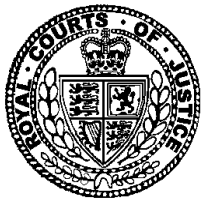

Neutral Citation Number: [2020] EWHC 3528 (Ch)

Case No: PT-2019-000122

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 December 2020

Before:

MR HUGH SIMS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

THE LAW SOCIETY — **Claimant**

- and –

(1) MRS ASHOO DUA
(2) MR SHASHI DUA — **Defendants**

- -
- -

JULIA PETRENKO (instructed by **Monro Wright & Wasbrough LLP**) for the **Claimant**
THE DEFENDANTS appeared as litigants in person

Hearing dates: 18, 19, 20, and 24 November 2020

- -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties and/or their representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18th December 2020 at 10:30 AM

Mr Hugh Sims QC:

Introduction

1. Fulmer is a village about one mile from Gerrards Cross, in Buckinghamshire. In 2004 the Defendants, Mrs and Mr Dua, purchased Fulmer House, in Fulmer, as a family home. The Claimant, The Law Society, is a judgment creditor of Mrs Dua, and seeks an order for possession and sale of Fulmer House, and another property also registered in the joint names of Mr and Mrs Dua, called 49 Sudbury Avenue, Wembley. They do so pursuant to charging orders the Law Society obtained over those properties between 2011 and 2013. As at 16 November 2020, according to the updated calculations performed by Ms Petrenko, counsel for The Law Society, the sum of £354,404.29 (inclusive of interest) remains due and owing.

2. At the trial, conducted by Skype for Business during the second Covid-19 "lockdown", I heard evidence from Mr and Mrs Dua, as well as receiving written evidence from other witnesses. The parties are to be commended for co-operating to enable an effective hearing to take place. I have been assisted, in particular, by the clear written and oral submissions made by Ms Petrenko, which travelled further than they might otherwise have done due to the Duas acting in person.

3. Whilst the ultimate issue in these proceedings is whether or not orders for possession and sale should be made in relation to the two properties, under CPR 73.10C, the following issues arise for determination in order to adjudicate on the ultimate dispute between the parties:

   (1) First, whether one of Mr and Mrs Dua are entitled to contend that Mrs Dua does not have any beneficial interest in the properties, or does not have any interest with realisable value (the "Res Judicata and Abuse of Process Issue")?
   (2) Secondly, if so, what is the interest Mrs Dua has in the properties, having regard in particular to the Fulmer Settlement Trust (the "Beneficial Interest Issue")?
   (3) Third, having regard to the determination of those issues, and the matters set out in section 15 of the Trust of Land and Appointment of Trustees Act 1996, should an order for sale, and possession, be made (the "Order for Possession and Sale Issue")?

4. I will consider first the factual background relevant to the Res Judicata and Abuse of Process issue, and determine it, before moving onto further facts relevant to the Beneficial Interest and Order for Possession and Sale Issues, and my judgment on those issues.

Res Judicata and Abuse of Process Issue

Background

5. The Law Society, a body incorporated by Royal Charter, is acting through its independently operated regulatory arm, the Solicitors Regulation Authority ("SRA"). Mrs Dua qualified as a solicitor and was admitted to the roll in 1990. An intervention was made by the SRA into the practice of Mrs Dua, in 2009, which intervention was unsuccessfully challenged by her. The costs of that intervention, and the unsuccessful challenge to it, led to judgment debts being established against Mrs Dua, including as to costs. Those judgment debts were not satisfied, and enforcement action was taken by the Law Society, which included obtaining charging orders over certain properties registered in the joint names of Mr and Mrs Dua.

6. So far as the properties are concerned, Mr and Mrs Dua are the joint freehold owners of five registered titles: (i) Fulmer House, Fulmer Road, Fulmer SL3 6HN, which is registered under title number BM61904; (ii) Land on the North Side of Fulmer House, which is registered under title number BM242835; (iii) Ferndown Cottage, Fulmer Road, which is registered under title number BM63634; (iv) Knoll Cottage, Fulmer Road, which is registered under title number BM61442; and (v) 49 Sudbury Avenue, Wembley, HA0 3AN, which is registered under title number NGL239371.

7. The first four properties were registered in the joint names of Mr and Mrs Dua on 1 June 2005, and the price recorded as having been paid for them collectively on their titles is the sum of £1,887,547 on 22 October 2004 (the transfer document dated 22 October 2004 also refers to another title, which may either have merged with one of those four titles, or not been registered in the names of Mr and Mrs Dua due to a defect in title, but nothing turns on that). The four titles are occupied by Mr and Mrs Dua, together with their two adult children, as a single residence, and may be conveniently referred to, for short, as Fulmer House. The 49 Sudbury Avenue property is a separate property, which was registered in the joint names of Mr and Mrs Dua on 10 September 1987. The transfer records the purchase price as being £93,000, and completing on 10 July 1987. Mr and Mrs Dua lived in this property for some time, as a married couple, before moving into Fulmer House, after the birth of their two children, in 2005, and after certain renovations were made to it.

8. There is a linked charge over all five registered titles (i.e. both Fulmer House and 49 Sudbury Avenue) in favour of HSBC Bank Plc, which provided a loan of c. £1.8m to enable the Duas to purchase Fulmer House. As of 2018, a similar indebtedness remained: the sum of £1,791,335.77 was the redemption figure in relation to the charge as of 24 August 2018 together with, as of 8 October 2018, the additional sum of £110,800.23. The figures remain of that order into 2019 and up to the date of trial.

9. The part of Fulmer House registered under title number BM61904 is also subject to a charging order, entered on 29 October 2007, in favour of Claire Court Schools Limited. Mr Dua described in evidence how he was pursued for a debt in relation to their son's education which he described as ultimately leading to his bankruptcy. Mr Dua was adjudged bankrupt on 12 December 2008, though he remained in occupation of Fulmer House with Mrs Dua, and their children, and remained on the title. The trustee in bankruptcy investigated a possible interest, but never made any realisation, in relation to Fulmer House. As of 24 November 2016 the sum of £14,630.62 was still due under the charging order in favour of Claire Court Schools Limited.

10. 49 Sudbury Avenue is subject to three interim charging orders against Mr Dua's beneficial interest in favour of Edwin Coe (Law Firm), Safeteach Systems Limited and Wembley Business Centres Limited respectively. Mr Dua explained at trial that these all arose in the context of the financial difficulties he was facing in 2007 and 2008 and he disputed these sums.

11. Turning back to the Law Society, between 2011 and 2013 the Law Society obtained final charging orders against Mrs Dua's interest in the properties, as set out in the four paragraphs which follow.

12. On 10 November 2011 Deputy Master Hoffman made five final charging orders (each of which related to one of the five registered titles) charging each title with payment of the sum of £76,977.53, together with any further interest becoming due and £264.80 the costs of each application.

13. On 18 April 2013 Chief Master Marsh made five final charging orders (each of which related to one of the five registered titles) charging each title with payment of the sum of £104,852.96 together with any further interest becoming due and £9,250 the costs of the application. I shall return to the proceedings before the Chief Master below.

14. On 22 April 2013 Master Leslie made five final charging orders (each of which related to one of the five registered titles) charging each title with payment of the sum of £7,096.12 together with any further interest becoming due and £1,500.00 the costs of the application.

15. On 29 October 2013 District Judge Evans made four final charging orders (each of which related to one of the five registered titles, but no order was made in relation to title number BM61442) charging each title with payment of the sum of £24,599.05 together with any further interest becoming due and £253 the costs of the application.

16. The making of the final charging orders by the Chief Master, as referred to in paragraph 13 above, was resisted by Mrs Dua. A hearing was due to take place on 23 January 2013 but was adjourned to 4 February 2013 on the basis that insufficient notice had been given to Mrs Dua. The hearing listed on 4 February 2013 was then also adjourned as Mrs Dua asserted that she had divested herself of any beneficial or equitable interest in the properties, and directions were made to enable Mrs Dua to file and serve evidence.

17. Mrs Dua filed and served a witness statement dated 4 March 2013 to support her opposition, which was prepared with the assistance of her spouse, Mr Dua. Mrs Dua exhibited and relied upon a number of documents, including: (i) a deed of settlement dated 15 October 2004 establishing the Fulmer Settlement Trust (the "Trust Deed"); (ii) minutes from a meeting of the Duas, as settlors and trustees of the Fulmer Trust on 24 October 2004, which she referred to as adjusting beneficiary clauses in the Trust Deed so precluding her and Mr Dua from being beneficiaries; (iii) further minutes of a meeting of the Duas, on 12 September 2015, which she described as transferring the remaining beneficial interest in 49 Sudbury Avenue to the Fulmer Trust. Those documents, together with some other documents, were referred to in

order to argue, in brief summary, that the properties were held by her and Mr Dua pursuant to an express trust in favour of her children.

18. On 18 April 2013, the Chief Master gave judgment. It is clear from his judgment that Mr Dua was not a party to the proceedings and nor was he treated as a person who was objecting to the order being made under CPR 73.10A. He observed that Mrs Dua had previously been assisted by Mr Dua as a McKenzie Friend, but that on this occasion Mr and Mrs Dua attended only as judgment was being given. Six points were identified as having been raised in the evidence of Mrs Dua in opposition to the charging order made final. I need consider only the sixth, namely that she no longer had any beneficial interest in any of the five properties.

19. The Chief Master concluded he should dispose of this point against Mrs Dua summarily:

20. First, he concluded that, absent a copy of the original Trust Deed, which the Law Society had been asking for and which the Duas had failed to produce, and/or any witness evidence from Mr Richard Tutty (the trust and estate practitioner who witnessed the Deed), and taking into account that the Deed was not registered at HM Land Registry until 2012 (being a date after the date on which the Law Society had obtained a final charging order), there were doubts as to its authenticity and Mrs Dua had not discharged the burden of proof which rested on her.

21. Secondly, he found that the Trust Deed only concerned that part of Fulmer House with title number BM61904, and not any of the other title numbers.

22. Thirdly, the Trust Deed was dated 15 October 2004, whereas the conveyance in relation to Fulmer House took place on 22 October 2004. The Chief Master noted that "*it is trite law that it is not possible to create a trust of future property, in other words a property which at the time was not vested in Mr and Mrs Dua. So even if the deed is authentic, it is ineffective to create a trust over either Fulmer House or any of the other former related properties*".

23. As for 49 Sudbury Avenue, Mrs Dua relied on a copy of a minute meeting of the Board of Trustees of the Fulmer Trust dated 12 October 2005 which said, in summary, that it was resolved that the unencumbered equity belonging to Mr and Mrs Dua in this property would be purchased by the Fulmer Trust for £90,000.00. The transcript of the approved judgment is not clear on this point, but it would appear that the Chief Master was persuaded by the Law Society that the minute on its own provided insufficient evidence to show a transfer of either a legal or equitable interest to the trust.

24. In these circumstances, the Chief Master considered that it was unnecessary to direct a trial of an issue before making the interim charging order final stating that "*on the evidence placed before me, for the reasons I have given, there is no reason to conclude that Mrs Dua has alienated her interest in these titles or her interest in them and there is no other good reason for declining to make these interim charging orders final such that would warrant a full investigation at the trial of a preliminary issue*".

Procedural history in this claim

25. The current proceedings were issued on 12 February 2019, by a Part 8 claim, as required by CPR 73.10C(4). The claim named both Mrs and Mr Dua as defendants. The relief sought is for an order for possession and sale of the properties in accordance with CPR 73.10C, as further set out in the witness statement of Michael James Acton, of Monro Wright & Wasbrough LLP, also dated 12 February 2019. Mr Acton is not a witness of fact in respect of the events in question. He has given two witness statements concerning the background to the final charging orders obtained by the Law Society, over the properties between 2011 and 2013, as well as exhibiting certain documentation relied on by the Law Society in support of their claim. At paragraph 9 of his first statement he confirms the total due under the charging orders, inclusive of interest at the date of that statement, was £324,685.64. The sum is now £354,404.29, as verified by a statement from Mr Wade, also of Monro Wright & Wasbrough LLP, dated 13 November 2020, subject to certain deductions confirmed by Ms Petrenko. The fact that the charging orders have been obtained is not in dispute.

26. By their statements dated 4 and 15 March 2019 Mr and Mrs Dua set out their initial evidence in response to the claim and why it was opposed. This raised a number of points, including the point that Mrs Dua did not have any beneficial interest.

27. The matter first came on for a hearing before Master Kaye on 21 May 2019. At that hearing Mr Brueton, a solicitor agent, attended for the Law Society and the Defendants attended in person. It had become apparent by that time that Mr Dua remained an undischarged bankrupt and the status of his last known trustee in bankruptcy, Mr Pick of Grant Thornton, was unclear. Orders were made on that date requiring the proceedings to be served on Mr Pick or any other person currently acting as Mr Dua's trustee in bankruptcy. The court also made an order permitting the Law Society to file and serve further evidence in response to the evidence of the Duas, and in particular to address the issues of payments alleged to have been made by or on behalf of Mrs Dua to the Law Society and any other credits which Mrs Dua claimed should be set off against the amount claimed to be due to the Law Society. The Duas were also given permission to file and serve evidence in reply and the matter was to be relisted for further directions after 1 August 2019.

28. Mr Acton served a further and second statement, dated 13 June 2019, in which he addressed the points identified by Master Kaye in the order of 21 May 2019, and he noted at paragraph 7 that he considered the crux of the matter was "*whether or not the First Defendant has a beneficial interest in the properties known as Fulmer House and 49 Sudbury Avenue*." He also referred, at paragraph 8, to the fact that Mrs Dua had, when seeking to challenge the conversion of an initial charging order into a final charging order before Master Marsh in 2013, made the same or similar arguments to ones she was raising in these proceedings, namely that Fulmer House and 49 Sudbury Avenue had been placed into a trust. In short, therefore, he was complaining that the Duas were wrongly seeking to relitigate the same points as "they" had raised, unsuccessfully, before the Chief Master. However, no strike out application was made.

29. As for Mr Dua's bankruptcy, Mr Acton's second statement refers to the Law Society having made further enquiries in relation to this issue, and identified that Mr Pick had ceased to act as trustee in bankruptcy and the matter had been passed back to the Official Receiver. Mr Pick recorded in his evidence that the proceedings were served on the Official Receiver by recorded post on 7 June 2019. That letter states that Mr Dua was made bankrupt on 12 December 2008. It also refers to Mr Dua's suspension from discharge, an order which would have been made under section 279(3) of the Insolvency Act 1986. The position now rests therefore, on the basis that Mr Dua's bankruptcy discharge has been suspended, and the Official Receiver is his trustee, but has not taken any interest or asserted any interest in these proceedings. Mr Pick, as his trustee in bankruptcy, did show an interest in matters concerning Fulmer House at an earlier date, and I shall return to that evidence, as it has some relevance to the failure to produce the original Trust Deed.

30. The matter came back again before Master Kaye on 14 August 2019 for further directions, Mr and Mrs Dua having not served any evidence in reply by this time. Master Kaye made an unless order on this occasion, providing under paragraph 1 of the order that "Unless the Defendants file and serve evidence in reply by 4pm on 11 September 2019 they will not be able to serve or rely on any further evidence at the Disposal Hearing". At this date the parties and the court appeared to have in mind that the disposal would be on the basis of written evidence alone. The Law Society was represented at this hearing. Mrs Dua did not attend, but Mr Dua attended in person. Still no strike out application, on abuse grounds or otherwise, was made.

31. Mr and Mrs Dua then duly filed and served the further evidence they wished to rely on, in the form of second witness statements from Mr and Mrs Dua dated 11 September 2019. Those statements, in contrast to the first set of statements, were served with the benefit of legal advice and assistance from solicitors. Mr Dua's witness statement, in particular, provides a reasonably detailed statement of his evidence, and exhibits a number of documents he relies on. So far as the Trust Deed is concerned, the exhibits included documents showing that the Original Trust Deed had been sent by Mr Tutty's firm, Teaco Associates, to Veale Wasbrough Vizards, the solicitors then acting for the trustee, Mr Pick, under cover of a letter of 1 March 2010. So, as it turns out, the failure to provide the Original Trust Deed could not be laid at the door of Mr and Mrs Dua. Nor could the absence of the Trust Deed on the register, before the Law Society took action in relation to its charging orders, be said to be suspicious, because this correspondence pre-dated the same.

32. Mrs Dua provided a shorter statement, identifying some minor differences between her evidence and that of Mr Dua, but in the main agreeing with Mr Dua's evidence. Mr Dua's brother, Ravi Dua, also provided a short statement, dated 10 September 2019, at the request of his brother. This statement dealt with the purchase of an earlier property, called 96 Hodder Drive, which was the first property transferred into the joint names of Mr and Mrs Dua. His evidence was not challenged at trial.

33. The contemplated disposal hearing on the papers, listed for hearing in January 2020, did not proceed due to, in part, the fact that the Law Society had decided they wished to cross-examine the Duas on their evidence. The disposal hearing was vacated, therefore, and relisted with a time estimate of 2 days on 17 and 18 September. Master Kaye caused a PTR listing to be arranged, and an order was issued on 25 August 2020

notifying the parties of a PTR on the 8 September 2020. That took place on 8 September 2020 and again Mr and Mrs Dua attended in person. The effectiveness of that hearing appears to have been impaired, to some degree, by difficulties the Duas were then experiencing with the technologies associated with remote hearings. They fared much better in relation to that at trial, which tends to illustrate that, with some training and experience, even litigants in person may cope effectively with remote trial hearings.

34. After the PTR, but about 10 days before trial, the Duas served a copy of a witness statement from Mr Tutty, the witness to the Trust Deed. I ruled at trial that they be permitted to rely on his evidence at trial. The Duas arranged for Mr Tutty to be available to be questioned. But the Law Society chose not to cross-examine him, and his evidence went unchallenged. He exhibited a copy of the Trust Deed and confirmed that his firm, Teaco Associates, prepared the Deed establishing the Fulmer Trust in 2004. He confirmed that he witnessed the Duas signatures and proceeded to register the Trust with the Inland Revenue. He, and his firm, thereafter ceased to have any involvement in the trust administration. He verified that his firm no longer held the original Deed, it having been released to Veale Wasbrough Vizards in 2010. This was consistent with the documentation Mr Duas had exhibited to his statement of 11 September 2019. A further evidential point which had supported the reasoning of Master Marsh had thereby been removed.

35. So, by the time of trial, the Law Society did not seek to suggest that any of the three main points which Chief Master had been persuaded of in 2013 (putting to one side for present purposes the separate question relating to 49 Sudbury Avenue) could be supported.

36. Returning to address them briefly here, the first evidential point, namely the concerns as to authenticity, I have already addressed in paragraphs 31 and 34 above.

37. The second point, that the Fulmer Trust only included that part of Fulmer House with title number BM61904, and not any of the 3 other title numbers, was not supported either, at the hearing before me. A wider consideration of the matrix of fact documentation which was available to this court at trial, and which is admissible as an aid of construction in relation to a voluntary settlement, points very clearly to the conclusion that references to Fulmer House in the Trust Deed was intended to refer to all the title numbers being acquired by Mr and Mrs Dua at Fulmer (i.e. all four title numbers) and not just the title number BM61904 associated with the main accommodation. Apart from anything else the financial numbers would not make any sense if the reference to Fulmer House did not mean all four titles. I might add that if it could have been said there was a latent ambiguity from the document, there is a suggestion in Lewin on Trusts (5th Edition) at para 7.014 that evidence might be admitted of the settlor's intention, in order to clarify the ambiguity. However, given the concession made by the Law Society on this issue and my conclusion that there is no ambiguity in the light of the surrounding relevant documentation, there is no need to resort to this.

38. The third point, whether the Trust Deed was an ineffective declaration of trust as to future property, was, also, not said to be determinative against the Duas by the Law Society at the hearing before me. This was because, even if the Chief Master was

correct to say that the Trust Deed was only a declaration as to trust of future property (assuming the exchange of contracts had not occurred before 15 October 2004), nevertheless the minute of 24 October 2004 amounted to a confirmation or new declaration, after the date of completion on 22 October 2004. Where property subsequently vests in the trustee and they confirm the previous declaration of trust that will suffice: see *Re Northcliffe* [1925] Ch 651 at 655.

39. It might be thought that in these circumstances there was not a stable foundation on which to contend that it would be unjust to permit the Duas to rely on the Trust Deed in support of their defence at the trial before me. However, it has been submitted that in this case I should discount any reference or reliance to the questions of the underlying merits when assessing the res judicata and abuse of process issue.

Res Judicata and Abuse of Process: The case advanced by the Law Society

40. Ms Petrenko, for the Law Society, contended that, save for the points of difference referred to in Mrs Dua's witness statement of 11 September 2019, Mr and Mrs Dua take the same position in this litigation as they did before Chief Master Marsh. She pointed out that both of them seek to argue that Mrs Dua does not have any beneficial interest in the properties. She referred to the fact that, in his main witness statement dated 11 September 2019, Mr Dua seeks to rely on the Trust Deed, as allegedly varied, to argue that beneficial title is held pursuant to an express trust. Mrs Dua's latest witness statement does not deal with this issue expressly, but she does say that she agrees with Mr Dua's statement, and at times she sought to rely on her earlier witness statement, including the statement put before the Chief Master.

41. In these circumstances, the Law Society contend that it should not be open to Mrs Dua to seek to argue that the properties are held by her pursuant to an express trust on the basis of the Trust Deed (as varied), or indeed on the alternative, implied, basis that Mr Dua is the sole owner. The Law Society complain Mrs Dua made this argument as to a lack of beneficial interest in the proceedings before Master Marsh who was entitled, under CPR r.73.10A(3)(c), to decide this issue and, after having given Mrs Dua the opportunity to put her case by adjourning the hearing, decided it against Mrs Dua. In these circumstances, it is contended, there has already been substantive adjudication on this point, and Mrs Dua is precluded by an issue estoppel from making this argument again. Mrs Dua is similarly estopped, submit the Law Society, from relying on the minute of transfer date 12 October 2005 as justifying her position that she divested herself of any interest in 49 Sudbury Avenue.

42. Ms Petrenko recognised that Mr Dua was not a party to the proceedings before Master Marsh, as the charging order was only sought against Mrs Dua's interest in the properties. However, she submitted that the rule against abuse of process first established in *Henderson v Henderson* (1843) 3 Hare 100 extends the ambit of *res judicata* in two respects. First, the rule applies to matters which were not decided by the court, but which might have been decided. Secondly, the rule applies not just to subsequent litigation between the same parties, but also to parties to the subsequent proceedings who were not party to the earlier proceedings. What constitutes abuse of

process depends on a broad merits-based approach taking in account all the facts and circumstances of the case.

43. She pointed in particular to the following factors, at paragraph 21 of her written opening submissions, as supporting the contention that the conduct by Mr Dua was abusive (omitting trial bundle references):

"*Mrs Dua's witness statement in the proceedings stated that it had been prepared with the assistance of Mr Dua. Further Master Marsh observed that Mrs Dua had, previously, been assisted by Mr Dua as a Mackenzie friend but that, on the occasion of the hearing, he attended only as judgment was being given. Having been closely involved in the previous proceedings, Mr Dua now seeks to mount to a collateral attack on Master Marsh's decision in his witness statement. This amounts to an attempt bring in, through the side door, an argument which Mrs Dua is not entitled to run and to an abuse of process. There was no application for permission to appeal Master Marsh's order and the Defendants have not made any such application to date (such an application would, of course, be out of time).*"

44. Ms Petrenko emphasised that it was Mr Dua's close involvement in the proceedings, as identified in the paragraph quoted above, which she was relying on to support the abuse of process argument. She stressed that the facts in this case were rare, or unusual, for the reasons summarised above.

45. It is to be noted that Ms Petrenko's submissions set out above in relation to Mrs Dua contain a mixture of submissions based on *res judicata*, or issue estoppel (as considered in *Arnold v National Westminster Bank* [1991] 2 AC 93, and more recently by the Supreme Court in *Virgin Atlantic Airways UK Ltd* [2013] UKSC 46) and abuse of process. But she recognised that in relation to Mr Dua she could only rely on the wider abuse of process principle. This was because Mr Dua was not a party to the earlier proceedings, and Ms Petrenko did not urge on me that he should be treated as a privy, either. I consider she was right not to do so, having regard to the principles which can be derived from the authorities, to which I shall now turn.

Res Judicata and Abuse of process: the principles and further analysis

46. The critical path for the decision-making process in this case does not rest with a consideration of whether or not Mrs Dua is barred, on issue estoppel or abuse of process grounds, from taking any of the points identified, but instead it rests with Mr Dua, and asking whether his defence should be precluded based on abuse of process principles. That is not to overlook that abuse of process principles may be said to form part of the law of res judicata (see *Virgin Atlantic* (at [23]-[25])), with substantially the same policy objectives of finality in litigation, and avoiding the oppression or harassment associated with successive actions. But it is to recognise that they are juridically very different. Res judicata is a rule of substantive law whereas abuse of process is an extension of the concept which informs the exercise of the court's procedural powers (*Virgin Atlantic* at [25]). Moreover, whereas under principles of res judicata or issue estoppel the correctness of the decision is not relevant (indeed it may be said the doctrine only comes into its own when the decision

is wrong (see the discussion in Spencer Bower and Handley: Res Judicata, Fifth Edition at [1.14])), in abuse of process cases the position is subtly different. Ordinarily, in abuse of process cases, the broad merits-based approach required by the authorities has nothing to do with the underlying merits, but to that general principle there may be said to be some exceptions, which I shall discuss further below.

47. The authority which may be said to be closest, on the facts, to the present case, is that of the Court of Appeal in *Skyparks Group Plc v Felician Marks Shanti Shah* [2001] EWCA Civ 319, which Ms Petrenko properly drew to my attention, in which Lord Justice Robert Walker (as he then was) gave the leading judgment (with which Lord Justice Keen and Mr Justice Colman agreed).

48. Skyparks brought a claim in the Queen's Bench Division against a company whose liability Mr Marks guaranteed, and Mr Marks. This concluded with judgment being entered, and a charging order being made in respect of Mr Marks' beneficial interest in a dwelling house known as Woodwinds, also close to Gerrards Cross, Buckinghamshire. The coincidence in locations with the present case might be thought remarkable. Mr Marks, the sole registered proprietor, contended that he had no beneficial interest in Woodwinds. That contention was rejected by the Master, and upheld on appeal, on the basis that Mr Marks had some beneficial interest in the house, and it was foreseen there would have to be further proceedings to enforce where the precise interest might be determined.

49. Those proceedings were duly commenced in the Chancery Division, and initially Skyparks sued Mr Marks alone, but Mrs Marks applied successfully to be joined. She contended that the beneficial interest in the house was either in a trust called the Chanick Trust, or belonged to her entirely, or as to part. Skyparks' riposte was similar to that of the Law Society in these proceedings, and to contend that Mr and Mrs Marks were not entitled to take the point. At first instance it was found that Mr and Mrs Marks were both to be treated as being bound by the decision in the Queen's Bench Division, on the basis that Mrs Marks' interest was the same as that of her husband, and she had knowingly abstained from taking any step to be joined in the proceedings.

50. That decision was reversed on appeal, Robert Walker LJ accepting the following submissions (at [41]):

"*Mr Griffiths was however on much firmer ground, in my view, in submitting that there was neither sufficient identity of interest between Mr and Mrs Marks nor sufficiently informed consent on the part of Mrs Marks to stand back and let her battle be fought by her husband. There was obviously a degree of common interest in persuading the master that the house belonged to the Chanick Trust, because that outcome held out the best prospect of the house being preserved as a family home (so long as the charge to Midland could be kept down). And a husband who is facing insolvency may wish to prefer his wife's proprietary claims to his own. Nevertheless Mr Marks, Mrs Marks and the trustees all had competing financial interests…*"

51. The parallels with the present situation are obvious. Like in *Skyparks* there is a common interest between Mr and Mrs Dua in persuading the court that Mrs Dua had no, or no realisable, beneficial interest of any value, because this holds out the best prospect of Fulmer House being preserved as the family home. But, nevertheless, his interests are not identical to those of Mrs Dua. A dispute with a trustee in bankruptcy of Mr Dua might illustrate that, as would a divorce dispute. That is before one begins to consider the separate interests of their children, who are stated to be potential beneficiaries under the Trust Deed.

52. It is instructive to note that whilst the main ground of appeal in *Skyparks* concerned res judicata, the Court of Appeal also rejected the attempt to uphold the decision on wider abuse of process principles (see at [46] per Robert Walker LJ).

53. Some of particular features of the *Skyparks* case are noted in the judgment of Robert Walker LJ at [43] as follows:

"*The evidence of Mrs Marks (which the judge seems to have accepted on this point) was that she knew of the master's decision at about the time it was made and that she was told not to worry because there was to be an appeal. She…had had no previous involvement in the litigation and there is no suggestion that she took (or was at any time before August 1999 advised to take) independent advice. Had she (or the trustees) applied to be joined as parties at the stage of the appeal to Sullivan J, they might well have been met by the objection that Master Murray envisaged that they (or at any rate the trustees) would have a chance of being heard in the Chancery Division.*"

54. Ms Petrenko sought to emphasise that the decision in *Skyparks* is distinguishable since it would seem that Mrs Marks may have been misled into not participating in the appeal, based on the observations quoted above. That does not appear to have been a critical feature. On the contrary, one facet of the reasoning was to note that had Mrs Marks applied to join she may well have had that application rejected on the basis she would get her chance to participate in the second stage, in the Chancery Division. Nevertheless, it may be said that the present facts show Mr Dua being more closely connected to the first proceedings than Mrs Marks was in *Skyparks*.

55. It was noted in *Skyparks* that section 2 of the Charging Orders Act 1979 is in wide terms and a wide variety of cases may occur, some straightforward and some a good deal more complicated. So, it is open to a judge to adopt a two-stage approach, if they think fit. The commentary in The Law and Practice of Charging Orders on Land, Harpum and Others, (Wildy, Simmonds & Hill Publishing) at 6.24, notes that:

"*Before making an order for sale, the court must be satisfied as to the nature of the debtor's title to the charged property. Evidence as to the nature of the debtor's title will already have been adduced at the stages of applying for and obtaining an interim and final charging order. However, evidence which sufficed at those stages may not be sufficient at the stage of enforcement. At those earlier stages, if there had been doubt as to the nature of the debtor's title, a charge may nonetheless have been granted, as it could only ever have attached to such interest as the debtor did in fact have in the property. If it transpired that he had none, then no charge would in fact*

have been imposed. However, at the stage of enforcing the charging order, the court must be satisfied that the debtor in fact has an interest in the property to be sold, and as to the nature of that interest."

56. This is reflected in cases such as *Walton v Allman* [2015] EWHC 3325 (Ch) (Snowden J), which emphasise that the court need not concern itself, at the charging order stage, as to the extent of any equitable interest. Indeed, there are sound practical and policy reasons why, at the charging order stage, it should not be necessary for the judge to deal in certainties and may make an order over the debtor's interest in a property "if any", including any interest they might have under a trust.

57. Ms Petrenko did not suggest this was not a possibility, but that Chief Master Marsh decided not to take that approach here. Instead, he decided the issue, as he was entitled to, such that his rejection of Mrs Dua's contention that Fulmer House was held under the Fulmer Trust formed an essential part of his reasoning. Ms Petrenko is right that this was the approach of the Chief Master. However, his decision in this respect is not to be divorced from the context in which charging order decisions are made, where it is not necessary to determine the precise interests, and his conclusions were very much based on the evidence placed before him at that stage.

58. There are two other points I should also note here. The first is that there is a procedure whereby objectors may participate in charging order proceedings by filing and serving their own evidence, and the court may give directions for the resolution of any dispute raised by their objections: see CPR 73.10A(2) and (3)(c). That did not happen in this case. Secondly, the Law Society could, but did not, seek to join Mr Dua to the earlier proceedings. If Mr Dua had applied to be joined he might well have been faced with the same argument which the Court of Appeal theorised Mrs Marks might have been met with in *Skyparks*, namely that he should not be joined, but would become a necessary party in any later enforcement proceedings, such as are now occurring, at which stage he could produce his evidence and argument.

59. Finally, in relation to *Skyparks*, I should note that the Court concluded that Mr Marks did have a beneficial interest in Woodwinds, under the Chanick Trust, but it was a defeasible interest with no realisable value, and insufficient to serve as a basis for the orders for possession and sale which the judge made (see at [52]).

60. So far as the overall guiding principles in relation to abuse of process, the speech of Lord Bingham in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 sets out the main principles. The case is so well known that I will take the facts very shortly. Mr Johnson, in the first set of proceedings, caused a company he controlled, to instruct solicitors in relation to the exercise of a purchase option, which resulted in litigation with the vendor and losses suffered by the company. The company sued the solicitors and shortly before that was settled it was identified Mr Johnson might have a personal claim also against the solicitors for losses he suffered. After the company's claim was settled he issued his own claim against the same solicitor defendants. They applied to strike out on abuse of process grounds, and also on the basis of the rule in

Prudential (the reflective loss principle). The latter is not relevant to this case, but the former is.

61. The House of Lords dismissed the abuse of process aspect of the application and considered the principles applicable in *Henderson v Henderson* abuse of process cases. The key passage is in the oft cited speech of Lord Bingham at page 31, which is worth reciting here to have in mind the key guiding principles:

> "*Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not … it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

62. This authority emphasises that there are no hard and fast rules, or bright lines, which can be drawn in abuse of process cases. The ultimate question is whether in all the circumstances a party's conduct is an abuse.

63. The decision of the Court of Appeal in *Conlon v Simms* [2008] 1 WLR 484 also considered abuse of process principles, and may be said to support three relevant propositions, namely that: the fact that the parties are not the same is not dispositive; but, it will be a rare case where the re-litigation of an issue which has not been decided between the same parties or their privies will amount to an abuse (the latter also emphasised in the decision of the House of Lords in *Re Norris* [2001] UKHL 34, another husband and wife case); and this is particularly so where the conduct which

is said to be abusive is that of the defendant making a second and successive attempt at defending themselves (though as noted by Mann J in *Barnett Waddington Trustees (1980) Ltd v Royal Bank of Scotland Plc* [2017] EWHC 834 (Ch), the doctrine of abuse of process is as capable of applying to defendants and defences as claimants and claims).

64. In *Conlon v Simms* the defendant was a solicitor who had been in partnership with the claimants. The defendant was found to have acted dishonestly in certain transactions and the Solicitors Disciplinary Tribunal struck him off the roll of solicitors. The claimants sued the defendant alleging that he had induced them to enter into a partnership agreement with him, seeking to rely on the findings of the Tribunal. The defendant denied the allegations and contended that the Tribunal's findings were inadmissible as evidence of the facts found against him. The judge held that the defendant was abusing the process of the court by making a collateral attack on the Tribunal's findings.

65. The Court of Appeal allowed the defendant's appeal. At [139] Jonathan Parker LJ noted that the starting point is as follows:

"139. As I have already pointed out, we are bound by the decision of this court in the Bairstow case [2004] Ch 1—a decision which, in so far as it relates to abuse of process, was in turn based upon the decision of the House of Lords in the Hunter case [1982] AC 529. Accordingly, the starting point on this aspect of the case must be Sir Andrew Morritt V-C's proposition (d) in para 38 of his judgment in the Bairstow case. I quote that proposition again, in full:

"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

66. Jonathan Parker LJ went on to recognise that the court may be slower to conclude that a defendant raising a defence which was unsuccessful in earlier proceedings will necessarily be bringing the administration of justice into disrepute or causing substantial unfairness to the claimant by raising it again in later proceedings, in the following terms (at [146]-[147]):

"146. In such circumstances I consider that there is force in Mr Simms's submission that in denying the allegations of dishonesty made against him in the present action he is doing no more than continuing to protest his innocence of the charges brought against him by the Law Society, albeit he is doing so in the face of the adverse findings of the SDT and the Divisional Court: to use his own words, he has initiated nothing. At the very least, as it seems to me, that is a factor which should be brought into account in considering whether the Bairstow conditions are satisfied, on the basis that in general the court should be slower in preventing a party from continuing to deny serious charges of which another court has previously found him guilty than in

preventing such a party from initiating proceedings for the purpose of relitigating the question whether he is guilty of those charges.

147. It should also be borne in mind, when determining whether a party (be he claimant or defendant) is abusing the process of the court by mounting a collateral attack on a previous court decision, that the practical effect of finding him guilty of such an abuse is to prevent him denying the allegations against him save in circumstances where he is in a position to adduce additional evidence which could not with reasonable diligence have been adduced in the earlier proceedings and which, if admitted, would have "changed the whole aspect of the case": see Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801, 814, per Earl Cairns LC, and the Hunter case [1982] AC 529, 545b–f, per Lord Diplock. To that extent the party guilty of abuse of process will, as I see it, be placed in a worse position in regard to the adducing of evidence than he would have been in had the previous decision been admissible as prima facie evidence (for it would be no more than that) of the facts found."

67. The Court of Appeal decided (see further at [149]-[150]) that there was no abuse of process because: (i) the defendant had not "*initiated*" the allegation; and (ii) the facts to be established in the proceedings before the Tribunal were different from the proceedings initiated by the claimants against the defendant.

68. An additional reason why the courts may take a more cautious approach in relation to abuse of process allegations concerning defendants is because the claimant is, subject to the court's overriding case management powers, in the driving seat so far as litigation is concerned. They can choose who they join as defendants, or respondents, and when. This point takes on even greater force where the defendant in the second action was not a party in the first action, but could have been joined.

69. In the context of disputes relating to property subject to a trust, or involving more than one party alleged to have the same interest, there are procedural safeguards for a claimant to employ, even falling short of joinder. For example, under CPR 19.8A there is the power to make judgments binding on non-parties where property is subject to a trust. There also rules relating to representation of beneficiaries by trustees (CPR 19.7A). And wider rules concerning representative parties with the same interest (CPR 19.6). None of those rules have been invoked in this case.

70. The stage at which proceedings have reached may also impact on the court's decision to strike something out as an abuse. In *Booth v Booth* [2010] EWCA Civ 27 the claimants had unsuccessfully challenged the validity of their father's will. The second claim concerned the administration of their mother's estate, and raised similar issues, but it was found that this did not constitute an abuse of process by the judge at first instance, when determining a number of preliminary issues. The Court of Appeal ultimately concluded that the reasoning which led to this conclusion by the judge at first instance was not supportable, but nevertheless declined to reverse the decision. They were significantly influenced in this respect by the fact that the rights had already been substantially determined by the findings in relation to the other preliminary issues. So, it is apparent that the applicant would have been on stronger ground if they had brought their application to strike out at an earlier stage in

proceedings, before trial. This reflects the fact that the extended abuse of process principle is concerned with the court's procedures (*Virgin Atlantic* at [25]).

71. Ordinarily the court will not consider the underlying merits of the case, but it would appear that is not a rigid rule. The parameters in relation to the extent to which the merits of the underlying proceedings may be taken into account were discussed in *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823. The first action was brought by the claimant against the defendant solicitor for breach of their undertaking. The second action alleged inducement of a breach of contract and misrepresentation. The parties were the same. The Court of Appeal nevertheless concluded that the second action was not an abuse, reversing the decision below. When discussing points of general application, under the heading "prospects of success", the Court stated (at [57]):

"Given Lord Bingham's emphasis [2002] 2 AC 1, 31 on the need for the court to avoid adopting "too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court", it is necessary to proceed with care in relation to a contention that some aspect of a particular case must be disregarded as irrelevant in principle. However, it seems to me that it would at most only be in an extreme case (either way) that the merits, in the sense of prospects of success, of the second proceedings can be relevant to deciding whether bringing them separately is an abuse of process. If the case can be shown to be cast-iron, so that judgment could be obtained for the claimant under CPR Pt 24, this might perhaps outweigh factors suggesting that the case ought to have been brought as part of the earlier proceedings. If, on the other hand, the case is hopeless, then it may be capable of being struck out for that reason in any event. But if, as here, the prospects of success are uncertain but the case is not suitable for summary judgment for either party under CPR Pt 24, then it seems to me that it is inappropriate to attempt to weigh the prospects of success in the balance in deciding whether it is an abuse of the process to bring the claim in later proceedings, rather than as part of the earlier proceedings. In my judgment, when Lord Bingham spoke of a "broad, merits-based" approach, the merits he had in mind were not the substantive merits or otherwise of the actual claim, but those relevant to the question whether the claimant could or should have brought his claim as part of the earlier proceedings. A defendant may feel harassed by having brought against him what appears to be a weak claim, but that factor should not count in this context. Whether the claim appears to be weak or strong, it is the fact of it being brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse."

72. So, the broad-merits based enquiry contemplated by Lord Bingham in *Johnson v Gore Wood* is in almost all cases focused on "*the public and private interests involved*" and engaged by successive actions involving the same or similar issues involving the same or connected parties. This must have regard to the twin objectives and desirability of finality of litigation and prevention of unjust harassment. But where the application is being considered at trial, and where it is apparent that by the

time of trial the factors relied on by the claimant in support of that outcome are not supported by the evidence, that is a factor, in my judgment, which the court may take into account.

73. I consider there are reasons why, in this case, it may be open to do so. Firstly, because if there has been any unjust harassment it has already occurred. The claimant had the ability to stop the abuse before trial by applying to strike it out. Secondly, it is going too far to say that an abuse of process argument cannot be successful at trial. Some abuse of process arguments or defences might require oral evidence and can only be determined at trial. But where, as here, the features relied on did not require oral evidence to be adduced, then this is a relevant factor to take into account. Thirdly, reasons of efficiency justify rejecting attempts to relitigate but where the litigation has reached the trial stage, and the determination of the abuse of process argument is happening at the same time as the determination of the case itself, any efficiency or cost saving in the public interest is much reduced.

Res Judicata and Abuse of process: conclusions

74. Applying the above principles to this case, I reject the Law Society's contention that Mr Dua should be precluded, at this trial, from seeking to adduce evidence and argue that Mrs Dua does not have a beneficial interest in the properties in question, or any interest of any realisable value, and to do so placing reliance on the Fulmer Trust. I do so for the following reasons:

    (1) I accept that Chief Master Marsh's decision in 2013, in one of the charging order proceedings, involved him rejecting substantially the same defence advanced by Mrs Dua in those proceedings and which Mr Dua now seeks to rely on;

    (2) I also accept that Mr Dua's involvement in those proceedings, by assisting Mrs Dua in the preparation of her evidence, and at court, as a McKenzie Friend, may be fairly characterised as close involvement which, taken together with the first factor, could make him vulnerable to the contention that he should be treated as bound by any findings made as a result of that process;

    (3) However, set against that is the important starting point that ordinarily only parties to proceedings are bound by the outcome, and care needs to be taken in the application of a rule which would depart from that. That is particularly so where there are rules which enable third parties to be joined or bound in, which can be used to protect the other parties, as I have referred to above, and where they have not been employed. Becoming a party gives the person in question certain unassailable rights: to adduce evidence, to be heard, to seek to appeal. Mr Dua had none of those in the earlier proceedings;

    (4) Whilst it is not a requirement to establish an abuse, there is no suggestion that Mr and Mrs Dua were "gaming the situation" with a conscious intention to run the defence through Mrs Dua first and then Mr Dua;

    (5) The context of the first decision/action was an earlier stage in the enforcement process, where it was not necessary to make the decision the Master made. I

accept he did make that decision, on a summary basis, rejecting Mrs Dua's contention that her interest in the properties had been settled on trust. But the context in which he made it, and that it was not strictly necessary for him to go as far as he did, is a relevant factor to take into account. In addition, whether an order for sale should be made gives rise to different and additional considerations;

(6) It would do the administration of justice a disservice to conclude that those who assist others in litigation could be prejudicing their own position by doing so, at least without any conscious appreciation they were doing so. In this case no warning was given to Mr Dua of this possible consequence. I am not satisfied that the fact that a husband helps their wife with litigation is rare, particularly where the wife is acting as a litigant in person. In my judgment if a spouse is to be viewed as potentially prejudicing their own position by assisting that of their spouse it would be preferable for them to be put on notice of that, and a warning should be given by the claimant, or the court, including that they should take legal advice. The best form of warning, of course, is to be joined in. In some cases a lesser type of warning may be considered to be sufficient. In this case no warning was given. Nor is there any suggestion Mr Dua received legal advice as to his position or interests at the time, indeed it was the precise absence of such legal assistance and representation for Mrs Dua which has drawn him into the cross-wires of a strike out argument;

(7) If there is any force in the contention that the Law Society is subject to unjust harassment by having to fend off a defence twice, that can hardly be said to be oppressive to them in this case, and nor does their conduct suggest that it has been oppressive to them. They had it in their hands to avoid the oppression by joinder or binding Mr Dua into the earlier proceedings if they wished, but they did not. They also had it in their hands to make a strike out application at an earlier stage in proceedings, in advance of trial, but they did not. Moreover, any complaint the Law Society might have made is now largely in the past;

(8) Similarly little is to be gained, from an efficiency or cost point of view, and having due regard to the wide public policy considerations, in acceding to the strike out argument now;

(9) It should also be noted that the Duas have not initiated either the proceedings under consideration in this case. Mr Dua is a defendant to this action and Mrs Dua was (in substance) a defendant to the earlier action (though the procedural effect of a challenge to an interim charging order may result in that person becoming the notional claimant);

(10) In all the circumstances, I conclude that Mr Duas' close involvement in the earlier proceedings before Master Marsh in 2013, as described above, when taken with all the other factors mentioned above, is not such that it would be an abuse for him to defend these possession and sale proceedings relating to his home on the basis that Mrs Dua does not have any beneficial interest, or none with any realisable value, because the relevant properties are held by the Fulmer Trust. The fact that in doing so he may benefit Mrs Dua, as a consequence, in circumstances where she might well be said to be subject to an abuse of process argument, is not

in my judgment, a relevant, or sufficient, reason to conclude he should not be entitled to run the defence for his own benefit and reasons.

75. Accordingly, it is not necessary for me to consider the underlying merits of the proceedings in deciding whether or not Mr Dua's conduct is an abuse. But in case I am wrong, and the above factors are insufficient to reject the abuse of process argument, I consider that the merits do have a role to play in this case, at this very late stage in the proceedings, and may be said to be a further relevant factor supporting the rejection of the argument, for the following two additional reasons:

    (11) As I have already stated above, the three main points in support of Chief Master Marsh's decision are now no longer supported by the Law Society or the evidence now before the Court. That is not to say the decision taken by the Master was necessarily wrong, on the evidence he had before him at the time. But with the evidence now before this court, and admitted into evidence at trial, the points are now no longer supportable, or supported by the counter-party to the earlier proceedings. That is an exceptional feature of this case;

    (12) Moreover, even now it seems to me the Law Society has not captured all of those who might have an interest in the outcome of these proceedings and entitled to be heard. The (at least main) potential beneficiaries identified in the Fulmer Trust were the children of the Duas. They have not been served or joined. So there remains the risk that they could seek to argue that the Fulmer Trust is effective and removes any justification for any charging order being enforced. In these circumstances, the administration of justice is best advanced by seeking to resolve the underlying merits of issues, after having conducted a trial of those issues, between the parties now before me, especially where, as appears below, I conclude those issues should be resolved against the Law Society. It is better for the Law Society, and for wider court users, to know that now.

76. I therefore reject the abuse of process argument in relation to Mr Dua. Given that Mr Dua can raise the same line of defence which Mrs Dua wishes to rely on, there is no need to decide whether or not the stance adopted by Mrs Dua is barred by res judicata, or issue estoppel, or is an abuse of process.

77. I shall turn now to consider the facts in more detail and which may be said to be relevant to the remaining issues of what interest Mrs Dua has in the properties, having regard in particular to the Fulmer Settlement Trust, and whether I should make an order for possession and sale.

The Beneficial Interest Issue

Introduction

78. Before making any findings of fact in relation to the Beneficial Interest Issue it is appropriate I should say a few brief words as to my overall impressions of the witnesses I heard, namely Mr and Mrs Dua, and the approach I have taken to making my findings.

79. Starting with the latter, I have reminded myself of the principles to apply as most recently summarised by the Court of Appeal in *Martin v Kogan* [2019] EWCA Civ 1645 at [88]. Findings of fact are to be based on all the evidence, though it will usually be appropriate, especially in cases which relate to events some time ago, as in this case, to start with a consideration of the contemporaneous documents and evidence on which undoubted or probable reliance can be placed. The fallibility of human memory is well established and is best assessed against the documents and natural or probable inferences from them. The manner in which evidence is given also has its role to play, though the role played by the demeanour of the witness when giving evidence tends to be overstated. The greatest focus needs to be on linguistic consistency, or inconsistency, and the extent to which the oral evidence is corroborated or consistent with the remainder of the evidence.

80. So far as my impression of the Mr and Mrs Dua were concerned, in general terms I consider Mr Dua was doing his best to assist the court. He had a reasonably good recollection of events, and of the documents in the bundle, sometimes drawing the court's attention to documents which helped clear up matters lacking in clarity. There were times where he was prone to giving speeches in support of what, I deduce, he perceived to be his best line/s of defence, and it became apparent during the course of his oral evidence that his main witness statement, dated 11 September 2020 contained errors, including as to the consideration and basis on which 96 Hodder Drive was transferred into the joint names of him and Mrs Dua, and the timing of its sale. Mr Dua explained he had intended to correct the first and third of these points, and had done so in an earlier statement which he had been refused permission to rely on at the PTR. I do not believe Mr Dua intended to give inaccurate evidence, but he clearly did sign a statement which contained inaccuracies. I consider that hardly surprising given the passage of time. I therefore treat his oral evidence with caution. An illustration of why I should do is the second point identified above, relating to the transfer into joint names of 96 Hodder Drive. Notwithstanding the fact that the title showed that Mr and Mrs Dua had declared this should be held as beneficial joint tenants, Mr Dua insisted that he was the owner. On further questioning his stance softened. I have in mind that his evidence in this respect may have been coloured to some degree by his attitude to who would control the decision making process in relation to the use of this property, rather than necessarily pointing to the conclusion that he did not intend Mrs Dua to share in any equity in the property.

81. As for Mrs Dua, whilst she is the reason why the Law Society are pursuing this claim, she had a lesser role to play in giving evidence. She very much deferred to Mr Dua and his evidence. She had the unfortunate tendency of seeking to anticipate the line of questioning, or suggest the line of questioning was beyond her ken, which I did not find convincing, and she was very defensive. She was prone to outbursts about the mistreatment she had received at the hands of the Law Society, which was a further warning sign as to the potential lack of reliability of her evidence. So caution is also required in relation to her evidence.

82. All that said, this is not one of those cases where there is a stark conflict of oral evidence between two or more witnesses. The Law Society called no oral evidence. And I bear in mind that through the passage of time documents may no longer be

available to assist with giving evidence. Where the oral evidence in question from the Duas is background to the ultimate issues, and concerns events, rather than more subjective questions of intention, and not obviously contradicted by the available contemporaneous documents, I consider it is likely to be broadly accurate.

The Beneficial Interest Issue: The Sub-Issue

83. The main sub-issues raised by the parties' evidence and submissions (this being a part 8 claim, the court did not have the benefit of statements of case at trial), may be summarised as follow:

    (1) The Fulmer Trust, namely and in particular: (a) proof; (b) determination of what property it holds; and (c) interpretation of its terms and whether any trust was "illusory";
    (2) If sub-issue (1) does not determine the issues as to beneficial interests in relation to the properties, on what terms did Mr and Mrs Dua hold the properties, which splits into the sub-issues of whether: (a) the presumption of equality applies; or (b) an implied (or resulting) trust analysis displaces this, and in each respect considering separately Fulmer House (4 titles) and 49 Sudbury Avenue (1 title);
    (3) Equity of exoneration or equitable accounting issues relating to the properties, including in particular having regard to Mr Dua's contentions about payment of the mortgage.

84. Before analysing those issues, I shall set out some further relevant facts.

The Beneficial Interest Issue: The Facts

85. Mr and Mrs Dua met in late 1983/early 1984. At the time Mrs Dua was studying at the College of Law, living in rented accommodation. Mr Dua was nearing the end of his four-year training contract with Arthur Anderson. After completing his training contract, in 1985, he was admitted as a member of the Institute of Chartered Accountants in England and Wales. He has worked in various accountancy and business roles since then.

86. Before Mr and Mrs Dua met, Mr Dua was living with his brother at a property called 96 Hodder Drive, Perivale, Middlesex UB6 8LL, which property the two brothers had purchased together in 1981, with assistance from their father. They were both trainee accountants at the time and Mr Ravi Dua confirmed in his evidence that they both paid for the purchase costs from their savings and they shared the mortgage and other ongoing outgoings.

87. Mr and Mrs Dua married in 1985 and after their marriage Mrs Dua moved into 96 Hodder Drive to live with Mr Dua and his brother. Mrs Dua continued with her studies. Mr Dua's brother, Ravi Dua, left the property sometime later, when he married. Mr Dua refers to him buying his brother's share at this time. Mr Ravi Dua does not address the question of the transfer to Mr and Mrs Dua in his evidence.

88. A copy of the transfer which Mr Dua referred to in his evidence has been obtained. This records that, on 11 September 1985, 96 Hodder Drive was transferred from the

two brothers to Mr and Mrs Dua for the sum of £15,000 with Mr and Mrs Dua to hold the property as "*beneficial joint tenants both in law and in equity*". Mr Dua's oral evidence was that he did not pay much attention to this at the time and that the only reason why the property was registered in joint names in this way was so that if Mr Dua died then Mrs Dua would inherit the property. He suggested he was still the person who controlled what happened to the property and viewed it as his to do what he wanted with it, including, if necessary, to make provision for other relatives.

89. In 1987 Mr and Mrs Dua decided to move to 49 Sudbury Avenue, Wembley, HA0 3AN. They did not sell 96 Hodder Drive in order to acquire the property, and instead that property was rented out. 49 Sudbury Avenue was acquired with a mortgage from Lloyds Bank plc and from using his savings, and transferred into their joint names on 10 July 1987 for the sum of £93,000. The transfer document is silent as to the terms on which they were to hold the property. Mr Dua's oral evidence in relation to this was similar to the evidence he gave in relation to 96 Hodder Drive, namely that the only reason why the property was registered in joint names in this way was so that if Mr Dua died then Mrs Dua would inherit the property and that he did not intend, by putting the property into joint names, to give Mrs Dua any share of the equity during his life. The official copy of register of title for 49 Sudbury Avenue (with title number NGL239371) shows that Mr and Mrs Dua became registered proprietors on 10 September 1987, but is silent as to the terms on which it is held and whether Mrs Dua has any beneficial interest in it.

90. Mrs Dua confirmed in her evidence that she did not have any discussions with her husband on the ownership of 49 Sudbury Avenue and that she never thought about it whilst they lived there. She stated if someone had asked her at the time she would have said it was hi property because he funded the purchase and made the mortgage payments. Mr Dua confirmed in his oral evidence that he did not any express discussions with Mrs Dua as to ownership in relation to 49 Sudbury Avenue.

91. In the meantime, Mrs Dua's training had progressed. She obtained a training contract in 1988 and qualified as a solicitor and was admitted to the roll in 1990.

92. Whilst living at 49 Sudbury Avenue, Mr and Mrs Dua had two children, a son born on 1 July 1991, Shiv Chadha Dua, and a daughter born on 28 August 1992, Ilesha Lakshmi Dua. During this time Mrs Dua worked part-time. By this time Mr Dua had set up his own accountancy practice, which was a growing success. In his evidence he referred to two major extensions being built at 49 Sudbury Avenue, in 1992/93 and in 1995, order to better accommodate his accountancy business, which he operated from that address. Mr Dua refers to paying for these extensions out of his own resources, but he has not retained any documents from this time. The overall picture, however, suggests that this is likely to be correct. Mrs Dua only seems to have started up her own practice in November 1994. From that date to 2000 she was operating a high street practice from Southall. Her main role seems to have been in conveyancing.

93. In 1997 Mr Dua started up a new business venture involving education for foreign students, offering courses to those students. He started a college based in Oxford Street, which expanded rapidly. Alongside this, he also purchased properties to provide student accommodation, including in his own name and via certain corporate

vehicles. Mr Dua described this in evidence as also being a successful and growing business.

94. 96 Hodder Drive was sold in 1999. Mr Dua stated he used the net proceeds of sale to pay for the extensions. After it became apparent that his written evidence was incorrect, by reference to the date of the sale transfer, he subsequently clarified that what he meant by this was these extensions were originally built using his funds, and loans, which were then "reimbursed" by the net proceeds of sale from 96 Hodder Drive.

95. Mrs Dua's practice in Southall was not working out for her and she decided to close the practice office and work with lower overheads from home, in Sudbury Avenue, from February 2000.

96. By 2003 Mr and Mrs Dua were looking for a bigger property to live in, for themselves and their children, who were at, or approaching, secondary school age. Mr Dua refers to various efforts by him to raise money to enable them to proceed with such a purchase by re-mortgaging various properties in his name. With some modifications, the documentary evidence substantially supported and was consistent with his recollections in this respect. By 14 March 2014 a sum of £400,000 had been raised and which was held on deposit in a Money Market Account with HSBC Bank Plc. Whilst these monies were raised substantially through Mr Dua's efforts and earnings, with Mrs Dua's practice turning over relatively modest sums during this period, they were placed into a joint account in the names of Mr and Mrs Dua.

97. By 2004 Mr and Mrs Dua had identified Fulmer House as a property they would like to buy. This property was acquired in their joint names using a mortgage from HSBC at an eventual purchase price of £1,887,547, with the purchase completing on 22 October 2004. It is necessary to refer to certain steps taken by the Duas in relation to Fulmer House before completion occurred.

98. On 8 April 2004 Mr and Mrs Dua, or an agent on their behalf, instructed a firm of surveyors called BBG Surveyors (this firm was linked, it would appear, to Bradford and Bingley plc) to report on the condition of Fulmer House and provide a market valuation. They described its location as follows: "*Fulmer is a sought after village about one mile from Gerrards Cross. It is a predominately [sic] conservation area with several Grade II listed properties, including Fulmer House*." It is described as a "*substantial Georgian period Grade II listed detached house, which dates I would estimate around 1750 and with later additions I believe added*." Some elements of disrepair were noted in the report. Accommodation is described as including the main house itself, a further guest wing and a coach house, as well as grounds of about 12 acres. Fulmer House had been on the market for some time, and had not sold with the valuer noting that the prices paid for substantial detached houses had suffered over the past year or so. The asking price had initially been set at £5m and then reduced to £2.75m and offers were then invited in excess of £2.5m. The valuer valued it, with vacant possession, at £2.25m.

99. On a date which is unclear from the documents, HSBC were approached as lender, and according to Mr Dua's evidence they valued the property at £2.5million. There is some corroboration for this figure in other documents, which I will come to shortly.

100. Mr Dua described the financial arrangements for the purchase of Fulmer House as being fairly complicated. HSBC lent a total of c. £1.8m to enable Fulmer House to be purchased on terms that they received a security deposit of £90,000 to be held by them for one year as security for the first year's mortgage interest repayments, which at that time were much higher than they are now. The lending by HSBC was also secured by a cross charge between Fulmer House and 49 Sudbury Avenue (and this has more recently been confirmed by HSBC).

101. Mr Dua stated in his evidence that the contracts for the purchase of Fulmer House were exchanged before the trust deed was executed on 15 October 2004, but the question of whether this is so is no longer a live issue before me and I make no finding on this point in view of the lack of documentary evidence confirming the position either way.

102. On 15 October 2004 the solicitors acting for Mr and Mrs Dua, Simon & Co, provided the Duas with an amended completion statement for the purchase of Fulmer House. In order to justify the conveyancing costs indicated the solicitors referred to the substantial additional costs arising from the numerous titles to the property, and the level of difficulty arising in the transaction.

103. Also on 15 October 2004, Mr and Mrs Dua executed a deed of settlement establishing a trust called the "Fulmer Settlement 2004" ("the Fulmer Trust"). This was drafted for them by Teaco Associates, a firm of trust and estate practitioners then practising from offices at 41-43 Green Lane, Northwood, Middlesex. Their signatures were witnessed by Mr Richard Tutty of Teaco Associates on 15 October 2004, who raised an invoice to them for his services in respect of the preparation and finalisation of the Settlement Deed ("the Trust Deed"), and registering the same with the Inland Revenue.

104. The Trust Deed identified Mr and Mrs Dua as the "*Settlors*" and "*Original Trustees*". The "*Beneficiaries*" were identified at clause 1.5 as including, at clause 1.5.1, "*The Settlors and their children and descendants*", and at clause 1.5.2, "*The spouses, widows and widowers (whether or not remarried) of paragraph .1 of this sub-clause*", and, at clause 1.5.3 "*Any Person or class of Persons nominated to the Trustees by 1.5.3.1 the Settlors or 1.5.3.2 two Beneficiaries (after the death of the last surviving Settlor) and whose nomination is accepted in writing by the Trustees*". "*Person*" was defined in clause 1.6 to include "*a person anywhere in the world and includes a Trustee*". The "*Trust Property*" was identified as any property comprised in the "*Trust Fund*", which was defined in clause 1.2.1 as the property described in Schedule 1, and any other property transferred to the trustees to hold on the terms of the Settlement, under clause 1.2.2. Schedule 1 to the Deed referred to the following items of property:

"*1 ordinary share of £1 in Espri Properties Limited valued at £1*
1 ordinary share of £1 in 1st London Properties Limited valued at £1
All that the property situated at and known as Fulmer House, Fulmer, Buckinghamshire, SL3 6HN valued at £2,500,000 subject to loans on the property."

105. As to trust income, the Trust Deed recorded at clause 2 that, subject to certain Overriding Powers (defined in clause 3), "*2.1 The Trustees shall pay the income of the Trust Fund to the Settlors during their respective lives. 2.2 Subject to that, if either Settlor dies during the Trust Period, the Trustees shall pay the income of the Trust Fund to his or her widow during his or her life. 2.3 Subject to that, during the Trust Period, the Trustees shall pay or apply the income of the Trust Fund to or for the benefit of any Beneficiaries as the Trustee think fit*."

106. Clause 3, entitled Overriding Powers, provided for wide powers of appointment in relation to the trust fund for the benefit of any of the beneficiaries, including by way of discretionary trusts.

107. Clause 4 then contained a "*Default Clause*" which stated that: "*Subject to that, the trust fund shall be held on trust for the children of the Settlors in equal shares absolutely*".

108. So far as the shares in the two companies which were placed into the trust, Espri Properties Limited and 1st London Properties Limited, Mr Dua described these companies as holding properties for which he had advanced monies for the purchase of student accommodation and that he wanted his children to benefit from them. Unfortunately, that did not transpire to be the case as these investments were adversely affected by the financial crisis, which occurred in or about 2008.

109. The purchase of Fulmer House completed on 22 October 2004. The transfer document shows that the sale was effected by Barclays Bank Plc (as successor to Woolwich Plc), under a power of sale, to Mr and Mrs Dua for the sum of £1,887,547.00 and the transfer deed had been signed on behalf of the Bank on 14 July 2004. Five title numbers are referred to on the transfer, including the 4 titles which are now showing as making up Fulmer House. The fifth title number was not explained in the evidence, but the property description on the transfer matches the description in the valuation, and the four titles still linked to the property, namely Fulmer House itself, Knoll Cottage, Ferndown Cottage and land lying to the South East of Fulmer Road but on the North side of Fulmer House. The transfer is silent as to the terms on which Mr and Mrs Dua were to hold the property and makes no reference to the Fulmer Settlement 2004.

110. The Trust Deed was, however, sent by Mr Tutty of Teaco Associates, to the Inland Revenue, on 16 October 2004, under cover of form 41G (Trust). This form recorded the trust fund assets as including Fulmer House and the two shares. The Inland Revenue confirmed receipt of the same in their letter of reply dated 2 November 2004 and that they had opened a file for the Settlement. Mr Tutty confirmed in his evidence that he had no further involvement in the trust administration thereafter, and nor did his firm. His firm no longer hold the original deed in storage as this was requested by a firm of solicitors in 2010. I will return to that point below.

111. Mr Dua gave oral evidence that shortly after the Trust Deed was executed he was advised that it would be better to entirely exclude him and his wife from being beneficiaries under the Trust Deed. Mrs Dua's oral and written evidence was consistent on this issue. She had previously noted in her witness statement of 4 March 2013, in the earlier charging order proceedings, that the beneficiary clauses of the

Trust Deed were adjusted "*precluding Mrs Dua and her spouse the settlors' from being beneficiaries*."

112. On 24 October 2004 minutes of a meeting of the trustees of the Fulmer Settlement 2004, namely Mr and Mrs Dua, record that the completion of Fulmer House had occurred and that having examined the trust deed, it was resolved that (bold emphasis added by me):

"*1. The Settlor's, being both Trustees, being both present re-affirmed transfer of all their beneficial and equitable interests in the Shares and Fulmer House as set out in Schedule 1 of the Trust Deed to the Trust* ***for the exclusive benefit of their children and lineal descendants***. *To ensure there is no confusion and for the avoidance of any doubt. That accordingly clauses 1.5, 2 and 4 of the Trust Deed be and are hereby amended to read (deleted items double strike through additions underlined) as follows*:

1.5 "The Beneficiaries" means:
1.5.1 The Settlors ~~and their~~ children and <u>their</u> descendants."

113. In clause 2, sub-clauses 2.1 and 2.2 were also deleted, to remove the settlors from being entitled to receive trust income, and clause 2.3 was amended to read:

"*2.3 Subject to that, during the Trust Period, the Trustees shall pay or apply the income of the Trust Fund to or for the benefit of any Beneficiaries as the Trustee think fit <u>(after making good accumulated past losses if any</u>).*"

114. The Default Clause, clause 4, remained unchanged.

115. The minute was signed as an approved minute by both of the Duas both as Trustees and in their personal capacity. The oral evidence of Mr Dua suggested that this minute and the later minute were drafted by him, notwithstanding they were prompted by advice from third parties. The amendment to clause 2.3 does suggest an accountancy bent to them. I find it is likely he was the draftsman.

116. Following certain renovation work being carried out at Fulmer House, Mr and Mrs Dua and their children moved into Fulmer House, in or about September 2005.

117. In a further minute of a meeting of the trustees of the Fulmer Settlement 2004, dated 12 September 2005, the move to Fulmer House was noted and it was resolved that, following the move, 49 Sudbury Avenue was vacant and being used for storage and that "*the remaining unencumbered equity belonging to Mr Shashi Dua and Mrs Ashoo Dua be purchased by the Trust for £90,000 being a fair estimate of the value of the remaining equity taking into account the charge by HSBC*". This is somewhat clumsy drafting, but it is reasonably clear that what was intended was a transfer of the beneficial interest and this was being valued by estimating the equity of redemption.

118. The minute went on to state that: "*These monies are currently held by HSBC as surety monies on completion of purchase of Fulmer House and remortgage of 49 Sudbury Avenue on 22nd October 2004. The monies should be due for release on the*

anniversary of the completion on 22nd October 2005. This arrangement and timing is acceptable to both Mr Shashi Dua and Mrs Ashoo Dua personally".

119. The minute was signed as an approved minute by both of them. Again, I find this was drafted by Mr Dua.

120. The college business of Mr Dua on Oxford Street, and the residential business built off the back of it, later came to be severely impacted by the financial crisis. According to Mr Dua's evidence some of his financial difficulties had started by 2007.

121. At about the same time Mr and Mrs Dua had a dispute with the private school which was educating their son through his GCSEs. On 4 October 2007 Claire's Court Schools Limited obtained a charging order to secure the debt owed to them, which was registered against Fulmer House and in particular title no. BMC61904.

122. Mr Dua was unable to deal effectively with these all the pressures, and on 12 December 2008 he was adjudged bankrupt (as referred to in the letter of 7 June 2019 written by the solicitors for the Law Society). Mr Dua stated that the bankruptcy petition related to the debt to Claire's Court Schools Limited and documents were not properly served on him, but his application to annul was not granted.

123. With effect from 9 September 2009 a trustee in bankruptcy, Mr Robert Pick, of Grant Thornton, was appointed.

124. An intervention was also made by the SRA into the practice of Mrs Dua, in 2009, which intervention was unsuccessfully challenged by her. In October 2011 she was suspended for one year and conditions were imposed on her practice. She considers they were unfairly restrictive, and she gave evidence that her career and life had been ruined by the Law Society. She indicated that she only began to receive gainful employment again from 2015, and much of that work has been of a part-time and piecemeal nature.

125. On 24 February 2010, a firm of solicitors, Veale Wasbrough Vizards, acting for Mr Dua's trustee in bankruptcy, Mr Pick, wrote to Teaco Associates enquiring into the affairs of Mr Dua. They stated: "*We understand that your firm was responsible for drafting a deed of settlement establishing the Fulmer Settlement 2004 ("the Settlement") on behalf of Mr and Mrs Dua. The document is dated 15 October 2004. We ask that you deliver to us the file dealing with the affairs of Shashi Dua as it was his property and now falls within the bankruptcy estate*."

126. On 1 March 2010 Teaco Associates responded to this letter and enclosed the file they had on the matter, including the original Trust Deed.

127. Under section 283A of the Insolvency Act 1986, where property comprised in the bankrupt's estate consists of a dwelling-house which at the date of the bankruptcy was the sole or principal residence of the bankrupt then at the end of three years beginning with the date of the bankruptcy the interest mentioned ceases to be comprised in the estate and vests in the bankrupt if the trustee in bankruptcy fails to

take certain realisation or preservation steps in relation to that property within that three year period.

128. The investigatory steps undertaken by the trustee within this period are therefore explicable by that section of the Insolvency Act, since Fulmer House was Mr Dua's principal residence at the date of bankruptcy.

129. It is evident however that they did not realise any interest of Mr Dua's after receipt of the Trust Deed. I have already referred to the up to date position so far as Mr Dua is concerned in paragraph 29 above. In short here, Mr Pick has since ceased to be Mr Dua's trustee and the matter has reverted back to the Official Receiver. Mr Dua remains undischarged. In his evidence he stated that his bankruptcy did not prevent him from being able to work as an accountant and property manager and he has continued to earn income from those sources since 2009. As a result, he says he has not taken steps to resolve his bankruptcy. He has more recently served subject access requests on the Official Receiver in order, he says, to try to obtain further information from them. The Official Receiver has been served but has chosen not to participate in these proceedings.

130. Mr and Mrs Duas' evidence was that throughout the period in question, and notwithstanding Mr Dua's bankruptcy, it was Mr Dua alone who continued to pay the mortgages and overheads throughout the period in question. Mr Dua sought to make good this point by reference to a lengthy spreadsheet which sought to show how money was taken from his sole account, in cash, and then moved via another account, in order to pay the mortgage payments required to be paid to HSBC. I made clear to the Duas at the outset of trial that I would permit reference to be made to an analysis schedule or spreadsheet so long as it related to documents which had been disclosed and were in the trial bundle. There are some limitations on the usefulness of the spreadsheet. This is in part due to the fact that it can only go far so far, due to the absence of bank records (before 2014, at least in the trial bundle). There also gaps in the spreadsheet in relation to the intervening accounts, though Mr Dua suggested these or some of these had been disclosed to the Law Society. But the matter is also complicated by the fact that the payments were taken from Mr Dua's account by way of cash withdrawals and not always at a time and in sums coincident to the mortgage payments. As such the spreadsheet is not simply a summary of the documents in the trial bundle, or disclosed, but also, in effect, contains forensic analysis of the money flow. Mr Dua cannot act as an expert in his own cause in this respect and no permission to rely on expert evidence has been sought or granted. All that said, and whilst I am unable to make any certain findings of fact, my overall impression is that it is likely that Mr Dua did indeed contribute most of the funds required to service the borrowings with HSBC.

The Beneficial Interest Issue: argument, analysis and conclusions

Sub-issue (1)(a): The Fulmer Trust: proof

131. Whereas before Chief Master Marsh it would appear that the Law Society was casting doubt on the authenticity of the Trust Deed, before me Ms Petrenko did not

seek to do so. I consider she was right not to. There was some evidence before the Chief Master suggesting that the Trust Deed may have been executed in 2004, when Fulmer House was acquired in the joint names of Mr and Mrs Dua. By the time of trial there was further contemporaneous correspondence supporting this conclusion, showing that the trustee in bankruptcy had enquired into its validity, in 2010, and obtained the original Trust Deed from Teaco Associates. Moreover, Mr Tutty confirmed that he witnessed it and his evidence was not challenged. I find that the Trust Deed was executed on 15 October 2014. I also find, and this was also accepted by the Law Society before me, that the variations made by the minute of 24 October 2004, also took place on that date.

Sub-issue (1)(b): The Fulmer Trust: property held

132. So far as Fulmer House is concerned, Schedule 1 to the Trust Deed referred to the property being held as including "*All that the property situated at and known as Fulmer House, Fulmer, Buckinghamshire, SL3 6HN valued at £2,500,000 subject to loans on the property*."

133. As noted at paragraph 37 above, it was accepted at trial that this reference to Fulmer House refers to all four titles, and I consider this was rightly conceded for the reasons set out there, and also the factual context set out in paragraphs 97 to 104 above.

134. For the purposes of this case that leaves the question of 49 Sudbury Avenue, the minute recording the material matters is dated 12 September 2005 and is referred to in paragraphs 117 to 119 above.

135. Ms Petrenko initially submitted that on a proper construction of the minute of 12 September 2005, whilst it might be said that the minute recorded an agreement to transfer the equity in 49 Sudbury Avenue on 22 October 2005, there was no declaration or transfer in writing which satisfied the formality requirements of section 53 of the Law of Property Act 1925. The legal title was already vested in Mr and Mrs Dua and so the question is whether or not the signed minute of 12 September 2005 was sufficient to provide the Fulmer Trust with an equitable interest in 49 Sudbury Avenue. In my judgment it was. I read the minute as an agreement to sell the equity in 49 Sudbury Avenue for £90,000. This was sufficient to transfer the equitable interest. No further written documentation was required.

136. Ms Petrenko initially drew my attention to the decision in *Southern Pacific Mortgages Ltd v Scott (Mortgage Business plc intervening)* [2014] UKSC 52, [2015] AC 385 (also referred to as the *North East Property Buyer's Litigation*) and the passage at [79], in support of the proposition that there is no proprietary interest which can be granted before completion. However, that was in the context of proprietary effects of a sale and lease back arrangement, and whether the purchaser, prior to acquisition of the legal estate, could grant equitable rights of a proprietary character (see at [60]). It was looking at the position of the seller (not buyer), after exchange of contracts. It is clear (see at [57], and reference to the decision in *Lysaght v Edwards* (1876) 2 Ch D 499), that the Supreme Court was not intending to say anything disturbing the line of authority that following exchange of contracts the seller holds the property on trust for the purchaser.

137. In addition, Ms Petrenko accepted in closing that even if there was no equitable interest passing at the time of the minute, the section 53 requirements could be met by a combination of the minute and subsequent oral agreement and/or conduct. So ultimately this point fell away.

138. I have not overlooked the fact the 2005 minute might be said to be somewhat artificial, as the funds were being provided by Mr and Mrs Dua to the Trust to enable it to acquire this interest in 49 Sudbury Avenue from them. But I was not invited to conclude it did not reflect their true intentions, that it was a sham.

Sub-issue 1(c): The Fulmer Trust: illusory?

139. It was also not part of the case put by the Law Society that the Fulmer Trust itself was a sham. But it was submitted that the purported trust is "illusory" in that Mr and Mrs Dua, as settlors and trustees, have reserved such extensive powers for themselves that they have, by the express trust as set out in the Trust Deed (as varied), failed to part with the beneficial interest. This line of attack in relation to property settled on trust has gained increased judicial attention in the last few years. The Law Society referred me two authorities in support of its submission.

140. The first, in time, is the decision of Birss J (as he then was) in *JSC Mezhdunaradniy Promyshleniy Bank v Pugachev* [2017] EWHC 2426. This decision concerned five New Zealand discretionary trusts created by Mr Pugachev. The claim was brought on the basis that Mr Pugachev was the beneficial owner of all the assets held in the trusts (see at [70]). The first basis for this was said to be that the trusts were illusory in that, properly construed and on a proper application of the law to them, the trusts were not effective to divest Mr Pugachev of his beneficial ownership of the assets put in them. The second basis was that the trusts were shams (see at [71]). As Birss J explained (at [168] and [203]) the difference between the two bases is that the former is not concerned with the subjective intentions of the parties, or whether they had an intention to mislead, but instead is an objective inquiry. The third basis for attack was, in the alternative to the first two, that the transfers were effective, but amounted to transactions defrauding creditors, under section 423 of the Insolvency Act 1986.

141. On the facts, Birss J held that the powers conferred on Mr Pugachev as protector could be exercised freely, for his own personal benefit (see at [268]), that trustees could be removed without cause (see at [272]), and concluded in all the circumstances that Mr Pugachev had not divested himself of his beneficial interest (see at [278]).

142. A key part of the reasoning appears to be that as protector Mr Pugachev could exercise powers to make himself the sole beneficiary without the need to consider the interests of anyone else (see at [267], [234]-[246], [222], [180]-[182] and see also the discussion of case law at [158]-[165]). This meant the power was tantamount to ownership, because the person in question can "*basically….do whatever he wants with the property*". The label "illusory" may be said to be misleading, and the test may better be summarised as to whether or not the powers are so broad that what was intended to be a trust was not in fact a trust. See at [165], citing *Tasarruf Mevduati Sigorta Fonu v Merril Lynch* [2011] UKPC 17), or "*TMSF*" for short (where the

power of revocation vested in the settlor was viewed as being tantamount to ownership). It was noted a different conclusion may have been reached if the settlor, and protector, had been excluded from being within the class of discretionary beneficiaries (see at [269]).

143. This decision in *Pugachev* is criticised in Lewin on Trusts above at para. 22-071, where the authors suggest that the approach of the judge may have been influenced by his positive finding that the trusts were a sham. I consider this criticism to be unfounded and the structure of the judgment clearly shows Birss J gave each argument separate and careful consideration. The reasoning of Birss J depended heavily on his categorisation of the powers of the settlor/protector as being personal powers, and in this respect derives some support from other practitioner's texts, such as Underhill and Hayton, Law of Trusts and Trustees (19th Edn) at 17.7. The term "illusionary" may have difficulties, but when viewed as a label for an investigation that leads to finding that a trust was either not properly constituted, or had some other defect meaning that the trust was not a trust, it can be viewed as conventional.

144. The case of *Webb v Webb* [2020] UKPC 22 is an illustration of an "illusionary" trust as I have defined it. It concerned trusts established by a husband, and the dispute arose in the context of matrimonial proceedings. One of the issues before the Privy Council was the validity of those express trusts known as the Arorangi Trust and the Webb Family Trust, though the Council felt it sufficient to dispose of the issues by reference to the terms of the Arorangi Trust alone (since the points stood or fell together). The judge at first instance rejected the challenges to the Trusts. In the Court of Appeal they focussed on the question of whether, on an objective analysis of the powers reserved to Mr Webb in the trust deeds, Mr Webb had evinced an intention irrevocably to relinquish his beneficial interest in the trust property. They concluded that the deeds of trust failed to record an effective alienation since the powers retained by Mr Webb meant that any time he could have recovered and could still recover the property which he had settled on the trusts.

145. Lord Kitchin (giving the advice of the majority) observed as follows at [76]:

"76. On this further appeal, Mr Webb does not challenge the proposition that there can be no valid trust if, on the proper interpretation of a trust deed, the settlor has in fact retained beneficial ownership of the property purportedly settled on the trust. However, he contends that the Court of Appeal adopted an unduly literal interpretation of the trust deeds and that, had it adopted a purposive and contextual approach to their interpretation, it would or ought to have found each of them to be effective and valid. He also argues that he did not retain for himself the uncontrolled power to deal with the settled property as he wished. He emphasises that he was and remains a trustee of both trusts and, in that capacity, has always had fiduciary obligations, among other things, to act honestly and in good faith, to observe the terms of the trusts and to act in the best interests of all the beneficiaries.

146. Lord Kitchin went on (at [77] and following) to note that "*It has long been recognised that a completely general power of appointment, such that the holder of the power can appoint the subject matter of the power to himself, may be tantamount to ownership"* and cited (amongst others) the observations of Upjohn J in *In re Triffitt's Settlement* [1958] Ch 852 at 861, quoted in *TMSF* at [42].

147. Lord Kitchin noted at [80] – [82] the following material facts as to the Deed in the Arorangi Trust. Mr Webb was the sole trustee, and the trust was for him and his son as beneficiaries. The Deed provided for the appointment of a consultant who had extensive powers, including, at his absolute discretion and without giving reasons, to remove trustees. Mr Webber appointed himself as the consultant. Mr Webb, as trustee, was permitted to exercise all powers and discretions conferred on him notwithstanding any conflict with duties to the funds of the trust.

148. Lord Kitchin went on to observe at [83] that Mr Webb could appoint himself sole beneficiary under clause 10 and that (my emphasis added) "*This reserved to Mr Webb as settlor the power to nominate himself as sole beneficiary in place of the existing beneficiaries and* ***in that way to become settlor, Trustee, Consultant and sole beneficiary. It is important to note that Mr Webb enjoys this power as settlor and not as Trustee and that, as settlor, he is not subject to any fiduciary duty, irrespective of the operation of clause 14.1(c)***."

149. Lord Kitchin explained that there was no inconsistency between the finding of the first instance judge (upheld on appeal) that the trusts are not shams, and were genuinely set up to create trusts primarily for the benefit of Mr Webb's children, and the conclusion that the attempts to create the trusts have failed or are defeasible, noting at [87] to [89] as follows (with bold emphasis added by me):

"87. Acceptance that Mr Webb intended to create trusts does not in any way preclude a finding that he reserved such broad powers to himself as settlor and beneficiary that he failed to make an effective disposition of the relevant property. Moreover, and as I have explained, the powers of clause 10 are conferred on Mr Webb as settlor, not in his capacity as Trustee or Consultant. These powers were therefore amply sufficient for Mr Webb to arrange matters in such a way that he alone would hold the trust property on trust for himself and no-one else, with the consequence that the legal and beneficial interest in all of that property would vest in him…

89.The Court of Appeal considered, correctly in my opinion, that the powers reserved to Mr Webb under the trust deeds may be analysed in two different ways. One is to consider whether those powers were so extensive that Mr Webb can be said never to have disposed of any of the property purportedly settled on or acquired by the trusts. In this connection one might also ask whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. The other is to ask whether the powers reserved to Mr Webb were so extensive that in equity he can be regarded as having had rights which were tantamount to ownership. The Court of Appeal recorded, at para 55, the parties' agreement that in this case it can make no difference to the outcome which of these two analytical routes is taken. ***I will therefore confine myself to the substantive question whether Mr Webb's powers under each of the trust deeds were such that, in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership****.* ***In my view he plainly can. Mr Webb had the power at any time to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries****. In my opinion, for the reasons set out at para 87*

above, the Court of Appeal was plainly entitled to find as it did that the trust deeds failed to record an effective alienation by Mr Webb of any of the trust property. The bundle of rights which he retained is indistinguishable from ownership."

150. Having concluded that an "illusionary trust" is different in terms of how the court will conduct the evidential analysis from a "sham trust", I turn to the express trust being relied on in the present case. The Law Society mounted its challenge to the effectiveness of the Trust Deed in divesting Mrs Dua's beneficial ownership by advancing three points.

151. First it was noted following the entry into the minute dated 24 October 2004 Mr and Mrs Dua were both settlors and trustees.

152. Secondly, Ms Petrenko accepted that the minute of 24 October 2004 changed the wording of Clause 1.5.1, to remove Mr and Mrs Dua from the class of persons who could be beneficiaries, but that clauses 1.5.3 and clause 1.6 stood unchanged. Clause 1.5.3 provided that a beneficiary could include "*Any Person or class of Persons nominated to the Trustees by 1.5.3.1 the Settlors or 1.5.3.2 two Beneficiaries (after the death of the last surviving Settlor) and whose nomination is accepted in writing by the Trustees*". "*Person*" was defined in clause 1.6 to include "*a person anywhere in the world and includes a Trustee*".

153. Thirdly, therefore, it was submitted, it was still possible for the beneficiary class to include any person or person nominated to the trustees by either the settlors (under clause 1.5.3.1) or (b) the beneficiaries (after the death of the settlors) (under clause 1.5.3.2) and whose nomination is accepted in writing by the trustees. So, it was submitted, in effect, Mr and Mrs Dua as settlors can add to the class of beneficiaries, and could therefore reverse their exclusion as beneficiaries. It was submitted that what this means is Mr and Mrs Dua, with their settlor and trustee hats on, can appoint themselves as beneficiaries. If that were to happen, they could then, as trustees, under clause 2 apply the income to any of the beneficiaries (including themselves). Subject to compliance with clause 3.4, which effectively required there to be two trustees, they could exercise the power of appointment in favour of any of the beneficiaries under clause 3.1, or transfer property to a beneficiary under clause 3.2.

154. Accordingly, the Law Society invited me to conclude that Mr and Mrs Dua were in such a position of complete power so as to procure for themselves the benefit of the property settled on trust at any time, such that their position was indistinguishable to that of ownership, and they had not divested themselves of any beneficial ownership.

155. I consider the position first on the assumption that the Law Society is right to contend as a matter of construction that the Trust Deed (as varied) reserved the power in Mr and Mrs Dua to reappoint themselves as additional beneficiaries.

156. The Law Society's submissions would require me to travel considerably further than the existing law in a number of material respects. It was central to the reasoning of Birss J in *Pugachev* that the powers conferred on Mr Pugachev as protector could be exercised freely, for his own personal benefit and without any effective fetter or

limitation. It was also noted that he could remove trustees without cause. Neither of those features are present in this case. I also note that in *Webb* it was central to the decision that Mr Webb had the power to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries. It was not suggested that the same applied in this case. A beneficiary's entitlement to be considered for an appointment of benefits under a discretionary trust is a right which will be protected by the Court: see *JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 at [13]. I also note that the submissions require me to treat Mr and Mrs Dua as effectively one for these purposes. In both *Pugachev* and *Webb* there was only one person.

157. A conclusion by me that the powers reserved to Mr and Mrs Dua are tantamount to beneficial ownership would require me to treat:

(1) the powers vested in Mr and Mrs Dua as trustees as free from any fiduciary responsibility, fetter or limitation, when that is not the case in this Deed;
(2) the beneficiary's entitlement to be considered for appointment as if it did not exist, when such a proviso is not present; and
(3) Mr and Mrs Dua as operating as one, when they are separate persons.

158. In my judgment this is not open to me, or in any event goes too far.

159. There remains the question however as to whether or not Ms Petrenko is correct in her submission that the Trust Deed (following the variations effected on the 24 October 2004) is such that it was objectively intended that Mr and Mrs Dua were persons who could become beneficiaries in the future, notwithstanding that they were removed as persons who were beneficiaries under clauses 1.5.1 and 2.1. In my judgment there are difficulties in reaching that conclusion, particularly when one has due regard to the preamble wording in paragraph 1 of the resolution in the minute, which records that the Trust was intended to be "*for the exclusive benefit of their children and lineal descendants*". The effect of Ms Petrenko's submissions is that all the variations to the trust deed did was to remove Mr and Mrs Dua from being capable of being the objects of benefit under the Trust on 24 October 2004, but that they could become beneficiaries the following day. This would be a strange conclusion to reach as it would appear to defeat the purpose of the variation as recorded in the preamble wording.

160. I have already noted that Mr Dua drafted the variations, and the "loose end", which Ms Petrenko identified in her submissions, which might permit Mr and Mrs Dua to pop back up as beneficiaries via a fresh nomination. This was not, in my judgment, objectively intended. As to the impact of the quality of drafting and the approach in these circumstances, see the observations of Lord Upjohn in *Re Gulbenkian's Settlement Trusts (No.1)* [1970] AC 508, HL at p522 and see also *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] (Per Lord Hodge)). A reasonable person looking at the language objectively would have understood Mr and Mrs Dua to mean that they were to be excluded as beneficiaries not simply for the present but for the future. Otherwise the Trust is not for the exclusive benefit of the children and their lineal descendants.

161. In my judgment, effect can be given to what I consider to that obvious objective intention, having regard to the preamble wording I have referred to above, by reading the category of persons who could be nominated to the trustees, as future beneficiaries under clause 1.5.3, as excluding Mr and Mrs Dua (compare with the approach taken in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] AC 1101 at [25], and see also Lord Upjohn above in *Re Gulbenkian's Settlement Trusts (No.1)* at p522).

162. The question arises however if I am wrong in my conclusions above, as to whether it might be said that there was a need to rectify the drafting by granting equitable relief on the basis of a mutual mistake on the part of Mr and Mrs Dua. Their evidence was that they had not intended to reserve their ability to re-appoint themselves as beneficiaries, and if the drafting did not accurately reflect this then that was a drafting mistake on Mr Dua's part. Mrs Dua had already given evidence in her statement of 4 March 2013 stating that the 24 October 2004 minutes were "*adjusting beneficiary clauses of the Trust Deed and precluding Mrs Dua and her spouse the settlors'[sic] from being beneficiaries*."

163. Ms Petrenko drew my attention to the law on rectification of voluntary settlements as summarised in Lewin on Trusts above at paragraph 5.079. The conditions as summarised there are as follows:

"(1) There must be convincing proof to counteract the evidence of a different intention represented by the document itself;
(2) There must be a flaw (that is an operative mistake) in the written document such that it does not, on its true construction, give effect to the settlor's intention;
(3) The specific intention of the settlor must be shown; it is not sufficient to show that the settlor did not intend what was recorded; it must also be shown what he did intend; and
(4) There must be an issue capable of being contested between the parties affected by the mistake notwithstanding that all relevant parties consent."

164. I also have regard to the recent guidance given by the Court of Appeal, in relation to rectification, in *FSHC Group Holdings Limited v Glas Trust Corporation Limited* [2019] EWCA Civ 1361 at [176], and the need to show an outward expression of accord.

165. The Law Society's primary submission was that the requirements for rectification are not satisfied on the basis that Mr and Mrs Dua have not established their case by "convincing proof" that their intention was different from that set out in the Fulmer Trust (as varied). In my judgment there is convincing evidence, and the four conditions are satisfied here:

(1) I have been cautious in accepting the oral evidence of Mr and Mrs Dua on this issue, having regard to my overall impression of them as witnesses, and as it could quite easily be said their evidence was self-serving, and given in the face of knowing what they needed to say to make out a case on rectification;
(2) I have in mind however that Mrs Dua had already confirmed, in a witness statement which her husband assisted her in drafting that, the intention of the 24 October 2004 minutes was to "preclude" the settlors from being beneficiaries,

and this was before the issue that the trust was "illusory", and the intention of the variations made by the 24 October 2004 minute, were the focus of any attention – indeed none of this was argued or live before Chief Master Marsh and only came into focus during the course of the trial before me;

(3) It is also apparent, from my conclusions as to the proper construction of the documentation, that if there was a mistake, it arose due to the failure by Mr Dua to give effect completely to the clearly expressed intention in the preamble;

(4) It is apparent from the preamble what the intention of the settlors was, and this was an outward expression of accord: that the Dua's children and their descendants would be exclusive beneficiaries, and that was to the exclusion of Mr and/or Mrs Dua.

166. The Law Society also submitted rectification should not be ordered in all the circumstances given in particular the length of time that has passed since the creation of the Trust and the fact that charges have been granted over the properties, including to the Law Society. This point may have acquired greater force if the Law Society had taken steps in reliance on a belief which based on their reading of the Trust Deed without rectification. But that was not their evidence, and indeed the point that the Trust Deed was illusory was not one developed until trial, and it was then that the point as to rectification was also considered. In these circumstances whilst I have in mind that there is a discretion to refuse to grant the relief, if I am wrong in my approach to the construction of the Trust Deed, as set out in paragraph 161 above, and I need to grant the relief to give effect to what I consider to be the subjective intention of the parties/settlors, I do so.

167. In view of these conclusions, I find that Mr and Mrs Dua do not have any or any, realisable beneficial interest in the properties, or none which is of any substantial value.

168. Even if it might be said that Mr and Mrs Dua might at some point have acquired a limited form of interest as discretionary beneficiaries, that is not an interest which is readily realisable. As noted by Lewison LJ in *Pugachev* ([2015] EWCA Civ 139) at [15]:

"15. On the face of it assets held by the trustees of a discretionary trust would not be amenable to execution if judgment is entered against one of the class of potential beneficiaries at the suit of a third party. The trustees might in such circumstances decide to confer a benefit on the beneficiary to save him from bankruptcy; but that would be a matter for them. If they did exercise their discretion in favour of a particular beneficiary the amount of the benefit would thereupon cease to be a trust asset and would become the asset of the beneficiary. It would then truly be his asset."

Sub-issue (2): the alternative position if the Fulmer Trust is not valid and applicable

169. It is strictly not necessary to deal with sub-issue (2), but I record briefly in this section of my judgment my findings and conclusions on the alternative case. This requires me to determine the terms on which Mr and Mrs Dua held the properties if they did not hold them under the Fulmer Trust, or if such Trust was not effective to divest them of their beneficial interests, if any, in the properties which formed part of

the Trust. This question splits into the further sub-issues of whether the presumption of equality applies, or (b) an implied (or resulting) trust analysis displaces this, and in each respect considering separately Fulmer House (4 titles) and 49 Sudbury Avenue (1 title) and the quantification of any beneficial interests (if different from the presumption of equality).

170. Mr Dua says, at the end of his main witness statement, in relation to the properties "*even if they had not been placed on trust, the Claimant would not have had any interest in the properties because the whole of the equity would have belonged to me or my trustee in bankruptcy*". Mrs Dua's evidence was to the same effect.

171. Mr and Mrs Dua do not, in their evidence, allege that they had an express discussion relating to ownership wherein they agreed that Mr Dua was the beneficial owner of the properties, rather they are asking the Court to find that there was an inferred common intention trust wholly in favour of Mr Dua. They make this argument on the basis that Mr Dua contributed the purchase price and paid the mortgage.

172. In my judgment there are a number of difficulties with such an extreme case, and I reject it.

173. Absent a valid express trust, the starting point is that equity follows the law such that where the parties acquire the property in joint names then the parties are beneficial joint tenants, unless and until beneficial title is severed, following which they hold as tenants in common with equal shares. It is for Mr and Mrs Dua to rebut this presumption (*Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 at [56]) and, even on a full examination of the facts, a joint names case is unlikely to lead to a different conclusion unless the facts are "*very unusual*" (*Stack v Dowden* at [68]). As Baroness Hale explained in *Stack v Dowden* at [69] many more factors than financial contributions may be relevant to divining the parties' true intentions.

174. Moreover, a common intention will not be inferred where there is positive evidence inconsistent with it; see Megarry & Wade on the Law of Real Property (9th Edition) at 10-026, which refers to *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776, per Lord Walker and Lady Hale at [51(3)].

175. I also have regard to the summary of principles to apply in relation to properties bought in joint names in *Jones v Kernott* by Lord Walker and Lady Hale at [51].

176. It was noted in cases before *Stack v Dowden* that the extent of financial contribution might carry more weight in case where the parties are married than where they were married (see for example in *Stoke's case* [1991] 1 FLR, 401). Following *Stack v Dowden* it seems to me this point is captured by the discussion at [69] and this may or may not be the case depending on the marriage relationship.

177. Applying the above principles to 49 Sudbury Avenue first, this was acquired as a property in the joint names of Mr and Mrs Dua. The starting point therefore is the presumption of joint beneficial ownership.

178. The question then arises whether that presumption can be displaced by showing a different common intention when Mr and Mrs Dua acquired 49 Sudbury Avenue, or

that they later formed the common intention that their shares in the same would change. This question is to be deduced objectively from conduct. I find that the following are relevant factors in this respect and point to the conclusion that Mr and Mrs Dua did intend Mrs Dua would share in the beneficial interest in 49 Sudbury Avenue and that there is insufficient evidence to displace the presumption:

(1) 49 Sudbury Avenue was being purchased as a family home for Mr and Mrs Dua to live in together;
(2) Mr and Mrs Dua had been married for a couple of years and Mr Dua provided the resources to acquire the property and, at least in the initial stages, to service the borrowings over it. This was because Mrs Dua had still not qualified and he viewed it as part of his matrimonial duty to provide for his wife;
(3) Mr Dua provided the initial resources to enable two substantial extensions to be built at 49 Sudbury Avenue from his own resources. However, those extensions were then reimbursed, or substantially so, according to oral evidence of Mr Dua, by the net proceeds of sale from 96 Hodder Drive. And 96 Hodder Drive was held on an express trust for Mr and Mrs Dua as "*beneficial joint tenants both in law and in equity*". I reject the oral evidence of Mr Dua in these circumstances that he and Mrs Dua did not intend Mrs Dua to share in the equity in 96 Hodder Drive, or 49 Sudbury Avenue, during his lifetime. Mr Dua accepted that if he was incapacitated Mrs Dua would be expected to make the decisions about the property and to ensure it provided a family home for the benefit of the whole family. His perceived primary decision making role in relation to 96 Hodder Drive and 49 Sudbury Avenue was more a feature of his view of his role in the family, and a desire to ensure he could, if appropriate, permit other wider family members to make use of it, such as his parents. But I do not think by that it can be safely concluded he wished to exclude Mrs Dua from any share in the equity of it during his life;
(4) The fact that Mr and Mrs Dua continued to live in 49 Sudbury Avenue until 2005 as their family home, including with their children after they were born;
(5) Mr Dua's stated intention in his witness statement, and elaborated on in oral evidence, that he put the properties into joint names so that the properties would pass to Mrs Dua "tax free and automatically" in the event of his death;
(6) Mr Dua's general stated intention in his witness statement and orally to provide for his family.

179. By the time that Mr and Mrs Dua had acquired Fulmer House, however, there can be no doubt that they must both have considered that Mrs Dua had a beneficial interest in it. That is because in the signed minute of the meeting of 12 September 2005 Mr and Mrs Dua referred to the transfer into the Fulmer Trust of "*the remaining unencumbered equity belonging to Mr Shashi Dua and Mrs Ashoo Dua*". As I have noted above I consider this to be a clear acknowledgement that Mr and Mrs Dua did intend that Mrs Dua had a beneficial share in 49 Sudbury Avenue.

180. Even if the point might have been arguable to the contrary before 12 September 2005, by this date in my judgment Mr and Mrs Dua shared a common intention that they would both share in the equity. But there is no need to infer that: Mr and Mrs Dua expressly confirmed it in the minute of that date. In my view that precludes them from submitting that Mrs Dua has no beneficial interest if the property has not been effectively settled into the Fulmer Trust and subject to that trust on the terms found

by me above. See Lord Upjohn's dictum in *Pettit and Pettit* [1970] AC 777, (83), [1969] 2 All ER 385, [1969] 2 WLR 966 cited by Slade LJ in *Goodman v Gallant* at p 521H to 522B. See also *Bernard v Joseph* [1982] 1 Ch 391 which emphasises that it is only in exceptional circumstances that the court may be willing to conclude this intention changed subsequently.

181. I also find that the fact that Mr Dua may have continued to be solely or principally responsible for discharging the mortgage after then is insufficient to justify an inference of a change in intentions. I also do not think I can exclude the possibility that Mrs Dua may have contributed, either directly or indirectly, to the family finances for at least part of the periods in question in relation to 49 Sudbury Avenue, perhaps only in a relatively modest way, and the documentary evidence is not sufficient to enable me to exclude this. I find that it is likely she made some contributions to the benefit of the overall family finances, to some degree, at least before 2009 when her practice was intervened.

182. In those cases where it is clear that the parties did not intend a beneficial joint tenancy at the outset, or had changed their original intention, and it is not possible to ascertain by direct evidence or inference what their actual intention was as to the shares in which they would own the property then the court embarks on a further enquiry to ascertain that share. However, I am not able to conclude that Mr and Mrs Dua clearly did not intend that Mrs Dua would not be a beneficial joint tenant from the outset.

183. Accordingly, I would have found, if the beneficial interest in 49 Sudbury Avenue had not been transferred into the Fulmer Trust, that Mr and Mrs Dua owned it as beneficial joint tenants, in law and in equity. Moreover, it seems to me that given that Mr and Mrs Dua settled 49 Sudbury Avenue into the Fulmer Trust, and if I had concluded that was ineffective because it was "illusory", then it is difficult to rationalise any other conclusion.

184. Before I turn to Fulmer House, I should point out that by the time of his bankruptcy Mr and Mrs Dua were no longer living in 49 Sudbury Avenue as his principal residence. Therefore if, contrary to my primary findings this property was not settled into the Trust, and if Mr and Mrs had succeeded in persuading me that he was the sole beneficial owner, then any such equity would have passed to his trustee in bankruptcy and would have remained with his trustee in bankruptcy absent the trustee's interest being bought out, and notwithstanding the lapse of time since. This is because it is only in relation to the principal residence that there can be an automatic revesting under 283A of the Insolvency Act 1986. As Mr Dua has confirmed no action has been taken by the trustee in bankruptcy then it would still be open to them to take action now, and on Mr and Mrs Dua's argument be entitled to 100% of the equity in the property (though as appears below, it is doubtful whether there is any equity in 49 Sudbury Avenue, given the cross-charge with Fulmer House).

185. Turning, therefore, to Fulmer House, again, and on the assumption, contrary to my primary findings, that this property was not effectively settled into the Fulmer Trust, then the starting point would be that equity follows the law and there was a beneficial joint tenancy.

186. The question then arises, to be answered objectively from conduct, whether that presumption can be displaced by showing a different common intention when Mr and Mrs Dua acquired Fulmer House, or that they later formed the common intention that their shares in the same would change. I find that the following are relevant factors in this respect and point to the conclusion that Mr and Mrs Dua did intend Mrs Dua would share in the beneficial interest in Fulmer House and that there is insufficient evidence to displace the presumption:

(1) Fulmer House was being purchased as a family home for Mr and Mrs Dua to live in together with their children;
(2) Whilst I accept that it is likely that the properties realised to enable it to be purchased were likely to be from the net proceeds of sale which Mr Dua may have acquired in his own name, or via companies set up under his control, it is also the case that these monies were then deposited in the joint names of Mr and Mrs Dua before being used to enable Fulmer House to be purchased. I find that these monies were placed in joint names because, like other joint ventures which Mr and Mrs Dua have engaged in their married lives, they intended to share in them together;
(3) Whilst I accept that is likely that Mr Dua has borne the main burden of discharging the mortgage, like in the case of 49 Sudbury Avenue, I do not think I can exclude the possibility that Mrs Dua may have contributed, either directly or indirectly, to the family finances for at least part of the periods in question in relation to Fulmer House and the documentary evidence is not sufficient to enable to exclude this. I find that it is likely she made some contributions to some degree, at least before 2009 when her practice was intervened;
(4) The fact that Mr and Mrs Dua continued to live in Fulmer House as their family home from 2005 to date;
(5) Mr Dua's general stated intention in his witness statement and orally to provide for his family; and
(6) It is not open, or readily open, to Mr and Mrs Dua to press on me an intention that Mr Dua alone should be the sole beneficial owner, having regard to the terms of the Fulmer Trust, which they both signed.

187. In short, there is insufficient evidence of an objective indication to show a departure from the presumption of equality in relation to Fulmer House, in the event that I had not found it was held on trust under the Fulmer House Trust.

188. Whilst I am satisfied on the evidence before me that Fulmer House is being enjoyed as one interconnected residence by the Duas family, and the Law Society did not challenge this aspect of the Duas evidence, if I had concluded that Fulmer House was beneficially owned by Mr and Mrs Dua equally I would still have required there to be a further enquiry as to whether or not as at the date of bankruptcy, in December 2008, all of it was occupied as Mr Dua's principal residence. At least I would have given the Official Receiver a further opportunity to make representations on the issue, before I could have safely concluded that the whole of Mr Dua's beneficial interest, as at the date of bankruptcy, had revested back in Mr Dua under section 283A of the Insolvency Act 1986.

Sub-issue (3): Equity of exoneration and/or equitable accounting issues

189. This sub-issue also does not strictly arise on my primary findings, but if the properties were not held by the Fulmer Trust, and instead were held jointly in law and in equity by Mr and Mrs Dua, then the question arises as to whether or not there should be any equity of exoneration or equitable accounting, in particular having regard to Mr Dua's contentions about payment of the mortgage. In my judgment there is little merit in these contentions, and I reject them.

190. Given that the mortgage over Fulmer House and 49 Sudbury Avenue is a joint liability of Mr and Mrs Dua the principle of equity of exoneration does not arise. That only arises where the property is used to secure the debts of one joint owner only and the other simply stands as surety; see In *Re Pittortou (a Bankrupt*) [1985] 1 WLR 58 at 61 (Scott J) and *Armstrong v Onyearu* [2018] Ch 137 at [1] (David Richards LJ).

191. Secondly, I also consider that Mr Dua has not adduced sufficient evidence to enable me to make a finding on the balance of probabilities as to the levels of contributions and how much this may justify exoneration. In headline terms the debt over Fulmer House and 49 Sudbury Avenue was c. £1.8m in 2004 and it has not been reduced. Therefore, the mortgage payments have largely been to service the interest when the matter is looked at over the entire period, even if the capital may have fluctuated during that time.

192. So far as equitable accounting this suffers similar problems. Mr and Mrs Dua have both continued to live at Fulmer House and the mere fact that Mr Dua may have shouldered the larger burden, or even the entire burden in relation to outgoings is insufficient to give rise to the inference that he and Mrs Dua intended that this imbalance would result in additional burdens being thrown onto (on this hypothesis) Mrs Dua's share in the equity. In *Clarke v Harlowe* [2005] EWHC 3062 (Ch), [2006] 1 P&CR DG 11 it was said (by HHJ Behrens) at [37], in a passage referred to with approval by the Court of Appeal in *Wilcox v Tait* [2006] EWCA Civ 1867, that in an ordinary cohabitation case there is usually no room or reason for equitable accounting whilst the parties' relationship subsists. By contrast, once the relationship has come to an end there are no longer any common arrangements in place between the parties, with the result that each ought to discharge his or her proportionate share of the outgoings. As emphasised by the Court of Appeal in *Wilcox v Tait* above, there is no absolute rule to the effect that equitable accounting cannot be applicable before relationship breakdown, but in these circumstances it may be difficult for a party to show an intention that by paying more than their fair share of mortgage payments the other partner should be burdened with that when the time came to sell. Moreover, it is to be noted that ordinarily the whole family unit will enjoy occupation of the property which in many cases is treated as approximating to an occupation rent.

193. I conclude there is no room for equitable accounting in this case for substantially the same reasons. There had been no relationship breakdown and Mr and Mrs Dua continue to live in the family home together, with their now adult children. The effect of mortgage payments made by Mr Dua was not to substantially increase any equity value in the properties since the value of secured liabilities has remained similar (and if anything is slightly higher than it was at the outset). Moreover, I find that Mr and Mrs Dua cannot contend the contrary given the terms of the Fulmer Trust.

The Order For Possession and Sale Issue

The principles

194. This claim has been brought under CPR 73.10C but because the property is held in joint names section 14 of the Trusts of Land and Appointment of Trustees Act 1996 applies. The matters relevant to determining an application for an order for possession and sale is therefore guided by the factors set out in section 15, which states as follows under subsection (1):

"(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
(a) the intentions of the person or persons (if any) who created the trust,
(b) the purposes for which the property subject to the trust is held,
(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
(d) the interests of any secured creditor of any beneficiary."

195. Subsection (3) also applies, so that the court is to have regard to "*the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests*)."

196. By having regard to, and considering, the above principles I am satisfied that the rights of Mr and Mrs Dua, and others interested, under the Human Rights Convention (and in particular article 8 rights) are properly taken into account.

197. I also note, having regard to cases such as *Mortgage Corp v Shaire* [2001] Ch 743 that I have a discretion both as to whether to make any order and as to the form of any such order.

Application

198. If I am correct in my conclusions as regards the Fulmer Trust then the Law Society accepts there would not be any proper basis to seek an order for possession and sale. It was also accepted that would be the case if I concluded that 49 Sudbury Avenue did not form part of the Fulmer Trust. Given the cross-charge arrangement in place with the bank this would not have any independent value for the Law Society.

199. I am only required, therefore, to consider this aspect of the case on the assumption that I am wrong in my conclusions in relation to Fulmer Trust. Moreover, it is only material to consider the position in relation to Fulmer Trust, for the reasons identified above. In these circumstances I will take the relevant facts and matters in brief terms here.

200. So far as the factors in subsections (1)(a) and (b) are concerned, the intention of Mr and Mrs Dua was that Fulmer House would be the family home, and that is how the property has been used. It has been the family home for 16 years. As for subsection 1(c), this does not apply. The Duas children do live in Fulmer House but neither of them are minors. As for 1(d), the interests of the secured creditor, here the Law Society, is, Ms Petrenko submits, best served by granting an order for possession and

sale. The fact that a creditor is being kept out of their money and is not receiving proper recompense is a powerful factor. In the present case, the debt owed to the Law Society is substantial and little has been received by way of payment since the first charging orders were made in 2011.

201. I must also have regard to subsection (3), and in this case the circumstances and wishes of Mr Dua (on the hypothesis that he is a beneficial co-owner) are to be taken into account. He wishes to continue to preserve Fulmer House for the benefit of the family and his children in particular.

202. He also presses on me three points to take into consideration, which Mrs Dua supported, which were that: (i) there is no good evidence as to what the properties are now worth; (ii) even if one makes certain assumptions about the worth of the properties there would be little or nothing to be gained on a sale when one takes into account the costs of sale and a delay in making the sale; and (iii) Mrs Dua confirmed an open offer by her to pay an immediate sum of £25,000 to reduce the debt to the Law Society and then to pay c. £2,000 a month (or £25,000 per annum) for 3 years. This offer was made on the basis it would secure a payment to the Law Society over 3 years which is the best the Law Society could realistically hope to achieve on a sale anyway, having regard to Mrs Dua's currently limited earning capacity.

203. There is some force in the first point, given that the valuation of Fulmer House is a drive by valuation from 11 August 2018 and the valuation of 49 Sudbury Avenue is from Zoopla only, and dated 12 February 2019. I could have simply dismissed the application for lack of evidence, but I note that it would also have been open to Mr and Mrs Dua to seek to adduce more up to date valuation evidence, based on an internal inspection, and they have not chosen to do so. Before I would have considered making an order for sale I would have required an internal inspection of both properties to be carried out by a valuer and an up to date valuation report provided as it does not seem to me that the balancing exercise can be carried out properly without understanding with greater accuracy how much benefit would accrue to the Law Society by making that order. Depending on the valuation produced it may well have been the case that the benefit to be gained from the Law Society is so marginal as to bring into play Mr and Mrs Dua's second submission, as referred to above, and where the other factors might be said to displace any benefit to be gained by the Law Society in the balancing exercise to be struck, and having regard to any proposals being suggested by Mrs Dua for payment of the debt. If one assumes however that the properties were worth a combined figure of £2.5m and with secured lending at £1.9m, prima facie, even after some sale and debt costs, it seems likely there would be some equity remaining. The submissions of Mr Dua, to the effect there would be no benefit, require a very lengthy sale period and high unsatisfied lending costs to be assumed. Again, this is something a suitably instructed expert could have been asked to opine on; the opinion on value might be influenced by what they consider a reasonable marketing period should be. There is not much more that can be usefully said in relation to this having regard to the lack of any reliable up to date valuation evidence. Given there would need to have been an adjournment to allow this better evidence to be adduced, I would also have required the creditors on the register of 49 Sudbury Avenue to have been served with notice, and required them to be invited to indicate what if any sums they were claiming security in relation to. I do not believe I can simply accept Mr Duas oral evidence

that they asserted invalid and exaggerated claims. The Official Receiver's files might have shed further relevant light on these matters and I would have required my judgment to be circulated to them too before making an order, in case they, somewhat belatedly, wished to make any representations.

204. Finally, so far as the offer is concerned, this might have had a greater attraction if it was not limited to 3 years, and was expressed to run until such time as the judgment debt had been paid, or such shorter time as the Law Society might have agreed. It would, however, have required, on my primary conclusions, the children of the Duas to be bound into these proceedings and been given an opportunity to make representations. That has not occurred. There is little point in discussing the point further here, but I mention it in case the parties still wish to consider a consensual resolution and bearing in mind the Law Society has other enforcement options.

205. In my judgment, however, the Law Society is now in the situation summarised at paragraph 168 above, and, absent other enforcement measures, it is a matter for the trustees of the Fulmer Trust to decide what provision should be made for Mrs Dua if the Law Society concludes its only other enforcement route is bankruptcy.

Conclusions

206. The Claimant's claim against the Defendants fails.

207. I invite the parties to agree an order in respect of this judgment and I shall deal with any remaining and consequential issues following the remote hand down.