consistent than that of Hitesh. However, during the s.994 proceedings it emerged (and was conceded) that contrary to Narendra's evidence in the possession proceedings, neither Surendra nor Narendra had ever had a beneficial interest in one of those two flats and that in fact it was held on trust for Milestar. At the time of the trial before HH Judge Wulwik, an application to set aside the possession order had been made but not yet resolved.

27. In February 2018 Amit, acting on behalf of Surendra, made a formal complaint to the Association of Chartered Certified Accountants (ACCA) about Jayesh, making allegations of serious professional impropriety. It was suggested that the efforts to increase Milestar's overdraft facility in April 2016 were for hidden purposes, because Narendra and Surendra had discovered that a company named Gandesha Estates Ltd had been incorporated by Davis Grant on 7 April 2016. The implication was that the NEC spring fair orders were fictitious, and the funds were never intended for Milestar but were going to be siphoned off for the benefit of Hitesh, aided and abetted by Jayesh. (In the s.994 proceedings, counsel for Narendra and Surendra accepted that the formation of Gandesha Estates Ltd on that date was pure coincidence.) Amit sought to withdraw the complaint on the death of his father in April that year, but the ACCA proceeded with their investigations and the complaint was dismissed.

28. The current proceedings were issued in July 2018 (a letter before action having been written on 1 June, only around six weeks after Surendra's death). The Particulars of Claim pleaded, in paragraph 21, that the breakdown in the relationship between members of the family is total and irretrievable and in paragraph 23 that the secondary purpose of the trust set out in Clause 2 was no longer possible "*because of the breakdown in the relationships between certain of the brothers and their families such that two of the five brothers, and their families, can no longer live in the Property and have effectively been excluded from it.*"

29. I emphasise the words *"can no longer live in the Property"* because when he refused permission to appeal in this case, the judge commented that "*it was not argued by the Claimants that they were unable to return having left the Property*." However, given the nature of the pleaded case (and the way in which matters were put in Mr Power's skeleton arguments at trial) they did not need to raise that specific argument. The focus of the claim was on the complete and irreparable breakdown in the relationship and its continuing effect on their ability to live in the Property and call it their home, irrespective of the time at which that situation might be said to have arisen. For the purposes of the application under s.14 of TOLATA, all the authorities make it clear that the point in time at which the Court must decide whether the purpose of the trust is still capable of being fulfilled is the time of trial.

30. The Defence served on behalf of all the Respondents and signed by each of them with a statement of truth on 26 September 2018 was drafted by them as litigants in person, with assistance from Sonia, who is a qualified solicitor. Although they were subsequently represented by solicitors and counsel, this statement of case was never replaced or amended. It stated in paragraph 14 that "*the relationship has broken down due to the way Hitesh has been conducting himself in the Milestar business… with the support of Jayesh Gandesha via his accountancy practice Davis Grant* ". It said that they had not been transparent in relation to financial matters and refused to supply information regarding the accounts and "*this is what has caused the breakdown in the relationship".*

31. In paragraph 15 it was alleged that "*the claimants have been conspiring and colluding together for a period of at least 10 years prior to transfer of this property and assets into their name by deception… The children of the defendants have followed their father's instructions to protect them against such conspiracies*" A request for further information about the alleged conspiracies and deception led to confirmation by the solicitors who had been instructed by then that the Respondents could provide no further information. The allegations were not pursued at trial.

32. At the trial, Narendra was too unwell to give evidence and his statement was admitted under the Civil Evidence Act. He made no mention of these allegations in that statement and denied that he had ever given his brothers cause to leave the Property. Sonia and Sailas were both cross-examined about the allegations. Sonia accepted that the findings of ICC Judge Jones in the s.994 proceedings were binding on the parties, and that he had exonerated Hitesh of wrongdoing in his conduct of the business of Milestar. Sailas said he thought paragraph 15 of the Defence was true, but he had no proof of any deception, that was just his understanding. On being questioned by Mr Power and the judge about where he got that understanding from, he was unable to give any coherent or sensible response, other than to deny that he got the understanding from anyone else.

33. HH Judge Wulwik referred more than once in his judgment to the "family rift". Referring to paragraphs 14 and 15 of the Defence, he said at paragraph 30: "*such serious allegations have not been made out in these proceedings, but it shows the depth of the mistrust and hostility between the parties*." He went on to refer to the fact that after Narendra and Surendra's estate executed the warrant of possession on 24 July 2019 over one of the two flats, which had been used by Milestar to store stock, Hitesh left a voicemail message for Narendra in which he swore and said that Narendra had started a war and he was going to finish it.

34. The judge said at [46] that it was all too obvious that the parties felt very angry and upset with each other. He then observed that the claimants appeared to have lost sight of the fact that the Property was purchased as a family home and used as a family home for all the brothers including themselves for many years "*and that it continues to be very much a home for those brothers who wish to continue to live there and other family members.*" Whilst all those matters are true, the judge appeared to have been looking at them solely from the perspective of those who were still able to live in the Property, rather than from the perspective of those who had left it.

35. Regardless of why it happened, the Defence expressly accepted that, by 26 September 2018, the relationship had broken down. The judge quite rightly avoided getting drawn into apportioning blame for this state of affairs, but it is absolutely plain that when these proceedings were initiated, at the very latest, the relationship had broken down to such an extent that it would be impossible for all the surviving brothers and their families to live together amicably under the same roof, irrespective of whether there is any physical impediment to Hitesh and Jayesh returning. That inference is inexorably to be drawn from the findings made by the judge, and from the unchallenged evidence of Hitesh and Jayesh, not to mention the admissions in the Defence that were never withdrawn.

36. This was clearly not a case in which either Hitesh or Jayesh would have been welcomed back into the Property with open arms by all those who remained living there. How could they possibly be expected to live under the same roof as people who suspected them, and had falsely accused them of fraud, forgery and serious professional misconduct? Even at the time of the trial, despite the outcome of the s.994 proceedings, Sailas apparently still believed that they were guilty of wrongdoing - and he was the one with whom they were still on speaking terms. Whilst their departure was voluntary in the sense that they each chose to depart rather than being asked to leave, the circumstances in which they did so were far removed from a situation in which it would have been possible for the family to continue living together, but one or more brothers had decided for their own reasons that they would prefer to live elsewhere. The fact that Hitesh stuck it out for so much longer than Jayesh and was in two minds about leaving, illustrates how hard it must have been for him to leave the place he had called home for most of his life.

37. Despite this, the judge decided that clauses 4 (a) and (c) of the Declaration of Trust "clearly prohibited" a sale in the present circumstances. He said, at paragraph 68, that it was not possible to consider clause 2 of the 2015 Declaration of Trust in a vacuum and that:

"*The fact that the claimants have chosen to move out of the Property and purchase their own homes elsewhere is no reason to override the terms of the 2015 declaration of trust and the clear intention of the parties.*"

38. The first issue that I must decide, therefore, is whether the judge construed the Declaration of Trust correctly. If he did, Mr Power realistically accepts that the appeal must fail. If he did not, both Counsel accept that the Court must exercise its discretion afresh.

CONSTRUCTION OF THE DECLARATION OF TRUST

39. The Appellants' case is that the secondary purpose of the trust set out in Clause 2 can no longer be fulfilled in the light of the total breakdown in the relationship between some of the brothers and their families. Mr Power submitted that if it is no longer possible to fulfil the stated purpose of providing a home for *all* the brothers and their families collectively, clause 4(a) serves no useful or equitable purpose, and is likely only to cause hardship and unfairness, whilst also making the prospect of further litigation in the future between family members much more likely. I agree.

40. Ms Williams, on behalf of the Respondents, contended that as a matter of construction, it was plainly intended that the Property should not be sold without unanimous agreement *in any circumstances*, prior to the death of the last surviving brother, and the judge was right so to hold. She submitted that clause 4(a) was clear and admitted of no exceptions; it should be construed as applying even in a case in which the secondary purpose of the trust could no longer be fulfilled, for example if the house burned to the ground and was no longer fit for occupation by anyone. However, even if that were wrong, she submitted that clause 4(a) was plainly intended to cover a situation in which a dispute between the brothers arose, however serious that dispute, so that the disgruntled brother or brothers would be prevented from forcing a sale of the Property against the wishes of the others whilst there were any brothers still alive. This construction was reinforced by the express terms of clause 4(c).

41. The first thing to note is that, despite the fact that the Declaration of Trust was executed after the coming into force of TOLATA, the Property is expressly held on a trust for sale with a power to postpone sale. This means that a sale is the fallback solution. As Neuberger J observed in *Mortgage Corporation v Shaire* [2001] 1 Ch 743 at 757F, Section 1 of TOLATA had the effect of rendering trusts for sale obsolete, and replacing them with the less arcane and simpler trusts of land. Trusts of land often leave the trustees with a free discretion to sell or retain, and therefore they have a much greater degree of flexibility. In Lewin on Trusts, 20th edition paragraph 37 – 076, the learned authors state that:

"Pre-1997 authorities often treated the trust for sale as a mere conveyancing necessity, with little influence on the just and equitable result. If a trust for sale is expressly imposed after 1996, then since it is no longer required, the court should give more weight to it than before, as an intention that the land should be sold is manifested."

42. I see the force of that analysis. The fact that the land is expressly held on trust for sale with a power to postpone sale is a significant feature of this case and must be taken to have been a matter of express choice. However, the authorities establish that sale is only to be regarded as the fallback position if any secondary purpose can no longer be fulfilled.

43. *Jones v Challenger* [1961] 1 QB 176, concerned a leasehold property, the short lease of which was held by a husband and wife as trustees on a trust for sale, with power to postpone the sale upon trust for themselves as joint tenants. The marriage broke down, and the wife left the home. The husband obtained a divorce on grounds of her adultery. She subsequently remarried. The husband continued to live in the former

marital home and refused to agree to a sale of the lease. The wife applied for an order under section 30 of the Law of Property Act 1925 (the precursor to s.14 of TOLATA) seeking an order directing the husband to concur in offering the property for sale.

44. Section 30 of the 1925 Act provided that:

"If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction, or for an order directing the trustees the sale to give effect thereto, and the court may make such order as it thinks fit."

45. The judge at first instance refused to exercise his discretion, on the grounds that it would be unreasonable to order a sale to turn the husband out of his house. The Court of Appeal reversed that decision. At page 181 Devlin LJ (with whom Ormerod LJ agreed) referred to the "*simple and fundamental*" principle that in a trust for sale there is a duty to sell and a power to postpone, and accordingly, one trustee may call upon the others to perform the duty (to sell), but all must be agreed if they are to exercise the power (to postpone). However, he said that this simple principle cannot prevail where the trust itself, or the circumstances in which it was made, show that there was a secondary or collateral object besides that of sale. In such a case, the court will not permit one of the parties to the trust to invoke the letter of the trust in order to defeat one of its purposes.

46. He referred to the earlier case of *In re Buchanan-Wollaston's Conveyance* [1939] Ch 738 as an example of this. The land in that case was subject to a statutory trust for sale, but the trustees, owners of neighbouring properties who wished to preserve the land as an open space, had entered into an agreement that any transaction in connection with a specific part of the land could not take place without their unanimous consent. One of them, having sold his neighbouring property, applied to the court for an order for sale, in breach of that agreement. It was held that the court had a complete discretion to do what was right and proper, and it would not allow the voice of a man who is in breach of his obligations to prevail. The Court of Appeal accepted that matters might change, for example if all the parties died and nobody had a real interest in keeping the land unsold, but otherwise the court should not order a sale which contradicted what the parties had agreed among themselves.

47. At pages 183-184 of *Jones v Challenger*, Devlin LJ considered the purpose of the joint tenancy in that case. The house was acquired as the matrimonial home, and he said that so long as that purpose was still alive, the test in *In Re Buchanan-Wollaston's Conveyance* was the right one; but with the end of the marriage that purpose was dissolved, and the primacy of the duty to sell was restored. The court would still have a discretion, but if the husband was not prepared to buy out his former wife's interest in the property, the only way in which the beneficiaries could derive equal benefit from their investment would be by selling it. He pointed out that whenever there is joint occupation, whether matrimonial or otherwise, and it is brought to an end, there may be hardship and inconvenience caused to the person who would have preferred it to go on, but that was no reason to refuse the order for sale.

48. He also said that the Court was not concerned with the reasons for the ending of the marriage or the rights and wrongs of it. Donovan J agreed, observing at page 187 that:

"*even if the wife broke up the marriage, it is no reason by itself for depriving her altogether of her property rights, whether temporarily or otherwise.*"

49. Moreover, Devlin LJ said that the test is not what is reasonable; it was reasonable for the wife to wish to sell the property, and reasonable for the husband to wish to remain in it. The true question was whether it was inequitable for the wife, once the matrimonial home has gone, to want to realise her investment:

"*The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount as it should be, there is only one order that can be made.*" [Emphasis added].

50. The principle articulated in *Jones v Challenger* that if the (secondary) purpose of the trust is still alive, the court will not sell the property against the wishes of one of the parties, was formerly subject to an exception in a case where, as in *In re Citro* (A Bankrupt) [1991] Ch 142, a sale was sought by a trustee in bankruptcy or by a chargee of one of the joint owners' share in the property. In such cases, under the pre-1996 law, the wishes of the applicant would generally prevail. That exception, which was overtaken by the wider discretion conferred on the Court by section 14 of TOLATA (see *Mortgage Corporation v Shaire*, above) and s.335A of the Insolvency Act 1986 (see s.15(4) of TOLATA) is of no relevance in the present case. However, many of the modern authorities in this area are concerned with that type of situation, and therefore few of them are helpful in this context.

51. Indeed, neither Counsel was able to find any case in which the secondary purpose of the trust could no longer be fulfilled, and there was an express contractual provision requiring unanimous consent before the property could be sold. *Jones v Challenger* appears to provide the closest analogy. Although in that case there was no express covenant or separate agreement precluding sale without unanimous consent, it seems clear from Devlin LJ's analysis that such an agreement would not have been regarded as a bar to sale, given that the secondary purpose of the trust had failed and the primary purpose revived. The underlying rationale for this appears to be that such an agreement would normally be interpreted as supporting or reinforcing the purpose(s) for which the trust was created. Thus, in the absence of clear language to the contrary, it would ordinarily be assumed that the parties did not intend it to cover the situation where the secondary purpose could no longer be carried out, or to frustrate the primary purpose.

52. Although pre-1996 authorities should be approached with some caution in the light of the changes made by TOLATA, which gives the Court a wider discretion than s.30 of the 1925 Act (and includes an express statutory power to relieve trustees of an obligation to obtain the consent of any person in connection with the exercise of their functions) *Jones v Challenger* is still good law. It was described as the "leading case" by Nourse LJ in *In Re Citro*, who quoted with approval the passages at pp 183-184 of Devlin LJ's judgment to which I have referred. Nothing has been said in any case since TOLATA came into force to doubt the soundness of Devlin LJ's analysis, which seems to me to be entirely consistent with that of Sir Wilfred Greene MR, who delivered the judgment of the Court of Appeal in the earlier case of *In Re Buchanan-Wollaston's Conveyance*.

53. The approach in *In Re Buchanan-Wollaston's Conveyance* has been adopted in the post-TOLATA era, for example in *Finch v Hall* [2013] EWHC 4360 (Ch), a decision of David Donaldson QC sitting as a Deputy Judge of the High Court. That was a straightforward case in which four siblings executed a Declaration of Trust in which they agreed to hold the property as tenants in common, with each having a 25% interest in it. They subsequently entered into an agreement which contained a specific condition that any sale of the property must be agreed to by all of them, and that whilst the signatures of two of the trustees would be required for any agreement to sell to be binding, they could sign only if they had received the positive consent of all the property owners to their doing so. This was stated in the agreement to be of "fundamental importance".

54. Not surprisingly, the judge refused an application by three of the four trustees for an order under s.14 of TOLATA because the fourth refused to agree to the terms of the proposed sale. He applied *In Re Buchanan-Wollaston's Conveyance,* commenting at [24]:

> "*The decision [in that case] is both clear and unsurprising. The role of the court is to act with rather than against the parties' agreement. Equity neither compels nor requires any other approach. If there were some development which changed matters significantly compared with the position at the time of the agreement, it may be that this would justify a different result on the basis that the new situation was outside the contractual expectation or what the parties had in mind when they entered into the agreement. In the course of argument I gave as an example where the income obtainable from a property was no longer sufficient to maintain it so that the property was a wasting asset declining significantly in value, but nothing of that sort has been shown to obtain here.*"

55. In *In Re Buchanan-Wollaston's Conveyance*, *Finch v Hall* and other cases in which the court has refused to allow a trustee to depart from the express terms of an agreement requiring unanimous consent before a property can be sold, that agreement has always been designed to strengthen the position that *Jones v Challenger* recognised would arise even without it, and to stop the secondary purpose of the Trust from being undermined. There is no authority in which such an agreement has been enforced in circumstances where that purpose can no longer be carried out. On the contrary, *Jones v Challenger*, *In Re Buchanan-Wollaston's Conveyance* and *Finch v Hall* all contemplate that there may be circumstances in which even an express covenant against sale (or a separate agreement requiring unanimous consent) will not be a bar to the exercise of the Court's discretion if the express secondary purpose of the trust can no longer be fulfilled or, as David Donaldson QC put it in *Finch v Hall:* "*the new situation was outside the contractual expectation or what the parties had in mind when they entered into the agreement.*"

56. It seems to me, therefore, that in a case such as this, the question whether the Court will exercise its discretion under s.14 must depend on (a) whether in fact the secondary purpose of the Trust is capable of being fulfilled and (b), if not, whether the agreement requiring unanimity is to be construed as applying even in those circumstances.

57. The provisions of a Declaration of Trust, like any other contract, fall to be construed holistically, having regard to the aim or purpose of the agreement and its surrounding

circumstances. In the present case, the judge rightly held that the Property was purchased as a home for all the five brothers and their respective families. That was the purpose for which it was initially bought in 1991, and that intention is reflected in Clause 2 of the Declaration of Trust. Clause 2 declares that the Property has been purchased "*as a home for all the five brothers, and for their respective families* *and during such period as it shall be the home for all those persons.*" (Emphasis added). Plainly the intention was that it should be available as a home for all those who wished to use it as such, so that if, for example, one brother decided to emigrate with his family, but would be able to return at any time and make it his home again, he could not force a sale. In those circumstances he could not successfully argue that the purpose of the trust was no longer capable of being fulfilled.

58. The parties also plainly intended that the death of one brother should not bring the postponement of the trust for sale of the Property to an end. Without Clause 4(a) it might have been arguable that the express purpose in Clause 2 would come to an end when the Property could no longer be a home for all the five brothers because one of them had died. Clause 4(a) makes the survival of the trust after the death of one or more brothers clear, as it was intended to. The family of the deceased cannot force a sale against the wishes of the survivors, though it would still be possible for all the surviving brothers to agree to a sale against the wishes of the family of the deceased brother or brothers. That is because the families have no say in the agreement under that clause.

59. The question at the heart of this case is whether the parties intended Clause 4(a) to apply in circumstances (other than death) in which the purpose envisaged in Clause 2 could no longer be fulfilled, the reason for postponement of the sale and realisation of the asset for the benefit of the beneficiaries no longer applied, and on the face of it the parties' intention was that the position would revert to the fallback position of sale under Clause 1.

60. As was recognised in *Jones v Challenger*, the word "home" is important. In that case the breakdown of the marital relationship meant the property could no longer serve as the matrimonial home. It was home for just one of the parties. Home does not mean a place to store property. It means more than just a roof over one's head. The fact that there is no practical impediment to Jayesh and Hitesh returning to the Property to live in, should they wish to do so, does not mean that it is somewhere that they and their families could regard as their home. Although Jayesh and Hitesh left of their own accord, they did so because they no longer felt comfortable living there. After they left, the family rift got worse, not better, culminating in the active hostility that the judge identified in July 2019. The fact that Hitesh left reluctantly reinforces rather than undermines the Appellants' case, as the judge appears to have thought it did. He plainly did not want to leave his home, he was in two minds about taking that step, but ultimately, he felt that he had no choice.

61. The situation in this case is analogous to the breakdown of a marriage where one of the parties chooses to leave the matrimonial home. Theoretically it might be open to that person to return and live under the same roof again, and they may have retained a key or left personal possessions behind, but in practical terms it can no longer be regarded as their home because the relationship is over. The wife in *Jones v Challenger* went to live elsewhere, and in a sense she did so voluntarily; but the property could no longer serve its purpose as the marital home. The relationship

between the joint owners, the brothers in this case, is damaged beyond the stage where it could ever be conceived that Hitesh and Jayesh could live again under the same roof as Narendra, and his and Surendra's offspring. This Property can no longer serve the intended purpose of being a home for all the family.

62. If one considers whether, objectively, the parties to the Declaration of Trust had it in mind when they entered into the agreement that if four of the brothers (or their families) had fallen out so badly that they could no longer live in the same Property, Clause 4(a) should still apply, the answer is plainly and obviously no, just as it would be no if the house had burned to the ground and could no longer serve as a home for anyone. The only sensible way of construing this Deed of Trust so that the primary and secondary purposes are consistent with Clauses 4(a) and 4(c) is that Clause 4 is dependent upon the purpose of the Trust articulated in Clause 2 still being capable of being achieved. Clause 4 is clearly designed to reinforce Clause 2, not to create some fresh inviolable contractual rights which cut across Clause 1 in circumstances where the intention in Clause 2 is no longer capable of being fulfilled.

63. As in *Jones v Challenger*, the conversion of the Property into a form in which all parties can enjoy their rights equally was the prime object of the trust for sale. That object was agreed to be postponed only for such time as the Property could be used as a home for all the surviving brothers and their families. That is no longer possible. The preservation of the Property as a home for just *some* of them (save in the event of the death of one or more brothers) is not an object of the Trust at all.

64. Clause 4(c) takes matters no further. It records that no one brother or his family has a right to demand that the property be sold, which on the face of it is just another way of stating what has been agreed in Clause 4(a). It could be construed consistently with Clause 2 and Clause 4(a) as a reinforcement of Clause 4(a) which specifically addresses the situation contemplated in the solicitors' email, where the family of a deceased brother wish the Property to be sold. It could also prevent a situation arising in which, for example, the last surviving brother moves out, and he or his family wish to realise his share in the Property before he dies. Without that clause, the surviving brother would have the final say under Clause 4(a), because there would be no remaining brothers whose consent to the sale was required, and consequently the families of the other brothers would have no protection, even though the intention was that they should still have a home there whilst at least one brother is alive.

65. Clause 4(c) could also simply be construed as confirmation that no brother would be able to realise his share and force the others to sell by deciding not to live in the Property any more, for whatever reason, at a time when there was nothing to prevent him from regarding it as his home if he wished to do so. However, I cannot construe that clause as evincing an intention that if the relationship between the brothers irretrievably broke down and the Property could no longer be used for its intended purpose, but could only be used as a home for some of them, none of the brothers or his family would be able to seek an order for sale until after the death of all the other brothers. There would have been no need to include Clause 2 in the document at all, if Clause 4 were intended to prevent a sale of the Property in any circumstances prior to the death of the last brother.

66. As I read the judgment, the judge accepted Ms Williams' submissions on the construction of Clause 4. I agree with the judge that Clause 2 is not to be construed in

a vacuum; but nor, with respect, is Clause 4(a). Unfortunately, the judge failed to engage sufficiently with the relationship between the two clauses. The interpretation of the Declaration of Trust advocated by Ms Williams and accepted by the judge makes Clause 2 so subsidiary to Clause 4 that it is effectively emasculated.

67. In consequence of his acceptance of that argument, it appears that the judge failed to address the key issue, which was whether the secondary purpose of the trust was still capable of fulfilment. However, if I am wrong about that and the judge implicitly held that it was, by referring to the fact that the Property still serves as a home for Narendra, Sailas and their wives and daughters and for Surendra's widow and son, that misconstrues Clause 2 and overlooks the fact that it cannot be used for that purpose by Hitesh and Jayesh and their families. They did not just take it upon themselves to move out because they felt like a change of scene; they did so because they felt, with justification, that they could no longer stay there. Irrespective of whether matters had come to a head by the time they moved out (though on the judge's findings the rift had already occurred) the relationship had reached the point of no return long before the trial. It appears that the last opportunity for reconciliation was after Surendra's funeral, and the efforts made then did not heal the rift.

68. For the avoidance of doubt, if and to the extent that his observations about Jayesh and Hitesh "choosing to leave" could be read as an implicit finding that the purpose of the trust could still be fulfilled, that finding is so clearly and obviously contrary to the weight of the evidence and the judge's own findings about the state of the relationship between the brothers, that I would have no hesitation in overturning it.

EXERCISE OF DISCRETION UNDER S.14

69. Having regard to the statutory factors under s.15(1), the intention of the persons who created the Trust were that the Property should be held on trust for sale, with the proceeds being divided equally between the five brothers or their estate, and the sale postponed for so long as the secondary purpose of the Property serving as a home for all the brothers and their families could be achieved. Given that the secondary purpose can no longer be achieved, a sale would not defeat the purpose for which this Property was acquired. On the contrary, it would achieve what was intended to happen if and when that situation ever arose. The default position under Clause 1 is that the Property should be sold. The parties deliberately chose to execute a trust for sale instead of a more flexible trust of the type more commonly created post-TOLATA.

70. The express prohibition on sale without the unanimous consent of the surviving brothers until the last brother dies, was not intended to apply in a situation where the relationship has irretrievably broken down and the Property can no longer serve as a home for all the brothers, despite the fact that it is being used for that purpose by some of them and their families. It does not matter who is to blame for the breakdown in the relationship or whether it was contributed to by the behaviour of all those involved in the dispute. If the Court were to order a sale, it would not be assisting a party to breach the terms of Clause 4(a) or 4(c). Hitesh and Jayesh are not invoking one of the clauses of the Trust to defeat its purposes. There are no minors living in the Property whose welfare falls to be considered, and no secured creditors whose interests are engaged.

71. The question for the Court is whether it would be unjust and inequitable to give effect to the primary purpose of the Trust, given that the secondary purpose is incapable of being fulfilled. The judge thought it would be unjust and inequitable to order a sale because it would potentially mean that (if they could not buy out Hitesh and Jayesh) those family members still living in the Property would have to leave their home of many years. That, however, is to fall into a similar error as the first instance judge did in *Jones v Challenger*.

72. As to non-statutory factors, this Property is unlikely to be a wasting asset in terms of its capital value, and in any event, it was not purchased as an investment. On the other hand, if matters are left as they are, it could be many years before the Property is sold. Sailas could continue to block a sale for years if he is left as the only surviving brother in residence, though there may be a better chance of reaching an agreement with him than there is with Narendra. Under the terms of the Declaration of Trust all the brothers are liable to contribute to the outgoings and upkeep under Clause 3, even if Hitesh and Jayesh no longer live there, though that obligation does not appear to have been enforced. There is an express prohibition in Clause 5 upon any of the brothers charging their share in the Property in order to raise money.

73. Whilst Hitesh and Jayesh made no capital contribution to the deposit, they did contribute to the purchase of the Property via the mortgage contributions, which financed most of the purchase price, and in any event the Parties expressly agreed that despite the lack of contributions to the deposit, they should each have a 20% share.

74. Ms Williams pointed out that the judge found that Hitesh and Jayesh have retained control over most of the rooms they vacated, and the inability of her clients to gain access to them has caused difficulties in terms of the upkeep, particularly as regards engineers fixing a problem with the heating of the Property during the cold winter months. She also relied on the fact that both Jayash and Hitesh have been able to purchase other properties to live in.

75. Narendra is in his seventies, and in poor health; he is a type 2 diabetic and suffers from the same congenital heart defect that Surendra had, and he has already suffered one heart attack. He also has poor kidney function. Sailas is also a type 2 diabetic who suffers from a variety of medical conditions, as does his wife. The Property has been their home for nearly 30 years, and they still live there with their families and Surendra's widow and one of his sons. However, as Devlin LJ pointed out in *Jones v Challenger*, an order for sale is almost always bound to cause a degree of hardship and inconvenience for those who are currently living in the property and wish to remain there. If the Property were to be sold and the net price divided five ways, there should still be sufficient money for each of the remaining brothers and for Surendra's widow each (or collectively) to purchase a reasonably large and possibly more suitable property for themselves and their families to live in, even without calling on other financial resources.

76. I was asked by both Counsel to consider some evidence about the financial circumstances of the parties, the judge having made no findings about this: but it did not seem to me to take matters much further. Hitesh appears to be the least well off and is substantially financially dependent on his sons, though that appears to be largely due to the deadlock in Milestar which has led to his income from that source drying up. Amit stated in his evidence at trial that Hitesh had received no salary from

Milestar since mid-2017. Sailas admitted in cross-examination that he knew that Hitesh was being supported by his sons. Jayesh and his wife each receive dividends from Davis Grant in lieu of salary, in the total order of around £120,000 per annum. There is evidence that Narendra and Surendra's estate between them own an extensive and valuable property portfolio, but they also said they struggled to raise the money to buy out Jayesh and Hitesh's shares in the Property. There is less evidence about the financial situation of Sailas though he, like Jayesh, is working as an accountant.

77. Taking all the circumstances into account, including the relevant statutory factors, I am satisfied that it is neither inequitable nor unfair for the Court to grant the order for sale: quite the contrary, and that a sale being the agreed default position, such an order should be made. It seems to me that this fully accords with the intention of the parties to the Declaration of Trust, as properly construed, and that there is no justification for denying Hitesh and Jayesh their share of the value of the Property now. Indeed, given that the relationship has irretrievably broken down, it appears to be the only means of providing a clean break and avoiding yet more litigation in future. However, the Respondents should first be afforded an opportunity to buy out Hitesh and Jayesh's shares, and my order should reflect that once the Property has been independently valued, they should have a reasonable period in which to make payment to Hitesh and Jayesh of their 20% shares of the value, before the Property is sold.

<u>THE CLAIM FOR OCCUPATION RENT</u>

78. The first question is whether the judge erred in finding that there was no constructive exclusion from the Property at common law (the Appellants having made it clear that they did not put their case on the basis of s.13(6) of TOLATA).

79. In paragraph 78 of his judgment the judge referred to *Davis v Jackson* [2017] 1 WLR 4005 and the passage in Snowden J's judgment at [57] and [58] in which he referred to the relevant authorities. The principles are not in issue: it is a question of fact in each case whether the person who has left the property has been excluded from the property, which is often (as in this case) the family home. As Millett J put it in Re Pavlou [1993] 1 WLR 1046:

> "*If a tenant in common leaves the property voluntarily but would be welcomed back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with occupation rent.*"

80. It appears that, probably in consequence of submissions made by Ms Williams that many of the matters of which Hitesh and Jayesh complained could not have influenced their decision to leave the Property because they post-dated their departure, the judge focused on the situation as at the date of departure of each brother. He said that Narendra, Surendra and Sailas did nothing to cause the incident on 7 April 2016, and that Jayesh and Hitesh chose to leave the Property after buying properties elsewhere. He pointed out that although the security code to the outer gate had been changed, the two brothers did not ask for the new code, or for the code to the burglar alarm, which was turned off during the day in any event. They still retained the keys to and control over the locked rooms. Whilst Mr Power quite rightly did not seek to go behind those findings of fact, he submitted that the judge never really grappled

with the question whether Jayesh and Hitesh would have been welcomed back and would have been in a position to enjoy their right to occupy those rooms.

81. The question whether a joint owner has been constructively excluded from the property (i.e. could he enjoy his rights of occupation?) depends on whether he could reasonably be expected to occupy the property. In *Dennis v McDonald* [1982] Fam 63 Purchas J said (at p.71):

"The basic principle that a tenant in common is not liable to pay an occupation rent by virtue merely of his being in sole occupation of the property does not apply in the case where an association similar to a matrimonial association has broken down and one party is, for practical purposes, excluded from the family home".

82. However, in *Davis v Jackson*, at [61]. Snowden J took the view that even in a case where it was unreasonable for the non-occupying party to go into occupation, there ought to be some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, to justify a court of equity concluding that it is appropriate or fair to depart from the default position and to order the occupying party to start paying rent.

83. For the purposes of s.14 of TOLATA, the Court had to focus on the state of affairs as at the date of trial, by which time it was obvious that the relationship between the brothers had reached the point of no return. However, the claim for occupation rent necessarily focused on the earlier stages in the history of the breakdown of the relationship.

84. The judge was entitled to conclude that Hitesh and Jayesh had not been constructively excluded from the Property by their brothers at the time of their respective departures (even if they personally decided that they found the situation in the household intolerable) because the events of 7 April 2016 which were the main cause of the rift at that time were not brought about by Narendra, Surendra or Sailas.

85. However, matters do not end there. The judge did not consider the position at any point after their departure. Ms Williams submitted that he had no reason to do so because it was never contended that they were unable to return; but as I have already explained, it was not incumbent on the Appellants to raise that as a discrete issue. Indeed, it was the Respondents who chose to focus on the situation as at the date of departure instead of addressing the case that was raised by the Appellants. Mr Power's written closing submissions at trial make it very clear that his clients' case on exclusion was that they:

"*cannot reasonably be expected to live in the same house as those that have in fact made false allegations of forgery and fraud, have made complaints to ACCA which could, if upheld, have destroyed [Jayesh's] career; [and] presented a petition pursuant to section 994 of the Companies Act 2006 containing serious allegations of impropriety and fraud against either [Hitesh or Jayesh] or both.*"

It was submitted that in those circumstances, on the criteria set out in *Davis v Jackson*, this was a case in which occupation rent should be paid, subject to a discount in respect of the fact that Hitesh and Jayesh had maintained some limited form of occupation, even if they cannot live there.

86. Therefore, it was very clear that the Appellants' case on occupation rent was not confined to a consideration of the situation when they left the Property. All the matters referred to specifically by Mr Power in those submissions post-dated their departure, but that was only relevant, at most, to the date on which any order for occupation rent would commence. However, possibly because of the emphasis placed by the Respondents on the dates of departure, the judge never asked himself the questions that he should have asked, namely, whether it was reasonable to expect them to return to live in the Property, and if it was not, were the brothers in occupation responsible for that state of affairs? If so, what did they do to bring it about, and when?

87. I have no doubt that when the s.994 Petition was served, and at the very latest by the date on which the Defence was served, there could be no question of either Hitesh or Jayesh returning to enjoy their rights of ownership or being welcomed back to the Property with open arms. By then, Narendra and Surendra had chosen to accuse them of serious misconduct including fraud, forgery, and conspiracy, based on little or nothing more than suspicion, and Surendra's sons were maintaining those accusations despite their father's death. Nothing that happened on 7 April 2016 (or before or since) justified those accusations. Their conduct might well justify a court of equity ordering the payment of occupation rent for at least some part of the period after the departure of Hitesh and Jayesh. On the other hand, although Sailas may have sided with his older brothers in this case, he was not concerned with the Milestar litigation or the application for possession of the flats. At most, he seemed disposed to believe, and repeat, the allegations of serious wrongdoing because his two older brothers had made them. It was not his behaviour that was keeping Hitesh and Jayesh away.

88. Even though the conduct of at least two of the brothers would suffice to meet Snowden J's threshold, matters do not end there. Narendra's and Surendra's conduct (and the conduct of Surendra's sons after his death) undoubtedly made it unreasonable for Hitesh and Jayesh to be expected to return to enjoy the use of the Property, but they derived little or no benefit from that constructive exclusion because they had very limited use of the parts of the Property which Jayesh and Hitesh had previously occupied. Occupation rent necessarily presupposes that the party in occupation has had the use and enjoyment of the property from which the party claiming the rent has been excluded. On the judge's findings, most of the rooms hitherto occupied by the departed brothers were locked and Hitesh and Jayesh retained the keys. Those who remained only had access to one of the six rooms. I cannot see why it would be just and equitable for any of the brothers who remained behind to pay occupation rent, even at a discounted rate, in respect of the rooms to which they had no access.

89. Whilst it would have been possible for this Court to order the payment of occupation rent, at least in respect of the single unlocked room to whichever brother had previously used it, for a period from service of the s.994 petition (or possibly from service of the Defence), it seems to me that the Court must stand back and ask whether that would be the fair result in all the circumstances. That is what the judge did, and although I have arrived there by a different route, in the end I agree with his conclusion that this is not a case in which equity requires the payment of occupation rent to the Appellants. They will get their capital share of the value of the Property and must be content with that.

CONCLUSION

90. For all the above reasons I allow the appeal in respect of the application for an order under s.14 of TOLATA. The precise terms of the order can be addressed by Counsel in the light of this judgment. However, the appeal in respect of the claim for occupation rent is dismissed.