Neutral Citation Number: [2019] EWHC 2507 (Ch)

Case No: C31BS199

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 30 September 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) Lynn Smith **(2) Deena Jane Patrick**	**Claimants**
- and -	
Arthur John Morris Crawshay	**Defendant**

- -
- -

Matthew Wales (instructed by **Kitsons LLP**) for the **Claimants**
Clive Wolman (instructed by **Athena Law**) for the **Defendant**

Hearing dates: 28-31 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim brought by the claimants, the executors of the will of the late Hope Crawshay, against the defendant, one of her children. The testatrix was born in 1919. She was married to Darryl Crawshay, who died in 1978. They had four children, Sarah Knight (born in 1942), Simon Crawshay (born in 1944), the second claimant (born in 1950) and the defendant (born in 1953). The testatrix died on 3 November 2010, and probate of her will, made on 24 May 1999, was granted to the claimants on 7 November 2011.

2. The claim relates to the affairs of a partnership or partnerships carried on between the testatrix and the defendant in the years leading up to the death of the testatrix. Essentially the claim is for the repayment of money which is said to be due from the defendant to the estate of the testatrix upon the dissolution of the business upon her death. The business was one of property development, and was carried on under the name "Genesis Homes" between 1998 and the death of the testatrix in 2010, although the final development was not sold until 2014.

3. The last full accounts for the business to be produced during the lifetime of the testatrix were in respect of the year ended March 2007, which she and the defendant both signed. They showed cash assets of the partnership as £371,704. The capital account of the testatrix was in *credit* in the sum of £465,711. The capital account of the defendant was in *debit* in the sum of £82,121. The sale of the final development at the death of the testatrix (2 St Katherine's Way) took place on 18 February 2014. The defendant as surviving partner had control of this sale. The net sale proceeds were divided equally by him into two, and he paid one half share, £74,179.50, to the estate of the testatrix, and retained the other half share. After the death of the testatrix he had been pressed to produce further accounts to show the position as at the date of the dissolution of the partnership between them. Ultimately accounts were produced by the defendant in November 2015. These accounts purported to show in effect a capital transfer between the testatrix and the defendant of about £274,000 in the year 2007-2008. They also showed a reduction in capital in 2007-2008 of £73,446 and a reduction in current assets between 2007 and 2009 of £62,667. They also showed that the assets of the partnership as at the death of the testatrix were 2 St Katherine's Way and cash amounting to £115,116 in three Halifax accounts.

4. In broad summary, the claimants' case (resisted by the defendant) is (i) that there was one partnership (rather than two or even three) between the testatrix and the defendant, which was dissolved only on the death of the testatrix on 3 November 2010, (ii) that a property known as 7 Weekaborough Drive is not an asset of the partnership but belongs beneficially to the estate of the testatrix, (iii) that, contrary to the defendant's contention, there was no equalisation of partners' capital in 2007-08, (iv) that another property, known as Lower Polsham Road, acquired in November 2002 in the defendant's sole name, did not belong beneficially to the defendant, but instead was an asset of the partnership, and (v) that the defendant has been overpaid (or has overdrawn) his entitlement under the partnership, and the overpayment or over drawing should be repaid to the claimants.

Procedure

5. A detailed pre-action letter was sent by the claimants' solicitors to the defendant on 25 September 2014. The claim form itself was issued only on 27 October 2016, with particulars of claim attached. The particulars were however amended on 30 November 2016, under CPR rule 17.1. The defendant's defence is dated 6 February 2017, and the claimants' reply is dated 13 March 2017. Directions to trial were given by District Judge Watson on 10 November 2017. But it was only in August 2018 that notice of the trial was given fixing this hearing. On 25 March 2019 District Judge Watkins refused applications by the defendants for certain further disclosure, relief from sanctions and an injunction against the claimant's solicitors. An application for permission to appeal from this order was dismissed by Mr Justice Birss on 14 May 2019. The claim was tried before me between 28 and 31 May 2019, although written closing submissions were lodged thereafter, on 4 June 2019.

6. Paragraph 4 of the order of District Judge Watson dealt with witnesses of fact. Expert evidence, to the extent that it was permitted at all, was dealt with in paragraphs 5 -7 of the order of District Judge Watson, as follows:

> "5. It is recorded that the defendant's proposed cessation accounts are those drafted by Mr Roberts (and exhibited to the Particulars of Claim) for the years ended 5 April 2009, year ended 5 April 2010, and the period ended 3 November 2010;
>
> 6. The claimants shall have permission to instruct an accountant to draft the claimants' proposed cessation accounts, to be drafted on the basis of the factual matters advanced by the claimants, to be filed and served by 4 pm 27 April 2018, together with an explanation of which factual matters have been taken into account in drafting those accounts, and commenting upon Mr Roberts' aforementioned accounts (insofar as Mr Roberts' accounts may be different from the draft cessation accounts advanced by the claimants);
>
> 7. The defendant shall have permission to put written questions to the claimants' expert, such questions to be served by 4 pm 18 May 2018, and the claimant's expert is to serve his written responses by 4 pm 8 June 2018".

Evidence

Witnesses

7. The evidence at the trial consisted in part of evidence from live witnesses and in part of evidence from hearsay statements. I heard from the first claimant, Lynn Smith, and an accountant, Paul Collings, for the claimants. On the other side, I heard from the defendant, John Crawshay, and from Anthony Roberts, an accountant who prepared accounts relating to the business.

8. It had been intended that the second claimant, Deena Patrick, would also give evidence at the trial. Unfortunately, she suffers from a number of severe medical conditions, confining her to a wheelchair and making it difficult for her to read and to speak. I was told by Mr Wales that these conditions are progressive. She had made a witness statement in accordance with the rules, and duly attended at court to give evidence, accompanied by her husband as her assistant and interpreter. However, even though she managed to take the oath she was sadly unable through ill health to deal

with the formalities of giving evidence. As a result, her witness statement (dated 15 February 2018) and written answers to previously submitted questions (24 May 2019) were, on the application of the claimants, and without objection on the part of the defendant, admitted as hearsay evidence, for me to give such weight as I thought fit. Counsel for the claimants realistically accepted that, given the progressive nature of the disease from which the second claimant was suffering, I might well give less weight to the written answers to questions (produced only the week before trial) compared to the second claimant's witness statement from 15 months ago.

9. I add here that, at the start of the third day of the trial, Mr Wales for the claimants asked me to appoint Mrs Patrick's husband as her litigation friend, on the basis that she had lost capacity to conduct the litigation. This application was supported by a short witness statement from Mr Patrick saying that he considered that his wife no longer had capacity. However, there was no medical evidence in support of the application. Given that the first claimant was continuing to give instructions in relation to the proceedings, Mr Wales accepted that there was no pressing need for an appointment to be made straight away. I indicated at the time that the evidence did not seem strong enough at present to overcome the presumption of capacity in the Mental Capacity Act 2005, s 1(2), especially taken with s 2(3), and that in my view it would be preferable therefore to obtain some medical evidence, preferably from a doctor who could compare Mrs Patrick's present condition to what it had been. The matter was left there, and in fact no further application on this aspect was made to me during the remainder of the trial.

10. I give my impressions of the live witnesses here. Lynn Smith, who is a practising solicitor and a partner in Kitsons, the claimants' solicitors, was a straightforward, careful and transparently honest witness, engaging directly with questions. She accepted correction where necessary, in particular agreeing that she was not particularly good with accounts. Otherwise, cross-examination made little impression on her. In addition, I bear in mind that, as a professional executor, she has no personal interest in this claim and that, as a solicitor, she has both a reputation and a professional status to lose by not telling the truth. Overall, I have no hesitation in accepting her evidence as truthful. Of course, I also bear in mind that she is not a direct witness for some of the events with which I am concerned. For example, she could not have been involved in discussions between the testatrix and the defendant, and she was not present at meetings between the defendant and others, such as the conveyancer Ms Postans.

11. Mr Collings was a bright, clear and straightforward witness, quick and engaging, and an evident master of his subject, accountancy. Cross-examination made no impression on him at all. As with Lynn Smith, Mr Collings is a disinterested professional with no axe to grind. His evidence was more limited than that of Mrs Smith, being confined to the accounts of the business, but I likewise have no hesitation in accepting it as truthful, so far as it goes.

12. The defendant was a quietly spoken and engaged witness, careful in what he said. He displayed a rather simplistic, layman's view of the world, very different from that seen by professionals. It was clear that his understanding of formal accounts was limited, as he himself confirmed. He referred any questions but the simplest about the accounts of the business to Mr Roberts, saying that he did not understand accounts. On the whole, I consider that he was telling the truth as he saw it. However, I also

think that he has convinced himself that he is in the right and that the events must have happened so as to support that. But, in certain crucial aspects, I think that he is mistaken.

13. Mr Roberts was a quiet, careful and straightforward, indeed transparent witness. He confined his evidence strictly to his own knowledge and experience. He referred constantly to his instructions and to what he had been told or informed of. I accept his evidence as obviously truthful. This does not, however, mean that I accept the correctness of his underlying instructions or his accounting treatment of the information with which he was supplied.

14. In addition to these witnesses, I also had the benefit of the witness statement of the second claimant dated 15 February 2018, and her answers to written questions, dated in the week before trial. Given what happened at the trial, I do not think I can place much value on the latter. But the former was made 15 months earlier, and, whilst I bear in mind what I say in the next paragraph about witness statement evidence, I think I can properly take that witness statement into account, to some extent at least. As it happens, I have not relied on the written answers to questions, and my reliance on her witness statement has largely been to support other evidence.

Fact-finding

15. In this case there is an acute conflict of evidence on certain points. That means that I must first decide what happened, before being able to apply the law to the facts. The lawyers involved in this case will know this already, but for the benefit of the non-lawyers, I make clear that judges have no superhuman skills when it comes to deciding what happened. They must rely on the evidence in the case, and on their own assessment of the witnesses that they observe giving evidence. Where *hearsay* evidence is admitted, and there is no witness to observe, the judge gives that evidence such weight as he or she thinks fit, bearing in mind that the witness has not sworn (or affirmed) to tell the truth, cannot be cross-examined or asked any supplementary questions, and cannot be observed by the judge whilst giving evidence.

16. Generally speaking, a party to civil litigation who asserts something has the burden of proving it. Civil judges decide what happened on the balance of probabilities, that is, that a thing is true if the judge thinks, on the basis of the evidence which the parties have adduced, that it is more likely to have happened than not. That means that decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are *the judge's assessment* of the *most likely facts* based on the *materials which the parties have chosen* to place before the court. But, whilst judges give reasons for their decisions (as I am doing now), they cannot and do not explain every little detail or respond to every point made during the trial. These reasons must be read in that light.

17. One problem in this case is that the events concerned go back more than twenty years. But human memory is well-known to be fallible. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [16]-[20], an experienced commercial judge, Leggatt J (as he then was), commented on modern research into the nature of memory and the unreliability of eyewitness evidence. Another problem in this case is that the testatrix, one of the main protagonists, who was involved in many of the important events which fall to be considered, is now dead and therefore cannot give

evidence about what happened. For these two reasons, therefore, the documentary evidence available to the court becomes even more important.

18. In the *Gestmin* case, Leggatt J said this (at [22]):

> "In the light of these considerations [about the unreliability of memory], the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

I propose to adopt a similar approach.

Other evidential matters

19. I should record four other aspects of the question of the evidence before me.

Exchange of emails between Mr Wolman and Mrs Angela Harrison-Branter

20. First, Mr Wolman at the start of the trial sought to allow into evidence an exchange of emails that had passed between him and Mrs Angela Harrison-Branter (formerly Postans) the week before in relation to her work as a conveyancing solicitor in 2002 on the acquisition of the development site at Lower Polsham Road. Mr Wolman argued that the defendant had not previously been able to obtain this information from Mrs Harrison-Branter (who had left this country and gone to live in rural France). In fact, the defendant had applied at the pre-trial review for permission to adduce a further witness statement from this witness, but there was not even a draft witness statement or even a witness summary to demonstrate what the evidence was or what its importance might be, and I had refused such permission for reasons given at the time, but essentially on the basis that it was now far too late.

21. Mr Wales for the claimants objected to the introduction of this exchange of emails on a number of grounds, not least that Mr Wolman could not be both advocate and witness, and should not be carrying on litigation by corresponding with potential witnesses, unless licenced to do so. It was not necessary for me to deal with those points, and I did not do so. But I pointed out that no witness summary (*ie* a summary of the evidence which would otherwise be included in a witness statement or, if that was not known, the matters about which the defendant would wish to question the witness) had been served or even permission sought within CPR rule 32.9(1). Mr Wales, for the claimants, referred to rule 32.9(4), requiring such witness summary to be served within the period in which a witness statement would have had to be served. That deadline had long since passed.

22. However, Mr Wolman sought to argue that CPR rule 32.9, dealing with witness summaries, did not apply to this case. He said it only applied to a party who was "required to serve a witness statement for use at trial", and that the defendant had never been required to serve a witness statement at trial from this witness. I rejected Mr Wolman's argument, holding that the reference in rule 32.9 to a requirement to serve a witness statement was a reference to the general requirement in CPR Part 32 that witness statements intended to be relied on at trial should be served in advance of it. I referred in particular to the cross-heading to rule 32.4 ("Requirement to serve witness statements for use at trial"). It was also far too late in the day. Accordingly I dismissed Mr Wolman's application to introduce the email exchange into evidence.

Photograph albums

23. The second matter was that, during the first day of the trial, Mr Wolman produced two albums of original photographs which he said had just been located by his client, the defendant, and passed to him. He wished to introduce some of these photographs into evidence, as they included photographs of the testatrix. He did not, however, have any copies of these photographs. All he had was the originals. It was difficult to see the significance of these photographs in relation to the issues arising. I rejected this application for reasons then given. But I pointed out that (if they were relevant at all) these documents had not been disclosed in advance in accordance with the disclosure requirements, and that the claimants had had no opportunity to consider them (and indeed at the time of the application had not even seen them). I held that the procedural rules were designed to enable parties to prepare properly for trial and to prevent being taken by surprise. A fair trial could not be had if parties were constantly seeking to introduce new material without warning.

Permission to examine in chief on new matters

24. The third aspect was that, at the start of the second day of the trial, Mr Wolman made an application under CPR rule 32.5(3)(b) to be allowed to ask questions of his own client in examination in chief about three matters which he said were new and justified such permission. That sub-rule provides as follows:

> "(3) A witness giving oral evidence at trial may with the permission of the court –
>
> (a) amplify his witness statement; and
>
> (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties."

25. These three matters were:

1. The evidence given on the first day of trial by Mrs Lynn Smith in cross-examination about the meeting between her and the defendant on 31 May 2012;

2. The evidence given on the first day of trial by Mrs Lynn Smith in cross-examination about whether the conveyancing lawyer Ms Postans had made notes during the meeting she had with the defendant in 2002;

3. The question of what weight to give to the hearsay evidence of the second claimant (see at [8] above), given her inability to give significant live evidence at the trial.

26. Mr Wolman argued that in each case the matters had arisen (within the meaning of rule 32.5(3)) since the defendant's witness statement was served, and it would be right to allow him to be asked questions about them. Mr Wales, on behalf of the claimants, objected to permission being given on any of these matters. He referred me to CPR rule 32.5(4), which provides:

> "(4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement."

27. In relation to the first of these matters, I accepted the submission of Mr Wales that this was the ordinary case of evidence having been elicited on cross examination which had not been in the witness statement, and that the rules provided that each party had only one chance to put in its evidence. As Mr Wales observed, there was a danger that, if permission was given in such ordinary circumstances, everyone would go round in circles, seeking the right to put in further evidence about the new evidence that had just been elicited in cross-examination. I therefore refused permission in relation to this matter.

28. As to the second matter, Mr Wales argued that this was an attempt to relitigate the application to District Judge Watkins to put in further evidence, which had been dismissed (as had an appeal from that dismissal). I accepted that what Mr Wolman wanted now to ask about had formed only a small part of the earlier application to District Judge Watkins to put in further evidence, Nevertheless, the witness statement of the defendant's wife (which had thereby been excluded) had been made in August 2018, before the disclosure to the defendant in December 2018 of the file relating to the acquisition of the Lower Polsham Road site, and it was that disclosure which was the new matter justifying permission being given. The question whether Ms Postans did or did not take notes during her meeting with the defendant was a very short and discrete point and would take very little time to be put to a witness who was already present. I therefore gave permission for questions to be put in chief to the defendant on this narrow point.

29. As to the third matter, Mr Wolman argued that there were two interpretations that could be put on what the second claimant said in court on the first day of trial about her witness statement and her written answers to the defendant's written questions. One was that she had forgotten what she had said. The other was that she was not happy with at least some of what had been put in front of her. He argued that the defendant would be able to give evidence about which of these was more likely to have been meant, and could also give evidence about the impact of the second claimant's medical condition. I held that, in circumstances where the second claimant and the defendant had been estranged for a number of years, any evidence that the defendant could give on these matters would not be likely to be of sufficient quality to justify the giving of permission, and in any event it would almost certainly be speculative. Moreover, in relation to the second claimant's medical condition, it would be opinion evidence, and the defendant was not qualified to give such evidence. Accordingly I refused permission.

Reliance on non-disclosed document

30. The fourth matter is that, right at the end of his re-examination of Mr Roberts (the final live witness at the trial), and indeed, at the end of the defendant's case, Mr Wolman sought to put to the witness and rely on a document to which he had referred earlier as one of a sequence of letters passing between Bartons solicitors and the partners of Genesis Homes about the completion of a conveyancing transaction in 2008. It was a letter from the solicitors addressed to both partners. Mr Wolman had been unable to find the document in the bundle, and it was his solicitor who eventually produced a copy.

31. Rather to my surprise, it turned out that this document was not in the trial bundle at all, indeed had never been disclosed at all, but was all along in the defendant's solicitors' hands. Mr Wolman accepted that his client had failed to disclose it, but sought to argue that, since it was addressed to both partners, it was not just the defendant that had failed to disclose it but also the claimants, as personal representatives of the testatrix. However, the letter was addressed to the partners at the home address of the defendant, and there was no evidence that the testatrix had ever received the letter or even a copy. Mr Wolman asked the court to infer from the letter's terms that the testatrix must have seen the letter. Mr Wales, for the claimants, objected to the letter being relied on for any purpose.

32. I declined to allow Mr Wolman to rely on the letter, holding that it was far too late in the day to seek to rely, in re-examination of his own witness, on a document which on any view should have been disclosed by the defendant but had not been, and which the counsel for the claimants had not seen, let alone read, before that moment. In any event I was not prepared in the circumstances to draw any inferences from its terms as to whether or not the testatrix had seen the document.

Issues at trial

33. A number of issues were live at the trial. In (more or less) chronological order they were as follows:

    i) the beneficial ownership of plot 12 of the Weekaborough development;

    ii) the question whether there was more than one partnership between the partners;

    iii) the beneficial ownership of the development project at Lower Polsham Road (Glen Court);

    iv) the reduction in capital of the partnership between 2007 and 2008;

    v) whether there was an agreement between the partners to equalise their capital shares in 2008;

    vi) if there was, whether undue influence was exercised in relation to that agreement;

    vii) if there was not, whether the defendant has a claim in unjust enrichment/restitution against the partnership or the testatrix.

I deal with these issues in that order, finding the relevant facts as I go, in the light of the evidence admitted, and the other material before me, and on the balance of probabilities.

Findings

34. First, however, I will set out the background facts. I have already mentioned the details of the marriage of the testatrix and the four children born of that marriage, including the defendant, who was the youngest. The others left home while he was still a teenager, but he always lived either with or close to the testatrix. He appears to have become the favourite child of the testatrix, even though (as will be seen) in her will the residuary estate of the testatrix was divided into four equal shares for her children. As I have already said, the testatrix's husband died in 1978. The defendant eventually became a teacher, though he gave up that profession in 1997.

35. On 30 September 1953 the testatrix purchased land in her own name at Marldon, near Paignton in Devon, extending to 2.189 acres and known as Weekaborough House, Churscombe Road. The title was unregistered. By three deeds of gift in 1982, 1991 and 1994, the testatrix conveyed to the defendant certain land forming part of the land she had purchased in 1953. They were all expressed to be made in consideration of "natural love and affection" for the defendant. The first conveyance gave the defendant land on which over time he converted an existing stable/coachhouse to a new residence (which was called "Barnfield"). The second conveyance added sufficient land to give the defendant a new access to Vicarage Road, the public highway on the far side of the property. The third conveyance added land which generally increased the defendant's holding. Title to the testatrix's remaining land was first registered at HM Land Registry in her name on 12 June 1998.

36. However, prior to that date, on 29 January 1998, the testatrix and the defendant had entered into a written partnership agreement. This was professionally drafted for them by Kitsons solicitors (now the claimants' solicitors). In a recital to that agreement, the parties are described as

> "partners in the business of building developers ("the business") the details of which are more particularly described in Schedule Two…"

That schedule states that:

> "The business shall develop the premises to build upon it 15 residential properties as is shown on Plan Two attached hereto and the construction of the same shall be divided into phases."

Details are then set out of the three phases. Phase 1 involved Plots 1-3, 14-15. Phase 2 involved Plots 3-7, 12-13. Phase 3 involved Plots 8-11.

37. "The premises" is defined by paragraph 1 of the agreement, which states:

> "The business of the partnership shall be carried on at the land adjoining Weekaborough House Churscombe Rd, Marldon nr Paignton Devon ("the Partnership Premises") as is more particularly described in Schedule One hereto or at such other place or places as the partners may from time to time agree".

38. Clause 2 of the agreement provided that the initial partnership capital should be £300,000, of which £50,000 had been contributed by the defendant and £250,000 by the testatrix, and which should belong to the partners in proportion to their contributions. I interpolate here to say that the contributions which the testatrix and the defendant made to the partnership capital were not made in cash, but in land. The testatrix contributed five sixths in value and the defendant contributed one sixth. In terms of the phases into which the development was divided, Phases 1 and 2 consisted entirely of Plots formed from the testatrix's contributed land. Phase 3 (except for Plot 11) consisted of Plots formed from the defendant's contributed land. Plot 11 was formed from both contributions.

39. Clause 2(4) provided:

> "Where the capital of the partnership shall be real property owned solely by any one of the partners the partners hereby AGREE AND DECLARE that they shall use their best endeavours to have such property transferred into the joint names of the partners but if this shall not be practicable that partner shall hold such property on trust for the benefit of the partnership".

40. Clause 3 of the agreement provided that the profits of the business should be divided between the partners in the proportion 75% to the testatrix and 25% to the defendant for each of Phases 1 and 2, but 100% to the defendant in relation to Phase 3, but with an exception for plot 11, the profits of which should be shared equally. These differences in treatment of the profits reflected the different sources of the land comprising the various plots. Clause 4 required that proper books of account should be kept properly posted up and available at all times for inspection by each partner.

41. Clause 5 provided:

> "On the 31 day of January in each year an account shall be taken of all assets and liabilities of the partnership and a balance sheet and profit and loss account showing what is due to each partner in respect of capital and share of profits and salary shall be prepared and shall be signed by each partner who shall be bound thereby unless some manifest error shall be found therein within three (3) months in which case such error shall be rectified".

42. In this connection, I was referred to the decision in *Ham v Bell* [2016] EWHC 1791 (Ch), in which a partnership agreement contained a very similar clause (see at [32]). HHJ McCahill QC, sitting as a judge of the High Court, made the general point (at [52]) that, without such a clause, accounts were simply evidence of the position between the partners. But he also referred with apparent approval (at [34]) to a passage from *Lindley and Banks on Partnership*, at paragraph 1075, which had also been cited with approval by Lord Reed in *Montgomery v Cameron & Greig* [2007] CSOH 63 (OH), [28]. That passage shows that, in the absence of an allegation of fraud or other dishonourable conduct, such a clause renders the accounts binding on the partners. It also represents my understanding of the current law. In the present case, no allegation of fraud or dishonourable conduct is made against the testatrix.

43. The defendant says the accounts constitute representations about the position of the partnership business that partners have agreed to make to 3rd parties, such as creditors and HMRC. He denies that they are binding *inter se* as to how much is owed by one

partner to another. I reject this submission. Clause 5 says in terms of the partners signing the accounts are "bound thereby" unless a "manifest error" is found within three months. This is consistent also with the approach of Lord Reed in *Montgomery v Cameron & Greig* [2007] CSOH 63 (OH), [30].

44. Clause 6 appointed Mr Roberts, trading as "The Tax Shop" in Paignton, as the partnership accountants. Clause 7 provided that:

> "The partners shall be entitled to draw out of the partnership bank account on account of the partners respective shares of the profits such sums as shall be agreed between the partners from time to time but if when the next following yearly account is taken it appears that any partner has drawn any sum in excess of such partner's share of the profits such partner shall forthwith repay such excess".

Clause 8 dealt with partnership banking. Clause 9 required the defendant to devote his whole time and attention to the business of the partnership, except as otherwise agreed. Clause 11(2) provided that a partner's interest in the partnership should pass under that partner's will on death.

45. At the time of the constitution of the partnership, the partners' respective contributions in land were still owned by each of them solely, and (at that time) as unregistered land. So the effect of the partnership agreement, and in particular clause 2(4), was that at that stage each partner held the land the subject of his or her respective contribution on trust for the partnership. Section 20 of the Partnership Act 1890 is to similar effect.

46. Up to this time the testatrix had lived on her own at Weekaborough House. But during January 1998 she became ill with an intestinal complaint. On 26 January 1998 she was taken urgently into hospital for an operation. She remained in hospital until 14 February 1998. So she actually executed the partnership agreement while she was an in-patient. When she came out of hospital, she did not go back to Weekaborough House, but instead went to stay with the defendant at Barnfield. She stayed there for 12 months, during which time she decided she would prefer to live in one of the new bungalows being built, rather than return to Weekaborough House. She chose the bungalow being constructed on plot 12, which became 7 Weekaborough Drive.

47. On 13 February 1998, that is, the day before the testatrix came out of hospital, the defendant's wife left him, taking their children. There then followed divorce proceedings initiated by the wife, which at some stage also involved registering a caution on Barnfield and the neighbouring land belonging to the defendant (including that part of which he was the legal owner but which had formed his contribution to the partnership capital, for the purposes of the development). This had the effect of preventing sales and thereby delaying the development. Eventually the defendant and his wife reached a financial settlement, involving the allocation of one of the properties being constructed to her. Subsequently, however, the wife's changed circumstances led to an application to set aside the settlement, and the obligation to allocate a property to the wife was replaced by a financial obligation of a lower value, £130,000 (reduced by £2500 already paid). This sum was resourced by drawing on partnership cash. The accounts showed this as a drawing by the defendant on his entitlement under the partnership agreement. His evidence was that this was wrong

and that it (or at any rate half of it) was a gift from his mother, who had encouraged him to draw the cash from the partnership. I deal with this question later.

48. The testatrix was evidently concerned to protect the defendant's position in the event of her own death as against claims by his wife. So in May 1998 she instructed Kitsons to prepare a will for her (replacing an earlier one), under which her residuary estate was divided into four parts, one for each of her children. However, that for the benefit of the defendant was subjected to discretionary trusts in favour of the defendant and his children rather than being an outright gift. In fact, the will was not signed until 24 May 1999.

49. The process of development of the land started in 1998. Plots 1 and 3 were sold in November that year. The remaining plots in phases 1 and 2 were sold in 1999, the last (plot 5) in September. Of the properties in phase 3 plots 8 and 9 was sold in February 2002, plot 10 in May 2002 and plot 11 in April 2003.

The beneficial ownership of Plot 12

50. Plot 12, which later became 7 Weekaborough Drive, was not sold as part of the development, because as mentioned above the testatrix decided to live there instead of at Weekaborough House. Since she was the original legal and beneficial owner of the whole land of which Plot 12 formed part, there was no need for any conveyance to her. The effect of the partnership agreement had been to subject it to a trust in favour of the partners. The question is whether that remained the case by the time of the death of the testatrix. It is interesting to note that the defendant's proposed cessation accounts do not purport to show Plot 12 as a partnership asset. Yet it was an issue at trial, and I must deal with it.

51. The balance sheet forming part of the accounts of the partnership for the year ending in 2000 (signed by both partners) show that the testatrix's capital account was debited with the sum of £82,500 in respect of Plot 12. The defendant did not complain about these accounts. Indeed, he signed them and did not suggest that there had been a "manifest error" within the three months stipulated by clause 5 of the partnership agreement. It is to be noted that a valuation of the prospective development for Midland Bank plc by valuers Irvine Nott in January 1998 placed a value upon Plot 12 of £85,000 when completed.

52. A letter written by Mr Roberts dated 5 May 2011 states that

> "the accounts were drawn on the basis that the property was 'disposed of', and certainly it did not feature as a Residual Asset when the partnership was closed".

The first claimant said in cross-examination that Mr Roberts had told her that he prepared the accounts on the basis that it belonged to the testatrix. In turn, Mr Roberts in cross-examination accepted that he knew that this property had been disposed of, because the partners, and in particular the defendant (who however denies it), had told him so. In evidence he confirmed that there was a capital gains tax advantage if Hope Crawshay took this property as her home, compared to selling it to a purchaser.

53. There is no suggestion that the disposal of the property in this way was a sham, to evade tax. Indeed, the testatrix paid all outgoings on plot 12 during her life, and her

estate has continued to do so after her death. The defendant has not contributed, or indeed offered to contribute, to these. However, I accept that the defendant did maintenance work on the property (as any child living close by to an elderly parent would do). In particular, he maintained the garden, as the testatrix was not able to do this.

54. The defendant says he "does not accept that in assenting to its accounting treatment in 2000, which was driven by tax considerations, he understood that he was surrendering his 25% stake in its proceeds of sale." If that is the defendant's belief, then it is mistaken. On the evidence, the defendant was not giving up his 25% stake for nothing. The property was being sold out of the partnership for its market value, which was paid to the partnership by debiting Hope Crawshay's capital account. As I have already said, clause 5 of the partnership agreement makes clear that the partners are bound as between each other by what the accounts say, unless a manifest error is rectified within three months. No such rectification of the 2000 Accounts ever took place.

55. In my judgment, it is abundantly clear that the partners had agreed between themselves that the testatrix would take Plot 12 for her own, and that her capital account would be debited accordingly. To the extent that it is necessary, the defendant's signature on the 2000 accounts is a sufficient compliance with the requirement for signed writing to dispose of an equitable interest in land under section 53(1)(c) of the Law of Property Act 1925. Even if it were not, it would be using the statute as an instrument of fraud for the defendant to insist upon such signed writing as between himself and the testatrix, or those who claim under her: *cf Re Duke of Marlborough* [1894] 2 Ch 133. Accordingly, Plot 12 forms part of the estate of the testatrix, and is not an asset of the partnership.

One partnership or more?

56. Further projects were carried out by the partners. Between phases 1 and 2 of Weekaborough, and phase 3, there were smaller projects at Endsleigh Orchard and Chapel Road, Lymstone. The four units in these two projects were all sold between December 2000 and May 2001. After Weekaborough phase 3, there were projects at Lower Polsham Road (Glen Court) (bought November 2002, units sold February 2005 to May 2006), Roselands Drive (bought April 2008, sold October 2008), Tallow Wood Close (bought October 2008 in part exchange for Roselands Drive, sold February 2009) and St Katherine's Way (bought November 2008, sold February 2014). The last two projects mentioned, in fact, realised losses.

57. It is clear that a partnership was constituted in 1998 between the defendant and the testatrix by virtue of the written agreement. But the defence to this claim alleges that that partnership was dissolved in March 2004 and that a new partnership arose in April 2004, which lasted until the death of the testatrix in 2010. In argument the defendant even submitted that there was a new partnership for the projects at Endsleigh Orchard and Chapel Road, Lymstone, which fell between Weekaborough phases 1 and 2 on the one hand and 3 on the other, and yet another partnership from April 2008 (when Roselands Drive was purchased) until the death of the testatrix. No permission was sought to amend the defence to allege these further partnerships. Nevertheless, I will deal with the allegations.

58. No positive evidence of any dissolution of the original partnership was placed before me other than the defendant's own assertion that that was the intention. The defendant accepts therefore that there was no formal dissolution. He points to the terms of the 1998 agreement, which were drawn with the Weekaborough development in mind. But the terms of that agreement are equally consistent with other projects being undertaken, and I cannot construe it as necessarily confined to a single adventure. Moreover, Mr Roberts drew the accounts for the partnership throughout the period of the alleged dissolution, entirely based on the 1998 agreement and the instructions of the partners. He agreed in cross-examination that he had no instructions to do anything differently.

59. The defendant argues that the partnership was nevertheless only concerned with Weekaborough. Yet, as I have said, there were two other developments in 2000 to 2001, and the provisions of the 1998 agreement were applied to them. Their costs and proceeds of sale were entered in the partnership accounts. So the agreement went wider than Weekaborough. The defendant says that they were only minor projects, entered into to keep things ticking over, and to keep tradesmen in the 'team'. Nevertheless, the units in these developments sold for about £700,000, which is not minor in the context of the business of this partnership. The development site at Lower Polsham Road was acquired in 2002, and the last units in that development were not sold until 2006. These facts are all inconsistent with a dissolution of the original partnership in 2004 and the creation of a new one. In addition, since in my judgment the partnership was not "entered into for a single adventure or undertaking", there was no automatic dissolution under the Partnership Act 1890, s 32(b).

60. The defendant says that the parties reached a new agreement in March 2004 to split future profits equally. But that is not inconsistent with a continued partnership. The 1998 agreement allowed for the partners to change the profit share by agreement. Mr Roberts accepted as much in giving evidence. Moreover, he pointed out that no new universal tax reference ("UTR") had ever been obtained for the partnership. The original reference continued to be used. If there had been a new partnership, a new UTR would have been needed. In any event, the accounts drawn by Mr Roberts show not an equal but an unequal division of profits between 2005 and 2007. Accordingly, if there indeed ever was an agreement to change the profit share, evidently it was not implemented, as everything stayed the same. The defendant in cross-examination could not explain this. My conclusion on the evidence, therefore, is that there was no new partnership in 2004.

61. So far as concerns 2008, the defendant argues that there was no trading between the last sales of units in the Lower Polsham Road development in 2006 and the purchase of the site in Roselands Drive in April 2008. Accordingly, he says, there must have been a cessation in 2006 and a new partnership from 2008. He supports this by saying the new economic activity was refurbishment rather than development. But the (original) partnership continued to have assets (*eg* bank accounts), and indeed the partnership bank account statements continue to show small amounts of economic activity during that time, mainly drawings and business expenses.

62. The defendant says that these are simply repairs and other matters arising from previous developments. That may be, but in my judgment the fact that bank accounts continue to be operated, and their statements show activity is strong evidence that the original partnership has not ceased. The absence of formal accounts prepared by Mr

Roberts for the period is explained by the fact that, as he admitted in cross-examination, he had not been told of this activity. The fact that from 2008 the business concentrated on refurbishment does not automatically make it a new partnership. Refurbishment and property development shade into one another. In my judgment, on all the evidence before me, there was a single partnership from 1998 until the death of the testatrix in 2010.

The beneficial ownership of Lower Polsham Road (Glen Court)

63. In 2002 a development site at the corner of Lower Polsham Road and Glen Road was acquired. It was conveyed into the defendant's sole name on 8 November 2002. Box 12 of the Land Registry form TR1 (declarations of trust) was left blank. The purchase money of £186,000 came from partnership funds. Section 21 of the Partnership Act 1890 provides that, unless the contrary intention appears, property bought with money belonging to the partnership is deemed to have been bought on its account. As it happens, the property appears in the (signed) partnership accounts as a partnership asset. The site was developed by the partnership, and the units of the development were sold (between February 2005 and May 2006) as partnership assets, and the sales figures were entered in the partnership accounts.

64. The defendant argues that he always intended that this should be his own beneficial property. He gave evidence that he had specifically told the conveyancer Ms Postans of Kitsons that it was to be his beneficially. However, there is nothing in the conveyancing file (which was in evidence) to show that any such direction had been given to her. Nor is there anything to show that she ever considered the question of beneficial ownership. The defendant's evidence was that he had seen Ms Postans make a note, but though there are various notes written by her on the file, there is nothing of this kind. Nor is there any evidence to suggest that any part of the file has been destroyed or lost. On the evidence, I am not satisfied that the defendant did tell Ms Postans that he was to be the beneficial owner of this property. It is easy enough to mis-remember events after 17 years. Even if he did, there is no evidence to show that the testatrix agreed with any such instruction or declaration, and I find that she did not.

65. Although it is not raised in the defence, the defendant also relies on a presumption of advancement as between mother and child. He refers to the advice of the Privy Council in the Bahamian case of *Antoni v Antoni* [2007] UKPC 10, [2007] WTLR 1335. Whether the equitable presumption operates at all as between *mother* and child is a difficult question. There is significant authority against it: *Re De Visme* (1863) 2 De G J & Sm 17, *Bennet v Bennet* (1879) 10 ChD 474, *Re Zielinski deceased* [2007] WTLR 1655, ChD. However, there are also authorities the other way: *Sayre v Hughes* (1868) LR 5 Eq 376, *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB), [93] (obiter), and see also *Re Cameron deceased* [1999] Ch 386, [52] (rule against double portions). (The presumption is prospectively repealed by s 199 of the Equality Act 2010, but that section has not been brought into force, and hence is not relevant here.)

66. But in my judgment I need not decide this question, because, even if there were any such presumption in the present case, it would be rebutted by the fact that the mother and the child were in partnership together, and the partnership agreement, and the treatment of the purchase, the development and the resale of the units in the accounts

of the partnership (with no counterbalancing entries to show a gift to the defendant), to say nothing of sections 20 and 21 of the 1890 Act, together go to show that this was not a gift from mother to son, but a business transaction between partners. In my judgment this property was a partnership asset from the beginning.

Reduction in capital

67. The accounts for 2009 drawn by Mr Roberts and produced by the defendant in November 2015 show an unexplained reduction in capital between 2007 and 2008 of £47,430. Mr Collings (the claimants' accountant) in his evidence treated this decrease in assets as attributable to drawings in this period by the partners. He apportioned the decrease as to £8,066 to the testatrix and £39,364 to the defendant. The defendant did not challenge this evidence in cross examination, and I accept it.

Whether there was an agreement to equalise partnership capital accounts

68. The defendant pleads in paragraph 25 of his defence that the testatrix in effect made a gift to him in October 2008 by agreeing to equalise their capital accounts. As I have already said, the balance sheet as at 31 March 2007 (the last available that was signed by the partners, and none was prepared for the year ending 31 March 2008) showed their capital accounts as having the values £465,711.87 for the testatrix and *minus* £82,121.77 for the defendant. In value terms an equalisation would have the same effect as if the testatrix had transferred to the defendant the sum of £273,916.82. Since the testatrix did not sign any accounts after 2007, clause 5 of the partnership agreement has no application to any later accounts, which are simply evidence. The burden of proof rests on the defendant to show that this agreement was made.

69. The defendant says that the need for this equalisation arose first of all because of the Lower Polsham Road transaction. The accounts treated the proceeds of sale of these units (in 2005-06) as divided 50:50 between the partners. However, he says the reality was that this development was his alone, and the accounts were presented in this form simply to avoid claims by his ex-wife. So on their face the accounts showed a "gift" by the defendant to the testatrix of about £296,000. Secondly, he says that in March 2002 the partnership had paid £127,000 to the defendant's ex-wife as part of a divorce settlement, the sum being debited to his capital account. This enabled the defendant to continue living on the development land, thereby conferring benefit on the testatrix because her son was living very close to her home. Accordingly, the defendant says that the testatrix agreed that the capital account should be adjusted so that half of the £127,000 should be debited from her account. Finally, the defendant says it was a recognition of the sacrifice of salary that the defendant had made in working for the partnership for the seven years from 2003, when he could have stayed in teaching, earning (according to him) £50,000 a year. The defendant's case is that the testatrix accepted that the defendant should be credited with contributing £25,000 a year over seven years, that is £175,000, to be deducted from the partnership share of the testatrix.

70. The defendant argues these points separately, although, if he were right on all of them, the equalisation of capital he argues for would not be enough. However that may be, in relation to the first point, that the equalisation had something to do with Lower Polsham Road, I have already held that there was no gift by the defendant to the testatrix. The property at Lower Polsham Road was bought with partnership

money. There is nothing in the second point either. It is clear that the responsibility for the payment to the defendant's ex-wife was the defendant's alone. Although it was paid by the partnership, it was very properly debited to the defendant's capital account in the accounts which he signed. Clause 5 of the agreement accordingly applies. Apart from the defendant's own assertion, there is nothing at all to show that the testatrix ever wished to pay half of this debit back to the defendant.

71. The same is true of the third point, although there are additional difficulties as well. It involves accepting that *in 2008* the testatrix considered that the defendant should be given credit for work starting in 2003, and that he would go on working for the partnership for another two years. But at that stage the time horizon for further business to be conducted for the partnership was measured in months rather than years. All that remained to be done was the resale of Tallow Wood Close (which had been acquired in part exchange for Roselands Drive, and was sold in February 2009, at a small loss). St Katherine's Way had not then been acquired. Moreover, it is *the defendant's own case* that there was no activity of the partnership in the years 2006-2008. So if one deducts two years after 2008 and the two years from 2006 the "seven years" of work for the partnership is really no more than three. Thirdly, the defendant's earnings as a teacher would have been subject to tax. So the "loss" to the defendant (like a claim for damages for loss of earnings in tort) would have been net of tax. A gift from the testatrix to the defendant would not have been subject to tax, at all events unless it exceeded the nil rate band and the testatrix failed to survive seven years.

72. But, in any event, I am not persuaded as a matter of fact that the defendant and the testatrix agreed any such equalisation of their capital accounts. Mr Roberts agreed in cross-examination that there was no express evidence of such an agreement, and neither did he recollect one. His witness statement evidence was to the effect that he did not see the testatrix from 2006 onwards and that she did not at any time raise with him any issue about disparity between the capital accounts. Obviously I have heard no evidence from the testatrix herself. But I can and do ask myself why should she and the defendant have agreed such an important transfer of value between them and not herself have told Mr Roberts as the partnership accountant? I ask myself why is there no evidence in writing of any such agreement, even in a letter or a note passing between the parties, or even to a third party? Other important agreements between them *were* documented, including a letter of 30 August 2008 to Barton's solicitors, confirming her agreement to the sale of Roselands Drive. In cross-examination the defendant agreed that it would have been very easy to make a formal agreement (*eg* for the testatrix to sign a typed letter), and to tell Mr Roberts about it.

73. There is a further point too. Significantly, the testatrix's will in 1999 (made after the defendant's marriage had broken down) had divided the residue of her estate into four shares, as I have already said, although the defendant's share was given not to him outright, but instead to trustees on discretionary trusts, in order to avoid the risk of the defendant's creditors (including his ex-wife) making claims on that part of the residue. I therefore ask myself why would the testatrix, having gone to that trouble to protect the defendant from creditors' claims, then give the defendant a large sum of capital absolutely, in his own name, exposing him to such claims, and at the same time reducing the value of the protected gift on discretionary trusts in the will?

74. Lastly, I note that the assertion of an equalisation agreement is made for the first time only in the "new" accounts produced by Mr Roberts in November 2015, despite numerous earlier opportunities to mention it, in particular, in correspondence between the claimants, the defendant, Mr Roberts and Mr Collings from 2010 onwards. No such equalisation is recorded in the accounts that Mr Roberts originally prepared for the years ending 2009, 2010 and the period ending November 2010. What the defendant through his solicitors *had* said was that he was contemplating making a claim under the Inheritance (Provision for Family and Dependents) Act 1975, though in the end this was out of time and never issued. For all these reasons, I am simply not satisfied that that there was any such agreement. In my view, the defendant has persuaded himself that there was such an agreement because (as he sees it) that is what the testatrix would have wanted, especially given that he could not make a 1975 Act claim. But that is not good enough.

75. There is a suggestion in the evidence of Mr Roberts that the effect of properties for development being purchased in joint names, coupled with the basis upon which he was being asked to prepare income and expenditure accounts, led to the "obvious implication" that there was to be an equalisation of capital. I am bound to say that I do not completely follow the reasoning here. It is correct that Roselands Drive, Tallow Wood Close, and St Katherine's way were all purchased in the names of both partners. In the absence of sight of the land registry transfers, or some other similar evidence, it is not possible to be sure whether the parties intended to be beneficial joint tenants or beneficial tenants in common. As partners, the presumption would be for a beneficial tenancy in common. Moreover, as with earlier development properties, there is no suggestion that these properties were purchased other than with partnership money, and were therefore partnership property. It is unclear to me why purchases of properties *after 2008* should have the effect of implying an equalisation, but not the purchases of properties before 2008. Accordingly, I do not accept Mr Roberts' suggestion of an implied agreement to equalise capital account shares.

Undue influence

76. It was submitted by the claimants that, if the defendant's arguments on equalisation of capital were successful, a presumption arose that the agreement had been obtained by undue influence practised by the defendant on the testatrix. I have however found that as a matter of fact there was no equalisation agreement between the testatrix and the defendant. In the circumstances, therefore, the issue of undue influence does not arise, and I need not deal with it.

Claim in unjust enrichment/restitution

77. In the event that the court finds (as is the case) that there was no agreement between the partners for equalisation of capital, the defendant pleads in paragraph 27 of the defence an alternative case. This is that the testatrix

> "stood by and accepted the work and services provided to the [partnership] and to her by the defendant from 2003 onwards … knowing that the defendant expected, and/or was fairly entitled to expect, reasonable remuneration for his services".

It is to be noted that this is not contained in any counterclaim (in fact there is no counterclaim at all). Instead, it is pleaded *as a defence* to paragraph 12 of the

particulars of claim. That paragraph pleads that the last partnership accounts agreed and signed by the partners are those dated 31 March 2007, and then gives details of the net current assets of the partnership and the state of the partners' capital accounts. Paragraph 15 of the defence states that paragraph 12 of the particulars of claim

> "is admitted, but only because of the insertion of the word 'signed'."

78. It appears therefore that paragraph 27 of the defence both asserts a claim in unjust enrichment on behalf of the defendant and seeks to use it to alter the state of the accounts between the partners as at 31 March 2007. As I have already said, clause 5 of the partnership agreement renders signed accounts binding on the signing party, except in cases of manifest error raised within three months. Even if a previously unasserted claim in unjust enrichment represented a "manifest error" for the purposes of clause 5 (which I very much doubt), it certainly has not been raised within three months of the signature of the accounts. Indeed, it appears to have been raised for the first time in the defence. That account is therefore contractually binding on the defendant as against the testatrix and those who claim through her.

79. Even if clause 5 did not prohibit the defendant's claim in unjust enrichment being taken into account in relation to the accounts, that claim *ex hypothesi* arises outside the partnership and the partnership agreement, just as if the testatrix had borrowed money from the defendant to buy new furniture for her own home and had not repaid it. In my judgment this is not a defence to paragraph 12 of the particulars of claim. It should have been raised, if at all, as a counterclaim in some way giving rise to a claim of set off against the payment of any sums found due on the account.

80. Strictly, that disposes of the point. But in my judgment there are other difficulties for the defendant in making good this plea. First, the Partnership Act 1890, s 24(6) provides that

> "Subject to any agreement express or implied between the partners … No partner shall be entitled to remuneration for acting in the partnership business."

Here there is an express agreement for profits from the business to be divided between the partners. But, apart from that, the statute says that there is no right to remuneration.

81. The defendant says that the statutory provision does not exclude the right to restitution for unjust enrichment, because in 1890 restitution – then generally called 'quasi-contract' in the books and cases – was said to be based on an implied agreement, and that is included in what s 24 means in referring to "implied agreement" as justifying remuneration. In my judgment, that argument goes too far. There is an important difference between what is implied in fact and what is implied in law. The argument is stronger in relation to claims arising out of what used to be called *quantum meruit* and *quantum valebat*, where a good or service is accepted knowing it had to be paid for at a reasonable rate, than it is in relation to claims to restitution arising out of mistake, duress, or some other vitiating factor. The former are cases of *actual* agreement on most, if not all, the elements of a transaction. The latter are cases where the parties usually have not thought of agreeing what happens if the transaction is vitiated, and in fact there is no agreement at all. In such cases the

obligation to make restitution in *imposed* by the law, and enforced by the law *as if it were* a contract (*quasi ex contractu*).

82. The claimants cited *Medcalf v Mardell*, unreported, 2 March 2000, CA, in relation to the interpretation of s 24(6) of the 1890 Act. In that case, a partner claimed an allowance in respect of his work done for the partnership, over and above his entitlement to share in the profits of the partnership. He claimed (amongst other things) that a term was to be implied in the circumstances to give him a right to that allowance. The claim was rejected both at first instance and on appeal, as inconsistent with s 24(6).

83. Giving the judgment of the court (Peter Gibson, Schiemann LJJ, Wilson J), Peter Gibson LJ said:

> "81. The judge held that it would not be proper [to imply a term that he should be remunerated above his share of profit and beyond reimbursement of expenses]. We agree with him, with the result that [s 24](6) precludes Mr. Mardell's own claim. Accepting that it was not expressed, Mr. Weatherill submitted to us that such an agreement should be implied. But to establish that it might have been reasonable for parties to have reached an agreement is not to establish by implication that they did so. Having – with Mr. Kemp – excluded Mr. Medcalf from any voice in the affairs of the partnership, Mr. Mardell was asking the court to infer that Mr. Medcalf agreed special terms unfavourable to himself. There was no ground for it. Furthermore in our view the judge was rightly influenced by the fact that in the 1989 Agreement Mr. Mardell and Mr. Kemp had made no provision for the former to receive remuneration above the line of equally divided profit. Yet the imbalance of work by Mr. Mardell was as marked in relation to Mr. Kemp as in relation to Mr. Medcalf. Mr. Weatherill submitted that the 1989 Agreement was irrelevant and that Mr. Mardell's generous treatment of Mr. Kemp should not inform the law's proper treatment of Mr. Medcalf. But there was no ground in the evidence for concluding that Mr. Mardell had been motivated to treat Mr. Kemp generously. No doubt their agreement reflected the fact that, as the judge had found, Mr. Mardell's hard work was in building upon the earlier efforts of Mr. Kemp. What however the agreement failed to reflect was that the partnership was tripartite and that Mr. Kemp's earlier efforts had been bipartite."

84. However, that case was not one of a claim in restitution/unjust enrichment, but clearly one in (truly) implied contract, which failed on the facts. That was why s 24(6) operated to bar the claim. In the present case, I have already held that the testatrix did not agree with the defendant to equalise their capital accounts, whether for any of the reasons suggested by the defendant, or otherwise. In my judgment there is nothing in the evidence before me which persuades me that the testatrix stood by and freely accepted the services of the defendant in partnership business, knowing that the defendant expected to be paid for these over and above his entitlement to share in the profits of the partnership. Accordingly, as a matter of *fact*, the claim based on free acceptance of services must fail under s 24(6) to the extent that it is based on the notion of an implied agreement between the parties.

85. But, as I have said, the law of unjust enrichment has moved on. Today a claim in unjust enrichment is not based on any implied contract, whether real or fictional. For a

claim in unjust enrichment to arise, the claimant must show that the defendant has been enriched, that the enrichment was at the expense of the claimant and that the enrichment was unjust; thereafter, questions of defences and remedies may arise: see for example *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176, SC.

86. The problem for the defendant here is to explain why any enrichment of the partnership or the testatrix by the supply of services by the defendant to the partnership should be regarded as *unjust*. The defendant's services provided were those stipulated for in the partnership agreement. That agreement provided for remuneration for the defendant, by way of sharing in the profits of the business. There is no unjust factor present, such as mistake, duress and so on. The defendant agreed to it. This is not a case of free acceptance, but instead of each side receiving what has been bargained for. Any enrichment of the partnership or the testatrix that there may have been in the present case was accordingly not unjust, and any claim by the defendant based on unjust enrichment must fail.

The testatrix

87. The testatrix suffered from progressive osteoarthritis, becoming stooped and hunched. She could not walk far. In the last years of her life the testatrix became frail and physically increasingly dependent on other people, in particular the defendant. Mr Roberts did not see her after 2007. As I have already said, the last set of accounts signed by the testatrix is that for the year end to 31 March 2007. However, she remained intellectually active, and wished to retain her independence for as long as she could. But in April or May 2010 she broke her hip, and was confined to a wheelchair thereafter. She declined, and died on 3 November 2010. Any partnership then subsisting between herself and the defendant was dissolved on that date. Her funeral took place on 11 November 2010. The claimants obtained probate of the will of the testatrix on 7 November 2011.

Use of the partnership Halifax bank account

88. The partnership had an account with the Halifax Bank (number ending 1722) with a balance of £28,645.96 as at 3 November 2010. The bank statements show that this balance was wholly spent by the defendant by January 2011. He accepted in cross-examination that he had spent it on living expenses. He must therefore account to the partnership for it, together with interest.

St Katherine's Way

89. This property had been bought in November 2008 for £149,000, with a view to renting it out in order to produce an income, at a time when interest rates were low. There were no further plans for property development as such. The collapse of Lehman Brothers had recently taken place, and the credit crunch was beginning to take hold. The property was sold on 18 February 2014 for a sum which, net of costs, produced £148,359. So in capital terms it resulted in a small loss. The defendant had the conduct of the sale. He kept half the proceeds and transferred the other half to the claimants as executors. He says that he was entitled to do this because by this stage it was agreed that profits were to be split 50-50. In fact, there was no profit to split. The proceeds were an asset of the partnership, to be dealt with instead according to section 44(b) of the Partnership Act 1890.

The executors' need for information

90. The claimants as executors needed information in order to complete various returns. They made enquiries of the defendant and of Mr Roberts as to the state of affairs of the partnership in which the testatrix had had an interest. There was a considerable correspondence, extending from November 2010 points were raised about the assets or potential assets of the partnership (including Plot 12 / 7 Weekaborough Drive) and the need for cessation accounts. Their accountant Mr Collings also engaged in correspondence with Mr Roberts. On the material before me, I am satisfied that the defendant did not respond in a timely fashion or in some cases at all to the reasonable requests of the claimants for the information which they needed. It was not until November 2015 that cessation accounts were produced by Mr Roberts on the instructions of the defendant. Even today the claimants have been unable to report in full to HMRC, because all the necessary information has not been provided by the defendant. I am however, inclined to think that the defendant's actions do not proceed from a desire deliberately to obstruct the claimants, but rather from the failure to recognise and perform the fiduciary obligations that lie upon the surviving partner of the partnership towards the estate of a deceased partner.

Mr Collings' report and draft cessation accounts

91. As will be apparent from what I have already said, I accept the propositions set out in Mr Collings' report at paragraphs 2.4 to 2.6, and 2.10, and the table at paragraph 2.2. Subject to any error on my part, it appears to me that his draft cessation accounts are correct.

Conclusion

92. In my judgment, the claimants succeed on all issues except that of undue influence, which I have not needed to resolve. I invite the parties to agree an order to give effect to this judgment, the terms of which I can approve at the handing down, as well as dealing with other consequential matters.