Neutral Citation Number: [2020] EWHC 3055 (Ch)

Claim No: BL-2018-001726

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES

BUSINESS LIST (ChD)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16 November 2020

Before:

Sarah Worthington QC (Hon) sitting as a Deputy High Court Judge

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Between :

HUSEYIN ALI **Claimant**

- and -

(1) ISMET DINC

(2) SELAHI DINC

(3) CHARTER COURT FINANCIAL SERVICES LIMITED

Defendants

- -

- -

Nicholas Trompeter (instructed by Ince Gordon Dadds LLP) for the Claimant

Nigel Woodhouse (instructed by Simons Rodkin Solicitors LLP) for the First and Second Defendant

James Pearce-Smith (instructed by Eversheds Sutherland (International) LLP) for the Third Defendant

Hearing dates: **27-31 July 2020**

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FINAL JUDGMENT

This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 16 November, 2020.

Sarah Worthington QC (Hon):

Introduction

1. This case concerns claims to equitable proprietary interests in real property. The claims are made by Mr Huseyin Ali ("**C**"), the previous registered owner of two freehold properties, against Mr Ismet Dinc ("**D1**"), the current registered freeholder, and against Mr Selahi Dinc ("**D2**"), a subsequently registered lessee, and against Charter Court Financial Services Limited ("**D3**"), a subsequently registered chargee, both of whom derived their registered interests from D1, the currently registered freeholder. There are also subsidiary claims by C to alternative personal monetary remedies.

2. The two freehold properties (the "**Properties**") are 19 Trent Gardens, Southgate, N14 4QA ("**No.19**"), and 67 Geldeston Road, London, E5 8SD ("**No.67**"). Until the events with which this hearing is concerned, C was the sole registered proprietor of the Properties.

3. On 27 April 2016, the Properties were transferred by C to D1 via signed transfer forms indicating the transfers were for nil consideration. D1 then became the registered proprietor in place of C: No.67 was registered in D1's name on 6 May 2016, and No.19 on 17 June 2016. The solicitor dealing with the transfers and applications for registration was Mr Asif Choudhury ("**Mr Choudhury**"), of Blakewells Solicitors Ltd ("**Blakewells**"), who acted for C in this transaction.

4. To enable the transfers to be registered, it was necessary to redeem an existing charge over No.19 in favour of Santander UK Plc securing a debt of c.£67,500 (the "**Santander Charge**"). Both C and D1 accept that D1 provided the funds for this. It may also have been necessary to redeem an existing charge over No.67 in favour of Datatyear Limited (see below). If so, it is unclear who provided the necessary funds. The issue was not said to be material to the current proceedings.

5. Later that year, on 6 December 2016, D1 gifted to D2 (his brother) a 999-year lease of the first floor of No.67 (the "**Lease**"). Later still, on 2 March 2017, D1 granted a charge to D3 over No.19 (the "**Charge**") as security for a loan in the sum of c.£460,000 (the "**Loan**"). Both the Lease and the Charge are registered. On the evidence before the court, the Loan was used exclusively for D1's and/or D2's own purposes and benefit.

6. No.19 was C's home, and C has continued in occupation rent-free notwithstanding the transfer to D1 and the dispute now before the court. No.67 is a rental property, split into two flats on the ground and first floors. In 2007, C granted a 999-year lease of the ground floor flat to a Mr Thompson for a premium of £295,000. C is still named as the landlord of the first floor flat, which is let to an assured shorthold tenant. C continues to receive the rent of c.£1,500pcm for himself notwithstanding the transfer to D1, the Lease to D2, and the dispute before the court. Further, C continues to pay the relevant utilities bills, insurance premiums and Council tax for the Properties.

7. There is a significant factual dispute over the circumstances which led to C transferring the Properties to D1.

8. It is C's pleaded case that the transfer of the Properties was subject to an oral agreement for sale at a price of £1.35 million (£750,000 for No.19 and £600,000 for No.67), made on 26 April 2016 (the day before the Properties were transferred to D1), and that, in addition, D1 would discharge the Santander Charge.

9. The Santander Charge was discharged, thus enabling the registration of No.19 in D1's name, but C has received no part of the £1.35 million.

10. By contrast, D1 and D2 maintain that C suggested a plan ("**the Claimant's Plan**") by which C would gift the Properties to D1, and D1 would then use the Properties to raise finance to give back to C. In particular, according to §10 of D1 and D2's Re-Amended Defence:

> "(3) In about 2015/2016 the Claimant wished to raise finance to fund, amongst other things, litigation in which the Claimant was involved in Cyprus.
>
> (4) On dates and places at which the 1st Defendant cannot now precisely recollect, the Claimant orally requested the 1st Defendant to assist him in raising such finance but, when it became apparent that the Claimant would not be able to raise funds in his own name, the Claimant suggested a plan ('**the Claimant's Plan**") whereby he would transfer No 19 and No 67 by way of gift into the name of the 1st Defendant in order for the 1st Defendant to raise finance on No 19 and No 67 to give to the Claimant.
>
> (5) It is admitted that the Claimant requested the 1st Defendant to redeem the existing mortgage on No 19 as part of and pursuant to the Claimant's Plan.
>
> (6) In order to induce the 1st Defendant to assist the claimant, the claimant assured the 1st Defendant that if anything went wrong with the Claimant's Plan the 1st Defendant would not be adversely affected as he would own No 19 and No 67."

11. D1's assertions concerning the precise nature of the Claimant's Plan changed in various significant ways in D1's subsequent witness statements and during cross-examination in these proceedings, as noted below. The most significant variation, suggested in D1's first and second witness statements, was that the funds were not to be used to finance the Cyprus litigation (which concerned C's minor interest in a failed Cyprus property development venture), but were instead to enable the takeover of the entire Cyprus property development venture, with D1 to assist in the redevelopment plans and then share in the profits.

12. D2 in his witness statements and in cross-examination denied any knowledge of the detail of the Claimant's Plan.

13. C claims that whichever version of events the court ultimately accepts, C remains entitled to the relief he seeks. His primary claim is to recover the Properties, or the £1.35 million sale price secured against the Properties, on the basis that he is entitled to various declarations and injunctions in support of equitable proprietary interests he

alleges he has in the Properties. Further, or in the alternative, he claims to be entitled to various personal remedies by way of restitution or equitable compensation.

14. D1 and D2 deny C's version of events, and all the legal consequences that are said to follow, but advance no counterclaims.

15. D3 claims that even if C does have an equitable proprietary interest of any sort in No.19, it is postponed to D3's subsequent registered Charge.

1. Preliminary procedural issues

16. This was a hybrid hearing: all the parties and witnesses appeared in court other than counsel for D3 and Mr Matt McAvoy, a witness for D3, both of whom participated remotely.

D1's disclosure application and associated application to adjourn proceedings

17. As already noted, one element of the alleged Claimant's Plan is the existence of litigation in Cyprus to which C was party.

18. In C's first witness statement ("**C's WS1**"), C said that he did not and had never owned land in Cyprus, and was not and had never been involved in litigation in Cyprus. D1 discovered in mid-July 2020 that these assertions were untrue. C provided a second witness statement ("**C's WS2**"), correcting these assertions and endeavouring to explain his initial errors. In C's WS2 he indicated that he had a shared interest in land in Cyprus inherited from his father (not material to this hearing), and that he also had a 5/152nd interest in some development land in Cyprus. In about 2003 he had contributed a "small minimal" sum (not particularised) to purchase vacant land in North Cyprus with his brother in law, his brother in law's business partner, and his brother in law's son (C's nephew, Ali (Tony) Ali, "**Tony**"). That land was subsequently sold to a developer on the basis that these four original purchasers would have the right to acquire a villa each, and a joint interest in a fifth villa, with each original purchaser's interest secured by a 5/152nd interest in the land. The villas have not been built. It appears the developers borrowed against the land and sold villas off plan to English tourists. It seems that litigation against the developers was commenced in 2009 ("**the 2009 Cyprus litigation**") to enforce the development arrangement, and in 2011 a Cyprus court ordered delivery of the promised villas by a certain date, and significant monthly penalty payments for late delivery. C says that the villas have not been built and none of the four original purchasers have received any money. He also says that Tony advised him that the land is now subject to so many charges in favour of interested parties that it would cost millions of pounds to retake control and do anything with the land, and so C says he and Tony decided years ago that the court order was worthless. C says he has not taken, and has no wish to take, further steps to pursue matters. C also says that he never discussed this land with D1, and can only assume that Tony, who is a good friend of D1's, did so.

19. Given the late discovery that C had been involved in the 2009 Cyprus litigation, D1 applied for an order for further discovery relating to this litigation, for a further witness statement from C describing the discovery that he had conducted, for C to sign a consent form enabling D1 (through a lawyer instructed by D1) to inspect the Cyprus court files, and for the trial be adjourned until this order had been complied with.

20. I refused this application, primarily on the basis of CPR PD51U Para 6.4(3), and noting also Paras 6.4(5) and (7). Even assuming that there had been the necessary material non-disclosure (and that might be debated), the existence of the 2009 Cyprus litigation was, on D1's own version of the facts, simply one reason, amongst others, explaining why C might have wished to fundraise via the Claimant's Plan. Given this, there seemed no compelling reason why the orders sought by D1 were likely to reveal facts material to resolving the issues now before the court. Moreover, C had already provided a third witness statement ("**C's WS3**") which described the discovery undertaken in respect of the Cyprus litigation. In addition, C was in court to be cross-examined.

Admission of C's Second and Third Witness statements (C's WS2 and C's WS3)

21. C applied for permission to rely on two further witness statements, C's WS2 and C's WS3. As already noted, C's WS2 was primarily to correct untrue statements in C's WS1 and also to respond to D1 and D2's first witness statements ("**D1's WS1**" and "**D2's WS1**" respectively). (D1 and D2's subsequent witness statements are abbreviated as for C.) C's WS2 also exhibited a "to whom it may concern" letter from C's solicitor in Cyprus. C's WS3 described what steps C had undertaken by way of discovery in relation to the Cyprus litigation.

22. I allowed C to rely on both these witness statements, with the exception of the "to whom it may concern" letter, and did so in the interests of accelerating the process of examining the witnesses. The three defendants were content with that.

Permission to amend C's particulars of claim to the Re-Re-Amended Particulars of Claim ("Final PoC")

23. C's counsel requested permission to add to the relief already claimed against D1 a further claim for the payment of the sum of £1.35 million. This request was made without dissent from the defendants, and was accepted by me, if indeed the relief requested was not already implicit in C's claim for a vendor's lien to secure a claim to that sum.

The "*Blackledge *point"

24. I deal with this now, although the argument was not made in court until the final day of the trial. Counsel for D1 and D2 had, however, anticipated the argument in the closing paragraphs of his skeleton. There he suggested that if I accepted D1's version of events then it would follow that C should be considered to have forfeited his right to be heard by the court. This was on the basis that:

> "28. If the court accepts the Defendant's version of events it follows that the Claimant will have advanced his primary claim on a wholly false basis, will have deliberately suppressed documents and will have persisted in an attempt to deceive the court throughout the trial. Further his refusal to address the real version will have deprived the court of knowing what his intentions were in entering into the arrangement. The Claimant's intentions are plainly relevant given that the Defendant's version

> involves an oral agreement that the Claimant asserts has failed and generates a trust in his favour.
>
> 29. A litigant engaging in deceptions of this scale and magnitude should result in a party forfeiting his right to be heard: see *Arrow Nominees Inc v Blackledge [2000] 2 B.C.L.C. 167, CA.*
>
> 30. If the court does not consider that the Claimant has forfeited his right to be heard, the court will be placed in the difficult position of considering whether the basis of an agreement has failed and/or whether a trust has been created without any evidence on the basis of the agreement from the Claimant or any evidence of the Claimant's intention as to the creation of a trust of the Claimant."

25. The allegation that C may have forfeited his right to be heard is a serious allegation, and must be strictly proved. Counsel raised the specific point only briefly at the conclusion of his closing arguments for D1 and D2. However, his broader legal arguments and his cross-examination of C suggested, if only by inference, the view that C's version of events was not the true version, that C was therefore putting his case on a wholly false basis, and that it must therefore be the case that C was deliberately trying to mislead the court.

26. No strike out was requested, nor any other formal order. No specific evidence was advanced by way of proof that C was deliberately intent on misleading the court, or intent on preventing a fair trial. I decline to find that C was. There is a great difference between advancing a case that the court may conclude is not proven, and advancing a case the court finds wholly deceptive, as the court did in *Arrow Nominees Inc & Anor v Blackledge & Ors* [2001] BCC 591. The judgments in that case indicate just how strong the facts must be before the court will go so far as to deny one party the right to heard. To warrant such a drastic response, it is necessary to prove that the party's objective is to prevent a fair trial, that his actions are inimical to the judicial process and a "flagrant and continuing affront to the court": see [74] per Ward LJ and [53]-[55] per Chadwick LJ, who referred at [54] to the key observations of Millett J (as he then was) in *Logicrose Ltd v Southend United Football Club Ltd* (The Times, 5 March 1988). The proven facts in this case do not even come close to meeting this test.

27. In the same vein, although neither side made the point, I do not find that C has come to court with sufficiently unclean hands to disentitle him from any equitable relief that might otherwise be available.

28. One further introductory point is noteworthy: no one alleges fraud. Even C, who insists he is the disappointed vendor of Properties that appear from the transfer documents to have been transferred for nil consideration, does not allege that D1 has defrauded him of these Properties.

3. Preliminary remarks on the legal context

29. Before turning to the witnesses and their evidence, some preliminary remarks concerning the legal context may help clarify why certain aspects of the evidential findings are important, and why others are less so.

30. First, the parties' pleadings indicate unequivocally that the transfer of the Properties from C to D1 was not intended by either C or D1 to be by way of outright gift, nor was the parties' arrangement intended to be binding in honour only. On any version, the transfer of the Properties by C to D1 required a substantial quid pro quo from D1. Not only do the pleadings make that plain, everything that emerged during the trial supported that.

31. Secondly, as emerges later, the evidence put before the court was not sufficient to prove to the civil standard the true arrangement between the parties. Despite the TR1s completed at Blakewells, both parties' pleadings affirm agreements indicating consideration was to be paid. No one alleges fraud. C maintained his starting position that the arrangement was an oral agreement for a sale at £1.35 million. D1 maintained his position that there was a Claimant's Plan, although the details of the plan varied at various stages of the hearing. Neither of these versions is consistent with the outright transfer by way of gift that Mr Choudhury seemed to think he was implementing. The only third party who, it seems, might have thrown light on the issues is a Mr AS Mohamed ("**M**"), a mortgage broker at Euroworld Investments UK Ltd, who was not called by either side to give evidence. The contemporaneous documentary evidence is limited.

32. Thirdly, whatever the actual arrangement between the parties, and however securely its detail might have been established by the evidence, such an arrangement would at its firmest be an unwritten contract concerning the disposition of an interest in land. It would therefore be void and its terms unenforceable: s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("**LPMPA**"). This means that the remedial focus would inevitably be on unravelling the parties' arrangement, not enforcing its terms. C's primary claims in this context are all proprietary, backed up by alternative personal claims.

33. Further, if the parties intended a binding arrangement but its terms cannot be proved with sufficient certainty, then their intended contract would be void for uncertainty as well as for want of writing. The contract again being void, the same legal consequences would follow.

34. Fourthly, this legal characterisation of the parties' arrangement as a void contract for the disposition of land is not the only possible option. The parties' arrangement might alternatively be characterised simply as an unintended gift. Or it might be characterised as a conditional transfer: the arrangement between C and D1 might be such as to impose conditions on D1's use of the Properties that are binding in equity, and have proprietary consequences in equity, even though those conditions are not binding in contract. C's arguments by way of proprietary estoppel, *Quistclose* trusts or other similar equitable doctrines pursue this line. This possibility of a conditional transfer means that the evidence of the terms of the parties' arrangement is important. That evidence may indicate not only the terms of an intended (but void) contract, but may also indicate a conditional arrangement circumscribing D1's use of the Properties transferred by C.

35. Finally, these alternatives – void contract, unintended gift and conditional property transfer – might all be apt characterisations of precisely the same factual scenario, although the legal analysis typically applied to each context is not identical. Whether these different legal analyses deliver different remedies is considered later. If an

analogy is needed, the same sort of issue arises where a given set of facts gives rise to claims in both contract and tort, and sometimes also in unjust enrichment.

4. Witnesses

36. Four significant witnesses were cross-examined in court: C, D1, D2 and Mr Choudhury (who had been issued a witness summons at the request of D1 and D2). Two further witnesses were also called: **Ms Havva Tacel**, C's daughter; and **Mr Matt McAvoy**, the Mortgage Underwriting Team Manager for D3. One notable absence was that of a Mr AS Mohamed (M), a mortgage broker at Euroworld Investments UK Ltd. He was party to much of what was put in evidence to the court, and I comment below on the explanation for his non-appearance.

37. Counsel for C and for D1 and D2 emphasised witness credibility in establishing the true facts. To that end both sides pointed to instances where the material evidence presented to the court was incorrect, or where documentary evidence not directly relevant to this hearing might suggest impropriety. Attention was also drawn to the inherent credibility of the arrangements advanced, and in particular – on C's side – the likelihood that C, as a 70-odd year old with no history of risky business ventures, would embark on the more elaborate versions of the Claimant's Plan described later.

38. I first describe each of the witnesses and issues said to go to credibility, before turning to the chronology. C, D1 and D2 were all a little nervous in court, as might be expected. Their language was not polished, and cross-examination was taken relatively slowly, but all seemed to understand clearly the detail of what was being asked. There were periodic requests to counsel to repeat or explain questions, perhaps because the questions had not been properly heard or understood, or perhaps simply because the witness wanted more time to answer.

39. I do not have a transcript or a recording of proceedings, but nevertheless I have occasionally endeavoured to reflect as best I can the words used by the witnesses in cross-examination.

Mr Huseyin Ali (C)

40. C is in his seventies. His preferred language is Turkish. He clearly understood the questions he was asked, but replied in rather halting English even though he has lived in the UK since he was 14 years old. In court he was quietly spoken, although occasionally prone to excitement or frustration over the position he now finds himself in. He seemed a little more relaxed on the second day. Despite the long questioning, it was difficult to persuade him to move beyond the barest details of the facts in issue. He required occasional short breaks.

41. *Language abilities*. There was some dispute over quite how poor C's language skills were, but by any measure he was not a fluent or confident speaker. C's WS1 makes the point that his reading and writing skills are modest and that he needed help, including from his daughter and his cousin, in preparing his witness statement. It was put to him in cross-examination that not only had he not written his witness statements himself, but that others had told him what to say. It was also suggested that his witness statements should have been delivered in Turkish, and translated. I am content that C's witness statements embody what he intended to say, even though they are not in his

own words. Taking into account his late corrections, C maintained his basic account throughout the hearing.

42. The witness statement provided by C's daughter indicated that C cannot type his own emails: whenever emails are required she, or C's cousin, would send what was needed. I was not shown any emails or other evidence to disprove this. Indeed, there appeared to be only one email in the correspondence with Blakewells which was sent directly from C's email account and written as if from C. However, it was credibly suggested that this was likely to have been written by M, as it matched exactly his usual opening and closing format and formal style of writing.

43. *Formal names and different dates of birth*. C is known as Huseyin Ali for the purposes of this case. That is the name in which he previously held the Properties and any mortgages associated with them. It is also the name on his bank accounts. However, his passport, National Insurance and HMRC records are all in the name Huseyin Ali Ibrahim (Ibrahim being his grandfather's name). His Driving Licence is in the name of Ali Huseyin. He is known as Huseyin Tunel in Cyprus, and his interest in the Cyprus land is in this name. The date of birth on his passport is 27.09.43, on his tax returns is 25.09.1943, and on his driving licence is 27.09.1945. There was a suggestion he had raised his age when he arrived in the UK as an unaccompanied 14 year old so that he could work.

44. *Fraud.* It was faintly suggested there might have been some fraud involved in these different identities, but the documents before the court indicated that C paid tax on income derived from his Properties despite the mismatch in the names used with HMLR and with HMRC, and indeed he continued to pay tax on rental income from No.67 despite the transfer of legal title to D1. It was further suggested that, given C's rental income from No.67, he could not be entitled to the Pension Credits he was receiving. This progressed no further than assertion, and, whatever the truth, it is not material to the case before the court. Finally, it was suggested that C had misrepresented his financial position in his tax returns, as he was claiming a deduction for mortgage repayments against the rental income received on No.67, while also asserting in C's WS1 that No.67 was not subject to a mortgage. However, just before the transfer of No.67, the land register indicated a charge against No.67 in favour of "Datatyear Limited" (referred to as Datayear Limited in later correspondence). That charge was removed from the register before D1 was registered. What sums were secured and who redeemed the charge has not been explained by either side. C's tax returns in 2014/15 and 2015/16 indicate he claimed mortgage repayments until April 2016, but his 2018/19 return indicates he was not then claiming them. Again, whatever the truth, this is not material to resolving the case before the court.

45. *Land in Cyprus, the 2009 Cyprus litigation and whether C was intending to mislead.* C was cross-examined on the two assertions in his first witness statement that had needed correcting by a second witness statement: i.e. that he did not and had never owned land in Cyprus, and that he was not and had never been involved in litigation in Cyprus. His justifications for the content of his first witness statement may have been more convincing had he not included the "have never" riders in his assertions. C clearly had owned land in Cyprus (and still does), and he had been involved in litigation in Cyprus. Putting to one side C's inherited interest in Cyprus land, C said that he did not regard the 5/152nd interest in the Cyprus property development which was the subject

of the 2009 Cyprus litigation as "owning" any land in Cyprus because he had no title deeds nor any interest that gave him control of the land.

46. As for the 2009 Cyprus litigation, C regarded that as coming to an end in 2011 when the Cyprus court made its order: i.e. well before the facts with which this case is concerned. Although the Cyprus court order specified large sums by way of liquidated damages if the villas were not delivered, C said the land itself was "locked" (because of all the different interests already secured against it) and the individuals who were liable to pay the damages were in prison. C thus regarded the court order as worthless. Accordingly, he thought he "was not involved" in litigation in Cyprus at any time material to the present events.

47. C insists that he never discussed the Cyprus land or the 2009 Cyprus litigation with D1, but that Tony (C's nephew, D1's friend, and a party to the Cyprus development) may have told him. D1 says he and C discussed it in detail. It is impossible to say who is right. Given how often C and D1 say they met in 2015/16, and D1's interest in land development, it is perhaps likely to have come up in conversation. But that is far from proof that it became part of any Claimant's Plan.

48. D1 also says he helped C in 2016 with money to pay C's legal fees in Cyprus. D1 says he paid C a total of £9,000 in cash, in four separate instalments, each being when he dropped C off at the airport when C was travelling to Cyprus. C denies ever receiving any money from D1, or being taken to the airport by D1 more than once. Again, it is impossible to say who is right. However, D1's evidence in support of these payments is weak (see below). Further, given the status of the 2009 Cyprus litigation, it seems unlikely that £9,000 was required by way of legal fees in 2016.

49. Again, neither the alleged conversations on Cyprus nor the suggested payments – even if there were convincing proof of either, which there is not – would go so far as to assist in proving one or other version of events, or in resolving the issues that are now before the court.

50. *Whether C was struggling financially*. It is part of D1 and D2's case that C was struggling financially, and hence entered into the Claimant's Plan. The evidence put forward in support seemed to go no further than C's reliance on Pension Credits; his payment plan with HMRC for the payment of a little over £400 in 2017; and a payment plan for payment of outstanding Council tax of £1,538.52 for No.19 in 2016. These sums are all relatively trivial, and would certainly not necessitate the Claimant's Plan. D1 also suggested that in 2015 C was unable to pay the mortgage instalments on No.19. However, that would seem unlikely given C's income tax returns, and the assertion collapsed under cross-examination. In 2016, C's Experian credit rating was 999/999 – i.e. a perfect score – showing only limited credit card bills, repaid on time, and kept well within agreed credit limits.

51. *Whether C was unable to raise his own funds because his identity documents were in different names*. It was also suggested that C was unable to borrow against his own Properties because his identity documents were in different names, and current KYC (know your client) requirements would not be met. D1's WS1 says this is what the solicitor at Bloomsbury Law (see below) told C, and this is what persuaded C to enter into the Claimant's Plan. C denies this, saying that he has had no problem borrowing in the past, and that in in any event he wanted to sell his Properties, not raise funds on them. Even if D1 is correct about C's ability to fundraise on his own account, which

was not proven, this does not assist in deciding which of C's or D1's account of the parties' arrangement is accurate.

52. *Emails and mobile phone.* There was some suggestion that C may not have received all the emails sent to him by Blakewells, and instead others did on his behalf without his knowledge. There was also some suggestion that when C lost his mobile phone for a few months between November 2017 and March 2018 there may have been foul play. I say no more about either issue, as it is not clear precisely what is alleged nor what evidence exists by way of support, beyond assertion in witness statements from C and his daughter. Neither matter appears relevant to a resolution of the issues before the court.

53. Finally, as emerges when the chronology of events is considered, C's description of the arrangement between the parties is so remarkably spare in its detail, even after cross-examination, that it leaves unexplained a good number of agreed or proven facts. These are noted later, but the most obvious is why C's practical position remained substantially the same after the transfer of the Properties as it had been before: C remained in occupation of No.19 and a landlord of the first floor of No.67, and remained responsible for costs and charges relating to the Properties, although of course he no longer had to meet obligations under the Santander Charge.

54. The same might equally be said of D1's account. In the end, therefore, I am left with the sense that the parties are simply unwilling to explain in any detail the true nature of their arrangement to the court.

Mr Ismet Dinc (D1)

55. D1 is 47 years old, and has lived in the UK all his life. His English is good, although not polished. He presented as a person with drive and energy. He persisted in describing himself as a businessman, and a very busy one, who pursued potential land development projects but left the detail of legal issues, project financing, tax issues, accountancy concerns and so forth to others, as he did not have time to deal with such matters. He has been in the business of property development for 20 years, starting with an association with Tony in 1999. Since then he has owned or been associated with a number of property developments companies, and also holds title to several houses in his own name. He agreed he was very familiar with property transactions and dealing with mortgage brokers and solicitors.

56. D1's credibility and reliability were questioned in cross-examination on the grounds set out below, and also on the basis of the changing versions of the Claimant's Plan (those versions are collected at [92]ff).

57. First, as noted earlier, D1 said he had helped C with his Cyprus legal fees by giving him £9,000 in cash in 2016 (two payments of £2,000 and two of £2,500). In the documentary evidence before the court, D1 had marked up on his bank statements the cash withdrawals that were said to relate to these cash payments to C. However, these entries, highlighted and annotated in D1's handwriting as payments to C, captured every cash withdrawal from D1's account, and in total amounted to alleged payments of c.£46,000 to C. Under cross-examination, D1 disavowed these as being payments to C and maintained his original version that only £9,000 had been paid, insisting instead that he had a lot of friends called "Huseyin". He said that although he had highlighted

the cash payments for the purpose of discovery for this litigation, the highlighting and annotation was not intended "to mean anything", and was "irrelevant".

58. Secondly, D1's Loan application to D3 contained various significant misrepresentations. The application indicated that D1 had purchased No.19 on 5 May 2016 and that the purpose of the Loan from D3 was to fund "BTL" (i.e. D1's buy-to-let investments). When it was pointed out in cross-examination that the Loan could not be both for BTL and also for the purpose of raising finance for C under the Claimant's Plan, D1 refused to answer further questions. D1 had also signed forms asserting that no one who had owned No.19 was in occupation, and that there was instead an AST in favour of a Mr Orhan Caya. To the contrary, it was not disputed that C remained in occupation throughout. As for the AST, D1's WS2 asserted that C had instructed D1 to create this AST, and that C had obtained Orhan Caya's signature, but neither assertion was put to C in cross-examination.

59. Thirdly, in D1's WS1, D1 claimed he waited 6 weeks before using the Loan funds received from D3, and did so then only because C would not accept them from him, despite D1's chasing. To the contrary, D1's bank statements revealed that he had started spending the Loan money for his own purposes on the day the funds were received. D1's explanation was that "6 weeks" was a typographical error, and he meant "6 days", and that giving that information in his witness statement was near enough, roughly right, and not misleading.

60. Certain questions put to D1 in cross-examination veered towards suggesting that some actions said to be taken on C's behalf may have been taken without C's knowledge and consent, but nothing advanced in evidence came close to proving that.

Mr Selahi Dinc (D2)

61. D2 is D1's younger brother by 11 months. By all accounts they are very close and often in contact. Their bank account details indicate frequent bank transfers between them.

62. Despite this, D2 insisted that he did not know anything about what was going on between C and D1, that it was nothing to do with him, and that he did not see why he was being dragged into the issues against his will. He said he had merely tried to help D1, and that in property dealings he did what he was told by D1: D1 was the businessman; he (D2) merely managed the day-to-day detail of the rental properties that he and D1 owned, and he only owned what D1 advised or told him to buy. Although it was suggested this was not credible, there is no clear evidence either way.

63. D2 had said in his first witness statement that he "did not know" Blakewells. However, it emerged that Blakewells had been on the verge of acting for D2 in another property acquisition ("**the Farley Road transaction**", which eventually fell through) only a few days before the visit to Blakewells to deal with the transfers from C to D1. It seems that D1 instructed D2 to purchase this Farley Road property, D1 was to provide the deposit, and M organised the lawyers, so there may well be little that D2 did know about Blakewells. Nevertheless, both D1 and D2 seemed keen in their witness statements to distance themselves from Blakewells.

64. D2's documents handed over by way of discovery did not initially include any correspondence relating to the Farley Road transaction, even though D2 had been asked

for any correspondence mentioning "Blakewells". Under cross-examination, D2 said he had not included the material because he did not think the Farley Road transaction material to the case now before the court.

Mr Choudhury (solicitor from Blakewells)

65. Mr Choudhury is an experienced solicitor, but the reliability of his evidence on this matter was severely tested under cross-examination.

66. Mr Choudhury's letter to C's solicitors in February 2020 set out the details of his involvement in the transfers of the Properties from C to D1. In that letter Mr Choudhury indicated the firm had never previously acted for "Mr Dinc" in any transaction and had never previously received any client recommendations from M. In fact M had recommended D2 to Blakewells for the earlier aborted Farley Road transaction. Thus, while it is true that the firm did not in the end act for D2, the firm had nevertheless confirmed to the other lawyers involved in the Farley Road transaction that it was instructed to act, and the firm had on file not only M and D2's details but also D1's telephone number and his bank statements as he was to be responsible for the deposit.

67. As for the transactions between C and D1, few documents are on file. There was a photocopy of C's driver's licence, hand-annotated to indicate the addresses of the Properties and a valuation for each of them; Client Care and Client Advice letters relating to each of the Properties; the relevant transfer forms (TR1s) indicating transfers for nil consideration and the applications to register (AP1s); and various emails dealing with incidental matters arising after the 27 April 2016 meeting. There was no separate attendance note for the meeting with C on 27 April 2016, and no bill was sent at the close of the transaction (although the fees have now been paid by C's previous lawyers in order to have the file released by Blakewells).

68. Mr Choudhury said that the meeting on the 27 April 2016 at his offices had been arranged by telephone the day before, and that telephone call had been 2-3 mins long, supposedly with C who was in the presence of M. However, in cross-examination Mr Choudhury admitted that he could not be sure of the identity of the person who had called him.

69. In cross-examination, Mr Choudhury described in detail his meeting with C on the 27 April 2016. In that account, he said that at that meeting he had taken instructions from C, obtained C's KYC documents and the details of the Properties and their values, and advised C on fees and on the legal issues relating to gifting his Properties to his "nephew" (which was how D1 was described in the Advice Letters), including issues relating to tax and to possible complaints from his own daughters. Mr Choudhury had then gone upstairs to produce the relevant Client Care Letters, Advice Letters and TR1s with all the property details. He had then brought these back downstairs so that C could sign the documents, which C had done in his presence and he had witnessed C's signatures where necessary. He then had D1 sign the TR1s.

70. Since no one suggested the entire visit to Blakewells had been longer than 40 minutes, this account lacks credibility. That is especially so given C's language skills. In fact Mr Choudhury had to concede this account could not be correct, since the evidence indicated that all these documents had been prepared the day before, on 26 April 2016: there was a 26 April 2016 draft Client Care letter on file, and the metadata on the Advice Letters and the TR1s indicate they were produced on 26 April 2016. What Mr

Choudhury was then unable to explain was who gave him the information he needed to prepare these drafts, since all this information could not have been conveyed in the 2-3 minute call that was received to set up the meeting on the 27 April 2016.

71. The further oddity in all these documents produced by Blakewells is that they are all in the name of Ali Huseyin, as appears on C's driving licence, and not Huseyin Ali, as C would have introduced himself on the telephone, as would have appeared on the land register, and as would have been on his utility bills. The near irresistible inference is that C himself did not provide the information to Mr Choudhury. That leaves M or D1, one of whom perhaps provided Mr Choudhury with the photocopy of C's driving licence and passed on details of the Properties. Whether that was the case, and whether it was with C's knowledge and consent, is not known, although C's evidence is that D1 had reassured him that he would make all the necessary arrangements.

72. Counsel for C also addressed in cross-examination further oddities in the recording of dates and signatures on the TR1s, but that detail does not add more to the issue of credibility, and is not of itself material to the case before the court.

Mr Matt McAvoy (Mortgage Underwriting Team Manager for D3)

73. Mr McAvoy has been working in financial services for 30 years. He was calm, precise and professional in giving his evidence.

74. His cross-examination was very brief, however, since he had no first-hand knowledge of the arrangements between C and D1, and his evidence of the Loan agreement and its security, and of the supporting valuation that was undertaken of No.19 was not disputed in any material respect.

Ms Havva Tacel (C's daughter)

75. Havva Tacel is C's daughter, and a legal executive at Ashtons Legal. She was an animated witness and responded in detail to the questions put to her in cross-examination. I sensed she would not want to harm her father's case, but she answered questions directly, without avoiding the issues.

76. Her cross-examination focused on the extent to which she, not C, was the author of C's witness statements and also of the chronologies of events C had provided to his lawyers. I have already commented on this in discussing C. Ms Tacel was also questioned on the Cyprus land and litigation issues, and on C's lost phone. Her evidence largely reflected what has been noted already.

One key party who did not appear: Mr AS Mohamed (M), a mortgage broker at Euroworld Investments UK Ltd

77. The one other person who by all accounts was present on many occasions mentioned by both C and D1 was M. He was not called by either party, even though D1 in cross-examination insisted his evidence would have been strongly supportive of D1's version of events.

78. D1 said M had not been called because he could not be contacted. This is hard to believe, given that D1 had telephone numbers, email addresses and office addresses for M. D1 also said he and M had fallen out, and that is why M did not attend. But M could have been issued a witness summons, as had Mr Choudhury.

79. In any event, the evidence of a falling out is thin. The only relevant documentation in evidence was an email allegedly written by D1's wife indicating that her husband had been subjected to violent threats instigated by C, and that "a Mr Abdul Shakoor" [said to be Mr AS Mohamed, i.e. M] had said that she had "in some way decided to 'kill Mr Hussein'" and this Mr Abdul Shakoor had "tried to embezzle from Mr Hussein the sum of £12,000 to 'put things right'". The email closing indicates it is cc'd to the Southgate Police, and the body text gave a crime reference number obtained on 3 February 2018. However, the email itself was from D1's email address to his wife's, not from his wife's email address at all; no one else was copied into the message; and this is the only email in the chain revealed in discovery.

5. Conclusions on witness credibility and approach to the evidence

80. To a greater or lesser extent, none of the four key witnesses emerged unscathed from these attacks on credibility.

81. Much of what was advanced as evidence was merely sworn assertion of remembered details or recalled motivations, with each party's conflicting versions of events maintained throughout the trial. There are very few contemporaneous documents, and those that exist do little to assist. There is no evidence from completely disinterested witnesses. Even Mr Choudhury's evidence adds little that assists the necessary legal analysis.

82. The inherent probabilities were called in aid, but do not take matters much further. On C's side, it may seem inherently improbable that C would want to dispose of his Properties in order to invest his life's savings in capturing control of the failed Cyprus development, but it is nevertheless clear that C wanted to dispose of his Properties for other reasons. Similarly, on D1's side, it is conceivable that in return for agreeing to meet C's financial demands, D1 may have negotiated some benefit beyond receipt of the Properties, perhaps including a promise of some sort of interest in the Cyprus venture. However, even if these possibilities could be converted into evidential certainties, they are largely irrelevant to the necessary legal analysis. What matters for the purpose of legal analysis is not the detail of each party's particular agreed delivery obligations, since those cannot in any event be enforced, but the detail of the constraints, if any, agreed between them as the means of achieving their plan, whatever that plan was.

83. It is against this background that I have tested the disputed oral and written evidence in order to set out the chronology of events so far as I can determine it. I have placed greater weight on parties' assertions where those assertions are against their own interests, and less where they are self-serving unless backed up by other evidence.

6. The parties' asserted versions of the arrangement between C and D1

84. Before summarising the key facts as found on the evidence, I set out in a little more detail than given so far the different versions of the arrangement said by the parties to exist between C and D1.

C's version: an agreement made on 26 April 2016 to sell the Properties to D1 for £1.35 million

85. C maintained throughout the hearing that there was a meeting between C, D1, D2 and M on the afternoon of 26 April 2016 at a restaurant in Southgate called Kervan, where D1 agreed to purchase the Properties for £1.35 million and to redeem the Santander Charge. The meeting with Blakewells was also arranged on that day, and took place the next day, on 27 April 2017, when the TR1s and other documents were signed. C maintained that he expected to be paid £1.35 million by D1 when the documents were signed, on the 27 April 2016, and that he signed the documents by mistake, expecting them to be documents for the sale of his Properties.

86. C was not moved from this being the date on which agreement was reached. Organising a sale from initial agreement to effective completion within 36 hours is not credible without earlier preparatory activity. C's own evidence in his first witness statement is that discussions of a sale at a price of £1.35 million began a year earlier, around April 2015, and that it was from then onwards that D1, D2 and M befriended him. These ongoing discussions included arrangements for property surveys and valuations, one of which C recalls taking place in August 2015, where D1 was present with the surveyor. Shortly afterwards, when C visited Cyprus, he says he left his keys with D1 so that further surveys could be conducted. The plan was clearly that, with M's help, finance would be raised on the security of the Properties so that D1 would have the funds needed for C. In cross-examination, C also indicated he left his keys with M on one occasion, again so surveys could be conducted.

87. C's original particulars of claim had indicated a much earlier date for the Kervan oral agreement: discussions for a sale were said to have begun in April 2015, with the Kervan restaurant meeting in "about May 2015" delivering an oral agreement for a sale at £1.35 million (plus redemption of the Santander Charge), and a survey was then conducted in August 2015. C also noted in his original particulars that between May 2015 and April 2016 D1 repeatedly assured C he was making arrangements for the purchase, "but with the exception of the visit from the surveyor no concrete progress was achieved".

88. C was cross-examined on these different versions. In response to many questions C either could not remember dates or said he did not understand what was being suggested, even to direct questions about when agreement had been reached. It seems there may have been two meetings at the Kervan restaurant. When pushed in cross-examination, C said the first meeting was not an agreement, simply a discussion of C's asking price. By the end of cross-examination on this issue, and given all the meetings between C and D1 in the intervening months, C seemed less certain of when agreement was reached and the price finally settled.

89. C also says all of this happened not long after the death in early January 2015 of his eldest daughter, during a period when he felt "very vulnerable … and somewhat disorientated".

90. At end of cross-examination, C was asked by counsel for D1 and D2 whether there was any arrangement between the parties other than one for a sale at £1.35 million. C said there was not. Counsel pressed him: if he was not believed on this, then was he sure there was nothing else, no other discussions other than for a sale. C confirmed that the only arrangement with D1 was for a sale.

91. The inference is that C expected to be paid £1.35 million in exchange for the transfer of the Properties. But the deal might equally be regarded as a sale if C were to receive this sum (or some other sum) for transfer of the Properties as well as the provision of some other benefit to D1. A more complicated arrangement is what is suggested by D1.

D1's version: the Claimant's Plan

92. D1's version of the parties' arrangement is quite different. In court, D1 confirmed that the version set out in his Re-Amended Defence was complete and accurate. This version, set out earlier at para [10], suggested C wanted to raise finance to fund "amongst other things, litigation in which [C] was involved in Cyprus". A variant, or perhaps simply a justification for this version of the Claimant's Plan, was that C could not raise funds himself from his Properties because his identity documents were in different names, so D1 would act as some sort of agent or nominee for C to raise funds on his behalf.

93. In cross-examination, D1 struggled to identify what "other things" C had contemplated, and eventually conceded that C was not struggling financially, and certainly was not desperately in need of money.

94. When the idea of "other things" appeared to run into the sand, D1 shifted to a second version of the Claimant's Plan. In this version, C's own personal and primary aim was not to fund litigation in Cyprus, but to obtain sufficient start-up funds to clear the charges over the Cyprus land, and then raise development funding to re-capture the entire development project and see what could be made of the venture. D1 suggested this would need very substantial funding, but with the potential for large rewards (it was suggested that a £3.5 million profit was discussed by C and M).

95. There is no evidence to support this being C's ambition. I regard the suggestion as inherently implausible given C's very modest small-business background (dry-cleaner, restaurant owner, textile manufacturer), his complete lack of experience in property development, his age, his health, and the absence of any earlier indicators of this aspiration since the 2009 Cyprus litigation or at any other time. Yet under cross-examination D1 said this was C's main reason for needing finance: C was motivated by the possibilities of large rewards, and keen to "max out" his Properties to that end. D1 was to achieve that for him.

96. A third version of the Claimant's Plan, and perhaps a more credible variant of the previous version, was given by D1 in his first and second witness statements and elaborated in cross-examination. In this version, D1 was to assist in the Cyprus redevelopment plans and then share in the profits. The profit share had not been settled, but, depending on how that was worked out, C might "keep [his Properties] if he wanted to" or he might not. However, that detail had not been discussed and so D1 could not say what C would want to do.

97. On any of these versions, D1 says if anything went wrong C told him he would be protected because he would have the Properties. However, D1 was not able to say what risk he was being protected from, nor how the Properties would protect him.

98. Finally, and perhaps as a last straw, D1 suggested in cross-examination that the TR1s indicated that the Properties "were legally a gift". But, in order to be a gift, the transfers would have to be for no consideration and C would have to *intend* to make a gift to D1.

The one thing that is crystal clear, on either parties' version of their arrangement, is that the transfer of the Properties was not intended to be by way of gift: both versions required a substantial quid pro quo from D1.

99. Exactly what the Claimant's Plan required of D1 in his use of the Properties was addressed explicitly in cross-examination. The issue was put in different ways. D1 was taken back to his pleaded case, where D1 had said that it was part of the Claimant's Plan that the Properties would by gifted to D1 in order for D1 to raise finance to give to C. It was put to D1 that, in other words, the Properties were "*gifted to you for a specific purpose*". D1 agreed with this formulation.

100. It was also put to D1 that his role was as C's nominee. D1 had said the Claimant's Plan emerged after the visit to Bloomsbury Law, when C realised he could not raise funds himself because of his identity documents. Counsel put it to D1 that the Claimant's Plan was that D1 would raise these funds for C: the Properties would be transferred to D1 so that D1 could act as C's "*nominee*" to raise the funds for him because D1 would not face the same problems. The word "nominee" was used by C's counsel three times: D1 replied "*That's right*" twice. In his middle answer he instead insisted that "*legally [it] was a gift*" (see my comments earlier). This was despite the fact that D1 had only just agreed that there was no mention of any gift in the initial formulation of the Claimant's Plan.

101. Later still, putting the matter in a third form, D1 volunteered that he was taking a gift "*but there's liability attached to it*" … "*there [were] funds to be raised*" from the Properties, and D1 was to raise this money "*and give it to C*".

102. As to the sums to be raised and the time frame, D1 said in cross-examination that the plan was for the Properties to be "maxed out"; no time period had been agreed for raising the funds, although I suspect both parties were unaware of the need for D1 to own the Properties for 6 months before finance could be raised on them.

103. D2's role in all of this seems minimal. In cross-examination, D2 denied any knowledge of the Claimant's Plan or its details, but admitted to knowing that it entailed a plan to raise mortgage finance from the Properties.

104. At various points in cross-examination, D1 emphasised that C had been given an exceptionally good deal in all of this: he could continue to live in No.19 as his home, collect his rental income on No.67, and he was free of his mortgage repayments. As D1 put it, it would be D1 who was carrying the risk of the development project.

Mr Choudhury's version: a gift from C to his "nephew", D1

105. The transaction Mr Choudhury facilitated between C and D1 had the superficial appearance of a gift from C to his "nephew", D1. Mr Choudhury's Advice Letter to C was drafted on that basis, and his fees were determined on that basis. What is patently clear, however, is that neither C nor D1 regarded the transfer of the Properties as being by way of outright gift. It is notable that these transfers of the Properties were not accompanied by Deeds of Gift, unlike the Lease arrangement between D1 and D2.

106. Given that C and D1 both assert that there was a private arrangement (although C resiles from this later, as discussed below), it seems likely that Mr Choudhury would have been told only whatever part of the story the parties wanted him to be told. Such circumstances make it harder for any solicitor to protect C. It may add nothing to note

that, in cross-examination, Mr Choudhury said that, if asked, he would have given further advice to C; and, equally, C said he believed that if he had asked, he would have been given further advice.

7. Evidence of the chronology of events

Early endeavours by C to sell the Properties

107. Between 2014 and 2016 C marketed No.19 through various real estate agents, typically at sale prices between £650,000-£695,000. Later on he briefly marketed the first floor flat of No.67 for £525,000-£599,950. He did not succeed in attracting offers he was happy to accept.

108. This evidence was used by both parties. C said it indicated that he was keen to sell his home in order to downsize, and this was the form of transaction he agreed with D1. D1 says it makes plain that C's alleged sale price of £750,000 for No.19 and £600,000 for No.67 is well above the market price of the Properties, so is unlikely to be what was agreed by D1, despite D1 using values of this order in subsequent loan applications.

109. Still later, in 2017/18, it seems C put both Properties on the market briefly, even though D1 then owned them.

The early engagement between C and D1, including the alleged agreement on C's version of events

110. *When C and D1 first met.* According to C, he met D1 in 2014 at the home of his nephew, Tony. According to D1 they first met in 1987. D1 would then have been around 14 years old and C in his mid-forties, and there is perhaps no reason for C to remember the occasion. Nothing turns on the issue.

111. *When agreement was reached, on C's version of events.* C's original particulars of claim had the agreement between C and D1 for a sale of the Properties at a price of £1.35 million being reached over a meal at Kervan in or about May 2015, whereas C's final PoC had it being at the same restaurant on the afternoon of 26 April 2016, the day before the visit to Blakewells. Bar the date, the details of the agreement reached were the same in both accounts. See the earlier discussion above at paras [86]-[88]. Both C and D1 are agreed that there were many meetings between the two of them (often with others) between these dates. Since nothing was in writing, it is likely that the meeting on the afternoon of 26 April 2016 was at least confirmation that some plan – whatever the details and whenever agreed – was now going to be implemented the next day.

112. *Interactions between C and D1 from April 2015 to April 2016.* C's evidence is that from April 2015 he had a lot of meetings and interactions with D1 and others in cafés, restaurants and at home. D1 in cross-examination could not recall how often they met, but often, and often with M.

113. C's evidence is also that when he and D1 first discussed the price in April 2015, D1 seemed content that he could raise money subject to valuation reports supporting these prices: in short, at this stage C expected the Properties to provide security.

114. C says that between May 2015 and April 2016 D1 repeatedly assured him he was making arrangements for the purchase. C says D1 arranged for a surveyor to visit No.19 in August 2015 while C was present, and indicated he would arrange for a solicitor to

deal with the conveyances. In cross-examination, C insisted this was the only valuation for which he was present, and that D1 had attended, and C's cleaning lady was also present. By contrast, D1 insisted that the only valuation he had been present for, also with C and C's cleaning lady present, was in January 2017, being the valuation undertaken for the purposes of D3's Loan.

115. There appear to have been further valuations. C says when he went to Cyprus on 28 August 2015 for a few weeks, he gave D1 the keys to No.19 so that D1 could arrange further valuations. In cross-examination, C insisted this was the only time he had given D1 the keys to his house, and that D1 had returned the keys to C when C returned from holidays. This might suggest that D1 did not open the doors of No.19 to any valuers after this 2015 Cyprus trip, and in particular did not do so in 2017. C also said that he gave his keys to M, again on one occasion only, when M took him to the airport for another of C's trips to Cyprus. It is not clear when this might have been, but perhaps in the early part of 2016, which would coincide with M's negotiation of the Masthaven Group Ltd loan ("**the Masthaven loan application**" – see below).

116. Finally, in D1's WS2, D1 says Santander valued the Properties in September 2016, again for a loan that M was brokering.

Efforts to raise finance by D1

117. I was taken to a good number of applications for finance made between February 2016 (before the Properties were transferred) and January 2017 (when the arrangement was made with D3). D1 says these applications were made by M acting on C's behalf before the transfers (although the application forms do not always suggest that), and by M acting on D1's behalf afterwards, although D1 paid for all of them, via M, because C did not have any money. Bar the Masthaven loan application, I simply indicate these other applications without endeavouring to explain their contents or what motivated them. It is notable, however, that the majority are for short-term bridging finance. C, in C's WS1, denies any knowledge of any of these funding applications, or that he gave anyone authority to make such applications for loans against the Properties.

118. On 28 February 2016, before the transfer of the Properties, D1 (not C) applied to Best Rate Mortgages Ltd for a loan of £450,000, for 6 months, secured on No.19 (although the address is "90" Trent Gardens) "to complete … development", with the property described as tenanted, with the tenant tbc, at a rent of £1800pcm, from December 2016.

119. Chronologically the Masthaven loan application is next, in March 2016, but I consider that in more detail below as it is important to D1's version of events.

120. On 18 April 2016, just a few days before the visit to Blakewells, there was an email from Only Bridging 365 Ltd to M, forwarded by M to D1 (only), indicating that "we are now at legal stage—all replies from the clients side have gone across to the lenders solicitor … We do not anticipate completion to take much longer…". The facility was for £783,111.50.

121. On 2 May 2016, shortly after the visit to Blakewells and before D1 was legally registered as the owner of the Properties, there was an email from M to D1, "Please find attached your mortgage illustration." This was from Precise Mortgages (D3) for an interest only variable rate loan of c.£525,000 for a term of 25 years.

122. On 4 August 2016, an email from M to D1 detailed loan terms from Funding 365 Capital Ltd for a 9 month bridging loan of £910,000 (£816,495 plus fees and costs) on the Properties, assuming a valuation of £1.3 million, with the loan stated to be for the purposes of "Acquisition". In cross-examination, D1 said that M was acting for him in making this application, and M – not D1 – was responsible for all the information on the application form.

123. On 9 August 2016, there was a decision in principle approving a 12 month loan of £980,000 secured over the Properties, which were said to be worth £1.4 million, from Million + Finance (Richmond Rock Capital Ltd). In cross-examination, D1 said these valuations again came from M but could not say whether the decision in principle was organised by M.

124. As noted earlier, D1's WS2 says Santander valued the Properties in September 2016, but that loan application was declined.

125. On 24 Nov 2016, the brokers, BB Financial Solutions Ltd, indicated to D1 that funding secured over the Properties could not be arranged because security over No.67 would require there to be a lease of the first floor flat, and security over No.19 was not possible until D1 had owned the property for 6 months. This is the broker D1 used to arrange the loan from D3.

126. In February 2017, D1 received another financing offer, but D1 says the application was made by C, not him. The offer was for £1 million from easyMoney (E-money Capital Ltd) for a 12 month loan, solely for the purpose of refinancing, secured on the Properties. This offer was forwarded by easyMoney to "Benli", who forwarded it to Orhan Caya on 17 February 2017, and on the same day Orhun Caya forwarded it to D1, and D1 forwarded it to his lawyers (Dogan Dogus at Sal & Co). D1's lawyers had also been sent a copy directly. In D1'sWS2, D1 says he does not know how this application was made by C, but suggests he was in disagreement with C over whether it was possible to raise £1 million on both Properties. It was put to D1 in cross-examination that on D1's version of events this application appeared to require some sort of substantial identity theft, and yet D1 did no more than forward the email to his lawyers and telephone them to say the application could be ignored as he was not proceeding with it.

127. The March 2017 loan from D3, secured over No.19, is dealt with below.

128. In June 2017, C received a letter sent to No.19 from "Tolga Kaymak" addressed to "Dear Homeowner" at No.19, saying that D1 want to re-mortgage, so he needed access for a surveyor and valuer.

129. This represents substantial activity. But what is still unclear, even after cross-examination, is whether C, D1 and M were working together towards a common end, or whether D1 and M had a different private plan. In the end, it is immaterial to the necessary legal analysis, but it does suggest a context that may be a good deal more complicated than revealed in the evidence before the court.

The Masthaven loan application and the alleged agreement to the Claimant's Plan on D's version of events

130. The Masthaven loan application featured prominently in D1's account of the parties' arrangement. D1 said it was this application for financing, and the subsequent visit to

Bloomsbury Law described below, that persuaded C that he would be unable to raise finance on his Properties himself and led to the Claimant's Plan. M brokered the arrangement.

131. On 15 March 2016, M emailed D1, sending his (M's) bank details and adding, "Over to you now for necessary action." On 21 March 2016, M sent D1 an email: "Please find attached the bridging illustration." According to its terms, the application had been produced for C on 18 March 2016, and was for an interest only loan for 9 months from Masthaven Group Ltd for the sum of £910,000.

132. In cross-examination, after some pushing on the issue, D1 suggested this short-term loan was needed to "unlock" the Cyprus land by providing the funds that were necessary to buy out all the other interested parties. The Cyprus project could then be presented to development funders as a project free of the interests of third parties and ripe for development. This plan for some sort of Cyprus redevelopment (and possible profit sharing) accords with D1's later versions of the Claimant's Plan, and provides a plausible motivation for wanting a bridging loan. However, it is inconsistent with D1's pleaded case, expressly maintained under cross-examination, that D1's obligation under any version of the Claimant's Plan was to transfer the funds raised on the Properties to C for C's needs as set out earlier at para [10]. Quite how this obligation could be squared with more elaborate versions of the Claimant's Plan was never explained. But then nor was it ever explained why the raising of funds on the security of the Properties, with those funds then to be paid immediately to C, was not achieved in the more usual fashion by the orthodox sale of the Properties funded by a secured loan.

133. D1 said that the funding application had been for C's benefit, and brokered by M at C's request, and that M had communicated with D1, not C, simply because D1 was paying for the service, and because M knew that D1 would pass on the information to C since they were always together. When it was suggested in cross-examination that the facts were also consistent with D1 – not C – asking M to broker the deal, D1 responded that "C asked too", and became flustered when pressed with the further question, "So you both asked [M]?".

134. After this funding application, and shortly prior to the visit to Blakewells, C was collected by D1 and M and taken to Bloomsbury Law. C took his driver's licence and utility bills. It seems the solicitor photocopied these, although it is not clear who kept the photocopies. C says D1 and M did all the talking, and that the purpose of the visit was to see if D1 could raise funds on the Properties. This is inconsistent with C's assertion, also in the same witness statement, that he knew nothing about any funding or loan applications made by M or anyone else to Masthaven or any other funder. D1 says the visit was to see if C could raise funds on the Properties, but the solicitor told C that a lender would decline the loan because C's identity documents were in different names. It seems that M set up the meeting, and D1 paid whatever costs were incurred (if any), but – according to D1 – C was the intended client.

135. D1 says that the Claimant's Plan emerged and was agreed after this meeting, once C realised he could not raise funds himself on the security of his own Properties. D1's pleadings indicate the plan was suggested by C. When pressed in cross-examination, however, D1 conceded that the plan had been suggested by C and M, with M doing a lot of the talking, because "I couldn't go to [C] and say give the Properties to me". This final observation may have been intended only as a flippant remark. Nevertheless, given

C's personal and business history and background, it seems inherently unlikely that C would have come up with a plan to borrow of the order of £1 million initially, secured on his Properties, and later further sums of £2 million or more, in order to capture control of the failed Cyprus development and then bring it to a profitable conclusion. That plan seems inherently more likely to have come from D1 and M, given their respective backgrounds in property development and fundraising. That said, and although C made something of the issue, the source and indeed the detail of the plan is largely immaterial in resolving the legal issues.

The visit to Blakewells on 27 April 2016

136. C, D1, D2 and M all went to the offices of Blakewells on 27 April 2016, the day after their meeting at the Kervan restaurant. The solicitor dealing with the matter was Mr Choudhury. D1, D2 and M collected C to take him to the offices.

137. *Arranging the meeting.* It is not clear who arranged the meeting. C and D1 both deny making the arrangements. If past practice carries weight, the appointment is likely to have been arranged by M. Since the call to Blakewells appears to have followed the meeting at the Kervan on 26 April 2016, the appointment is perhaps likely to have been agreed by all. Mr Choudhury's evidence in this regard was set out earlier: see above, para [68].

138. *The six signed documents in evidence.* There are two signed TR1s, for No.19 and No.67, dated 27 April 2016. These indicate the transfers are "not for money or anything that has a monetary value". C's signatures are witnessed by Mr Choudhury. D1's signature on the TR1 for No.67 is witnessed by Ms Razia Begum (a legal secretary at Blakewells); his signature on the TR1 for No.19 is unwitnessed on the document on file in evidence.

139. There are also two Client Care letters, each in identical terms in respect of No.19 and No.67, each dated 27 April 2016, and each signed by C. Finally, there are two Client Advice letters, again in identical terms in respect of No.19 and No.67, each dated 27 April 2016 and each signed by C and by Mr Choudhury. Each of these advice letters gives brief bullet-point advice on the advantages and disadvantages of C's transfer of his Properties by way of gift to "his nephew", D1.

140. *The preparation of these documents.* As explained earlier, these documents had all been prepared in advance, on 26 April 2016, probably on the basis of information provided by M or D1: see above, paras [70]-[71]. Given the content of the documents, this information provided on or before the 26 April 2016 must have included the detail that the transfers were for no consideration.

141. *The signing of these documents.* It is part of C's pleaded case that when he signed the documents at Blakewells, he "believed mistakenly that he was signing contracts for the sale of [the Properties]". There are six documents bearing C's signature. C became excited and rather emotional when cross-examined on these documents. At times he insisted that he had only signed two documents, not six; that Mr Choudhury had not witnessed any of his signatures or given him any advice; that he had not read any of the documents, or that he had read them but they had not referred to his "nephew" or to a gift, or that they were "wrong" and whatever they might have said he had only ever intended a sale. C's evidence in relation to all of this is not entirely consistent. I summarise the evidence chronologically.

142. The contemporaneous evidence from the Blakewells meeting on 27 April 2016 is limited. There are the six documents just mentioned. There is no additional file note. C says Mr Choudhury did not advise him; Mr Choudhury says he did. Wherever the truth lies, it seems impossible to conceive of a visit to lawyers for the purpose of signing these documents where Mr Choudhury at no stage even mentioned even in passing to C that the transfers being executed were by way of gift, not sale.

143. *C's second visit to Blakewells and the attendance note of 27 July 2017.* Over a year later, on 27 July 2017, C again visited Blakewells, in person, with a friend, to complain. Mr Choudhury's hand-written attendance note records that C told him that there had been "a private arrangement with the buyer [D1] that the buyer would pay him £1.35 million one month after completion of the transfers" and that C did not tell Mr Choudhury this at the time because "he trusted the buyer and also that his daughter had recently died and that his head was "all over the place"". Mr Choudhury also notes that C told him the buyer was not his nephew and when "I asked … why he mentioned the buyer was his nephew at the point of transfer, he had no answer". The note indicates that when Mr Choudhury asked C why he had waited so long to complain, C said that the buyer had been promising all this time to pay the money, but C now no longer trusted the buyer. The attendance note also records Mr Choudhury as telling C that if someone impartial looked at the transactions they may conclude that C was trying to avoid CGT, and that C then became defensive, and said he had always paid his taxes, and that he would pay any CGT if he got his Properties back. Finally, the note records C as saying he remained in regular contact with D1.

144. It is notable that at this stage, at least so far as the attendance note records matters, C did not allege that he had expected to sign contracts for the sale of the Properties, or that he had only just discovered that he had signed transfers for no consideration. Indeed, if C and D1 had a "private" arrangement for a sale, presumably private from Mr Choudhury, the inference is that C knew that the transfers he signed at Blakewells were not those sale documents, and were transfers for no consideration, and knew that this documentation did not reflect the parties' true, "private", deal.

145. When Mr Choudhury was cross-examined on this attendance note, it was not suggested to him that any part of it was not a true record of the meeting. The only suggestion put to him was that, beyond avoidance of CGT, a further reason for a gratuitous transfer could have been to enable D1 to avoid SDLT.

146. By contrast, in C's first witness statement, prepared almost three years later in 2020, C has a different version. What he says there is that "The attendance note on the file states that I had a private agreement with [D1] that [D1] would pay me £1,350,000 one month after completion of the transfer. That is not correct. The agreement I had with [D1] was always that I would be paid £1,350,000 on completion of the sale of the Properties and it was not a private agreement, it was the agreement that Blakewells should have documented." This different version was not put to Mr Choudhury in cross-examination.

147. *C's visit to Rossides Caine Solicitors.* It seems that after this July 2017 visit to Blakewells, C then went to see his usual solicitors, Rossides Caine Solicitors, who had acted for him for over 30 years in all his past property transactions. On 7 August 2017, Rossides Caine wrote to Blakewells seeking an explanation for the gratuitous transfers. That letter referred to D1, not C, as Blakewells' client. A reply was received from

Blakewells on 10 August 2017. Rossides Caine then had no further involvement in this matter. No reasons for that have been given.

148. C says in his first witness statement that he went to see Rossides Caine before his July visit to Blakewells. As he put it, he went to see Rossides Caine after "around a year" of D1's unmet promises to pay, and it was only then, when Rossides Caine obtained the information from HMLR, that C was "horrified" to learn that he had transferred his Properties for no consideration. It was after this that he contacted Blakewells and saw Mr Choudhury on 27 July 2017. I do not accept this. If C went to see Rossides Caine between April 2017 (i.e. a year after the transfers) and 27 July 2017, there is then no explanation for the short letter sent by Rossides Caine to Blakewells on 7 August 2017. That letter says, "Mr Ali has been to see us in a state of some anxiety." The inference is that they acted promptly after C's visit to resolve C's concerns.

149. Consistently with C's visit to Blakewells coming first, C also says in C's WS1, in the next paragraph, that it was during the visit to Blakewells where he "learnt for the first time" that he was transferring the Properties to D1 as a gift.

150. *Instructing SA Law LLP.* After Rossides Caine, C then instructed SA Law LLP (not his present solicitors). They wrote to Blakewells on 4 December 2017 requesting Blakewells to send them the file relating to the transfers of the Properties. Blakewells declined, because they were entitled to exercise a lien for payment of their outstanding fees of £600. Communication was resumed on 12 January 2018, with a further letter from SA Law LLP enclosing a cheque for £600. In return, on 15 January 2018, Blakewells sent a photocopy of C's file. On 19 January 2018, SA Law LLP requested the originals and any electronic communications. That seems to have been the extent of their engagement before C instructed Ince Gordon Dadds LLP, the firm now acting for him.

151. *C's formal complaint against Blakewells and his January 2018 chronology of events.* During this period of engagement with SA Law LLP, but independently of these lawyers, C sent a formal letter of complaint to Blakewells, dated 15 December 2017. Blakewells replied on 21 December 2017. This was followed by a further letter from C on 5 January 2018, attaching an unsigned chronology of the events surrounding the transfer of the Properties. Both letters from C were signed by his daughter, Havva Tacel, on his behalf. In cross-examination, she agreed she had written both these letters and the chronology, but on C's instructions and with his consent.

152. In this January 2018 chronology, C alleges fraud. He indicates that he and D1 first met to discuss the Properties in 2015/16. There was then an agreement on the sale price, and a subsequent valuation where C says he and D1 were both present, and then the 27 April 2016 visit to Blakewells. C said he was reassured by D1 that he need not use his own solicitors "as everything was sorted in terms of legal documentation being prepared for the sale of both properties". C says he was taken to a room at Blakewells where there were "documents" for him to sign. He believed that these were documents for the sale of his Properties, and he "had seen that the documents had [D1's] name in one document and the other in [D2's] name…". There is no evidence to support this mention of D2, and it is not repeated later. It seems C signed all the documents, whatever their number. C says there were no witnesses at the time of his signing, and that he signed no engagement letter and received no advice. He then says that when he did not receive the money immediately, he orally agreed with D1 that the "sale proceeds" would be

paid within "that month, being May 2016", by way of an agreed variation of their original agreement which had been for immediate payment. He added that it had later come to light that D1 had arranged for transfers of both Properties to his and D2's names and had taken out charges on both Properties to further his own development work. C said he was a victim of fraud, because the documents he had signed were not the sale agreements he "was led to believe they were by [D1], his accomplices and Blakewells". The change in C's story in this January 2018 version from that recorded less than six months earlier in Mr Choudhury's attendance note of 27 July 2017 is dramatic.

153. *Reporting matters to the police.* In C's first witness statement, C says Mr Choudhury told him he should report the matter to the police, and C noted that this is not included in Mr Choudhury's attendance note. In his January 2018 chronology, however, C says that this advice to contact the police came from Rossides Caine Solicitors, and that he had followed that advice. C's same witness statement indicates that these matters were reported on his behalf to the police on 8 December 2017 (i.e. after the visit to SA Law LLP). That report seems to have concerned a complaint about men turning up at his property. A report was also made to Action Fraud, seemingly shortly afterwards. Later still, the police attended at No.19 again on 2 February 2018, again in connection with men turning up at No.19.

154. *C's particulars of claim*. Next in the chronology is C's particulars of claim. As indicated earlier, C's first particulars of claim set out a different timing of the agreement between C and D1 for the sale of the Properties. C says he was content to let D1 make all the arrangements with Blakewells, and that at the meeting on 27 April 2017 he was presented with two documents which he now believes were TR1s. He says he was prepared to sign the two documents presented to him by Mr Choudhury "without considering their contents", but "relying on the assurances of [D1] that the necessary documentation to effect the sale of the properties had been prepared". C said the meeting with Mr Choudhury lasted approximately 10 minutes.

155. This description is largely repeated in C's final PoC, although the date of the agreement between C and D1 moves to 26 April 2016, and C says he signed the documents (and he is less specific about the number, although they "comprised or included" the two TR1s), and did so "without reading or considering or being advised as to their contents, believing mistakenly that he was signing contracts for the sale of [the Properties]". C repeats that the meeting with Mr Choudhury lasted approximately 10 minutes.

156. *C's Witness statement.* In his first witness statement, C maintains the PoC version of when the agreement was reached, and says that at Blakewells there were only two documents to sign, which he identified as the TR1s, but which C assumed at the time were sale agreements for the Properties prepared in accordance with his agreement with D1. C says that he was simply given the documents to sign by Mr Choudhury, and left alone to sign them. He says he was not advised at all, he did not read the documents, and no one witnessed his signature when he added it. He says was happy to sign without advice because he was selling to a friend. He says in this witness statement that he did not sign the four other letters – the advice letters and the engagement letters – and that the signatures are "not therefore my genuine signature".

157. *Cross-examination.* In cross-examination, C maintained he had only signed two documents at Blakewells, although he also said that the reason he knew he had signed

these two TR1 documents was because he had been told afterwards that he had signed them. A lot of his answers suggested that the signatures on the other four documents – and indeed maybe the signatures on all six documents – were forgeries, and that "I haven't seen this document", "this is forged", "I only signed two documents", "I haven't signed anything like this", "I don't remember", "this is false", "this is wrong … looks like my signature … but not what I am saying", "this is false", "this is all fixed", "this written here is all wrong" "I don't know. I can't remember", "didn't see any "nephew"", "I never give anything to [D1]", "why would I do this?", "this document wrong. I never give as gift".

158. There was a lot of emotion in all these answers, and in the end it was difficult to tell whether C's reaction was directed primarily at denying that he had signed all these documents at all, or at denying that he had made a gift of his Properties, whatever the documents might seem to suggest. He mentioned both in his answers. Given the documents before the court, I do not accept that C signed two of the documents but not the other four, and C made no effort, beyond assertion, to prove that was the case. On the other hand, what was clear by the end of this long period of questioning was that, whatever the documents appeared to say, it was always C's intention and understanding that he would be paid for the transfer of his Properties, so any signed documents that indicated he was making a gift of his Properties were "wrong". I accept this as C's intention and understanding, but, as noted earlier, that is also D1's intention and understanding.

159. The evidence and cross-examination on these issues sought to go further, but little can be made of the additional issues raised. Under cross-examination by counsel for D3, C admitted that he expected his solicitors to give him proper advice and would – as he had done in the past – sign the documents his solicitors advised him to sign without reading them, but assuming they represented the deal that had been settled. He also admitted that had he asked Mr Choudhury for advice, he had no reason to think that advice would not have been provided. In the end it was not clear whether C's evidence was that he had not looked at the documents at all, or had looked, but quickly, or had looked but not understood. It was, however, clear that at this early stage he trusted and relied upon D1.

160. Little turns on this. C does not advance his case on the basis of forgery, or any sort of fraud, even though both were mentioned or could be inferred from his replies in cross-examination. Further, C agrees he signed the TR1s, and yet it is plain from the pleadings that neither C nor D1 is suggesting the transfers were intended to be by way of gift. There is thus no need for C to find a basis on which to resist a non-existent claim that he has made a gift of his Properties to D1.

161. Finally, it might be noted that D1 and D2's Re-Amended Defence asserts that C instructed Blakewells to implement the Claimant's Plan. However, the only transaction put into play by Blakewells was the transfer of C's Properties to D1 for no consideration, and, even on D1's version of events, that was plainly not the implementation of the Claimant's Plan. Further, the donee of a gift cannot instruct lawyers to implement the transfer, so instructions to Blakewells would need to have come from C in a formal sense. But, as noted earlier, it is unlikely that C himself devised the scheme of which these transfers were presumably a part, and it is clear he did not himself communicate the essential details to Blakewells.

162. *Finalising registration of the Properties in D1's name.* The evidence concerning the registration of the Properties in D1's name is largely uncontested and is of little significance to the legal analysis. The AP1 forms requesting registration of the Properties were prepared on different dates. The AP1 for No.67 was prepared on 27 April 2016, the same date as the visit, presumably by Mr Choudhury. C is the applicant, and the value of No.67 is given as £400,000. No one seemed to know where this figure came from. On receiving this form, HMLR queried the mismatch in C's names as they appeared on the forms and on the registered title. They also noted the outstanding charge in favour of "Datatyear Ltd". C's evidence is that this had already been redeemed. Whatever the facts, the entry was removed from the register and No.67 was registered in D1's name.

163. The AP1 for No.19 came later, after D1 had redeemed the Santander Charge. M also seems to have been involved in this, and it is unclear how C's input was obtained. D1 was the applicant on this AP1, not C, and No.19 was valued at £750,000. Again, it is not clear where this figure came from. Under cross-examination, Mr Choudhury said that it was an error that D1 appeared as the applicant, as their only client had been C.

164. In finalising these details, all the emails between Blakewells and C or D1 seem to be copied to M, and it is he who sometimes replies giving the details requested. On the one occasion where C appears to have sent a reply himself, from his own email address and signed off in his own name, the formatting and wording of the message would suggest that it was written by M, who was cc'd. C denies he wrote the email, or would have been able to write it.

165. C made a number of assertions in his witness statements and in cross-examination that suggested D1 and M had accessed his personal files, including his bank details, when they had been at his house, either when he was there or when he was in Cyprus. They had also had access to his old telephones. The inference was that they had cut him out of the loop in communications about his Properties, or, worse, were dealing behind his back. But C did not offer proof of this and his claims do not rest on such assertions.

Summary of the evidence as to the arrangement between C and D1

166. My conclusions on this evidence can usefully be summarised here. *First*, I find that the six documents listed earlier were signed by C. In the face of the paperwork, I do not accept C's assertion that he only ever signed two documents. It is not part of C's case that the other signatures are forgeries, and in cross-examination, even though C used the word "forgery", he would not go so far as to insist his signatures were indeed forged by some third party.

167. *Secondly*, I do not accept C's claim that he expected the single visit to Blakewells on 27 April 2016, arranged the previous day, to deliver a completed sales transaction that would see £1.35 million paid into his bank account on that same day. During cross-examination by counsel for D3, C unilaterally volunteered the detail that he understood the series of steps in a sale transaction, and the documents required, and the time it took to move from agreement to sell, then to contract, and then to completion. He had also conceded the same under cross-examination by counsel for D1 and D2, despite his asserted ignorance of the mechanics in C's WS1. Given that it is C's own case that agreement was only reached on the afternoon of 26 April 2016, I do not accept that he expected completion and payment in full to be delivered less than 24 hours later, on 27

April, and moreover that he expected that it could be delivered without the provision by him or by someone on his behalf – presumably done only after the deal was agreed on 26 April 2016 – of all the necessary information to the lawyers tasked with the endeavour, or, further, without a loan secured against the Properties, given all D1's earlier valuation endeavours, or, finally, without any plans on his part to leave No.19. To that end, C's comment in C's WS1 that he planned to move to his daughter's house once he was paid is on its own account not a plan indicating C expected a completed sale, with payment in full, on 27 April 2016.

168. *Thirdly*, by contrast, I do accept the much looser proposition that the only deal C intended to enter into was one where he transferred his Properties to D1 in exchange for money: i.e. a "sale". However, I do not accept as proven that the terms agreed were simply those of a standard property conveyance, with land exchanged for a settled sum of money, being £1.35 million, and nothing more. The only evidence of that is C's own assertion, albeit repeated to Mr Choudhury on his second visit to Blakewells in July 2017. I make further comment on this later.

169. *Fourthly*, I do not accept the assertion advanced in C's WS1 that the parties' arrangement was not private, and that Blakewells should have prepared the documentation for a sale at £1.35 million (or any other price). C's evidence on that front changed dramatically from his visit to Blakewells on 27 July 2017, to the preparation of his chronology in February 2018 and, later still, the preparation of his first witness statement. Whatever the other challenges to Mr Choudhury's evidence, his attendance note of the 27 July 2017 meeting was not challenged in cross-examination. In this context, it is notable that, despite earlier suggestions that this was the case, C does not claim here that D1, or D1 and M, were endeavouring to perpetrate a fraud on C in providing instructions to Blakewells that did not conform to the deal agreed between C and D1. In addition, but without considering it proven, I think it inherently unlikely that C was not told in advance that the documents he was to sign at Blakewells included a transfer for no consideration as part of some more complex deal between C and D1. I say that because it seems inconceivable that Mr Choudhury could have engaged with C over a 30 minute, 20 minute, or even a 10 minute visit, without ever mentioning the word "gift", given the documents about to be signed. If this had come out of the blue, when C was expecting a standard sale, it is difficult to believe that C would still have signed the forms, or that he would have done nothing for 12 months despite D1's reassurances that he would be paid. I acknowledge that C says in C's WS1 that it was only over a year later that he first learnt from Rossides Caine, or from Blakewells, that he had signed forms gifting his Properties to D1. But C knew well before then that his Properties had been transferred: shortly after the April 2016 visit to Blakewells, C had been involved in communications to sort out the queries over his different names on the TR1s and the respective property titles, and he acknowledges his role in the necessary redemption of the Santander Charge so that D1 could become the registered owner. As to the Datatyear charge, C became very agitated in cross-examination and denied knowledge of its existence, and denied receiving any communications from Blakewells concerning the need to redeem it. Somehow this charge was removed from the register, but there is no evidence at all before the court as to how that happened. I accept that, despite knowing that his Properties had been transferred, it was perhaps not until C's visit to his lawyers in 2017 that he first realised the possible legal consequences of what he had done, but that is a different matter. It may well have been Rossides Caine who

pointed out to him that the only documentation reflecting his deal with D1 was documentation indicating a transfer for no consideration, and that therefore asserting his legal rights was likely to be more complicated than would have been the case with a traditional sale. But that is not the same as being ignorant of the fact of the gratuitous transfer step at the time it was undertaken through Blakewells.

170. *Fifthly*, I reject D1's assertion that C has prevented D1 from providing the funds so far raised to C: no evidence to that effect was put before the court. I also reject D1's suggestion that it was necessary for C to make a special request that these funds be paid over in order for D1's obligation to materialise. In any event, a request has now been made. In cross-examination D1 repeated that he intends to perform this obligation, but he has no funds and could not say when he might have them.

171. *Finally*, one important further finding can be made as to what the parties expected would happen with the Properties. This is crucial to the necessary legal analysis. D1's pleaded case is that he was to pay money to C. In particular, he was to raise finance on the Properties and then pay that money to C. That understanding is crucial. Equally, I consider that C also understood that it would be necessary for finance to be raised on the Properties in order for D1 to pay him. C's own evidence is that was how he understood the arrangement in 2015, in the very early stages. From then until the visit to Blakewells, it is also C's evidence that D1 continued to reassure him that he was busy obtaining the necessary valuations, and C made provisions to enable access to valuers. The Masthaven loan application was made only shortly before the visit to Blakewells, and it is C's own evidence (although not D1's) that this application, and the visit to Bloomsbury Law, was to determine whether D1 could raise finance on the Properties to fund their acquisition. I do not therefore accept C's assertion later in the same witness statement that he was told by D1 at the Kervan restaurant on 26 April 2016 that D1 now had the necessary £1.35 million to proceed with the purchase, and C would receive the money the next day. At the time of, or even after, the Blakewells visit, C has not suggested any basis for a different assumption, nor put in evidence anything that supports a change from the earlier assumption. I therefore find that there was no change from that earlier assumption that finance would need to be raised by a loan secured over the Properties.

172. In cross-examination by counsel for D3, C was moved to concede this element in the arrangement, even though C insisted he had been "set up" by D1 and M. However, it seems he felt "set up" because he had not received the £1.35 million, not because the £1.35 million might have to come from a loan secured on the Properties.

173. In closing this section, I note that neither party has explained the basis on which C remains in occupation of No.19 and collects the rental income on the first floor of No.67.

D1's Lease of the first floor flat of No.67 to D2 for 999 years by deed of gift

174. On 6 December 2016, D1 made a gift to D2 of the Lease, a 999-year lease of the first floor of No.67. D1 also signed a Deed of Gift, confirming the intention that the transfer be by way of gift. As noted earlier, C's transfers of the Properties to D1 were not accompanied by a similar Deed. The Lease was registered the next day, on 7 December 2016.

175. D1 said in cross-examination that this transaction was not part of the initial Claimant's Plan, but there are inevitably "problems as [you] go on a journey", and it had become clear that it was necessary to have a separate leasehold of the first floor of No.67 in order to raise finance on that part of No.67. D1 also said in D1's WS2 that C had helped with getting the floorplan done so the Lease could be registered.

176. D2's evidence, in D2's WS1, is that "It was all being sorted out by [D1] and [C]. I just did what [D1] asked. If [D1] had told me to give the [Lease] back then I would have done. It did not matter to me. I have never been to the property. I have never seen it, inside or out, I do not know the postcode. I have never dealt with any maintenance there. I do not know who the tenant is."

177. In cross-examination, although D2 denied any knowledge of the Claimant's Plan or any of its details, he did admit to knowing that there was a plan to raise mortgage finance from the Properties. It was also put to him that when he took the Lease he knew that its grant was a breach of the arrangement between D1 and C. He denied knowing what their arrangement was, and insisted he was simply helping his brother out.

D1's Charge over No.19 in favour of D3

178. On 2 March 2017, D1 granted a registered charge to D3 over No.19 (the Charge) as security for the Loan in the sum of c.£460,000. Execution of the mortgage deed, registration of the Charge and payment of the Loan funds into D1's bank account all took place on 2 March 2017. This followed an earlier loan application from D1 to D3 in early January 2017, a valuation of No.19 by Connells Survey & Valuation Ltd ("**Connells**") on 18 January 2017, an offer from D3 on 7 February 2017 and instruction of D3's lawyers, Martin Kaye LLP, on the same day.

179. As between C and D3, the primary concern addressed in cross-examination was the evidence surrounding the visit to value No.19. This is because C claims that he was in actual occupation at the time, notwithstanding assertions in the Loan documentation and in the personal undertakings signed by D1 indicating that was not the case, and that instead there was an AST in favour of Orhan Caya.

180. However, once all the evidence had been presented in court, D3 conceded that C had been in actual occupation at the time the Charge was taken. I agree, but D3's concession makes it unnecessary to set out the evidence.

D1's use of the Loan funds

181. The completion statement detailing the Loan to D1 from D3 indicates that D1 borrowed £466,935.00, and received a balance (less arrangement fee and costs) of £458,773.01. This sum is recorded as being paid into D1's bank account on 2 March 2017. The balance in D1's account immediately before this payment was nil.

182. It is plain from D1's bank records that D1 immediately began using this sum for his own purposes, despite his witness statement (D1's WS1) to the contrary. I will not detail all the transactions, although two categories merit comment. First, substantial sums – over £200,000 – were paid out for the acquisition of investments in cryptocurrencies. The evidence did little to illuminate the detail of the acquisition process or exactly what "assets" were acquired. It is D1's evidence that all these investments in cryptocurrencies are now worthless. It was also D1's evidence in cross-examination that he had

suggested to C in January 2017 that some of the funds raised on the Properties should be invested in cryptocurrencies (although only sums of the order of £500-£1,000 it seems), but no agreement to do so was suggested. D1 conceded that he and C were not speaking to each after that, and there was no agreement with C that the Loan funds would be invested in cryptocurrencies.

183. Secondly, D1's evidence, and D2's, was that £70,000 of the Loan funds were paid to D2 by way of repayment of a debt owed by D1 to D2. However, in cross-examination both D1 and D2 conceded that the £70,000 was paid into D2's account to enable him to pay out £68,000 for an investment off-plan in a Canary Wharf development that D1 had told D2 to buy.

184. Despite these dispositions, D1 agreed in cross-examination that he always knew he was supposed to pay these Loan moneys to C, and that he had always intended to replace the dissipated funds.

185. The short point to take from all of this is that D1 used the Loan for his own purposes, and did that despite knowing that he should have transferred those funds to C.

What's App communications from January 2017-January 2018

186. I was taken to What's App evidence intended to show that D1 had tried to communicate with C from January 2017, but C had declined to communicate. The evidence was screen shots of C's phone showing receipt of a number of text messages from D1 and missed calls from D1 over a dozen or more days during the year, with C responding very infrequently. That evidence also included a couple of photographs of C and D1 clearly from a time when their relationship was good – both look very happy – although it is not clear when these photographs were taken: they are not given any context in the run of missed What's App phone calls and messages. This series of screen shots has some oddities: the run of dates shown on the screen in August and September is not in date sequence (even in a single screen shot).

187. Similar evidence from one of D1's phones (it seems D1 had a number of mobiles) shows some overlap with the above information from C's phone, and also a handful of missed incoming calls from C. D1 says that he understands C's daughter told C not to communicate with D1 anymore.

188. I am not able to take anything from this evidence that is material to the legal analysis required.

Alleged agreement by D1 to retransfer No.67 and the Lease to C

189. The final piece in the jigsaw is that there is some evidence of an arrangement by D1 to retransfer No.67 and the Lease back to C for no consideration. I will not set out that evidence. I was not asked to take anything specific from this evidence other than that it indicated that D1 may have realised he was not entitled to the Properties. But in cross-examination D1 insisted that the aborted retransfer had been motivated by threats he had received to his person. He insisted he was entitled to the Properties because the parties had agreed to implement the Claimant's Plan, and they were "on a journey" to deliver that plan.

8. Distilling the factual findings necessary for the required legal analysis

190. Having set out my findings on much of the evidence presented to the court, I now summarise the limited facts I regard as essential to the legal analysis.

191. First, I find that an arrangement or agreement between C and D1 did exist, and was not an arrangement intended by either party to be by way of gift or binding in honour only. Further, that arrangement – on both parties' versions – was to involve the transfer of the Properties from C to D1 and the payment of money by D1 to C. That arrangement, whatever its detail, is not in writing. All this is clear from both C's and D1's own pleadings, so I accept it as not in dispute.

192. Secondly, D1 redeemed the mortgage over No.19, paying c.£67,500.

193. Thirdly, I find that neither C nor D1 has presented sufficient evidence to establish the truth of their own version of the arrangement between the parties. The only evidence of a contract of sale for £1.35 million is C's own assertion, including his own assertion in July 2017, before this litigation started, when he visited Blakewells for the second time. Although Mr Choudhury's attendance note is the only documentary evidence from a third party of what was intended by the parties' arrangement, it nonetheless presents only C's version of events and will not do to prove the complete terms of an oral agreement intended to be binding. Moreover, it leaves unexplained why the sale was not conducted in the normal fashion, with D1 raising the purchase price by way of mortgage over the Properties, especially if such a mortgage, with payment of the proceeds to C, was planned. It also leaves unexplained why D1 would pay above market price (i.e. over the price that C could obtain from anyone else) for two properties which did not have development potential for his business, and which he could not in any event use for his business or personally, given that C remained in occupation of No.19 and collecting the rent on No.67. The inevitable inference is that there must have been some more complex arrangement agreed. If the plan was that C would receive £1.35 million, then I suspect that D1 was to receive more than the Properties, but all of that is speculation.

194. Similarly, D1's version of events is also founded entirely on his own assertions. The pleaded version delivered in his Amended Reply was only one of a number of versions suggested in his witness statements and under cross-examination. On one version the sharing of benefits was still to be worked out. On his own shifting evidence, therefore, D1 could not state the terms of the arrangement agreed by the parties, never mind afford proof.

195. In short, while I suspect that the parties may have had some relatively clear endeavour in mind by 26 April 2016, when they discussed the issues at the Kervan restaurant, it is impossible on the evidence presented to say what that might have been.

196. Fourthly, there is, however, one aspect of the parties' arrangement that I am prepared to find proven on the evidence put before me. I find that both C and D1 had in mind as part of their arrangement that the Properties would be used to provide the security for the funds that needed to be raised by D1 to pay to C, as required by their arrangement. In reaching this conclusion, I give special credence to a party's evidence when it goes against his own interests.

197. This aspect of the arrangement is explicitly an element of D1's version of events under the Claimant's Plan, and he maintained this clear vision of how the Properties were

required to be used under cross-examination, and he did that even when changing his versions of what benefits might be due to him under the plan, including the version which entailed recapturing the failed Cyprus development. Moreover, on D1's own evidence, C wanted D1 to "max out" the Properties to that end, leaving no window for funds to be raised for D1's benefit. This constrained D1's use of the Properties: he was not to mortgage them for his own ends and benefit. D1 did not at any stage in the proceedings assert that he had a right to use the Properties as his own, notwithstanding that he holds legal title to the Properties. He committed to his version that the Properties were to be used to generate funds and those funds had to be passed on to C. Further, D1 did not seek to provide a special explanation of why C was still in occupation of No.19, nor why he was still managing and collecting the rent on No.67.

198. Equally, in my view, this version of how the Properties were to be used is necessarily implicit in C's version of the arrangement. I reach this finding despite C's assertion that he expected to be paid £1.35 million on 27 April 2016, and despite his assertion in his witness statement that he knew nothing of the fundraising and financing endeavours set out in the evidence. Those two assertions are contradicted by the facts also asserted by C in his witness statements and in his cross examination. For reasons set out in more detail earlier at paras [171]-[172], I find as a matter of inference from C's behaviour that he both understood and expected that the Properties would necessarily be used as security to facilitate delivery of – according to C – the purchase price of £1.35 million to C.

199. This finding that both C and D1 knew and intended that the Properties would be used to provide security for the funds that needed to be raised by D1 to pay to C under the arrangement can be put in two ways: a strong version and a weak version.

200. The strong version is that it was C and D1's clear intention, understood by both, that the Properties would be transferred by C to D1 for D1 to use exclusively for raising funds which were to be transferred to C. As indicated below, the legal consequence of this is to find a *Quistclose* trust. This conclusion requires it to be clear on the evidence that C did not intend that the Properties were to be at the free disposal of D1, *and* D1 also understood that to be the case. The latter is required to protect D1 in circumstances where it is necessary to distinguish an arrangement that is purely contractual, where D1 receives the Properties absolutely, and an arrangement where D1's proprietary rights in the Properties are severely constrained. As already noted, D1's own consistent and persistent evidence is that he knew and understood that his proprietary rights in the Properties were severely constrained: D1 was to use the Properties to raise funds that were then to be transferred to C.

201. This strong version of the parties' understanding of how the Properties were be to used is my finding on the evidence put before the court. I note that a weak version is also possible. If, contrary to my findings, D1 had not appreciated the constraints on his use of the Properties, but the court were nevertheless to find that D1 held the Properties on trust for C, then it would be material to consider whether C's beneficial interest in the Properties was qualified in any way. The reasons for that become apparent when the legal analysis is addressed later in this judgment. For the reasons given then, I hold that it can be inferred that C understood and accepted that the Properties would necessarily be used to raise all or some part of the funds that were required in order for D1 to pay C whatever sums were due under their arrangement for the reasons set out above.

202. So far as D3 is concerned, it is not in dispute that a secured loan was granted on 2 March 2017, that No.19 was visited and valued on 18 January 2017, and that the property was obviously occupied by someone on that date. In cross-examination, counsel for D3 accepted that C was in actual occupation.

203. A number of more minor factual findings are picked up in the legal analysis, but these are the material facts. I repeat that I cannot resist the inference that there are further facts known to both parties that are simply not being put before the court. Be that as it may, certain legal consequences follow from the facts that are established, and I now consider what they are.

9. The legal arguments as between C and D1

204. As noted earlier, C claims various remedies, personal and proprietary, that are said to be available regardless of which version of the facts the court finds proven. C's various claims rest on characterising the facts in different ways, much as is done when a given set of facts is seen as generating claims either in contract or in tort. C is free to advance all these possible remedial options before the court, but in the end may have to elect which of these remedies to pursue, as it is not possible to pursue claims leading to double recovery for the same harm, or claims that are inconsistent.

205. Here, although C does not put it like this, his claims are based on characterising the proven facts as indicating either (i) an intended oral contract; or (ii) an oral agreement not necessarily amounting to a contract, but one that nevertheless gives rise to equitable proprietary remedies; or (iii) an unintended gift; or (iv) a scenario that, for reasons beyond those already considered, gives rise to claims in unjust enrichment (with those additional reasons being failure of basis or mistake). I consider each of these categorisations in turn.

9.1 Remedies founded on an intended oral contract

206. C's pleaded version of the arrangement is that D1 was obliged to pay the purchase price. D1's pleaded version is that D1 was obliged to raise finance on the Properties and give these funds to C pursuant to the Claimant's Plan: i.e. on either version, C was to transfer the Properties and D1 was to pay money to C.

207. Not only do both parties insist that their own version of the agreed arrangement imposed obligations, they each insist that the arrangement was sufficiently certain in defining what those obligations were. C does that by pleading the existence of a contract for the sale of the Properties to D1 for £1.35 million. D1 does that with pleadings that explicitly deny vagueness or uncertainty, and assert D1's ongoing intention to carry out his obligations.

208. I have already concluded that neither C nor D1 has succeeded in proving satisfactorily the terms of their arrangement. Without clear agreed terms, there can be no contract. For present purposes what is important it that both parties agree that binding legal obligations were intended, even though I find that their intended contract is void for uncertainty.

209. Even assuming the terms had been clear, an oral contract for the disposition of an interest in land is void unless it is in writing: s.2 of the Law of Property (Miscellaneous

Provisions) Act 1989 ("**LPMPA**"). The intended contract is not simply unenforceable; it is of no effect.

210. Since the intended contract (whatever its terms) cannot be enforced, given the want of writing, any remedies which depend on court enforcement of the contractual obligations undertaken by either side are not available.

211. This means that even if C had been able to advance firm proof that there was an oral contract for the sale of the property for £1.35 million, he could not enforce that contract, and in particular could not enforce payment of the purchase price: it follows that C is not entitled to an order requiring D1 to pay him £1.35 million by way of purchase price.

212. It follows automatically from that conclusion that C is not entitled to a vendor's lien over the Properties to secure that obligation, since the obligation itself does not exist. I was taken to numerous authorities to that effect, if authority is needed for so fundamental a proposition: see *Megarry & Wade: The Law of Real Property* 9th Ed at 14-054 and the cases cited there; *Snell's Equity* 34th Ed at 44-007 and the cases cited there; *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261 at 278; *London Cheshire Insurance Co Ltd v Laplagrene* [1971] Ch 499 at 514; *Re Bond Worth* [1980] Ch 228 at 251 (which counsel for C thought especially helpful, but which in my view reaffirms the orthodox view of an equitable lien); *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415 (CA), at 419; *George Wimpey Manchester Ltd v Valley & Vale Properties Ltd (in administration)* [2012] EWCA Civ 233, [2012] 2 EGLR 113, at [37].

213. Further, I do not accept C's contrary argument that a vendor's lien can exist despite the absence of a legally enforceable contract for the sale of property. An equitable lien is a security interest; it must by definition secure the performance of an obligation. A vendor's lien is one version of an equitable lien, designed to secure the purchaser's obligation to pay the sale price. I do not read any of the authorities cited to me as suggesting otherwise. I mention only two upon which C placed great reliance.

214. The first is *Mackreth v Symmons* (1808) 15 Ves Jun 778, at p 781, where, in a sentence that is rather difficult to parse, Lord Eldon includes the phrase "though perhaps no actual contract has taken place". I am unable to extract from these eight words the principle for which C contends: they seem unrelated to the context of the case, which accepted the existence of a vendor's lien in a contract for the sale of land, and was more concerned with when such an interest might be regarded as relinquished by the vendor (as to which, now see *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261).

215. The second is the extempore decision in *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P & CR 452 (CA), which C suggested is authority for the proposition that once the "land" aspects of the parties' arrangement have been executed, s.2 of the LPMPA will not prevent the enforcement of other aspects of the agreement. The facts of that case (where there were two signed contracts, one expressed to be collateral to the other) are a long way from those now before the court, and the true basis for the court's decision has been disputed. On their face, however, the words of Scott LJ in *Tootal* do not appear to be open to the interpretation C wishes to advance. What Scott LJ said, at 455, was:

> "However, section 2 [of LPMPA] is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land

> contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2."

216. This would seem to do no more than acknowledge that parties can act upon arrangements that are not binding: their acts will be lawful, even though a court would not force them so to act, nor remedy their failure to do so. To the extent that other cases have read more into *Tootal*, such as might support C's assertion, I am persuaded by the considered dismissal of those views by Rimer LJ in *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 WLR 2855, [42]-[47], especially at [46].

217. Finally, just as D1's alleged obligation to pay the purchase price (on C's version of the facts) is not enforceable, it also follows, for the same reasons, that on D1's version of the facts, D1's obligations (and C's, to the extent there might be further obligations on C) are not enforceable.

218. All of those remedies are directed at enforcement of the intended, but void, contract. None of those remedies can be ordered.

219. That is not the end of the matter, however. When a void contract has been partly performed, the loss is not generally left to lie where it falls. The intended transaction must be unwound, and both sides put back in the position they were in before the deal was entered into. The principal exception is where the court sees its intervention on that basis as unwarranted because the arrangement is tainted by illegality. Neither side has suggested this is the case here.

220. D1 and D2 suggest this unravelling delivers only personal remedies in unjust enrichment, citing *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("***Westdeutsche***"), see especially 690C-F, 703D-F, 705-709. This case concerned a void swaps contract. The House of Lords held that the recipient of moneys under a void contract did not hold those moneys on a resulting trust from the date of receipt. Further, the court held that it would be undesirable to develop the law to deliver that result since the consequences of that were so unattractive: to give the claimant a proprietary interest in the moneys would produce injustice to third parties (especially on the defendant's insolvency) and commercial uncertainty (especially in competing priorities), and would render the defendant liable as a fiduciary for use of the funds during the period between their receipt and discovery of the true circumstances, i.e. at a time when the defendant had no knowledge that the funds were not its own property to use as it wished.

221. *Westdeutsche* has been the subject of significant academic commentary, much of it, but not all, critical of the seemingly blanket conclusion that restitution for unjust enrichment in the context of a void contract is not proprietary, and the further assertion, in reaching that conclusion, that a defendant holding assets on resulting trust would necessarily be liable as a fiduciary for its dealings with those assets, since anything other than their return to the claimant would be a breach of the trust. If true, this latter assertion would indeed be unfair. But, as has often been pointed out since *Westdeutsche*, that conclusion of fiduciary liability does not necessarily follow. We routinely assert that an innocent donee who receives trust assets under an unauthorised disposition from

a trustee holds those assets on trust, but owes no personal obligations to the disappointed trust beneficiaries unless or until he can be shown to be a knowing/unconscionable recipient of those assets. In this context we know that it is important to separate the proprietary and obligational aspects of a trust, and we know that the existence of the former is possible without the latter. The same might equally be the approach with void contracts. See the extended critical discussion in *Goff & Jones: The Law of Unjust Enrichment* 9th Ed, paras 37-22 – 37-26.

222. I have a great deal of sympathy for the force of these criticisms, but even on the strictest view of the non-availability of proprietary remedies advanced in *Westdeutsche*, that case does not deny C a proprietary interest in the Properties in the circumstances before me. As Lord Browne-Wilkinson noted, the knowledge of the defendant is all: it determines whether his conscience is affected. At p 715B, in providing an alternative justification for what he considered to be the acceptable outcome (but not the reasoning) in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, Lord Browne-Wilkinson noted that "[a]lthough the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust [so disagreeing with the analysis in *Chase Manhattan*], the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust". In short, the personal obligation to make restitution of the particular assets received under the void contract was rendered proprietary once the defendant was on notice that the assets (or whatever now remained of them in the defendant's hands) were not to be treated as the recipient's own and restitution was in order.

223. In the present case, assets were transferred on the basis of an intended contract that is void, so both parties are under personal obligations to make counter-restitution. That is uncontroversial. In addition, following the above analysis advocated by Lord Browne-Wilkinson in *Westdeutsche*, C also has a proprietary restitutionary claim: since D1 still retains some interest in the Properties he received, he can now be put on notice that restitution is warranted – if he was not on notice much earlier – and he will then hold his interest in the Properties on constructive trust for C. Since D1's current interest in the Properties is less than the interest he initially received from C (D1 has disposed of interests to D2 and D3), C's personal and proprietary restitutionary claims are not straightforward alternatives. If C wishes to enforce the restitutionary proprietary remedy in full, he will need to give up the personal claim, but only to the extent it would afford double recovery.

224. Equally, C must also make counter restitution of what he received under the void contract, which was the benefit of D1's repayment of the outstanding debt of £67,500 which secured the discharge of the Santander Charge over No.19. The orthodox means of achieving counter-restitution in these circumstances is to subrogate D1 to Santander's security interest in order to secure C's obligation to repay c.£67,500 to D1.

225. I make one further comment on this analysis of C's proprietary restitutionary claim. The constructive trust analysis advocated in *Westdeutsche* leaves the messy problem of needing to determine when a defendant should be considered to know that particular receipts were not his to treat as his own. This can be crucial if the assets have been dealt with between initial receipt and the acquisition of the required knowledge. Here, D1 has had dealings with D2 and D3, and it is material to know whether C had a proprietary interest in the Properties held by D1 at the time of those dealings, or whether C's interest

did not arise until later, if it was only later that D1 realised that the Properties were not his to treat as his own.

226. Here, as part of the terms agreed between the parties in their void arrangement, it is D1's own case that he understood from the very outset that the Properties were not his to treat as his own. His pleaded case is that the only permitted dealings with the Properties were dealings enabling him to raise finance that was to be paid over to C. His inability to use the Properties as his own, and his knowledge of that, goes at least that far in constraining D1's use of the Properties. It is further reinforced by the fact, not explained by either side in evidence, that C remains in occupation of No.19 and in receipt of the benefits derived from No.67.

227. It follows that, even on Lord Browne-Wilkinson's preferred analysis of the proprietary position in respect of restitutionary claims following transfers made pursuant to a void contract, D1 held the Properties on constructive trust from the time of their receipt, so C had an equitable interest in the Properties at the time D1 engaged in his dealings with D2 and D3. I deal with the further consequences of this proprietary interest as it affects D1, D2 and D3 later in this judgment.

9.2 Equitable remedies in the context of an oral arrangement not amounting to a contract

228. The previous section focused on particular personal and proprietary remedies in contract and in unjust enrichment. But these two sharply divided categories – enforcing the intended contract because it is binding, or unravelling it because it is not – do not capture all the available remedial options.

229. Equity provides a number of remedial halfway houses. These typically concern arrangements relating to land, although in other respects the contexts vary widely. What is true in every case of relevance here, however, is that the equitable intervention is designed to prevent one party asserting absolute ownership of an asset (typically land) in circumstances where that party must be taken to appreciate that the asset is not his to treat as his own, and in particular is not his in which he can assert his own beneficial interest in the property to the exclusion of any beneficial interest of another. To prevent that outcome, the owner is invariably found to hold the asset on trust, in whole or in some part, for the disappointed counterparty. The trust may be constructive or resulting; there seems to be no compelling consistency in terminology.

230. For simplicity, there appear to be three broad categories of such cases where owners inappropriately assert absolute ownership. In the first category are cases where an existing owner induces the claimant to act to his detriment in the reasonable belief that in so doing he will acquire a beneficial interest in the owner's land: see many of the proprietary estoppel cases, noting the limitations in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, where such a claim was unsuccessful. In the second rather different category are the cases where a new asset (typically land) is acquired in the owner's name in circumstances where the parties are held to have embarked on a common venture which involves exploiting the asset for their common purposes: see the cases said to give rise to a "*Pallant v Morgan*" equity (after *Pallant v Morgan* [1953] AC 43), and also some common intention constructive trusts cases (although, especially in the context of family homes, these typically have a far broader base). In a third and equally distinctive category are cases where the claimant himself transfers property to the new owner, but does so on the basis that the

asset is only to be used for a specific purpose: see the cases said to give rise to *Quistclose* trusts (named after *Barclays Bank Ltd v Quistclose Investments Ltd* [2002] 2 AC 164, although the now accepted analysis is that laid out in *Twinsectra v Yardley* [2002] 2 AC 164).

231. The boundaries between these categories are not watertight, and I was referred to cases from every category, although often with little to tie the principles in those cases to the facts before the court. Nevertheless, the judgment of Lord Scott (with whom the majority agreed) in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, makes it plain that arguments based on proprietary estoppel or on the *Pallant v Morgan* equity are not open on the facts now before the court: see especially paras [14]-[16] and [33]-[37] respectively. The problem, putting it shortly, is that, in the present context, a proprietary estoppel claim amounts to no more than a claim to enforce the unenforceable unwritten agreement; and the *Pallant v Morgan* claim cannot be made out where the land subject to the "joint venture" is already owned by one of the parties: in that context the joint venture agreement itself must be enforced, and, again, here that agreement is unenforceable as it is an unwritten agreement relating to the disposition of interests in land.

232. That leaves C's *Quistclose* trust argument. C's assertion is that such a trust can be made out on the facts of the Claimant's Plan, and that it is not needed on C's version of the facts. The remedy may not be needed, but that does not mean the analysis is inapplicable. For the reasons given below, I consider that such a trust is made out on the facts. The law is familiar. In *Twinsectra v Yardley* [2002] 2 AC 164, Lord Millett set out what is now considered to be the orthodox view of *Quistclose* trusts. The central idea behind such trusts is simple. The cases typically concern money. If money is lent on the mutual understanding that it should not be at the free disposal of the borrower, but should be used exclusively for a specific purpose, then a stipulation will be implied that if the purpose fails then the money must be repaid. The borrower cannot simply use the funds for other purposes. Crucially, these obligations will be specifically enforced. The result is that, on receipt of the loan funds, the borrower will hold those funds on trust for the lender until the funds are used for the specified purpose. The borrower obtains legal title to the funds, but the lender retains the beneficial interest, under a resulting trust, until the funds are used for the nominated purpose. This trust recognises that the loan funds never form part of the borrower's assets, able to be disposed of as the borrower wishes. Because the trust is resulting, not express, it does not need to be in writing even when the subject matter is land: s.53(2) of the Law of Property Act 1925 ("**LPA**").

233. Although these elements appear straightforward, they set up a number of hurdles that must be negotiated before it can be said on the facts here that D1 holds the Properties subject to a *Quistclose* trust in favour of C. Those steps are addressed in what follows.

(a) *The headline elements of a* Quistclose *trust*

234. Although *Quistclose* trust cases typically concern money, there is nothing in the general principles suggesting such trusts cannot be generalised to apply to any form of property: see *First City Monument Bank Plc v Zumax Nigeria Ltd* [2019] EWCA Civ 294, at [19] (Newey LJ). Here C's claim is that D1 holds the Properties on a *Quistclose* trust.

235. The relevant law is as set out by Lord Millett in *Twinsectra v Yardley* [2002] 2 AC 164 at paras [68]-[69]:

> "… it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. …
>
> When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. … If for any reason the purpose cannot be carried out, … [then the entitlement to the money] depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case."

And at [83]:

> "The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. He must keep the money separate; he cannot apply it except for the stated purpose; unless the terms of the loan otherwise provide he must return it to the lender if demanded; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to beneficial ownership at all, the lender is the beneficial owner and the borrower is not."

236. A number of specific incidents of these trusts are important. *First*, *Twinsectra v Yardley* makes it clear that the duty which binds the borrower is not contractual, but fiduciary, so it may exist despite the absence of any contract at all between the parties: Lord Millett at [76]. That is the case here. Moreover, there is no need for C to intend to create a trust; it is sufficient that C intends to enter into the type of arrangement which a court would hold gives rise to such a trust: Lord Millett at [72]-[73], [92].

237. *Secondly*, it does not matter that the undertaking between the parties is "unusual" in the purposes it seeks to achieve, as it is here (where it might be said that most parties would have entered into a formal arrangement embodying the relevant terms): Lord Hoffmann in *Twinsectra v Yardley* at [15].

238. *Thirdly*, the intended limitations on the borrower's power to use the funds must be certain, but they will be deemed sufficiently certain so long as "the court can say that a given application of the money does or does not fall within its terms": Lord Hoffmann in *Twinsectra v Yardley* at [16]. Here I have held that the facts before the court indicate that the arrangement between C and D1 required the Properties to be used for the purpose of raising funds which were then to be given to C. Such an arrangement leaves at large the remaining terms that might be enforced by way of an entire contractual agreement. But as a restriction on the power of D1 to use the Properties for other purposes, it is perfectly clear and certain.

239. *Fourthly*, it is not enough that the parties simply contemplated that the transferred assets would be used for a specific purpose: that does not automatically generate a *Quistclose* trust of the property transferred. If it did, then the Loan from D3 would also be held on such a trust – a *Quistclose* trust – for D3 pending the use of these funds by D1 for BTL purposes. Instead, what is required is a mutual understanding that the assets are not intended to be at the free disposal of the recipient: Lord Millett in *Twinsectra v Yardley* at [74]. This needs some elaboration.

(b) *The necessary proprietary understanding between the parties*

240. In many cases where there is a written contract, it has been enough for the parties to assert that the property is transferred "on condition that it will *only* be used for the nominated purpose", or that it will be used for the nominated purpose "*and for no other purpose*" (emphasis added): Lord Millett in *Twinsectra v Yardley* at [74]-[75].

241. Here there is such a mutual understanding, even though it is not committed to writing. I have found it on C's side for the reasons set out at paragraphs [171]-[172] and [198]. That finding is contrary to C's interests (for reasons explored later), but is supported by C's pleadings, by inferences from other facts, and by C's evidence in cross-examination.

242. On D1's side the understanding is very clear. D1's (and D2's) defence specifically asserts that his understanding of the arrangement was that the Properties were to be transferred to him "*in order for* [him] to raise finance … to give to [C]" (§10(4), emphasis added), and that he regarded himself as so obliged (§§33(1), 34(1), 36(2), 38(2)). Further, it can be inferred that D1 also understood that use of the Properties for other purposes was not permitted under the Claimant's Plan: D1's defence asserts that the creation of the Lease and the Charge was for the purposes of raising funds pursuant to the Claimant's Plan, and was not for his own ends, being ends which – it can be inferred – would not have been permitted (§§20(3), 21(2), 21A, 29(2)). All this was further supported by D1's witness statement evidence and evidence on cross-examination.

243. More recent cases have emphasised how important it is to be quite sure that the arrangement is one which clearly entails not only a personal obligation constraining use of the property, but also the proprietary rider that the property is not in the meantime to be at the free disposal of its owner. In *Bieber v Teathers Ltd* [2012] EWCA Civ 1466, at [15], Patten LJ put it this way:

> "It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the monies transferred by the [payors] should not become the absolute property of [the payee] (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the [payor] unless and until the conditions attached to their release were complied with."

This was approved by Newey LJ in *First City Monument Bank Plc v Zumax Nigeria Ltd* [2019] EWCA Civ 294, at [23].

244. Here I find there is such further evidence, should further evidence be needed. C and D1 have acted in ways that are consistent, and – given the evidence before the court – it seems only consistent, with C continuing to have beneficial ownership of the Properties subject to the power in D1 to use the Properties to raise finance. In particular, from the date of the transfer of the Properties until the date of the hearing, and despite the transfer of legal ownership to D1, D1 has at no stage asserted an entitlement to any benefit from the Properties other than to use them to raise funds. Even at the hearing date, C remained in occupation of No.19 and it is he who engaged the tenant and collects the rent on No.67. That is not only despite the transfers to D1, but also despite D1's subsequent Lease of the tenanted property to D2. Neither side endeavoured to explain this. It was not said to be the result of some separate agreement. Given D1's assertion that the relationship with C has fallen apart, I can only assume that D1 did not regard himself as entitled to assume full beneficial control of the Properties. The facts thus suggest, with no evidence or assertion to the contrary, that not only is D1 obliged to use the Properties only for the purpose of raising finance for C, but also that in the interim D1 is to derive no other possessory or economic benefits from the Properties. It appears to be C who has both the economic benefit of the Properties (typically protected via a trust, here said to be a *Quistclose* trust – i.e. a trust subject to D1's power to use the Properties to raise finance for C) and also the possessory interests in the Properties (typically protected by a common law lien, and here C is in possession of No.19 and appears to have the undisputed right to lease the first floor of No.67).

245. I make one further general observation in this context. Although it is typically said that there must be a *mutual* understanding by the parties of all these proprietary issues, it would appear from the paragraphs above, and the authorities cited, that what is important is that the transferor of the property (here C) intends the type of arrangement which a court would hold gives rise to such a trust, but there is really no need for C to understand that this has any proprietary consequences. On the other hand, it is absolutely crucial that the payee/recipient of the property (here D1) understands that his use of the property is specifically restricted: he is not entitled to use the property as his own despite his legal ownership of it. Of course it does not matter whether D1 understands the legal niceties – it is rare that he will – but it is necessary that he understands that his newly acquired legal ownership does not come with all the normal incidents of full ownership. That is the case here, on D1's own evidence.

246. Before closing this discussion of the proprietary understanding between the parties, two further matters merit comment. First, D1 makes the point that the Claimant's Plan is one by which he was assured that "if anything went wrong with the Claimant's Plan [D1] would not be adversely affected as he would own No 19 and No 67" (see D1 and D2's Re-Amended Defence at §10(6)). That raises the question of whether this affects the alleged *Quistclose* trust. Although it is possible for an express term of a contract to negate the possibility of finding of a *Quistclose* trust, that is not the case here. It is impossible to be sure what protection might have been contemplated without knowing the full details of the arrangement. Even D1 could not describe in cross-examination the protection that was allegedly contemplated. On C's version of the arrangement, D1 would have the power to mortgage the Properties to pay the purchase price. If he were then unable to service the loans he would be at risk of losing the Properties if lenders

enforced their securities. If he had judged the price well, he would nevertheless be ahead financially even though he would no longer have the Properties. He would be "protected". Indeed, he would benefit, financially, from whatever equity of redemption might remain. On D1's version all is far more uncertain: under the Claimant's Plan, the performance and counter-performance required of C and D1 are unclear, and varied under D1's cross-examination. But D1 surely cannot have assumed that the protection being delivered to him, assuming such protection was agreed, was that if "something went wrong", and he simply did not raise the funds for C, he would nevertheless own the Properties outright and C would be left with nothing. This could be the case only if there was an outright transfer of the Properties to D1, intended as a gift, and nothing more than an arrangement binding in honour that D1 might help his old friend by providing him with financing if he could. Nothing in D1's case approaches this.

247. Secondly, D1 and D2 resisted C's claim that there could be any form of resulting or constructive trust, including a *Quistclose* trust, since imposition of such a trust would mean that D1 would have trusteeship and associated fiduciary obligations forced upon him in circumstances where there were no allegations of duplicity or fraud, and he would be bound by all the associated liabilities of fiduciaries, including being subjected to tracing claims in relation to his misuse of the Properties. Lord Browne-Wilkinson's comments in *Westdeutsche*, at pp 703-705, were cited. But a *Quistclose* trust does not raise the objections that troubled Lord Browne-Wilkinson. Lord Browne-Wilkinson was concerned that all these fiduciary incidents could arise "when no one was aware, or could have been aware, of the supposed trust" and thus could not have been aware of the consequential restrictions on the use of the trust property. But a *Quistclose* trust can only arise when those very restrictions are part of the mutual understanding of the parties to the engagement.

248. In summary, I am satisfied that the arrangement between the parties was such that D1's use of the Properties was restricted to use for the purposes of raising funds that were to be given to C. These restrictions are sufficiently clear and certain for a court to be able to determine whether D1 is acting in breach of the restrictions. Further, D1 appreciated that fact, and appreciated that apart from this permitted use of the Properties it was C, not D1, who was beneficially entitled to the Properties despite the transfer of legal title to D1.

(c) *Enforcement of the resulting trust by C while the agreed purposes are still possible*

249. The next issue is whether C's resulting trust entitles him to demand return of the Properties. Although D1 has shown no inclination so far to carry out the agreed purposes, those purposes can, theoretically, still be carried out. The question in issue therefore is whether C is nevertheless entitled to terminate the arrangement and demand transfer of the legal titles back to C. I was not directed to any authorities specifically on point, and so I rely on the dicta in *Twinsectra v Yardley* suggesting the approach which should be followed.

250. In *Twinsectra v Yardley*, at para [100], Lord Millett said:

> "Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case."

Earlier, at para [98], Lord Millett indicated that where the borrower is subject to a lender's revocable mandate, and:

> "the lender's object in giving the mandate is frustrated, [the lender] is entitled to revoke the mandate and demand the return of money which never ceased to be his beneficially."

And earlier still, at para [83] (which was cited in more detail at para [235] above), Lord Millett noted that:

> "The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. … *unless the terms of the loan otherwise provide he must return it to the lender if demanded*; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to beneficial ownership at all, the lender is the beneficial owner and the borrower is not." (emphasis added)

251. This is not a lot to go on, especially as the terms of the arrangement are considered to be all. Paragraph [83] in *Twinsectra v Yardley* suggests the default assumption is that arrangements can be revoked at will unless otherwise provided, although perhaps the resulting risk of commercial uncertainty for the borrower/owner will mean that an "otherwise provided" is readily inferred.

252. But here this approach seems unnecessary. The parties here are not in a position where their arrangement is proceeding according to plan, and C has simply had a change of heart. Here, even on D1's own version of the Claimant's Plan, D1 is in obvious breach of the restrictions on his power to use the Properties. He has used No.19 to raise funds, it is true, but he has then immediately used those funds for his own purposes and has shown no practical indication, despite his assertions to the contrary, that he proposes to remedy this breach of what Lord Millett holds to be his fiduciary duties. Further, he has executed a gratuitous Lease of the first floor of No.67, again he says in pursuit of the proper purposes, but that was in December 2016, and still it has delivered no funds for C.

253. In such circumstances, and whatever the agreed terms of the arrangement between the parties (especially where no one has suggested they limit C's rights to intervene), I find that C is entitled to terminate the arrangement with D1 and enforce his resulting trusts. He can do this under the general law in order to preserve and protect his proprietary interests in the Properties. C has already purported to terminate the arrangement, and in the present context this is effective.

(d) *Proprietary consequences of finding a* Quistclose *trust*

254. For the reasons set out in the preceding paragraphs, the arrangement between C and D1 are sufficient to constitute a *Quistclose* trust, with D1 holding the Properties on resulting trust for C, but with a power in D1 to use the Properties for the agreed purpose of raising funds for C. That power has now been effectively revoked. C is thus free to enforce the resulting trust. However, it is not yet possible to provide the details of what "enforcement of C's resulting trust" will deliver to C until the proprietary effects, if

any, of the Lease in favour of D2 and the Charge in favour of D3 have been considered. I address those issues later, after first addressing the remaining remedial claims arising directly between C and D1.

9.3 Further consequences for D1 of the finding that C has an equitable interest in the Properties, whether by virtue of a Quistclose *trust or otherwise*

255. Given C's proprietary interest in the Properties, whether by virtue of a *Quistclose*/resulting trust or a constructive trust on the *Westdeutsche* analysis, C further claims that in granting the Charge to D3 and the Lease to D2, D1 acted in breach of trust. Accordingly, C seeks an order requiring D1 to pay equitable compensation for breach of trust, or an order to account for the Loan funds, and a declaration that C is entitled to proprietary remedies following a tracing exercise to determine the traceable proceeds of the Loan funds. C claims that these remedies follow automatically from the alleged breach. I agree such remedies would follow, but the prior question is whether there is a breach by D1.

256. D1 again resisted C's claims on the basis that any finding that D1 was a fiduciary would deliver such unacceptable outcomes that the premise could not be true, citing *Westdeutsche*. I have already dismissed that: see above at paras [226] and [247].

257. Alternatively, D1 resisted the claims on the more compelling basis that the *Quistclose* trust (and thus also the *Westdeutsche* constructive trust) was one subjecting him to fiduciary duties to use the Properties for the designated purposes only, and D1 was in fact using the Properties for such purposes when D1 granted the Charge to D3 and the Lease to D2, so there was no breach of fiduciary duty. I agree with this, but in part only.

258. D1's grant of the Charge to D3 in return for the Loan of £460,000 was in accordance with the agreed purposes. This has ramifications for the issues between C and D3, and I return to it later. If D1 had then handed these funds (or, more specifically, these funds net of costs) to C, C could have had no cause for complaint: D1 would have been acting within the remit of his power. But C may certainly complain that, having raised the Loan funds, D1 did not then comply with his fiduciary obligations which required him to hand those funds over to C. Certain rights and remedies follow automatically.

259. First, C can assert an equitable proprietary interest in the Loan funds in D1's hands. This outcome is delivered either on the basis that the obligation imposed on D1 to transfer the Loan funds to C, as embedded in the *Quistclose* trust arrangement, is enforceable in equity; or, alternatively, on the basis that D1, as a fiduciary, is not permitted to take an unauthorised personal benefit from his role, and will hold any such benefits – here the Loan funds – on constructive trust: see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2105] 1 AC 250.

260. Secondly, C's proprietary interest in the Loan funds can then be traced into any identifiable proceeds: *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102. However, the limited evidence before the court suggests these Loan funds in D1's hands have largely been dissipated. It follows that there is likely to be no practical benefit in pursuing a proprietary claim in respect of these Loan funds in the hope of accessing windfall investment gains made by D1 from their use (in purchasing Bitcoin and cryptocurrency assets, for example). Equally, there is no suggestion that C requires a proprietary claim to secure priority in the face of D1's insolvency.

261. C also has personal remedies. D1's fiduciary obligation to hand over the Loan funds raised from the Properties is an obligation that, if breached, entitles C to equitable compensation. Quantification is straightforwardly the sum that C would have received if D1 had fulfilled his fiduciary duties, or alternatively the sum that C would have received but for D1's breach of fiduciary obligation: it is put both ways in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC1503, but amounts to the same counterfactual. On the modern authorities, equitable accounting will deliver the same sum.

262. I do not regard any of this law as contested. Accordingly, I find that D1 is liable to pay equitable compensation to C of a sum amounting to the net funds received by D1 through the Loan: i.e. c.£460,000 less the justifiable and essential costs actually incurred by D1 in raising those funds. It is these funds which should have been paid to C, or these funds that C would have received but for D1's breach. I also hold that C is entitled to trace the Loan funds, and assert proprietary claims to their traceable proceeds. However, I suggest that the evidence-gathering expense in doing so is not warranted unless there is good reason. That might be to secure for C the profitable investments generated by D1 using these funds, or to protect C on D1's insolvency by securing the personal claim to equitable compensation by a lien against the traceable proceeds. The limited evidence before the court suggests that the first advantage is unlikely and the second unnecessary. Of course C will have to elect between remedies based on equitable compensation and those based on tracing, as the two claims are inconsistent: *Tang Man Sit v Capacious Investments Ltd* [1995] UKPC 54 (PC).

263. I can deal with D1's grant of the Lease to D2 more briefly. D1 asserts that this Lease, granted to D2 gratuitously in 2016, was also for the purposes of raising funds for C. But there is no evidence to support that assertion: D1 can point to no activity on his part directed at raising funds from the Lease, or from No.67 more generally. Accordingly, I hold that D1's creation of the Lease in favour of D2 was in breach of his fiduciary duties. D1 is therefore personally liable to C for any losses caused to C by the breach.

264. This has consequences for D2, and it is simplest to consider those here, even though a little out of sequence. Since D2 takes his interest in No.67 as a donee from a trustee acting in breach of trust, it follows that D2 holds his interest on trust for C, or – as I would prefer to analyse it – D2's subsequent interest has no priority over C's prior equitable interest. Further, D2 is not protected by registration, since the statutory rules on priorities relating to registered interests only protect subsequent registered estates granted for valuable consideration: see s.29 of the Land Registration Act 2002 ("**LRA**"), discussed in more detail below in the context of D3.

9.4 An unintended gift

265. The final basis on which C puts his claim to a resulting trust is a claim to a presumed resulting trust, by way of response to C's apparently gratuitous transfers of the Properties to D1 in circumstances where it is clear that an outright gift was not intended, and indeed no one asserts that such a gift was intended.

266. Reliance on presumed resulting trusts, and their resort to a presumption of intention, is only needed in the absence of evidence of the parties' actual intentions. Such lack of evidence is now accepted as rare: *Lavelle v Lavelle* [2004] EWCA Civ 223, at [12-[13]

(Lord Phillips MR). See too *Kyriakides v Pippas* [2004] EWHC 646 (Ch), at [76], where Mr G Moss QC said:

> "I suspect the position we have now reached is that the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a "long-stop" or "default" solution is needed."

267. I have already found that there is sufficient evidence of the parties' intentions to generate a *Quistclose* trust. If that is accepted, then resort to a presumed resulting trust is unnecessary. Nevertheless, I consider whether such a trust is possible on the facts here.

268. D1 resists C's claim to a presumed resulting trust, relying once more on *Westdeutsche*, where no resulting trust was found. But the House of Lords in *Westdeutsche* accepted the existence of presumed resulting trusts. Lord Browne-Wilkinson made that clear, at p 708:

> "where A makes a voluntary payment to B … *there is a presumption that A did not intend to make a gift to B*: the money [or property] is held on trust for A … It is important to stress that this is only a presumption, *which presumption is easily rebutted* either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer" (emphasis added)

269. This raises the much-debated issue of what exactly is presumed in a modern presumed resulting trust, and thus what evidence is needed to rebut the presumption. What Lord Browne-Wilkinson said, at p 708, was that:

> "the presumption of resulting trust is rebutted by evidence of any intention inconsistent with such a trust, not only by evidence of an intention to make a gift".

That phrasing captures transfers intended to deliver the benefit of the property to B (since such an intention is inconsistent with a trust for A), and it is irrelevant that this intention to benefit B was not an intention to benefit B by way of gift. It was this which proved fatal for the parties in *Westdeutsche*: they had intended to benefit each other by way of contract, and that was held sufficient to rebut the presumption, even though the contract was void and so their transfers were in fact gratuitous.

270. Here, by contrast, D1 has not presented evidence rebutting the presumption of a resulting trust, being evidence that C intended D1 to take the benefit of the Properties. To the contrary, D1's own evidence is that the transfer was intended to benefit C, enabling C to "max out" his Properties for the financial benefit of C, all facilitated by D1. Moreover, D1 does not even take the benefit of the Properties until that financing is achieved. Instead, it is C who is in occupation of No.19 and collecting the incoming rent on No.67. This is all notwithstanding D1's denial that C has the beneficial interest that this would seem to reflect.

271. Since the presumption of a resulting trust is not rebutted, D1 holds the Properties on presumed resulting trust for C unless there is some other reason why this result should not prevail.

272. D3, not D1, advances such a reason, suggesting that s.60(3) of the Law of Property Act 1925 (LPA) has abolished the presumption of a resulting trust in relation to land. The section provides:

> "In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee."

273. The impact of this provision has long been a matter of controversy, but a controversy generally avoided since outcomes rarely turn on the issue. Here too the outcomes do not turn on the issue, but the point was fully argued and I set out my conclusions. By contrast, the outcomes did turn on the issue in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, and there, at [49], Lord Sumption simply adopted the presumption of a resulting trust in relation to land without mention of s.60(3).

274. By contrast, in *Lohia v Lohia* [2001] EWCA Civ 1691, the trial judge advanced detailed reasons for preferring the view that s.60(3) did abolish the presumption of a resulting trust, but he then held that in any event a gift had been intended, so the s.60(3) issue was unnecessary. Given this, when the case went on appeal, the Court of Appeal declined to express a view.

275. The most recent case goes the other way. In *The National Crime Agency v Dong* [2017] EWHC 3116 (Ch), at [24]-[34], Chief Master Marsh provided detailed reasons for preferring the view that s.60(3) did not abolish the presumption of a resulting trust. He considered this view was open on the wording of the section, and a more likely interpretation of it than outright abolition of the presumption that had been executed by the legislature so indirectly and with so little fanfare. He noted that abolition of the presumption in this way would mean that gifts of land and personal property would have vastly different consequences. And finally he took comfort in the fact that Lord Sumption in *Prest v Petrodel* had taken it as read that such a trust would arise. But in this case too the analysis was not strictly necessary, since there was evidence that supported the view that the transferor's intention was that the transferee hold the house on trust for him: the transferor treated the house as his own and the transferee knew this. The parallels with the present case are obvious.

276. This view in *The National Crime Agency v Dong* that s.60(3) has not abolished the presumption of a resulting trust is preferred by the editors of *Snell's Equity*, 34th Ed, at §25-017, and *Megarry & Wade: The Law of Real Property*, 9th Ed, at §10-14. The editors of *Lewin on Trusts*, 20th Ed, at §10-12, are more circumspect.

277. I appreciate the issue is finely balanced, but I am persuaded by the view set out in *The National Crime Agency v Dong*, and supported by leading commentators.

278. Accordingly, if there is no evidence of the actual intention of the parties, and despite this being directly contrary to my earlier findings, then D1 would nevertheless hold the Properties on presumed resulting trust for C, and that presumption is not barred by s.60(3) of the LPA.

9.5 Failure of basis

279. C also claims to be entitled to personal restitutionary remedies because there has been a total failure of basis for the transfers of the Properties to D1. C presents two versions of this claim, one valid, the other not.

280. C's first way of putting the claim is that the basis fails because, on either C's or D1's version of events, C has transferred the Properties and has not received any of the money promised by D1. Implicit in this view of the facts is an assumption that the arrangement is legally binding, and D1 is indeed obliged to provide the promised money. The basis of the transfer then fails, because D1 does not deliver what was promised. In the normal context where C is advancing a claim in unjust enrichment in such circumstances, C will terminate the contract for breach by D1 and, instead of suing for damages for breach of contract, will sue for restitution of the unjust enrichment received by D1 on the basis that there has been a total failure of consideration. Perhaps predictably, D1 resists such a claim on the basis that the failure must be total, and here it is not, since D1 paid off the Santander Charge. C's counter-response is that the repayment can be ignored as merely collateral to the arrangement and not part of it, or that it can apportioned to No.19 only, or that in any event C can make counter-restitution. I do not need to resolve this matter as I do not accept this basis for C's claim.

281. C alternatively claims that, on D1's version of events, there is a total failure of basis because the intended contract is void for uncertainty or did not materialise. The same might be said of C's version of events: the intended contract is void because the terms are not proven or the contract is not in writing. Equally, this applies to the version of events I have found on the evidence, where I am content to hold that there was an arrangement between C and D1, intended to be binding, but the terms of that arrangement are neither clear nor in writing. This version of C's claim does have force. D1 resists this claim too, on the same basis that the failure must be total and it is not. Here, D1's response is not a relevant issue.

282. So far as unjust enrichment claims are concerned, the contractual context and the "no contract materialised" context are quite different: see *Goff & Jones: The Law of Unjust Enrichment*, 9th Ed, Ch 12. One of the disadvantages of an umbrella term such as "failure of basis" is that essentially different contexts are not always adequately distinguished. If there were indeed a legally binding contract between C and D1 (on any terms at all), then the disappointed contracting party is generally restricted to remedies for breach of contract: common law damages or orders for specific performance, with the purchaser's constructive trust or the vendor's lien providing proprietary support for that enforcement in advance of its delivery in contracts for the sale of land. Disappointed contracting parties cannot simply elect to pursue claims in unjust enrichment as an alternative to their contract claims. Such unjust enrichment claims are available only if the injured party can escape the contractual regime by showing that the initially fully binding contract is voidable (i.e. that the intention to contract was vitiated by mistake, misrepresentation, etc) or alternatively that the contract has been terminated *and* there has been a total failure of consideration (now often labelled a failure of basis). The total failure of consideration requirement has been much criticised, but its one obvious benefit is that it prevents claimants resorting to unjust enrichment remedies when it is advantageous to unravel a bad bargain and return to the pre-contractual position rather than accept the loss of the contractual bargain. This problem

might be addressed by recognising that a "failure of performance" by one side (or "failure of consideration" promised), is not at all the same concept as "failure of basis" for the *entire* contract. But the slippage between the two concepts is common, as evident in this case. Here, however, there is no binding contract which can or must be terminated, and therefore no need to engage with these total failure of consideration debates at all.

283. By contrast, where the intended contract is void or simply did not materialise, then there are none of these complications. There is a total failure of basis, for both parties, since both parties will have performed on the basis of a binding contract when there is not one. Any transfers made on the basis of the intended but non-existent contract are unjust enrichments in the hands of the other. Restitution and counter-restitution will be ordered: the failure of basis is total; the failure of consideration is irrelevant. See *Westdeutsche*.

284. It follows that C's unjust enrichment claim based on failure of basis – i.e. that there was an intended contract that never materialised – has force. The personal claim is to restitution of the value of the enrichments received by the counterparties, with arguments for subjective devaluation and change of position open to the party making restitution. D1 advanced no arguments on this front. Note that C's personal unjust enrichment claim against D1 is clearly not simply one for the payment of £1.35 million. The enrichment that is unjustifiably in D1's hands as a result of the transfers must be valued, and that has not been done. By contrast, the obligation on C to make counter-restitution of c.£67,500 (the value of the Santander charge that was paid off) is far more straightforward.

9.5 Mistake

285. Finally, C argues that he signed the TR1s mistakenly believing they were sale contracts, and that this mistake gives him grounds for personal restitutionary remedies.

286. Mistake is typically asserted when a claimant wishes to escape from what would otherwise be a valid contract of sale or what would otherwise be an effective gratuitous transfer. The argument then is that the objective intention to be contractually bound, or the subjective intention to make what appears to be a gratuitous transfer, is flawed because the claimant was mistaken as to material facts. The consequence is that the transaction – the gift or the contract – will be unwound. The nature of the mistake that is required before the claimant will be entitled to unwind an apparently valid transaction is different for contracts and gifts, being more demanding for the former: see *Goff & Jones: The Law of Unjust Enrichment* 9th Ed, paras 9-01 – 9-02, and Ch 9 generally.

287. Given my earlier findings, this argument based on mistake is not essential to C's claims. His claims can be asserted on the basis that there was an intended contract which was void for failure of formalities or for uncertainty, or an intended contract which never materialised. These assertions do not depend on any mistake in signing the TR1s.

288. On the separate ground of mistake, I do not consider that C has made out his claim. He has not proven the necessary mistake. C asserts that he signed the TR1s mistakenly believing they were sale contracts. I do not accept that, for the reasons summarised at para [169]. It follows that I do not accept that C has a claim based on mistake.

10. The legal arguments as between C and D2 and D3, assuming C has an equitable proprietary interest in the Properties

289. If C had no proprietary interest in the Properties, contrary to my findings, then D2 and D3 would take their interests free of any proprietary claims made by C and the rest of this section would be immaterial. Further, C makes no claims to common law damages from D2 or D3. C does however claim certain alternative remedies against D2: these are dealt with below.

290. Since I find that D1 holds the Properties on resulting trust (or perhaps a constructive trust on the same terms) for C, the next question is whether this earlier interest of C's takes priority over the subsequent registered proprietary interests of D2's Lease and D3's Charge.

The statutory scheme of priorities under the Land Registration Act 2002

291. The rules on priority as between unregistered and registered interests in land are set out in the Land Registration Act 2002 ("**LRA**"). The basic rule, in s.28, provides that:

> "(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.
>
> (2) It makes no difference for the purposes of this section whether the interest or disposition is registered."

292. Section 29 then provides:

> "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> (i) …
>
> (ii) falls within any of the paragraphs of Schedule 3 …"

293. Section 30 is in precisely the same terms, but relates to registered charges rather than registered estates.

294. Schedule 3 to the LRA then sets out the unregistered interests which override these otherwise protected registered dispositions, and at paragraph 2 includes the following categories of overriding interest:

> "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for— …
>
> (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
>
> (c) an interest—
>
> (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
>
> (ii) of which the person to whom the disposition is made does not have actual knowledge at that time; …"

295. Note that the protection given in ss.29 and 30 is only available where the registered disposition is made for valuable consideration. Where it is not, the basic priority rule alone (in s.28) is determinative. This will affect D2.

296. By contrast, where registered interests are acquired for valuable consideration, the LRA provides for a system of priority by registration subject to certain exceptions. An exception will apply – and C's interest will have priority – if C has an "overriding interest" (although the LRA does not use that expression), being an unregistered interest which is *both* (i) the type of interest which would, under the general law, rank in priority to the competing registered interest (i.e. which has priority under the basic rule in s.28); *and* (ii) is an interest held by a person in actual occupation in circumstances where none of the exclusions set out in Schedule 3, paragraph 2 apply. This is the two-step requirement that determines priority as between C and D3.

297. This two-step requirement is made plain by a number of important authorities, usefully summarised by Lewison LJ in *Mortgage Express v Lambert* [2017] Ch 93, at [21]:

> "A right falling within this description [i.e. the rights described in paragraph 2 of Schedule 3 to the LRA] is one of a number of rights traditionally referred to as overriding interests. … There are a number of preliminary observations to be made about such interests:
>
> (i) The equitable doctrine of notice has no part to play in the system of registration of title. In the case of unregistered land, the purchaser's obligation depends upon what he has notice of—actual or constructive. In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material: *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 504 (Lord Wilberforce) and *Wishart v Credit and Mercantile plc* [2015] 2 P & CR 15, para 46 (Sales LJ).

> (ii) Paragraph 2 of Schedule 3 does not create rights. It preserves rights that already exist. If the rights of the person in actual occupation are not under the general law such as to give any priority over the holder of the registered estate, there is nothing in paragraph 2 of Schedule 3 which changes such rights into bigger and different rights: *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244, 248 (Browne-Wilkinson LJ).
>
> (iii) Unregistered rights which override registered dispositions under paragraph 2 of Schedule 3 must be proprietary in character. …
>
> (iv) …
>
> (v) In addition, if there is some rule of law which prevents the occupier from having a relevant right as against the purchaser before one comes to apply the actual occupation test, that may have the effect of preventing a finding that there is an overriding interest under the statute: *Credit & Mercantile Ltd*, para 47 (Sales LJ)"

The points made at (ii) and (v), which would seem to overlap, are of particular relevance in the present context. They emphasise that C may have an unregistered proprietary interest, but one that does not on the facts before the court override the subsequent registered interest because, under the general law, it is not a proprietary interest of that nature or quality.

298. Before considering the impact of these statutory provisions on the facts before the court, I need to digress to consider an argument advanced by counsel for D1 and D2 that would make that deliberation unnecessary.

The impact of section 26 of the LRA

299. Counsel for D1 and D2 cited *Mortgage Express v Lambert* [2016] EWCA Civ 555, [2017] Ch 93 ("***Mortgage Express***") as crucial authority for the proposition that s.26 of the LRA prevents C from questioning the title of either D2 or D3 under the Lease or Charge. It was suggested that the consequence of this is that C cannot even get past first base, and the priority provisions that have just been outlined are immaterial. An immediate response might be that C is not questioning the title of D2 or D3, merely the priority of that title. But *Mortgage Express* suggests otherwise.

300. *Mortgage Express v Lambert* involved a priority competition between two innocent parties, the vendor and the secured lender, following the actions of rogue purchasers who had caused them both loss. The defendant vendor, Lambert, had entered into a contract with the rogue purchasers for the sale and leaseback of her home. Lambert had a mere equity to set aside this contract of sale and leaseback because it was an unconscionable bargain at a gross undervalue. Some time later the purchasers mortgaged the property to the claimant, Mortgage Express. When the purchasers defaulted on the mortgage repayments, Mortgage Express brought possession proceedings. Lambert was in actual occupation and claimed an overriding interest by

way of her mere equity to rescind (which under s.116 of the LRA qualified as a potential overriding interest). The court held that Lambert's interest did not bind Mortgage Express.

301. For present purposes the focus is solely on the role played by section 26 of the LRA in delivering this outcome. Section 26 provides for the protection of disponees in these terms:

> "(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.
>
> (2) Subsection (1) does not apply to a limitation—
>
> (a) reflected by an entry in the register, or
>
> (b) imposed by, or under, this Act.
>
> (3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)."

302. On an orthodox reading, this provision simply states that a registered owner of land can effect dispositions of that land regardless of any limitation on his powers or authority to do so under the general law, unless a restriction is placed on the register or imposed under the Act. Although the section provides for the valid transfer of title, it remains possible to question the lawfulness of the disponor's disposition (as is made explicit in s.26). Equally, one might have thought that the priority accorded to the disponee's title (i.e. the priority accorded to the estate or charge held by the disponee under valid title) could also be questioned, and would be determined under the machinery of the self-same Act, machinery that is set out only a few sections later in ss.28-30. In this way section 26 would leave a party such as Lambert with claims against her two purchasers (being claims based on the lawfulness of the transfer, although only claims that did not call into question the title of Mortgage Express) and with at least the possibility of priority claims against Mortgage Express.

303. But, on the priority point, Lewison LJ appears to take a different view. At [27], he says:

> "If there were an overriding interest that interest would not affect the *validity* of the disposition consisting of the grant of the mortgage. The mortgage would take effect subject to it." (emphasis in the original)

That is not surprising, and indeed would seem simply to restate the orthodox view of LRA s.26. But in the next sentence he continues:

> "But as section 26(3) makes clear, the purpose of the section is to prevent the disponee's [the mortgagee's] title from being called into question. Miss Sandells submits on behalf of Mortgage Express that in effect this means that if a right is asserted as an overriding interest, and that right is a right to

> impugn the title acquired by the disponee, then section 26 defeats that right."

304. Lewison LJ then set out an illustration from a joint report of the Law Commission and HMLR (*Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001) (Law Com 271) (HC 114) – "**the LC/LR Report**" – at para 4.10), showing how the LRA was intended to operate. That illustration suggested that if two trustees held land on a bare trust for a sole beneficiary in actual occupation, and they then fraudulently and without authority charged the land to a mortgagee, s.26 would operate to deny the beneficiary priority over the mortgagee via an overriding interest, because the trustees would be seen to have owner's powers free of limitation by virtue of s.26: i.e. s.26 delivered this outcome, not the overreaching provisions in s.2(1)(ii) of the LPA, nor the priorities provisions in the LRA.

305. Lewison LJ then added that the LC/LR Report also made the point that the consequences of unlawfulness could only be pursued so long as they did not call into question the validity of the disponee's title. He then concluded, at [28]:

> "This, in my judgment, provides strong support for Miss Sandells's submission that Ms Lambert is not able to call into question the title acquired by Mortgage Express."

306. No further authorities were cited, judicial or otherwise. Lewison LJ did not go further and find against Lambert specifically on the basis of s.26, so the discussion in paragraphs [27]-[28] is obiter. Instead, he decided the case on the basis that Lambert's mere equity had been overreached by the disposition to Mortgage Express, since that disposition had been made by the two purchasers holding as trustees of land (see s.2(1)(ii) of the LPA), or, alternatively, that the "in actual occupation" test for the statutory priorities rule was not met on the facts.

307. Counsel for D1 and D2 suggests this s.26 point is determinative for D2 and D3 on the facts before the court. The point is obiter, and although I would be predisposed to follow obiter remarks from the Court of Appeal, it is not clear from the few relevant paragraphs in *Mortgage Express* precisely how far Lewison LJ would have taken the point, and I cannot persuade myself that he would have taken it as far as counsel suggests.

308. Lewison LJ clearly found counsel's submission on the s.26 point persuasive, and the illustration taken from the LC/LR Report influential. Yet if it is right that Lambert's mere equity, accepted as existing, could not even be advanced by Lambert as a potential overriding interest because that would call into question the title of Mortgage Express, then it is difficult to see why the same influential LC/LR Report devoted so many pages to discussing the treatment of mere equities as potential overriding interests in the context of the priorities provisions just a few pages later (see LC/LR Report, paras 5.32-5.37). If the s.26 point is right, then any assertion of a mere equity would automatically fall at the s.26 stage, before a priorities issue could be raised. This initial failure is how the issue was put in *Mortgage Express*.

309. Moreover, the consequences do not stop there. The right which Lambert asserted was a mere equity to have the sale agreement between Lambert and the two purchasers set aside. That right to rescind, if exercised, would result in the purchasers (or the remaining purchaser, as it was) holding the sale property on constructive trust for Lambert. If a

mere equity is defeated by s.26 of the LRA as a potential overriding interest because it "calls into question the title of the disponee", then it must also follow as a matter of the same principle that every equitable interest that is a potential overriding interest would be similarly affected, including any interest by way of constructive or resulting trust. That would, in one sweep, render the priority provisions on overriding interests completely otiose. That outcome is so completely contrary to the many cases on overriding interests that I am not prepared to accept that this breadth is what Lewison LJ intended or contemplated by his words of support in paras [27]-[28].

310. In the one case since *Mortgage Express* that has considered these conclusions, Sir Gerald Barling, in his judgment in *Kensington Mortgage Company Limited v Mallon* [2019] EWHC 2512, at [112]-[113], also obiter, expressed sympathy for Lewison LJ's approach to s.26, accepting that it would in principle capture all constructive trusts (and, as noted earlier, presumably also all resulting trusts, and indeed all other equitable proprietary interests addressed in the LRA). He thought that outcome could be justified on the basis that "the purpose of the [LRA] in providing certainty by reference to that which is registered would clearly be frustrated if the [registered mortgagee] were not entitled to rely upon the register" (at [113]). This seems doubtful: eliminating all the frustrations that might be visited on subsequent disponees by off-register equitable interests would obliterate completely the need for any priority provisions dealing with such interests, and that is clearly not the purpose or intent of the LRA.

311. *Kensington Mortgage Company* also addressed the argument that, in *Mortgage Express*, Lambert had not been seeking to call into question the title of Mortgage Express; she simply sought to show that Mortgage Express took its title subject to her unregistered interests. The response, given in *Kensington Mortgage Company* in the context of an unregistered interest by way of constructive trust rather than Lambert's mere equity, was as follows, at [109]:

> "If the [alleged prior constructive trust interest] has priority over the mortgage, then the mortgage, in Lewison LJ's words, "takes effect subject to" the trust. Yet in that event the mortgage would in practice be rendered valueless; there would be no real difference between that situation and one where the mortgagee's title was said to be invalid. Why would the former situation not amount to "questioning the title" of the Respondent?"

312. It is possible to sympathise with the practicalities of the point being made, but there is an important difference of legal principle between impugning the title of a disponee and asserting a competing interest that reduces the value of the disponee's title, even reducing its value to nil. The two ends are delivered on quite different grounds, and have quite different consequences, even though sometimes the financial impact of both outcomes may be identical. But identical financial outcomes are not sufficient reason to merge different legal concepts.

313. It follows that, despite the obiter comments in *Mortgage Express*, I am not persuaded that s.26 of the LRA prevents a party from asserting a potentially overriding interest as against a registered disponee: in my view s.26 is directed at protecting the disponee's title (i.e. his legal title), not its priority. I therefore decline to hold that s.26 prevents C from asserting the potential priority of his equitable proprietary interest in the Properties as against D2 and D3.

314. I am reassured in that conclusion by *Megarry & Wade*, 9th Ed, at para 6-049. The editors there assert that owner's powers in s.26 do not affect priorities, and simply regard the suggestion to the contrary in *Mortgage Express* as "with respect, incorrect"; also see para 11-038. See too *Emmet & Farrand on Title*, para 5-111; and the useful commentary in Televantos [2016] CLJ 458; Dixon (2017) 133 LQR 173; and Lees [2017] Conv 71.

315. This conclusion means that it is necessary to consider whether C's unregistered equitable proprietary interest has priority over the interests acquired by D2 and D3.

Does C have an overriding interest?

316. As against D3, C's proprietary interest will only have priority over D3's Charge if C's interest has priority under the basic rule in s.28 *and* C is a person in actual occupation in circumstances where none of the exclusions set out in Schedule 3, paragraph 2 apply (see LRA s.30). Counsel for D3 accepted in closing, after hearing all the evidence during the trial, that C was in actual occupation at the time of the disposition to D3, and none of the relevant exceptions in paragraph 2 of Schedule 3 of the LRA applied.

317. Given that C meets the "in actual occupation" test in respect of D3, and that test is not necessary in respect of D2 (his interest being acquired for no consideration), the sole remaining determinant of C's priority in respect of both D2 and D3's interests is the basic rule in s.28 of the LRA.

318. In order to decide whether C's interest is one which would have priority under the basic rule, it is necessary to establish precisely what C's proprietary rights entail. C cannot simply assert that he has an interest under a trust, and that because it is prior in time it prevails over the subsequent registered interest. Whether that is true depends on the terms of the trust under which the Properties are being held for C. Consider trustees holding property for X on trusts which expressly allow, or oblige, the trustees to give the property to Y or sell it to Z. If the trustees act according to those powers or duties, X will have no proprietary claims to priority against Y or Z: X's prior interests will have been overreached, perhaps replaced by interests in the sale proceeds from Z, but all will depend on the terms of the trust. This approach is illustrated by the analysis adopted by Lewison LJ in *Mortgage Express*: see paras [29]-[39] on overreaching, although there has been some subsequent debate about whether section 2(1) of the LPA was apt to deliver that outcome. See too *Mortgage Express* at para [21](ii) and (v), cited earlier in this judgment at para [297].

319. Given the facts established in this hearing and their consequences for the terms of the trusts under which D1 holds the Properties for C, I find that C's proprietary interests in the Properties are subject to D3's Charge but not D2's Lease. This is true regardless of the different analyses of the facts advanced earlier, and the particular form of trust then held to exist.

Analysis if D1 holds the Properties on a* Quistclose *trust or a constructive trust under the* Westdeutsche *analysis

320. Take the *Quistclose* trust first. On the facts here, this trust is one where D1 holds the Properties on trust for C with the power in D1 to use those Properties only for the purpose of raising finance which is to be given to C.

321. Given such a trust, D1 is acting perfectly properly in using the Properties to acquire secured finance from D3, and to that extent C's interest in the Properties is overreached. This is the usual outcome in a *Quistclose* trust arrangement. When the borrower (as it usually is) uses the funds as agreed, the lender's interest is overreached. Similarly, here C cannot complain about the fact that effecting the parties' intended purpose delivers a valid and effective security interest to D3: that is an essential outcome of the pursuit of the parties' arrangement. It is immaterial for priority purposes that what D1 was then supposed to do, pursuant to his fiduciary duties, was pay those funds over to C. That is a breach of D1's duty to C, but does not have any impact on D3.

322. The analysis is not the same with D2. I have already held that D1 was in breach of duty in granting the Lease to D2, because the facts do not support D1's assertion that this was done to raise funds for C. Accordingly, C's interest in No.67 is not overreached by D1's disposition to D2, since this disposition was not authorised by the limited purposes which define the parties' *Quistclose* arrangement. As a consequence, C retains an interest, and under the general law C's interest has priority over D2's subsequent interest since he acquired that as a donee. Further, D2's subsequent interest is not given any additional protection by registration, since the added statutory protection applies only to registered estates granted for valuable consideration: see s.29 of the LRA.

323. Since the constructive trust under the *Westdeutsche* analysis is a trust subject to precisely the same powers in D1, the same result follows.

324. It follows that if C's proprietary interest in the Properties is held under a *Quistclose* trust or a constructive trust under the *Westdeutsche* analysis, on the terms outlined earlier, then D3's Charge is not subject to any overriding interest held by C, but D2's Lease is subject to C's overriding interest.

Analysis if there is a presumed resulting trust: the **Wishart** *line of cases*

325. If, contrary to my primary findings, C does not have an interest under a *Quistclose* trust nor a *Westdeutsche* constructive trust on the terms outlined earlier, but instead has an interest under a presumed resulting trust arising on the basis of a voluntary transfer of the Properties to D1 where that transfer was not intended to be by way of gift, then the same priorities consequences will follow.

326. This conclusion was advanced by counsel for D3 on the basis of "the *Wishart* line of cases", referring to a line of cases where the most recent Court of Appeal authority is the judgment of Sales LJ (as he then was) in *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655, [2015] 2 P & CR 15. Resisting this approach, counsel for C raised a pleading point, suggesting D3 was not entitled to run this argument as it had not been properly pleaded. I prefer D3's argument on this, and, for the reasons set out below at paras [363]-[367], I find that the point had been properly pleaded. In the end, however, this procedural matter has little practical relevance given my conclusions on the impact of the *Wishart* line of cases in the present context.

327. In my view the priorities outcome can be derived simply and directly from the nature and characteristics of the proprietary interest held by C under the presumed resulting trust. One crucial fact renders the resulting trust in the present context a little different from the usual presumed resulting trust. Typically, with presumed resulting trusts, the only evidence is of a gratuitous transfer from A to B in circumstances where A did not intend B to take the benefit. The presumed resulting trust then ensures that B does not

take the benefit, and instead A keeps it. The trust arising by operation of law does not need to be more complicated, because the facts it is responding to are not more complicated.

328. Other forms of resulting trust appear rather different, in that they mould themselves quite flexibly to the context the parties find themselves in. This is clearly true of a resulting trust reflecting a *Quistclose* arrangement. It is also true of purchase money resulting trusts. With these trusts, if the parties intend their purchase funds to be used to acquire property with the help of a mortgage rather than by way of outright purchase, then the beneficiary's interest in the property by way of purchase money resulting trust will be subject to the interest of the mortgagee. This would now be explained on the basis that there is no *scintilla temporis* in the acquisition of the property where the property is unburdened by the mortgage, so the beneficiary of the purchase money resulting trust never gets the chance to have a prior equity, but it also follows as an incident of the intended proprietary interest of the purchaser in advancing funds for the purchase, notwithstanding that the trust is one arising by operation of law: see the discussion in *Abbey National Building Society v Cann* (1989) 57 P & CR 381 (CA), at 392. Equally, it seems, the presumed resulting trust arising in response to a transfer by way of unintended gift can also respond to more nuanced contexts.

329. Here, C understood from the outset that the Properties would need to be mortgaged to third parties in order to source the funds that were to be used to pay C. In these circumstances there is not simply a bald transfer from C to D1 by way of unintended gift, as in the usual presumed resulting trust scenario. Instead, there is a transfer by way of unintended gift, but a transfer where it was intended or understood that the Properties would be utilised to achieve particular ends. The presumed resulting trust will necessarily need to be moulded accordingly. If so, then once again C's proprietary interest in the Properties is subject to D3's Charge but not D2's Lease for reasons that on all fours with those set out in the context of the *Quistclose* trust.

330. Some of the detail in support of this approach emerges from considering the impact of the *Wishart* line of cases. However, counsel for D3 adopted a far more expansive approach. At its strongest, he suggested (I quote from his skeleton argument) that even if "C were able to establish that his actual occupation would have been obvious on a reasonably careful inspection of [No.19], he is nonetheless not entitled to assert an overriding interest *if [C's]actions gave rise to the situation in which D3 made a loan to D1 on the security of a first legal charge without knowledge of C's (potential) overriding interest*". (emphasis added)

331. That is a very broad proposition. Counsel for D3 says it is based on a desire for fairness as between two innocent parties in deciding whether the loss should fall on the original owner (the person alleging an overriding interest) or the subsequent registered mortgagee. That principle is said to be derived from *Brocklesby v Temperance Permanent BS* [1895] AC 173, as developed by Lewison J (as he then was) in *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P&CR 16 at [139]-[143], and explained by Sales LJ (as he then was) in *Wishart*, at [52]-[53], as follows:

> "52. The *Brocklesby* principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has

> furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent. *This combination of factors creates a situation in which it is fair, as between the owner of the asset and the innocent purchaser or lender, that the owner should bear the risk of fraud on the part of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud.* The same principle applies where the dishonest vendor or mortgagor of the asset, who by the sale or mortgage raises money from an innocent third party, has been vested with the legal title as a trustee: *Rimmer* p 173 [*Rimmer v Webster* [1902] 2 Ch 163, 173]. As Farwell J explained there:
>
> > "The gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the indicia of title as absolute owner for the purpose of enabling him to deal with the property, although in a limited way only; whether the trust was to sell only, or to mortgage only, is immaterial, if the mortgagee or purchaser had no notice of the existence of any trust at all."
>
> 53. In that case, the owner of a mortgage bond delivered it to an agent with instructions to sell it, and transferred legal title to the agent. In breach of his authority, the agent mortgaged the bond to a mortgagee who had no notice of the limits on the agent's authority and so believed he was dealing with someone with full legal power to enter into the mortgage transaction. The agent pocketed the proceeds of the mortgage. Farwell J held that, by operation of the Brocklesby principle, the mortgagee was entitled to maintain his security interest in relation to the bond as against the owner." (emphasis added)

332. Although the italicised sentence refers to delivering what is "fair", the context relates exclusively to agency. In particular, these paragraphs identify the circumstances in which a principal will be bound by the unauthorised actions of an agent who engages with a third party who is unaware of the limitations on the agent's authority (i.e. under the familiar doctrine of ostensible or apparent authority, as analysed by Diplock LJ in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480).

333. Although Sales LJ makes no reference to ostensible or apparent authority, and *Brocklesby* and *Rimmer* predate that legal terminology, the *Brocklesby* "combination of factors" identified by Sales LJ embraces precisely those factors required by Diplock LJ in *Freeman and Lockyer*. These are actual authority given by the principal (the owner) to the agent (i.e. an agency relationship); the principal furnishing the agent with the means of making representations to third parties which do not indicate the limits of that authority (this provision by the principal of the indicia of the intended agency is crucial,

since the doctrine does not apply to "self-authorising" agents); and the principal doing nothing to alert the third party to any limitations.

334. Both *Brocklesby* and *Rimmer* make it clear that it is not enough simply that the "agent" has the documents of title or other accoutrements that would enable such a person to represent his *own* authority as being sufficiently unlimited to do what he intends to do. That would take the principle too far. To adopt and adapt the words of Sales LJ, it is essential that the principal has "set the agent in motion".

335. In *Brocklesby v Temperance Permanent BS* [1895] AC 173, at p 180, Lord Herschell said:

> "There can be no doubt that the mere possession of deeds of title, although that possession has been lawfully acquired from the real owner of them, will not of itself validate a security given by the person to whom the possession of the deeds has been committed where there was no authority given to him to use the deeds as security. … [Y]et where that possession *was coupled with an authority to use the deeds for the purpose of raising money*, then the security was valid, not to the extent to which the mortgagee had given the mortgagor authority to raise money upon the deeds, but to the extent to which the mortgagor had, in fact, raised money upon them from a person who had no notice of any limitation in point of amount of the authority given." (emphasis added)

336. In *Rimmer v Webster* [1902] 2 Ch 163, 169, Farwell J put it this way:

> "It is, indeed, plain that a man may in many cases intrust another with all the indicia of ownership, including the legal title, and yet not deprive himself of his equitable rights."

Were that not the case, he added, it would never be safe for a beneficiary to leave any trustee with the indicia of title, and that is not the law. But he went on, at p 171:

> "On the other hand, it is equally well settled that if a man hands over the indicia of title to a third person, *for the purpose of enabling that person to* raise money, either for his own benefit … or for the benefit of the owner [citing *Brocklesby*] but with a limit on the amount, the lender, being ignorant of the limit, is entitled to a charge for the whole amount advanced although it exceed the limit." (emphasis added)

And at 172-3:

> "*…the particular authority proved or admitted is necessary in order to make the case one to which the principles of agency apply at all; but when that is once proved, and* the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any

> limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee." (emphasis added)

337. This notion of "setting the agent in motion" to deliver particular ends, and the "agent" then exceeding the terms of the engagement, is also evident in *Abbey National Building Society v Cann* [1991] 1 AC 56, where Lord Oliver said the Court of Appeal had been entitled to conclude that Mrs Cann had left it to her son to raise money on mortgage to complete the purchase of the property in which she claimed an equitable interest, and he then added, at p 94:

> "If that is right, it follows that George Cann was permitted by her to raise money on the security of the property without any limitation on his authority being communicated to the society. She is not, therefore, in a position to complain, as against the lender, that too much was raised …"

338. Such an agency was material in *Wishart* itself (see [57]): Wishart had set the agent in motion, giving "Sami authority to make whatever arrangements he saw fit" to acquire the property for the benefit of Wishart, free of any mortgage. It was therefore Wishart who had to shoulder the burden of his agent's fraud in acting outside his authority by arranging for a mortgage on the property for his own benefit. Recalling *Mortgage Express*, the overreaching provisions in s.2(1) of the LPA give statutory force to principles similar to those underpinning ostensible or apparent authority, although only in the very specific circumstances set out in that section.

339. Of course, if there is an agency relationship and the agent simply acts as planned, then the principal has no cause for complaint: see *Abbey National Building Society v Cann* (1989) 57 P & CR 381 (CA), at 392, where Dillon LJ noted that if George Cann had simply acted within his authority, mortgaging the property only to the extent of the price shortfall, then Mrs Cann could have had no complaint that the mortgagee's charge would rank ahead of her interest in the property. See too *Bank of Scotland v Hussain* [2010] EWHC 2812 (Ch), at [102] (Newey J (as he then was)). The analogy then is with the outcomes that obtain with express trusts and *Quistclose* trusts when trustees act within their remit.

340. The principle linking all these cases is the agency context, where the principal's representation to third parties comes about because the principal has armed his agent with the accoutrements of title *for the purposes of the planned endeavour*, and sent him out to deal with third parties. If the agent then exceeds his authority, it is "fair" that the losses fall on the principal rather than the third party.

341. The agency feature, and its abuse by the agent, distinguishes these cases from another class of case where the court is simply focused on determining the precise nature and limits of the equitable interest asserted by the claimant. That seems to be the objective of the court in *Paddington Building Society v Mendelsohn* (1985) 50 P&CR 244, even though this is a case frequently cited in the *Brocklesby/Wishart* line of cases. Similarly, see too *Bristol & West BS v Henning* [1985] 1 WLR 778, 782 (Browne-Wilkinson LJ).

342. In *Paddington Building Society v Mendelsohn*, a mother and son agreed to buy a flat together, but in the son's name only. Some of the purchase price was provided by the mother and the balance by Paddington Building Society. When mortgage possession

proceedings were brought, the mother unsuccessfully claimed an overriding interest. Browne-Wilkinson LJ, with whom Donaldson MR agreed, said, at 247:

> "Since the mother knew and intended that the mortgage was to be granted to the society and that without the mortgage the flat in which she claims a beneficial interest could not have been acquired, the only possible intention to impute to the parties is an intention that the mother's rights were to be subject to the rights of the society. Therefore, if the land were unregistered land, in my judgment the mother's equitable interest in the flat would have been subject to the society's rights and would provide no defence to the society's claim to possession."

He then continued, holding that it made no difference that the land was registered. The parallels with the present case are apparent.

343. The same approach is evident in *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P & CR 16, at [143], where Lewison J said of the facts in that case:

> "One thing is clear from start to finish in this case. Money was always going to be raised on mortgage. Mrs Thompson knew and understood that and wanted it to happen. She wanted it to happen because she knew that without a mortgage she would not receive her £200,000. She executed the assent transferring the legal title to Mrs Foy in order to enable the money to be raised by the grant of a mortgage. In those circumstances I would have held that Mrs Thompson was precluded from relying as against TMB upon any right to set aside the assent for undue influence."

This was obiter, since Lewison J had held that Mrs Thompson did not have any proprietary interest at all on the facts, never mind one qualified in this way. Nevertheless, the parallels with the present case are again apparent.

344. Before moving on, it is worth noting that in *Bank of Scotland v Hussain* [2010] EWHC 2812 (Ch), at [101], Newey J expressed some concern about the legitimacy of imputing intentions, noting the use of that term by Browne-Wilkinson LJ in *Paddington BS v Mendelsohn*, cited earlier. Newey J noted the different views on that issue expressed in *Stack v Dowden* [2007] 2 AC 432. In that case, it was Lord Neuberger's view (see [126]) that intention could be inferred but not imputed, since the latter involved a search for what the court considered the parties would have intended even though the parties may have had no such intention at all.

345. That concern is often justifiably high when it is necessary to discover intention in common intention constructive trusts, especially in the context of family homes, where the range of possibilities is so completely at large. In the context of cases such as *Paddington BS* and *Henning*, however, the question being asked about intention is much more circumscribed, and so too are the possible answers. The question in issue is simply whether it was the party's intention to mortgage (or otherwise deal with) the property to further the common plan or arrangement. The answer to that question is simply yes or no, and it is unlikely that the answer will be found to be "yes" unless that intention can be inferred (i.e. is seen to be real) rather than imputed (i.e. may not exist, but could

have). In the present context, for all the reasons based on the evidence set out earlier, I regard myself as having inferred C's real intentions and expectation from his acts and the surrounding circumstances, not imputed them to him on the basis of what he might have thought should or would happen when in fact he had not had occasion to contemplate the issue.

346. That is not the end of the story in the *Wishart* line of cases. The two distinct strands of authority identified above, one based on ostensible authority (even if not so labelled) and one based simply on determining the nature of the party's beneficial interest (again, even if not so labelled), should not in my view be merged under one umbrella. The agency strand requires an actual agency relationship, and a representation by the principal to the third party, even if that representation is made via the agent who has been armed by the principal with the accoutrements of title *for the very purpose of engaging with third parties to deliver a specific end*. If these demanding criteria are met, then the "loss" will fall on the principal, not the third party, even when the agent acts beyond his actual authority. This is an estoppel-based doctrine: the focus is on the relationship between the principal and the third party. Its impact can be profound. In determining the priority of C's potentially overriding interests under the basic rule, C's prior interest may be defeated not because of the nature of his interest, but because his agent acted without authority in ways which destroyed or damaged that interest, but are nevertheless considered binding on C. This is illustrated by the facts in *Wishart* itself: C had an absolute interest by way of purchase money resulting trust in the property, and later, after the acquisition had been completed, his fraudulent agent charged the property to an innocent mortgagee and absconded with the loan funds.

347. By contrast, the other strand of authority seeks simply to determine the nature of the beneficial interest held by a party such as C. The relevant legal principles are well-known, although the facts are not always easy to unravel. Once the nature of the relevant interest is settled, however, it is generally relatively straightforward to determine the outcome of a priority dispute under the basic rule. Here, in sharp contrast with the agency cases, C's interest is only defeated by the subsequent interest if the quality of C's interest admits of that outcome. This is well illustrated by *Skipton Building Society v Clayton* (1993) 66 P&CR 223 (CA). There, simplifying the facts radically, A sold his property to B subject to a "licence" which the court held to be a tenancy for life notwithstanding B's endeavours to word it otherwise. Shortly afterwards, at B's request and in order to enable B to mortgage the property, A signed various documents indicating that the "licence" was cancelled but that he was nevertheless to remain entitled to live in the property for life. B then mortgaged the property to C, and when C brought possession proceedings A successfully claimed an overriding interest. Slade LJ provided various reasons for reaching his conclusion. The plainest, once the court decided that A's interest was indeed proprietary, was that A's proprietary entitlement to the tenancy was absolute: A had not agreed, and it was no part of either A's intention or understanding, nor A and B's common endeavour, that A's proprietary interest would necessarily be pared back in order to achieve an intended objective. It followed (given A's actual occupation) that A's prior equitable interest prevailed over C's subsequent registered interest. In addition, on these facts, it plainly could not be, and was not, suggested that A had "set B in motion" as A's agent to deliver a particular objective, and armed B accordingly for those purposes, so that A would be bound when B exceeded his authority.

348. If these two distinctive strands of authority are merged, there is a risk that the "agency" line of authority, with its potentially punitive outcomes for C, will be applied merely because D1 is in possession of the accoutrements of title obtained from C. As *Brocklesby* and *Rimmer* make plain, that is not the law: see above, paras [335]-[336]. If it were the law, an extraordinary number of potentially overriding interests would be defeated at the basic rule stage.

349. Nevertheless, some of the judgments in recent cases push hard in that direction. These cases would seem to support and accord with the broad principle advanced by counsel for D3.

350. In *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P & CR 16, for example, Lewison J rejected a submission that in *Paddington Building Society v Mendelsohn* the Court of Appeal had been concerned only with determining the nature of the relevant party's beneficial interest in the property. He then referred to the broader principle in *Cann* (see above, where the agreed basis of the funding arrangement was exceeded), and concluded, at [142]:

> "This, as it seems to me is a much broader principle, akin to an estoppel. In the course of his reasoning [in *Cann*] in the Court of Appeal (which Lord Oliver approved) Dillon L.J. applied the principle in *Brocklesby v Temperance Permanent BS* [1895] A.C. 173 which was referred to and applied by Farwell J. in *Rimmer v Webster* [1902] 2 Ch. 163 …. Shortly stated the principle is that when:
>
> > 'the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee.'"…

351. Nothing turned on the point in this case, but this quotation from *Rimmer* has lost its link with the agency qualifier that Farwell J thought so important: see above at para [335]. If the only precondition to holding that C's interest loses out to a subsequent disponee is that C has armed the trustee with the paraphernalia of ownership, then a wide range of usually effective overriding interests will necessarily fall by the wayside.

352. Similarly, in *Skipton Building Society v Clayton* (1993) 66 P & CR 223, at 228–229, Slade LJ suggested that authorities such as *Cann* (HL) and *Henning* demonstrate that:

> "in a case where A, the holder of the legal estate in land, has executed a mortgage of the land in favour of B, and C, who claims an interest in the land, *has so conducted himself as to give B reasonable grounds for believing that C is consenting to the creation by A of a charge over the land in favour of B which will have priority to C's interest*, then C will be estopped from

> asserting that his interest has priority to B's charge." (emphasis added)

353. Again, nothing turned on this formulation in the case, but views might differ as to how this broad estoppel principle is derived from *Cann* and *Henning*. It was not applied directly to the facts in *Skipton*, and Newey J in *Hussain*, at [101], queries whether a conventional estoppel by representation is capable of supporting the broad formulation here.

354. In summary, I suggest that these cases fall into two separate categories. One is directed at identifying the true nature and quality of C's proprietary interest, and any qualifications inherent in the interest. The focus is exclusively on A, or A and B. These are the only relevant parties in determining the characteristics of A's equitable proprietary interest in an asset held by B. And in a priority dispute between A and C under the basic rule, A's prior interest will prevail unless the inherent characteristics of A's interest are such that it was always contemplated that A's interest would have to be pared back or conceded, in favour of C, in order to deliver A's intentions, or A and B's intentions, being intentions which may be express or inferred. *Paddington BS v Mendelsohn, Henning, Skipton, Thompson v Foy* and *Hussain* are illustrative.

355. The other strand of authorities is directed at agency relationships, and in particular agency relationships where the agent has exceeded his authority. Here the focus in on A and B to determine whether there is indeed an agency relationship, and then A and C to determine whether A has made the necessary representations to C, typically found because A has armed B with all the paraphernalia of ownership for the purpose of achieving the particular endeavour with C. If those conditions are met, then A is bound by B's dealings with the property, even if those dealings exceed B's actual authority, and A's equitable interest is then deferred to C's. *Brocklesby, Rimmer*, *Cann* and *Wishart* are illustrative.

356. This approach fits neatly within the structure of the statutory priority rules in the LRA. These statutory rules do away with reliance on notice. If A has an equitable interest in land held by B, and B transfers that land or charges it to C, and we then want to know, as between A and C, whose rights have priority, the analysis is in two steps: (i) does the transfer or disposition by B destroy A's rights? and (ii) if not, *and only if not*, then, in the priority competition between A and C, who wins? All of the preceding paragraphs on the inherent nature of A's proprietary interest, or alternatively on the nature of the actual agency relationship between A and B, are directed at the first step in this process.

357. Applying this law to the facts before the court, I have already indicated that I find C's proprietary interest in the Properties under the limited terms that have been proven in respect of the parties' arrangement is a proprietary interest conditional on D1 using the Properties to raise the necessary funds.

358. On the other hand, I am not prepared to hold that C "set D1 in motion" as C's agent to deliver their agreed arrangement. This is not because I regard that as implausible, or even unlikely, in these circumstances. It is because there is no robust evidence before the court to prove such a positive arrangement and its terms with sufficient certainty. All the cases cited earlier as agency cases were able to define the underlying agency relationship before visiting on the parties, especially the principal, the consequences of a breach of that relationship. I do not consider the evidence here goes so far. I note that

D1 was happy to be described as C's "nominee" in raising the funds, thus conceding, it seems, that there was indeed an agency relationship. But the parties here each also conceded in their pleadings that they had entered into an arrangement where the terms were certain. Just as I found that not to be the case, I also find their agency relationship, if indeed there was one, not established with the necessary certainty.

359. Put another way, what I have been prepared to find is only evidence that "constrains D1 in his own activities" (thus defining and qualifying C's interest in the Properties), not evidence that "prescribes D1's activities as an agent for C" (which would define and might qualify their agency relationship).

360. It follows that under this analysis too, just as under all the prior proprietary analyses, C's equitable interest in the Properties is subject to D1's use of those Properties as security to raise the funds that are to be provided to C, and again C's equitable interest does not, and was never intended to, survive D1's disposition in favour of D3, which was undertaken for the purpose of raising funds. C's interest is overreached by the disposition in favour of D3, and so C has no interest which survives and can contest priority with D3.

361. On the other hand, D1's disposition to D2 was not a disposition undertaken to raise funds – for the reasons given earlier – so C's interest is not overreached by that disposition. There is then, yet again, a priority dispute that must be resolved between C's earlier equitable interest and D2's subsequent interest under the Lease. In this priority dispute, C's interest takes priority over D2's, notwithstanding the registration of D2's interest, because D2's interest was not acquired for valuable consideration, so is not protected by the LRA. The outcome is precisely the same as it was on the basis of the earlier *Quistclose* trust analysis.

362. Finally, while theoretically I agree it is possible that a broad estoppel by representation may infect the relationship between C and D3, so that D3's interests take priority over C's, there is no factual evidence to sustain such a claim. To the extent that the argument advanced by counsel for D3's falls into this category – and it is not at all clear that in the end it did – it is not material on these facts.

The pleading point

363. C's counsel alerted D3 on the first day of trial that he would dispute D3's entitlement to rely on *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655, [2015] EGLR 57 as the point had not been pleaded in D3's Amended Defence. D3 did not seek to amend. C returned to the issue in closing arguments, noting CPR 16.5(2)(b), which provides that if the defence "intends to put forward a different version of events from that given by the claimant, he must state his own version". C submitted that since D3 had not pleaded that there was an agency relationship or an estoppel between C and D1, it was not now open to D3 to raise this point, since C would have adduced relevant evidence if the issue had been raised in pleadings.

364. Since I have dismissed any arguments based on agency or estoppel, my response to this pleading point will have no practical impact. But in any event I do not accept C's argument that D3 had not sufficiently pleaded its case in a way that entitles it to reply on *Wishart*. D3 did not attempt "to put forward a different version of events" from that put forward by C in his PoC. Indeed, it is difficult to see how D3 could have put forward a different version of events. As D3 noted in its Amended Defence, C's PoC were

unusually sparse in setting out the facts said to support C's legal claims to any equitable proprietary interest, and D3 had no personal knowledge of the matters between C and D1. Even if D3 had sought to amend at the start of the trial, it is difficult to see what facts or events might then have been additionally pleaded, given that D3 had no knowledge of the dealings between C and D1, and no means of knowing about those dealings other than from the pleadings and evidence advanced by C and D1 before and during the trial.

365. D3 merely relied on *Wishart*, and other cases, to argue that the legal consequences following from those pleaded facts, and other facts that emerged in evidence and during the trial, were not those advanced by C. It was not suggested (and in this context could not have been suggested) that D3 was required to plead the point of law to be relied upon. D3's amended Defence made it plain that D3 would avail itself of every legal argument open to it to rebut C's proprietary claims or, if they existed, their priority.

366. In just the same way, C's PoC assert absolute equitable proprietary interests in the Properties with little further detail, but C's skeleton and oral argument noted various forms of resulting and constructive trust, including *Quistclose* trusts and trusts arising in response to the *Pallant v Morgan* equity. These forms of trust were not specifically pleaded by C, nor the specific facts underpinning them, and there is no complaint made about that.

367. The purpose of pleadings is to settle the issues for trial. Here, I am content that D3 did not allege different events or rely on different facts. D3 simply sought to apply a different legal classification to those facts as they emerged in evidence and during the trial. D3's intention to query C's own legal classification was plain in the Amended Defence and amplified in D3's skeleton, in the same way that C's was.

Claims against D2

368. I have already found that D2's Lease ranks in priority behind C's prior interest arising under the trust whereby D1 holds No.67 on trust for C. That effectively renders D2's Lease worthless.

369. C seeks a mandatory injunction against D1 and D2 for surrender of the Lease. An entitlement to this outcome follows from the outcome of the priority dispute or alternatively on the basis of ordinary trust principles. Given that C's interest in No.67 has priority over D2's interest under the Lease, D2 therefore holds the property on constructive trust for C, and C is entitled to require D2 to retransfer the property. In practical terms that is effected by a surrender of the Lease. The suggested analogy with *Crestfort Ltd v Tesco Stores Ltd* [2005] L&TR 20 is unnecessary.

370. C also claims surrender of D2's Lease not merely on the basis of the priority of C's proprietary interests, but also on the further basis that the grant of the Lease was a breach of trust by D1, and D2 knew that (because of the closeness of D1 and D2), and by accepting the Lease he intended to induce or procure such a breach, and intended, with D1, to cause loss to C by the granting and accepting of the Lease.

371. This claim does not on the present particulars of claim give C any more than he is already entitled to by virtue of the priority he has over D2's proprietary interests, but it would, potentially, expose D2 to additional personal liability to C, although no claims are advanced against D2 on that basis in this hearing.

372. I do not find this alternative basis made out on the facts. D2 denied all knowledge of the detail of the Claimant's Plan. What limited evidence there was before the court of the relationship between the two brothers would suggest that D2 goes along with D1's plans. C did not point to any evidence suggesting that D2's knowledge of the relevant issues met the knowledge test set out in *Crestfort Ltd v Tesco Stores Ltd* [2005] EWHC 805 (Ch), [2005] L&TR 20, at [66] (Lightman J), for the common law economic tort, nor (though this was not pleaded) the equitable test for personal liability for knowing/unconscionable receipt.

11. Conclusion

373. For all the reasons given, I find that the arrangement between C and D1, whatever its terms might have been, is void and unenforceable. In unwinding what has happened between the parties as a result of that void arrangement, or alternatively in enforcing the *Quistclose* trust that can be proved on the facts, C has established that D1 and D2 hold their respective interests in the transferred Properties on trust for C. Accordingly, and subject to the important qualifications below, C is entitled to an order requiring D1 to re-transfer the Properties, and D1 and D2 to surrender the Lease.

374. C's equitable interest does not have priority over D3's Charge, so No.19 remains encumbered by D3's registered security interest, securing the sum of £466,935.00 (being a loan amount of £460,000 plus fees of £6,935) owed by D1 to D3.

375. D1's failure to transfer the Loan funds to C was a breach of trust. D1 should have transferred those funds to C, although D1 was entitled to be indemnified for any necessary expenses. My understanding is that those expenses were met directly from the Loan funds themselves, and a net sum was transferred from D3 to D1. In calculating the sum due, it is immaterial whether D1 is required to account to C for the sum received or is ordered to pay equitable compensation to C. Accordingly, D1 is personally liable to pay to C the sum of £458,773.01, being the Loan funds received by D1 net of expenses.

376. As an alternative to this personal claim, C is entitled to follow and trace the Loan funds received by D1, and then make appropriate claims in respect of the traceable proceeds. However, on the evidence currently before the court this does not appear to afford C any advantages beyond those he has already obtained. There is little if any evidence of traceable proceeds, no evidence of D1's impending insolvency, and little or no evidence that the Loan funds were used to make investments delivering windfall profits which C might wish to claim.

377. D1 did not claim any remedies, but as an incident of unravelling the arrangement between C and D1, and putting the parties back in the position they were in before these events took place, account has to be taken of D1's redemption of the Santander Charge. The appropriate way of doing this was set out earlier. C would typically be made personally liable to D1 for the costs and any necessary expenses incurred by D1 in redeeming the Santander Charge, and D1 would be entitled to be subrogated to the Santander/Alliance & Leicester's security over No.19. On the present facts as I understand them, C will owe D1 the sum of £67,509.76 (being the sum that was secured by the Santander Charge), plus any necessary expenses incurred in redeeming it, with that sum secured by a charge over No.19 to the extent of £67,509.76 (that being the

protection afforded by the original Santander Charge). In the present circumstances, however, it would appear preferable simply to net the sums due between C and D1.

378. C is not entitled to payment of the sum of £1.35 million from D1.

379. D3's position is unaffected by the failed arrangement between C and D1: D3 still has its original personal claims against D1 and its security over No.19.

380. The remedies just outlined will see C recover No.19 subject to a charge in favour of D3, as well as recovering the Loan funds (via a personal or proprietary remedy) from D1. However, if D1 repays the Loan he still owes to D3, that will redeem the Charge over No.19. C is not entitled to recovery of his Properties, unencumbered, as well as recovery of the Loan funds. That would be inconsistent with the arrangement between the parties and would amount to double recovery. To the extent that D1 redeems the mortgage over No.19, that will constitute payment in kind to C. Further, C's obligation to repay the sums expended by D1 in redeeming the Santander Charge must not be lost in the mix.

381. In closing, I thank counsel for their assistance in dealing with the many legal arguments raised by these facts.