Neutral Citation Number: [2024] EWHC 167 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT-2022-NCL-000010**
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
PROPERTY, TRUSTS AND PROBATE LIST

Date:

Before:

Mr Andrew Sutcliffe KC, sitting as a Judge of the High Court

- -

BETWEEN:

MUSTAFA ERDEM BALDUDAK

Claimant

and

MARK MATTEO

Defendant

- -

Mr Seth Kitson (instructed by **Sintons LLP**) for the Claimant
Mr Michael Pryor (instructed by **Clarke Mairs Law Ltd**) for the Defendant

Hearing dates: 5-8 December 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version is handed down may be treated as authentic.

MR ANDREW SUTCLIFFE KC:

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Introduction

1 The Claimant, Mr Baldudak, and the Defendant, Mr Matteo, are former business partners in a 50/50 joint venture. This is the second set of proceedings resulting from the acrimonious breakdown of their relationship.

2 The issue in these proceedings is who is the beneficial owner of a freehold commercial property known as Gregson Building, Tyne View Terrace, Howdon, North Shields, NE28 6SG, title TY306564 (the "**Property**"). The Property is the trading premises of a company named Heating Trade Supplies Group Ltd ("**HTS**"). HTS was previously jointly owned by the parties, but is now solely owned by the Claimant following the outcome of the previous proceedings between the parties.

3 It is not disputed that the immediate source of the purchase cost was a bank account in the name of a company called PCB Centres Limited ("**PCB**"). Since its purchase in November 2016, the Property has been held in joint names of the Claimant and the Defendant. Neither the Claimant nor the Defendant contends that PCB (now dissolved) was at any time the beneficial owner of the Property.

4 The Claimant's case is that he and the Defendant hold the Property on a resulting trust for him alone because he alone contributed the entire purchase cost of the Property and it is not disputed that he did not intend to make a gift of the Property to the Defendant. The Claimant further contends that in the previous proceedings between the parties the Defendant accepted that the Claimant contributed the purchase price so he cannot now deny that fact.

5 The Defendant's case is that he and the Claimant are joint beneficial owners of the Property. He says this was PCB's intention at the time of the purchase, was agreed by the Claimant and is consistent with the contemporaneous communications and actions of the parties and the terms of their overall business venture at the time. He seeks a declaration that they own the Property in equal shares, an order for sale and orders to limit the effect on his interest of the possible enforcement of the mortgage over the Property currently securing a debt owed by HTS (now 100% owned by the Claimant). He also seeks an account for occupation rent from the Claimant due to his exclusion from the Property and its continued occupation by HTS.

6 The Claimant accepts that the Defendant is entitled to an indemnity in respect of any personal claim that may be made against him by the mortgagee under the mortgage although he says that indemnity is unnecessary because it was expressly ordered by the court in the previous proceedings. However, he denies the Defendant's claim for occupation rent and resists any order for sale of the Property.

Background facts

7 I set out in this and the next section facts which are not (or ought not to be) contentious and can be taken as my findings on those matters.

8 Both the Claimant and the Defendant originate from Turkey. The Defendant (born in 1973) is a heating engineer who has lived in England since 1998 and was the sole director and shareholder of HTS which he incorporated on 30 June 2015 under its original name National Boiler Parts Limited before the name of the company was changed to HTS on 13 February 2017. For convenience I shall refer to this company as HTS both before and after its name was changed.

9 HTS's business was the supply of boiler parts. The Claimant (born in 1988) met the Defendant in around 2015 at the time he was finishing his business studies course in Sunderland. The Claimant wanted to do business in the UK and to obtain a UK visa. The two men agreed to go into business together and to expand and build upon the Defendant's existing business.

10 On 8 January 2016 the Claimant became a 50% shareholder in HTS and he was appointed a director of HTS on 1 November 2016. The two of them drew up a business plan dated June 2016 (the "**Business Plan**"), the principal purpose of which appears to have been to assist the Claimant in obtaining a visa to enter and work in the UK. The Business Plan refers to the parties' plans for HTS and PCB. PCB had been incorporated by the Defendant on 8 March 2016 with the Defendant as its sole shareholder and director. However, it is apparent from the Business Plan that it was intended the Claimant would be a 50% shareholder in PCB in the same way that he was a 50% shareholder in HTS. PCB was incorporated with the aim of selling printed circuit boards and, in order to help achieve that aim, acquiring two other companies, OEM Spares Ltd ("**OEM**") and MKK Services Ltd ("**MKK**"),

11 On 27 May 2016 the Claimant paid £750,000 into PCB's bank account. The precise purpose for which this payment was made is one of the issues I have to decide. The Claimant contends that the monies were advanced for a specific purpose (namely, the acquisition of OEM) and that such purpose failed with the result that PCB held those monies on trust for the Claimant. The Defendant denies that the monies paid into PCB's account were held with the specific purpose of buying OEM and he points to the fact that substantial sums were paid out of the sum of £750,000 sitting in PCB's account for the benefit of HTS both before and after the purchase of the Property in November 2016.

12 By 10 August 2016 it seems that the Claimant and the Defendant had decided not to acquire OEM and instead to acquire the Property as it was on that date that a firm of solicitors called Brar & Co acknowledged the Defendant's instructions to act for both the Claimant and the Defendant in connection with the purchase of the Property.

13 There then followed a hiatus caused in part by Brar & Co's need to satisfy themselves as to the source of the purchase monies for the purposes of the money laundering regulations (as is apparent from emails exchanged between Mr Brar and the Defendant on 28 October 2016). On 1 November 2016 the sum of £464,283.80 was paid out of PCB's bank account to Brar & Co for the purpose of acquiring the Property. This sum was to fund the purchase price of £450,000 and the transactional costs of £14,283.80. Contracts were exchanged on 16 November 2016. The Property was transferred by the vendors into the joint names of the Claimant and the Defendant on 22 November 2016 and registration was completed by 30 November 2016.

14 As already mentioned, the remainder of the £750,000 that the Claimant had paid into PCB's bank account, amounting to £285,716.20, was paid out by means of a series of payments in order to settle business expenses of HTS. Some of these payments were made before the purchase of the Property and others afterwards. There is no dispute that HTS owed PCB £285,716.20 as a result of those payments. The Defendant describes that debt as the "**Intercompany Loan**".

15 At around the time that the parties took the decision not to proceed with the purchase of OEM and MKK and instead to purchase the Property, the Claimant and the Defendant made the decision to apply to strike off PCB. On 5 January 2017 the Defendant lodged a form DS01 at Companies House applying for PCB to be struck off. Having been incorporated some 10 months earlier, it appears PCB had never traded.

16 Sometime between 5 January and 10 February 2017 the Defendant spoke to Thomas Duffy ("**Mr Duffy**"), a chartered accountant who, through his company Glen C Rodger Ltd, was HTS's accountant. They spoke about PCB and HTS. Mr Duffy had previously been involved in reviewing and preparing financial forecasts figures for inclusion in the Business Plan (as his company's invoice to HTS dated 29 July 2016 indicates). Mr Duffy was also already aware of the parties' intention to purchase the Property because on 20 September 2016 the Defendant had sent him two emails explaining that the Claimant's visa application had been completed the previous day and that changes were required to the Business Plan because OEM was no longer to be acquired and instead they proposed to purchase the Property.

17 After speaking to the Defendant, on about 10 February 2017, Mr Duffy drew up some draft accounts (the "**PCB working papers**"). What conclusions can be derived from the PCB working papers is a matter which was contested at trial. The Defendant and Mr Duffy gave differing evidence about their discussions. The findings I make about this evidence are critical to the outcome of this case.

18 PCB was dissolved on 11 April 2017. Mr Duffy prepared HTS's abbreviated accounts for the period ended 30 June 2016 ("**HTS's 2016 accounts**") which were

filed on 22 March 2017. He also prepared HTS's abbreviated accounts for the period ended 30 June 2017 ("**HTS's 2017 accounts**") which were filed on 20 September 2017. Both sets of accounts were prepared on the instructions of the Defendant who signed them to indicate that they had been approved by the board. The abbreviated balance sheet in HTS's 2016 accounts does not refer to a loan from the Claimant or show the money he introduced as part of the capital of the company or in a share premium account. HTS's 2017 accounts show £811,331 owed to the Claimant by HTS and that the Property had been used as a security for a bank loan to HTS which stood at £270,000. The Property never appears as an asset of the company in HTS's accounts, nor is there a reference to rent for the Property in either the profit and loss account or as creditors falling due on the balance sheet.

19 On 12 November 2020 the Defendant was excluded from the Property by the Claimant. This was the cause of the previous proceedings referred to at the outset of this judgment.

The previous proceedings

20 The previous proceedings resulted in a trial over 11 days between 22 November and 13 December 2021 trial (the "**Liability Trial**") before His Honour Judge Kramer, sitting as a judge of the High Court (the "**Judge**"). Judgment was handed down on 6 May 2022 ([2022] EWHC 1070 (Ch)) (the "**Liability Judgment**").

21 On 9 November 2021 (just two weeks before the Liability Trial was due to commence), the Claimant's solicitors wrote to the Defendant enclosing a draft claim form and particulars of claim which asserted that the Property was held on a resulting trust for the Claimant and sought a declaration that the Claimant was its sole owner. At the start of the Liability Trial, the Defendant sought to have this issue determined in the Liability Trial. That application was opposed by the Claimant. In paragraph 7 of the Liability Judgment, the Judge refers to the fact that he was shown the draft proceedings and states that he gave reasons in a short judgment for declining to permit the Property ownership issue to be determined at that trial. Although I have not seen that judgment, it is likely the Judge's main reason for refusing to decide this issue in the Liability Trial was that it had been raised too late in circumstances where there were many other issues which needed to be determined.

22 The Liability Trial concerned (amongst other matters) whether the sum of £1 million introduced by the Claimant into the parties' business (which included the sum of £750,000 paid by the Claimant to PCB) was a gift or a loan and whether the Defendant had been unlawfully excluded from the business of HTS, it being common ground that HTS was a quasi-partnership.

23 Mr Duffy gave evidence for the Claimant at the Liability Trial. In the course of his cross-examination by the Defendant's then counsel (Mr Hugo Page KC), it was

initially suggested by Mr Page that the Claimant should not have had the entirety of the purchase price of the Property (referred to as £460,000) deducted from his loan account because the Defendant claimed that he owned half the building so the deduction should only have been £230,000. This point was put to Mr Duffy who explained that the sum of £750,000 had increased the Claimant's loan which had then been reduced by £464,000 because that was a personal item. Mr Page then apologised to the Judge for taking what he called a "bad point" and did not challenge Mr Duffy's evidence. As explained below, Mr Duffy's evidence in these proceedings regarding the Claimant's director's loan account was consistent with this evidence that he gave at the Liability Trial.

24 In the Liability Judgment the Judge held that: (1) the £1 million was introduced by the Claimant by way of a loan; (2) the Defendant had been unlawfully excluded from HTS by the Claimant; (3) the Defendant and the Claimant were 50/50 owners of HTS; and (4) the Claimant should be compelled to purchase the Defendant's HTS shareholding at a price to be determined by the court. In the order made on handing down the Liability Judgment, the Judge gave directions for a further hearing. Those directions included the appointment of a single joint expert to give evidence as to the value of the Defendant's shareholding.

25 The parties appointed an accountant, Denis Cross, as their single joint expert and on 19 July 2022 provided him with separate instructions regarding the valuation of the Defendant's shareholding in HTS. Mr Cross produced his report on 11 August 2022 to which was attached a list at Appendix 9 entitled "*Loan account – Mr Baldudak [the Claimant] in accordance with the instructions of Mr Matteo [the Defendant]*". This list had a single amount of £285,631 (what the Defendant calls the Intercompany Loan) shown against the date of 27 May 2016.

26 On 25 August 2022, the Claimant's solicitors sent an email to Mr Cross, copied to the Defendant's solicitors, which attached (amongst other documents) a spreadsheet containing a summary of the Claimant's "loan account movements". This document contained the following entries over two lines beside the date of 27 May 2016: "*Paid into PCB Centres Ltd 750,000" and "Factory purchase (464,368.80)*".

27 On 15 September 2022, the Defendant's solicitors sent a letter to the Claimant's solicitors indicating that in advance of the further hearing due to start on 28 September 2022 the parties "*should attempt to narrow so far as possible the issues with respect to the competing calculations of the amount owing by [HTS] to [the Claimant]"*. Referring to the document setting out the Claimant's position regarding his director's loan account (or 'DLA' as such account was often referred to as shorthand) sent by his solicitors to Mr Cross on 25 August 2022, the Defendant's solicitors continued: "… *we understand that there will be the following issues of principle which will need to be the subject of submissions ... 4.* ***Investment:*** *The Claimants DLA Comparison lists at Line 92 an "Investment in property" of £464,368.80. We are unclear whether your client asserts that this*

sum is an amount which he has lent to the Company and which the Company is liable to repay. We would be grateful if you could advise". This query related to the purchase cost of the Property which had been paid from PCB's bank account in November 2016.

28 The Claimant's solicitors replied the following day indicating that they were taking instructions. It does not appear that they ever gave a specific response to the query raised by the Defendant's solicitors in their letter of 15 September 2022. However, it is clear that matters moved on and it became unnecessary for that query to be answered because, on 21 September 2022, the Defendant's solicitor sent a further email attaching his firm's letter of 15 September 2022 and continuing: "… *I have attempted to prepare a template for the proposed agreed document. Attached is an excel document which sets out what I believe are the parties' current positions with respect to the DLA*". This document (the "**DLA Spreadsheet**"), entitled "*Mr EM Baldudak Summary of Director's Loan Account Movements*", contained the following entries in the "*Agreed*" column against the date of 27 May 2016: "*Paid into PCB Centres Ltd 750,000.00*" and "*Factory purchase -464,368.80*".

29 Although the entries in the "Agreed" column did not change, the DLA Spreadsheet put forward by the Defendant's solicitors was the subject of further amendment over the next few days before it was finally agreed in the morning of 27 September 2022, the day before the start of the three-day trial which commenced on 28 September 2022 (the "**Remedies Trial**"). After skeletons had been exchanged, at 10:39 on 27 September 2022, the Defendant's counsel (Mr Heath) sent an email to the Judge, which (referring to the DLA Spreadsheet) read so far as relevant as follows: "… *The parties have recently agreed an Excel Spreadsheet which sets out the points of dispute in relation to [the Claimant's] director's loan account. A hard copy will be brought to trial. ... The document can be explained in more detail tomorrow orally, but briefly: Column D sets out payments which are not in dispute. ...*". The payments in Column D which were described as not being in dispute included the entries over two lines beside the date of 27 May 2016: "*Paid into PCB Centres Ltd 750,000" and "Factory purchase -464,368.80*". The total of the agreed Column D figures, being the balance owing to the Claimant on his loan account, came to £714,777.21. It was common ground before the Judge at the Remedies Trial that this figure excluded the amount spent on the purchase of the Property as was indicated by the agreed debit for the "Factory purchase" of £464,368.80. I consider the significance of this agreed document in more detail below.

30 The Remedies Trial resulted in a second judgment (the "**Remedies Judgment**") handed down on 5 December 2022 and a final order of 14 December 2022. By that order, the Claimant was required to pay the Defendant the sum of £66,255 for his 50% beneficial interest in HTS as well as 70% of the Defendant's costs of the Liability Trial and 100% of the Defendant's costs of the Remedies Trial, in both cases on the indemnity basis.

31 In paragraph 58 of the Remedies Judgment, the Judge recorded that the parties had produced the DLA Spreadsheet which showed in Column D that the parties were in agreement that the sum of £714,777.20 had been spent by the Claimant from his own money on behalf of HTS. In paragraph 66, the Judge repeats this Column D figure as being the balance owing to the Claimant on his loan account. Relying on this figure, after making adjustments to reflect his other findings, the Judge concluded in paragraph 66 and in the table recording his conclusions as to HTS's enterprise value in paragraph 69 that the amount of the Claimant's loan account was £603,060.67. This figure was taken into account by the Judge as part of the funded debt totalling £758,808 which he deducted from the maintainable EBITDA figure of £891,319 in order to arrive at a fair value of the entire issued share capital of HTS of £132,511.

32 It was as a result of these findings and calculations that (in paragraph 70) the Judge valued the Defendant's 50% shareholding in HTS at £66,255, being half the fair value figure. As paragraph 71 records, the Defendant accepted that his director's loan account debt of £58,956 should be credited against the purchase price of his shares. Accordingly, as paragraphs 1 and 2 of the Judge's order dated 14 December 2022 make clear, the net result was that the Claimant had to pay the sum of £7,299 to the Defendant in order to extinguish the Defendant's 50% beneficial interest in the HTS shares.

These proceedings

33 On 9 May 2022, within a week of the Liability Judgment being handed down, the Claimant issued these proceedings.

34 In paragraph 8 of his Defence in these proceedings, the Defendant admits that the Claimant had no intention of making a gift to the Defendant of the monies used to purchase the Property. The Defendant's case (pleaded in paragraphs 4 and 5 of the Defence) is that the monies paid by the Claimant were provided to PCB to be used exclusively for business investments in the UK which were to be owned equally by the Claimant and the Defendant. In paragraph 9 of the Defence, reference is made to the Defendant's email to the solicitors Brar & Co dated 27 October 2016 and the fact that by that time the Defendant and the Claimant had decided to use the monies lent by the Claimant to purchase the Property of which, so it is alleged, they were to be equal legal and beneficial owners.

35 One of the consequences of the beneficial ownership issue not being determined in the previous proceedings is that I have to decide whether and if so to what extent findings of fact made by the Judge in those proceedings give rise to an issue estoppel in these proceedings. This is a matter which was clearly appreciated by the parties from at least the time of the pre-trial review in these proceedings which took place on 3 February 2023. On that date the trial of this action was adjourned from 20 March 2023 to a later date and the parties were ordered to exchange

documents setting out (1) the findings from each of the Liability and Remedies Judgments on which they relied, stating what contention in these proceedings each finding was said to support and (2) which findings gave rise to an estoppel in these proceedings, specifying the species of the estoppel and providing particulars of the necessary elements of the estoppel.

36 The document served by the Claimant on 20 March 2023 relied (amongst other matters) on the Judge's finding in paragraph 106 of the Liability Judgment that the money introduced by the Claimant was by way of a loan. The Claimant also relied on the Judge's reference to the agreed figures in Column D of the DLA Spreadsheet in paragraphs 58 and 66 of the Remedies Judgment as well as the calculations set out in paragraphs 67 to 69 of the same judgment.

37 The Claimant contended (in paragraph 4 of this document) that an issue estoppel arose out of those findings since the issue was as to the source of the purchase price of the Property and that issue "*was a necessary ingredient of the Defendant's cause of action ... in the previous proceedings and has been litigated and decided as follows: (a) the Court found that the Claimant has advanced money to HTS by way of a repayable loan and not investment; (b) the Court found that the amount due to the Claimant under his loan account with HTS was £603,060.47; (c) the calculation of the sum of £603,060.47 included a debit in the sum of £464,368.80 in respect of the [purchase price of the Property]*".

38 In his Re-Amended Reply (for which the Judge gave permission on 26 June 2023), the Claimant alleges in summary that: (1) he lent £750,000 to PCB for the specific purpose of funding PCB's purchase of all the shares in OEM and since that purpose failed, those monies were held by PCB on a Quistclose trust for him; (2) on the instruction of the Defendant and with the knowledge and consent of the Claimant, the Defendant, PCB and HTS, the loan to PCB was transferred to HTS and credited to the Claimant's account with HTS such that HTS came to stand in the place of PCB as regards the Claimant; (3) at the direction of the Defendant, a debit equal to the purchase price of the Property and associated transaction costs (being £464,368.80) was deducted from the Claimant's loan account with HTS; and (4) in the Remedies Trial, the Defendant elected to take the benefit of this debit and it is not now open to him to take an inconsistent position in these proceedings.

39 In his Rejoinder, the Defendant alleges in summary that: (1) the Claimant's loan of £750,000 was beneficially owned by PCB as borrower from 27 May 2016 onwards and lent to PCB by the Claimant for a variety of purposes including potentially acquiring OEM, potentially acquiring other companies and/or general expenditure on behalf PCB and HTS, not for the specific purpose of acquiring OEM; (2) by 5 January 2017, the Claimant and the Defendant had decided in principle to apply for the strike off of PCB but no decision had been made or agreement reached with respect to the treatment of the £750,000; (3) the PCB working papers prepared by Mr Duffy incorrectly recorded that the purchase price

of the property had been paid by PCB on behalf of HTS. This was simply a more convenient way of recording the mathematically correct end result; (4) there was no novation of the debt owed by PCB to the Claimant so that it became a debt owed by HTS to the Claimant because a novation would have required the involvement and agreement of the Claimant who was not involved in instructing Mr Duffy to prepare the PCB working papers; and (5) the extent to which PCB had any liabilities when it was struck off depends on the extent to which the Claimant may have forgiven any portion of his loan to PCB.

The Claimant's disclosure

40 The Defendant submits that the Claimant has deliberately refrained from disclosing harmful material in the form of WhatsApp messages and is attempting to obtain a finding in his favour without that material being present. The Defendant relies on the fact that, despite having indicated that in his DRD Questionnaire that he was able to retrieve all his WhatsApp messages for the period 2015 to 2019, the Claimant did not disclose any such messages between 28 October 2016 and 21 June 2017 which the Defendant describes as the "**Crucial Period**". In response to an order made by the Judge on 26 June 2023 that the Claimant should disclose WhatsApp messages for the Crucial Period or else explain what had become of those messages, he made a witness statement dated 14 July 2023 (the "**Claimant's disclosure statement**") in which he said he was unable to retrieve WhatsApp messages for the Crucial Period but made no attempt to explain why he had previously indicated in his DRD Questionnaire that such messages were available and would be disclosed.

41 The Defendant submits that the absence of these WhatsApp messages for the Crucial Period is important. He relies on the fact that it is clear from the many other WhatsApp messages disclosed that the Claimant and the Defendant communicated regularly via WhatsApp. On 12 November 2020, when the Claimant excluded the Defendant from the business and the Property, his associates took possession of the Defendant's iPhone and other devices. The Defendant's devices were returned some months later following a court order, following which it proved difficult to extract the WhatsApp messages contained on those devices at proportionate cost.

42 In the previous proceedings, the Claimant and HTS did not disclose any WhatsApp messages prior to trial. In the course of the Liability Trial, the Claimant was pressed on his non-disclosure of these messages and in the second week of the trial he disclosed a large number of them in two batches which the Defendant has referred to in these proceedings as the "**Dumped WhatsApps**". The Defendant identified a two-week gap in the Dumped WhatsApps and succeeded in extracting certain messages from his own devices in order to fill that gap, one of which was put to the Claimant in cross-examination and resulted in a finding being made against him. The Judge concluded (at paragraph 127 of the Liability Judgment) it was likely that "*the extract from the message transcripts was missed out of [the*

Claimant's] version of the transcripts ... because he realised it supported the [Defendant's] case ...". The Defendant also points to various places in the Liability Judgment where the Judge relies on WhatsApp messages as the basis of several findings where he differed from oral evidence given by the Claimant.

43 It is worth noting that in paragraph 81 of the Liability Judgment, the Judge held that neither the Claimant nor the Defendant were credible witnesses and stated that he was "*cautious about accepting anything they say unless it is agreed or supported by some other evidence or circumstance which lends it credence*".

44 The Defendant argues that the messages contained in the Dumped WhatsApps indicate it is likely the two men would have said important things about the purchase and ownership of the Property during the Crucial Period and that such messages as exist suggest that others sent during the Crucial Period would have been more consistent with the Defendant's case as to joint beneficial ownership than the Claimant's case as to sole ownership.

45 The Defendant criticises the Claimant's disclosure statement on a number of grounds, in particular because it fails to explain the inconsistency between what is said in the statement (namely, that he no longer has the device or sim card which contained the WhatsApp messages) and his DRD Questionnaire on which he based his Disclosure Certificate dated 15 November 2022 (which indicated that there was no problem with disclosure of WhatsApp messages).

46 In paragraphs 10 to 15 of the Claimant's disclosure statement, he advances a number of explanations as to why WhatsApp messages for the Crucial Period may be missing or he is unable to recover them. These include changing the handset twice since 2017, not having the 2016/2017 device anymore, changing his numbers, WhatsApp's terms and conditions, and saying his current oldest WhatsApp message is 24 November 2022. As the Defendant points out, these explanations are contradicted by the Claimant's DRD Questionnaire and his ability to disclose a WhatsApp from 21 July 2016, neither contradiction having been explained in the Claimant's disclosure statement.

47 The Defendant submits that an honest person in the Claimant's position who had been wrong about the relevance of WhatsApp messages and found to have withheld messages in previous proceedings would take extra care to explain the absence of messages during the Crucial Period and the Claimant has not done this. He invites the Court to draw the inference that the Claimant has deliberately withheld WhatsApp messages from the Crucial Period because those messages damage his case. I shall indicate my conclusion with regard to that submission having considered the other documentary and witness evidence.

The witnesses

48 The only witnesses whose evidence was tested by cross-examination at trial were Mr Duffy (who gave evidence for the Claimant) and the Defendant. The evidence

of Tom Charlton, an occupational pensions adviser, whose witness statement was filed on behalf of the Defendant, was not challenged. I refer to Mr Charlton's evidence below.

49 Although the Claimant made a witness statement for trial, he was not called to give evidence and I did not therefore read his statement. As already mentioned, I was invited by the Defendant to read the Claimant's disclosure statement and to conclude that the Claimant has deliberately refrained from disclosing material that would be harmful to his case. The Defendant pointed out that the Claimant was sitting in Court during the trial and could have entered the witness box in order to answer the criticisms made of his disclosure.

50 As regards the evidence of Mr Duffy and the Defendant, I remind myself of the caution that needs to be exercised in assessing evidence from witnesses' memories unsupported by contemporaneous documents. This is especially the case where, as here, the witnesses are giving evidence of things alleged to have been said more than six years ago. I bear in mind what has been said in a number of recent authorities regarding the inherent unreliability of memory. The guidance provided in recent authority is helpfully summarised in R (on the application of Dutta) v General Medical Council [2020] EWHC 1974 (Admin) at [39]-[40]. I take from it the following propositions: (1) memory is malleable by nature, is itself changed merely by the process of being revisited and is particularly susceptible to being rewritten/fabricated by the biases inherent in litigating disputes; (2) a witness can be honest and yet be seriously mistaken about what he says he remembers, to the point of creating "memories" of events which did not in fact happen; (3) a witness's demeanour tells a judge nothing about that witness's honesty or the reliability of that witness's memory, which will be inherently fallible for the reasons given in (1) and (2); (4) the best approach is to base factual findings on inferences drawn from known or probable facts and from documentary evidence.

The evidence relied on by the Claimant

51 The Claimant relied on the evidence of Mr Duffy who said that the Defendant had used him for his accounting and company needs since October 2015 and that, even after the Claimant and the Defendant went into business together, his dealings were almost exclusively with the Defendant who gave him instructions and information, answered his queries and signed off on anything he did. He said he never drew up statutory accounts for PCB but he prepared draft accounts for PCB based on PCB's bank statements and on information supplied to him by the Defendant. He drew up statutory accounts for HTS and prepared wider accounts for HTS based on bank statements, cash books and HTS's ledgers.

52 Mr Duffy was clear that in all his dealings with the Defendant from 2016 onwards the Defendant referred to the sum of £750,000 paid by the Claimant into PCB's bank account as a loan. He said that when he met with the Defendant on a date prior to 10 February 2017 (which is when he prepared the PCB working papers), he was told by the Defendant that he and the Claimant wished to strike off PCB

because it had not traded, had no assets and did not owe any money to third parties. He was clear in his evidence that the effect of what he was told by the Defendant was to treat the Claimant's loan of £750,000 paid into PCB's bank account as being a loan to HTS. The Defendant's counsel seeks to rely on what he submits was a concession by Mr Duffy in re-examination that he (Duffy) probably did not have instructions from the Defendant to treat the £750,000 in that way. However, my understanding of Mr Duffy's evidence as a whole was that, whilst (given the lapse of time) he could not recall the precise words used by the Defendant, he was in no doubt as to the effect of the instructions he received from the Defendant which were to treat the £750,000 as being a loan to HTS.

53 Mr Duffy said that when he initially started to prepare HTS's accounts he believed that HTS owned the Property but his view changed as a result of the instructions he received from the Defendant that the Claimant's loan monies were funding the purchase of the Property which meant the cost of the Property needed to be debited from the Claimant's loan account with HTS.

54 In cross-examination Mr Duffy was taken to a passage in his evidence in the previous proceedings where the Judge had asked him about the document at page 1953 of the trial bundle (page 1045 of the trial bundle in these proceedings) which contained a summary of the Claimant's loan account with HTS and which included the following entries over two lines beside the date of 27 May 2016: "*Paid into PCB Centres Ltd 750,000" and "Factory purchase (464,368.80)*". In giving evidence at the Liability Trial, Mr Duffy explained to the Judge that the purchase price of the Property had been treated as a personal item and therefore the sum of £464,368 had been deducted from the Claimant's director's loan account with HTS. In answer to the Judge's question as to whether that sum had reduced the amount of the director's loan to HTS, Mr Duffy confirmed that it had, replying: "*… it's in there because ... he's used the cash he put in for a personal item, therefore he's not owed £464,000 of that money because the company's effectively settled the personal liability, i.e. the purchase of a building*".

55 In his evidence in these proceedings, Mr Duffy said he was there describing what happened in his conversation with the Defendant at the meeting to discuss the 2017 HTS accounts, when he was instructed by the Defendant that the purchase price of the Property was being paid entirely by the Claimant and therefore the money "did not belong in the company [i.e. HTS] accounts". Mr Duffy also explained that if the purchase price had not been deducted from the Claimant's loan account as a personal item and instead PCB or HTS had purchased the Property for both the directors, the company would have been settling a personal liability in respect of which substantial tax would have had to be paid by the directors.

56 So in summary Mr Duffy was clear about two matters arising from his discussions with the Defendant. First, that he was instructed by the Defendant that the Property should be shown as having been paid for out of the Claimant's loan account with HTS even though the money had come out of PCB's bank account. Second, that

he was further instructed by the Defendant that the purchase price of the Property should be deducted from Claimant's loan account with HTS because it was a personal item and should not therefore be included as part of the debt still owed by HTS to the Claimant. Mr Duffy accepted he had no written record of the instructions he was given by the Defendant but maintained that these were the instructions he was indeed given which he said were reflected in the PCB working papers.

The evidence relied on by the Defendant

57 *The Defendant's evidence*: The Defendant made two witness statements for trial and tendered himself for cross examination. His evidence was that there was never any suggestion that the Property was being purchased for the Claimant's sole benefit. He said that he and the Claimant agreed they would be 50-50 partners in everything they bought with the investment made by the Claimant. He said this was set out in the Business Plan which they prepared in 2016 and discussed with Mr Duffy. The Defendant was adamant that the £750,000 which the Claimant had paid into PCB's bank account was never intended by either of them to be a loan, even though he accepted (as indeed he was bound to do) the Court had ruled in the Liability Judgment that it was a loan.

58 The Defendant said that whilst he recalled speaking to Mr Duffy in early 2017 about how to close down PCB, he did not recall the detail of their conversation. He recalled telling Mr Duffy that he and the Claimant wanted to close down PCB and asking him whether it was a complicated process. He sent Mr Duffy PCB's bank statements. His evidence was that he recalled discussing the purchase of the Property with both the Claimant and Mr Duffy "in the months following its purchase" (i.e. in the months following 22 November 2016) and that he and the Claimant "made it clear that the [Property] was owned by the two of [them] equally". He also said they told Mr Duffy they had purchased the Property personally so that they could collect rent from HTS once that company was in a position to pay rent.

59 In cross-examination the Defendant denied that when he and Mr Duffy had their meeting about PCB prior to 10 February 2017, he had given instructions to Mr Duffy to transfer the £750,000 from PCB to HTS and to debit the purchase price of the Property (£464,368) from the Claimant's director's loan account. He said as far as the Intercompany Loan was concerned, he did not regard PCB as being owed money by HTS because it was all part of the same venture. His evidence was that however Mr Duffy chose to reflect the instructions he was given by either himself or the Claimant, the Property - like everything else in their business - was to be owned by the two of them jointly. He said it was obvious and clear from the WhatsApp messages passing between him and the Claimant at the time that they owned the Property together and it did not matter how the money was paid. He described that as a technicality. The end result was that he and the Claimant had

an agreement and acted together. If they had purchased OEM, instead of the Property, OEM would have been jointly owned in the same way.

60 The Defendant's evidence was that at a later stage he spoke to Mr Charlton about the possibility of transferring the Property into a pension plan which would allow him to collect the rent in a pension tax free and that he discussed the idea with Mr Duffy and with the Claimant who was interested. He said he would not have discussed putting the Property into his pension if he was not a part owner as there would have been no point in doing so. He said the Claimant never suggested in any of the many WhatsApp messages they sent each other over the years that the Property was bought for his (the Claimant's) sole benefit and the first time this was suggested was in the Claimant's solicitors' letter sent shortly before the Liability Trial.

61 *Mr Charlton's evidence*: The Defendant also relied on the unchallenged evidence of Mr Charlton who said he met with the Defendant at the Property in, he believed, 2016 (although the Property was not purchased until 22 November 2016) and that in the course of their discussion he told the Defendant the Property was eligible for inclusion in a small self-administered scheme for occupation pensions ("**SSAS**"). He explained the basic structure and benefits of SSAS whereby a director transfers property that he owns personally to his company, giving rise to a credit in his director's loan account which can then later be drawn out tax-free. The company then transfers the property to a SSAS in the name of the director which would be a business expense, giving rise to tax savings for the company. Mr Charlton said that unless the director had a beneficial interest worth more than about £90,000 in the Property, the SSAS was not financially viable due to the various expenses involved. He said that he discussed ownership of the Property with the Defendant and the clear understanding he obtained from the Defendant was that the Property was owned 50-50 with his partner. He said that he subsequently had a telephone conversation with the Defendant when the Defendant told him he did not want to proceed with the SSAS at that time but would keep it in mind.

62 In his witness statement for the Liability Trial, Mr Duffy referred to being asked by the Defendant in or about 2019 for his views with regard to Mr Charlton's idea to put the Property into a SIPP and for HTS to obtain tax relief on the rent paid whilst the money received into the SIPP would grow tax-free. Mr Duffy's evidence was that HTS could not afford to pay rent to a pension fund at the time the matter was discussed with him and that the Defendant stated he would not proceed with the idea at that time but might revisit it should the company's financial position improve.

Findings on the evidence

63 I consider that Mr Duffy was a truthful witness, doing his best to assist the Court. When he did not remember, he said so. Although he did not make a note of the

instructions he was given by the Defendant in early 2017 regarding the closure of PCB, I accept that what he recalled as being the instructions he was given by the Defendant were the instructions he was given. I also consider that the state of affairs as set out by Mr Duffy in the PCB working papers accurately reflected those instructions and was not, as the Defendant sought to suggest, accounting treatment that he chose to adopt of his own accord without instructions.

64 Moreover, HTS's 2016 and 2017 accounts correctly reflected the instructions Mr Duffy received from the Defendant in early 2017 regarding the directors' loan accounts and the sums owed by HTS to PCB. The abbreviated balance sheet of HTS for the period ended 30 June 2016 (approved by the board on 22 March 2017) does not refer to a loan from the Claimant or show the money he introduced as part of the capital of the company or in the share premium account. Those 2016 accounts show creditors totalling £412,050 which Mr Duffy confirmed included the £96,812.93 owed by HTS on its loan account with PCB for that period. Mr Duffy's calculation of sums owed by HTS to PCB for the period ended 30 June 2017, including the opening balance of £96,812.93, totals £757,287.67, which includes £186,876.55 (the total of further transfers from PCB's account to HTS in the period ended 30 June 2017) and £464,283.80 (being the amount paid to Brar & Co on 1 November 2016 for the Property). The sums of £750,000 and £255 are then shown as directors' loans from the Claimant and the Defendant respectively transferred to HTS from PCB. Following a payment by HTS to PCB of £7,032.67, this produced a balancing figure of £757,287.67.

65 As already mentioned, HTS's 2017 accounts show £811,331 owed to the Claimant by HTS. The summary of the Claimant's director's loan account in the working papers prepared by Mr Duffy prior to drawing up those accounts shows the sum of £750,000 being transferred from PCB to HTS, making a total loan from the Claimant of £1,275,700, followed by the deduction of the "Factory purchase" (being the purchase price of the Property) in the sum of £464,368.80, leaving a balance of £811,331.20.

66 Where the evidence of Mr Duffy conflicted with that of the Defendant, I prefer the evidence of Mr Duffy. I have to treat the Defendant's evidence with caution since in important respects it was not consistent either with his pleaded case or with the Judge's findings made in the Liability Judgment and the Remedies Judgment.

67 In his oral evidence, the Defendant said that PCB did not owe the Claimant anything, that neither HTS nor PCB owed each other anything and that no element of any loan was transferred from PCB to HTS. This evidence contradicted the Defendant's pleaded case where it was admitted (in the Rejoinder) that the Claimant loaned £750,000 to PCB, that PCB was owed £285,631 by HTS, that in about February 2017 the Defendant consulted Mr Duffy with regard to the loan of £750,000 and the proposed strike off of PCB and that the overall accounting effect of the PCB working papers was consistent with PCB having no assets or liabilities at the time of its dissolution.

68 Moreover, PCB's bank account (into which the Claimant paid £750,000 on 27 May 2016) for the period ended 12 November 2016 showed a credit balance of only £159.07, with the sum of £464,283.80 being paid to Brar & Co on 1 November 2016 in order to purchase the Property and the balance having been paid out to HTS by means of various amounts which comprised the Intercompany Loan. There is no evidence that PCB traded for its own purposes. The entries in its bank account are consistent with that account having been used for two purposes. First, in order to make numerous payments on behalf of HTS. Second, in order to pay the monies required by Brar & Co to purchase the Property. I accept Mr Duffy's evidence that when he spoke to the Defendant prior to 10 February 2017 about the dissolution of PCB, he was instructed by the Defendant first that the Property should be shown as having been paid for out of the Claimant's loan account with HTS even though the money had come out of PCB's bank account and second that the purchase price of the Property should be deducted from Claimant's loan account with HTS because it was a personal item and should not therefore be included as part of the debt still owed by HTS to the Claimant.

69 I find that the Claimant never intended to forgive any part of the debt owed to him by PCB and subsequently HTS and that it was never the intention of either the Claimant or the Defendant that either PCB or HTS should purchase the Property for them both in equal shares. They would have appreciated that had PCB or HTS done this, both of them would have a significant tax liability.

70 I also find that Mr Duffy's analysis of the position as shown by the PCB working papers is consistent with the instructions he received from the Defendant, namely, that the Claimant's loan of £750,000 to PCB was to be transferred to HTS and then the purchase price of the Property was to be deducted from the Claimant's loan account with HTS in order to reflect the fact that this was a personal transaction, indicating that the Claimant had paid for and was the sole owner of the Property.

71 This finding is consistent with the summary of the Claimant's director's loan account in the working papers prepared by Mr Duffy for HTS's 2017 accounts which shows the sum of £750,000 being transferred from PCB to HTS, making a total loan of £1,275,700, followed by the deduction of the "Factory purchase" (being the purchase price of the Property) in the sum of £464,368.80, leaving a balance of £811,331.20.

72 It is also consistent with the document sent by the Defendant's then counsel Mr Heath to the Judge on 27 September 2022, the day before the Remedies Trial, which showed that the parties were in agreement that the purchase price of the Property should be deducted from the amount owed by HTS on the Claimant's director's loan account.

73 I bear well in mind the fact that the Claimant chose not to give evidence at this trial and relied instead on the evidence of Mr Duffy as well as the findings of the

Judge in the Liability Judgment and the Remedies Judgment. This meant that he did not make himself available to answer questions about his failure to give disclosure of WhatsApp messages during what the Defendant calls the Crucial Period.

74 However, I find that whatever those missing WhatsApp messages may have said, the effect of my having accepted Mr Duffy's evidence as regards the instructions he was given by the Defendant in early 2017 means that I can rely on that evidence as well as the important finding in the Liability Judgment that the sum of £750,000 paid by the Claimant into PCB's bank account in May 2016 was a loan and not an investment. I conclude that, whether or not the Defendant on his own or the Defendant and the Claimant together represented PCB's guiding mind, it was never intended at the time the Property was acquired in November 2016 or at any time prior to its acquisition that PCB or HTS would own the Property. It follows that there was never any intention that PCB or HTS would give 50-50 ownership of the Property to the Claimant and the Defendant. I also find that there was no agreement between the Claimant and the Defendant that the Property would be owned beneficially by each of them in equal shares.

75 Accordingly, I reject the Defendant's alternative case that he and the Claimant agreed that the Defendant would buy the Property to be owned beneficially by both of them in equal shares. This case is in any event contradicted by the Defendant's pleaded case where it is admitted (in paragraph 8 of the Defence) that the Claimant had no intention of making a gift to the Defendant.

76 Moreover, it is inconsistent with the finding in the Liability Judgment that the sum of £750,000 (part of which was used to purchase the Property) paid by the Claimant into PCB's bank account in May 2016 was a loan not an investment. The Defendant continued to maintain in his evidence that this money had been injected by the Claimant as an investment and was part of the price paid by the Claimant for the acquisition of his half share in their business venture. The Defendant's difficulty in maintaining this case is that it had been rejected as a result of the Judge's finding in the Liability Judgment that the Claimant's injection of £750,000 was a loan and not an investment.

The issues

77 The primary issue I have to decide is who paid the purchase price for the Property. This in turn involves deciding the following further issues:

77.1 Was the £750,000 paid to PCB by way of loan the subject of a Quistclose trust in favour of the Claimant and if so does that mean the Claimant is the sole beneficial owner of the Property? (The "**Quistclose Trust Issue**")

77.2 Did the Defendant instruct Mr Duffy to novate the Claimant's loan to PCB to HTS and to debit the purchase price of the Property from the Claimant's director's loan account with HTS? (The "**Novation Issue**")

77.3 Did the Defendant and the Claimant agree that they would use the Claimant's money to purchase the Property of which they would be equal legal and beneficial owners? (The "**Agreement Issue**")

77.4 Did the Defendant proceed in the previous proceedings on the basis that the Claimant's loan to PCB was novated to HTS and the purchase price of the Property debited from the Claimants director's loan account with HTS? If so, is the Defendant prevented from adopting an inconsistent position in these proceedings? (the "**Election Issue**")

77.5 Did the Judge make findings in the previous proceedings that the Claimant's loan of £750,000 to PCB was novated to HTS and that the purchase price of the Property was debited from the Claimant's director's loan account with HTS, such that the Defendant is bound by those findings in these proceedings? (the "**Estoppel Issue**")

78 As regards the Defendant's counterclaim, if I find that the Defendant has a beneficial interest in the Property, the primary issue I need to decide is what relief the Defendant is entitled to in addition to a declaration that he is joint beneficial owner. This gives rise to the following issues:

78.1 Is the Claimant in occupation of the Property and, if so, has he wrongfully excluded the Defendant from the use and enjoyment of the Property and should an occupation rent be paid?

78.2 Should there be an order for sale?

78.3 Is any further order required in respect of the mortgage over the Property?

The Quistclose Trust Issue

79 The Claimant contends that he lent the £750,000 to PCB for a specific purpose, namely, the purchase of all the shares in OEM so that PCB held the money on a Quistclose trust for him and since that purpose failed he remains the beneficial owner of that money and the beneficial owner of any property acquired with that money. The Defendant does not accept that the money was lent was for a sufficiently fixed and stated purpose in order to create a Quistclose trust.

80 A Quistclose trust is a form of resulting trust named after the decision of the House of Lords in Barclays Bank v. Quistclose Investments Ltd [1970] AC 567. The nature of such a trust was authoritatively explained by Lords Millett and Hoffmann in Twinsectra v Yardley [2002] 2 AC 164 at [12]-[17], [71]-[73], and [100]-[103]. The trust arises when a party pays money to another on terms that the receiving

party may only apply the money for a specific purpose and must return that money if the specific purpose becomes incapable of being met or fails. The trust arises at the time of the advance because that is when the monies paid are impressed with the limited power only to use them for that specific purpose.

81 There are a wide variety of situations in which a Quistclose trust can arise, typically when a solicitor for a purchaser is asked to hold onto mortgage funds to apply them for a specific purpose. In more general commercial situations, Quistclose trusts are relatively unusual. The key question in each case is whether, at the time of payment, the parties intended the money to be at the free disposal of the recipient or whether such freedom was necessarily excluded by an arrangement that the money should be used exclusively for the stated purpose. Trusts do not necessarily arise merely because money is paid with a particular purpose in mind. That is frequently the case with loans. If that low bar were sufficient, commercial life would become impossible: Twinsectra at [73], Shalson v. Russo [2005] Ch at [128]-[130], First City Monument Bank Plc v. Zumax Nigeria Ltd [2019] EWCA Civ 294 at [32]-[36].

82 I do not consider that the £750,000 paid by the Claimant into PCB's bank account on 27 May 2016 was paid only for the purpose of purchasing OEM. I consider that the Claimant was lending this money to a joint business venture and its use was not restricted to the purchase of OEM. The Business Plan drawn up in June 2016 shows that by the time this document was prepared the Claimant had already transferred the money into PCB's account with a view to OEM being acquired ("*..We are in process of purchasing [OEM] ... Buying [OEM] will cost us some £750,000 and [the Claimant] has already transferred this amount to the account of [PCB] (proposed shareholder of [OEM]).*" However, I do not read this as meaning that the money could only be used for the purpose of acquiring OEM. The Business Plan also states that the parties were in the process of buying MKK (a proposed purchase which did not go ahead) and refers (at paragraph 8.5) to the parties' intention to source new premises in Newcastle. The parties clearly had a number of business options in mind at that time. There is no suggestion in the Business Plan that the monies advanced by the Claimant would need to be returned in the event that the purchase of OEM did not go ahead. This is corroborated by the fact that when the Defendant emailed Mr Duffy a few weeks later on 20 September 2016 about the purchase of new premises for the business, he referred to the fact that the Business Plan would need to be changed by taking out the references to OEM and adding in the purchase of the Property.

83 The Judge says in paragraph 14 of the Liability Judgment: "*It is common ground that the [£750,000] was paid to PCB to purchase [OEM]*". I do not consider that the Judge was there making a finding that the money could only be used for this purpose. He was simply referring to the fact that, at the time the money was paid to PCB, the parties' intention was that it should be used to purchase OEM. I accept the Defendant's evidence that the Claimant's loan of £750,000 was not restricted to the purchase of OEM. This is apparent from the fact that, shortly after the money was received into PCB's account on 27 May 2016, payments were made in

settlement of general expenses of HTS. For example, a payment was made to HTS from PCB's bank account in the sum of £16,000 on 6 June 2016. These payments are inconsistent with the existence of a Quistclose trust, and it has not been suggested by the Claimant that those payments were made in breach of trust.

84 The Claimant did not give evidence in support of his case that the £750,000 was impressed with a trust. I was referred to certain WhatsApp messages which were said to support his case but those messages go nowhere near establishing that the money could only be used to purchase OEM. In the absence of evidence from the Claimant making good that case, I cannot accept that any such trust existed.

85 For these reasons, I find that the sum of £750,000 paid by the Claimant into PCB's bank account on 27 May 2016 was not subject to a Quistclose trust.

The Novation Issue

86 I have found that the Defendant instructed Mr Duffy in early 2017 to novate the Claimant's loan to PCB of £750,000 to HTS (with the result that HTS owed £750,000 to the Claimant in place of PCB) and to debit the purchase price of the Property from the Claimant's director's loan account with HTS.

87 This instruction from the Defendant to Mr Duffy followed on from the agreement which I find was made between the Claimant and the Defendant prior to the purchase of the Property that they would wind up PCB and not proceed with the purchase of OEM and MKK. They also agreed at this time that part of the Claimant's loan would be used to purchase the Property. Their agreement is evidenced by the Defendant's email to Mr Duffy dated 20 September 2016 in which he informs Mr Duffy about the purchase of new premises for the business and refers to the fact that the Business Plan would need to be changed by taking out the references to OEM and adding in the purchase of the Property. It was also the Defendant's evidence that shortly afterwards they decided not to proceed with the proposed purchase of MKK.

88 The effect of the parties' agreement to wind up PCB and transfer the Claimant's loan to HTS was to novate PCB's indebtedness to the Claimant to HTS so that HTS became indebted to the Claimant in the sum of £750,000. This made obvious sense given that PCB never traded and all the payments made from its account before they agreed to wind up PCB and close the account had been made on behalf of and for the benefit of HTS. At or about the same time as the Claimant and the Defendant took the decision to wind up PCB, they agreed to purchase the Property using the Claimant's loan money but that the amount required to purchase the Property would then be removed from the Claimant's director's loan account so that it ceased to be treated as a loan by the Claimant to HTS and was instead treated as a personal payment made by the Claimant to acquire the Property. Having agreed to proceed in this way, the Defendant gave instructions to Brar & Co with

regard to the purchase, including an instruction to register the Property in the parties' joint names.

89 Following his discussion with the Defendant in early 2017, Mr Duffy acted in accordance with this agreement and with the instructions he received from Defendant when in the PCB working papers he transferred the sum of £750,000 from the Claimant's director's loan account with PCB to the Claimant's director's loan account with HTS and then deducted the cost of purchasing the Property from the Claimant's director's loan account because the Property had not been purchased by or on behalf of HTS. Mr Duffy's accounting treatment reflected his instructions because, although HTS was to occupy the Property, it did not own the Property and there was no basis for treating the purchase price of the Property as a debt due from HTS to the Claimant.

90 Accordingly, I find that it was prior to the purchase of the Property that the parties agreed to wind up PCB and transfer the monies lent to PCB as having been lent to HTS, thus novating to HTS the debt owed by PCB to the Claimant. Mr Duffy carried out the Defendant's instructions in early 2017 when he prepared accounting documents which had the effect of novating the Claimant's loan of £750,000 to PCB to HTS. He then correctly debited the purchase price of the Property from the Claimant's director's loan account with HTS, reflecting his further instructions from the Defendant that the Claimant, not HTS, had purchased the Property.

The Agreement Issue

91 The question of who owned the Property, namely, whether it was beneficially owned solely by the Claimant (as the Claimant contends) or jointly in equal shares by the Claimant and the Defendant (as the Defendant contends) depends on the intention of the parties.

92 The parties were agreed as to the law to be applied in determining the parties' intention. I was referred to the well-known statement of principle of Lord Browne Wilkinson in Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 at 708A-B:

> Under existing law a resulting trust arises … where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchase by A and B in shares proportionate to their contributions.

93 On the facts of this case, the Claimant's money was used to pay the entire purchase price of the Property which was then vested in the joint names of the Claimant and the Defendant. As a consequence, a presumption arose that the Claimant did not intend to make a gift to the Defendant and that the Property was held on trust for the Claimant as the sole provider of the purchase monies.

94 This presumption may be rebutted by evidence of the parties' actual intentions. This requires an objective inference drawn from the parties' words and conduct as explained by Lord Diplock in Gissing v. Gissing [1971] AC 886 at 906B-D:

> As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which could reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.

95 The onus is on the Defendant to rebut the presumption that there was a resulting trust in the Claimant's favour. I find that the Defendant has not come close to rebutting that presumption. The only inference I can reasonably draw as to what occurred in 2016 at the time the Property was purchased in the parties' joint names is that they did not by their words or conduct agree that they would own the Property beneficially in equal shares. There was never any agreement or intention that the Claimant would gift half the purchase monies or half the Property to the Defendant. The Judge found that the £750,000 paid by the Claimant into PCB's bank account in May 2016 was a loan not an investment. Whilst this finding does not exclude the possibility that the Defendant and the Claimant reached a separate agreement that they would use the Claimant's money to purchase the Property of which they would be equal legal and beneficial owners, there would need to be cogent evidence to persuade me on the balance of probabilities that such an agreement was made. As already mentioned, in paragraph 8 of his Defence in these proceedings, the Defendant admits that the Claimant had no intention of making a gift to the Defendant of the monies used to purchase the Property. This admission, combined with the Judge's finding in the Liability Trial that the sum of £750,000 paid by the Claimant was a loan and not an investment, lend support to my conclusion that the Defendant has not rebutted the presumption. It cannot reasonably be inferred from the parties' words or conduct that they agreed the Property would be owned jointly in equal shares.

96 The Defendant submits that the court should have regard to the fact that the purchase monies were paid out of PCB's bank account and the Claimant cannot be the beneficiary under a resulting trust in respect of PCB's payment for the Property with part of the loan. He says there are two reasons for this. First, if a lender also obtained a beneficial interest they would gain double benefit for their loan, namely, a right to repayment and a beneficial interest. He relies on In Re Sharpe [1986] 1 WLR 219 where Browne-Wilkinson J said as follows at 223B:

"*In my judgment, if, as in this case, monies are advanced by way of loan there can be no question of the lender being entitled to an interest in the property under a resulting trust. If he were to take such an interest, he would get his money twice: once on repayment of the loan and once on taking his share of the proceeds of sale of the property*". Second, the Defendant submits it is trite law that, absent imposition of a restriction on their use, when monies are lent they become the borrower's monies beneficially.

97 The difficulty with this submission is that it ignores what, as I have found, the parties actually agreed prior to the time when the Property was purchased. They agreed not only that the £750,000 loan made by the Claimant to PCB would be novated to HTS but also that the amount required to purchase the Property would then be removed from the Claimant's director's loan account so that it ceased to be treated as a loan by the Claimant to HTS and was instead treated as a personal payment made by the Claimant to acquire the Property. This agreement meant that neither PCB nor HTS was liable to repay any part of the purchase monies to the Claimant with the result that neither of the principles of law relied on by the Defendant has any application to these facts. There was no question of the Claimant getting his money twice because he no longer had a right to recover the purchase monies from either HTS or PCB. Furthermore, the monies had ceased to be beneficially owned by either company.

98 The effect of what the Defendant is saying is that the Claimant agreed with the Defendant to pay the entire purchase price of the Property but then make a gift to the Defendant of the value of the Property, namely some £230,000. The difficulty facing the Defendant is that he has accepted in paragraph 8 of his Defence that the Claimant did not intend to make a gift to him. Yet he now maintains that this is precisely what the Claimant did by making a gift to him of half the beneficial ownership of the Property. On the basis of the facts that I have found, I cannot see any basis for concluding that there was an agreement as alleged by the Defendant.

The Election Issue

99 The Claimant relies on a principle of law that it is not possible to approbate and reprobate. This principle has been succinctly summarised by Lord Browne-Wilkinson VC as follows in Express Newspapers Plc v News (UK) Ltd [1990] 1 WLR 1320 at 1329:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

100 The Claimant says that in the previous proceedings the Defendant adopted the position that the entirety of the purchase cost of the Property was borne by the Claimant and the Defendant cannot now resile from that position in these

proceedings without a substantial injustice. Put colloquially, the Claimant says the Defendant cannot have his cake in the previous proceedings and now eat it in these proceedings.

101 The Claimant relies on the email sent to the Judge by Mr Heath (then counsel for the Defendant) on the day before the start of the Remedies Trial to which was attached the DLA Spreadsheet. Mr Heath's email makes clear that Column D in the DLA Spreadsheet set out payments which were not in dispute between the parties (i.e. agreed). Halfway down Column D, there is a debit against the Claimant's director's loan account for £464,368.80, being the entire cost of purchase of the Property. This is a document which the Defendant accepts was produced based on information he provided to his solicitors.

102 The Defendant had an option before the Remedies Trial. He could have contended that the purchase price was – as between the parties – treated as being a joint expenditure. That is the position the Defendant takes in these proceedings. However, the Defendant chose not to adopt that position. Instead he agreed with the Claimant that the entirety of the purchase price should be deducted from the Claimant's director's loan account with HTS which had the effect of reducing the amount owed by HTS to the Claimant and thereby increasing the value of the Defendant's own shareholding in HTS.

103 The Defendant was well aware at the time he agreed these figures that the Claimant was asserting sole beneficial ownership of the Property. The point had been raised in a letter of claim sent by the Claimant's solicitors shortly before the start of the Liability Trial in November 2021. These proceedings were issued on 9 September 2022, not long before the DLA Spreadsheet was submitted to the Judge on 27 September 2022. He must or ought to have appreciated that the consequences of agreeing to the deduction of the entirety of the purchase price of the Property from the Claimant's loan account with HTS were, first, to enable the Claimant to say he had paid for the Property and, second, to reduce the debt owed by HTS to the Claimant, thereby increasing the value of the Defendant's own HTS shareholding. I find that the reason the Defendant had no difficulty agreeing to this is because it was in accordance with his instructions given to Mr Duffy in early 2017 that the entirety of the cost of the purchase of the Property should be deducted from the Claimant's director's loan account with HTS.

104 I therefore consider that this is a situation where the Defendant should be held to his election as evidenced by his agreement of the figures submitted to the Judge in Column D of the DLA Spreadsheet under cover of his counsel's email and should not be permitted to resile from that position in these proceedings.

The Estoppel Issue

105 Judgments are not generally admissible as evidence in other proceedings of the facts established within them: Hollington v F. Hewthorn & Co Ltd [1943] 1 KB 587. The doctrine of issue estoppel is one of the exceptions to this general rule.

Whereas the doctrine of election or approbation/reprobation is governed by the position taken by a party in prior proceedings, the doctrine of issue estoppel is governed by the findings of the court in those prior proceedings.

106 Issue estoppel applies where the court's finding on a particular issue involving the same parties was essential to the final resolution of the proceedings in which the finding was made, even if the later proceedings concern a different cause of action. A party is not entitled to advance an argument of fact which conflicts with a court's determination of the same issue in earlier proceedings between the same parties, where the determination of that fact was an ingredient or a necessary part of that party's cause of action or defence.

107 In Arnold v National Westminster Bank Plc [1991] 2 AC 93, Lord Keith summarised the principle as follows at 105E:

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open the issue.

108 Where a party seeks to rely on an issue estoppel in a subsequent case, it is essential that he establishes two matters. First, that the issue was necessarily determined in the previous case. When considering the issue of 'necessity', the court will consider whether the issue in question was "*so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do*": Spens v IRC [1970] 1 W.L.R. 1173 Ch D. at 1184D-E. Second, that the same issue is relevant in the subsequent case. In deciding whether the same issue is relevant in the subsequent case, the safest approach is to enquire whether the same evidence would support both issues.

109 Where an issue is agreed, but formed a necessary part of the court's determination, this will not prevent an issue estoppel arising. The authors of Phipson on Evidence (20th Ed) provide the following useful summary at 43-32:

> If an issue was necessarily determined by a previous decision, …, it does not matter that the question was in fact not the subject of any dispute or argument. … Thus, if a party in previous litigation expressly or impliedly conceded a fundamental issue he may be prevented from re-opening that issue in subsequent litigation. The circumstances of the concession may be highly relevant, however, to the question of whether special circumstances exist which would justify permitting the issue to be re-opened.

110 The Claimant submits that the Defendant is estopped from denying that the Claimant paid for the Property by reason of the findings contained in the Remedies Judgment. He submits that (1) due to the way in which HTS was valued in the previous proceedings (enterprise value less funded debts), the value of the Claimant's director's loan account was an issue which required determination by the Judge in reaching his decision as to the value of the Defendant's shareholding in HTS and (2) it was critical to the outcome of that valuation whether all or part

of the purchase price of the Property was included or excluded from the Claimant's director's loan account.

111 The Defendant contends that it is not open to the Claimant to rely on this estoppel issue because it was not properly pleaded. I do not accept this. As a result of the order made by the Judge when he adjourned the trial in these proceedings on 3 February 2023 (see paragraph 35 above), the Claimant served a document on 20 March 2023 which relied on (1) the Judge's finding in paragraph 106 of the Liability Judgment that the money introduced by the Claimant was by way of a loan and (2) the Judge's reference to the agreed figures in column D of the DLA Spreadsheet in paragraphs 58 and 66 of the Remedies Judgment as well as the calculations set out in paragraphs 67 to 69 of the same judgment. The Claimant contended in paragraph 4 of the same document that an issue estoppel arose out of those findings since the issue was as to the source of the purchase price of the Property and that issue "*was a necessary ingredient of the Defendant's cause of action ... in the previous proceedings and has been litigated and decided as follows: (a) the Court found that the Claimant has advanced money to HTS by way of a repayable loan and not investment; (b) the Court found that the amount due to the Claimant under his loan account with HTS was £603,060.47; (c) the calculation of the sum of £603,060.47 included a debit in the sum of £464,368.80 in respect of the [purchase price of the Property]*".

112 The Defendant was plainly given sufficient notice by this court-ordered document that this estoppel point would be taken against him and it matters not that the Claimant's case is set out in a schedule ordered by the court, as opposed to in a formal pleading.

113 Turning to the substance of the issue estoppel argument, I find that issue estoppel arises for the following reasons:

113.1 Due to the way in which HTS was valued in the previous proceedings (enterprise value less funded debts), the value of the Claimant's director's loan account was an issue which required determination by the Judge in the Remedies Judgment.

113.2 The remedy sought by the Defendant in respect of his unfair prejudice petition was an order that the Claimant purchase his 50% shareholding in HTS. That remedy necessarily involved a valuation of HTS and, as part of that valuation process, an assessment of the debts owed by HTS.

113.3 The Judge addressed the question of what liabilities were owed by HTS in a section of the Remedies Judgment headed: "*What deduction is to be made from the Enterprise Value?*". He noted in paragraph 53 that the issue was as to the size of the funded debt. He referred to the evidence of the expert regarding the funded debt at paragraphs 54 to 56 and noted in paragraph 57

that these figures were agreed save for the size of the Claimant's director's loan account.

113.4 At paragraph 58, the Judge refers to the schedule of movements on the Claimant's loan account produced by the parties shortly before trial (i.e. the DLA Spreadsheet) and notes that Column D (totalling £714,777.20) comprised the parties' agreement as to what the Claimant had spent from his own money on behalf of HTS, whilst Column E (totalling £484,824.99) were sums which the Claimant claimed he paid on HTS's behalf but were disputed and Column F (totalling £142,656.29) were sums which the Defendant claimed should be debited to the Claimant personally and deducted from his director's loan account. The Judge noted in paragraph 59 that, in the course of the Remedies Trial, the Claimant had not pursued his Column E claims and the Defendant had sought to add to Column F all monies spent by HTS on excluding the Defendant from the business.

113.5 After dealing with the matters in dispute between the parties, at paragraph 66 the Judge found that the balance owing to the Claimant on his loan account was £714,777.21 (i.e. the amount of the agreed column D figure), from which he deducted £111,716.74 (being HTS's expenditure on the action which he held should have been spent by the Claimant together with a small item of personal expenditure), leaving a balance of £603,060.47.

113.6 The Judge concluded (also in paragraph 66) that the funded debt, assessed by the expert as £611,187, should be adjusted to £758,808 in order to reflect the true state of the Claimant's loan account. He then (in paragraph 69) and deducted that adjusted funded debt figure from the maintainable EBITDA figure of £891,319 in order to arrive at a fair value of the share capital of HTS of £132,511 which he used to value the Defendant's 50% shareholding in HTS at £66,255.51 (see paragraph 70).

113.7 Importantly, the figure of £714,777.21 is the total of the debits and credits placed before the court as an agreed figure on the day before the Remedies Trial. The calculation of that sum included a credit to Claimant's director's loan account of £750,000, reflecting the novation of the debt from PCB, as well as a debit of £464,368.80 reflecting the purchase of the Property.

113.8 The Defendant submits that in taking account of the DLA Spreadsheet submitted by the parties in the Remedies Trial and in making the calculations referred to above in the Remedies Judgment, the Judge was only concerned with the overall amount owing as a matter of arithmetic, which the parties agreed was (what the Defendant refers to as) the Intercompany Loan. He was not concerned with the precise order of payments. I do not agree.

113.9 What is clear, applying the ratio in Spens v IRC, is that a fundamental part of the reasoning resulting in the Judge's decision as to the correct amount of the funded debt - and thus his decision as to the value of the Defendant's shareholding in HTS - was his acceptance of the agreed figures in column D of the DLA Spreadsheet which showed that the Claimant had been treated by the parties as having paid for the Property personally, the amount spent in purchasing the Property having been deducted from his loan account. It is self-evident that without the deduction of £464,368, the figure of £714,777.21 which the Judge treated as an agreed starting point would have been commensurately higher.

113.10 Thus, the Judge's conclusion as to the valuation of the Defendant's shareholding relied on the agreed fact that the purchase price had been debited from the Claimant's director's loan account. As between the Claimant and the Defendant, it was already a matter of agreement that the Claimant contributed the purchase costs of the Property. Without that agreed matter being taken into account, the Judge's reasoning and conclusion would have been different and it is likely that the Claimant would not have had to pay any money to the Defendant for his HTS shares.

113.11 I do not need to reach a definitive conclusion as to what might have happened had the Defendant adopted the position in the Remedies Trial which he adopts in these proceedings as it is not a requirement of issue estoppel that prejudice be proved. However, it is not difficult to see that if the Defendant is permitted to change his position in these proceedings by arguing that only 50% of the purchase price of the Property should be deducted from the Claimant's director's loan account (representing what he contends is the Claimant's 50% share of the Property), it results in a dramatic difference to the Judge's calculations and there is no doubt that the Claimant would not have been required to pay any money to the Defendant for the value of his HTS shares. On 9 September 2021, the Claimant made an offer under CPR Part 36 offer to accept £1 in full and final settlement of all claims and counterclaims in the previous proceedings. It is possible that had the result of the Remedies Trial been that no money was payable by the Claimant to the Defendant for his shares, instead of having to pay the Defendant's costs of the Remedies Trial on the indemnity basis, the Defendant might have been required to pay the Claimant's costs of that trial.

114 Accordingly, I conclude that the Defendant is not permitted to adopt a different position in these proceedings by arguing that the purchase price of the Property should not be deducted from the Claimant's director's loan account with HTS and that the Claimant did not fund the purchase price of the Property. I find that the Defendant is estopped from so arguing in these proceedings. The operation of that estoppel is another reason why the Claimant's resulting trust claim succeeds.

The Defendant's Counterclaim

115 I have rejected the Defendant's case that he is a joint beneficial owner of the property. It therefore follows that his counterclaim, which is dependent on his having successfully resisted the Claimant's claim, must be dismissed.

116 The Defendant sought relief in his counterclaim relating to the charge in favour of HSBC UK Bank Plc which he and the Claimant entered into over the Property, securing HTS's indebtedness to the bank. The Judge's order dated 14 December 2022 made after the Remedies Judgment required the Claimant and HTS to indemnify the Defendant in respect of any liability or obligation under the mortgage and the debt which it secured. This indemnity ought to provide the Defendant with sufficient protection. However, I am prepared to consider any further submissions the Defendant may wish to make in this regard should he still consider this indemnity to be inadequate or insufficient in some way.

Conclusion

117 For the reasons given, the Claimant's claim succeeds. The Claimant is entitled to a declaration that he and the Defendant hold the Property on a resulting trust for the Claimant alone and an order that the Defendant transfer his legal interest in the Property to the Claimant.

118 I invite the parties to seek to agree an order and will decide any consequential matters which cannot be agreed following receipt of further short written submissions.

119 I conclude this judgment by expressing my gratitude to both counsel for the quality of their written and oral submissions and to their instructing solicitors for agreeing and producing trial bundles that, despite containing a multiplicity of diverse documents, have been easy to navigate.