Neutral Citation Number: [2021] EWHC 2230 (Ch)

Case No: BL-2019-001624

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

10 August 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

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Between :

(1) RAJIV SINGH ARORA **(2) SABINA ARORA**	**Claimants**
- and –	
(1) REZA MOSHIRI **(2) INNER CITY APARTMENTS LIMITED**	**Defendants**

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Benjamin Fowler (instructed by **Eldwick Law**) for the **Claimants**
Barnaby Hope (instructed by **Berlad Graham LLP**) for the **Defendants**

Hearing date: 29 June to 2 July 2021
Draft judgment circulated: 4 August 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Judge Jonathan Richards:

1. Mr Arora ("C1") and Mrs Arora ("C2") are husband and wife. The First Defendant ("D1") is an estate agent, The Second Defendant ("D2") is a company of which D1 has, at all material times, been the sole director and shareholder. The dispute arises in connection with three properties to which I will refer individually as "9H", "415PW" and "10PW" and together as the "Properties". The Claimants are the sole registered proprietors of the Properties.

2. Very broadly, the dispute centres on the terms of an oral agreement (the "Agreement") entered into between the Claimants and D1 in either 2007 (on the D1's case) or 2013 (on the Claimants' case). It is common ground that the Agreement provided for D1 to introduce suitable investment properties to the Claimants with a view to the Claimants purchasing them in their sole names and subsequently reselling them a profit. The parties agree that the Claimants acquired the Properties following an introduction that D1 made pursuant to the Agreement and that the Agreement required D1 to manage the Properties pending their resale. They also agree that D1 was not to receive the normal kind of fee that might be payable to a buyer's agent or property management company but was, instead, to be paid 50% of any net profit made on sale of the Properties. However, they have radically different perspectives on the precise effect of the Agreement, and the extent to which the Agreement was performed.

3. The Claimants assert that the Agreement created no partnership between them and D1. They also assert that D1 committed repudiatory breaches of the Agreement by, among other matters, wrongfully failing to account to the Claimants for rent received on the Properties. The Claimants argue that they accepted those repudiatory breaches and brought the Agreement to an end on 14 March 2019. The Claimants continue to own the Properties and they say that, since they had not sold any of the Properties by the date the Agreement terminated, they are not obliged to pay D1 any share of any profits made when the Properties are sold.

4. D1 argues that the Agreement established a partnership between him and the Claimants and that the Properties were partnership property so that, in particular, D1 has a proprietary interest in the Properties. D1 denies that he is in breach of the Agreement. On the contrary, he argues that the Claimants have acted wrongly by denying the existence of the partnership and seeking to retain income and capital profits from the Properties contrary to the terms of the Agreement.

5. Given the nature of the dispute between the parties, I will structure this judgment as follows:

    i) In Part A, I will make findings of fact as to the factual matrix in which the Agreement was concluded and will determine the key terms of the Agreement in the light of that factual matrix. I will also determine whether the Agreement was a partnership or not.

    ii) In Part B, I will make factual findings relating to the Properties including the extent to which the Defendants retained rent on the Properties.

iii) In Part C, I will consider the allegations that both sides make as to breach of the Agreement and will determine whether the Agreement was terminated following any repudiatory breaches.

6. I had factual and expert evidence from the following witnesses:

i) The Claimants and D1 provided witness statements on matters of fact and were cross-examined.

ii) The Defendants also relied on hearsay evidence on factual matters contained in witness statements given by Florin Buccur (a builder who had undertaken building works at the Properties), Amanda Anastacia (who had been tenant in one of the rooms in 9H), Shamil Patel (a solicitor who had acted for D1 and gave evidence as to transfers of money made out of funds held for D1) and Saam Forouhar (who had assisted the Defendants with aspects of management of the Properties).

iii) There was agreed expert evidence relating to, among other matters, the valuation of the Properties given by Andrew J Balcombe FRICS FCIArb.

7. I regarded the Claimants as honest and reliable witnesses. I formed a less favourable view of D1's witness evidence. He was argumentative and frequently made statements he considered to support his case rather than answering questions put in cross-examination. Of course I understand his wish to put forward his version of events but I considered, at least in part, this behaviour was calculated to avoid answering some difficult questions. His oral evidence was also sometimes impulsive: he would provide an answer to a question in cross examination that could be shown to be at odds with contemporaneous documentation (see for example, his evidence about the repayment of £2,000 to the tenant of 415PW referred to at paragraph [121] below). Some of the evidence he gave was not true.

PART A – THE TERMS AND NATURE OF THE AGREEMENT

Relevant factual background

8. The parties first met in around 2005. In the same year, the Claimants instructed D1 (acting through D2) to sell their then family home. That transaction evidently went well and, after it had completed, the Claimants used D1's services in connection with other purchases of ex-local authority properties. D1 considered at the time that such properties were attractive investments as they could be bought relatively cheaply, had low service charges, but produced an attractive rental yield.

9. The Defendants provided services to the Claimants in connection with the purchase of at least four such ex-local authority properties with those transactions having the following salient features:

i) The Defendants would introduce suitable properties to the Claimants and would charge a finder's fee of 2% to 3% of the property value if the Claimants decided to go ahead with a particular purchase.

ii) The Defendants would also typically find tenants for the properties and provide general property management services once tenants had been found. Sometimes tenants would pay their rent direct to the Claimants by bank transfer, sometimes they would pay it either by cash or by bank transfer to the Defendants with the Defendants passing it on to the Claimants. Whatever the details of the arrangement, the Defendants charged a property management fee of around 10% of the rent payable.

iii) D1 knew a number of builders and decorators. If work needed to be done at a particular property, the Defendants would arrange the necessary quote and supervise the work for a separate fee of around £100 per day.

iv) If the Claimants wished to sell a particular property, they might ask the Defendants to act as estate agent on the sale, for a fee of around 2% to 3% of the purchase price.

10. These transactions proceeded well. The professional relationship between the Claimants and the Defendants blossomed. The Claimants and D1 became good friends.

11. Over time the Defendants' business altered slightly. D1 considered that he had the skills and contacts to enable him to identify properties that were being offered for sale at a price below market value. He considered that such properties could produce a healthy profit if they were purchased and then "flipped" (i.e. sold at a higher price after a relatively short period). This was a different value proposition from that associated with the ex-local authority properties on which the profit was expected to come from an attractive rental yield.

12. In 2007, D1 introduced a property ("422PW") to the Claimants. This was not an ex-local authority property and D1 explained to the Claimants that he thought it could be successfully "flipped" at a profit when the time was right. The parties agreed that D1 would charge on a different basis for services provided in connection with 422PW. Instead of charging a finder's fee of 2% to 3%, a management fee of 10%, and a £100 daily fee for overseeing building and renovation works, D1 would instead receive 50% of "profits" made on sale. Those profits would be calculated as the excess of the ultimate sale price over the purchase price after taking into account all expenses (such as mortgage interest, service charges and utility bills). The Claimants would be responsible for funding the purchase of the property and would discharge expenses as they arose.

13. D1's evidence was that the initiative for this revised arrangement came from C1 and that, in oral discussions on the terms of the revised arrangement, C1 stated specifically that the arrangement would be a "partnership" and that C1 would prepare "partnership accounts". I do not accept that evidence for the following reasons:

i) D1 was introducing a new type of property investment to the Claimants. Therefore, it is more likely that the initiative to introduce a new charging structure would also have come from D1 rather than from the Claimants.

ii) I do not accept that C1 would have used the legalistic phrase "partnership accounts". D1 claimed, in cross-examination, to have a vivid recollection of the conversation with C1, but it took place over 14 years ago. I consider it more likely than not that D1's recollection of the phrase "partnership accounts" has been conditioned by the use of that term in legal proceedings that were commenced many years later.

14. I have also concluded that the parties' discussions in 2007 only resulted in an agreement as to how D1 would be paid for his work in connection with 422PW. They did not set out an overarching agreement that would apply to properties other than 422PW. I have reached that conclusion because I accept C1's evidence that, as noted in more detail below, he had a specific reason for wishing to conclude an overarching agreement in 2013, namely his focus on funding his retirement, which was not part of his thinking in 2007. It follows that I have concluded (i) that the Agreement in issue in these proceedings was concluded in 2013 and (ii) D1's argument that there was a partnership between him and the Claimants stands or falls by reference to the terms of the Agreement as concluded in 2013 although I accept that the terms of the Agreement in 2013 may be informed by the history of the parties' dealings before then.

15. The Claimants decided to go ahead with the purchase of 422PW. They paid £425,000 to acquire it and legal title was registered in their joint names. Since it was acknowledged that the property could not be "flipped" immediately, the Claimants asked D1 to find a tenant which he duly did. The Claimants referred to this tenant as a "nightmare tenant" and, conscious that I have not heard evidence from the tenant himself, I will refer to him in anonymised form as the "422PW Tenant". For the first 18 months, he paid rent due on time. However, when the Claimants asked him to vacate (so that 422PW could be "flipped" as planned) he refused to do so. Perhaps as an inducement to him to leave, D1 gave the 422PW Tenant his deposit back. However, this failed to achieve the desired result and ultimately legal proceedings had to be taken to evict him. The 422PW Tenant did not vacate the property until April 2012 and the Claimants incurred over £28,000 in legal fees in securing his eviction.

16. 422PW was eventually sold for £685,000 in August 2013. Even taking into account the difficulties with the 422PW Tenant that still left a healthy profit. The Claimants' evidence is that, after 422PW was sold, D1 said that he felt responsible for the delay of several years in selling 422PW that had been caused by the difficulties with the 422PW Tenant and agreed to absorb total costs of around £65,000 by having those costs debited against his share of net profit rather than being shared 50:50. That position was reflected in the cash payments that the Claimants made when profits on 422PW were shared out in 2014.

17. D1 disputes the Claimants' account. However, he has advanced two conflicting analyses of the £65,000. On the one hand, in paragraph 8.5 of the Defence and Counterclaim served on 15 November 2019, it was stated that "on recent reconsideration", D1 had realised that £65,000 was wrongfully withheld from his

share of profits from the sale of 422PW. On the other hand, in his witness statement served on 28 April 2021, D1 said that C1 had asked him if he would agree in the first instance for £65,000 to be deducted from his share of profit but on the basis that he would then enjoy a credit of half that amount (£32,500) when profits from their next property investment came to be divided. In his oral evidence, he gave a slightly different version of this account saying that, because the full £65,000 had been deducted from his share of profit on 422PW, rather than 50% of that amount, there was a £32,500 credit in his favour in the "general pot" of dealings between him and the Claimants.

18. I have not accepted D1's evidence and prefer the Claimants' version of events for the following reasons:

    i) I agree with D1 that typically a property agent finding a tenant would not expect to underwrite all the costs that would arise if that tenant proves to be bad. However, this was not an ordinary situation. The discussions about the £65,000 were taking place at the time the Claimants were thinking of putting more business D1's way on attractive terms that meant he could receive 50% of the net profits arising on future sales of properties, even though the Claimants were putting up all the finance. He had much to gain from making the grand gesture of agreeing to bear all of the costs. D1's grand gesture achieved precisely the result intended. C1 said that he was impressed by it and it was a factor in the Claimants' decision to broaden their business relationship with D1.

    ii) There was, therefore, a logic that explains D1's agreement to meet the full £65,000 costs. By contrast, D1's explanation suffers from several objections. First, as I have noted, he has advanced two contradictory positions which raises obvious questions as to whether either position is correct. Moreover, there is little support for either position in contemporaneous documents to which I was referred. D1 knew the price at which 422PW had been bought and sold. He could have asked questions if he did not think we was receiving his appropriate share of profit made. If the payment that D1 received was short (as alleged in the Defence and Counterclaim) one would have expected D1 to raise objections at the time.

    iii) A similar point can be made of the alternative explanation that a £32,500 credit was carried forward, either against the next property investment or into the "general pot". There was little, if any support in the contemporaneous evidence for D1 having a £32,500 credit. I have concluded that D1's evidence as to the existence of this credit was, whether consciously or otherwise, influenced by his perception that it would be helpful to his case on partnership if he could demonstrate a financial contribution to the venture.

19. At or around the time of the sale of 422PW, the parties were having discussions about their ongoing business relationship. These discussions took place at C1's initiative. At the time, he was 48 years old and about to come into some money. While he was still working full-time, he was looking ahead to his retirement. His plan was to deploy his capital in acquiring properties that could be "flipped" in the short term for a profit and, by doing so, accumulate further capital that would

ultimately be invested in properties with a high rental yield to fund his retirement. He needed D1's help to implement that plan as he considered that D1 would be able to identify suitable investment properties and manage the properties pending sale (which C1 would not have had the time to do as he was continuing to work full-time). The Claimants were happy to offer D1 50% of the net profit because they thought that would suitably incentivise him to give them, rather than his other clients, first choice of properties that could be "flipped". In due course these discussions led to the conclusion of the Agreement whose terms I analyse in the section below.

20. On 18 September 2013, the Claimants purchased the first property ("7K") to which the terms of the Agreement applied. There was little dispute as to the parties' dealings in relation to 7K. It was bought for £524,480.35. It was tenanted for a short period and sold for £770,000 on 24 January 2014. This property was, therefore, successfully "flipped" and produced a very attractive profit on resale that was realised over just four months.

21. The parties were agreed that the "net profit" that fell to be divided between them on the sale of 7K was £188,844.54. In his contemporaneous spreadsheet dividing up this profit, C1 made an adjustment reflecting the undisputed fact that, for the period when 7K was let, D1 had received and retained some rent. The Claimants quantified the net amount of this rent at £3,200 (gross rent of £3,600 less associated expenses incurred by D1 of £400). Accordingly, the Claimants deducted £3,200 of D1's notional half share of net profit (£94,422,27) and so paid the Defendants a total of £91,222. It was suggested to C1 in cross examination, and C1 denied, that D1 received £7,200 of gross rent so that the manual adjustment in relation to just £3,600 was indicative of an agreement that D1 was entitled to retain 50% of the gross rent received, with the adjustment being needed only in relation to the remaining 50%. I have concluded that only £3,600 was received – primarily because I was not shown any reference in the contemporaneous spreadsheets that C1 maintained to a receipt of £7,200 and because I consider it more likely that, since the Claimants owned 7K for only four months, only the lower amount was received.

22. The Properties were also purchased in accordance with the terms set out in the Agreement. Dealings in relation to the Properties were much more contentious and are at the heart of these proceedings. I set out my findings in relation to dealings in the Properties later in this judgment.

The terms of the Agreement

23. The parties are agreed that the Agreement was oral only and that no part of it was reduced to writing. It is also common ground that the Agreement was entered into between C1, acting both on his own behalf and as agent for C2, and D1. D2 was not party to the Agreement although, as discussed later in this judgment, it did receive sums in connection with the Properties.

24. The parties were also agreed that the following terms formed part of the Agreement:

i) D1 would contribute his experience, expertise, time and contacts to "source and procure opportunities to acquire undervalued properties that could be sold on for a profit".

ii) To the extent that the Claimants wished to proceed with the purchase of a particular property that D1 brought to them, D1 would oversee negotiations leading up to that purchase. Similarly, D1 would oversee negotiations for the sale of any property that he had brought to the Claimants, although D1 was not obliged to market the properties for sale as third party estate agents could be used for that purpose.

iii) D1 would be responsible for the management of properties that the Claimants acquired pursuant to the Agreement. That would include overseeing their maintenance, communicating with management companies, finding suitable tenants and dealing with those tenants.

iv) If they wished to go ahead with the purchase of a property that D1 had identified, the Claimants alone would be responsible for providing the purchase price (partly from their own resources and partly by way of mortgage finance). Similarly, the Claimants would be responsible for defraying all costs and expenses associated with any properties so purchased.

v) Any properties purchased pursuant to the Agreement would be registered at HM Land Registry in the names of the Claimants alone.

vi) D1 would not be entitled to any commission or fee for introducing properties to the Claimants. Nor would he be entitled to any fee for managing properties that the Claimants acquired following an introduction by him. Instead, he would receive 50% of the "net profits" following sale of the relevant property. C1 and C2 would between them share the other 50% of net profits.

vii) "Net profits" were to be calculated by calculating the excess of the sale price of a property over the purchase price as reduced by all expenses associated with the property, its acquisition, or its sale. Such expenses would include (without limitation), the costs of building or renovation works, the costs of routine maintenance, refurbishment or decoration, legal and estate agents' costs arising in relation to the sale or purchase, mortgage interest and early redemption penalties imposed if a loan was repaid early, and stamp duty land tax. However, to the extent that rent was obtained on a property that would be treated as reducing the expenses arising thereby indirectly increasing net profit.

viii) D1 was to use reasonable skill and care in the performance of his obligations under the Agreement. He was obliged to give the Claimants an accurate account of rent that he received on their behalf when managing the Properties.

25. In the remainder of this section, I make findings on the terms of the Agreement on which the parties were not agreed.

Introductory remarks on the law

26. No party made any detailed submissions on the approach that the court should follow to ascertain the terms of the Agreement. I proceed on the following basis, which I understood to be uncontroversial:

    i) The task is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement. That involves a consideration of the language that the parties used and what a reasonable person, who has all of the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract, would have understood the parties to have meant.

    ii) Where there are competing interpretations of what the Agreement meant, it is appropriate to test each competing interpretation against the provisions of the Agreement viewed as a whole and its commercial consequences.

    iii) It is important to be alive to the possibility that one side may have agreed to something which, with hindsight, did not serve that party's interest. Moreover, provisions whose meanings or effect are in dispute might well represent a negotiated compromise or that the parties were not able to agree more precise terms.

    iv) Since the Agreement was not reduced, even partially, to writing it is appropriate to have regard to the parties' conduct after concluding the Agreement as an aid to determining its terms.

    v) In order to imply a term into the contract, the term in question must satisfy the test of "business necessity" (*Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72). The fact that an implied term is "reasonable" is not sufficient; nor is it sufficient that the parties might have agreed to that term had it been suggested to them.

Whether D1 would have any proprietary interest in the Properties

27. D1's pleaded case is that the parties to the Agreement provided for the Properties to be registered in the Claimants' names only because D1 had a bad credit rating which would, had he been registered as co-proprietor, have adversely affected the ability to raise finance secured on the Properties.

28. I am prepared to accept that D1's credit rating in 2013 was poor. I am also prepared to accept that this might have impacted on banks' willingness to lend if D1 was to be registered as a co-proprietor. However, I do not accept that these were reasons why D1 was not registered as co-proprietor. Rather, I accept the Claimants' case that D1 was not so registered because the common understanding of the parties was that the Properties were to belong legally and beneficially to the Claimants alone.

29. I have reached that conclusion primarily because it would have no commercial sense for the Claimants to cede any proprietary interest in Properties in

circumstances where they alone were providing the deposit for the Properties and they alone were liable to the banks providing loan finance.

30. Both the Claimants and the Defendants had considerable experience in property investment. Both sides would have been well aware at the time they concluded the Agreement that banks would typically be unwilling to lend 100% of the purchase price of any Property so that some material part of the purchase price would need to be funded out of the Claimants' own resources and be paid, as a deposit, on exchange of contracts. That was precisely what happened on the purchase of all of the Properties.

31. On D1's interpretation of the Agreement, despite having contributed nothing to the purchase price, D1 would nevertheless obtain some proprietary interest in the Properties. On that interpretation, the Claimants' very act of providing part of the purchase price from their own resources would result in a bounty to D1. Moreover, that bounty would arise at the moment of a Property's acquisition even if the Property was subsequently not sold at a profit.

32. A similar point arises in relation to the part of the purchase price provided by way of bank finance. The Agreement made it clear that only the Claimants assumed liability to the bank in relation to those loans. Yet on D1's case, if a particular Property could not be sold at a profit, the Claimants would alone be obliged to pay the principal and interest on the bank debt only to find that they had to share ownership of that Property with D1 who had contributed no funds to its purchase.

33. The consequences I have outlined are so contrary to commercial common sense, and so at odds with the clear intention behind the Agreement to the effect that D1 was to be rewarded in relation to a particular Property only if it was ultimately sold at a profit, as to demonstrate that the true agreement between the parties, objectively ascertained, could not have involved D1 obtaining any proprietary interest in the Properties.

34. I am reinforced in that conclusion by the fact that D1 himself appeared to recognise that he would be paid only out of "net profit" generated on sale and had no proprietary interest in the Properties prior to sale. On 21 November 2018, D1 and C1 had a difficult conversation over WhatsApp about a possible marketing of 9H for sale at £1.5m. No material net profit would have been generated by a sale at that price and D1 wanted to "sit on it and sell it for [£2m later on]". Revealingly D1 said the following about the effect of a sale at £1.5m:

> *"The price you're selling is good for you u will get your deposit out and [I] am left with nothing".*

If he had a proprietary interest in 9H, he would not have been "left with nothing" even if it had been sold for £1.5m.

35. Since there was a clear understanding, at least until the relationship soured, that D1 was to obtain no proprietary interest in the Properties, it follows that the Claimants made no representation to the effect that he would obtain such an interest. Nor did they fail to correct any misapprehension on D1's part that he was

entitled to an interest in the Properties. There was no misapprehension to correct since D1 realised he would obtain no such interest.

Whether D1's obligations under the Agreement were "entire"

36. The question is whether D1's obligations under the Agreement were "entire" (in the sense explained in *Cutter v Powell* (1795) 6 T.R. 320) so that it was only when he performed all of his obligations under the Agreement that he acquired a right to 50% of net profits.

37. D1 did not say in his witness evidence that there was any express agreement to the effect that he might obtain a right to payment under the Agreement in respect of a particular Property before the point at which that Property was sold or before the point at which he had performed all of his obligations under the Agreement. It was therefore common ground that any term to such an effect would necessarily be an implied term.

38. D1 argued for an implied term in either of the following forms:

    i) Provided that he had been performing his obligations under the Agreement for a sufficiently long period of time, he would, on expiry of that period, acquire a right to be paid a reasonable sum for his work in relation to a particular Property even if the Property had not been sold by that point.

    ii) Since the primary service that D1 was providing consisted of identifying suitable properties that could be "flipped", D1's entitlement to be paid 50% of net profits in relation to a particular Property was crystallised as soon as the Claimants acquired that Property. If D1 did not perform his remaining obligations under the Agreement, he could certainly be sued for damages, but non-performance of those remaining obligations would not, of itself, cause him to lose the right to receive his share of net profits.

39. Neither party gave evidence that they even considered, still less discussed, what would happen if, after several years, having introduced the Properties to the Claimants, and managed them in the interim, the Agreement was terminated before those Properties were sold. I can accept that the parties might, had this risk been pointed out to them, have sought to deal with it in some way, but there was no single "right" way of doing so. D1 might well have argued for some right of payment in respect of work already performed. However, the Claimants might have had a different perspective. If, after several years, properties that the Defendant had introduced remained unsold, they might well have argued that no fee should be paid, since those properties could not have been the kind of undervalued properties they were looking for.

40. I therefore conclude that the implied term referred to in paragraph [38.i)] above does not satisfy the test of "business necessity". Since the parties did not expressly provide for what was to happen if the Properties remained unsold for a few years, I infer that they did not intend anything particular to happen in that situation.

41. There is even less of a case for the implied term referred to in paragraph 38.ii) above. Both sides would have realised that some work and management of the

Properties would be needed before they could be flipped. Even 7K, which had generated a very healthy profit in a short period, had been tenanted for a period and so would have needed some management. The Claimants were busy people. They were looking to D1 to provide a complete package of services starting with the identification of undervalued properties and continuing with property management up to the point at which the Properties were successfully flipped. Far from being "necessary" from a business perspective for D1's right to payment to crystallise as soon as a property was purchased, the term outlined at 38.ii) would have been at odds with the factual background in which the Agreement was concluded and what the Claimants were seeking to obtain from it.

42. My conclusion, therefore, is that D1's obligations under the Agreement were "entire". His right to payment crystallised only after he had performed all of his obligations under the Agreement.

Decision on whether to sell

43. As I have concluded above, the Agreement gave D1 no proprietary right in any of the Properties. Accordingly, the decision as to whether, when and at what price to sell the Properties was one that the Claimants alone were entitled to take. Passages of the written submissions that Mr Hope made on behalf of D1, and parts of D1's evidence, suggested that he was arguing that he had a contractual right to be consulted as to the timing and terms of any sale of the Properties. In the ordinary course of events, the Claimants would naturally consult D1 on matters such as this since they considered him to have more experience than them on such issues and, until the relationship broke down, they trusted his views. However, the parties agreed no contractual obligation on the Claimants to consult. Rather, they proceeded on the basis that since the Claimants and D1 were sharing any net profits equally between them, the Claimants had a natural incentive, that did not need to be enforced by contractual provisions, to sell the Properties at a time, and for a price, that would generate a healthy profit.

44. Nor do I consider that any right of consultation should be implied into the Agreement on the basis of "business necessity". The Agreement was capable of functioning perfectly well on the basis of the Claimants' natural incentive, which was only reinforced by their wish to fund C1's upcoming retirement, to sell the Properties for a good price which would, in the ordinary course of events, involve them seeking D1's views. Therefore, I conclude that D1 had no contractual right to be consulted on sale of the Properties; still less did he have any contractual right to veto the sale of any particular Property.

Classification of the Agreement – whether it established a partnership

45. Section 1 of the Partnership Act 1890 provides as follows:

> ***1 Definition of partnership***
>
> *(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.*

46. That definition is supplemented by s2 which provides, so far as material, as follows:

> ***2 Rules for determining the existence of partnership***
>
> *In determining whether a partnership does or does not exist, regard shall be had to the following rules:*
>
> *…*
>
> *(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business;*

47. Therefore, the central question is whether the Claimants and D1 were carrying on "business in common" (it being quite clear that, if they did, that business was carried on "with a view of profit"). The fact that the Agreement provided for D1 to receive a payment by reference to "net profits" realised on sale of Property is prima facie evidence of the existence of a partnership, but is not determinative.

48. D1 relies on various WhatsApp messages in which D1 used the expression "partnership", or similar to describe their relationship. In the first, sent on 3 February 2017, D1 wrote to C1:

> *"U tell him your my partner".*

49. The message set out above was sent immediately after a message in which D1 attached a ".vcf" file (which typically includes contact information) relating to "Yousif Removal Company". In my judgment, D1 was saying that, if C1 called Yousif Removal Company and said that he was a partner of D1, he would obtain a favourable quote. It is true that C1 did not challenge D1's use of the word "partner". However, I consider that this exchange sheds little light on the legal classification of the parties' relationship.

50. The other WhatsApp messages to which I was referred were generated much later, and after the point at which cracks were forming in the parties' relationship. By 16 January 2019, evidently concerned at the prospect that the Claimants might sell 9H for a price which generated little if any profit (see paragraph [34] above), D1 sent C1 a WhatsApp message claiming that he (D1) was C1's "50% partner". In a similar vein, also in the context of discussions on a proposed sale of 9H for little or no profit, on 19 December 2018, D1 said in a WhatsApp message that he and C1 are "50% 50% you have your opinion and I have mine". That D1 sent these messages, after the relationship started to fracture, does not demonstrate the Claimants and D1 <u>were</u> partners; just that D1 was formulating that position in response to concerns that 9H might not be sold for a "net profit" and so D1 would not be paid for his work on 9H. I do not attach much significance to the fact that D1 was not challenged on his choice of words. His oral evidence demonstrated that he was a forceful personality. Towards the end of their relationship, there was evidently clear tension between the Claimants and D1, but the Claimants were still relying on D1 for some help and assistance. In those circumstances, I do not regard it as unsurprising that the Claimants would have sought to avoid confrontation.

51. Nor do I regard the parties' requests to each other for the provision of "accounts" as indicative of partnership specifically. Whether it was a partnership or not the parties were engaged in a venture in which each needed information from the other. D1 was receiving rent on the Properties and paying builders who were undertaking work at the Properties. There did not need to be a partnership for the Claimants to have a legitimate interest in receiving details of money that was spent and received. By the same token, C1 was keeping a running total of amounts spent and received on the Properties which was central to the determination of "net profit". Even if there was no partnership, it was entirely understandable that D1 would periodically wish to understand the level of those expenses so that he could make an informed estimate of how much he might expect to receive when the Properties were sold.

52. D1 also relies on occasions on which he provided financial support in relation to the Properties. In September 2018, he covered £8,000 of expenses associated with the renovation of 10PW out of his own resources. However, I have concluded that this was not a contribution to "capital" of a partnership. It would have been contrary to the rationale underpinning their dealings for D1 to make any financial contribution to capital since the essence of their relationship involved the Claimants providing finance and D1 providing his skill and professional services. Rather, the payment of the £8,000 was a short-term loan, made by D1 to C1 at a time when the Claimants, although generally responsible for meeting costs and expenses, were experiencing cash flow problems.

53. D1 also stressed the use of his own initiative in relation to the Properties. For example, he started building works at 10PW to return it to a "shell" as discussed in paragraph [76] below without telling the Claimants in advance. My conclusion is that D1 overstepped his authority on this occasion, but the Claimants simply chose not to challenge him because there was little to be gained in doing so after the event. However, more generally, I do not consider that the wide authority that D1 enjoyed was indicative of partnership. Rather, it is consistent with the Claimants, busy people with capital to invest, choosing to delegate to D1 much of the day-to-day management of their investments.

54. D1 pointed to his agreement to live at 9H, and pay a rent for doing so, even though 9H, a 5-bedroom property, was not suitable for a single man such as him. I agree that D1's occupation of 9H (discussed later in this judgment) demonstrates that D1 was prepared to make some sacrifices in the furtherance of the overall project. However, whether or not the Agreement is characterised as a partnership, D1 would be well rewarded if the Properties could be sold at a significant profit. Accordingly, his willingness to make certain personal sacrifices to maximise the prospect of the Properties being sold at a profit is consistent with D1 seeking to secure an overall return for himself. It does not suggest that he was in partnership.

55. All of the points that I have made on the factors D1 relies on in support of a partnership being present are aspects of the fact that no business was being carried on in common. The reality is that the Claimants and D1 were carrying on separate businesses: the Claimants' business was of property dealing; D1 was an estate agent and property manager. The Claimants engaged the service of D1's business with a view to making profits in their own property dealing venture. The Claimants and D1 were to share in the profits of realisation of the Properties, but

in their capacities as owners and operators of separate businesses, not as partners. It follows from this that their business relationship was close and their goals similar. However, the closeness of relationship and similarity of goals are not indicative of a partnership because the parties were entering into their dealings as operators of separate businesses.

56. I am reinforced in that conclusion by a number of asymmetries between the positions of the Claimants and D1 which I consider to be inconsistent with a single business being carried on. Particularly significant was the asymmetry in terms of decision making. The Properties belonged to the Claimants alone and, as I have concluded, they alone had the power to decide when the Properties would be sold and at what price. A further asymmetry concerned their exposure to loss. If it took time to sell a Property, and if there were void periods in which no rent was received, but expenses still had to be paid, the Claimants alone bore that risk. (The fact that D1 offered, purely voluntarily, to provide loans of relatively small sums, for example the £8,000 referred to at [52] above does not alter this conclusion. He was under no contractual obligation to do so.) If a Property was sold at a loss, D1 could not be required to contribute a share of the loss. Of course, there would be consequences for D1 if the Properties were sold at a loss: he would not be paid for the work he had done. He would therefore have suffered an opportunity cost as he could have spent his time more profitably on other projects. However, that was a different type of cost from that to which the Claimants were exposed.

57. A further asymmetry arose from the fact that, if a Property was sold at a profit, D1's profit in relation to that Property crystallised at that point. His share of profit could not be taken away even if the other Properties performed badly. By contrast, the Claimants remained exposed to the risk of financial loss on other Properties even after a particular property had been sold at a profit.

58. Finally, I note that in some respects, D1's own conduct was inconsistent with the existence of a partnership. For example, as I have noted at [102] below, D1 regarded it as proper for him to receive and retain a commission from the vendor of 415PW without telling the Claimants about it. That behaviour is consistent with D1 seeking to further the interests of his own separate business; it is inconsistent with him carrying on a single business in common with the Claimants.

59. For all of those reasons, I have concluded that the Agreement did not establish a partnership between the Claimants and D1.

PART B: FACTUAL FINDINGS RELATING TO THE PROPERTIES

Introduction

C1's spreadsheets

60. C1 maintained contemporaneous spreadsheets that were intended to record income and expenses associated with the Properties. Those spreadsheets sought simultaneously to record both the receipt and expense in question and who had

received or paid it by means of a procedure analogous to double-entry book-keeping. So, for example, if C1 paid a council tax bill of £1,000, the expense would be recognised in the "charges" column of the spreadsheet and a positive entry of £1,000 would be made in C1's column of the spreadsheet. The idea was that, when the Property in question was sold, all expenses and receipts would be captured (to enable net profit to be calculated). The Claimants' and D1's respective columns would show how much they had each paid and received in respect of that Property with those columns being used to determine the precise amounts each was to receive out of the net proceeds of sale so as to result in them each retaining 50% of net profit.

61. Consistent with the above principle, if it was known that a rental payment of £5,000 was made on a Property, but that D1 had retained the entirety of that payment, then a £5,000 entry would be made in the "rents" column of the spreadsheet and a negative entry made in D1's column of the spreadsheet. That treatment of known retentions of rent was accurate as far as it went. However, it was at risk of overlooking an additional entry that logically needed to be made if and when D1 used the £5,000 to discharge a liability associated with a Property. The logic of the spreadsheets was that, at that point a further entry needed to be made in which the liability of £5,000 was recorded in the "charges" column of the spreadsheet and a positive entry of £5,000 was made in D1's column reflecting the fact that he had discharged that liability. Provided that both entries were made, there would be no net effect on D1's column, reflecting the fact that he had used rent of £5,000 to discharge a liability of £5,000 and had therefore suffered no overall detriment nor realised any overall benefit. But if the further entry was not made then the spreadsheets would effectively be treating D1 as having taken rent for his own benefit.

62. C1 would in many cases not know whether, and if so when, to make that further entry. I am satisfied that if, in the above example, D1 had provided C1 with a receipt for the £5,000 he had spent, C1 would have made the appropriate entry. But D1 did not always volunteer receipts, and C1 did not always ask for them. After the relationship between the Claimants and D1 broke down, C1 set about trying to estimate expenses that D1 had incurred that had not previously been reflected in the contemporaneous records of income and expenses. He therefore sought to address the vulnerability that I have identified. However, this after-the-event exercise would not necessarily provide a complete answer. It must still have depended on receipts that D1 provided to C1 and so risked overlooking expenditure that D1 had incurred, but for which he had not provided a receipt.

63. My overall impression is that the spreadsheets are careful, meticulous and detailed. There were occasional errors in the spreadsheets which I address below. (I do not, however, accept D1's specific criticism that the spreadsheets omit the £8,000 loan referred to in paragraph [52] above. That £8,000 did not need to go into the spreadsheet as it was a loan that was repayable on its own terms and not as part of the process of calculating profits of sale of 10PW). I consider that, in general, the spreadsheets give an accurate account of sums that the Claimants received, and did not receive, from D1 in respect of the properties. However, because of the point I have just made, I consider that they are at risk of not disclosing all expenses that D1 discharged out of rent that he received.

How I will seek to ascertain the scope of any wrongful retentions of rent

64. Many of the factual findings I need to make in this part relate to the Claimants' allegation that the Defendants withheld rent that they collected on the Properties and did not pay it over to the Claimants. The Defendants' response to that allegation typically involved either (i) an assertion that rent was not withheld, but was paid over and the Claimants failed to recognise that fact in its records and/or (ii) to the extent that rent was withheld, it was legitimately spent on expenses connected with the Properties. Argument (ii) is a shorthand which I will adopt in this judgment: the Defendants do not in general say that a particular receipt can be matched with a particular expense since money is fungible. Rather, they say that they have incurred expenses on the Properties which the Claimants have failed to take into account in their claim for what is owed.

65. Where there is a dispute as to whether D1 paid over a particular sum to the Claimants then, because I consider C1's spreadsheets to be, as a general matter, an accurate record of payments actually made I tend to prefer C1's version of events. I recognise the possibility that the spreadsheets might, by mistake, overlook particular receipts and, as noted below, this did happen with some of the rent received from Grosvenor on 415PW. However, I do not accept D1's evidence to the effect that the spreadsheets failed, on a significant and widespread basis, to reflect sums paid over.

66. The question of whether rent was withheld was legitimately spent on matters connected with the Properties is more difficult given the points I have made at paragraphs [61] and [62] above. To an extent, D1 has taken the opportunity to put forward more evidence of expenditure than he put forward when C1 was preparing his spreadsheets. However, there are still gaps: and some of the expenditure for which D1 seeks credit is not verified by receipts. I accept D1's evidence that, when his relationship with the Claimants was good, he was not always required to retain receipts. Accordingly, there would be some risk of goalposts being moved if, at trial, D1 was only given credit for expenditure verified in receipts. I am, therefore, prepared to accept that some expenditure was incurred even where no receipts are provided.

67. This approach, however, has its limits. It would not be right to accept that credit should be given for every individual sum that D1 said, in his witness statements, was spent on the Properties. That would be too generous to D1, first since the money might not have been spent in the way asserted; second because even if it has been so spent, it might already have been taken into account in the formulation of the Claimants' claim so that giving further credit would involve a double count.

68. I will make findings of fact in two stages. First, I will ascertain the aggregate rent that was not paid over. I will do that on a "property-by-property" basis. Second, I will consider the extent to which D1 has incurred expenditure that has not previously been taken into account in the Claimants' contemporaneous records of income and expenses (perhaps because of the vulnerability in those records that I have mentioned in [61] above). It is less straightforward to do that on a property-by-property basis since D1's case in certain respects was that some rent received on one Property was spent on refurbishments on both that and another Property, without always allocating the amount spent between the two Properties

involved. Therefore, I will approach additional expenses on a global basis, making a slight exception in relation to 9H since on that Property, D1 was quite specific as to the expenses that should be taken into account in the calculation of the profit that he made on subletting.

69. The parties' closing submissions helpfully focused their dispute on particular rent said to have been retained, and particular additional expenses said to have been incurred. I have focused my analysis on those areas of dispute.

10PW

General matters

70. The Claimants purchased 10PW on 18 November 2013. They provided the entire purchase price of £660,000 of which £492,960 came from a loan to the Claimants from Clydesdale Bank plc by way of mortgage secured on 10PW. The balance came from the Claimants' personal resources including funds raised from an equity release transaction on their private residence. (Subsequently the Claimants remortgaged 10PW in order to reverse that equity release).

71. Agreed expert valuation evidence estimates the value of 10PW as being £660,000 when it was purchased, with the result that the Claimants neither overpaid, or underpaid for it. The agreed expert evidence is that 10PW would, if let, command an annual rent of £39,000 as at the date of purchase. By the time of the trial, it was common ground that, when D1 arranged lettings of 10PW, the rent receivable was at least a market rent.

72. In 2013 to 2014 some works were undertaken at 10PW, but they were not significant in scale.

73. On 10 June 2014, a Mr Al-Kurdi entered into a 4-month tenancy of 10PW for a monthly rent of £4,250. Mr Al-Kurdi paid his rent in full and the Claimants accept that they received this sum in full.

74. Mr Al-Kurdi's tenancy expired in October 2014. Between then and January 2016, the Claimants received some payments of rent in respect of 10PW although they complain that there were wrongful deductions from rent that the Defendants paid over to them.

75. From early 2016, D1 arranged for individual rooms in 10PW to be let on a monthly basis. The letting of rooms in 10PW ceased in around February 2017.

76. After the individual room lets ceased, refurbishment works at 10PW commenced. Those refurbishment works took place in two stages. First, 10PW was, as C1 put it "completely gutted out… leaving an empty shell". That process was undertaken by Florin Buccur, a builder, and was completed by July 2017.

77. At or around the time that 10PW was being returned to an "empty shell", a Mr and Mrs Kobeissi indicated some interest in purchasing 10PW as a shell. That put the Claimants in something of a quandary as money spent on bringing 10PW back from its state as a shell could be wasted if the Kobeissis ultimately purchased

10PW. As events transpired, the transaction with the Kobeissis fell through in December 2017.

78. Once the transaction with the Kobeissis fell through it was clear that 10PW needed to be brought back from its condition as a shell. A builder called Harry Singh was engaged but work did not start on this second phase of refurbishment until around April 2018. Both sides blame each other for the delay.

79. On 8 November 2018, by which point the second phase of the refurbishment of 10PW was still not complete, the Claimants took back responsibility for the management of 10PW from D1.

80. I now turn to make findings of fact on points of detail relating to 10PW that were in dispute.

When Mr Forouhar and D1 respectively were collecting the rent on 10PW

81. I reject D1's case that he was not collecting rent or undertaking primary management of 10PW until January 2016. On 10 June 2014, he signed (as "Landlord") a tenancy agreement of 10PW with Mr Al-Kurdi. Certain details on that tenancy agreement, such as the address of the property, the term and the monthly rent were hand-written. I accept D1's evidence that the writing was not his. However, the fact that he signed it means that I cannot accept his evidence that he had never previously seen that agreement. The agreement has satisfied me that D1 was managing the property in June 2014.

82. Moreover, the Claimants' Scott Schedules indicate that they received payments from Mr Forouhar's bank accounts in respect of 10PW only between September 2015 and December 2015, a period in which D1 was in prison. Mr Forouhar's witness statement takes matters no further forward as he does not say clearly the periods for which he was, or was not, collecting rent on 10PW. I have concluded that D1's evidence that Mr Forouhar was taking the lead role in collecting rent on 10PW until January 2016 was intended to distance D1 from responsibility for irregularities with the rent that happened before then. Since D1 was managing 10PW in June 2014, I have inferred that he was also doing so from the date 10PW was purchased as I was shown no reason why responsibility for management of 10PW would have changed between then and June 2014.

Letting December 2013 to June 2014

83. I accept the Claimants' case that 10PW was tenanted between December 2013 and June 2014. That is consistent with contemporaneous records that C1 made in his spreadsheet recording summary details of short-term lets of the property in that period. To give a flavour of these, one such entry read:

> *"Let from 21 dec for 10 days to 31 dec check out 12pm. 1100 pw. Picked up 1570 -10 electric top up."*

84. These and similar entries were made before 2016, well before the relationship between the Claimants and D1 soured. C1 was working full time. He would not have arranged these short term lets or received the rent for them. As I have concluded above, D1 was managing 10PW at this time and therefore I find that

D1 received £16,702, the figure set out in C1's spreadsheets, in respect of short-term lets of the property in this period. I also find that C1 received none of this rent, because that was the position recorded in the contemporaneous spreadsheet.

85. D1 argues that, since there is no evidence of C1 objecting to this retention at the time, that suggests that no retention took place. I disagree because I accept C1's evidence that D1, whom he trusted at the time, gave him a reason: the rent was being withheld in order to pay for anticipated works at 415PW. D1 said he made no such statement, pointing out that 415PW was not purchased until July 2014. However, it would have taken time for that purchase to be concluded. Therefore, the purchase of 415PW would have been an event within the parties' contemplation from around February 2014 onwards. I determine the extent to which the £16,702 was indeed spent at 415PW in the global "Expenses" section below.

Other withholdings from rent November 2014 to June 2015

86. C1's contemporaneous spreadsheets record two occasions on which D1 retained an element of rent received on 10PW: £1866.67 on 1 November 2014 and £1,300 on June 2015. I reject D1's argument that there is no evidence that the rent was retained since the retentions were noted in C1's contemporaneous spreadsheets. Having concluded that D1 was managing the property in this period, I have concluded that he did indeed retain these sums.

Individual room lets January 2016 to February 2017

87. Between January 2016 and February 2017, D1 arranged to let individual rooms in 10PW for rents ranging from around £780 per month to around £1,000 per month. The Defendants agree that the room lets were arranged and that they received the rent. They also agree that some rent received was not paid over saying that they applied it towards refurbishment costs on 10PW. I will deal with the question of expenses later and in this section simply determine the amount of rent that was retained.

88. Some of the individual room lets were evidenced by tenancy agreements entered into between a particular tenant and D2. However, in some cases, no tenancy agreements were available evidencing a particular room let, but it could be inferred that a tenant was occupying the room from entries in D2's bank statements. For example, it could be inferred that a Mr Karan Metha was occupying Room 1 of 10PW in January 2016 from a receipt in D2's bank statements with reference "Mr Karan A Metha 10R1".

89. Some tenants paid their rent, and deposits, to D1 in cash. Some paid by transfer to D2's bank accounts. D1's cross-examination demonstrated that his record-keeping was not equal to the task of keeping track of all payments made and received by the number of tenants involved. A particular defect was that D1 kept no meaningful contemporaneous records of cash payments that he received. The approach he followed when preparing his Scott Schedule was revealing: he deduced the amount of payments that he received for the individual room lets by checking entries in his, and D2's, bank statements. He was driven to accept in cross-examination that he could not, therefore, be sure that his Scott Schedule,

still less his contemporaneous records, properly captured cash payments that he received.

90. In their Scott Schedule, the Claimants distilled from the contemporaneous documents, including C1's spreadsheets, D1's bank statements and such tenancy agreements as were available, the amount D1 and D2 received from the individual room lets. They then took into account known receipts from C1's contemporaneous spreadsheets and bank accounts to estimate the amount of rent that D1 and D2 kept back. That must have been a painstaking process and the result was an impressive document that served as a distillation of the large amount of contemporaneous documentary evidence.

91. The Defendants' Scott Schedule did not engage with much of the detail in the Claimants' Scott Schedule. It did not address the contemporaneous documentary evidence of receipts (such as the tenancy agreements), but rather deduced receipts from bank statements alone, which overlooked cash payments. In saying this, I should not be taking as criticising D1 or his advisers who I know have worked hard on the preparation of their Scott Schedule. Rather, I am simply observing that the poor quality of D1's contemporaneous record-keeping meant that he did not have the raw material necessary to mount a detailed challenge to the Claimants' Scott Schedule which was rooted in both the primary documentation and contemporaneous records set out in C1's spreadsheets.

92. Perhaps conscious of this difficulty, in his oral closing submissions on behalf of the Defendants, Mr Hope made few observations on the specifics of the Claimants' Scott Schedule as it applied to the individual room lets. Instead, he made more general criticisms, arguing that, in seeking to infer rental receipts from tenancy agreements, the Claimants were making unwarranted assumptions and double counting rental receipts in two respects:

    i) A tenant might have signed a tenancy agreement of a particular room for 6 months or 12 months, but this did not mean that the tenant actually stayed for the period of the tenancy.

    ii) Moreover, because the tenancy agreements did not always specify the room to which they related, what might appear to be two concurrent tenancies of different rooms might actually be sequential tenancies of the same room. To give an extreme example to illustrate both points, two tenancy agreements might be identified, one for a 12-month term dated 1 January 2016 and one for a six-month term dated 1 June 2016 and both providing for a rent of £800 per month. Those two agreements between them might appear to generate gross rental income of £14,400. However, if the two agreements related to the same room and each tenant left after one month, the actual rent received (ignoring the potential for retention of the tenant's deposit) would be just £1,600.

93. There is a clear logic underpinning these submissions. However, they lacked an evidential basis to make them good. I was not referred to witness evidence suggesting that tenants frequently left before the expiry of their tenancy agreement. Indeed D1's evidence in his witness statement was that "Most of the tenants stayed for around 6-12 months". The tenancy agreements were for a

mixture of 6 months and 12 months. Therefore, I have concluded that a tenant who wished to stay for 6 months would ask for a 6-month tenancy agreement and stay for the duration. Similarly, a tenant who wished to stay for 12 months would ask for a 12-month tenancy agreement and likewise stay for the duration or renew a 6-month agreement for a further 6 months. In cross-examination, D1 said that he might, depending on the relationship with a particular tenant, allow the tenant to leave early without forfeiting his or her deposit. However, he did not say how frequently this actually happened. I have concluded, therefore, that the submission outlined at paragraph [92] above simply represented a logical possibility rather than something that actually affects the accuracy of the position set out in the Claimants' Scott Schedules.

94. Nor do I attach much weight to Mr Hope's argument that D1 had provided the tenancy agreements on which the Claimants' Scott Schedules and would not have "dropped himself in it" if those tenancy agreements revealed rent that had been retained. Whether D1 realised or not when disclosing the tenancy agreements, as subjected to the detailed analysis that the Claimants' advisers have performed, those tenancy agreements do demonstrate that some rent was not accounted for.

95. When kindly complying with my request that both counsel share their speaking notes of oral closings (suitably edited), Mr Hope made some additional points that I did not understand to have been advanced orally. I can deal with those briefly. First, I do not accept that the Claimants' Scott Schedules can only distil evidence of retentions of rent received in cash. Those Scott Schedules sought to compare those receipts that it could be presumed the Defendants received (given the terms of the tenancy agreements and payments into the Defendants' bank accounts that appeared to link to room lets at 10PW) with the payments the Defendants actually made. That process was capable of highlighting evidence of a failure to pay over rent that the Defendants received into their bank accounts just as much as it could indicate a failure to pay over cash rent received. If the Defendants considered that particular items included in the Claimants' Scott Schedule did not represent rent on 10PW, or if they considered that they had paid over more in rent than the Claimants' distillation of the evidence suggested, they needed to draw that point specifically to my attention.

96. Nor do I accept that the accuracy of the Claimants' Scott Schedules is called into question by the fact that, in some months, the Claimants were inferring receipts from more tenants than there were "live" tenancy agreements. The Claimants were entitled to submit that entries in the Defendants' bank accounts that appeared to refer to rent on 10PW could be indicative of a rental receipt even without a tenancy agreement, not least since the Defendants had access to underlying tenancy agreements which the Claimants did not.

97. I therefore consider that the Claimants have, in their Scott Schedules accurately calculated rent withheld in relation to the individual room lets. I do, however, accept the Defendants' general point that some of the receipts going into their bank accounts from tenants of individual rooms at 10PW could have included a deposit that the Defendants might have had to return at the end of the tenancy. It is difficult to know what allowance, if any, to make for this point since I was not referred to evidence on the point. I will invite the parties to reach an agreement on an adjustment for this item.

Overall conclusion on gross rent withheld at 10PW

98. I have, therefore, concluded that, subject to an appropriate adjustment in respect of deposits, the distillation of the evidence set out in the Claimants' Scott Schedules is correct. Subject to that adjustment, D1 retained £57,650.04 of rent that he received on 10PW without paying it over to the Claimants.

415PW

General matters

99. D1 introduced 415PW to the Claimants and they completed the purchase on 7 July 2014. The Claimants provided the entire purchase price of £775,000 with £499,231 coming from a loan secured on 415PW and the balance from their personal resources, including the proceeds of sale of two of their ex-local authority properties.

100. Agreed expert valuation evidence estimates the value of 415PW as being £775,000 when the Claimants purchased it so they neither overpaid, nor underpaid for it. The agreed rental valuation evidence puts the annual rentable value of 415PW at £36,400 at the time of purchase. It was common ground by the time of the hearing that all tenancies that D1 arranged of 415PW provided for at least a market rent.

101. D1 had introduced 415PW to the Claimants in or around August 2013, some time before they actually purchased it. In August 2013, 415PW was being marketed for sale at £665,000 but the then owners decided to take the property off the market for a while. Accordingly, the price that the Claimants paid for 415PW was over £100,000 more than the price at which it had been offered for sale just 12 months previously, but D1 told the Claimants that the market had shifted in the meantime and the price was still good value.

102. D1 was paid a commission of £15,500 (2% of the purchase price) by the vendors of 415PW. D1 accepts that he receives that commission but asserts, and the Claimants deny, that he did so with the full knowledge and approval of the Claimants.

103. As with 10PW, there was some disagreement between the parties as to the precise periods during which 415PW was tenanted and the periods for which D1, as opposed to Saam Forouhar, was managing the property and collecting rents on it. The following summary of relevant events in the history of 415PW sets the scene for the findings of fact on disputed matters that follow:

    i) No significant building or refurbishment work took place at 415PW until the middle of 2017.

    ii) 415PW was tenanted almost continuously from July 2014 to until June 2016 and while the Claimants complain that some rent that the Defendants received during this period was not paid over, they accept that in general rent was properly accounted for in this period. (For their part, the Defendants argue that they were not responsible for rent collection until

May 2017 and so they do not accept that they were responsible for any shortfall in this period).

iii) In July 2016, D1 received some payments of rent totalling £4,321 from a "Mumtaz F" but did not pay this sum over to the Claimants. D1 asserts that there was a legitimate reason for this; the Claimants disagree.

iv) The Claimants were not notified of, and did not receive, any rent in the months of August to October 2016. The Defendants say that this is because 415PW was not let in this period. The Claimants assert that the Defendants did receive rent but failed to pay it over.

v) Between 26 November 2016 and 26 June 2017 (or perhaps a few weeks earlier), Grosvenor Property Investments Limited ("Grosvenor") was the tenant of 415PW. Grosvenor carried on some kind of property-related business which involved it sub-letting properties to tenants who paid rent in cash. Grosvenor sub-let 415PW and, since it was receiving rent in cash, paid the rent due on 415PW in cash. Grosvenor was irregular in paying rent for 415PW and either D1 or Mr Forouhar had to visit Grosvenor at their premises, and then be kept waiting for long periods, in order to secure the rent due.

vi) From June 2017 until around November 2017, 415PW was untenanted as building and refurbishment works were taking place. That work was undertaken by Florin Buccur.

vii) On 9 December 2017, Mr Al-Kurdi (perhaps the same gentleman as had previously occupied 10PW) took a 6-month tenancy of 415PW for a rent of £725 per week. He renewed for 6 months at a higher rent of £750 per week in June 2018 and renewed for a further 6 months in December 2018. Each time he entered into, or renewed, a tenancy he paid 6 months' rent in advance. No particular issue arose in relation to D1's dealings with Mr Al-Kurdi's tenancy until the renewal in December 2018. However, when in December 2018 Mr Al-Kurdi paid D1 £18,850 representing 6 months' rent in advance, D1 only initially accounted to the Claimants for half that amount (£9,425). He paid over a further £3,141.66 in March 2019, but only paid over the balance of £6,283.33 on 7 May 2019 after the Claimants threatened legal action. D1 accepts that the withholding of rent took place but denies that he misled the Claimants in connection with it.

The commission of £15,500

104. For reasons that follow, I do not accept D1's evidence that the Claimants knew that he was receiving the £15,500 commission from the vendors of 415PW and were comfortable with that. I prefer the Claimants' evidence that they were unaware that D1 was receiving that commission.

105. The Claimants would have realised that, if D1 was receiving an ordinary estate agent's commission from the vendor of 415PW, he would obtain a normal level of financial reward whether or not 415PW was the kind of prized undervalued property that the Claimants wanted D1 to introduce to them. That cut across the

very incentive that the Claimants were seeking to introduce in offering D1 50% of net profits particularly in circumstances where D1 had advised them that, even at the increased price of £775,000, 415PW represented good value. Therefore, had they known that D1 was receiving such a commission, they would at the very least have expressed concern. The fact that neither party suggests that any such concern was expressed indicates to me that D1 did not disclose to them that he was receiving that commission.

106. I am reinforced in that conclusion by the way in which D1 has dealt with the allegation that the Claimants were unaware of the commission. That allegation was set out in paragraph 33 of C1's first witness statement, dated 28 April 2021. D1 served evidence in response to that witness statement on 14 May 2021, which denied many of the allegations that C1 had made in his witness statement but was silent as to the allegation that the Claimants were unaware of the 2% commission from the sellers of 415PW. It follows that D1's evidence to the effect that he told the Claimants about this commission emerged for the first time during his oral evidence and I regarded it as less plausible as a result.

When Mr Forouhar and D1 respectively were collecting rents on 415PW

107. I have concluded that the Defendants were responsible for collecting any rent that was received on 415PW between July 2014, when the property was purchased and August 2015. There was a simple disagreement between the parties on this issue, with D1's evidence being that Mr Forouhar was managing the property in this period. On balance, I prefer the Claimants' evidence. C1 noted in his witness statement that D1 had to arrange for someone else to collect rent and manage the properties while he (D1) spent a few months in prison from around September 2015. Mr Forouhar was evidently D1's replacement for this period and I consider it less likely that C1 would have remarked on the handover if Mr Forouhar had been collecting rent and managing the property throughout. I also note that C1's spreadsheets reflect the fact that rent was kept back in various of these early months. While they were prepared to trust D1 to keep rent back, I do not consider that they would have been as trusting of Mr Forouhar whom they knew less well.

108. Between September 2015 and June 2016, I have concluded that Mr Forouhar was managing 415PW and collecting rent on it. That is consistent with C1's spreadsheet which refers to receipts of rent from "S Forouhar" in this period. It is also consistent with the fact that D1 spent some time in prison during this period. That conclusion is also corroborated by a tenancy agreement relating to 415PW dated 7 September 2015 which described the "Landlord's Agent" as "Maas Management", and Mr Forouhar was known to operate through a company with a similar name.

109. After June 2016, I consider that D1 was responsible for collecting rent on 415PW and that some of this rent was paid into D2's account. I recognise that D1 gives a conflicting account, saying that he did not start managing 415PW until May 2017. However, C1's account is supported by D1's name appearing on receipts from Grosvenor prior to May 2017.

Withholding of rent between July 2014 and July 2016

110. The Claimants assert that there were the following wrongful failures to account for rent received in this period:

    i) D1 told the Claimants that he was retaining £2,000 of rent received between July 2014 and November 2014 in order to reimburse him for expenses he had incurred in getting 415PW ready for tenants. However, since no receipts for the £2,000 were provided, they conclude that D1 wrongfully failed to account for this rent. Similarly, while D1 had told the Claimants that he was withholding £200, £1,000 and £1,600 of rent on various dates up to June 2015, he gave no satisfactory explanation of what these sums were spent on and accordingly, I should conclude that the money was wrongfully withheld.

    ii) D1 received rent receipts totalling £4,321 from "Mumtaz F" in July 2016 but failed to pay that sum over.

111. I have concluded that the amounts summarised in paragraph 110.i) were indeed withheld. The Claimants knew at the time that the sums were being withheld because the withholding was noted in C1's spreadsheets. More controversial was the question whether the amounts withheld were legitimately spent on paying expenses incurred by the Claimants and I address that issue in the "Expenses" section below.

112. The payments from "Mumtaz F" were received into D1's personal bank account bearing the reference "Rent 415". C1's contemporaneous spreadsheet does not record any rent being received for 415PW in July 2016 or as D1 retaining any part of a known payment of rent falling due in July 2016. D1 said little about the payments from "Mumtaz F" in his written evidence or Scott Schedule. In his oral evidence, he said that the reference might be to another property he managed with the number "415" forming part of its address but in the absence of any details as to this other property, I think it is more likely that D1 received £4,321 rent from "Mumtaz F" in respect of 415PW and simply forgot to pass it on. In total, £9,121 of rent was kept back in this period.

Rent from Grosvenor

113. I was shown a "rent receipt" on Grosvenor's letterhead dated 12 December 2016. That referred to a payment of £9,425, made in cash at Grosvenor's office, in respect of the period from 26 November 2016 to 26 February 2017. The receipt bears a signature (which D1 said was not his). Above the signature the word "Reza" (D1's first name) is typed. D1 denies receiving this payment of cash, saying that it would have been collected by Mr Forouhar. He says that his name is shown on the receipt simply because Grosvenor regarded him as a relevant contact for 415PW and so his name would have been pre-printed. D1's position, therefore, is that Mr Forouhar would have collected the cash and paid it over to the Claimants.

114. I have concluded that it is more likely than not that D1 himself received the cash payment of £9,425 from Grosvenor. Grosvenor would not regard D1 as a contact

for 415PW unless he was collecting rent on the properties. Yet D1 denied that he was collecting rent on 415PW at the time Grosvenor wrote out their receipt. I consider that D1's evidence as to Mr Forouhar's management of 415PW represented an attempt to muddy the waters and distance D1 from, among other matters, the Grosvenor receipt. That then leaves the question of what happened to that payment after D1 received it. C1's spreadsheets show no reference to receipts of rent for 415PW between December 2016 and February 2017 (the period to which the first Grosvenor receipt relates). Nor is there any reference to rent being paid but being subject to a known deduction by D1. D1's evidence is that the rent was paid over but C1 neglected to update his spreadsheet. In his oral evidence, C1 accepted that there might have been instances where a cash payment that D1 received might not have appeared anywhere on his spreadsheets if that cash was, with the Claimants' permission, immediately spent on other expenses in connection with the Properties. However, £9,425 would have been a reasonably large amount of cash for the Claimants to lose sight of. I consider that D1 received £9,425 of rent and did not account to the Claimants for that rent.

115. The second relevant Grosvenor receipt was for £9,420. It was dated 29 March 2017 and was expressed to cover the period from 26 March 2017 to 26 June 2017. D1 accepts that he obtained this sum in cash. No corresponding receipt appears in C1's spreadsheet. There was, however, some contemporaneous discussion in WhatsApp messages of rental receipts relating to 415PW for the period in question. On 11 April 2017 works were evidently in progress at 10PW because D1 told C1 that there were five skips full of waste from those works. The following exchange then took place relating to rent on 415PW:

> *"C1: Any chance we are getting the remaining rent for 415PW*
> *D1: I have already used it for the project is costing a bomb.*
> *C1: Use it against the 15K…*
> *D1: Trust me am there everyday*
> *C1: You collected 4800 for 415*
> *D1:Yes"*

116. The Claimants invite me to conclude that D1 was being positively misleading in this exchange because he had collected £9,420 on 29 March 2017 but had allowed C1 to continue thinking that there was still rent to be collected on 415PW. They invite me to conclude that D1 wrongfully withheld £14,220 (the first payment of £4,800 together with the £9,420).

117. I have concluded that D1 received a <u>total</u> of £9,420 in cash from Grosvenor in March 2017. He did not receive £9,420 plus £4,800. That is because £9,420 was almost identical to the £9,425 that Grosvenor had paid in December 2016. Grosvenor were unreliable payers who needed to be chased for payment. WhatsApp exchanges from the time suggest that D1 attended Grosvenor's offices on both 28 and 29 March 2017. I have concluded from the analysis of the WhatsApp chat and the Claimants' bank statements referred to below that Grosvenor paid a first instalment of £4,510 on 28 March 2017 and the balance of £4,910 on 29 March and wrote a single receipt for the entire sum.

118. I have interpreted WhatsApp exchanges on 28 March 2017 as indicating that the first instalment of cash received from Grosvenor would be paid into D1's account

after banking hours on 28 March 2017. That tallies with the Claimants' bank statements which show that, on 30 March 2017, £4,510 cash was paid into their account by "PIM" (probably "paying in machine"). The delay between the date of deposit and the entry on the bank statement is explicable by the bank needing time to process the deposit since it was made after banking hours.

119. On this analysis, D1 was not misleading C1 in the WhatsApp exchange. He had received £4,910 on 29 March 2017 and confirmed that he had received "4800 for 415" because that figure was about right. He did not mention the previous payment, because that had already been dealt with. There was, therefore, an error in C1's spreadsheet as the £4,510 receipt was not reflected. The omission arose because the receipt went direct into the Claimants' bank accounts and so C1 was not prompted, by the receipt of a significant amount of cash, to update his spreadsheet.

120. D1 said in his evidence that the rent from Grosvenor was paid in cash to the Claimants. I am satisfied, however, that the £4,910 was not paid over. As I have observed, C1's spreadsheets were meticulous. It is one thing for C1 to overlook a payment that had gone direct into the Claimants' bank account. It would be quite a different matter to overlook a cash payment of £4,910. In his closing submissions, Mr Hope asked, rhetorically, why, if it was missing the payment was not chased up. I understand that point, but it is equally valid to ask why, if the payment was received, it was not reflected in the spreadsheets.

121. I am reinforced in this conclusion by the fact that, in his oral evidence, D1 put forward an explanation to the effect that C1 must have received all the rent paid by Grosvenor because C1 paid £2,000 to D1 in June 2017 to enable D1 to rebate rent to Grosvenor when it became necessary to end their tenancy a few weeks early so that necessary works could start in June 2017. Why, D1 asked rhetorically in his evidence, would C1 give him £2,000 to repay Grosvenor if he had not received all the rent due from Grosvenor? However, the £2,000 bank entry on which D1 relied could be shown to be the principal amount of a short-term loan that C1 made to him. Accordingly, since D1's explanation was undermined, so too was his account that C1 had received all rent due from Grosvenor.

122. My overall conclusion is that D1 retained £14,335 of rental receipts from Grosvenor.

<u>Whether 415PW was tenanted between August 2016 and October 2016</u>

123. The Claimants invite me to conclude that 415PW was tenanted in this period. They accept that there is no contemporaneous evidence in the form of tenancy agreements or references in spreadsheets to tenants being in place at this period. However, they received £2,600 in rent for the month of November and £4,321 in rent for the month of July (the payments from "Mumtaz F" considered above) and accordingly submit that there must have been some rent between August and October.

124. I will not make the inference that the Claimants ask me to make. While I have certainly found that D1 did not pass over some rental receipts I am by no means

satisfied that his failure to do so was so pronounced as to justify an inference that rent was received in periods for which there is no direct evidence of any receipts.

Whether D1 misled C1 in relation to rent paid by Mr Al-Kurdi in December 2018

125. I am satisfied that D1 misled C1 in relation to Mr Al-Kurdi's rent. On 7 December 2018, C1 and D1 had a WhatsApp exchange. C1 outlined his understanding that Mr Al-Kurdi had paid only three months in advance and that a further instalment of three months' rent would be received in the next couple of months. C1, who needed cash at that time, asked D1 to ensure that the additional instalment would be received by a particular date and D1 said "I can ask…That's all we can do". At no point in that discussion did D1 tell C1 that he had already received payment of the full six months' rent. The deception was deliberate. D1 said that, by withholding rent, he hoped he might force C1 to give him what he regarded to be an overdue statement of partnership accounts.

126. D1 did not pay over the missing three months' rent until May 2019, after the Claimants, by their solicitors, sent notice that they regarded the Agreement as terminated.

Conclusion on amount of rent withheld at 415PW

127. In total D1 received rent of £23,456 on 415PW without paying it over.

9H

General

128. The Claimants exchanged contracts for the purchase of 9H on 6 January 2014. The purchase price was £1,180,000 and the completion date was originally fixed as 7 July 2014. The Claimants and Defendants initially hoped that they could "flip" 9H before the scheduled completion date by assigning the benefit of the contract and the contract was, accordingly, drafted so as to permit such an assignment. The Claimants provided an initial "exclusivity fee" to the vendors of £10,000 to take the property off the market. When contracts were exchanged, they topped up this amount by £49,000 and the vendors were treated as having received a deposit of £59,000 representing 5% of the purchase price. The Claimants provided this amount out of their own resources.

129. 9H was a leasehold property with just 63 years remaining on the lease. Accordingly, after exchange of contracts the Claimants started the process of seeking to secure an extension to the term of the lease.

130. The Claimants' hope of "flipping" 9H before completion was not realised. In June 2014, they agreed with the sellers that completion would be pushed back to January 2015 and the Claimants provided a further deposit of £50,000. The completion date was extended again in October 2014.

131. Negotiations surrounding the lease extension continued but were complicated by fact that, since the Claimants were still not the registered proprietors of 9H, they had to be conducted through the then current owners. The Claimants and the

freeholders were significantly apart on the appropriate price for the lease extension and the Claimants made an application to the First-tier Land Tribunal for resolution of that dispute, incurring significant legal and other expenses as a result. In November 2014, D1 transferred £10,000 to C1 to help to fund the continuing negotiations relating to the lease extension. The source and characterisation of this payment are disputed.

132. There was no sale of 9H to any buyer and eventually the Claimants were required to complete the contract of purchase. They did so in October 2015. £881,969 of the purchase price came from a loan made by HSBC to the Claimants, secured on 9H. The Claimants also obtained an equity release of some £248,000 in respect of their interest in 415PW in order to fund the acquisition.

133. Agreed expert evidence shows that 9H had a market value of £1,180,000 on completion so that the Claimants neither overpaid nor underpaid for it. That expert evidence also showed that 9H's annual rentable value was £52,000 per annum on acquisition. It is now common ground that when D1 arranged lets of 9H, the rent payable was a market rent.

134. 9H is located on an upper floor of a block of flats. The lift in the block was not working when the Claimants purchased 9H and they formed the view, after consulting with D1, that it was not practicable to secure a tenant. Instead, in January 2016, they agreed that D1 would himself occupy that flat for a below-market rent that was sufficient to meet the mortgage costs and service charge for 9H. The parties are not agreed on the monthly rent they agreed or the period for which it was payable: D1 says that it was initially £2,500 per month but rose to £3,000 later on; the Claimants say that the rent was £3,000 per month throughout the term of the arrangement.

135. Ultimately, I took the parties to agree that the following terms applied to D1's occupation of 9H:

    i) D1 was obliged to pay his monthly rent whether he chose to live in the property or not. Therefore, to the extent rent was otherwise payable, the fact that D1 was not living at 9H between June 2017 and April 2018 did not excuse him from meeting that obligation.

    ii) D1 was permitted by the terms of his agreement with the Claimants to sublet, or share occupation, of 9H with others. However, if in doing so, he made a profit, he was obliged to account to the Claimants for both that profit and his monthly rent. The parties were not, however, agreed on how "profit" was to be calculated (although they did agree that the rent D1 had to pay should be allowed as a deduction) or the frequency with which D1 was obliged to pay over that profit.

136. I should say something about how the term in paragraph [135.ii)] was dealt with in the evidence and pleadings. D1's Defence pleaded that he was entitled to sublet and share occupation. That defence was, however, silent as to who was entitled to retain any rent received, or profit made, on subletting. D1's Scott Schedules were prepared on the footing that any profit made on subletting needed to be paid over to the Claimants. His oral evidence on the point was, however, confused. At

points he suggested that the gross receipts from any subletting of 9H were his to keep. However, at other points he suggested that it was in order for him not to pay any proceeds of subletting over to the Claimants because he had made no overall profit. Mr Hope said, in answer to a question from me during his closing submissions that it was accepted that there was an obligation to account for profit arising on sublettings of 9H.

137. In case I have misunderstood the parties' positions, I will make a finding that it was inconceivable that the Claimants would have agreed with D1 that he could keep any profit arising on subletting. The Agreement provided for rent on all of the Properties to be applied in defraying expenses, thus increasing net profit that was to be shared 50-50. The parties would not have agreed, and did not agree, a different treatment for 9H which resulted in some rents benefiting D1 alone, particularly given a monthly rent of £2,500 would not cover the mortgage interest and service charge and even a monthly rent of £3,000 was below market.

138. Neither party's Scott Schedule showed D1 as paying rent prior to October 2016, although the parties are not agreed as to whether the period of non-payment was longer than this.

139. Between September 2016 and (approximately) September 2017 D1 was arranging short lets of 9H over the Airbnb and booking.com websites (which I refer to generically as the "Airbnb lets"). The extent to which he made a profit on those transactions, and the extent to which he accounted for that profit is disputed.

140. Between (approximately) October 2017 and April 2019, D1 was letting individual rooms in 9H.

<u>The source of the £10,000 that D1 paid towards the costs of the lease extension</u>

141. C1 says that the £10,000 came from a prospective buyer of 9H. D1 says that he provided the £10,000 out of his own funds. D1 says that his account is supported by the fact that, on 28 November 2014, Saiwil Limited (a company controlled by the Claimants) received a payment of £10,000 from YVA Solicitors LLP. There was a statement from Shamil Patel, a partner in that firm, who confirmed that his firm acted for D1 on the sale of a property and held money for him. Shamil Patel gave some details of two transfers made out funds held for D1: a £110,000 payment on 8 June 2015 and a £8,000 payment in January 2016. However, he gave no evidence relating to £10,000 paid in November 2014.

142. D1 says that C1's explanation is inherently implausible, because no prospective buyer would pay £10,000 prior to having lawyers involved and face the obvious risk that the money might not be refunded if no transaction resulted. However, the force of that point is somewhat diminished by the fact that the Claimants did something very similar. C1 said in his witness statement that he paid the vendors of 9H a "£10,000 non-refundable exclusivity fee to take the property off the market following which a balance of 5% of the purchase price (£59,000) would be paid on exchange of contracts."

143. On balance, I prefer C1's explanation of the £10,000. It is consistent with evidence in his witness statement to the effect that there was a potential buyer on

the scene between November 2014 and March 2015. The fact that the immediate source of the funds was the client account of a firm of solicitors acting for D1 is not determinative: it is quite possible, for example, that D1 asked a prospective buyer to pay the £10,000 to his solicitors. D1 and Shamil Patel were in a position to explain the source of the £10,000 that was paid out of YVA Solicitors LLP's client account but no evidence at all was given on that issue and I consider that detracts from the force of D1's explanation.

144. I therefore find that the £10,000 was a pre-contract deposit made by a prospective buyer of 9H that was forfeited when that buyer did not proceed with an acquisition of 9H. The £10,000 was not a loan advanced by D1 and was not a contribution to the capital of a partnership made by D1.

The detailed terms of the tenancy agreement under which D1 occupied 9H

145. D1's evidence was that he was not obliged to pay rent for a period of 8 months because of the credit of £32,500 from 422PW. Since I have found that there was no such credit (see paragraph [18] above) I have rejected that evidence. D1 also suggested that, since there was little evidence of the Claimants chasing rent prior to August 2017, they must have been content for him to live rent-free at 9H up until then. I do not accept that argument. D1's witness evidence was that he did not have to pay rent while the £32,500 "credit" was used up. That is very different from the parties agreeing a rent-free period. In my judgment, D1 became liable to pay rent from 1 February 2016, the month he moved in.

146. In agreement with D1, I have concluded that the initial rent agreed was £2,500 per month until the end of December 2016. That is because a 5-bedroom property was clearly surplus to D1's needs as a single man. He was doing the Claimants something of a favour by occupying the property: he would be making a stable contribution to expenses and could be trusted to move out quickly if a sale transpired. The parties evidently agreed at the time that mortgage interest and service charge on 9H amounted to £3,000 per month, but I accept D1's evidence that a discount to this figure was agreed because of the favour that he was doing the Claimants.

147. D1's Scott Schedule was prepared on the footing that he paid £3,000 rent on 9H in February 2017. The Claimants do not accept that such a payment was made, but D1's Scott Schedule tends to support the position that D1 thought the rent had gone up to £3,000 by February 2017. I have concluded that the natural time for the rent to increase would be the end of a calendar year, hence my finding that the lower rent was payable up until December 2016, with £3,000 per month payable thereafter.

148. The hearing revealed a potential dispute between the parties as to whether any profit that D1 made on any subletting of 9H should be calculated before, or after, utility bills. C1's position was that utility bills at 9H were for D1's sole account in the same way as any tenant of a property could expect to be responsible for paying utility bills. I have, however, accepted D1's submission that utility bills should be an element in the calculation of profit. As I have noted, D1 was doing the Claimants a favour by living in a property that was bigger than he needed. As a consequence he would be incurring utility bills that were higher than he would

ordinarily incur. If he sublet the whole property, then no particular issue would arise as the subtenant would, in the ordinary way, be responsible for paying utility bills and so D1 would not be incurring these expenses. However, if D1 simply shared possession (as happened with the individual room lets) or made Airbnb lettings that would leave D1 liable for utility bills, I find that the parties agreed that utility bills should be an element in the calculation of overall profit. I accept that another arrangement would have been possible, but I consider taking utility bills into account was consistent with the overall arrangement between D1 and C1 and the favour that D1 was doing the Claimants.

The total amount that D1 paid the Claimants in respect of 9H

149. The parties are almost agreed on this issue. D1's Scott Schedule puts total payments at £45,427. The Claimants put the figure at £39,250. The Claimants are correct that D1's Scott Schedule contains an arithmetic error and should put total payments at £42,250. That leaves the parties just £3,000 apart. I will split that difference and conclude that D1 paid the Claimants £40,750 in respect of 9H.

The total amount that D1 should have paid

150. D1's monthly rent was payable from February 2016 to, and including, April 2019, a total of 39 months. For 11 months rent was payable at £2,500 per month. For 28 months, it was payable at £3,000 per month. That is a total of £111,500.

151. The parties were not far apart on the gross amounts that D1 received from room lets or Airbnb. D1's Scott Schedule showed gross receipts of £130,240.33. The Claimants' figure was £140,443.33. Neither party took me through the detail of their calculations in oral submissions as they both preferred to focus on more material issues. D1 did include some criticisms of C1's calculation in a further Scott Schedule, served without permission, after the hearing. However, the Claimants have had no opportunity to respond to those and I have decided that I will split this difference as well, concluding that D1 received £135,341.83 from individual room lets and Airbnb lettings.

152. D1's profit must be calculated by first deducting the rent he was obliged to pay (£111,500) leaving a residue of £23,841.83. From that figure, expenses need to be deducted to produce overall profit and those expenses need to include utility bills given my finding at paragraph [148] above.

153. D1 submits that the following amounts should be taken into account as expenses:

    i) The £10,000 paid towards the lease extension. However, as I have found that this sum came from prospective purchasers of 9H, and not D1, it was not an expense that D1 incurred in connection with the receipt of rent.

    ii) £8,000 transferred out of the client account of YVA Solicitors to C1 on 22 January 2016. However, Mr Patel in his evidence said that this was referenced as a "loan repayment". I have inferred, therefore, that the £8,000 represented the repayment of a loan that C1 had previously made to D1. It was not an expense connected with the receipt of rent on 9H.

iii) "Furniture and refurbishing costs towards 9H" totalling £13,650.31.

iv) Utility bills for 9H totalling £31,316.57

154. The furniture and refurbishing costs represented a change of approach on D1's part. In 2019, he had prepared a list of expenses he said he had incurred in connection with 9H which totalled £11,914.51. However, there were clear problems with some of the figures set out in that schedule. For example, a bill for key-cutting totalling £40 appeared in the schedule as being for £401 – no doubt because the bill had been misread. The revised figure of £13,650.31 appeared for the first time in D1's Scott Schedule and D1 effectively asks the court to pay little attention to the earlier figure of £11,914.51.

155. The difficulty with even the revised figure of £13,650.31 is that, while a lot of work had clearly gone into identifying bills in the hearing bundle, there was no primary evidence in the form of a witness statement as to what the money in question was spent on. So, for example, a bill is produced showing that £300 was spent at "The Glass Shop (Cricklewood) Ltd". But there was no witness evidence to explain who spent that £300, what it was spent on or how it related to 9H. In the circumstances, I will use the figure of £7,230 that Mr Fowler suggested in closing.

156. That leaves the utility bills. The Claimants raise two objections to the allowance requested:

i) First, they argue that there is an evidential gap. Before D1 can obtain any allowance for utility bills, he needs to show that he was bearing these and the cost had not been passed on to the Airbnb customers, and tenants of individual rooms in 9H. There is something in that point. However, I am prepared to infer that it would not be possible to charge tenants of individual rooms, or customers booking rooms over Airbnb separately for utilities. I infer that, even when 9H was the subject of Airbnb lets and even when some of the rooms were occupied, D1 alone was funding the utility bills.

ii) Second, they point to clear problems in the breakdown of the £31,316.57 figure. It could not obviously be deduced from the bills provided. It appeared to include some amounts twice. It appeared to include items that did not have a clear link with 9H, or the relevant period for which 9H was the subject of individual room lets or Airbnb lettings. In my judgment, that criticism was valid.

157. I will, therefore, make some allowance for utility bills. I will not take into account the full £31,316.57 figure given the clear problems with it. Even a figure of half the amount claimed strikes me as somewhat high for a period of 39 months. I will give D1 credit for £10,000 of utility bills. It follows that D1's profits from the room lets and Airbnb lettings was £6,611.83.

Whether the Claimants were aware of the Airbnb lettings

158. The Claimants' evidence is that they did not know until May 2019, after their solicitors sent notice of termination of the Agreement that, that D1 was making

the Airbnb lets. D1 says that the Claimants were aware of this throughout. I prefer the Claimants' evidence. While I am prepared to accept that there could be the occasional error in C1's spreadsheets, I do not consider that they would overlook wholesale significant sums being received from Airbnb.

Conclusion on shortfall on rent in respect of 9H

159. D1's own total rent due over the period was £111,500. He was obliged to pay over profits from the individual room lets and Airbnb lettings of £6,611.83. Against this, he paid over £40,750. That left a shortfall in respect of 9H of £77,361.83.

Expenses

160. The issue addressed in this section is how much of this aggregate withholding was spent on other expenses at the Properties. The Defendants broadly adopted the following approach:

    i) In D1's witness statements, it was asserted that particular items of rent were spent on particular general categories of expense. For example, he said that "I used around £17,000 of the rent received from all of the properties to pay for the demolition to [10PW] and to pay for renovations to 415". He said that he spent "around £5,000" redecorating 10PW shortly after it was purchased.

    ii) They provided, in their Scott Schedule relating to 9H a summary of expenses that they incurred on the Claimants' behalf. Some of that consisted of a distillation of evidence already given. However (principally relating to cash payments said to have been made to Florin Buccur) this consisted of new evidence that was not trailed in any written or oral evidence but was advanced for the first time in the Scott Schedule. I have already dealt with many of these expenses in my consideration of the profit that D1 made on subletting and sharing occupation of 9H. What remains, therefore are:

        a) £18,750 of expenses that the Defendants say they paid on the 10PW refurbishment; and

        b) £19,465 of payments made to Florin Buccur.

161. I have already explained the difficulties that arise in trying to "earmark" particular receipts of rent with particular expenses. That difficulty is exemplified with the £17,000 referred to in paragraph [160.i)] as conceptually that could have been included in £18,750 expenses referred to in paragraph [160.ii)a)]. I will not, therefore, give D1 credit for every sum identified in his witness statement or Scott Schedule as having been spent at the properties. I am, however, prepared to accept that D1 incurred £5,000 of expenses in redecorating 10PW shortly after purchase. I did not consider that there is a double count in giving credit for this sum. The £5,000 does not feature in C1's spreadsheets or Scott Schedules, and is not included within the other costs that D1 put forward.

162. With the exception of the £5,000, I consider that the question of expenses is best approached by considering, in the first instance, the Claimants' estimate of expenses that the Defendants incurred as set out in the reconciliation that C1 performed in 2019 and then testing those in the light of the items that the Defendants have referred to in their Scott Schedule.

163. For 415PW, the Claimants accept that £13,455 of expenses were met out of the rent withheld (£10,000 to Florin Buccur which was evidenced by a receipt, £3,305 spent at IKEA and £150 spent on satellite TV installation).

164. I have concluded that the Claimants' approach understates the payments that D1 made to Florin Buccur. I acknowledge that there is an evidential gap in relation to the claimed £19,465. However, an insistence that only £10,000 could have been spent because only £10,000 was receipted risks being unfair because, at the time D1 was paying Florin Buccur, no receipts were being requested. I have already accepted C1's evidence that he was told that building works would cost around £17,000 – because approximately that amount was kept back from rents on 10PW. I am prepared to infer that the figure of £17,000 was based on an estimate provided by the builder. It is also reasonable to infer that, since building works seldom come in exactly on budget, slightly more than the estimate was spent. I will, therefore, adjust the Claimant's figures by allowing D1 the full £19,465 claimed for Florin Buccur's building work. Allowable expenses at 415PW were, accordingly £22,920 (£19,465 + £3,305 + £150).

165. Turning to 10PW, C1's reconciliation prepared in 2019 showed D1 as having paid £30,498.08 in respect of the 10PW refurbishment out of the various rents that he received on all properties. I am satisfied that this figure is accurate except that it overlooks the £5,000 that D1 spent shortly after 10PW was purchased. Total allowable expenses on 10PW are £35,498.08. The figure is higher than the £18,750 put forward by the Defendants as set out at paragraph [160.ii)a)] which was itself derived from C1's spreadsheets detailing amounts that C1 was aware had been kept back from rents in order to fund building works. I have concluded that the difference is explained by the fact that D1 spent further sums, of which C1 was not aware at the time, on works at 10PW.

166. My conclusion, therefore, is that of the amounts of rent kept back, £58,418.08 (£35,498.08 + £22,920), was spent on expenses associated with 10PW and 415 PW. Expenses associated with 9H have already been taken into account in the determination of profit for which D1 was liable to account in respect of the individual room lets and Airbnb lettings.

PART C – TERMINATION OF THE AGREEMENT

Findings of fact on matters relevant to termination

167. By late 2018, relations between the Claimants and D1 had deteriorated. They were at odds over the sale of 9H and the Claimants' perception that D1 was frustrating their attempts to market 9H for sale caused them to take back management of 9H.

168. In December 2018, C1 took legal advice. He has disclosed some aspects of his instructions to his solicitors given at that time and so waived privilege to that limited extent. Those instructions indicate that the Claimants were concerned that D1's management of the Properties exposed them, as owners of the Properties, to legal risk because 9H appeared to have been let in breach of HMO regulations and 415PW had been let to persons whose exact profession and sources of income were not known or made transparent. For that reason, they wanted notices to quit to be served on the tenants of 9H and 415PW. Their next priority was to investigate what they considered to be D1's mismanagement of the properties including a failure to account properly for rent. In his written instructions to his solicitor C1 wrote:

> *"In dealing with Reza, the matter must be treated in a manner like an employer dealing with his employee (Reza) for stealing from the company. The discussions with Reza must only be initiated once we have built a "disciplinary" case against Reza, present with the facts and leave him with no option but to accept the termination of the contract".*

169. This wish to build a "disciplinary case" was reflected in a letter from the Claimants' solicitors dated 14 March 2019 which was addressed to both Defendants. That letter contained considerable detail on what were asserted to be repudiatory breaches of the Agreement by the Defendants, including detailed assertions as to amounts of rent that the Defendants were alleged to have retained. I have inferred that, in the period between December 2018 and March 2019, the Claimants were building their "disciplinary case". The letter of 14 March 2019 stated that, in view of the asserted repudiatory breaches of contract, the Agreement was terminated.

170. On 19 March 2019, D1 sent the following email to C1:

> *"… As per your request I am willing to return your keys and will go through all the bills, rent in regards to the tenants at 9H and I'm happy to introduce you to the tenants if you feel it [will] help with the transition. I no longer wish to manage these properties and will give all management responsibilities back to you. I would need to do a full handover with yourself."*

The law on repudiatory breaches of contract

171. Neither party made any material submissions on the law relating to repudiatory breaches of contract and I took them to be agreed on the following propositions:

    i) None of the breaches on which the Claimants rely were pleaded to involve breaches of "conditions" of the Agreement. Accordingly, the Court should approach matters on the footing that any breaches of the Agreement were of "intermediate terms".

    ii) It is, therefore, necessary to have regard to the nature and consequences of any breach. The question, in essence, is whether those breaches "go to the root of the contract", or "affect the very substance of the contract". Applying dicta of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawaski*

Kisen Kaisha Ltd [1962] 2 QB 26, the question in the present case is whether D1's breaches of contract deprived the Claimants of substantially the whole benefit which it was the intention of the parties, as expressed in the Agreement, that they should obtain as consideration for their promise to pay D1 50% of net profits arising on sale of the Properties.

iii) If the breaches of contract satisfy the above test then the Claimants were entitled, by their solicitors' letter of 14 March 2019, to treat the Agreement as terminated with the result that they are excused performance of the remaining obligations under the Agreement, including the requirement to pay D1 50% of net profits. (D1 did not accept that there could be a repudiatory breach of a partnership agreement given the overlay of equitable principles that apply to the winding up of a partnership. However, nothing turns on this given my earlier finding that there was no partnership).

iv) While the position might be otherwise if different breaches of contract were alleged, if the breaches of contract relied on were repudiatory in the sense set out above, the Claimants were entitled to treat themselves as excused from future performance even if they did not know of the existence, or the full extent of, those breaches at the time of their solicitors' letter of 14 March 2019.

Damages payable by the Defendants for breach of contract or by way of an account of rent

172. The Defendants had no proprietary interest in the Properties, or in rents receivable on the Properties. Therefore, by retaining rent, without applying it to pay expenses, they were in breach of the Agreement. Furthermore, D1 was in breach of his own agreement with the Claimants in failing to pay rent he owed on 9H or profits he made from subletting. The total amount due to the Claimants from the Defendants is as follows:

Rent kept back on 10PW	£57,650.04 (to be adjusted for returned deposits)		
Rent kept back on 415PW	£23,456		
Total unpaid on 9H	£77,361.83		
Subtotal		£158,467.87	
LESS expenses		(£58,418.08)	
TOTAL			£100,049.79

173. My conclusion is that the Defendants must pay that sum to the Claimants. During the hearing I asked the parties to consider whether this sum should be abated to take into account the disbenefit that D1 is suffering since, as set out in the next section, as a consequence of termination of the Agreement, he no longer has any entitlement to receive a payment of 50% of net profits when the Properties are sold. Neither party suggested that any such abatement was appropriate and therefore I make none.

174. I also note that the Claimants' closing submissions focused on the allegations of breach of contract consisting of the above failures in respect of rent on the Properties. Mr Fowler advanced no positive submission in closing as to the other breaches of contract or duty that had been pleaded. I therefore make no finding of breach of contract or duty except those referred to in paragraph [172] above.

175. I consider that there is an open question as to how much of that sum is payable by D1 and how much by D2, noting that (i) D1, but not D2, was party to the Agreement, but that D2 has received some rent that should have been paid over to the Claimants and (ii) D1's obligation to pay rent for his occupation on 9H was personal to him. I will ask counsel to resolve that, together with the adjustment to take into account returned deposits on the individual 10PW room lets, when agreeing the terms of an order.

Whether D1 committed repudiatory breaches of the Agreement which were accepted

176. In their Particulars of Claim, the Claimants relied on a number of breaches of contract, many of which were said to be repudiatory in nature. However, in closing argument, Mr Fowler relied primarily on the unauthorised retentions of rent.

177. As I have concluded above, D1 was in breach of the Agreement by retaining rent that he received on the Claimants' behalf. D1 argues that, to the extent there was unauthorised retention of rent, that did not go to the root of the contract as it could be cured by the Claimants taking over management of the Properties. Moreover, since the Claimants had already obtained significant benefits under the Agreement, in the form of identification of suitably undervalued properties, and since D1 remained in a position to provide future services under the Agreement, by helping the Claimants to sell those properties, the Claimants had not been deprived of "substantially the whole benefit" of the Agreement.

178. I consider that the Defendants' arguments understate the magnitude of D1's breaches. The unauthorised retention of rent cannot simply be explained as a failure to deliver just a part of the service that D1 was to provide under the Agreement. As I have noted at paragraph [19] above, the Claimants' aim of raising funds for their retirement required <u>all</u> of the following: the acquisition of undervalued properties on D1's recommendation, followed by D1 managing the properties, followed by a sale. All of those steps were central to the outcome the Claimants were seeking. They wished to outsource almost the entirety of that process to D1 and were prepared to pay him handsomely for that service. Since D1 was offering no guarantees that the Properties could be sold in short order, he would need to manage those Properties for a potentially unlimited time. The Claimants needed to have confidence that he would accurately and fairly account to them for rent that he received during a potentially lengthy period. An accurate and reliable account of rent received was more than just an aspect of the service the Claimants were seeking. It was an integral part of the whole and involved the Claimants placing significant trust in D1.

179. The large sums of rent that were not accounted for demonstrates that the Claimants' trust was misplaced. In part the problem was that D1 did not have

adequate systems in place to keep track of money that he received, particularly in relation to those tenants who paid him in cash. However, there were also occasions on which D1 did not tell the Claimants even about the sources of rent he had received such as certain individual room lets at 10PW or the Airbnb lettings.

180. In short, the breaches of contract involved a failure to account for material sums of money combined with instances of non-disclosure of sums that had been received and, in relation to Mr Al-Kurdi, a positive deception designed to further D1's commercial interests at the expense of those of the Claimants. Those breaches took place in the context of a contractual relationship in which the Claimants were reposing trust, both in D1's judgment, and his ability to account accurately for material sums of money. In my judgment, those breaches went to the very root of the contract.

181. It follows that the Claimants were entitled to bring the Agreement to an end. By their solicitors' letter of 14 March 2019 they exercised that right. There is therefore no need to analyse the effect of the subsequent email from D1 referred to at paragraph [170] since, by then the Agreement was already at an end.

The Defendants' counterclaims

182. The Defendants' counterclaims were predicated largely on the assertion that D1 and the Claimants were in partnership, which I have rejected. However, some aspects of the counterclaim remain and I can deal with them briefly.

183. I reject the Defendants' claim that D1 had a proprietary interest in the Properties by virtue of a constructive trust based on common intention (see *Stack v Dowden* [2007] UKHL 17). For reasons that are similar to those I gave when determining the provisions of the Agreement, I have concluded that there was no common intention that D1 was to have any proprietary interest in the Properties. On the contrary, the parties' common intention was that he would <u>not</u> have such a proprietary interest and would instead, provided he complied with his obligations under the Agreement, obtain a payment of 50% of the net profits arising on sale of a Property.

184. In a similar vein, I see no basis on which D1 could obtain an interest in the Properties under the principles of proprietary estoppel. The Claimants made no unequivocal representation that D1 would obtain an interest in the Properties since both parties understood quite clearly that he would obtain no such interest. Nor did the Claimants make any representation to the effect that they were in partnership with D1 since the Claimants did not consider that there was any partnership and instead concluded (correctly) that they were simply engaging the services of D1's separate business on terms that provided for him to receive a proportion of the net profits made on sale of the Properties.

185. In his closing arguments, D1 argued that the necessary representation for a proprietary estoppel arose because the Claimants failed to correct his mistaken assumption that there was a partnership. I reject that. As I have found, D1 knew throughout that he was to have no proprietary interest in the Properties. I do not consider that, until the relationship with the Claimants broke down, D1 turned his

mind to whether the Agreement was a partnership as a matter of legal classification. The fact that he ultimately chose to make a claim based on the incorrect proposition that he was in partnership with the Claimants does not mean that, while the Agreement was in place, he was labouring under any misapprehension that the Claimants could, or needed to, correct.

186. I reject D1's claim for a payment, based on restitutionary principles, for the work done to date under the Agreement. In my judgment, there is no scope for a restitutionary remedy in circumstances where the parties have agreed, pursuant to the Agreement, that D1's obligations were entire so that he would acquire a right to payment only after he had performed all his obligations under the Agreement: see paragraphs [135] to [139] of *Cleveland Bridge UK Ltd v Multiplex Construction UK Ltd* [2010] EWCA Civ 139.

187. I would ask counsel to try to agree the terms of an order reflecting this judgment and consequential matters. I will hear counsel separately if they cannot agree those matters.