Neutral Citation Number: [2022] EWHC 356 (Ch)

Case No: PT-2019-MAN-000097

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 18 February 2022

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

VALERIE MAY OLGA SIM **Claimant**

- and -

(1) KATIE ELLEN ELIZABETH PIMLOTT
(2) ALISTAIR SIM
(3) DAVID AUSTIM SIM
(4) CALLUM SIM
(5) LOUISE CALDER **Defendants**

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The Claimant in person
Lesley Anderson QC
(instructed by **Pannone Corporate LLP, Manchester**) for the **Third Defendant**

Hearing dates: 8 - 10 February 2022
Draft judgment circulated: 14 February 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 12.30pm on 18 February 2022.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction

1. This is my judgment on the trial of the preliminary issue ordered in these Inheritance Act proceedings by His Honour Judge Pearce on 9 September 2021. The preliminary issue is the determination of the claim made by the claimant that the third defendant holds part of his shareholding in a company known as Brickies Limited ("the Company") on trust for the estate of the deceased, Dr. David Morrice Sim.
2. The claimant was legally represented until November 2021 but has since acted in person. With the assistance of her daughter and one of her sons she has conducted the trial with some skill and with determination. The third defendant has been very ably represented by Ms Anderson QC at trial.
3. None of the other defendants have been involved in the preliminary issue. That is not surprising since the claim, as pleaded in the points of claim by counsel then instructed by the claimant, does not make any relevant allegations against any of them. As I said at the outset, it also follows that any findings made in this judgment are not binding in relation to the issues in the main action.

Persons involved

4. I begin by identifying the various persons who feature in this case, starting with the deceased. He died on 16 January 2018, aged 79 years, having made his last will, the subject of the claimant's Inheritance Act claim, on 19 December 2017.
5. He qualified and practised for most of his life as a medical doctor but also had a number of business and property interests, including an online Viagra sales business, which had made him a wealthy man.
6. He was married three times, the last time being to the claimant, and had five children with four different women. His first child and the fifth defendant is Louise Calder, who is the daughter of his first marriage. His second child and the third defendant is David Austin Sim, who is the son of his second relationship. His third and fourth children, the first and the second defendants respectively, are Katie Pimlott and Alistair Sim, who are the children of his second marriage. His fifth child and the fourth defendant is Callum Sim, who is the deceased's son from his third marriage to the claimant. I shall refer to each of them by their first names only.
7. The claimant married the deceased in 1998. They had been in a relationship for many years before this. Indeed, Callum had been born in 1992. She was 20 years younger than the deceased. Although the deceased was still married to the claimant at the time of his death, their relationship had been a tempestuous one, in the course of which the claimant had

previously commenced divorce proceedings in which the decree nisi was apparently subsequently rescinded. There is an issue as to whether, and if so to what extent, they were reconciled at the time of his death, which may be an issue for the main proceedings but is not relevant to the preliminary issue.

The deceased's last will

8. The deceased's last will was made with the benefit of legal advice. As relevant to this case, he made two gifts totalling £375,000 to the claimant, conditional however upon her: (a) not making any Inheritance Act or other claim against his assets; (b) moving out of the matrimonial home; and (c) releasing her interest in a property in Dubai. Since the claimant has not complied with any of these conditions, she is not entitled to any capital sums under his will. He left the reminder of his estate to provide an income for the claimant for life and then to be divided between Louise, Katie, Alistair and Callum. He left nothing to David, explaining in his will that this was because he had been "fully provided for under arrangements during my lifetime". He appointed Katie, Alistair and David as executors. The fact that he appointed David as an executor is good evidence that he did not expect David to challenge the lack of any provision for him in the will.

The pleaded cases

9. Because the claim the subject of this preliminary issue was not included in the main claim as originally formulated, the claimant was ordered to formulate it by way of separate points of claim. The claim as advanced can be summarised as follows:

    9.1 The claimant contends that David holds 45% of the share capital of the Company on trust for the deceased, arising out of the deceased investing the sum of £400,000 (in evidence she said in excess of £400,000) in the Company within the first year of its existence, coupled with the common intention and agreement that he had with David that he had a significant shareholding in the Company.

    9.2. The intention and agreement is said to have been a "gentlemen's agreement".

    9.3. The evidence relied upon in support of the common intention and agreement consists largely of what the claimant says she was informed by the deceased, in particular that the money which he was investing from his existing business interests would provide an income for both of them for the present and the future.

    9.4 The claimant also relies upon a recording made by Callum of a conversation with the deceased in August 2017 which she says shows that the reason why the agreement to confer the 45% shareholding upon the deceased was not put into effect was the common

desire of the deceased and David to conceal the deceased's shareholding in the Company in order to protect it from any claim made by the claimant in divorce proceedings.

9.5 The claimant contends that the evidence relied upon by David to the effect that the monies advanced by the deceased were invested in the Company as a loan and, subsequently, as a gift by way of advance inheritance to David, was part of the process of seeking to conceal the true position.

9.6 The claimant also relies upon other evidential matters to support her case, to which I shall refer in due course.

9.7 The legal effect of all the facts and matters relied upon are said to be that David has "at all material times held a shareholding equivalent to 45% of the share capital (or such other percentage as the Court may conclude) on a bare trust for the Deceased, and, by extension, the Deceased's estate", alternatively that David "holds the said shareholding on a constructive trust for the Deceased and, by extension, the Deceased's estate", alternatively that he "holds the said shareholding as a nominee for the Deceased and, by extension, the Deceased's estate". As a further and final alternative it is said that David "holds the sum of £400,000 (being the Deceased's investment; alternatively, such other sum as the Court considers fit) on a resulting trust for the Deceased's estate".

10. David's case is, as anticipated in the points of claim, that the monies advanced by the deceased to the Company, which he says amounted only to some £295,000, were initially advanced as a loan and subsequently, in 2008, converted to a gift, therefore explaining why no further provision was made for him in the will.

11. In her written opening the claimant contended that her case was founded on the legal principle of proprietary estoppel and the provisions of spousal claimants under the Inheritance Act. She referred to the decision of the House of Lords in the case of Thorner v Major [2009] UKHL 18 which is, as is well known, a case involving the application of that principle. In her oral opening Ms Anderson objected that it was not open to the claimant to advance a claim on this non-pleaded basis. In my judgement this objection is well founded. The claimant appears to be advancing this as a claim by her against the estate of the deceased. That, however, is not what this trial is concerned with, since the preliminary issue is about the claimant's case that the estate of the deceased has a trust claim either to a shareholding in the Company or to the monies invested by the deceased into the Company.

12. Insofar as the claimant might have wished to contend that David was aware of the representations alleged to have been made by the deceased about the purpose and effect of his investment into the Company, that he allowed the claimant to rely upon those representations to her detriment, and that in consequence some proprietary interest has arisen in relation either to the shareholding or to the

monies invested, that is not a claim which was in any way made in the points of claim nor otherwise asserted in clear terms in her witness statement made in support of this claim. The same is true of any allegation that David allowed the deceased to rely upon any representation which it might be said that David might have made. In the circumstances I am satisfied that it would not be fair to allow the claimant to advance such a claim at this trial, regardless of any merit which it might otherwise have had.

13. In her written opening Ms Anderson suggested that this case was likely to be decided on the facts rather than the law, which was unlikely to be controversial in any event. Whilst, as will be seen, I largely agree with that analysis, as I also indicated during the course of closing arguments it seems to me that there are also certain legal obstacles which the claimant would have had to surmount even if I had accepted her case on the facts. I will refer to those issues reasonably briefly once I have dealt with the facts because, given my conclusions on the facts, they are not determinative of the case in any event.

Sources of and approach to the evidence

14. As is common in cases of this kind, the court has to make findings based not only upon the conflicting oral evidence of the principal protagonists but also by reference to the contemporaneous documentary evidence. This is a case where it is important to test the competing accounts of the principal protagonists by reference to the contemporaneous documentary evidence which is, where reliable, a surer guide to the truth than the oral evidence of the principal protagonists, which is coloured by their partisan interests in the claim.
15. David called as witnesses the two accountants who dealt with the financial affairs of the Company from its incorporation onwards. Their evidence was, in my view, entirely consistent with the totality of the contemporaneous documentation and realistically incapable of serious challenge.
16. Where I have to choose between the uncorroborated evidence of the claimant and of David I prefer that of David. The claimant's evidence seemed to me to be unreliable and inconsistent in a number of important respects.
17. For example, she had pleaded that the £400,000 had been invested "in or around early 2005", within a year of its formation, to enable the Company to obtain business premises and expand considerably. However, it was apparent that in fact the Company did not obtain new business premises or expand until a much later date. This was not just a mistake about a date, because contending that the investment was intended for a particular purpose - which did not actually happen at that time - was both potentially important for the claim but also demonstrably wrong. There is also no documentary evidence that £400,000, as opposed to the lesser sum identified in the Company's accounts, had been invested.

18. Her evidence about the true nature of the relationship between herself and the deceased was also contradictory. Initially, she had given the impression in her evidence that the deceased had confided in her about his financial affairs whereas, when pressed, she conceded that he tended to conceal his financial position from her and that she only gleaned information as regards the Company from his occasional outbursts when he returned home annoyed with something which David had said or done. She also initially sought to present herself as someone who was under the financial control of the deceased, however again when pressed she had to accept that she had felt able to register a matrimonial charge over the matrimonial home many years before divorce proceedings had even been intimated, as well as complaining vociferously about the amount of money which the deceased was investing into what she saw as David's business. I did not gain the impression she was at all under his control.
19. In evidence she described the deceased as a psychopath, a narcissist and an abuser who would do anything to make her do what he wanted. She said in terms that at one stage he had made an attempt to have her killed or at least disappear, which was the subject of a warning notice from the police. However, she also complained with evident emotion about being wrongfully excluded from seeing the deceased, who she said she still loved, in the run up to his death. I am prepared to accept that during the course of a long standing relationship people can display strong contradictory feelings towards their partners. However, in my judgment her evidence overall about the relationship was very substantially inconsistent and exaggerated and this satisfies me that she is not a reliable historian.
20. David's evidence was also, it seemed to me, highly partisan in his determination to fight his corner. There was clearly some real animosity on his part towards the claimant. That was not wholly unsurprising, given that in the course of her cross examination of him she suggested that he was in some way complicit in the attempt allegedly made by the deceased to arrange her death or disappearance, when there appeared to be no objective evidence to support such a serious allegation. However, it was also apparent that there were some inconsistencies between his evidence and some of the contemporaneous documentation and it seemed clear that he was prepared to conceal the true position as to the claimant’s nominal employment by the Company from the Revenue. Nonetheless, overall he came across as more dispassionate and more reliable as a historian than did the claimant.
21. The contemporaneous documentation, in particular the evidence casting light on the intentions and beliefs of the deceased, was not always entirely consistent. In the circumstances I must consider the evidence with some care and reach a conclusion based upon my assessment of the totality of the evidence which is before me and which I consider to be relevant to my decision, which is the task

upon which I now embark. I do not mention every item of evidence or every document to which I was taken, only those which I consider key to my determination of the issues.

The relevant evidence

22. It is not necessary for me to deal with the history of events preceding April 2004, when the Company was incorporated. It suffices to say that:
    (1) The deceased's medical practice and various business interests, including the online Viagra business, were all doing well and he was not short of money.
    (2) David, on the other hand, had just lost his job as a manager of a well-known builders merchants, after his plan to set up in business with another man, Wayne Rafferty, had being discovered, and he needed to find other work to provide him with a source of income once his employment had ended.
    (3) As the claimant said in her witness statement, the deceased had previously helped both Katie and Alistair set up businesses of their own.
    (4) As a result of discussions between David and the deceased it was agreed that David would set up a builders' merchant business from a small yard which was for let at the rear of the deceased's GP surgery premises, which could be used as an office. Working capital came from funds provided by the deceased. Wayne Rafferty was employed as sales director but did not become either a shareholder or a company director.
23. Once the Company was set up it had two shares, one allotted and the other transferred by the company formation agent to David. The deceased did not have, and never had, any share in his own name. David was the sole appointed director. The registered office of the Company was given as the surgery premises. The deceased was appointed as Company secretary, although there is no evidence that he performed any such role, that being left to the company accountant, Mr Crocker, to whose evidence I refer below.
24. The Company opened a business current account with RBS. David was the sole signatory to the account. The very first bank statement shows that on 10 May 2004 the deceased made two payments of £150,000 and £60,000 respectively, totalling £210,000, into the Company bank account. A ledger produced by David with a page headed "directors loans, Dr Sim", records this as an injection of working capital. The ledger also records further payments being made by the deceased for various business related purposes. The total amounts to £294,654.90.
25. The Company's first year accounts, prepared by Mr Crocker, who was one of the witnesses called by David, identified an amount of £295,000 as a loan to the Company. Mr Crocker had been the accountant for the deceased for some time before 2004, which is how he came to be appointed by the Company. In his witness statement he said that "my understanding at the time from my conversations with the

deceased and [David] was that these payments were made by the deceased to assist [David] in starting the company". The accounts for the year ended 30 April 2007 recorded a loan repayment of £10,000, bringing the balance down to £285,000. In his witness statement Mr Crocker said that "the loan was subsequently converted by the deceased to a gift from the deceased to [David]. I was informed of this by [David] while preparing the accounts for the year ended 30 April 2008". Mr Crocker confirmed in his witness statement that he recorded this change in the accounts, so that from that point onwards the funds were treated in the Company's accounts as monies having been introduced by David to the Company. He stated that so far as he was aware the deceased never held shares in the Company and was never a director of the Company. He also confirmed that the deceased never received a salary from the Company.

26. It cannot be disputed that the ownership and control of the Company and the monies advanced by the deceased to the Company were recorded in the Company's books in the ways described above. It follows that to the world at large the deceased was neither an owner or a controller of the Company, with his only role being the formal one of Company secretary, and his only interest in the Company as a creditor of the company up until 2008.

27. The only relevant change as recorded subsequently occurred in 2013, when a further 98 shares were issued of which 88 were allocated to David, giving him a total of 90 shares, with the remaining 10 shares being allocated to his wife. In his witness statement Mr Crocker confirmed that this was done at his suggestion for tax purposes. It is clear that there was no suggestion at this point that the deceased should have any shareholding allocated to him. When he was asked by the claimant in cross examination Mr Crocker denied ever having been aware of any gentlemen's agreement as regards any shareholding between the deceased and David.

28. After Mr Crocker's practice was taken over upon his retirement in 2015 he continued to work part time for the Company, assisting it with its accounts. An accountancy firm known as Nolan James succeeded Mr Crocker as company accountant. Ms Nolan, who also gave evidence, took over as the director of the firm responsible for dealing with the Company's affairs. She explained that after the death of the deceased she received an email from Mr Crocker, notifying her of the death and that David's wife had taken over as company secretary. She confirmed that she would update the details at Companies House accordingly. She explained that, due to an error made by a then junior employee, the forms filed wrongly recorded David as no longer being a director or person with significant control (PWSC) as well as recording the deceased no longer being company secretary. She explained that when the error was discovered it was put right, with David being reinstated as director and PWSC and his wife being appointed as company secretary. Although the claimant has suggested that there is some significance to this, I am quite satisfied from the evidence of Ms Nolan and the contemporaneous documentation to

which she refers that it was an error, plain and simple, notwithstanding that David has not called the actual employee concerned who made the error to give evidence,.

29. What, then, is the evidence upon which the claimant relies so as to show that this picture does not reflect the reality?

30. Although the claimant has pleaded and asserted that she was told by the deceased that he had invested £400,000 into the Company and that gentlemen's agreement with David would ensure that he and she received an income from the Company and would continue to do so for the future, I am unable to accept this evidence as a reliable. Apart from anything else, there was no mention of this having been what she had been told by the deceased in the previous divorce proceedings when, if that is what the deceased had said and the claimant had understood from 2004 or 2005 onwards, it plainly would have featured.

31. I am satisfied that the claimant's case has been taken from a combination of what the deceased said to Callum in a conversation when Callum visited him in August 2017 and recorded the conversation, and what the solicitors who prepared the deceased's last will said in a letter providing information in response to a request made by the claimant's then solicitors in March 2018, and I turn to this evidence now.

32. As to the transcript, its accuracy is not disputed although, as Ms. Anderson observed, it is clear that Callum was introducing the subject in order to obtain a response from the deceased and it is unlikely that the deceased was aware that the conversation was being recorded. Having introduced the subject, the relevant part of the conversation continued as follows (where D is the deceased and C is Callum):

"D: … Don't say anything to anybody because what I'm going try and do is, I'm going to force David to pay money, so Katie can distribute the money to you all. Without tax, do you understand? David will have to pay the money to her, maybe not right away, but in bits and pieces, as the years and months go by, so that she can give it to you later on. Don't say anything to your mother, or anything about that, because she'll want a piece of that as well.

C: Right, ok.

D: I mean, she was- David was going to give me forty-five percent of Brickies at one time, before your mother started the divorce proceedings, and then it all fell on the back burner, and now I've got nothing, I've don't have even a ha'penny of Brickies. No percent.

C: But didn't you put the money in in the first place? Why didn't you take shares?

D: Because I relied on the promise that he would give me a share of the business, but once your mother started her nonsense, and said I had a share in the business, which I didn't -

C: And now he's -

D: And I had to say I didn't have a share of the business, so she's lost all that money for us.

C: So now he doesn't want to give you anything back?

D: He won't give me anything back, will he.

C: Jesus Christ, Dad.

D: The business is probably worth five million quid, I would have been worth two million right now.

C: Jesus Christ.

D: I don't want you to tell on anything about that, that's just for your information.

C: That's bloody big money that-

D: It's huge money! But she was determined, because she wanted to get rid of me. Divorce me. When she discovered I had Parkinson's disease, I was no longer any good to her, she thought. It was all about money again, she thought I wouldn't be able to have any money, but I did.

C: So is there no way to – I don't get how David's got these shares then. Were they yours to begin with?

D: Once you've set up a business you get two years or three years to distribute the shares.

C: And he didn't distribute any?

D: He distributed them to himself.

C: Oh dear. I mean the only thing you've got there is, you can take him to court over it.

D: I couldn't because then she'd be right in the middle of it again. Claiming a piece of it, can't deal with it all.

C: Yeah.

D: At the moment I've got no share in Brickies whatsoever. But she went to the court and she said I did have a share of Brickies, and the judge said, "I don't know who to believe". Well believe what the bloody Companies House share issue shows. It would have shown that I had no shares. But I just had to give up because I was in an impossible situation, and I was ill. So when she said she wanted to stay in the house to look after me, I accepted that and I shouldn't have. I should've known it was a mistake."

33. Two particular points can be made about this evidence:

    (1) In summary, the deceased appears to be saying that: (a) David had promised to give him 45% of the Company; (b) in the divorce proceedings the deceased had said that he did not have a share in the Company; (c) that was a true statement, because David had allocated them to himself; (d) and David would not give him anything back; (e) the value of any share in the Company which the deceased might have had had been lost; and (f) the deceased was not prepared to take David to court for it.

    (2) Although the opening section is not entirely clear, it is a reasonable inference that the deceased was expressing his intention to try to force David to pay money to Katie, representing the value of the 45% interest he had been promised in the Company, in instalments for her to distribute to all of his children.

34. A few months before this, in May 2017, the deceased had been visited by a solicitor at Bramhall solicitors with a view to making a will. There is a handwritten file note and a subsequent typed up file note. The handwritten file note states as relevant: "Lot of money into David's business, were to get shares, £400,000 invested, was supposed to get 45% of business, builders merchants (Brickies)". The

typed up note states as relevant: "We then discussed his son David. I had asked [the deceased] what other major assets he had and he basically said that he had cash but it was significantly reduced as he had given a large sum to his son David. He said that originally this had been intended to be in return for shares in David's company (Brickies) but that never transpired. When he subsequently asked David for repayments and or shares David has said it was a gift and that he is not going to get anything. He takes the view that David has effectively had his inheritance therefore and doesn't want him to take anything off the Will."

35. In my judgement there is a core consistent element to both accounts, which is that the deceased had invested £400,000 with an intention of receiving a 45% shareholding, but that no shareholding had been allocated to him and David had subsequently refused to give him a shareholding. The deceased was not suggesting that he had, or would seek to enforce, any legal right to obtain a shareholding. He told the solicitor that he was effectively writing it off as an advance inheritance, whereas he suggested to Callum that he hoped he could persuade David to make some payment to be shared out among his other children.

36. Even if I was to accept this account as accurate, which I should not do without considering the relevant evidence in totality, it must be observed that:

    (1) There is no suggestion that David had ever expressly promised that he would give the deceased a shareholding of 45% in return for his investment into the Company.

    (2) There is no suggestion that there had been any discussion or agreement as to how or when it would be done. Bearing in mind that since there were only two issued shares, both in David's name, the only practicable way of doing so would be - as happened in 2013 - for a further 98 shares to be issued and then for David to be allocated 53 and the deceased allocated 45.

    (3) There is no suggestion that David had stated or had been asked and had agreed that he would hold a shareholding, 45% or otherwise, on trust for the deceased, whether to conceal an actual shareholding from the claimant in the divorce proceedings or otherwise.

    (4) The evidence is clear that even if he had ever had any intention of seeking to force David to give him a 45% shareholding the deceased had long given up on the idea and had decided instead to treat his investment as a gift by way of advance inheritance to David and, perhaps, to persuade David to make some informal payments via Katie to the other children as some form of recompense. Whether the deceased was just saying this to Callum to make him and Callum feel better is open to conjecture. There is no evidence that he ever did so.

37. There is no other evidence to support the figure of £400,000 having been invested. Given that the ledger produced by David is, I accept, a genuine contemporaneous record, it is surprising that if further monies had been invested by the deceased into the Company they would not also have been recorded and included in the accounts produced by Mr Crocker. I am satisfied that no more than £295,000 was invested.

38. Both parties referred to a letter written in May 2008 from a firm of solicitors known as Pricketts to David, following a meeting between the solicitor and the deceased. As I said at paragraph 22 above, Wayne Rafferty had been involved in the business since it had started up. Pricketts had been consulted because Mr Rafferty was unsettled and the proposal was to persuade him to remain by providing him with a capital sum and some equity. It appears clear that this meeting and this letter was by way of an update from a previous instruction, seemingly in December 2007. What is relevant for present purposes is that the initial intention appeared to be to increase the shareholding to 100 shares, with David to have 70 and Mr Rafferty the remaining 30. By May that had changed, with David to have 49.5%, the deceased to have 37.5%, Mr Rafferty to have 10% and the remaining 3% to be divided between two others, presumably more junior employees. Of the 37.5% which the deceased was to have, 20% was to be obtained by purchasing 20 shares from Mr Rafferty for £200,000.

39. It is common ground that this transaction did not take place. The claimant seeks to rely upon it as showing an intention to give the deceased a substantial shareholding. David seeks to rely upon it as showing that it was not being suggested at that time that the deceased had any existing shareholding or right to a shareholding, and that the only way he would obtain a shareholding would be through this transaction, which never proceeded and, even then, only by paying a further £200,000 for a 20% shareholding.

41. David's evidence was that the reason the transaction did not proceed was because the deceased was unable to raise the £200,000 by borrowing funds secured against the matrimonial home because when he attempted to do so he became aware that the claimant had registered a matrimonial charge against it. There is no hard evidence one way or another about this, although it might explain the reference in the transcript of the conversation between the deceased and Callum to the claimant having “lost all that money for us”.

42. It is quite clear that the content of the letter is inconsistent with the deceased maintaining at the time that he was entitled to have an existing agreement enforced by obtaining a 45% shareholding with no need to make any further payment. However, it does appear that it was envisaged that the deceased would receive a 17.5% shareholding without having to pay anything for it. The letter also refers to Mr Rafferty's original terms of employment as entitling him to a profit share to be calculated on a specified basis, including a “payment to Dr Sim of 25% of profit”. That appears to suggest some prior agreement to the effect that the deceased had some right to a profit share, albeit not as a shareholder, although the letter also records that the solicitor was informed that the Company had never actually paid a dividend and all profits had been reinvested.

43. David was cross examined as to whether any terms had been agreed for what he maintained was the original loan. He said that no terms were agreed and, in particular, nothing was agreed in relation to the time of repayment or payment of interest. The claimant suggested that this was inherently implausible,

given that the deceased was a businessman who would not have entered into such an uncommercial agreement. In contrast, Ms Anderson pointed out that this was primarily a family, rather than a business, transaction, with the deceased being affluent at the time and wanting to help his son in the same way as he had previously helped two of his other children.

44. This ties into another point, which is that it is common ground that in January 2005 the claimant herself was put on the Company payroll, with an employment contract showing her as a marketing assistant at an annual salary of £15,000. This enabled her to receive £1,000 per month net, in circumstances where it is common ground that she was not actually asked to work for the Company in any capacity. It appears that previously she had had a similar arrangement with the company which ran the medical practice and that this had been transferred to the Company. Although David suggested that this only happened because the deceased wanted to stop her complaining about the time and money he was putting into the Company business for no reward, it seems to me to be perfectly plausible that this was also seen as a convenient way of providing the deceased with an indirect tax-efficient return on his investment.

45. More controversially, the claimant contended that every Saturday morning the deceased and David would visit the Company office and return with £1,000 each in cash, of which the deceased would give the claimant £300 from his share. This was not a pleaded allegation, and had only previously been made in passing in an earlier witness statement by the claimant. David denied that it had ever happened, pointing out that its effect would have been to withdraw over £100,000 in cash from the business each year, in circumstances where - despite a Revenue inquiry - no such activity had ever been alleged let alone substantiated. It is also worth pointing out that this allegation was not put to Mr Crocker in cross-examination, who might have been able to comment on whether he had been able to reconcile the company records had this been happening. Its only relevance to this case would be to support an argument by the claimant that this was a form of disguised return on the shareholding which the deceased and David had agreed he should have. I am not satisfied on the evidence that the claimant's version of events can be accepted in this respect. It is possible that some cash payments were made and distributed, but I do not accept that the evidence proves on the balance of probabilities that it was as regular and substantial as the claimant contends or, thus, that it is referable to the deceased having a substantial concealed shareholding in the Company.

46. The claimant also relied upon an email sent by the deceased to a college friend in June 2008 where he referred to having "two main businesses", one of which was described as "with my son I have a builders supply company in Stockport". Ms Anderson suggested that it was difficult to place any real weight on this statement, especially since David accepted in evidence that after his retirement the deceased enjoyed coming down to the builders yard to help out in the business. I agree that this email is equivocal and cannot be taken as providing firm support for an assertion by the deceased that he did have a

shareholding in the Company, especially since it is almost contemporaneous with the letter from Pricketts, referred to above, which showed that this was still only a proposal at that stage.

47. It is clear that the account given by the deceased was never consistent. In his answer to a divorce questionnaire, raising the question of the purpose of the investment into the Company, he suggested that he had gifted David £150,000 in 2004 as a way of compensating him for the fact that his former wife had not made any provision for David in her will. Both the amount and the basis of this payment as stated here are clearly inconsistent with what he said to Callum and to Bramhall solicitors in 2017. He gave a similar explanation, through his representative, in 2008 during the course of a revenue investigation, saying that he was not a shareholder and had given his son £210,000 (later corrected to £295,000) as a gift to set the business up. He repeated this explanation in a subsequent meeting in 2009 at which the deceased was present as well.

Discussion and conclusions

48. As I have already indicated, this is not a completely straight forward case to determine, because the contemporaneous documentary evidence, as well as the varying accounts given by the deceased over the years, does not always paint a consistent picture.

49. However, it is possible for me to reach sufficiently firm conclusions from the totality of the evidence, coupled with my assessment of the inherent probabilities.

50. The treatment of the investment into the Company and its ownership and control in the accounts and the filed information is plainly inconsistent with any argument that it was agreed that the deceased should have a 45% shareholding in the Company from the outset. If that had been the intention from the outset, there is no explanation given as to why it should not have been put into effect from the outset. Mr Crocker had no motive not to record accurately what he had been told was agreed, since he was the deceased's longstanding accountant and had no possible motive for helping David do his father down. Thus, whilst I accept that there is no positive evidence to the effect that the deceased saw the accounts and the filed information at the time, on Mr Crocker's evidence which, as I have said, I am satisfied is reliable, it is plain that the deceased gave him to understand at the outset that the investment was a loan. It is implausible that David should have informed Mr Crocker that the loan had been transferred to a gift without that actually having been agreed by the deceased.

51. As Ms Anderson submitted, there is no evidence or basis for suggesting that in 2004 or 2005 the deceased would have had any particular reason to want to keep any shareholding off the filed Company records or accounts. It was not until late 2007, when the claimant first instructed solicitors to write in connection with her intended divorce, that the deceased might have had a positive reason for doing so. Until then, his reason for doing so is inexplicable and unexplained.

52. That is reinforced by then deceased's failure to explain any such agreement, if it had been made, to Mr Crocker as his accountant at any time from 2004 onwards or to Pricketts in 2008. If the deceased had

told them at the time what he was perfectly happy to tell Bramhall solicitors in 2017 it seems unlikely that some reference would not have been made to this in the contemporaneous documentation.

53. Whilst I am prepared to accept that the deceased would have had a motive, from late 2007 onwards, to seek to conceal the existence of any such agreement from the claimant, due to a fear that she would seek to obtain a share in the value of the business in the divorce proceedings which she subsequently commenced in 2009, that does not provide a retrospective explanation for any such concealment before late 2007. Furthermore, as Ms Anderson also submitted, the deceased as a professional person would not lightly have lied to the court in the divorce proceedings or to the Revenue during its investigation. That is particularly so when, on the claimant's version of events, he had openly told her about the arrangement, so that he could scarcely have expected her not to pursue any claim in divorce proceedings or to keep quiet about it.

54. I also agree with Ms Anderson that it would be wrong to treat the transcript of the conversation with Callum in 2017 and the file notes produced by Bramhall solicitors in 2017 as if they were the equivalent of either a contemporaneous documentary record or something in the nature of a formal signed declaration, made by someone with an accurate recall and with no motive not to tell the whole truth. I agree with her that it is entirely plausible that by 2017 the deceased had come to regret the decision not to proceed to acquire a substantial shareholding in the company along the lines outlined in the letter from Pricketts, especially since he clearly believed by 2017 that the business was extremely valuable, in the region of £5 million. What he said to Callum and to Bramhall solicitors in 2017 is certainly capable of being read as a reference to his believing that David was responsible, in one way or another, for the 2008 proposal not being carried through. That is very different, in my judgment, from a conclusion that there had been a firm agreement in 2004 or 2005 that in return for his investment he should have a 45% shareholding in the Company.

55. It must also be borne in mind, in my judgement, that discussions between close members of a family about interests in a business may ebb and flow, with various discussions, proposals and understandings occurring over the years, without ever reaching a definite conclusion, and with recollections subsequently changing. It is entirely plausible in my judgment that in 2017, looking back over the events of the last 13 years, the deceased had come to believe that he had an understanding with David from the beginning about having a right to a shareholding when no such clear, unequivocal or definite agreement had ever been reached.

56. Having regard to all of the evidence, I am not satisfied on the balance of probabilities that the claimant has proved her case to the effect that there was, at any time from 2004 onwards, a firm agreement that in return for his investment into the Company the deceased should have a shareholding interest in the Company, whether of 45% or any other proportion. It is not sufficient for the claimant to prove on the balance of probabilities that there was some discussion at some time about some shareholding. There has

to be clear and convincing evidence that there was a clear and specific agreement about a clear and specific shareholding. In the end, I am not satisfied that the picture as revealed by the filed accounts and company information does not represent the true position, which is that the £295,000 provided to the Company in a number of separate payments was intended to be and was treated as a loan from the outset, on an informal family basis, and then converted into a gift in 2008 on a similar basis.

57. On that simple basis, in my judgement the claim as advanced by the claimant in the points of claim cannot succeed on the facts.

The legal difficulties with the claimant's case

58. Although unnecessary to go further, I should also briefly explain why I would have found that the claim as advanced could not have succeeded even had I been satisfied that there was such an agreement.

59. As I have explained, the claimants case is founded fairly and squarely upon an argument that David held either a share of the shareholding or the investment into the Company on trust for the deceased and now for his estate.

60. Although the legal basis for the trust over the shareholding was not clearly spelled out in the points of claim, it can be said with reasonable confidence that the claims pleaded, as summarised in paragraph 9.7 above, involve an assertion either of a private express trust or of a constructive trust of the kind which may arise where the vendor of property has done everything within his power to complete the transaction, so that the law regards him as holding the property as constructive trustee for the purchaser. It seems to me that the alternative plea of a nominee holding does not differ in legal analysis from these two claims and can only sensibly be intended as a way of expressing the argument that there was a deliberate decision to conceal the true position from the time of the divorce proceedings onwards.

61. In closing submissions I referred to the principles underpinning the creation of such trusts as being conveniently summarised in Snell's Equity 34th edition Part 5 - Trusts.

62. The classification of trusts into express trusts, resulting trusts and constructive trusts is neatly summarised at 21-018 to 21-021 of Snell.

63. As regards private trusts, Snell refers at 21-012 to the need for the three certainties of intention to be present, namely certainty of intention to create a trust, certainty of subject-matter and certainty of objects or persons.

64. The first difficulty which the claimant would face is that until 2013 there were only two issued shares in the Company. It would not be possible to have a trust over 45% of 2 shares, unless it could be found, or inferred, that the intention was for David to declare himself a trustee as to 45% of each of the two shares. That of course is inherently implausible and there is no evidence or basis for such a finding.

65. This is not a mere legal or technical point. It illustrates the reality, which is that even if there was an agreement as contended for it could only, as I have already noted, have been an agreement for David to procure that the deceased obtained a 45% shareholding in the Company. In the absence of a specific

agreement about how that was to be done, that could most conveniently have been done by a further 98 shares being issued and allotted so as to give David a total of 55 and the deceased 45. But such an agreement could rest only in contract, not in the creation of a trust over existing property, i.e. the existing two issued shares. There could only have been a sufficiently certain trust if, at the time of the agreement, it was agreed either that David would hold the two issued shares on trust as to 45% each for the deceased, which is inherently implausible, or that there were sufficient shares already issued and held by David to enable him to transfer the equivalent of 45% in whole shares the deceased, which was not the case.

66. This difficulty cannot be avoided by finding that it would have been sufficient for David to agree to hold one of the two shares on trust for the deceased. That would have had the effect of the deceased having a 50% shareholding which would have deadlocked the Company and there is no suggestion from anyone that this was ever discussed or agreed.

67. The second, associated, difficulty, is that if there was an agreement as alleged by the claimant reached at the time it is impossible to infer that it was also agreed that until such time as the agreement was put into effect David should hold 45% of the issued two shares on trust for the deceased. There is simply no evidence that any such arrangement was ever discussed or agreed, expressly or inferentially. Thus the requirement for certainty of intention is not satisfied either.

68. It follows in my judgment that a claim based on a private express trust could not succeed.

69. As to the constructive trust, the legal basis for the imposition of such a trust is well-summarised in Snell at 24-001 thus:

> "In many situations, however, a person's express intention that the beneficial interest should pass to another, whether by way of trust of the legal interest or by entire transfer, may be ineffective to achieve that end. The parties may not have complied with some formality necessary to make the transaction valid or enforceable. Similarly, the transaction may only be complete once an entire series of formal steps has been carried out, and the parties have carried out some, but not all, of them.
>
> In such situations a constructive trust may be imposed on the property. The trust arises by operation of law and is exempt from any formality provisions that might have determined the validity or enforceability of the express transaction which the parties intended. It is not an express trust, though the parties' intention to complete the original express transaction is one of the facts on which the creation of the trust depends. A common feature of such trusts is that the intended transaction has proceeded to the stage where the intended beneficiary could obtain a specific equitable remedy to require it to be completed. The trust gives effect to, and is coincident with, the intended beneficiary's present equitable right to have the transaction completed."

70. However, as Snell notes at 24-006, it is a pre-requisite of such a trust that the donor has taken all the steps that lie exclusively in his power, according to the nature of the property given, to vest the legal interest in

the property in the donee. As regards shares in a company, assistance may be obtained from the decision of the Court of Appeal in Zeital v Kaye [2010] EWCA Civ 159, where the substantive judgment was given by Rimer LJ. The facts are irrelevant for present purposes. Paragraphs 38 to 40 are key and state as follows:

"38. Mr Banks sought to meet this point in two ways. First, he invoked the principle reflected in cases such as *In re Rose, Midland Bank Executor and Trustee Company Limited v. Rose* [1949] Ch 78 (Jenkins J); *In re Rose, Rose v. Inland Revenue Commissioners* [1952] 1 Ch 499, Court of Appeal; and, more recently, *Pennington and another v. Waine and others* [2002] EWCA Civ 227; [2002] 1 WLR 2075, Court of Appeal. I do not, however, regard those cases as providing the help that Stefka claims to derive from them.

"39. The cases all concerned the question of whether the legal owner of shares had made a valid gift of them. They related to companies, like Dalmar, whose shares were required to be issued in certificated form. To become a member of such a company, the ordinary requirements are that the member must agree to become such and have his name entered on the shareholder register. A member will also have a share certificate evidencing his membership. In order for such a member to transfer his shares to another, he must ordinarily complete and sign a stock transfer form and deliver it to the transferee together with the relative share certificate. The transferee will require both documents in order to apply to be registered as a member in place of the transferor. He will become such a member upon being registered in the share register.

40. In broad terms, what the two *Rose* cases decided was that once the legal owner of shares hands to his donee a properly completed share transfer form relating to such shares and the relative share certificate, he will thereby have done all within his own power to transfer the shares to the donee. The donee will only become their legal owner upon being later registered as a member, a matter commonly outside the donor's control; and until such registration, the donor will remain the legal owner. But once the donor has done all in his own power to transfer the shares, he will be regarded as holding the legal title to them upon trust for the donee, who will thereupon become their beneficial owner. The relevant passages in the two *Rose* cases (the identity of name is a coincidence) are at [1949] Ch 78, at 88 to 90, per Jenkins J; and [1952] 1 Ch 499, 511 to 513, per Sir Raymond Evershed MR; and 516 to 519, per Jenkins LJ. In the *Pennington* case (which raised special facts relating to the delivery of the stock transfer form not in point in this case) the gift of the beneficial interest was regarded as complete even though no share certificate was handed over, a point to which I infer the court was sensitive. But Arden LJ explained in paragraph [5] that '[n]othing turns on the absence of the share certificates as Ada's [the donor's] share certificates were held by the company.' The point

> Arden LJ was implicitly making was, I consider, that in those particular circumstances no question arose on the donor's omission to deliver the certificates to the donee. The court in Pennington did not speak with one voice as to why the appeal in that case should be dismissed, but the majority comprised Arden and Schiemann LJJ."

71. In this case, even assuming that there were shares held by David upon which a constructive trust could have been imposed, there is no evidence whatsoever that any of these steps were ever taken by David. There is no evidence that there were any share certificates or that any stock transfer form was signed or delivered to the deceased together with the relevant share certificate. It follows that there can be no basis for imposing a constructive trust of the kind contended for.

72. As to the fallback argument of the resulting trust in relation to the monies invested, which on my findings would be £295,000 (less the £10,000 repaid) and not the £400,000 claimed, again there is a helpful analysis of resulting trusts in Snell at 25-001. A resulting trust may arise where property is transferred by A to B where it is unclear who A intends to have the beneficial interest. It is a default presumption that a gratuitous transfer could not have been intended, so that the beneficial interest results back to A.

73. That is completely different from the facts of this case where, on the claimant's case had I accepted it, the deceased intended to invest £295,000 in the Company in order to obtain a shareholding in the Company. If David had indeed defaulted on a promise to give him the agreed shareholding the remedy of the deceased would have been to sue either for specific performance or for damages. There would be no basis for suing either David or the Company on the basis that they were trustees of the investment. There is no evidential or pleaded basis for an argument that the investment was paid conditional upon the shareholding being issued so that it was impressed with a trust that if such shareholding was not issued it would result back to the deceased (i.e. what is known as a *Quistclose* trust). In any event, by agreeing - as I have found - to the investment being treated as a loan and then written off as a gift it would not have been possible for the deceased to seek to resile from that at later stage. There would also be real difficulties due to what would now appear to be a very substantial delay in the assertion of any claim for specific performance.

74. For all of these reasons, there is no legal basis for the claim as pleaded, even if the factual basis had been established.

75. Accordingly, the claim as made by the claimant in the Points of Claim against David must be dismissed.