Claim No G10CL471

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 9 June 2022

Before :

HIS HONOUR JUDGE MONTY QC

- -

Between :

(1) RANJANIE DOREEN NANAYAKKARA
(2) ASHLEY GAMUNU NANAYAKKARA FERNANDO

Claimants

- and -

EDGAR ASOKA NANAYAKKARA FERNANDO

Defendant

- -

Mr Bromilow (instructed by **Gregsons**) for the **Claimants**
Dr Wilkinson (instructed on direct access) for the **Defendant**

Hearing dates: 16-18 May 2022

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Approved Judgment

HHJ Monty QC:

1. This unhappy family dispute sees a mother and one of her sons suing her other son over interests in a property.

2. I shall refer to the parties by their first names, which was their preference expressed at the trial.

3. The First Claimant is Doreen. She was married to Nimal until they divorced in 2014. They had two sons, Edgar (the Defendant) and Ashley (the Second Claimant).

4. Nimal and Doreen owned 33 Circle Gardens, a residential house in Merton Park, South London, which was the family home. They bought it at some time in the 1980s.

5. In 2011, Nimal and Doreen transferred the ownership of the property to themselves and Ashley. The transfer used the standard TR1 form, and it contained a declaration of trust that the property was owned by them as tenants in common in the following shares, namely Nimal 25%, Doreen 25% and Ashley 50%.

6. In 2014, by a settlement order that was later embodied into a consent order in the divorce proceedings (the order was approved on 24 October 2014 and the consent order was dated 28 January 2015), Doreen agreed (and by the consent order was required) to pay Nimal £293,000, and Nimal was to transfer to Doreen his legal and beneficial interest in the property. The consent order gets the reference to Nimal and Doreen the wrong way round, but nothing turns on that.

7. Doreen was able to pay £10,000 cash to Nimal, and she did so, leaving her owing him £283,000 under the consent order.

8. The money was raised on a mortgage, using the property as security. The property was transferred into the names of Ashley and Edgar, again using a TR1 form, and it contained a declaration of trust that it was held by them as tenants in common in equal shares.

9. At the same time as the transfer, Ashley and Edgar obtained an interest-only buy-to-let mortgage on the property with Virgin Money, raising enough money to pay the £283,000 to Nimal, with an additional £34,553 of the mortgage advance being paid into a joint account in the name of Doreen, Ashley and Edgar.

10. Although the property has been let from time to time, Doreen lived in the property from November 2014 (when the property was transferred to Edgar and Ashley and the mortgage was obtained) until September 2016, when she moved out.

11. Doreen moved back to the property in May 2019, and she remains living there.

12. It is Doreen's case, supported by Ashley, that the 2014 transfer was agreed (between her and her sons) to be only temporary, and that while she appreciated that she would not be entitled to live in the property once the buy-to-let mortgage was in place and that she would have to move out, it was also agreed that:

> "As and when Doreen and Ashley were in a position to refinance the [buy-to-let] Mortgage by taking out a standard repayment mortgage, Doreen could call upon Edgar and Ashley to transfer the Property to Ashley and Doreen on the redemption of the [buy-to-let] Mortgage to enable them to obtain a mortgage in their joint names".

See the Amended Particulars of Claim, paragraph 6 b.

In the same paragraph, it was also asserted that it was agreed that:

> "The Property would be let out, and the income from the Property would be used to repay the interest payments on the [buy-to-let] Mortgage and any balance would be used to pay for alternative accommodation for Doreen"

And:

> "It was agreed that Doreen would have a right to reside in the Property for as long as she wished to do so for the remainder of her life".

13. This agreement is said to have pre-dated the application for the buy-to-let mortgage and the 2014 transfer. The mortgage was entered into, and the advance drawn down, on the same date, 14 November 2014.

14. Doreen seeks the following relief: (1) a declaration that a proprietary estoppel arises in her favour as a result of her execution of the 2014 transfer and the payment of mortgage instalments (Doreen made payments of £500 per month into the joint account, as well as paying the council tax for the property); (2) an order requiring Edgar to transfer the property to Doreen and Ashley upon Doreen and Ashley discharging the buy-to-let mortgage; (3) alternatively such other relief as the court considers appropriate to satisfy the equities arising in favour of Doreen under the proprietary estoppel.

15. An order is also sought in respect of the joint account; Doreen says the money in the account is hers and Ashley's, whereas Edgar says it is his and Ashley's. I note that Doreen's pleaded case is that under the agreement leading to the alleged constructive trust the money would be used in relation to the property but that otherwise the money belonged to Doreen alone.

16. By an earlier order of this court, all accounts and inquiries consequent upon the court's findings are to be dealt with separately.

17. The issues are therefore:

    (1) Whether Doreen and Ashley have a proprietary estoppel claim arising out of the agreement said to have been reached in or about November 2014;

    (2) If so, what is the relief appropriate to satisfy that claim; and

    (3) Is there a constructive trust over the joint account and if so, in whose favour.

18. In *Habberfield v Habberfield* [2019] EWCA Civ 890, Lewison LJ stated at [33]:

> "Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept."

19. A proprietary estoppel is a doctrine of equity founded upon three main elements:

> "a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable reliance)"

See *Thorner v Major* [2009] UKHL 18 at [29].

20. If those three elements are satisfied (whether they are or not is Issue (1) in this case), it raises an equity in favour of the claimant, and the court must then decide how to satisfy that equity (that is Issue (2)).

21. Guidance as to the relevant principles is set out by Lewison LJ in *Davies and another v Davies* [2016] EWCA Civ 463 at [38]:

> "i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18, [2009] I WLR 776 at [57] and [101].
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> ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29].
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> iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].
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> iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* at [38].
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> v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.
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> vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [56].

> vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].
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> viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].
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> ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a 'portable palm tree': *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*)."

22. As to the appropriate means by which to give effect to any equity, the position is that set out in *Jennings v Rice* [2002] EWCA Civ 159 as set out by Zacaroli J in *Anaghara v Anaghara* [2021] 2 P&CR 441:

> "20. …Robert Walker LJ, at [45] to [47] contrasted (i) cases where the assurances, and the claimant's reliance on them, had a consensual character falling not far short of an enforceable contract with (ii) cases where the claimant's expectations were uncertain, or where the high level of the claimant's expectations may have justified only a lower level of expectation. At [47] he said:
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> > 'If the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point.'"

23. As I have already noted, the alleged agreement which is said to underpin the proprietary estoppel claim pre-dated the 2014 transfer and thus the express declaration of trust set out in the TR1.

24. The 2014 TR1 was signed by Nimal, Doreen and Ashley. It was not signed by Edgar.

25. In *Taylor v Taylor* [2017] EWHC 1080 (Ch), HHJ Matthews sitting as a High Court Judge held that it made no difference that the TR1 was signed by the transferor and not by the transferee.

26. Section 53(1)(b) of the Law of Property Act 1925 provides that:

> "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust".

27. In *Taylor*, it had been submitted that only the transferee was "able to declare" such trusts, and he had not signed the TR1. HHJ Paul Matthews rejected that submission, holding at [44]:

> "In my judgment, although Mark and Boyd would have been able to declare such trusts once the legal title had been conveyed to them, at the time when the transferors signed the form they were the legal and beneficial owners of the land and well able to declare such trusts. On the face of it, if A conveys to B on trust for C, only A's signature on a declaration of trust is required."

28. The argument that the vendor of land is unable to declare a trust once a contract for sale is entered into was also rejected.

29. In *Ralph v Ralph* [2021] EWCA Civ 1106, the Court of Appeal expressed doubts as to whether those parts of the decision in *Taylor* were right. At [11], the Master of the Rolls referred to section 53(1)(b) of the 1925 Act, and said this:

> "The trial judge proceeded (at [18] and [21]) on the basis that HHJ Paul Matthews had decided in *Taylor v Taylor* [2017] EWHC 1080 (Ch) (*Taylor*) that it made no difference to the validity of the declaration of trust in this situation if the TR1 was signed by the transferor, but not by the transferees, because a properly completed TR1 could only be impeached on the grounds of fraud, undue influence, mistake or proprietary estoppel (see *Pankhania*). I confess to some doubt about the correctness of HHJ Matthews' decision on that point, but since it was not raised or argued by David, I shall assume the validity of the declaration of trust for the purposes of this appeal, and leave the point to be considered again if appropriate in a case in which it does arise."

30. As it happens, I was the trial judge in *Ralph*. I felt bound in *Ralph* to follow *Taylor*, which was binding on me (being a decision of the High Court), and the position in the present case is that it remains so. Neither party in the present case suggested that I should not follow *Taylor* on this point nor was it either party's case that the declaration of trust in the 2014 transfer was not effective. I therefore hold that the 2014 transfer in the present case was an effective express declaration of trust.

31. Both parties are agreed that an express declaration of trust is conclusive as to the beneficial interests in the property.

32. As HHJ Paul Matthews said in *Taylor* at [42] and [49]:

> "The selection of the words 'they are to hold the property on trust for themselves as joint tenants' in box 11 in my judgment amounts to an express declaration of

> trust of the land being conveyed. So long as such a declaration is valid and unimpeached, it is conclusive: see Lord Upjohn in *Pettitt v Pettit* [1970] AC 777, 813; Griffiths LJ in *Bernard v Josephs* [1982] Ch 391, 403; *Goodman v Gallant* [1986] Fam 106, CA; *Re Gorman* [1990] 1 WLR 616, 621. …
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> Once the beneficial ownership of the land is determined by the documents, it is conclusive in the absence of fraud, mistake or some other vitiating factor: see *Pankhania v Chandegra* [2012] EWCA Civ 1438, [15]-[17], [27]-[28]. Such a factor may lead to the setting aside or rescission of the document or transaction (see Lord Upjohn in *Pettitt v Pettitt* [1970] AC 777, 813), it may lead to the rectification of the document so as correctly to record the intended transaction (see *Wilson v Wilson* [1969] 1 WLR 1470), or it may lead to a finding that the declaration of trust was a sham (see *Hitch v Stone* [2000] EWCA Civ 63; though this category may be only a subset of the second). In the present case, no suggestion has been made that the declaration of trust in box 11 was affected by any vitiating factor, and no claim has been made to set it aside or rectify it. It must therefore stand."

33. The point which arises in the present case is whether Doreen and Ashley can rely on the agreement as it pre-dated the express declaration of trust.

34. This point has been the subject of judicial consideration in two cases, one very recent.

35. *Clarke v Meadus* [2010] EWHC 3117 is a decision of Warren J on an appeal from the Chancery Master, who had given summary judgment against the claimant on her proprietary estoppel claim. By her proposed amended pleadings, the claimant relied on promises which she said were made both before and after an express declaration of trust. In September 1996, there was a declaration of trust stating that the beneficial ownership of a property called Bonavista was shared equally between the claimant and the defendant. The claimant asserted that she was entitled to the whole of the property on the death of the defendant.

36. Warren J identified the issue arising in this way:

> "whether the express provisions of the [declaration of trust] make it impossible to rely on the representation or promises made before that time in the light of (a) the express declaration of trust…".

37. The claimant contended that the declaration of trust was part of a tax planning exercise in which it was agreed that the defendant's half remaining share would be bequeathed to the claimant by a will to be executed following the implementation of the declaration of trust. As Warren J then said:

> "Thus, far from the [declaration of trust] being intended to displace or satisfy the previous promise to leave Bonavista to [the claimant] there was, on the claimant's case, an agreement which was consistent with, and only consistent with, an affirmation of that promise."

38. Warren J's decision at [77] was to the effect that, quite apart from a new case by way of amendment as to a promise that was made after the declaration of trust, the claimant

> "clearly has in my view, a well arguable case that the [declaration of trust] makes no difference whatsoever to the claim based on proprietary estoppel which she would otherwise have had".

39. The second authority is *Bahia v Sidhu* [2022] EWHC 875 (Ch) in which Joanna Smith J analysed the decision in *Clarke* at [118 - 122] (my summary of *Clarke* above is mainly taken from that analysis), and concluded at [122]:

> "Aside from the fact that Warren J was dealing with a summary judgment application and so could make no findings on the facts, it is quite clear that he was accepting in his judgment only that the claimant had an arguable case that there was nothing to preclude a claim in proprietary estoppel having regard to the particular (potentially consistent) terms of the later declaration of trust and the case advanced by the claimant to the effect that the declaration of trust was plainly not intended to be determinative. This is entirely different from accepting the much broader proposition that a prior equity can always be relied upon notwithstanding the inconsistent terms of a subsequent declaration of trust."

40. At [123], Joanna Smith J held as follows:

> "i) An express declaration of trust will be conclusive subject to rectification or rescission (*Goodman v Gallant*);
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> ii) A constructive trust cannot be relied upon to contradict or override the terms of a subsequent declaration of trust (*Pink v Lawrence*);
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> iii) Given that the facts needed to establish a constructive trust and a proprietary estoppel are analogous, there is no principled reason to treat a proprietary estoppel claim any differently from a claim of constructive trust in the context of determining the conclusiveness of a subsequent declaration of trust (save where, as was the case in *Clarke v Meadus*, the declaration of trust is not, on close analysis of the evidence, inconsistent with the equity and/or, as explained in Megarry & Wade (9th Edition) footnote 240 at page 426 by reference to Baroness Hale's remark at [49] in *Stack v Dowden*: '…one of the parties to the express declaration [has] led the other to believe, unconscionably, that they will not rely on that declaration as evidence of equitable ownership');
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> however
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> iv) An express declaration of trust may be overridden by an equity arising in light of representations and promises made after the declaration of trust (see *Clarke v Meadus*)."

41. For Edgar, Dr Wilkinson submitted in the light of these two authorities that whilst there was no absolute prohibition on promises made before an express declaration of trust being relied on to found a proprietary estoppel, it would be an unusual case where the express trust was consistent with the pre-trust promises and – in the present case – the trust and the promise (that is to say, the agreement) were inconsistent. Dr Wilkinson points out that in *Sidhu* it was held that the general rule is that a subsequent express trust rules out any attack on it by both the constructive trust and proprietary estoppel

routes, save for what one might call the "*Clarke v Meadus* exception", where the trust is not inconsistent with the prior promise.

42. For Doreen and Ashley, Mr Bromilow submitted that the express trust and the promises (the agreement) were entirely consistent. The agreement always was that the property would be transferred to Ashley and Edgar absolutely, and that is reflected in the declaration of trust, but it was on the basis that Doreen and Ashley could later call on Edgar to transfer it to them. The trust was therefore part of (and envisaged by) the agreement, but the agreement was enforceable in equity by Doreen and Ashley (subject to them satisfying the court about the three essential elements of proprietary estoppel). Mr Bromilow submits that the key here is that the time at which the equity "bites" is when Edgar indicated that he would not be bound by the agreement and that he regarded the property as his and Ashley's, with Doreen having no interest in it at all.

43. It will be appreciated by the reader of this judgment that the case put forward by Doreen and Ashley is a novel one. It is that a party (Doreen), who is expressly divesting herself of her legal and beneficial interest in a property, can nevertheless later call for her legal and beneficial interest to be transferred back to her, because of a promise made prior to her having divested herself of the property which was then held on express trust for others.

44. It seems to me that there are a number of problems with the case advanced by Doreen and Ashley.

45. First, it is important to remember that any agreement between the parties is unenforceable as a contract as it relates to land and is not in writing: section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. As Hoffman LJ (as he then was) said in *Walton v Walton* (unreported, 14 April 1994) at [21]:

> "But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

46. It will also be recalled that in *Davies* the first proposition was also that this is all about an exercise being carried out when the promise falls due to be performed, and that passage is worth repeating here (emphasis added):

> "i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise <u>looking backwards from the moment when the promise falls due to be performed</u> and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 at [57] and [101]."

47. The passage from *Walton* set out above is cited in *Thorner v Major* at [57] and at [101].

48. The agreement which is said to have been made – as pleaded, and as set out earlier in this judgment – is that as and when Doreen and Ashley were in a position to refinance the buy-to-let mortgage by taking out a standard repayment mortgage, Doreen could

call upon Edgar and Ashley to transfer the property to Ashley and Doreen on redemption of the existing mortgage.

49. There was no evidence in the present case that Doreen and Ashley are now in a position to refinance by taking out their own mortgage.

50. Thus, we are not presently at a time "when the promise falls due to be performed", and it is therefore not possible to decide whether an equity has been raised. That is a retrospective exercise, and the moment at which it is – on the authorities – to be carried out has not yet arrived.

51. Secondly, I am not convinced that the trust and the agreement are consistent with each other.

52. On the one hand, as Mr Bromilow submits, it was part of the agreement that the property would be transferred to Edgar and Ashley.

53. On the other hand, this is not the usual sort of proprietary estoppel case where the claimant A is alleging proprietary estoppel in respect of a property being sold by X and Y to A and B. There, A will be alleging that because of B's promises, A has a greater share than the 50% under the express trust created when the property was transferred.

54. By contrast, using the same analogy, in the present case it is X who is claiming an interest in the property despite the express trust in favour of A and B, and despite the fact that X has (by the transfer and the terms of the trust) completely divested herself of any interest.

55. In the more usual case where A claims an interest, it can be seen that the express trust may not be inconsistent with a prior promise for B's share to pass at a later stage. Under it, A has a 50% share, but is claiming also to be entitled to B's 50% share; this was the position in *Clarke*, where the promise was arguably not inconsistent with the half share under the trust because under the promise the other half share was only due to pass at a later stage on the death of the promisor.

56. In the present case, however, X has no interest at all in the property after the express trust is declared.

57. In my judgment, therefore, the express trust in the present case is wholly inconsistent with the alleged agreement.

58. I have concluded that in the present case it is simply not open to Doreen and Ashley – on the facts as pleaded, which rely entirely on an alleged agreement which came before the express trust – to seek an interest by reason of a proprietary estoppel. The trust is inconsistent with the agreement.

59. I have also concluded that in any event it is also not possible for the court to determine whether an equity has been raised (let alone how that equity should be determined) because – as is the requirement, set out in the authorities to which I have referred – Doreen and Ashley are not as a matter of fact able to say that the promise has fallen due to be performed.

60. I do not see how the court could properly make a declaration that Edgar and Ashley must transfer the property to Doreen and Ashley at some unspecified date in the future upon the happening of an event which might never occur. To do so would in effect be granting a "call option" over the property in favour of Doreen and Ashley in circumstances in which it was not possible to enforce such an unwritten contractual promise.

61. For these reasons, irrespective of any findings as to whether there was an agreement as pleaded, this claim fails.

62. In case I am wrong in my conclusions, I need to set out my findings of fact in relation to the alleged agreement.

63. I heard evidence from all three parties. To differing extents, their evidence – relating as it did to events stretching back to 2011 – was a little unsatisfactory, and in my judgment the touchstone is to look at the contemporaneous documentation and test the evidence against that documentation, paying particular regard to the parties' motives and to the overall probabilities; see the oft-cited judgment of Robert Goff LJ (as he then was) in *The Ocean Frost* [1985] 1 Ll Rep 1 at [57], which is sensible guidance in all cases, not just, as in that case, fraud claims. As Leggatt J (as he then was) said in *Gestmin v SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [22]:

> "the best approach for a judge to adopt … is … to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

64. I accept many of the criticisms made of Doreen's evidence by Dr Wilkinson as summarised in his closing submissions. For example, Doreen attempted to disown any documents she did not immediately recognise, and her evidence that the WhatsApp messages were not actually hers and were made up was plainly incorrect. Doreen's answers to questions were, in the most part, not actually answers but repetitive comments on other aspects of the claim.

65. As for Ashley, I was not impressed that he appeared to be giving evidence now which conflicted with that given by him in his parents' divorce proceedings. In 2014 he had said that the 2011 transfer was not reversible, but now he appeared to be saying that it was. In 2014 he also said that his parents knew that Edgar was getting divorced in 2011, but now he was saying that they were not aware. When it was put to Ashley that it was Doreen's idea to convert the loft, he suggested it was a joint idea and that they all agreed everything at regular family meetings. Having been reminded that he had said in his witness statement it was Doreen's idea, he went back to his written statement, and in my view all of this was most unsatisfactory.

66. Finally, I thought Edgar was overall an unimpressive witness; he found it hard to answer a straight question with a straight answer, preferring to give long explanations in which he seemed to me to want to argue his case rather than give evidence. Of particular concern to me was his evidence in relation to an attendance note of a conversation he had with Doreen's solicitor prior to the 2014 transfer in which he is recorded as having referred to Doreen moving out temporarily until they could remortgage. Instead of accepting the note as broadly accurate, he gave a long answer

about the note being an incomplete record of what was discussed (although he said he could not actually recall the conversation) and then said that he was not aware that his mother wanted to carry on living in the property.

67. I have concluded that I should approach the evidence of all three witnesses with some caution, and that I should look carefully at the contemporaneous documentation in assessing where the truth actually is.

68. I will deal briefly with events surrounding the 2011 transfer, whereby Ashley acquired a 50% share in the property and Edgar got nothing.

69. As Doreen explained in her statement, it had been Nimal's idea to transfer the property into the names of themselves and their two sons. However, Doreen said that Edgar had said that he did not need or want any share in the property, and that is why he did not get a share.

70. Edgar said that that the reason he did not get any share transferred to him in 2011 was that he was getting divorced from his first wife Martina, which his parents knew about, and they did not want him to acquire an interest in the property which Martina could then claim in the divorce.

71. Doreen says that she and Nimal were unaware of Edgar's marriage to Martina, and thus also unaware of any divorce. Ashley says he was himself aware of the marriage, and of the impending divorce, but that Edgar had sworn him to secrecy and his parents knew nothing about it.

72. In my view, Doreen and Nimal did know about the marriage and the divorce, and that was the reason for Edgar not getting a share in the property in 2011. In his witness statement given in the divorce proceedings, Ashley had said that the reason Edgar did not get a share in 2011 "was due to the fact that he was going through a divorce and therefore my parents did not want to jeopardise his share", which in my view was the truth. Doreen also said in cross-examination that she had met Martina, which in my view gives support to the fact that Edgar is right about all of this. In any event, the key thing about the transfer is that Edgar would have acquired a share in 2011 (presumably 25% but it is unclear) had he not been going through a divorce, and that was because it was always the parents' intention to give an interest in the property to their sons during their lifetimes.

73. By the time matters moved on to 2014, and Doreen and Nimal's divorce settlement under the consent order, it was plain that Doreen could not afford to pay the entire sum of £293,000 to Nimal unless the property was sold – which she did not want to do – or money was raised by a mortgage on the property. She actively consulted a broker, arranged valuations and also (as matters turned out) the Virgin Money application, and she kept her solicitors regularly updated. She considered equity release, and a standard residential mortgage, but both were dismissed as being unaffordable or unworkable. There were plainly discussions with Ashley and Edgar. Both were keen to support their mother to help raise the money. A decision was reached to apply for an interest-only buy-to-let mortgage, as this was the only affordable option, but it was appreciated that it came with a major problem: it would be a breach of any buy-to-let terms if Doreen (or Ashley, for that matter) lived or remained living in the property. At this point, if not before, the parties' evidence diverges.

74. Doreen's case, supported by Ashley, is that the three of them reached the agreement which is pleaded at paragraph 6 of the Amended Particulars of Claim: see paragraph 12 above.

75. Edgar's case is that Doreen wanted her sons to have the property as an investment property for them, and so long as she was able to pay Nimal the £283,000, she was prepared to move out of the property and live somewhere else.

76. What does the contemporaneous documentation for 2014 – such as it is – show?

77. Doreen had instructed Sella Solicitors ("Sella"), and Ashley and Edgar instructed KTS Legal.

78. The position leading up to November 2014 and the 2014 transfer can be traced through various attendance notes and letters.

79. On 19 June 2014, Sella recorded in an attendance note the following discussion with Doreen:

> "We discussed further the potential of her two sons taking on a mortgage and I explained that unless she goes on the mortgage as well, the mortgage company would expect her to transfer her legal right over to them both. She told me she understood what this meant and in fairness, and ultimately they are her sons and are looking after her to save the house and the house - or rather her share of the house would have gone to them on her demise or earlier as part of inheritance.
>
> We discussed her still having a beneficial right in the property as the boys would not be giving her consideration so to speak-as it was her intention that even if the boys managed to get a mortgage in their names, she would continue to live in the property. We spoke about her having a life interest in the property in that regard if it came to it but the client would Just be happy to live in the property and didn't mind that it being transferred to her boys. I advised her that we are not at any of these points yet as we will need to see what the outcome of the mortgage applications are and thereafter she could decide."

80. In their attendance note of 20 June 2014, Sella recorded:

> "Your sons have been looking after you and ultimately if you are not able to get a mortgage and Ashley and Edgar could then take over the property and you don't mind transferring your share over, as long as she was able to continue living at the property."

81. Sella's attendance note of 22 July 2014 notes:

> "Both agreed that the additional money would be used for a loft conversion down the line and she was content knowing that her boys would look after her and all she wanted to do was somehow save the house. I advised her that buying H out and trying to keep the house may put strain on everyone down the line financially and they all needed to consider this. Doreen was of the mind that this was better than selling the property."

82. On 24 August 2014, Sella advised Doreen that whilst she should explore the possibility of equity release, it was likely that there would be no equity left in the property after she died.

83. Sella made it clear to Doreen that she would not be able to live in the property if it was transferred to Edgar and Ashley and a buy-to-let mortgage was in place. In the attendance note of 23 October 2014, Sella recorded:

> "I did explain that as it was a buy to let mortgage — it would be unlikely she could continue living there as under the terms of a buy to let owners do not live there - she understood this but suggested that she could try to stay at the property for as long as possible with the view to taking in lodgers — but if she needed to move out-she would do so — but thought it would be temporary until the boys managed to get a better rate and a residential mortgage in the years to come. Told her that I would be speaking to Ed now regarding the mortgage implications of her continuing to live there with a buy to let mortgage and would also speak to Hasitha".

84. That same day, there was a discussion between Sella and Edgar, and the attendance note records:

> "…said that she could try to continue living in the property but he was worried that if the lender got wind then they could repossess the property. He told me that they would discuss this eventuality with her and she might have to move out temporarily until they could re-mortgage and revert to a residential mortgage - he would be speaking with her."

85. Again, Sella spoke with Doreen and on 25 October 2014 the attendance note records:

> "Call out to client - spoke to her at length about what happens with the transfer in that I reiterated that she would be transferring her legal entitlement to the property and on paper she would have no legal right to the property. She reiterated that her boys have done everything to protect her and that she was adamant that there would be no issue with being able to stay at the property even after the transfer and if there was then temporarily in a flat until things sorted themselves out and may be in a few years' time they could agree what they wanted to do with the shares-and transfer is back to her- but she wasn't too concerned with this as long as she kept the house- the house would be going to the boys anyway as part of their inheritance when she died anyway. She just wants to enjoy the property whilst she is alive - she wasn't interested in formalising what I explained was her beneficial interest (In terms of a deed of trust) as she was concerned that it might jeopardise the mortgage and in any event she trusted her two boys, they know the intention behind the transfer so there was no need for that and those were her firm instructions."

86. Sella then wrote a lengthy letter of advice to Doreen on 26 October 2014, in which they said:

> "The lender has every right to ask you to leave as you are related to the borrowers - ie your sons. Remember, they would also not be allowed to stay in the property as well, unless they obtained permission from the lender (which is very unlikely

> in the early stages) as the argument may well be that if you intended to live there and so too the boys, then, it should have been a residential mortgage they obtain. My concern, as you are aware, and as we have discussed multiple times beforehand, and certainly since the FDR is that you will effectively be relinquishing your legal right to the house. What you propose to do is to transfer your holding to your sons because you cannot secure a reasonable residential or buy to let mortgage yourself. You therefore face the insecurity, and of this, I must advise you.
>
> When we spoke you were adamant and content for the transfer to go ahead in the terms of yours hare being transferred to both children so that, simultaneously, you Ex will transfer his 25% upon him receiving his lump sum and you will in turn transfer at the same time, the overall 50% to Edgar and Ashley- effectively as Ashley already has 50% - it would be Edgar you would be transferring to. The overall transfer would mean that Edgar and Ashley both hold the property 50/50- most likely, as tenant in common. Joint tenancies as normally kept for husband and wife. You confirmed that you were Ok with your share being transferred over in this manner, as long as the boys were able to save the house and you understood that you might have to move out of the property as it was a buy to let-but would cross that bridge when it came to it When we discussed formalising you having a life interest in the property, again, as you were content that your children would be helping you, you have no reason to believe this is necessary and in any event, in time upon your demise, they would be set to inherit your assets anyway. You also told me that you did not want any risk of jeopardising the mortgage, if the lender got wind of your intentions - then you would have no other option but to sell the property and this is not what you want."

87. Doreen then spoke to Sella and confirmed her instructions, on 30 October 2014, and the attendance note records:

> "…received call from client - thanked me for my recent letter and said that she understands why I might have concerns and advised her in this way but she just wanted to get on a get the transfer done as soon as possible so that she can move on. She knows that her boys are doing the right thing and helping her out so much and could not have got through it without them. She knows what she is doing and wants to get on with it now. Explained that as long as she is knows what she is doing and is happy to proceed on this basis I would speak to Hasitha and find out what happens next and get back to them all."

88. If there had indeed been the agreement for which Doreen and Ashley contend, it is remarkable that it was not mentioned by Doreen to Sella at any stage.

89. Nor does it appear that it was mentioned by Ashley to his solicitors (and had he done so, it would have meant that he and Edgar's interests differed, and they would have been obliged to obtain separate advice).

90. Further, the attendance notes and letters do not support there having been the agreement for which Doreen and Ashley contend. That agreement is pleaded as being (in part) that once Doreen and Ashley were able to remortgage, the property would be transferred back. The only reference to another mortgage is in the attendance notes of 23 October 2014. In the discussion with Doreen, the solicitor refers to a remortgage by

Edgar and Ashley, and not by Doreen (and if that is right, there is no reason why there should have been a transfer back of ownership). The discussion with Edgar does refer to Doreen having to move out "temporarily until they could re-mortgage and revert to a residential mortgage", which again appears to be a reference to Edgar and Ashley remortgaging, and not Doreen and Ashley. Whilst I reject Edgar's evidence that he was not aware that Doreen wanted to stay in the property – this note clearly shows that he was – it is clear that there were to be discussions with Doreen, and it is also clear that Doreen was aware that the effect of the mortgage would be that she would have to move out.

91. It is also notable that the agreement contended for is that Doreen would use the rental income to pay her own rent elsewhere. However, in cross-examination Doreen accepted that she had never used the rents for that purpose, despite being able to.

92. Further, the payments Doreen was making into the joint account appear to have been voluntary, and she was asked by Edgar to stop making them, but she persisted. Doreen was also paying council tax, but as Dr Wilkinson submits, she should not have been (as the property was tenanted) and Edgar managed to obtain a refund.

93. When one looks at what was happening in the joint account, it is clear – and I accept Dr Wilkinson's submissions in this regard – that there was always a healthy balance to pay the mortgage and council tax each month taking into account the rental income.

94. I accept Edgar's evidence that it was Doreen's intention to give the property to her sons as an investment, and that whilst she would have liked to have carried on living there, she realised eventually that she could not. I also accept his evidence that the falling out was because when he wanted to raise more money on the property to fund a deposit for him and his new wife, Ashley refused and Doreen vacillated, coming up with a number of different suggestions, but eventually she asserted (in her solicitor's letter before action) that she had been pressurised into the 2014 transfer (the allegation of undue influence never found its way into the claim as eventually formulated).

95. Finally, it seems clear to me that Doreen was fully advised and that her clear instructions were that she did not want to have any interest protected in any way.

96. I therefore find as a fact that there was no agreement as contended for by Doreen and Ashley, and the claim also fails for that reason.

97. I also find that there was no detrimental reliance by entering into the 2014 transfer, because it was part of the actual agreement between the parties (as opposed to being part of the agreement contended for by the Claimants).

98. As to Issue 2, the satisfaction of the equity, Mr Bromilow had made various suggestions, including paying Doreen the difference between the income and outgoings on the property. I found it difficult to understand precisely what the Claimants were contending should be the outcome of Issue 2. However, in the light of my earlier findings, I do not need to decide Issue 2, as it does not arise on the law or on the facts.

99. As to Issue 3, the ownership of the joint account, it must follow as a result of my findings on Issue 1, and the fact that I have rejected the Claimants' case, that the money

coming from the property in the joint account belongs to Edgar and Ashley, and the money coming from Doreen belongs to her.

100. There were many other factual matters which were raised during the course of the trial, but in this judgment, I have dealt only with those matters which I have felt necessary to explain my decisions. I have nevertheless taken into account all the evidence and all the submissions which were made, and in that regard I am grateful to both counsel.

(End of judgment)