Neutral Citation Number: [2024] EWHC 1284 (Ch)

Case No: BL-2022-BHM-000017

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

Birmingham Civil and Family Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 04/06/2024

Before :

MR JUSTICE ZACAROLI

- -

Between:

(1) PATHWAY TO RELIEF	**Claimants**
(2) MR ARAM MOHAMAD ALI	
- and -	
(1) MR SHVAN ABBAS ALI	**Defendants**
(2) YOUR BEST PROPERTIES LIMITED	

- -
- -

Nicholas Cobill (instructed by **Abraham Baron Solicitors**) for the **Claimants**
Adam Swirsky (instructed by **Nicholls Brimble Bhol Solicitors**) for the **Defendants**

Hearing dates: 13, 14, 15, 16 & 17 May 2024

- -

JUDGMENT

Mr Justice Zacaroli:

Introduction

1. This case concerns the attempt by members of the Kurdish community in Birmingham (which I will refer to as the "Community") to acquire the Farcroft Hotel, Handsworth, Birmingham (the "Hotel"), to convert it for use as a community centre with prayer rooms.

The Parties

2. One of the principal matters in dispute is the identity of the parties to the transactions relating to the acquisition of the Hotel.

3. The owner of the Hotel is, and was at all material times, the second defendant, Your Best Properties Limited ("YBP"). The negotiations were conducted on YBP's behalf by its sole shareholder and director, the first defendant, Mr Shvan Abbas Ali ("Shvan Ali").

4. The negotiations for the purchase of the Hotel were led, on behalf of the Community, by the second claimant, Mr Aram Mohamad Ali ("Mr Aram").

5. Sometime prior to the attempt to buy the Hotel, Mr Aram formed, together with other members of the Community, a group called "Pathway to Relief". This was intended to be a focus for charitable purposes. It had a Facebook page, but was never registered as a charity. At best it was an unincorporated association. The evidence from those of its members who gave evidence was inconsistent as to whether or not it had a written constitution. It is more likely that it did not, and was merely an informal group of members, led by Mr Aram, with a common aim. It is unnecessary to resolve this issue since, even if it was an unincorporated association, it had no legal personality and could not enter into a contract to purchase the Hotel.

6. On 13 April 2021, Mr Aram with the help of solicitors caused a new company, limited by guarantee, to be incorporated, called "Pathway to Relief". I will refer to this, so as to avoid confusion with the group of the same name, as "the Pathway Company". I address below whether the Pathway Company was ever, or was ever intended to be, the purchaser of the Hotel.

7. I heard evidence from numerous witnesses on behalf of both parties. I address the evidence which is relevant to the issues I need to decide, and my findings in respect of it, at the relevant points in this judgment. Given the conclusions I have reached on various of the legal issues, it is unnecessary to address much of the evidence that was presented.

The steps taken to acquire the Hotel in the first half of 2021

8. I refer in this section to matters that are common ground, except where stated otherwise.

9. Mr Aram, together with other members of the Community, visited the Hotel for a viewing on 7 February 2021. They returned on 21 February 2021. On that occasion, Mr Aram led the discussion on behalf of the Community. Shvan Ali was there with

his cousin, and co-investor in the Hotel, Shan Rojdar, although Mr Rojdar had left by the time the discussion turned to the terms of the acquisition.

10. Also present, on behalf of the seller, was Iskan Sadiq, a friend of Shvan Ali's. Shvan Ali said that he asked his friend to speak for him at the meeting.

11. It is common ground that at this meeting Mr Aram made an offer to purchase the Hotel for £1.45 million. Mr Aram says that Shvan Ali orally agreed to this. In his witness statement, Shvan Ali said that no agreement was reached, but that he had told Mr Aram that he would have to speak to Mr Rojdar before confirming whether this was acceptable. In cross-examination, however, Shvan Ali accepted that he had "verbally agreed" at the meeting that the Hotel would be sold for £1.45 million.

12. He also accepted, on being shown a video of part of that meeting, that Iskan Sadiq, in his presence and without his objection, told Mr Aram and the other Community members that they had an agreement for sale at £1.45m, that the Community could back out within 10 days, but the sellers could not back out, and that a deposit of 20% would be payable. I find, from Shvan Ali's conduct (as shown in the video) in letting Mr Sadiq speak without correcting him, that a reasonable person in Mr Aram's position would understand that Mr Sadiq was speaking with Shvan Ali's agreement and authority.

13. Little turns on this, however, because it is common ground that shortly after this meeting, Shvan Ali told Mr Aram that he could not accept an offer of £1.45 million. There is a dispute as to whether Shvan Ali said that the price would have to increase because of a liability to VAT incurred by YBP in connection with the purchase of the Hotel, or whether it was simply because Mr Rojdar insisted on a higher price. Again, however, nothing turns on this because a subsequent oral agreement was reached, at a meeting on 31 March 2021. YBP agreed to sell the Hotel for £1.65 million with completion to take place within 18 months, to give the Community the opportunity to raise the funds.

14. It was also agreed that a deposit of £300,000 was payable. There is, however, no consensus as to what was agreed as to the timing of the payment of the deposit, the manner in which it was to be paid (whether in cash or by bank transfer) and whether it was to be refundable. I address this dispute below.

15. On 1 April 2021, upon Mr Aram handing over £50,000 in cash to Shvan Ali as part of the deposit, a deed of deposit was signed by Mr Aram, another member of the community, Mr Sami Mohammed Aziz, and Shvan Ali. It was witnessed by a number of other Community members. It stated as follows:

> "Following our verbal agreement regarding the sale/purchase of the Farcroft Hotel, between Mr Shvan Abbas Ali (seller) and Mr Aram Ali Mohammed (buyer), Mr Sami Mohammed Aziz (buyer) this is to confirm that the first deposit payment of £50,000 has been made to Mr Shvan Abbas by Mr Aram Ali Mohammed and Mr Sami Aziz Mohammed regarding the purchase of the FARCROFT HOTEL … The payment of £50,000 was made by cash and agreed that the rest of the payments will [sic] made in the future."

16. Upon payment of £50,000, Shvan Ali handed over the keys to the Hotel to Mr Aram.

17. On 9 April 2021, Shvan Ali sent a text message to Mr Aram, asking him to identify the company buying the Hotel. Shvan Ali's evidence – which I accept – is that he wished the purchase to be by a recognised entity such as a company or registered charity, but he did not understand the difference between those two concepts, and did not distinguish between them.

18. Mr Aram messaged him to say that the purchaser would be "Nursi Charitable Association". His evidence was that it was always intended that the Hotel would be purchased by a registered charity, that it was intended that Pathway to Relief would be registered as a charity and that in the meantime another charity which was known to members of the Community, the Nursi Charitable Association, would help out by being the entity that acquired the Hotel. The Hotel would then be transferred to Pathway to Relief when it was itself registered as a charity. In fact, Pathway to Relief was never registered as a charity but, in September 2021, the Community registered a charity under the name "Runaky". Mr Aram said that it was never the intention that the Pathway Company would acquire the Hotel. Rather the Pathway Company was to enter into a lease (as I describe further below).

19. Shvan Ali texted Mr Aram back, asking – with reference to the Nursi Charitable Association – "you sure about this name?". Mr Aram then texted back on 15 April 2021 saying simply "Pathway to Relief". The Pathway Company had been incorporated two days earlier, but it is unclear whether this text was meant to refer to the Pathway Company or to the charity that it was intended to set up under the name Pathway to Relief.

20. On 24 April 2021, there was a further meeting at which Mr Aram handed over a further £100,000 in cash to Shvan Ali. A second deed of deposit was signed. This was in identical terms to the deed of deposit dated 1 April 2021 (including that it confirmed the "first deposit payment of £50,000"), but in the last sentence the reference to £50,000 was replaced with £100,000.

21. The Community had been given possession of the Hotel on 1 April, as prospective purchasers. They wished to gain early entry in order to be able to begin works converting part of the Hotel into a prayer room in time for Ramadan, as that was an optimum time to raise funds for the purchase.

22. Shortly afterwards, however, it was agreed that a formal lease would be entered into. Solicitors were instructed and a lease was executed on 30 April 2021. The lessor is identified on the title page as "Shvan Ali t/a Your Best Properties Ltd", but under the prescribed clauses it is identified as "Your Best Properties Limited".

23. The lessee is identified on the title page as "Mohamad Aram Ali And Mohamad Hamza t/a Pathway To Relief", and under the prescribed clause as "Mohamad Aram Ali And Mohamad Hamza t/a Pathway To Relief (incorporated and registered in England and Wales…").

24. As I have already noted, it was Mr Aram's evidence that the Pathway Company had been incorporated for the purpose of acquiring the lease. The lease contained the following terms:

(1) The term was 5 years commencing on 1 April 2021;

(2) Rent was £5,000 per month;

(3) There was a break clause after 18 months (intended to coincide with the fact that completion of the purchase should have taken place by then);

(4) Permitted use was defined as "offices", and the tenant was prohibited from using the premises for anything other than the permitted use or such other use as the landlord allowed.

25. Matters quickly turned sour. Two meetings took place during May 2021. It is agreed that these were acrimonious meetings but, otherwise, much of what happened is disputed. Shvan Ali contends that at the first meeting Mr Aram attended with £150,000 in cash to pay the remainder of the deposit, which he refused to accept because he wanted to be paid by bank transfer. Mr Aram denies that this happened, and insists that he said he was willing and able to pay the remainder of the deposit, but would only do so – partly in cash and partly by bank transfer – when the contracts were exchanged for the purchase of the Hotel.

26. By the end of May 2021, Shvan Ali was unhappy at waiting 18 months for the remainder of the purchase price. At a further meeting a proposal was put forward (most likely, I find, by an independent person called Daran who was present in an effort to mediate between the parties) whereby the purchase price would be paid sooner: £600,000 immediately, £400,000 after six months and the full price being paid within a year.

27. It is clear that by the beginning of June, Shvan Ali and Mr Rojdar no longer wanted to sell the Hotel to the Community, and sought to exclude the Community from it. On 2 June 2021, Shvan Ali erected a fence around the Hotel in an effort to keep the Community out. The police were called. On discovering that there were people apparently living in the Hotel (the claimants maintain that they were simply security guards staying overnight for security reasons) the police made Shvan Ali give keys to the fence to the Community.

28. On 29 June 2021, the keys to the Hotel were handed back to Shvan Ali. The circumstances in which they were handed back are in dispute, and I consider them in more detail below. It is common ground, however, that since that date the Community has been excluded from the Hotel.

29. No steps were taken to seek re-entry to the Hotel until January 2022 when an application was made for an injunction to restrain Shvan Ali from disposing of the Hotel.

Causes of action

30. By their amended particulars of claim, the Pathway Company and Mr Aram claim the following main heads of relief:

(1) Specific performance of the transfer of the Hotel to the Pathway Company and/or Mr Aram by way of proprietary estoppel and/or under a constructive trust, in consideration of the balance of the purchase price.

(2) Rectification of the lease so that the user clause is rectified to allow the Hotel to be used as a community centre and "the parties' names are rectified to reflect the Claimants' correct position as between the First and Second Claimants".

(3) Damages for breach of the purchase agreement, the breaches consisting of: Shvan Ali stating that he no longer wished to sell the Hotel to the claimants; putting a security fence around the premises; putting the Hotel up for sale; and refusing to return the £150,000 deposit.

(4) Damages for breach of the lease, the breaches consisting of: putting up the security fence around the Hotel; and purporting to forfeit the lease.

The purchase agreement

31. As I have described above, the purchase agreement was made orally.

32. By s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 ("s.2(1)"):

> "A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."

33. Failure to comply with s.2(1) renders the contract ineffective (not merely voidable): *Firstpost Homes v Johnson* [1995] 1 WLR 1567, at 1571E-H.

34. Although, in his skeleton argument, Mr Cobill (who appeared for the claimants) contended that the purchase agreement was evidenced in writing by the second deposit deed referred to above, this was rightly not pursued at trial. It is not sufficient for a contract to be evidenced in writing. It must be made in writing. Moreover, the deposit deed does not contain essential details of the contract, including the purchase price, the date for completion, the terms governing the deposit, or even (given that it is not the claimants' case that any of Mr Aram, Sami Aziz or Shvan Ali were intended to be parties to the contract) the parties.

Proprietary estoppel/constructive trust and s.2(1)

35. Mr Cobill's principal submission was that s.2(1) does not preclude a cause of action in proprietary estoppel or constructive trust. Section 2(5) states in terms that nothing in the section affects the creation or operation of resulting, implied or constructive trusts.

36. He contends that the elements of a proprietary estoppel claim are established in this case, and that effect should be given to the estoppel by transfer of the beneficial title in the Hotel to the claimants, in consideration of the payment of the agreed purchase price.

37. The elements of a claim in proprietary estoppel are well known (see for example *Thorner v Major* [2009] 1 WLR 776, per Lord Walker at §29): a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.

38. Mr Cobill contended in the alternative that the same result could be achieved via a remedial constructive trust, relying on the comments of Lord Scott in *Thorner v Major*, at §14, where he said that he preferred the analysis of a remedial constructive trust. Mr Cobill accepted that if he could not establish the requirements for proprietary estoppel, then the claim in constructive trust could not succeed and, conversely, if he did establish the requirements for proprietary estoppel, the claim in constructive trust added nothing. Accordingly, it is unnecessary to give any separate consideration to the claim in constructive trust.

39. The claim in proprietary estoppel faces, in my judgment, insurmountable problems.

40. First, it is a requirement of a claim in proprietary estoppel that the defendant is estopped from denying that the claimant has a proprietary interest of some kind in land.

41. In *Cobbe v Yeoman's Row* [2008] 1 WLR 175, the claimant orally agreed with the defendant to purchase a property for redevelopment. Acting in the belief that the property would be sold to him the claimant spent 18 months engaging architects and other professionals and obtaining planning permission. Immediately after planning permission was granted, the defendant withdrew from the agreement. The claimant brought proceedings claiming, among other things, that the defendant was estopped from denying that he had acquired a beneficial interest in the property because they acted unconscionably in knowingly inducing and encouraging his belief, upon which he acted to his detriment, that the property would be sold to him.

42. The House of Lords rejected that claim. Lord Scott, with whom the other members of the court agreed, cited with approval the following passage from the judgment of Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, at p.144,

> "if A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation."

43. In the present case, the claim in proprietary estoppel is based on a promise, rather than the mere encouragement of an expectation, but this does not affect the analysis.

44. At §20, Lord Scott concluded that the requirement that there be an expectation of a certain interest in land was problematic for the claimant:

> "The problem is that when he made the planning application his expectation was, for proprietary estoppel purposes, the wrong sort of expectation. It was not an expectation that he would, if the planning application succeeded, become entitled to "a certain interest in land". His expectation was that he and Mrs Lisle-Mainwaring, or their respective legal advisers, would sit down and agree the outstanding contractual terms to be incorporated into the formal written agreement, which he justifiably believed would include the already agreed core financial terms, and that his purchase, and subsequently his

> development of the property, in accordance with that written agreement would follow. This is not, in my opinion, the sort of expectation of "a certain interest in land" that Oliver J in the *Taylors Fashions* case or Lord Kingsdown in *Ramsden v Dyson* had in mind."

45. Lord Walker put the point succinctly at §68, in distinguishing the many cases – mostly in a domestic context – where a claimant established a proprietary estoppel by reason of a promise or expectation of an interest in property:

> "In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an interest in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title."

46. Although the claimants plead, in this case, that the oral agreement gave rise to an expectation that they would acquire a proprietary interest in the Hotel, I am satisfied Mr Aram was at all times aware that in order to acquire an interest in the Hotel he would first have to enter into a written contract. He accepted, in response to a question that by 31 March 2021 he was aware that for the contract to be effective, a formal contract had to be drawn up and exchanged, that "we all knew". That is not undermined by his qualification that he nevertheless trusted Shvan Ali. It is moreover confirmed by the fact that he contends that the second half of the deposit would only be payable on exchange of contracts.

47. The expectation of acquiring an interest in land was thus, on a proper analysis, an expectation that a formal contract would be entered into, pursuant to which the Community would, if and when they paid the full purchase price, acquire the Hotel. As in *Cobbe*, therefore, this is the wrong form of expectation: it was the expectation of getting a contract, not an interest in land. The acquisition of an interest in land was contingent, first, on exchange of contracts (which was outside the control of the Community) and, second, on the Community raising the funds to pay the full purchase price within the 18 months that the formal contract was to provide for completion.

48. The second difficulty with the claim is that, since the relief sought is "essentially contractual", proprietary estoppel cannot be used to avoid the effect of s.2(1).

49. In *Cobbe*, Lord Scott said, at §29, that – while it was unnecessary to decide the point – his present view was that:

> "proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of

> section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute."

50. Subsequent cases have considered the scope of this dictum, particularly in light of the fact that it is clearly possible for a proprietary estoppel to operate so as to give a claimant a proprietary interest in land notwithstanding that there is no legally effective contract for its transfer.

51. In *Thorner v Major* [2009] 1 WLR 776, Lord Neuberger pointed out at §99 that s.2(1) may have presented a problem in *Cobbe* because he was seeking to invoke an estoppel to protect a right which was "in a sense, contractual in nature", however, he said, "at least as at presently advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection."

52. The question as to when a claimant might be seeking to invoke an estoppel to protect a right which is "contractual in nature" has been the subject of elaboration in later cases.

53. *Herbert v Doyle* [2010] EWCA Civ 1095 concerned an agreement between neighbours for, among other things, an exchange of parking spaces and the grant to one of them of extensions to an existing lease of certain areas. The claimants sought to rely on a constructive trust to overcome the problem that the agreement was not in writing as required by s.2(1). At §57, Arden LJ – referring to the speeches of Lord Scott and Lord Walker in *Cobbe* – said this:

> "In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act."

54. It is instructive to see how an "essentially contractual" case was contrasted with the position in two recent first instance decisions involving more "straightforward" proprietary estoppel.

55. In *Sahota v Prior* [2019] EWHC 1418 (Ch) the claimants entered into a sale and leaseback arrangement with the defendant, involving a lease for only five years, but having been assured that their debts would be paid and that they would be permitted to live in their property for the rest of their lives provided they paid the rent. The

judge found that the defendant was prevented, by a proprietary estoppel, from obtaining possession of the property.

56. One of the grounds of appeal was that the judge had been wrong to find that s.2(1) did not apply to prevent the proprietary estoppel claim. In dismissing that ground of appeal, Falk J distinguished the case before her – where the claimants were seeking to rely on the estoppel to prevent the defendant from obtaining possession of their home – from the type of case which Lord Scott had in mind in *Cobbe*. At §25 she cited Lord Scott's comment at §25 of *Cobbe* that proprietary estoppel cannot usually arise in so-called "subject to contract" cases, because the purchaser's expectation of acquiring an interest is subject to a contingency entirely under the control of the other party. That was not, however, the case before her, as she explained at §26:

> "The dictum relied on at para. 29 [of *Cobbe*] is to the effect that proprietary estoppel is not to be used to make an agreement enforceable which the statute has declared to be void. That is, of course, right, but, in my view, that is not what [the claimants] are seeking to do. They are not trying to enforce a contract for the sale or other disposition of land. What they are trying to assert is that [the defendant] is prevented from recovering possession of their home from them during their lifetime, because of an assurance on which they relied when they transferred the property and subsequently did work on it."

57. In *Howe v Gossop* [2021] EWHC 637 (Ch), the claimants orally agreed with the defendants that, in return for relieving the defendants of a £7,000 debt, the claimants would acquire two parcels of land. The claimants went into possession of the parcels of land. One of the grounds of appeal against the judge's conclusion that the defendants were estopped from claiming possession of the land, was that a claim in proprietary estoppel was precluded by s.2(1).

58. After a careful review of the previous authorities, at §52-54 Snowden J distinguished the case before him on the basis that it was not an attempt by the claimants to rely on proprietary estoppel to *enforce* the oral (and thus non-compliant) agreement. The claimants were relying on the estoppel to preclude the defendants from obtaining possession, and contended that effect should be given to the estoppel by a declaration that they were entitled to a licence to occupy the land for their lives or until they sold their own property.

59. The claim in this case is, on the contrary, essentially contractual. As Mr Swirsky (who appeared for the defendants) submitted, what the claimants really want is the benefit of the agreement they reached on 31 March 2021, that is, the benefit of a contractual right which gives them up to 18 months to raise the funds so as to purchase the Hotel for £1.65 million. That is clearly, in my judgment, an attempt to rely upon proprietary estoppel in order to *enforce* the terms of an ineffective oral agreement. Moreover, in contrast to the position in *Howe v Gossop*, where the price for the acquisition of the land had been paid, the contract which the Community expected to be given was (save only to the extent of the part payment of the deposit) wholly executory.

60. For these reasons, I consider that the claim in proprietary estoppel fails (as does the claim in constructive trust, since it was accepted that it added nothing). It is therefore

unnecessary to consider whether the elements of such a claim are otherwise made out. I will nevertheless briefly set out my conclusions on the further objections raised by Mr Swirsky.

61. Mr Swirsky submitted that, although the elements of assurance and reliance are met, the claim would fail because there is insufficient clarity "as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat": see Lord Scott in *Cobbe* at §28.

62. Specifically, he submitted, there is no sufficient clarity as to important terms of the purchase contract, namely the identity of the purchaser and the terms on which the deposit was to be paid.

63. Mr Aram never intended that he personally would purchase the Hotel. He intended at all times to act on behalf of someone else. The difficulty is establishing who that someone else is. There is no evidence that any trust was established of which Mr Aram was trustee. The intention was to set up a charity, but that was not achieved until September 2021 (in the form of Runaky). It is not sufficient for Mr Aram to have been acting on behalf of the Community, because I am not satisfied on the evidence that the Community consisted of a sufficiently certain group of people so as to establish certainty of objects – one of the three certainties necessary to establish a valid trust. The evidence was that the make-up of the membership of the Community was somewhat fluid, with people joining or leaving without any formality.

64. As I have already noted, it was Mr Aram's evidence that the purchaser of the Hotel was in fact to be Nursi Charitable Foundation, at least until the Community was able to establish its own charity, at which point the ownership would be transferred to that charity. He was adamant that the Pathway Company was not the intended purchaser, although it was the intended lessee.

65. On the basis of Mr Aram's evidence, therefore, the intended purchaser is not a party to the claim.

66. Mr Cobill submitted that the agreement was reached, by Mr Aram, on 31 March 2021 with the intention to form a company, i.e. the Pathway Company, and that the Pathway Company is therefore the party that was intended to purchase and who is entitled to pursue a claim for proprietary estoppel. He submitted that I should reject Mr Aram's evidence, and prefer that of Mr Hamza – another director of the Pathway Company and someone who was present at a number of the meetings at which the purchase was discussed. Mr Hamza corroborated Mr Aram's evidence that it was intended that the purchaser would be the Nursi Charitable Foundation, but said in evidence that it was also intended that the Nursi Charitable Association would later transfer the Hotel to the Pathway Company (and not to the charity which it was intended to establish).

67. The problem with this submission is that the idea for a limited company being formed came from Shvan Ali *after* the meeting on 31 March 2021. Mr Aram's evidence was that it was formed specifically for the purpose of taking on the lease, and that the idea of a lease was not mentioned until after the Community had gone into possession of

the Hotel on 1 April 2021. Mr Hamza cannot, therefore, have had in mind – on 31 March 2021 – the possibility of a limited company being formed to acquire the Hotel.

68. Accordingly, I do not prefer Mr Hamza's evidence on this point, but prefer that of Mr Aram. It follows that neither of the claimants was intended to be party to the contract for the purchase of the Hotel. Neither of them, therefore, could assert a claim in proprietary estoppel or constructive trust.

69. There is also considerable uncertainty over what was agreed as to the terms of the deposit. Apart from the fact that it was agreed to be in the amount of £300,000, all other aspects are in dispute: the timing for its payment; whether it was agreed to be non-refundable; and how it was to be paid (cash or bank transfer).

70. As to timing, in his second witness statement, Mr Aram said merely that it was agreed that the Community would pay £300,000 "initially" towards the purchase. In his third statement, he said that they agreed to pay an initial £200,000 in cash, and a further £100,000 by bank transfer on exchange of contracts. In cross-examination, he referred to an agreement to pay £50,000 in cash immediately, at which point the keys would be handed over. In a letter before action written by the claimants' solicitors in January 2022, it was contended that the agreement was to pay £150,000 in April, and a further £150,000 when formal contracts were drawn up. On the difference between this and his evidence from the witness box being pointed out, Mr Aram said that the solicitors' letter was correct.

71. Shvan Ali, in his witness statement, said nothing about the timing of the payment of the deposit, other than that, when he was paid only £50,000 on 1 April, he was annoyed because he was expecting the full amount. In cross-examination, he said that it was agreed that the whole deposit was due "in April".

72. The only contemporaneous record of any agreement as to timing is to be found in the two deeds of deposit, each of which recorded the cash payment that was made (respectively of £50,000 and £100,000) and then stated: "agreed that the rest of the payments will be made in the future". Shvan Ali accepted in cross-examination that at the time these deeds were signed there was no agreement about *when* in the future the rest would be paid.

73. There is also a dispute as to whether the deposit was agreed to be non-refundable. Mr Aram denies that the deposit was said to be non-refundable, except that he agreed that the £50,000 paid on 1 April 2021 was non-refundable in the event that the Community pulled out of the purchase. The defendants contend that it was agreed that the whole deposit was non-refundable, although they differ as to how this came about. Mr Rojdar said that *he* insisted that the deposit was to be non-refundable. Shvan Ali says that it was Mr Aram that *offered* that the deposit would be non-refundable, which he said he found surprising, particularly as he knew that the Community was to raise the funds for the purchase price from donations from the wider Kurdish community.

74. There is also a lack of consensus as to *how* the deposit was to be paid, i.e. as to the extent to which it was to be paid in cash or by bank transfer. Shvan Ali's evidence is that he was concerned to accept cash, because of the difficulty of explaining to his bank the provenance of such large amounts of cash. In fact, he accepted (whether or not willingly) the first £150,000 by way of cash payments.

75. Doing the best that I can with the conflicting and inconsistent evidence of the parties to the contract, on balance I conclude that nothing was expressly agreed about the deposit on 31 March 2021, other than the amount. Each witnesses' recollection of what was agreed on that date is likely to have been clouded by what was said over the course of the next few weeks, for example when part payments were in fact made, or during increasingly acrimonious meetings when relations soured between them.

76. Importantly, the requirement to pay a deposit, and its approximate amount, had been agreed at the meeting on 21 February 2021. The agreement on that occasion (as evidenced by the video of Iskan Sadiq speaking) was for a deposit of 20% of £1.45 million – which is just short of £300,000. Although the purchase price was increased by a further £200,000, the amount of the deposit was not increased to £330,000 (i.e. 20% of the new purchase price). I do not think, therefore, that the precise terms on which the deposit was to be paid would have been the subject of discussion on 31 March 2021. I find it particularly unlikely that there would have been a discussion on 31 March 2021 about the precise time of payment. All parties knew that the purchase price was to be raised from donations, and that the Community were anxious to go into possession as soon as possible, and in time to open for Ramadan, because this would help them raise the funds. It was accordingly inherently uncertain as to when the full deposit *could* be paid.

77. The substantial uncertainties as to the terms of the purchase contract illustrate why s.2(1) exists, and why a failure to comply with it ought not to be mitigated in this case by reliance on proprietary estoppel.

The lease

78. It is common ground that the lease does not reflect the common intention of the parties insofar as it restricts the use to offices. It was the common intention of the parties that the Hotel would be converted to be used as a community centre and prayer rooms. It remains in dispute whether the lease correctly identifies the lessee as Mr Aram and Mr Hamza, trading as the Pathway Company, or whether it should identify the lessee as the Pathway Company.

79. The claim to rectify the lease can serve no purpose, however, if the lease has been brought to an end. I note that rectification would serve little useful purpose in any event, given that the claimants do *not* seek any order requiring the defendants to give them possession of the Hotel under the lease. Such a claim was originally made, but was later removed by amendment.

80. The defendants say that the lease was brought to an end upon its surrender by the claimants on about 28 June 2021, when the keys were returned to Shvan Ali. If that was done, and accepted, with the intention of ending the relationship, then it would amount in law to a surrender of the lease: see Woodfall on Landlord and Tenant at §17-020.

81. The claimants accept that the keys were returned, but Mr Aram maintains that they were returned on the condition Shvan Ali would return new keys within two days and grant the claimants a new lease of part of the Hotel so that they could use it as a mosque. Shvan Ali denies that any such agreement was made with him.

82. Mr Aram relies on an undated handwritten document written in Kurdish containing three points, and signed by 14 people, most of whom were members of the Community. The three points are:

> "1. We will return the keys to the landlord; 2. We will get the keys back in two days; 3. Make a new lease, at least for the location of the mosque."

83. Notably, neither Mr Aram nor Shvan Ali have signed this document. Mr Aram's evidence is that a delegation of Community members, not including him, went to speak with Shvan Ali to agree that upon handing back the keys, he would install new locks, give them new keys within 2 days, and then enter into a new lease with them for at least the upper part of the Hotel.

84. There is no evidence from anybody who made such an agreement with Shvan Ali. None of the other witnesses who gave evidence on behalf of the claimants actually saw or heard such an agreement being made. One of them, Mr Saman Ismail, signed the handwritten document (identified as Saman Dalek, meaning Saman the barber) but he said he had not seen Shvan Ali agreeing to the proposal contained in it.

85. The only other person who signed the handwritten document, and who gave evidence, was Taha Hussein ("Taha"). He is part of the Kurdish community, but not a member of the Community. He owns a shop across the road from the Hotel, and first introduced Mr Aram to Shvan Ali. He was called to give evidence by Shvan Ali. In his witness statement, he said (under the heading "surrender") that he organised a meeting of key people in the Community in the Hotel. He said that Mr Aram was there, and that the meeting – including Mr Aram – agreed to give the keys back because it was clear that Shvan Ali and Shan Rojdar were not willing to sell the property to them. I treat the evidence in his witness statement with caution as, when he was asked what was meant by the word "surrender" he said he did not know. He did say, in cross-examination, that he understood that if you have a lease and give the keys back, that means "it is done, finished", but I find that at least part of the statement does not represent his own words.

86. He made no mention in his witness statement of the handwritten document. In cross-examination, Taha said that he signed the document as a witness of a meeting among the Community which took place before the keys were handed back, and at which those present discussed what to do with the property. Some of them, he said, proposed that the keys would be given back, new keys obtained two days later and that a lease would be granted of at least part of the Hotel. He does not recall anyone saying that Shvan Ali had agreed to that proposal. But he does recall someone at the meeting saying something like: "we give the key and we take it back again". He also remembers telling the members of the Community that it was a bad idea to hand the keys back, because if they were handed back, and nothing else happened, then that would be the end of the lease. Given the state of relations between the sides at that point, he did not think that, if the keys were given back to Shvan Ali, he would ever return them or grant a new lease.

87. The only other contemporaneous reference to handing the keys back is the following text exchanges in late June 2021.

88. On 22 June 2021, Mr Aram texted Shvan Ali to say that he had tried to see Shvan Ali several times to give him the rent for April and May, but "u didn't arrange it". Shvan Ali responded the next day with the following:

> "you funny man you have till 31 this month to make sure you give me all the keys back."

89. Separately, on 28 June 2021, Shvan Ali texted Sami Tahir at 22:20 asking: "everything ok?". The answer, across five texts, was:

> "Not yet; Soon; I will let you know in a bit; Good news inshallah; We will handover the keys without court procedure inshallah. We all agreed including aram."

90. The reference to court procedure is important because, three days earlier, solicitors acting for the Pathway Company had written to Shvan Ali, threatening proceedings for an injunction and relief from forfeiture unless the fence around the property was taken down. The text from Sami Tahir was a clear climb-down from that position.

91. Shvan Ali responded with a praying hands emoji and "thanks". The next day, at 23:46, Sami Tahir texted Shvan Ali: "They will hand the keys to shop tonight."

92. These texts are more consistent with the arrangement being that the keys would be handed back unconditionally, without any agreement for a new lease.

93. In considering whether it is more likely than not that Shvan Ali agreed that the return of the keys would be conditional on handing back new keys and granting a new lease, I take into account the following.

94. First, by this point it is clear that Shvan Ali and (to an even greater extent) Mr Rojdar had completely lost faith in the ability of the Community to purchase the Hotel. They did not believe Mr Aram could raise the money. Irrespective of whose fault it was, they had not been paid the remainder of the deposit or any rent, and had continuing outgoings (including the mortgage payments). They had already tried to exclude the Community, by erecting the fence around the premises on 2 June 2021. They clearly wanted to retake possession of the Hotel. It is in my judgment inherently unlikely that Shvan Ali would have agreed in these circumstances to grant a new lease to Mr Aram or the Community. The tenor of the texts from him (particularly when he told Mr Aram that he had until the end of the month to "give me all the keys back") supports that view.

95. It is also relevant to note that the local council had already been in contact with Shvan Ali in connection with the Hotel being used for a non-permitted purpose. In a letter addressed "to whom it may concern" at the Hotel, dated 5 July 2021, Michael Anderson of the Council wrote: "The recent Use as a Community Centre is not in accordance with the sites planning history and therefore unlawful. The Local Councillor and I have responded to a number of complaints *and worked with the support of the owner*, to bring an end to the unlawful use" (emphasis added)

96. In light of these factors, and in the absence of any evidence from any person who either made an agreement with Shvan Ali, or was there when any agreement was

made or when the keys were handed back, I find that the handing back of the keys was not accompanied by an agreement to grant a new lease of any part of the Hotel. I think it most likely that this was led – on behalf of the Community – not by Mr Aram, but by others. Whether or not Mr Aram personally agreed to this, I conclude that he left the communications between the Community and Shvan Ali to others, and is bound by their actions.

97. Accordingly, I refuse the application to rectify the lease, on the grounds that it would serve no useful purpose as the lease was terminated by surrender on 29 June 2021.

98. This renders it unnecessary to determine whether it would have been appropriate to rectify the lease so far as the identity of the tenant is concerned. Had it been necessary to do so, I would have concluded that it was the common intention of the landlord and tenant that the tenant was the Pathway Company. The definition in the lease makes no sense: it is not possible for two individuals to "trade as" an incorporated company. It was Mr Aram's clear evidence that the Pathway Company was incorporated so as to acquire the tenancy. Shvan Ali's evidence (to which I have referred above) was that he wanted a company or charity (and he did not distinguish between the two) to be the purchaser of the Hotel and the tenant. He cannot have intended, therefore, the tenant to be Mr Aram and Mr Hamza.

Damages

99. The claimants claim damages for breach of the lease and/or damages for breach of the purchase agreement.

100. As to the former claim, the alleged breach consists of putting up the fence around the Hotel on 2 June 2021. This, it is said, constituted wrongful purported re-entry and forfeiture of the lease. The problem with this claim is that no loss flows from that action. In the first place, at the insistence of the police, the Community were given the keys to the fence, so were not in fact excluded from possession by reason of the fence. Second, (as I have found above) the lease was surrendered on 29 June 2021.

101. The claimants contend that the defendants breached the purchase contract by: indicating in May 2021 that they did not wish to go ahead with the sale; putting up the security fence on 2 June 2021; refusing to return the £150,000 deposit; and in October 2021 putting up the Hotel for sale.

102. The heads of loss are: (1) the loss of benefit of the Hotel; (2) £150,000 (the deposit); (3) the costs and expenses incurred in carrying out steps necessary to implement the purchase; (4) works (with an estimated value of between £20,000 and £25,000) to convert the hotel; (5) the loss of the use of the Hotel as a community centre; and (6) the costs of finding another property.

103. The problem with this claim is that, because the contract failed to comply with s.2(1), it was invalid. No claim for its breach can therefore lie. In the absence of a valid contract, the defendants were free to walk away. Any expenditure which the claimants carried out on converting the Hotel, or in taking steps to implement the purchase, was incurred at their own risk. I find, therefore, that none of these heads of loss are recoverable on the basis of breach of contract.

104. So far as the deposit is concerned, the only claim pleaded in respect of it is as a head of damage under the claim for breach of contract. That claim fails for the above reasons. In fact, however, it is common ground that the defendants are not entitled to keep it. In their original defence, in support of their denial that the claimants have suffered any loss by reason of breach of contract, it was pleaded that:

> "The Defendant [i.e. Shvan Ali] recognises and has acknowledged to the Community that he holds the £150,000 on trust given the purchase agreement has terminated."

105. That position was maintained in the amended defence, save only that it was said that the second defendant holds the £150,000 on trust.

106. That must be read together with paragraphs 25 and 25A of the amended defence, where (1) it is averred that the defendant had confirmed to the Community that he would "retain" (but this is clearly an error for "return") the deposit once he had accounted for the missed rental payments and the costs of repairing the Hotel; and (2) it was denied, for the avoidance of doubt, that the defendants, or either of them, hold the £150,000 on trust "for the Claimants". Reading the pleading as a whole, I infer that while the defendants have accepted all along (at least since service of their original defence) that they hold the deposit on trust, they do not accept that it is held on trust for the claimants.

107. In his skeleton argument for trial, Mr Swirsky said that the defendants have said that they will return the deposit, less the cost of remedying the damage to the Hotel caused by the alterations carried out by the claimants, and the payment of outstanding rent. Shvan Ali confirmed that during his evidence.

108. I consider that the defendants' stance – that the deposit is returnable to the claimants – reflects the legal realities. Given the admission in their defence, it was unnecessary for the claimants to plead and establish a right to its return. For the reasons I have set out above, I have concluded that there was no express agreement reached on 31 March 2021 as to whether the deposit was to be refundable or not. Given that the deposit was paid in anticipation of a contract which was void, the most apposite analysis is likely to be that there is a claim in restitution to recover the deposit on the basis that it was paid for a consideration that has wholly failed. Since it was accepted by the defendants that they held the Deposit on trust for the Community, however, it was unnecessary for the claimants to articulate such a claim.

The defendants' counterclaim

109. The defendants counterclaim for rent due under the lease, for the period in which the Community was in occupation of the Hotel. The claimants accept that in circumstances where the purchase contract has fallen away, the defendants are entitled to such rent, and that the defendants may deduct it from the £150,000 deposit. That is the position the claimants have adopted ever since their solicitors' letter to YBP of 25 June 2021, in which it was stated that the claimants were willing to accept the defendants' decision not to sell the Hotel, but that the claimants insisted on their rights under the lease.

110. It is accordingly unnecessary to determine whether – as the claimants contend – it was agreed that rent was not payable under the lease.

111. If it had been necessary to do so, I would have concluded that rent was indeed payable under the lease, whether or not the purchase contract was terminated. That is because: (1) the bespoke clause in the lease relating to rent expressly provided that it was payable; (2) there is no clear evidence of any agreement between the parties to disapply the terms of the lease (and certainly nothing in writing); (3) this accords with commercial sense: in circumstances where the defendants were incurring monthly costs in relation to the Hotel – including mortgage repayments and other outgoings – it is to be expected that the Community would be required to fund such costs in the period of up to 18 months before completion if they were to be permitted to occupy the Hotel; (4) conversely it does not make sense (as the claimants at one point suggested) that no rent was payable because the defendants had possession of the deposit; the suggestion that the payment of the deposit was to be treated as an advance payment of rent is inconsistent with the fact that it was agreed upon before Shvan Ali first requested that the Community enter into a lease. It is also inconsistent with the claimants' attempts to pay rent in June 2021 and their solicitors' letter of 25 June 2021, in which all that was said was that YBP could, as a practical matter, recoup the unpaid rent out of the deposit, *not* that the deposit constituted the advance payment of rent.

112. The defendants also counterclaim for damage to the property caused by the claimants' work on converting the Hotel for use as a community centre and prayer room.

113. To the extent that this claim is advanced as a claim for breach of the purchase contract, it fails for the same reason as the opposite claim made by the claimants: there is no valid contract, and therefore no claim lies for its breach.

114. To the extent that the claim is advanced as a claim for breach of the lease, the prohibition on carrying out works on the Hotel was subject to the landlord consenting otherwise. I have no doubt that Shvan Ali consented to the works which the claimants carried out. He knew that the Hotel was being purchased by the Community to convert it into a community centre and prayer rooms. He gave the Community the keys for the express purpose of starting the conversion works in order to be able to open the premises as a prayer room in time for Ramadan. Shvan Ali accepted that he visited the Hotel on a number of occasions during April 2021. I find that in doing so he saw that works were being carried out. Whether or not he saw the precise extent of the works is irrelevant, because – having consented to them carrying out conversion works – if he did not trouble to check up on precisely what was being done, he had implicitly consented to any works reasonably necessary to convert the Hotel to a community centre and prayer room.

115. Accordingly, I find that the work was carried out with his consent, and I reject the claim that the works were carried out in breach of the lease.

116. The lease contains a covenant by the tenant to restore the premises to their original condition on the "End Date". The defendants have not, however, as Mr Swirsky accepted in closing argument, brought any claim for breach of that covenant. Whether such a claim would lie in the circumstances of this case was not, therefore, explored at trial.

Conclusion

117. For the above reasons, I conclude as follows:

(1) The claimants are not entitled to have the purchase contract specifically performed, whether pursuant to a claim in proprietary estoppel or constructive trust;

(2) The defendants are required (as they accept) to return the £150,000 deposit, less a deduction for three months rent (totalling £15,000) under the lease for the period of 1 April 2021 to 29 June 2021;

(3) The claimants are not entitled to rectification of the lease;

(4) The claimants are not entitled to claim damages for breach of either the purchase contract or the lease;

(5) The defendants are not entitled to claim damages for breach of either the purchase contract or the lease;

(6) Specifically, the defendants may not deduct from the deposit any sum claimed by them as damages for breach of the purchase agreement or the lease (save for the rent as referred to above).

118. That leaves only the question of to whom the deposit (less the rent) should be returned. The defendants accept that it should be returned to the "Community". I would hope that the parties can agree upon the identity of the person to whom the defendants should return the deposit on behalf of the Community, and the terms of an order giving effect to that, so that the defendants can obtain a good receipt. Given the circumstances in which the money was raised (from donations from the wider community) and the intention from the outset that there would be a registered charity running the Hotel, it may be that the appropriate recipient of the returned funds is the Runaky charity that has now been established. I will need to hear further from the parties in the event that they are unable to reach agreement on this point.