

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 29 July 2022

BEFORE:

DEPUTY MASTER MARSH

BETWEEN:

ALHILFI AND ANOTHER

Claimants

- and -

HUSSAIN AND OTHERS

Defendants

MR F SAIFEE (instructed by TKD Solicitors) appeared on behalf of the Claimants
GILEAD COOPER QC AND GIDEON ROSEMAN (instructed by Sterling Winshaw
Solicitors) appeared for the Defendants

JUDGMENT
(Approved)

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DEPUTY MASTER MARSH:

1. The claimants' application for permission to amend the particulars of claim was made by an application notice dated 16 March 2022 and the application was heard on 21 and 22 July 2022 when judgment was reserved. Faisal Saifee appeared for the claimants and Gilead Cooper QC and Gideon Roseman appeared for the defendants.
2. The background can be stated quite briefly. The particulars of claim contain two quite distinct claims. The first is a claim by the first claimant, Mr Alhifi, and he brings claims by which he seeks proprietary and other relief in relation to money he invested in the acquisition of shares in the second and third defendants and by investing in sixteen properties in London. He says he is entitled to a 50% beneficial interest in those properties. Mr Alhifi is resident in Dubai.
3. The second claimant, Omniyat, is a company registered in Dubai that provides money exchange services. Mr Alhifi is a director of and major shareholder in Omniyat. Omniyat says that over a period from October 2017 to March 2019 it made money transfers to or on behalf of the first defendant, Mr Hussain, amounting to US\$902,329.99. Those claims are particularised in paragraphs 31 and 32 of the particulars of claim. The amended particulars of claim provide further particulars of those claims and no objection is taken to them.
4. The position, however, concerning Mr Alhifi's claim is very different. The defendants object to the amendments and I will need to consider them in some detail. Mr Alhifi's claim is summarised in the draft amended particulars of claim at paragraphs A1-A3 in the following way –

“A1. In October 2017, the first claimant agreed with Mr Amar Hussain, acting on his own behalf and on behalf of the second, third and sixth defendants that in consideration of a payment of US\$1 million or £740,000, he would acquire a 35% beneficial interest in the assets and properties held by those defendants and those which would be acquired. The first claimant paid and the arrangements were acknowledged in writing by Mr Amar Hussain.

A2. In January 2018, the first claimant agreed to loan Mr Omar Hussain US\$1 million for two months. The loan was not repaid. In March 2018, it was agreed that the loan would be converted into equity in the investment project and if the first claimant paid a further US\$300,000, his share would increase from 35% to 50%. Mr Amar Hussain instructed solicitors to draw up a 50% declaration of trust in the first claimant's favour. The first claimant paid the balance of US\$300,000 in January 2019. By email on 30 January 2019, Mr Amar Hussain offered for the first claimant to continue the involvement and investment under the original and correct terms of a 50% share.

A3. Mr Amar Hussain failed to follow through on his assurances that a declaration of trust would be provided. The first claimant has never received any income from the assets and properties. Mr Amar Hussain has failed to account for the first claimant's investments and further investment monies paid totalling US\$340,000. The first claimant's primary claim is for a declaration of his 50% beneficial ownership in the various properties and assets."

5. It can therefore be seen that Mr Alhifi relies upon two agreements. The first made in October 2017 and the second was made in March 2018 by which the first agreement was varied. It is notable that the first agreement related to properties held by Mr Hussain and his wife, who is the sixth defendant, and the third defendant and in addition to assets and properties that "would be acquired".
6. There is no dispute about the payment of money by Mr Alhifi to one or more of the defendants. However, they do not accept there was an agreement made in 2017 under which he would acquire and, indeed, did acquire a 35% beneficial interest in the properties which are said to have a gross value of nearly £8 million at that time. They do not accept either that there was an increase in the beneficial interest to 50% as a consequence of the later agreement.
7. The procedural history can be summarised briefly. The claim was issued on 5 August 2021. The claimants say the date has some significance because Dubai had been on the UK's red travel list due to the Covid restrictions and it was not until 8 August 2021 that Dubai joined the amber list. They say that because Mr Alhifi does not speak English and the difficulty with travel at the time the particulars of claim were drafted, any

failings in the original version of the particulars of claim can be forgiven. I find this explanation rather less than convincing. The claimants' lawyers are Arabic speakers. During the pandemic, when periods of travel were restricted, professionals adapted quickly to the use of technology. Remote meetings are possible and documents can be freely transferred. Face to face meetings may in some ways be preferable, but the business of taking instructions for the purposes of drafting a claim was not unduly hampered by an inability to travel.

8. A defence was served on 3 October 2021. After that, although the claimants may have proposed initially to make some minor adjustments to the particulars of claim, the draft document that emerged on 24 October 2022, involved a substantial body of amendments. On 9 March 2022, the defendants objected to the amendments on the basis that the claims put forward on behalf of Mr Alhifi seeking proprietary remedies had no real prospect of success.
9. The draft amended particulars of claim make very wide-ranging changes to the claim. They were clearly put forward in recognition of the fact that the particulars of claim in its original form was nowhere near adequate to make out proprietary claims in respect of the properties. Although the prayer for relief referred to Mr Alhifi's beneficial share in those properties arising from express or constructive trusts, the particulars of claim did not explain how those trusts were said to come into being.
10. The amended particulars of claim sought to improve the position and set out the basis upon which Mr Alhifi's primary claim to be the beneficiary of a constructive trust arose. In the alternative, the draft pleading set out claims based upon proprietary estoppel, an express trust and a resulting trust.
11. Late alterations to the draft amended particulars of claim were made overnight between the first and second days of the hearing, after Mr Saifee's case had closed. Aside from what may be regarded as relatively minor changes to clarify and tidy up the draft amended claim, Mr Alhifi abandoned his claims based upon proprietary estoppel, express and resulting trusts, leaving the constructive trust claim at the forefront of the amendment.

12. As I observed during the course of the hearing on the first day, the amended particulars of claim have been substantially over-pleaded and sought to include claims that were fanciful. Mr Alhilfi's approach in abandoning three grounds of claim was both realistic and helpful.
13. I turn to the test for amendment. Happily, the parties have been able to deal with the hearing on the basis of a common understanding of the principles the court must apply. They are set out in the current edition of *The White Book* at note 17.3.6. As those notes record, a distinction has been drawn in a number of first instance decisions between an amendment that introduces a new claim and one that provides further particulars or factual material of existing pleaded points. It is not in doubt that this application is properly seen as falling within the first category. The amendment does far more than provide further particulars and falls to be tested against the first limb of CPR Rule 24.2.
14. At one point during the hearing, Mr Saifee suggested it would suffice if the amended claim was in a developing area of law, even if on the basis of the current law it had not real prospect of success. He sought to develop a test similar to that that can be seen in relation to the no reasonable grounds test, as it has been explained in *Hughes v Collin Richards & Co* [2004] EWCA Civ 266. However, the cases that are cited at the note 17.3.6 clearly state that the court is to apply the law as it stands. This test can be put in another way, that the court is only to have regard to the first limb of CPR rule 24.2 and not the second.
15. As to the no real prospects test, the principles provided by Lewison J, as he then was, in *Easy Air v Opel Telecom* [2009] EWHC 339 (Ch) say all that needs to be said on this topic. It is a well-known summary which has been approved by the Court of Appeal. I do not need to set it out in this judgment. The key points for the purposes of this application are that Mr Alhilfi must show a claim that is realistic as opposed to one that is fanciful. It must be more than merely arguable. It is of particular importance that the court must not conduct a mini trial. The draft amended claim may be carefully reviewed and the court may resolve 'short' legal issues. If there are facts pleaded that are obviously unsustainable, the court may reach that conclusion without being regarded as conducting a mini-trial. However, care is needed to avoid reaching conclusions about contentious facts that ought to be left to be determined at a trial.

16. A letter from Sterling Winshaw dated 9 March 2022 written on behalf of the defendants suggested that they took no issue with the facts pleaded in the amended particulars of claim. It is right, as Mr Saifee pointed out in the hearing, that the defendants have, to some extent, resiled from their initial stance. However, I do not consider that their change of position has created any procedural unfairness for Mr Alhifi.
17. The way the claim is now put is that it is based upon an oral agreement made on 21 October 2017. There is a one-page written document dated 23 October 2017, written in Arabic which was produced by the first defendant's accountant. That document is said to be evidence of the oral agreement, the nature and terms of which are disputed.
18. The defendants have submitted that the claim is based on flimsy foundations because it has been put forward over a period of time in a number of ways which are inconsistent. Although the court must focus primarily upon the amended particulars of claim and the way in which the case is put there, it is right to see how those amended particulars came about and to give proper weight to the apparent difficulty Mr Alhifi has had in settling upon a version of events and a legal analysis. At the heart of the claim lies an oral agreement that is said to give rise to a proprietary interest and, inevitably, such an approach begs a number of questions.
19. The first way Mr Alhifi's claim was put was in a letter from TKD Solicitors dated 18 March 2020. There they referred to properties having been purchased within a "partnership project". They go on to say:

"We are also instructed that you had agreed initial terms of your relationship, which need to be recorded in a partnership agreement, to be drafted in due course."

The letter then sets out five terms of the partnership project, some of which do not appear in Mr Alhifi's current case. Of particular note are the third, fourth and fifth terms which do not now feature. Furthermore, although the terms mention a 50% interest, no mention is made of the initial 35% interest which is now relied upon.

20. The second way in which the case was put forward was in a letter, also from TKD Solicitors dated 20 May 2020. This letter set out the case in more detail and in a manner that is rather closer to the way in which the claim is now put forward. On the third page, reliance is placed upon a trust and it is put forward in the following way,

“By virtue of the sum received by you (that is the first defendant) in October 2017 (£740,000) and the written agreement between you and our client, an express trust has arisen (section 53(1)(b) of the Law of Property Act, 1925). The terms of this trust were amended by agreement in around 18 March 2017 and was evidenced in writing in the client care letter dated 9 March 2019. Our client then made further payments pursuant to this trust and the agreement with you.”

21. In the alternative, the letter sets out a claim based on what is described as an institutional constructive trust and in the further alternative, the case is put forward on the basis of a presumed resulting trust.

22. The next iteration can be seen from the original particulars of claim, which I have already mentioned. The particulars of claim did not explain the mechanism by which trusts came into being. However, it relied upon two payments of £367,265 which did not add up to £740,000 and the dates of those payments were said to have been 22 and 25 October 2017. On that basis, the first payment would have been made before the oral agreement that was then said to have been made on 23 October 2017.

23. The fourth version appears in the witness statement prepared by Mr Al-Sabah, who is Mr Alhifi’s solicitor, dated 15 March 2022, made in support of the application for permission to amend. The witness statement was therefore made after the draft amended particulars of claim had been settled. I need only say that in material respects, the version of events that took place in October 2017, as set out in that witness statement, differ from the version set out in the amended particulars of claim.

24. Finally, we come to what may fairly be described as version five, that is the amended particulars of claim. The first claimant, Mr Alhifi, has now settled on 21 October 2017 as the date when the oral agreement was made and the document, said previously to have been an agreement, is now to some extent downgraded to being a document acknowledging payment of £740,000. It is, nevertheless, an important document that underpins, as we will see, Mr Alhifi’s claim.

25. There is one complete translation of that document and the material paragraph of it reads,

“Transfer of ownership of 35% of the properties owned by Mr Ammar Hussein and his wife provided that this percentage (35%) is of the value he deposited as capital in the aforementioned properties.”

26. The document is signed and witnessed by the accountant and the signatures of Mr Alhifi and the first defendant are marked as being signatures of “Payor” and “Payee”. The defence relied upon the apparent conditionality appearing from the words “...provided that this percentage (35%) is of the value he deposited as capital”. It is also worth remarking that the agreement does not identify any properties at all. The word "aforementioned" is difficult to understand because there are no properties referred to in the document and no clear reference to an earlier document or conversation.

27. The translation is now said to be an inaccurate translation of what Mr Saifee described during the course of submissions as an “unhappily drafted” document. No new translation of the document has been produced. All the draft amended particulars of claim provide is an extract from the document which has been translated in a different form, apparently by Mr Alhifi’s solicitor, so that the material words now read:

“Transfer of 35% of the ownership of the owned properties of Amar and his wife and that percentage (35%) is the value of what he paid towards the deposit in the properties referred to above.”

28. That paragraph is only an extract taken from the document and is quoted at paragraph 26A in the course of providing particulars of what is said to be a common intention constructive trust. There is no longer in the new translation any apparent conditionality in the wording, so the “provided that this percentage” wording has disappeared.
29. It seems to me there are at least four problems for Mr Alhifi in relying on this new version of the facts.

(1) The translation is not complete; there is only have an extract from the document.

(2) The translation has not been authenticated by a professional translator. In that regard, the same observation can be made about the first translation, albeit that was complete.

(3) The new translation was put forward after the defendants had relied upon the terms of the first translation and appears to be responsive to the defence. Paragraph 9 of the original particulars of claim refers to a written agreement in Arabic dated 23 October 2017, made at NBA Accountants, which manifests, declares and proves the express oral agreement of around the same date.

(4) Paragraph 10 of the particulars of claim says that, insofar as is necessary, the first claimant will seek rectification of the written agreement, so as to accord with the oral agreement. The amended particulars of claim remove the claim for rectification as part of the downgrading of the importance of the document dated 23 October 2017. Nevertheless, it is instructive that what was said to be an agreement was originally of such importance that it needed to be rectified to reflect the oral agreement and at one time, it was relied upon as the basis for an express trust.

30. I now turn to the amended claim. At an earlier stage, there were four complaints made by the defendants. The first three of these I can deal with briefly:

(1) The defendants pointed out that the duties said to fall upon the first and second defendant, as pleaded in paragraphs 14-16, do not have lead to any allegations of breaches that correspond to them. The way the case is put now, and explained by Mr Saifee, is that the duties are said to be relevant of the claim for an account. I note there was no complaint about the pleaded duties in the defence. In any event, it seems to me this is an element of the amended particulars of claim which is not controversial and the changes are not significant. It certainly does not form a basis for saying the amended particulars of claim has no real prospects, whether taken on its own or taken with the amended particulars of claim as a whole.

(2) There was complaint about what is said to be an admission in a message which, in fact, was an attachment rather than a message. I need only say the position has been

clarified now in the latest draft and no objection, as it seems to me, can be taken to the amended particulars of claim on this ground.

(3) A claim is made against the sixth defendant, who is the first defendant's wife. The defendants submitted that because Mr Alhifi had no direct dealing with her, it was not possible for him to say that the first defendant acted as the sixth defendant's agent. It is now clearly pleaded that the first defendant had express authority and that disposes of the point made against the draft particulars of claim.

31. It can be seen therefore, that these first three grounds put forward by the defendants are not matters of concern to the court. The fourth and substantive complaint concerns the pleading of a constructive trust. The oral agreement that is relied upon is set out in paragraph 9 and it is appropriate to set it out in this judgment in full (without the words and passages that have been deleted):

“The First Claimant and Mr Amar Hussain both signed a written document in Arabic dated 23 October 2017 at NBA Accountants, 8A Pop In Business Centre, Southway, Wembley, HA9 0HF, which manifests, declares and proves the express oral agreement of or around 21 October 2017, at the Rose Café Praed Street, London between the First Claimant and Mr Amar Hussain, acting on his own behalf, on behalf of Autotrade London Ltd, on behalf of AFH Properties Ltd and on behalf of Mrs Amal Suhail Abd Reda; which express oral agreement was that, in consideration of the payment of USD 1 m or £740,000 – payment of which sum, the written document also acknowledged – the First Claimant (i) owned 35% of the shareholding in Autotrade London Ltd and AFH Properties Ltd and 35% of the equity in all real properties currently owned by Mr Amar Hussain, Auto Trade London Ltd and Mrs Amal Suhail Abd Reda, which are listed in the 6 October 2017 investor proposal and or that would be indicated (ii) would own 35% of all future real properties acquired using the First Claimant's invested money or assets, or proceeds of assets in which he was invested and (iii) future real properties would be held by the special purpose company, AFH Properties Ltd. On or around 23 October 2017, the First Claimant asked Mr Amar Hussain to factor in the sums paid of £175,000 on 16 October 2017 and USD 100,000 on 19 October 2017, but Mr Amar Hussain said that would be done separately on a subsequent occasion.”

32. The document is said to manifest, declare and prove the express oral agreement. However, the document is not cited in full or attached and it is unclear which translation of the whole document is now relied upon. To some extent, that question is answered by paragraph 26A, to which I will come. I also note that the properties that are said to be the subject of a trust are identified in different ways. First, there are the properties listed in the investor proposal dated 6 October 2017 and this is clear. Secondly, there are properties that “would be indicated”. Thirdly, there are future real properties to be acquired, using Mr Alhifi’s money or assets, or proceeds of assets in which he had invested. The second and third classes of property are rather more problematic for Mr Alhifi’s claim than the first.

33. The basis upon which the common intention instructive trust is said to have arisen is set out in paragraph 26A of the amended particulars of claim. It starts by saying that:

“A common intention constructive trust arose which reflects the common intention whether express and or inferred of the First Claimant on the one hand and Mr Amar Hussain, the Second Defendant, the Third Defendant and the Sixth Defendant on the other”

34. It then provides particulars of a common intention, which include paragraphs 1-26 of the pleading, the investor proposals and other communications and then refers to the change in March 2018. Sub-paragraph (6) and (7) say:

“(6) The common intention is proved or evidenced by reference to the relevant events pleaded in paragraphs 1-26 above, including –

(2) the Arabic language agreement signed by, amongst others, the First Claimant and Mr Amar Hussain on 23 October 2017. The translation of that agreement includes the statement ...” [as I have quoted it earlier in this judgment].

(ii) the email investment acknowledgment of a 50% share, signed by Mr Amar Hussain on 30 November 2019 at 17.36, as set out in paragraph 24 above.

(7) That the common intention on 21 October 2017 set out in paragraph 9 above is not perfectly mirrored in the 23 October 2017 signed document, is because it was intended to be an acknowledgment and because of a

mistake in its drafting, that arose as a result of the draftsman accountant's attempt to encapsulate acknowledgment of an agreement under English law in a single, poorly drafted Arabic sentence."

35. I turn then to disposal of the application. Despite the length of the hearing and the provision of two large bundles of authorities, the application really comes down to two points. First, whether the final iteration of the amended particulars of claim puts forward a case of sufficient coherence to demonstrate a real, rather than a fanciful prospect of success in relation to the common intention construction trust. That is to be considered, looking at the undisputed facts placed before the court, without the court conducting a mini trial, but having regard to the difficulties Mr Alhifi has had in articulating his claim. Secondly, on the basis of the facts put forward, does the amended particulars of claim demonstrate a case in law that has a real prospect of success. It is plain these two issues overlap.
36. On the factual case that has been pleaded, the claim has a number of troubling aspects. As I have indicated, Mr Alhifi has not put forward a consistent case from the outset. His initial position was that there was a partnership and a partnership agreement was to be produced reflecting terms apparently agreed, but not now relied upon. He initially relied upon, principally, an express trust founded upon a written agreement, but it is now said not to be an agreement (although I see it is still referred to as an agreement in sub-paragraph 6 of paragraph 26A).
37. The second letter that was sent refers to section 53(1)(b) of the Law of Property Act, 1925 and it is clear therefore that the document was being treated itself as a declaration of trust. At that point, there was no reliance upon an oral agreement.
38. I have already pointed out the difficulties with the first version of the particulars of claim. Reliance is placed upon an oral agreement that with the document then referred to as a written agreement, manifesting, declaring and proving the oral agreement, albeit that the written agreement required rectification to accord with the oral agreement. In effect, it seems to me the need for rectification is a way of saying that the agreement does not achieve that objective, because the written words do not accord with the underlying oral agreement. In the amended draft, the 'agreement' is still said to be inaccurate.

39. The amended particulars of claim also suffer from grave difficulties and paragraph 9 does not sit easily with paragraph 26A. The document dated 23 October 2017 still says in paragraph 9, “to prove, manifest and declare the oral agreement”. However, it plainly does not do that, because:

(1) The written agreement makes no mention of the third defendant.

(2) It does not define or list the properties to which it relates. It refers to the “aforementioned properties” where there are no properties mentioned in the documents at all. If it means to refer back to properties mentioned at an earlier stage in oral discussions or in a document, it completely fails to identify where and how they were previously mentioned. The more recent translation uses the expression “the properties referred to above” which does not assist Mr Alhilfi and no properties are referred to in the document.

(3) The document says nothing about the properties not yet acquired.

40. The plea of rectification has disappeared. Instead, in paragraph 26A, it is said that the common intention is to be derived from an oral agreement which is not, as it is put, “perfectly mirrored” in the 23 October 2017 document for two reasons. First, the document was intended to be an acknowledgment and secondly, because of a mistake in its drafting that arose as a result of the draftsman accountant’s attempt to encapsulate acknowledgment of an agreement under English law in a single, poorly drafted, Arabic sentence. As I have said, put another way, it is in reality being said that the document does not accord with the oral agreement.

41. Turning to the oral agreement pleaded in paragraph 9 of the amended particulars of claim, the properties at its subject are only partly identified. Those in the investor agreement clearly are identifiable, the other two categories of properties are not.

42. It seems to me that although the amended claim is now stripped of claims for a claim based on proprietary estoppel or express or resulting trusts, it remains muddled and hard to follow.

43. It is not the role of the court to measure or mark the quality of drafting in a statement of case. If the claim that as it is put forward has basic coherence, pleads adequate facts to explain the cause or causes of action, and puts forward a claim that is, in legal terms, viable that is sufficient. The fact that the claim might have been articulated in a more felicitous way is not to the point. I observe that the real prospects test sets the bar relatively low. That said, the CPR requires a claim to have sufficient clarity to enable the defendants to understand the case they have to meet. It seems to me the particulars of claim fail to achieve that standard, and the claims for proprietary relief based upon a constructive trust cannot be said, as drafted, to have a real prospect of success.
44. I turn to the second element I have to consider. The courts have had to grapple on many occasions with circumstances in which the parties have failed to comply with the formalities that are required by section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989 and/or sections 53(1)(a) or (b) of the Law of Property Act, 1925. The claimant may assert that a constructive trust came into being and thus, relies upon section 2(5) or section 53(2) of those Acts.
45. I start by looking at the necessary elements of a constructive trust relying upon an express agreement. I do so because the particulars of claim merely mention a trust that can be inferred, but a constructive trust that arose by inference is not part of the case that has been developed and was not part of the submissions that were before me.
46. A convenient summary of the requirements for the court to find that a constructive trust has arisen from an expressed agreement can be found in the judgment of the court, given by Sir Terence Etherton MR in *Dowding v Matchmove Ltd* [2017] 1 WLR 749 at paragraph 29. There was no dispute between the parties that a common intention constructive trust could arise where:
- (1) there was an express agreement between parties as to the ownership of property;
 - (2) which was relied upon by the claimant;
 - (3) to his or her detriment such that;

(4) it would be unconscionable for the defendant to deny the claimant's ownership of the property.

47. Issues that need to be considered here include the degree of precision that is required for an express agreement that will form the basis for a constructive trust. In *Dowding*, the judge at first instance had found that the oral agreement was complete as to its essential terms, that the parties intended it to be immediately binding and it had not been conditional upon extraneous matters.

48. The following issues emerged from the submissions made to me at the hearing:

(1) Can a constructive trust attach to property that is already owned by the person offering to transfer a beneficial interest?

(2) Can a constructive trust be created by an oral agreement, where the parties intend to create a formal contract following their oral agreement, but fail to do so?

(3) Can a constructive trust be created in relation to property which is not identified or identifiable, including property that is to be filed in the future?

49. I can readily dispose of the first point. It seems to me it is plain that the legal owner of an interest in land may agree, without complying with section 2, that another person is to have an interest in that land if there is an agreement of sufficient clarity and detriment is suffered by this other person. A constructive trust of the land may come into being in those circumstances: see the judgment of Sir John Chadwick in *James v Thomas* [2007] EWCA Civ 121 at paragraphs 19 and 24.

50. The second issue then depends upon the nature of the oral agreement the parties have made. A constructive trust may arise where the parties enter into an oral agreement, intending to enter into a section 2 compliant agreement, but fail to do so; but it all depends on the facts. Here, it is useful to refer to the judgment of Arden LJ in *Herbert v Doyle* [2010] EWCA Civ 1095. Her judgment provides an analysis of the speeches of Lords Scott and Walker in *Cobbe v Yoeman's Row Management Ltd* [2008] 1 WLR 1752. At an early stage in her judgment at paragraph 8 she remarks:

“I shall have more to say about the decision of the House of Law in *Cobbe* later in this judgment, but significantly, it emphasised that the terms of an oral agreement giving rise to the constructive trust had to achieve a level of certainty or completeness to fall within section 2(5).”

51. Later in her paragraph at paragraph 57 she says,

“In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel and also to constructive trust, that common thread is that if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, no party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations if there is agreement which does not comply with section 2(1) is complete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.”

52. The first of Arden LJ’s examples might be taken to mean that if the parties intend to make a formal agreement that complies with the requirements of the 1989 Act, a constructive trust can never arise. However, as Sir Terence Etherton, MR explained in *Dowding v Matchmove* at paragraph 32, a constructive trust would not arise where there are further terms to be agreed as part of agreeing a section 2 compliant document. The converse, however, can be seen from the facts in *Dowding* themselves, where the court concluded that a constructive trust arose because the parties had agreed all the essential terms and intended the oral agreement to be binding. So, the answer to the second question, will depend upon exactly what the parties intended when they made their oral agreement and that will usually be a matter that must be determined at a trial.

53. In my judgment, the critical element here arises from the third issue I have identified, namely whether the agreement was of sufficient certainty to amount to an agreement. The court has to consider what degree of certainty is needed. As Arden LJ pointed out in *Herbert v Doyle*, if there remained terms to be agreed so that the interest in property cannot be clearly identified, a constructive trust will not arise, albeit there is reliance, detriment and unconscionability. It is also instructive to consider the remarks made by Morgan J in his judgment in *Herbert v Doyle* at paragraph 91:

“Having considered the way in which the requirement for certainty or completeness is described in *Cobbe and Thorner v Major*, I find there is nothing there which suggests that the test for certainty or completeness is more strict than is the test for certainty in the law of contract. It is not necessary in this case to consider a possibility that the test in the law of constructive trust might be less strict than the law of contract. On the facts of the present case, given that the agreement in the present case meets the test as a certainty and completeness in the law of contract, it follows in my judgment that it also meets the test as to certainty and completeness in the law as to constructive trusts.”

54. I say in passing that no authority was cited to me which suggests that the degree of certainty which is required for an agreement founding a constructive trust is less than that which is required for a contract to come into being. Even if there is some additional latitude in the case of an agreement that founds a constructive trust, it must be possible for the claimant to articulate the terms of the agreement with a reasonable degree of precision.

55. It is therefore necessary for me to return to paragraph 9 of the draft amended particulars of claim. Here, the lack of clarity in the draft pleading which I have set out above, resumes significance. It seems to me that Mr Alhifi has failed to plead an oral contract of sufficient certainty to found a constructive trust for two main reasons:

(1) The written document does not, for the reasons I have given, manifest, declare and prove the oral agreement. Indeed, it falls far short of doing so. The original translation relied upon appears to point to an agreement that was conditional, as the defendants pleaded in their defence, and the reliance by the first claimant, Mr Alhifi, upon an extract of that document which has been translated without any authentication in a different way to the earlier translation he relied upon, is entirely unsatisfactory. In any event, whichever translation is taken the properties are neither “aforementioned” or “referred to above”.

(2) Although there is no difficulty in principle with a constructive trust relating to a property or properties to be acquired in the future, it is essential for it or they to be identified or identifiable with sufficient clarity. In this case, there are two categories of assets that are said to be the subject of the constructive trust (for these purposes I leave aside the shares in the companies).

56. The first category of property refers to those listed in the investor proposals, but then the following words appear, “or would be identified”. The first element is satisfactory, the properties can be identified by reference to the investor proposal. However, the second element is hopelessly vague.
57. The next category that is pleaded is future real properties acquired using the first claimant’s invested money or assets or proceeds of assets in which he was invested. The difficulty here is that the £740,000 paid by Mr Alhifi was said to acquire the shares in the identified properties. It is, in my judgment, hopelessly vague to say that Mr Alhifi would acquire a 35% interest in unidentified properties by virtue of Mr Alhifi’s “invested money or assets” where the sums invested and assets are not identified in type and/or amount. Similarly, the use of the proceeds of sale of investments might yield sums, large or small, but rolled over into future acquisitions the value of the interest could not always be 35%, whatever the amount of those proceeds.
58. In conclusion, it seems to me the oral agreement is unclear and falls far short of providing certainty that would be needed for a binding contract and, to the extent the test may be a lower one, far short of the requirements of certainty that is required for a constructive trust. It follows that it fails to provide evidentially, by referring to what is now described as the document, or in the way it is pleaded, an agreement that could found a constructive trust.
59. I will therefore refuse permission for Mr Alhifi to amend the particulars of claim to bring a claim under a constructive trust. The remaining elements of the draft amended particulars of claim are not objectionable and permission will be granted for those amendments to be made. The practical outcome here is that Mr Saiffee will need to produce a revised draft and provide it to the defendants. I would hope that there will be no issues about what elements of the claim are in and what are out but, to the extent that any issues remain between the parties, they will need to be referred to me for a determination in writing.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge