



Neutral Citation Number: [2024] EWHC 1127 (Ch D)

Claim No.s: PT-2023-000930 & PT-2021-001004

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

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

Date: 14 May 2024

**Before:**

**MR HUGH SIMS KC (sitting as a Deputy Judge of the High Court)**

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**Between:**

**THE ESTATE OF NAFISA HASAN (DECEASED) Claimant**  
**(acting by Adeela Unger and Richard de Unger as  
personal representatives)**

**- and -**

**(1) DIGIT LIMITED (in liquidation) Defendants**  
**(2) EFG PRIVATE BANK (CHANNEL  
ISLANDS) LIMITED**

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**Mr Michael Horton KC and Mr Greg Williams (instructed by Dawson Cornwell LLP) for  
the Claimant**

**The First and Second Defendants did not appear and were not represented.**

Hearing dates: 1 and 2 May 2024

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**APPROVED JUDGMENT**

**MR HUGH SIMS KC:**

**Introduction**

1. This is my judgment following the trial of the following preliminary issues:
  - (i) Whether Nafisa Hasan had a beneficial interest in Flat 13, 42 Upper Berkeley Street, London W1H 5QL (“the Property”); and
  - (ii) If Nafisa Hasan had a beneficial interest in the Property:
    - (a) What interest she had; and
    - (b) Whether she held that interest under an express trust, a constructive trust, a resulting trust, or under the doctrine of proprietary estoppel.
2. The preliminary issues are framed in the past tense because Nafisa Hasan died on 5 May 2022, after she had issued these proceedings (in PT-2021-001004). Since then the executors of her estate, Adeela Unger (her daughter) and Richard de Unger (Adeela Unger’s husband), have been substituted for Nafisa Hasan. In substance, therefore, the preliminary issues seek the determination of whether or not the deceased’s estate has a beneficial interest in the Property. The Property is, and at all material times has been, a residential dwelling.
3. The claim is brought pursuant to section 14 of the Trusts of Land and Appointment of Trustees Act 1996, and a declaration is sought against the defendants that the estate of Nafisa Hasan is the sole beneficial owner of the leasehold title to Property (with registered title no NGL766504). Permission to serve the proceedings outside the jurisdiction was granted on 19 April 2022, and the proceedings were subsequently duly served.
4. The first defendant, Digit Limited (“Digit”), is a Cayman Islands company, which is now in liquidation. It was incorporated and registered as a non-resident company in the Cayman Islands on 13 August 1998. Digit holds the legal title to the leasehold title to the Property, which was acquired in its name on 15 October 1998. The former husband of Nafisa Hasan, Mahmud ul-Hasan, caused Digit to be incorporated, in 1998, at a time when he was married to Nafisa Hasan. Mahmud Ul-Hasan was a Colonel in the Pakistani army, and I shall refer to him below as Colonel Hasan.
5. Nafisa and Colonel Hasan married on 4 September 1981. Nafisa Hasan had a daughter from a previous relationship, Adeela, aged 12 at the time of the marriage. Nafisa and Colonel Hasan had a daughter, Iman, born on 17 May 1983. The Property was bought, in 1998, at a time when the family were domiciled in Pakistan and Iman was nearing the end of her secondary education. She finished her education in the UK. Nafisa subsequently came to occupy the Property, together with her daughters, and they used as it as their home when in London. Colonel Hasan would also stay at the Property when he was in London and before the breakdown in the marriage. I shall refer to the different members of the Hasan family below, on occasion, by their first name, without thereby intending any disrespect.
6. Colonel Hasan set up a company with Nafisa Hasan, called Integral Resources (Private) Limited (“Integral Resources” or “IR”), in or about May 1994. It was

incorporated and registered in Pakistan. Integral Resources was involved in the arms trade, and by the mid to late 1990s had been involved in facilitating arms contracts between state export companies in Ukraine and the Ministry/Department of Defence in Pakistan. By the late 1990s and early 2000s Colonel Hasan was spending a lot of time in Ukraine, where Integral Resources was doing a lot of business. The documents show that by 1996 Integral Resources was being paid consultancy fee payments representing about 10-12 per cent of the contracts supplied. One of those contracts, by way of example, dated 29 August 1996, refers to a fee of US\$500,000.

7. The personal relationship between Nafisa and Colonel Hasan deteriorated from about 2003 to 2006. They separated in 2006 and Colonel Hasan obtained a divorce in Pakistan on 10 January 2012. Various divorce and family proceedings occurred between 2009 and 2023. Nafisa claimed that during the course of the marriage very significant sums were accumulated. Documents in the family proceedings suggested an accumulation of wealth in the region of US\$50m, though this issue was hotly contested. Colonel Hasan had set up a complex set of companies and trusts in various different jurisdictions. Colonel Hasan married Lamya Al Shaibah on 28 March 2014. Colonel Hassan died in Dubai on 18 January 2021, then aged 81 and domiciled in Pakistan. This had the effect of bringing to an end various proceedings which had been ongoing in the family court, and latterly the Family Division of the High Court, between Nafisa and Colonel Hasan. Those proceedings also included Lamya Al Shaibah as representative of the estate of the late Colonel. The legal effect of the death of the Colonel on the Family Division proceedings was not finally and decisively confirmed until the decision of the Supreme Court on 28 June 2023 in *Unger and another (in substitution for Hasan) v Ul-Hasan (deceased) and another* [2023] UKSC 22.
8. The second defendant, EFG Private Bank (Channel Islands) Limited (“EFG”) forms part of a group of companies operating in the financial services sector with offices situated in Guernsey. On 18 February 2014 Digit granted EFG a legal charge which was subsequently registered against the leasehold title to the Property. Relying on that legal charge, and the non-payment of £185,000 by Digit said to be secured by that charge, EFG had issued proceedings for possession of the Property against Digit in the County Court on 6 March 2015, originally under claim no. B00CL645. Nafisa Hasan was joined as a second defendant to those proceedings, and entered a defence and counterclaim, asserting that she was the beneficial owner of the leasehold title to the Property and had an overriding interest in the Property (protected by paragraph 2 of Schedule 3 to the Land Registration Act 2002), by reason of the fact that she had that interest, and was in occupation in the Property, before EFG registered its charge. This second set of proceedings was transferred to the Chancery List and allocated a new claim no C10CL790 and was then transferred to the High Court, in 2023, when it was allocated claim no PT-2023-000930.
9. By order made on 14 November 2022 the two claims (PT-2021-001004 and PT-2023-000930) have been joined together, the preliminary issues (in substantially similar form to that summarised above) were identified for initial determination, and EFG elected to take no part in the trial of the preliminary issues. The order of 14 November 2022 also required Digit to file a defence by 12 December 2022, but the liquidators of Digit sought, and obtained, various extensions to this deadline. They did so whilst

they sought, by way of summons in the Cayman Islands dated 23 December 2022, court directions as to Digit's participation in these proceedings.

10. In affidavit evidence filed on their summons/application for directions, the liquidators informed the Grand Court of the Cayman Islands that Digit was not in possession of any information which bears on the question of whether Nafisa Hasan's estate has a beneficial interest in the Property, were unlikely to come into possession of any such information, and therefore did not consider it was in a position to defend the claim. This evidence also confirmed that the only asset Digit held is such interest and title as it has to the Property. It proposed to the Cayman Islands Court that Digit take no steps to defend the proceedings in this jurisdiction, notwithstanding that the Property was its only apparent asset. This evidence and notice of the application/summons was served by the liquidators on Lamya Al Shaibah as representative of the late Colonel's estate. After hearing counsel representing the joint liquidators and the executors of the estate of Nafisa Hasan, by a subsequent order made by the Grand Court of the Cayman Islands, dated 13 July 2023 and filed on 4 September 2023, the liquidators were permitted to cause Digit not to defend or otherwise participate in these proceedings. In a letter to this Court written by Campbells, the Cayman Island attorneys for the liquidators of Digit, dated 19 September 2023, further details are provided in relation to the application, its advertisement, and the order made in Cayman. At the end of this letter, which was copied to the solicitors for the claimant, the second defendant and Lamya Al Shaibah, it was formally confirmed that the joint liquidators, and therefore Digit in liquidation, would not be participating in proceedings moving forward.
11. After the position of Digit became clear further directions were made on 9 January 2024 to bring this matter on for trial, for determination of the preliminary issues. The trial therefore proceeded on the basis that the estate's claim, so far as the preliminary issues are concerned, was not defended. I have, however, been taken to documents filed in previous proceedings in which Digit and Colonel Hasan contested Nafisa Hasan's claim to be a beneficial interest.

### **The evidence**

12. Dr Adeela Unger, an art historian, was called as the witness on behalf of the estate. On oath she confirmed the truth of the evidence set out in her witness statement. In particular she gave the following evidence concerning the purchase of the Property:

*"9. Prior to purchase of the flat, Mr Hasan had been trying to convince my mother to move from Pakistan to London for some time, for my stepsister Iman to be educated there after her secondary school education had finished, in time for her A Levels. Another consideration was that he was living mainly in Ukraine and the UK was an easier commute for him compared to Pakistan and he mentioned this in my presence on several occasions. After months of consideration, my mother agreed to this.*

*10. In the summer of 1998, my mother and Mr Hasan, were shown the flat by Plaza Estates on Edgware Road. It was newly refurbished and my mother liked it immediately as it was spacious. I went to the second viewing with her, and I believe that Mr Hasan had been to the first with her. After a few more viewings she and my stepfather decided to buy it. The flat was bought through Plaza Estates on Edgware*

*Road and the two agents handling the sale were Ethan Fox and Barbara Mansour, who both work for different companies now. I remember them because I dealt with them many times, as they also used to manage the building.*

*11. My mother had asked her husband to put the flat in her name as she had been an integral part of his business dealings and was a director in the company that generated the income to buy the property, Integral Resources (PVT) Ltd (registered in Pakistan). She managed the company office in Pakistan and filed all the tax returns as Mr Hasan was often abroad in Ukraine or elsewhere, so she was well aware of how much money the company generated (although only had access to the company accounts in Pakistan, not those in England or Switzerland). He duly promised to put the flat in her name.*

*12. However, after completion of the purchase, towards the end of 1998, she found out that he had registered it in a company name, Digit Ltd. He claimed it was held by an offshore company for legal reasons and to be discrete> [sic] Prior to this my mother had no knowledge of Digit Ltd.”*

13. Whilst this evidence was not challenged by cross-examination, and some of it is hearsay evidence, I am satisfied that it is substantially consistent with similar previous statements made by Nafisa Hasan, before her death. This included statements made by Nafisa Hasan in earlier possession, and family, proceedings, as well as statements of case produced on her behalf in those earlier proceedings, and which were verified by statements of truth. Unless the evidence of Adeela Unger is inconsistent with the contemporaneous documents identified below, or aspects of previous statements made by Nafisa Hasan herself, I find it should be accepted. As appears below, I do not consider there are any significant inconsistencies and accordingly I conclude Adeela's evidence should be accepted.

14. In a written statement made by Nafisa Hasan, dated 18 May 2011, filed in defence of earlier possession proceedings brought by Digit, which she was joined to as a second defendant, Nafisa gave evidence that:

*“4. The Flat was bought by my husband for me. He was working on a multi million pound contract and I was helping him with it. He wanted me to come to live in London. I did not want to as I was happy in Pakistan. Eventually I agreed and he agreed to buy the flat in my name. I chose it and then I went back to Pakistan. While I was in Pakistan he phoned me to say that he had bought the Flat but had put it in the name of a company. I said that I thought it was in my name because he had agreed to that. He said he had put it in the company name to be discreet because of the big contract.*

*5. The Flat was bought for me and I have always considered it to be mine. I have decorated it and furnished it buying all the furniture and art in the Flat myself. My clothes and personal belongings are at the Flat. I do go back to Pakistan but I live here most of the time because my children live here.”*

15. In her defence and counterclaim in those earlier proceedings, dated 7 June 2011, Nafisa Hasan (the “2<sup>nd</sup> Defendant”) contended, at paragraph 15, that there was an oral agreement between her and Colonel Hasan (the “Third Party”) in the following terms, which are in similar terms to the case as advanced by her estate in these proceedings (which asserts a similar oral agreement in July 1998):

- (i) *the Third Party would purchase a flat for the 2<sup>nd</sup> Defendant in London;*
  - (ii) *the 2<sup>nd</sup> Defendant agreed to move her domicile from Pakistan to London;*
  - (iii) *the 2<sup>nd</sup> Defendant was to search for a flat that she wanted the Third Party to buy for her pursuant to the agreement;*
  - (iv) *once a flat was purchased it was to be decorated and furnished by the 2<sup>nd</sup> Defendant;*
  - (v) *the purchase price of the flat was to come out of the first payment made to Integral Resources for the Ukrainian project;*
  - (vi) *the flat was to be registered in the 2<sup>nd</sup> Defendant's name;*
  - (vii) *the flat was to be the matrimonial home.*
16. The same statement of case went on to plead, as detrimental reliance, Nafisa's relocation to London, which had occurred by 2001, and the fact that she did not claim the equivalent of the purchase price from Integral Resources, which would otherwise have been due to her.
17. In response to a request for further information dated 11 August 2011 Nafisa Hasan also gave further information, explaining that Colonel Hasan had a 60 per cent shareholding in Integral Resources and she had 20 per cent, and that the two other shareholders were Mariam Mahmud and Mohammad Mahmud, the daughter and son of Colonel Hasan, each having 10 per cent. She explained that she had previously operated her own business before meeting Mr Hasan, and she was involved in carrying out administrative and public relations duties for the company, hosting events for politicians and the military both from Pakistan and abroad. She explained that there was an agreement that she would be paid 20 per cent of the profits from the company and payment would be in the form of assets, to be purchased for her by the company and income from the company. The first part of her share of income from the company was, she stated, to be used to purchase a property for her in London. In essence therefore she was contending that the source of the monies for the purchase of the Property was to come from Integral Resources and, by agreement with Colonel Hasan and Integral Resources, which he controlled, to be treated as her share of the profits, and hers beneficially.
18. The statements of case were verified by Nafisa's solicitor at the time, Trevor Burton, on her behalf. He also later came to make a statement on her behalf in 2015, in the later proceedings brought by EFG (initially issued with claim no B00CL645), where he referred to and summarised the contents of those statements of case, explaining at paragraph 7 that Nafisa had stated "*In her Defence she claims she has a beneficial interest in the Property. Mr Hasan had agreed to buy the Property for her as she had agreed to move to England so that their daughter, Iman, could be educated in London. She also agreed to forego any share of the profits of a company that she and Mr Hasan had set up.*" Nafisa Hasan subsequently confirmed, directly, the veracity of these statements, in paragraph 2 of a later statement she made in family proceedings, dated 28 August 2018.
19. Mr Horton KC and Mr Williams, representing the estate, took me to a number of other documents during the course of trial over 2 days, which provided support and corroboration for the evidence of Adeela Unger. Without wishing to demean the efforts to which they went I will not refer to all of that documentation in this

judgment. I shall, however, return further to consider the documentary record below when considering whether it corroborates the evidence of Adeela Unger, the previous statements of Nafisa Hasan, and supports the heads of claim relied on by the estate.

20. When assessing the evidence overall I was also reminded of the observations made by Lord Sumption in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34; [2013] 2 AC 415. In particular, at [44] Lord Sumption adopted, with one modification, the view of Lord Lowry in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300, to the effect that silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. "*Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure...can be credibly explained, even if not entirely justified, the effect of his silence ...may be either reduced or nullified.*" The suggested modification of Lord Sumption, in the context of a family dispute concerning residential or matrimonial property which is put into the name of a company by the husband, was as follows at [45]:

*"The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is."*

21. As these observations make clear, whilst courts considering the ownership of family property may readily conclude that property acquired in a company name is not beneficially owned by the company, this is not a licence to speculate and there must be an evidential basis to so conclude. But the observations do have some bearing in this case, where Nafisa has consistently asserted a case in support of her claim for a beneficial interest, and the response to that from Digit and/or Colonel Hasan, before the Colonel's death, has either been silence, or a series of inconsistent statements. Any positive assertions have tended to be bare assertions, not supported by any documents.

### **The factual background – some further detail**

22. Before turning to the heads of claim I will set out in this section of my judgment some further detail as regards the background to the purchase, the purchase itself and in brief terms the subsequent events.
23. I accept and find that Nafisa and Colonel Hasan agreed to buy the Property as a family home. It was agreed orally that Colonel Hasan would arrange for it to be bought using monies from Integral Resources, monies which might otherwise have been claimed by Nafisa, and it was to be bought for Nafisa as her Property. This formed part of the encouragement to Nafisa to agree to the purchase of the Property and the relocation to the UK, if not immediately, then in due course. I also accept and find that Nafisa did not know the Property was bought in the name of Digit until after the purchase had occurred. In a statement of Nafisa made in family proceedings dated 4 April 2018 she said she found out about this after completion, towards the end of 2008. I accept that is accurate and I also accept that Colonel Hasan made an excuse to her that the Property title had been put in Digit's name, an offshore company, to keep the family affairs "discreet". Given the nature of the business being undertaken by Integral Resources I find it is credible Colonel Hasan would have said this. There is nothing to suggest Nafisa knew about Digit at an earlier point in time. She was not a shareholder or director in Digit. There is a paucity of evidence as to exactly how Digit was held before 2008/2009, but I find that at all times before then it was likely under the ultimate control of Colonel Hasan, whoever its de jure directors were stated to be.
24. The lease in the Property was purchased in the name of Digit on 18 October 1998 for £285,000, free of mortgage. Digit had been incorporated in the Cayman Islands just two months prior to the purchase of the Property, on 13 August 1998. Its articles indicate that its registered office would be the offices of Merrill Lynch Bank and Trust Company (Cayman) Limited at PO Box 1164, George Town, Grand Cayman. In addition, on 17 September 1998 a trust called the Nafisa Hasan (Mahmud Family) Trust was settled, according to a letter of wishes signed by the Colonel on 3 April 1999. There is no Deed of Trust in evidence in relation to Nafisa Hasan (Mahmud Family) Trust, but the letter of wishes suggests Colonel Hasan was a settlor and intended principal beneficiary. The price paid for the leasehold interest in the Property was £285,000, which, I find, came from the profits generated by Integral Resources, a company in which she worked and had a 20% shareholding. Nafisa agreed to forego her share of the profits in exchange for the Property. She initially visited the Property to furnish it and decorate it. She later moved to live at the Property full-time with her daughter, Iman, by no later than 2001, and Adeela also lived there for significant periods. By the time of the Purchase of the Property Adeela was already in her early 30s and this lends support to the conclusion I have reached that it is credible she would have been privy to the communications relating to the Property, and would have discussed them with her mother and step-father at the time. This lends support to the conclusion her evidence should be accepted, and it corroborates Nafisa's account of events.
25. Consistent with Nafisa's belief that she was the owner, she caused it to be let out. She caused it to be let for 6 months from September 1999 for £500 a week and the lease was in her name as "landlord". She received the rent for this into a joint account in her name with Colonel Hasan; the money did not go to Digit. Nafisa believed that at or shortly after purchase that Merrill Lynch, in the Isle of Man, were involved in Digit.



As noted above, there is no documentation showing the precise capacity in which Merrill Lynch were operating, though the inference to be drawn is that they were in some way involved in a trust, possibly the Nafisa Hasan (Mahmud Family) Trust, who may have been the initial owner of the shares in Digit. Nafisa does not appear to have enquired further into the precise structures at this time. The Trust structure under which Digit's shares were held appears to have moved from Cayman to Lichenstein to Jersey to an LLC in Oregon, though not all the details are clear from the documents.

26. Perhaps more significantly, Nafisa lived at the Property with her daughters without payment of any rent to Digit. There is no suggestion either that Digit granted her a licence as a beneficiary of a trust which ultimately held the shares in Digit. As will be considered further below, in 2009 Digit subsequently suggested that Nafisa Hasan entered into the Property in circumstances unknown to Digit. This is not a credible stance for Digit to take and tends to support the conclusion that Digit was used by Colonel Hasan as his vehicle. It was initially used to conceal the true state of affairs from others and was later sought to be used by him, when his relationship with Nafisa had broken down, to try to remove her from the Property.
27. The relationship appears to have gradually deteriorated from about 2003 and by 2006 husband and wife had separated. In 2008 Nafisa refurbished the whole property, installing a new wooden floor, repainting, certain windows replaced and with new white goods installed. By 2009 the parties had been married for approaching 30 years. In 2009 Nafisa Hasan instigated divorce proceedings in the UK and Colonel Hasan instigated divorce proceedings against her in Pakistan (of which at the time she was unaware initially).
28. It was also at about this time that the shares in Digit appear to have become owned by an entity known as The Orchid Trust, a Jersey Trust formed on 9 December 2008. Digit's director became EFG Trust Company Limited, a Jersey based company. EFG Trust Company Limited is also identified as the Original Trustee in The Orchid Trust Deed of Settlement, which is in evidence. This Deed shows that all routes lead back to Colonel Hasan: he is identified as the beneficiary during his lifetime, with the power to add or alter beneficiaries, to remove trustees and to give directions to procure any director of any company owned by the Trust to act in accordance with instructions given. Although the trustees had the power to appoint the trust protector, Colonel Hasan signed a letter of wishes as to whom should be appointed – Andrew Dixon – who was duly appointed, and Colonel Hasan himself later become the protector. The documents do not show how Digit's shares came to be owned by The Orchid Trust, and there is no evidence any valuable consideration was paid to any previous person or entity by it.
29. On 9 October 2009 solicitors instructed by Digit, Whitman Reed, sent a letter to Nafisa and Adeela at the Property stating "*We are instructed that you have occupied the Apartment since about 2002 without our client's consent and without any payment to our client for your use and occupation of it*". The letter sought vacant possession of the Apartment for "our clients" and said court proceedings would be commenced if it was not. It is not apparent how Digit could itself have wished to occupy the Property and I conclude these actions were taken by Colonel Hasan who wished, in the context of a divorce, to claim the Property.

30. In 2010, Digit brought possession proceedings to evict Adeela (claim no 0CL01748), who was then living in the Property. At paragraph 3 of the Particulars of Claim in those proceedings it was repeated that Nafisa and Adeela had entered or remained in the Property from around 2002, and never made any payments to Digit for its use and occupation. This is clearly inconsistent with the notion the Property was bought as family home, however Digit subsequently contradicted this stance in its Reply to Adeela's defence, on 16 December 2020, when it admitted/averred (at paragraph 2) the Property was occupied for a period of time as a matrimonial home. This was then further contradicted by a statement made by Mr Mercury of EFG Trust Company Limited, as corporate director of Digit, when he suggested, on apparent instruction from Colonel Hasan, that the Property was bought as an investment and it was not and never had been a matrimonial home (paragraphs 6 and 8). On 18 May 2011, HHJ Bailey made an order for possession against Adeela, who had no beneficial interest in the Property, but stayed the order, and permitted Nafisa to be joined to the possession proceedings. Nafisa was duly joined and entered a defence and counterclaim which I have already referred to above. She positively asserted her beneficial interest at the first opportunity. The possession proceedings were later stayed. They were never revived, it would seem because in 2012 the parties reached a compromise by way of a memorandum of understanding, albeit that compromise was never completed or performed.
31. The marriage was dissolved in Pakistan on 10 January 2012 when the talaq became effective. In May 2012 Nafisa was diagnosed with cancer while spending time in Pakistan. On 12 July 2012 Nafisa and Colonel Hasan signed a memorandum of understanding in Pakistan in which Colonel Hasan agreed to pay a money sum, part of which was to be treated as being discharged by the transfer of the Property to Nafisa. This memorandum of understanding therefore contemplated that Colonel Hasan could procure the transfer of the Property to Nafisa. It cannot be relied on as evidence of a declaration of trust in 1998, on purchase, but it is noteworthy that out of the assets which had been built up over the years the Colonel agreed that the Property was the asset which should be transferred to Nafisa. Unfortunately, neither the original promise nor the promise as set out in the memorandum was made good by the Colonel during his life.
32. In February 2014, at a time when it was hoped that matters might be resolved along the lines of the July 2012 memorandum of understanding, without Nafisa's knowledge or agreement Digit granted a charge over the Property to secure its indebtedness to EFG. The sum advanced by EFG to Digit was initially about £150,000, and included advances for the benefit of Colonel Hasan, and the sum had grown to approximately £185,000 by the time of the charge.
33. On 23 July 2014, as part of the process of a settlement based on the 2012 memorandum of understanding, Digit agreed to transfer the Property to the Claimant free of the charge, although this never took effect. Digit signed the transfer documents 'in escrow' pending the repayment of its debt to EFG. Earlier that month Digit had indicated to the Claimant's solicitors that it was in the process of repaying EFG.

34. On 06 March 2015, EFG brought a County Court possession claim against Digit (initially with claim no B00CL645). By an order made on 30 June 2015, the Claimant was joined to those proceedings as a Defendant. On 06 May 2016, District Judge Parfitt made a further directions order, by consent. As part of that order, preliminary issues were defined in similar terms to that stated in paragraph 1 (concerning the question of Nafisa’s beneficial interest in the Property) and it was ordered that EFG would play no part in that determination. As noted in paragraphs 8 and 9 above those proceedings have now been consolidated and form part of these proceedings, though the claim issued by Nafisa has been treated as the lead claim for case management purposes.

### **The heads of claim and analysis**

35. The claim is pursued on the basis that Nafisa was the beneficial owner of the leasehold title to the Property from the time of purchase on the basis of (i) an express trust, or (ii) resulting trust, or (iii) constructive trust, or (iv) by way of a proprietary estoppel.

#### Express trust

36. As to the contention of there being an express trust, reliance is placed on *Rochefoucauld v Boustead* [1897] 1 Ch 196, as authority for the proposition that extrinsic, parol, evidence is admissible to prove trust, and that, on the evidence taken as a whole, an express trust is established on the facts of this case. To deny Nafisa’s interest, it is submitted, would be to use statute as an instrument of fraud. In *Rochefoucauld v Boustead* what was in issue was a section from the Statute of Frauds. The modern day equivalent in relation to declarations of trust is to be found in section 53(1) of the Law of Property Act 1925. Section 53, under the heading “Instruments required to be in writing”, provides that:

*“(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—*

*(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;*

*(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;*

*(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.*

*(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.”*

37. Thus, subject to section 53(2), section 53(1)(b) provides that declarations of trust of land must be “manifested and proved” in writing. The rule in *Rochefoucauld v Boustead* would apply to prevent Digit from relying on that section, as reliance on it would be to use it as an instrument of fraud. This is said by the estate to be a fraud in the sense of equitable fraud as explained by Patten LJ in *De Bruyne v De Bruyne*

[2010] EWCA Civ 519, [2010] 2 FLR 1240 at [51]). *De Bruyne* has recently been interpreted by Fancourt J in *Archibald v Alexander* [2020] EWHC 1621 (Ch) at [35] as supporting the notion that the rule in *Rochefoucauld v Boustead* is best understood as forming part of a wider category of constructive trust where it would be inequitable for a landowner to deny a claimant an interest in land. This is separate from the common intention constructive trust of the type considered in cases such as *Lloyds Bank plc v Rossett* [1991] 1 AC 107, where, as well as the common intention (express or implied/imputed), detrimental reliance is considered a key ingredient.

38. There is a lively academic debate as to whether this is the correct rationalisation of the rule in *Rochefoucauld v Boustead* – other proponents suggest that instead the rule can be understood as an example of recognition of an express trust, on the basis that it removes a plea which a defendant would need to make, and a plea which would otherwise be open to a defendant to make but for its removal. See AB Douglas, ‘*Trusts, Formalities and the Doctrine in Rochefoucauld and Boustead*’ [2021] Conv 128. However, this alternative rationalisation does not work easily in a case like this where there is no defence, but nevertheless the estate must still prove the express trust relied on. I cannot ignore the words in section 53(1)(b) which do not permit the express trust to be proved by parol evidence. This significantly weakens the argument that the rule or doctrine in *Rochefoucauld v Boustead* can be rationalised simply on the basis of a recognition and enforcement of an express trust.
39. Further or alternatively, in the instant case, in written argument it was suggested that as there is no defence to the claim by Digit, and therefore no pleading relying of the modern equivalent of the Statute of Frauds (now section 53(1)(b) of the Law of Property Act 1925) I need not concern myself with formalities. Accordingly, it was submitted there is no bar to the estate relying on parol evidence that there was an express trust. However, this submission was not pursued in oral submissions, rightly so in my view. The burden is on the estate to prove the express trust relied on, and in deciding whether it can do so I must apply the law as it is known to me, which includes section 53(1)(b).
40. In my judgment the present case is better analysed from the perspective of whether or not a resulting or constructive trust was created.

#### Constructive and resulting trusts

41. Turning to the arguments in support of a constructive trust, the estate principally relies on an express common intention trust. This has already been referred to in paragraph 15 above, as pleaded in an earlier set of proceedings, and is pleaded in similar terms in these proceedings as follows:

“*In or about July 1998, the Claimant and Colonel ul-Hasan agreed as follows:*

- a. *The Claimant agreed to move from Pakistan to London;*
- b. *The Claimant would find a suitable flat for the family to live in;*
- c. *Colonel ul-Hasan would purchase the flat for the Claimant and in the name of the Claimant;*

- d. *The flat would be bought with the profits made by Integral Resources from the Ukraine contract which would otherwise have been paid (in whole or in part) to the Claimant;*
  - e. *The Claimant would decorate and furnish the flat once purchased.”*
42. As I have recited above Nafisa substantially complied with her part of this bargain. The Colonel also appears to have done so initially, albeit he bought the home in the name of Digit, not in the name of Nafisa as had been agreed. As I have noted above, he made an excuse to Nafisa as to why this was so, in order to be discreet as to ownership of the Property.
43. This is a case where Nafisa seeks to rely on an express common intention, not conduct from which the court should infer/implicitly/impute a common intention to share the beneficial interest. The former case is often called the “first” and the latter the “second” category of common intention constructive trust case, as per Lord Bridge in *Lloyds Bank v Rosset* [1991] 1 AC 107, 132E-133A.
44. My attention was drawn, in particular, to the “excuse” cases of *Eves v Eves* and *Grant v Edwards* cited by Lord Bridge in *Lloyds Bank v Rosset* at 133C-E, where an inference as to a common intention may be drawn from the excuse in not putting the property in the wife’s name. This is said in *Lloyds Bank v Rosset* to be examples of the first category of common intention constructive trust.
45. I consider that analysis can properly be applied to the current case, in the sense that the justification, or excuse, for why the Property was not put in the wife’s name is of evidential relevance, and on which an inference can be properly drawn that it was intended the wife would be an owner, but there is a difference. The difference in this case is not that the husband just put the title in his name, rather than in the wife’s name or in joint names, but that he put it into a company name. But for the excuse, this might have encouraged a conclusion that the Property was purchased in the name of the company because it was intended that the company would be the beneficial owner: compare with, for example, *Smith v Bottomley* [2013] EWCA Civ 953, [2014] 1 FLR 626. Often this might be so for tax advantages, though as the estate was keen to point out, at the time there were no obvious tax advantages for the Colonel or Nafisa in doing so. In my judgment the decision to put the Property into an offshore company whose ownership was not apparent from public records was, as Nafisa said she was told, to keep it “discreet” i.e. hidden from public view.
46. On detrimental reliance, reliance is placed on the judgment of Lewison LJ in *Hudson v Hathway* [2023] KB 345, 387, at [154] – [155], which emphasises that detriment is not a narrow or technical concept. Whilst it will frequently involve financial expenditure, it need not consist of expenditure of money or other quantifiable financial detriment, so long as it something substantial. If the claimant has acted to their detriment in reliance on the common intention a constructive trust will be recognised.
47. There is no shortage of detriment in this case. The most significant form of detriment is the fact that the money used to acquire the Property was agreed to be treated as Nafisa’s share of profits from Integral Resources. There are at least four sources of evidence on which this conclusion can be reached, and which in my judgment

supports, more straightforwardly, the notion of a resulting trust (as well as constituting detriment for a constructive trust argument).

48. The first is the evidence of Nafisa as given in previous proceedings, and as set out in various documents and statements of case produced in those previous proceedings, some of which I have referred to above.
49. The second is that the documentary record does indeed show that, according to a print-out of a register of companies in Pakistan, Integral Resources was owned by the Colonel and Nafisa and other family members. As at the date of subscription (on incorporation) and as at 2006 Integral Resources was held in the following shares: the Colonel – 60; Nafisa – 20; Mariam – 10 and Mohammad – 10. Those individuals are also all shown as directors going back to at least 2003. The natural and probable inference is that Nafisa was a shareholder and director of Integral Resources as at 1998, with an expectation she might derive remuneration and/or share in its profits via dividends. There is no evidence to suggest this version of the register, printed in 2011 at a time when matters had become contentious, did not reflect the position in the intervening period, including as at 1998 (when the Property was acquired).
50. The third is that there is a substantial body of evidence in the form of contract documentation to show that there were indeed apparently profitable contracts being entered into involving arms supplies from Ukraine which would have resulted in substantial monies being paid to Integral Resources.
51. The fourth is the fact that if the case of Nafisa was incorrect those who had information to show that it was incorrect have either been silent or failed to produce the documentation to show that to be so. Neither Digit nor Colonel Hasan set up any positive contrary case showing how Digit came to purchase the Property if it was not using monies from Integral Resources. Digit was a newly created company at the time, and its only activity was to hold the Property. You would expect Digit to have held evidence showing what consideration, if any, was provided by Digit for the acquisition it held, whether in the form of an introduction of shareholder capital, or a director's loan, or in some other way. It failed to do so in the earlier proceedings. And of course in this case the liquidators of Digit have decided not to actively participate or contest the case because it says it has no records to support a contention of beneficial ownership. In my judgment this is the sort of case where a prima facie case becomes a strong case, which crosses the balance of probabilities threshold, given the silence and lack of disclosure from those who would be expected to provide the necessary material. I might have concluded the silent party's failure could be credibly explained in this case on the basis of a lack of resources, but the application by the liquidator suggests the principal reason for silence on the part of Digit is due to lack of supporting documentation not lack of resources.
52. I have also given consideration to whether or not the lack of documentation might be explained on the basis of a loss of relevant documents over time. However, there are two reasons why I do not conclude this is so. The first is that the loss of relevant documents has not been relied on in earlier proceedings, going back to 2010. Secondly, whilst some documents have not been disclosed, a significant number of documents have been gathered in. Nafisa and/or the estate have obtained third party disclosure orders, made against the EFG Trust Company. This revealed that that

company ceased to be a trustee of The Orchid Trust, in 2015, and they agreed to send the records of the trust and the companies to Devonshires, solicitors for Colonel Hasan. A subsequent third-party disclosure order against Devonshires for disclosure of the records, including those relating to Digit, provided precious little documentation from the time of the purchase. In addition, Colonel Hasan's estate has been disinterested in claiming the Property as his own and falling within his estate. This is despite being served by the Cayman liquidators in relation to their application, which warned his estate of the stance intended to be adopted on behalf of Digit, and that this may well result in the estate's claim succeeding.

53. In addition, standing back more widely, the notion that Digit was the intended beneficial owner is inconsistent with a number of other matters. If Digit had genuinely bought a residential dwelling as an investment vehicle for its own benefit and profit I would not have expected it to stand idly by for over 7 years, from 2002 to 2009, permitting someone to occupy it without paying any rent. Nafisa acted, and was permitted to act, as if the Property was her own because, in my judgment, this reflected the real and shared intention of her, Colonel Hasan, and Digit, as at 1998. The use of Digit was to conceal the true intention.
54. In my judgment therefore when the Property was acquired it was held on a resulting trust by Digit, which did not provide any of its own funds for the Property to be acquired, and which permitted or acquiesced in the gratuitous occupation of the Property by the family. These are factors which distinguish this case from cases such as *Smith v Bottomley* mentioned above.
55. There is one feature of this case which is arguably shared with that in *Smith v Bottomley* in that the promise relied on by Nafisa in this case most likely took place before Digit was incorporated, so it might be argued that Digit was party or privy to the agreement or the common intention. In my judgment this is not a difficulty for the estate in this case, for at least three reasons.
56. The first is that Digit was holding the Property on a resulting trust, for the reasons already set out above.
57. The second is that Digit came to hold the Property in circumstances where the knowledge of the Colonel should be attributed to it. The terms of The Orchid Trust show that under that Trust the Colonel was the directing mind. I infer that a similar arrangement was in place from the date of acquisition, in 1998, with the Colonel being in ultimate control.
58. The third is that this case can be rationalised, if not on a common intention constructive trust basis with Digit, then on the basis of the wider equity recognised in *De Bruyne* and *Archibald v Alexander* mentioned in paragraph 37 above, on the basis of which a constructive trust should be recognised.
59. I should add, for the sake of completeness, that I also accept that Nafisa suffered wider detriment in reliance on the common intention or promise made by the Colonel, including foregoing a claim to profits from Integral Resources (which would apply even if it turned out Integral Resources money was not used to acquire the Property, on the basis she believed it had and this was in some way in lieu of an entitlement to a

share of profit she would have), moving to live in the UK, carrying out expenditure on the Property, including refurbishments, and, from at least 2011, paying service charges and other charges relating to the Property, which in total exceed £74,000. Those payments exceeding £74,000 were no doubt made by Nafisa to protect her from eviction, but I see no reason why they cannot form part of the broader detriment enquiry. Standing back, and even if Nafisa had not made good a claim that the purchase monies were derived from her monies, I would have found detrimental reliance had been established so as to justify a constructive trust being imposed in the terms of the promise made to Nafisa.

#### The Doctrine of Proprietary Estoppel

60. The claimant also submits that the three fundamental ingredients for a proprietary estoppel are clearly made out on the facts of the case. This does not materially add to the analysis already conducted above in relation to constructive and resulting trusts. Should it have been necessary to do so I would have found that the elements of this doctrine had also been made out.

#### **Conclusion and disposal**

61. I am satisfied on the balance of probabilities, and find, that Nafisa Hasan was the beneficial owner of the leasehold title to the Property after its purchase in 1998, and up to the date of her death in 2022. She had that interest by reason of a resulting and/or constructive trust.
62. In accordance with paragraph 9 of the order made on 14 November 2022 the remaining issues in these proceedings should be listed for case management at a hearing, on notice to EFG, when I will also hear further submissions on consequential orders to be made.