Neutral Citation Number: [2009] EWHC 003 (Ch)

Claim No: 5BM74165

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BIRMINGHAM DISTRICT REGISTRY

Date: 7th January 2009

Before :

MR STEPHEN SMITH Q.C.

Between :

(1) NASIR MIRZA

(2) NAIM MIRZA

Claimants

and

(1) JAHANGHIR MIRZA

(2) TAHIRA MIRZA

(3) SHAKEEL MIRZA

(4) HALEEMA MIRZA

Defendants

Hearing dates: 13th, 14th, 15th, 16th, 17th, 21st October 2008

JUDGMENT

Stephen Smith QC sitting as a Deputy Judge of the Chancery Division

Introduction

1. This is a dispute about two residential properties in Birmingham which has some unusual features.

2. The proceedings commenced in 2005 as a landlord's claim in the County Court for possession of residential premises, on the expiry of an assured shorthold tenancy by effluxion of time. They have since transmogrified into a High Court claim by the current occupant of the premises that the tenancy was a sham and the tenant was actually the beneficial owner of the premises, who had disguised himself as a tenant in order to claim housing benefit. Along the way, the claimant landlord has acknowledged that although he is the registered owner of the premises he is not their beneficial owner; the true beneficial owner (according to the landlord) has since been joined to the proceedings as the second claimant. The tenant himself denies that he is or ever was the beneficial owner of the premises; two of the tenant's children, however, do claim a beneficial interest in the premises.

3. All the parties are related and all appeared to be getting along well together (at least to the outside world) until two seemingly unconnected events in the last 6 years or so. The tenant and the occupant of the premises were married but separated in the latter part of 2004, the occupant alleging domestic violence against the tenant; they are now divorced. The tenant is the brother of the claimants. Although nominally the first defendant, the tenant supports his brothers' claim for possession against his former wife. If the claim is successful, three of the tenant's children who continue to live with their mother will also be evicted, one of whom is still of school age. In the event that it is found that the tenant has no beneficial interest in the premises, the premises will not form part of the tenant's estate for the purposes of the ancillary relief proceedings brought by his former wife.

4. The other event concerns a fourth brother, who is not a party to these proceedings. He is very dissatisfied with dealings he had with one or both of the claimants, and he has brought his own (separate) High Court proceedings against them. He also expresses disgust at the way his brothers are proceeding against his erstwhile sister-in-law and her children (his nephews and nieces).

5. Two of the tenant's adult children are also defendants. They were the purchasers of different premises which they acquired from the non-party brother in 2002. That brother acknowledges that although he was the registered owner of those premises, he was never the beneficial owner of them; he says the

premises were beneficially owned by the tenant (in disguise again, so that he could claim housing benefit). That claim too is denied by the tenant: he says that those premises were also owned beneficially by the second claimant and his occupation of them was pursuant to a lease.

6. The second claimant makes claims against the tenant's adult children – his nephew and niece – in connection with an oral arrangement for the sale of the latter premises which he says he made with them in 2001. The nephew and niece accept that they purchased the premises in 2001, but they claim that the true vendor was the non-party brother as trustee for the tenant, their father, not the second claimant, their uncle, and that the latter therefore has no claims against them. Their father, however, denies that he was the vendor.

7. None of the members of the family has ostensibly accumulated much by way of wealth or income, apart from the second claimant. The two elder brothers have been claiming state benefits for themselves and for their families for many years: indeed, the tenant says that he has not worked since about 1981 when – aged 28 - he was made redundant from a job in Manchester, and that he has been living largely on benefits for the past 27 years.

8. The family is now deeply fractured, with brother making allegations against brother, husband against (now former) wife, father against child, uncle against nephew and niece, and vice versa. As if this were not enough, a number of those allegations are of criminal activity, including tax evasion, social security fraud, domestic violence, dishonesty and drug smuggling, not all of which I can avoid having to consider during the course of my ruling. All of the protagonists gave evidence at the trial.

9. Before I can begin to resolve the parties' disputes raised for determination in these proceedings, however, I must first set out more information about the family and its history. Most of this account is common ground; where it is not common ground and I do not expressly or impliedly reserve a finding, the account should be taken as recording my findings of fact.

The family history

10. The head of the family was Bashir Ahmed Mirza. Bashir was born in 1925 in Sind in undivided India. He arrived in the UK some time in about the early 1960s, having left behind in Pakistan his wife, Malkaperveena, and children. Bashir and Malkaperveena had five children, four of whom were sons: Jahanghir (now aged 55), Saleem (now aged 53), Naim (now aged 48) and Nasir (now aged 47). Their daughter has taken no part in these proceedings. In the introductory narrative above, Jahanghir is the brother described as the tenant, and Saleem the

brother who has now fallen out with his other brothers and supports the claims of Jahanghir's former wife, Tahira. The first claimant is Nasir and the second claimant Naim.

11. Malkaperveena and the five children arrived in the UK from Pakistan in the late 1960s and joined Bashir, who was then working in King's Langley in Hertfordshire; the family settled in Hemel Hempstead.

12. In about 1971 Saleem left school and went to college in Openshaw in Greater Manchester. Whether by coincidence or not, the family moved north at about the same time and settled in Stockport. In about 1975 a property known as 2 Buller Road, Longsight, Manchester was purchased for the family to live in. The property was not purchased in Bashir's name but in Jahanghir's, then aged 22. Jahanghir says this was done because Bashir was not well and the lender of the purchase monies (who happened to be the vendor of the property) wanted Jahanghir to be the person responsible to him for the payment of the instalments of purchase price which were left outstanding on completion. Jahanghir says that Bashir paid the deposit on the purchase and as far as he was concerned the Buller Road home was his father's property.

13. Jahanghir first worked as a taxi driver in Manchester, and then he became a bus driver with the Greater Manchester Bus Company. Tahira arrived from Pakistan to be Jahanghir's wife in 1977, then aged 22; their first child, Shakeel, was born not long afterwards, in 1978.

14. Tahira speaks only Urdu and gave her evidence through an interpreter. She does not read. She appeared before me with one arm in a sling in consequence, she said, of violence directed against her in the previous week by Jahanghir, which had caused her to seek and obtain an exclusion order against him. There has been at least one previous exclusion order made against Jahanghir by the Family Proceedings Court (in 2004). Shakeel, their eldest child, said in evidence that Tahira "has been through hell" with Jahanghir.

15. Tahira said that the problems in her marriage were long-standing and began on her arrival in the UK (ie over 30 years ago), but as part of her culture she was obliged to stay with Jahanghir. Cultural influences also meant that Tahira did not expect to be involved in discussions about financial affairs, and she was not involved; hence it came as a considerable shock to her in 2004 to learn how the structure of those affairs might impact on her situation following her separation from Jahanghir.

16. Jahanghir left his employment with the Greater Manchester Bus Company in 1981, after experiencing what he described as a back problem and severe arthritis. His evidence is that he was given a redundancy payment of between £3000 and £4000, which he gave to his father. He says that he has not worked since. He has been claiming state benefits for the last 27 years and says that "all my money" has been used "to support my family, to top up my benefits". When he left the bus company Jahanghir had two children to support; thereafter he and Tahira had four more children. Although he says he was never engaged in remunerative employment after 1981, he obviously did manage to find support for his immediate family of 8 people (including himself), until relations broke down completely in 2004.

17. After he had completed an OND in mechanical engineering at Openshaw Technical College, Saleem studied for an HND at Manchester Polytechnic. When he completed those studies in or about 1976 it is not clear on the evidence whether he obtained remunerative employment. If he did, there has been no suggestion that he amassed any significant wealth in the process.

18. Naim, the second youngest brother, left home in 1978 to study in the vicinity of Brighton (Naim said he studied aeronautical engineering at Sussex University, but Saleem denied this). Naim was the son of whom Bashir was the most proud, because of his educational success. After graduating in 1981 Naim obtained a job with British Caledonian Airways based at Gatwick Airport and purchased a house in Shoreham-on-Sea, West Sussex. Some time thereafter Naim obtained a commercial pilot's licence and found employment in the Middle East with enormously wealthy and generous employers.

19. Naim's fortunes have continued to improve over the years and he is now, by the standards of the rest of his family, very well off: his evidence was that he owns his own aviation company and 10 properties, including the house in Shoreham-on-Sea and an apartment in Marrakech, as well as several houses in Birmingham and one in Nottingham. It is plain from the evidence that he has held numerous bank accounts over the years, several of which were offshore (including accounts in Jersey, France, Switzerland and Spain, according to Nasir). Naim's evidence is that until the breakdown in the family's relationships, he was supporting all or most of the other members of the family, principally by supplementing their incomes as and when needed, usually in cash.

20. When Naim purchased the house in Shoreham–on-Sea in or around 1981, he did so with the assistance of a mortgage. The house and the mortgage were taken in Naim's sole name.

21. Nasir, the youngest brother, left Manchester in 1982. He bought a small supermarket business in Alum Rock in Birmingham (known as Medina Supermarket), he says with financial assistance from his father. Nasir persuaded Bashir that all the family should move to Birmingham. The family moved to Birmingham in about 1983, into the small flat above Medina Supermarket: that is to say, at least Bashir and Malkaperveena, Nasir and Saleem moved there. It is not clear whether Jahanghir and Tahira and any part of their burgeoning family also moved into the flat, as Tahira said that around that time she and Jahanghir were on an extended visit to Pakistan (which in Tahira's case lasted for 2 years or thereabouts).

22. The ownership of the supermarket business is not something I have to determine. Although Nasir viewed it as his business, Saleem considered himself an owner as well. Saleem, however, did not overly concern himself in those days with such formalities. His attitude was what he described as the more traditional Pakistani attitude, viz. that all the property owned by family members was family property, in which all had an interest. It is clear that Saleem's younger brothers do not now subscribe to that approach, and I doubt that Naim ever did (though that is not to deny that Naim gave generous support as and when it was required).

23. Naim visited the family after the move to Birmingham and was disgusted at the squalor (his description, echoed by Saleem) in which the family was living. He told Nasir that better accommodation had to be found. Not long after that Nasir found a house to rent in Ralph Road, Moseley, Birmingham, and the family moved in.

24. When the Buller Road, Manchester, property was sold (not immediately in 1983, but some time later, perhaps as late as 1986), the proceeds of sale yielded £15,000 or thereabouts. Nasir says that a significant part of the Buller Road proceeds were used to finance the ailing supermarket business; and about £6,500 was used in the purchase of a new home for the family at 78 Wake Green Road, Birmingham. Naim says he also contributed to the purchase of 78 Wake Green Road, and remortgaged his house in Shoreham-on-Sea in order to be able to do so. The purchase was made with the assistance of a mortgage, and both the house and the mortgage were taken in Nasir's name. Later, when Nasir was experiencing marital difficulties, 78 Wake Green Road was transferred into Naim's name, and Naim executed a declaration of trust that the property was held for himself and Saleem in equal shares.

25. 78 Wake Green Road had 5 or 6 bedrooms and became the family home for a number of years. Bashir lived at 78 Wake Green Road (until his death in 1987) with Malkaperveena, as did Jahangir and Tahira and their six children, Nasir and Saleem. After Naim's marriage in 1989, Naim's wife went to live at 78 Wake Green Road, Naim having by then moved on from his job at Gatwick into his lucrative employment abroad.

26. The supermarket business was sold in 1989 or 1990. With the proceeds of sale two fast food businesses located close to each other in what was then the centre of Birmingham's clubland were purchased. The names of these changed from time to time, but they were most often referred to in the evidence as "Mr. Britt's" and "Mermaid Fish Kebab House". They sold fish and chips, pizzas, kebabs and the like.

27. These businesses operated for 7 years, possibly longer. Formally they appear to have been conducted as a partnership between Nasir and Saleem. In the early years, according to the evidence, the takeaways did very well: Nasir says that each made a net profit in excess of £30,000, though I have no documentary evidence to support this and do not know whether this was after money was taken out for family members. In those early years, the takeaway businesses were open for most of the night, 7 days each week (from about 5 or 6 pm until 3 or 4 am).

28. According to the evidence, Birmingham's clubland relocated elsewhere in the mid-1990s and in consequence the takeaways soon began to fare less well. In 1997 at least one of the leases was surrendered or assigned, but the evidence does not disclose for exactly how much, though it was in excess of £50,000. With the proceeds of sale Nasir acquired a Post Office business in 1997.

29. Saleem does not appear to have benefited from the winding down of the takeaway businesses, although nominally at least he appears to have been a partner in them. One of Saleem's grievances with Nasir is that the latter did not pay any or sufficient national insurance on Saleem's behalf whilst the takeaway businesses were operating, which meant that when he subsequently presented his claims for state benefits, Saleem was disadvantaged.

30. Various witnesses gave evidence that Saleem was not often around, or was abroad for a lot of the relevant time. Saleem's own evidence gave some support for that picture: he testified that in the early 1990s he was badly injured in a major road traffic accident whilst on holiday in Spain, and had to spend many weeks in hospital in Barcelona; later in the 1990s, he was arrested in Pakistan on one or more charges of smuggling heroin, and in consequence spent the next 2 ½

years in jail in Pakistan. The winding down of the takeaway businesses and Nasir's acquisition of the Post Office business appear to have coincided with Saleem's period of incarceration in Pakistan.

133 Springfield Road, Molesley, Birmingham

31. 133 Springfield Road, Molesley, is the property purchased by Shakeel and his sister Haleema, two of the children of Jahanghir and Tahira, early in 2002. Saleem accepts that from 1990 until 2002 he was a bare trustee of the premises. One of the principal questions I have to resolve in these proceedings is, who was the premises' beneficial owner before the sale to Shakeel and Haleema?

32. 133 Springfield Road is a semi-detached dwelling-house. Naim's evidence is that he decided in 1990 to buy a property for investment. He says he saw 133 Springfield Road advertised in the local newspaper and considered it to be suitable for his purpose. The level of Naim's remuneration from his employers in 1990 was very high: his basic salary was US $125,000, additionally he received an expenses allowance in cash, a bonus and occasionally substantial tips. By 1990 Naim already had at least two offshore bank accounts, with Hill Samuel & Co (Jersey) Ltd.

33. Naim says that as he was travelling a lot at this time, he wanted the purchase to be made in Saleem's name. At that time Saleem did not own a property of his own, and therefore had no mortgage in his own name, whereas Naim himself did (the house in Shoreham), and so did Nasir (78 Wake Green Road). Saleem denies this: his evidence is that he agreed to purchase the property in his name as a home for Jahanghir and his family and the decision had nothing to do with Naim.

34. Saleem was able to persuade the Leamington Spa Building Society to make an advance on mortgage of approximately 75% of the £58,000 purchase price of the property, viz. £43,000.

35. Contracts for the purchase were exchanged on 31st August 1990. A deposit of £5,200 was paid on exchange, leaving a balance of £52,500 together with stamp duty and sundry expenses payable on completion on 10th September 1990. The advance from the mortgagee of £43,000 left a further £10,871.50 to be found by the purchaser.

36. Naim says that he provided all the funds which were not raised by the mortgage. He refers to a letter he wrote to Hill Samuel Jersey dated 13th June 1990, in which he requested Hill Samuel to send a cheque for £15,000 made out to Saleem; if, however, there were insufficient funds in his Hill Samuel Jersey

account, Naim requested a cheque to the nearest figure to be sent to his home address.

37. There must have been less than £15,000 (or the equivalent) in Naim's Hill Samuel Jersey accounts when his request was received, because what Hill Samuel did in response was to send Naim a cheque for £13,156. Naim deposited that cheque in his Royal Bank of Scotland account in early July 1990, and shortly afterwards wrote a cheque for £13,000. Naim says that that money, together with further monies to make up the shortfall which he also provided from his own funds, covered the £5,200 deposit payment on 31st August and the final balance of £10,871.50 on completion.

38. Saleem does not deny that the part of the purchase price not received from the mortgagee may have been sourced from Naim's bank account(s). Saleem says that Jahanghir used to hide his savings in Naim's accounts. Saleem said that Jahanghir did this for two reasons: first because it meant that the authorities did not see money standing in Jahanghir's name, and therefore happily carried on paying him benefits, and secondly because there was no tax to pay on the interest received on the monies because the account(s) were held offshore.

39. Naim says that on completion he left a substantial sum of money with Nasir to pay for repairs to the property and to cover the mortgage payments. He says that the property was soon let out to students by Nasir, but after a while Jahanghir asked whether his family could rent 133 Springfield Road. Naim agreed that they could, and Jahangir, Tahira and their six children moved in.

40. The plan was for Jahanghir to claim housing benefit to cover the rent payable. I have not seen a written tenancy agreement and there is no evidence that there ever was one; Jahanghir said that at that time Birmingham City Council did not require to see a written agreement before agreeing to pay housing benefit, just a rent book. Naim said that the monies paid by Jahanghir went to meet the payments due under the mortgage, but if they were insufficient he would arrange for transfers as appropriate from another of his accounts.

41. Naim says that in about 1996 Jahanghir approached him about improvements he wished to see made to the house at 133 Springfield Road. These concerned the addition of a further bedroom, an extra or extended kitchen, new windows and more living room space. Naim says he was agreeable to the works being carried out and he provided Jahanghir with the necessary funds. The works were carried out.

42. The mortgage on 133 Springfield Road with the Bradford and Bingley (following their takeover of the Leamington Spa Building Society) was redeemed in January 2001. Naim says that the cost of the redemption was £35,597.13. He produced a bank statement on a Woolwich account in his name which showed that a cheque for £30,597.13 was drawn on that account on 29th January 2001. Naim says that he paid the balance of £5000 in cash.

43. According to Naim, therefore, in the just over 10 years since 133 Springfield Road was purchased, he paid in respect of that property £5,200 + £10,871.50 (both in 1990) + £5000 + £30,597.13 (both in 2001) = £51,668.63 + the mortgage instalments (including £12,402.87 in reduction of the capital originally advanced) + the cost of the new extension and further improvements. In aggregate, his evidence is that he invested considerably in excess of £64,000 in the property. The fact that a capital investment of this magnitude or thereabouts was made in 133 Springfield Road by someone is indisputable.

637 Shirley Road, Solihull, Birmingham

44. Later in 2001, according to Naim, he found a further property in which he wished to invest, being 637 Shirley Road, Solihull. Naim says he found the property through a local agent, and that he, Jahanghir and Nasir went to view it; the property had 5 bedrooms, a garage and a garden. It was obvious that it needed a lot of work to be carried out on it: Naim obtained a report from a structural surveyor which had been commissioned by an earlier would-be purchaser and which revealed some significant structural issues. That potential purchaser pulled out of the purchase after the report was received. In consequence, Naim was able to purchase the property for what he considered to be a good price of £135,000.

45. A copy of an estate agent's Confirmation of Sale dated 11th December 2001 and addressed to "Mr. Mirza" at Naim's home address at the time (133 Widney Lane, Solihull) has been produced. Also produced was a copy of a written set of instructions to Cunningtons solicitors (under the name "Direct Dial Conveyancing") to act on the purchase of 637 Shirley Road, which is dated 15th December 2001 and signed by Naim.

46. Naim says that because of pressure of work he left the purchase in the hands of Nasir.

47. At about the same time, Naim says that he was urging his nephew Shakeel to get onto the property ladder. Shakeel had by then become an employee of Xerox, the copying company. Shakeel was to be married in the near future, but was at the time living at 133 Springfield Road.

48. Shakeel was keen to purchase 133 Springfield Road. Naim says that after some toing and froing, it became clear that the maximum amount Shakeel's intended mortgagee would lend to Shakeel and his sister Haleema (Shakeel's wage on its own was insufficient) to assist with the purchase, was £70,000 against a stated price of £95,000 (ie requiring a deposit of about 25%). Naim says he therefore agreed to sell 133 Springfield Road to Shakeel (and Haleema) for £95,000; to lend Shakeel the deposit of £25,000 to be repaid "as and when he could" or when the property was eventually sold; and, says Naim, Shakeel agreed to pay Naim an additional £50,000 on the eventual sale of the property. This latter element was agreed because, according to Naim, he was of the view that the 133 Springfield Road property was then worth much more than £95,000.

49. The arrangement I have just described was not put into writing. Naim says that it was reached at a meeting at which Nasir and Jahanghir were present, as well as himself and Shakeel. According to Naim, Nasir and Jahanghir, Saleem was not involved in the discussions. Saleem says that he was asked by Jahanghir to appoint solicitors to conduct the sale of 133 Springfield Road to Shakeel.

50. Shakeel and Haleema instructed Taylors, solicitors, to act for them on the purchase of 133 Springfield Road; Saleem instructed Seghal & Co to act on the sale. Naim, as I have already pointed out, instructed Cunningtons to act on the purchase of 637 Shirley Road.

51. The movements of money in connection with these two transactions were as follows.

52. As regards the purchase of 637 Shirley Road, according to Cunningtons' completion statement dated 5th March 2002, the total cost was £137,085.27 (not including the cost of the surveyor's report which Naim says he paid for directly himself). Cunningtons' statement breaks the £137,085.27 into 4 elements: i) £150 was received as a deposit for their fees; ii) £13,500 was received as a payment on account on 30th January 2002; iii) £94,692.63 was received on 31st January 2002; iv) leaving a balance to be paid of £28,742.64.

53. Element (i) was paid by a cheque for £150 drawn on Saleem's Halifax account on 14th December 2001. Element (ii) was paid by a cheque drawn by the Woolwich on 29th January 2002 and debited to Naim's account with that bank. Element (iii) was received from Meghal & Co, being the proceeds of sale of 133 Springfield Road. Element (iv) was paid by a cheque drawn by the Woolwich on 7th February 2002 and debited to Naim's account with that bank.

54. Just over £42,000 of the purchase price of 637 Shirley Road thus came directly from one of Naim's onshore bank accounts.

55. Taylor's completion statement (addressed to Shakeel and Haleema) shows that the total cost of their purchase of 133 Springfield Road was £96,621.62 (including stamp duty of £950 assessed on a purchase price of £95,000). That statement breaks the cost down into 3 elements: 1) £70,000 received from the Halifax (the mortgagee); 2) £125 received in respect of the local search; and 3) a balance of £26,496.62.

56. The evidence does not disclose the source of the £125. The £26,496.62, however, was paid by a cheque drawn by the Woolwich on 24th January 2002 and debited to Naim's account with that bank. Naim thus withdrew funds from his account which, on his evidence, came back to him very soon afterwards in the form of the sale proceeds of 133 Springfield Road. His explanation for this is that the intended mortgagee of 133 Springfield Road, the Halifax, required a deposit towards the purchase to be provided by Shakeel and Haleema; that they had no funds to finance the deposit; and that therefore he agreed to lend the funds to them.

57. I have already referred to the fact that structural issues with 637 Shirley Road had been flagged up by a surveyor prior to the purchase. A firm of architects was instructed to draw up plans for substantial improvements to the property. Naim says the architects were instructed by him; such of the relevant documents as have found their way into the trial bundles are addressed to "Mr. N Mirza". None is addressed to J Mirza.

58. The architects made an application for building regulation approval for a single storey extension at the rear of the 637 Shirley Road, which Birmingham City Council received on 29th August 2002. Approval was granted on 30th September 2002. This does not appear to have been communicated by the architects to "Mr N. Mirza" until 28th November 2002.

59. More work than just a single storey extension was carried out. According to the evidence of more than one witness the premises were almost gutted, and a significant amount of work was done by family members for no reward. Nasir has produced a document from a "M. Khan" trading as "DD Builder & Contractors" addressed "To Whom It May Concern" which says:

> "I can confirm that our firm was responsible for sub-contracting the work out to meet the client's needs. We did extensive work to the property. We stripped the house down to the bare brick and then re-built the property. The work commenced in mid October 2002 and was concluded at the beginning of January 2003."

There is attached to that document a schedule headed "637 Shirley Road Moved in 01.05.2004". That describes as the works carried out: building the kitchen

extension and installing the new fitted kitchen, replastering, rewiring and redecorating the house, installing central heating and new pipework throughout, converting a loft, installing a bathroom and 2 additional toilets and a new roof. The total cost is stated as £42,500.

60. The DD Builder documents are helpful in showing the amount of the work which is likely to have been carried out, and the likely level of cost, neither of which was disputed. It is not necessary for me to decide the dispute which arose between the witnesses (especially between Shakeel and Nasir) as to whether DD Builder did carry out the works.

61. There is also evidence of block paving having been laid to the front and rear of the premises, for a total cost of £4,500, by an operation called Regency.

62. Naim's evidence, supported by Nasir, is that he funded the building works with his own monies.

63. Some work which was carried out at 637 Shirley Road but which was not paid for by Naim was the installation of new double glazing. There is no doubt that Shakeel paid for this. Shakeel's evidence is that he did this at the request of his father Jahanghir. Jahanghir, Nasir and Naim tell a different story: they say Shakeel signed up to a contract for the installation before it had been approved by Naim. When Naim found out, he was very angry and refused to reimburse Shakeel the cost of windows he did not want.

Occupation of 637 Shirley Road

64. There does not appear to be a dispute that the building works were completed in the Spring of 2004 and that Jahanghir, Tahira and family moved into 637 Shirley Road soon afterwards (albeit without Shakeel who had recently married and who of course now had his own home at 133 Springfield Road).

65. Naim and Nasir, supported by Jahanghir, say that the family's occupation was pursuant to a lease. Nasir has produced an assured shorthold tenancy agreement dated 7th May 2004. This is the lease which Tahira, Shakeel and Haleema assert is a sham.

66. In the agreement the landlord of 637 Shirley Road is said to be Nasir and the tenant Jahanghir. The term of the lease is 12 months from 1st May 2004, and the rent £600 per month. The landlord's agent is given as an organisation trading under the name Point Four.

67. The agreement, which is in a standard form, contains a warranty by the landlord:

"that he is the sole owner of the leasehold or freehold interest in the property and that all consents necessary to enable him to enter into this agreement (whether from superior lessons [sic], mortgages [sic] or other) have been obtained."

On Nasir's case, that warranty does not tell the whole truth. I imagine what happened is that nobody paid any attention to the small print, or understood it or cared about it if they did.

68. The agreement was signed by someone on behalf of the landlord (presumably someone at Point Four), and by Jahanghir as tenant.

69. Nasir produced a rent account statement prepared by Point Four for the 1 year term. This shows £600 falling due on the first day of each month. In May 2004, a payment of £270 was received by Point Four in cash and described as "amount received towards rent from tenant". In June 2004 2 such payments of £270 in cash were received and recorded in the same way. The same occurred in July 2004; also in July a bank transfer was received in the amount of £271.60, seemingly directly from Birmingham City Council. On each of 21st August and 23rd September a payment of £542.32 was received by bank transfer directly from Birmingham City Council. The payment received on 23rd September was the last payment received. At the end of the contractual term, the rent was stated to be £3893.76 in arrears.

70. It seems that the reason why the rent ceased to be paid to Point Four after 23rd September 2004 is because shortly afterwards, on 13th October 2004, Tahira obtained an order against Jahanghir from the Solihull Family Proceedings Court, excluding him from 637 Shirley Road until 31st January 2005. The terms of that Order are interesting:

"1. The respondent Jahangir MIRZA shall not evict or exclude the applicant Tahira MIRZA from 637 Shirley Road, Hall Green, Birmingham or any part of it AND

2. The respondent Jahangir MIRZA shall not occupy 637 Shirley Road, Hall Green, Birmingham ...

3. Having left 637 Shirley Road, Hall Green, Birmingham, the respondent Jahangir MIRZA shall not return to, enter or attempt to enter it.

4. The respondent Jahangir MIRZA shall pay the rent for 637 Shirley Road, Hall Green Birmingham."

71. Paragraph 4 of the Order was a deliberate inclusion, as is clear from the letter from Tahira's solicitors, Millichips, to Nasir's solicitors dated 29th October 2004. On 28th January 2005, Millichips wrote a further letter to Nasir's solicitors:

"Our client is prepared to pay rent for the property on the basis that she is handed a tenancy agreement in her sole name, and arrangements must be made that the tenancy agreement is prepared via a reputable agent."

72. It is odd to see Tahira in 2004 and 2005, with the benefit of legal advice, accepting that the tenancy agreement was valid, and not asserting that Jahanghir had a beneficial interest in 637 Shirley Road. It also appears from the documents that in the early summer of 2005 Tahira made her own claim for housing benefit (seemingly in vain), relying on the (by then expired) tenancy agreement. The inconsistency with her position 4 years later in these proceedings has not been explained.

73. On 19th October 2004, Nasir served notice to repossess 637 Shirley Road on Jahanghir and Tahira, to expire on 30th April 2005

74. It is not clear to me on the evidence I have heard what has been happening since early 2005 so far as concerns Jahanghir's occupation of 637 Shirley Road. It is clear that he has been in occupation of at least one room in the house from time to time, and indeed he was in occupation until just before the trial commenced (when a further exclusion order was made against him by the Family Proceedings Court).

General comments on the witnesses

75. The level of animosity between the protagonists in this story, the fact that they are all members of the same family, and the nature of the issues at stake, combine to mean that especial caution must be exercised when making any critical findings of fact.

76. The most reliable witness amongst the protagonists was in my judgment Naim. His account of many of the payments which were made was supported by documentation, and his evidence was on the whole given concisely and carefully. I could not discern a particular axe which he had to grind vis a vis any of his relations: as he has been away from the family for a large part of the past 30 years (first studying in the South East of England, then working abroad) he was not part of the day to day events in Birmingham which have ultimately led to the breakdown in the relationships. Naim has amassed significant wealth and has no obvious pressing need to obtain possession of 637 Shirley Road.

77. Tahira remained dignified and restrained notwithstanding her plight. However, she could give only limited evidence from her own knowledge on the more critical aspects of the case, because of her lack of direct involvement in the financial matters to which I have referred. Tahira gave an impassioned plea for justice before she left the witness box, pointing out that after suffering what she

portrayed as almost 30 years of misery with Jahanghir, it is unfair that he and two of his brothers should now conspire to evict her from what she thought was her family home.

78. The other family witnesses were less helpful.

79. Jahanghir was not an honest witness. As I shall explain below, in my judgment his evidence about the extent of his involvement in the supermarket and takeaway businesses was untruthful: he did work in the businesses for a substantial part of the time, and I have no doubt he received payment (in cash) for his work. It must follow from that finding that Jahanghir made false and dishonest claims for social security benefits, perhaps for as long as 12 years or longer, and made no payments of tax or national insurance on his secret earnings.

80. Nasir's evidence was also untruthful when describing the extent of Jahanghir's role in the businesses. Nasir was Jahanghir's principal employer in the supermarket and takeaway businesses and would have known how much and how regularly he used to pay Jahanghir; it was certainly more than the occasional "couple of hundred quid" which eventually he admitted in the witness box. His denials that Jahanghir worked in the businesses and was paid by him, reflect to his general discredit.

81. Saleem, Shakeel and to a lesser extent Haleema gave the impression of having axes to grind with other family members.

82. Saleem, according to his own evidence, was closely involved in assisting Jahanghir to continue his benefits frauds, because – so he says - he lent his name to the purchase of 133 Springfield Road so that the authorities would not suspect that Jahanghir was earning an income. To similar effect, on his own evidence, the accountants of the businesses – and therefore the tax authorities - were misled as to the true ownership of those businesses, because they were never informed of Jahanghir's interest; since he was involved in dealing with the accountants, Saleem was also party to this deception. I address further aspects of Saleem's evidence below.

83. Shakeel disputed that Naim was the beneficial owner of either 133 Springfield Road or 637 Shirley Road, asserting that his father Jahanghir was the beneficial owner of both properties, but Shakeel could not give any meaningful explanation of how his father could have accumulated sufficient capital to make the investments which were made into those properties (see below). Shakeel also could not explain why Naim was involved – as on Shakeel's evidence Naim was involved – in the redemption of the Bradford & Bingley mortgage over 133

Springfield Road: on the understanding he says he has of the former ownership of that property, redemption should have been no concern at all of Naim's.

84. Shakeel also denied that Naim was involved in the sale of 133 Springfield Road to him. Naim, however, says that he received (from Shakeel or Haleema) a copy of a Statement of Account prepared by Taylors, the solicitors instructed by Shakeel and Haleema, which was addressed to Shakeel and Haleema and which set out the balance required from Shakeel and Haleema to complete the purchase of 133 Springfield Road, and thus the exact amount required from Naim. I find that Naim did receive that document, and that it was more than likely Shakeel, whilst carrying out work for Xerox at the offices of Land Rover (whose fax transmission details run along the foot of the document), who faxed it to Naim. The reason why it was faxed to Naim was so that Naim knew exactly how much money he needed to lend to Shakeel and Haleema by the time of completion.

85. A further point against the reliability of Shakeel's evidence was his assertion in paragraph 11 of his first witness statement that he and Haleema borrowed £20,000 from Halifax Building Society on 11th March 2002 (and £10,000 from MBNA), to pay for renovations to 637 Shirley Road. It transpired at the trial, however, that the £20,000 loan was not used, or hardly used at all, and was repaid in full on 9th October 2005.

86. Haleema gave only limited written evidence, and it is clear that her involvement in relevant events was not significant. In her short witness statement made on 27th August 2008 she also said that £20,000 was borrowed from Halifax to pay for improvements to 637 Shirley Road without disclosing that that loan was hardly used at all and was repaid in 2005. At trial, however, she said that the £20,000 loan was arranged with a view to the construction of a conservatory at the rear of 637 Shirley Road which did not take place.

87. Haleema's involvement in the purchase of 133 Springfield Road was only ever to assist Shakeel to raise the necessary amount on mortgage. In 2004 she transferred or assigned her interest in 133 Springfield Road to Shakeel (with the consent of the mortgagee).

Decision

88. The key questions concern the beneficial ownership of 133 Springfield Road and 637 Shirley Road. Central to those questions is the ownership of the money used to fund the respective purchases and the refurbishment of the properties.

The beneficial ownership of 133 Springfield Road and 637 Shirley Road

89. The Defendants' case is that all that money belonged to Jahanghir. He amassed it, they say, by salting away his earnings – received in cash and tax free – from the supermarket and later the takeaway businesses.

90. The Defendants say that Jahanghir was effectively a full-time employee (some witnesses aserted, a partner) in these businesses. A photograph produced by the Defendants during the trial of Jahanghir present in the Medina Supermarket on an unspecified occasion was of little value. Of greater value was a later photograph showing Jahanghir preparing to cook food in one of the takeaways. He is shown wearing a cook's overalls. His evidence was that he had just popped into the takeaway that day to cook himself a pizza to eat because he did not trust the employees to cook it for him, an account which sounded laughably far fetched.

91. Tahira, Shakeel and Haleema all gave evidence of Jahanghir's absences during working hours, and how he could be found in the supermarket, when it was operating, and later in the takeaways. Shakeel said that he would regularly take his siblings to his father in one of the takeaways for their supper, and Haleema said that her father would be absent for most of the night when the takeaways were operating in their heyday.

92. Shakeel also said that he would regularly accompany his father to purchase provisions for one or other business from the cash and carry supermarket. Saleem supported this evidence, though, as I have already recorded, Saleem was often absent abroad during the relevant times.

93. Further support for the notion that the burden of obtaining supplies for the businesses would have fallen on Jahanghir, at least from time to time, is supplied by the evidence of Nasir's conviction in May 1995 at Birmingham Magistrates Court for the offences of driving whilst disqualified, driving with excess alcohol and driving without insurance. Nasir was put on probation for 2 years and banned from driving for 3 years.

94. The Defendants called corroborating evidence from Mohammed Shafiq and Mohammed Usman. Mr. Shafiq worked at Medina Supermarket between 1986 and 1991. He said that from his perspective all three brothers, viz. Nasir, Saleem and Jahanghir were working in that business, which he considered to be a family business, though Jahanghir was not there all the time. I see no reason to believe that Mr. Shafiq was not telling the truth.

95. Mr. Usman's evidence was less helpful. The bulk of it was directed to how he had been roped into spying on Tahira by Jahanghir (including helping to monitor her telephone calls), especially when Jahanghir – then one of Mr. Usman's friends – was away in Pakistan. Jahanghir was suspicious that Tahira was seeing other men (a suspicion for which I have seen no grounds). Mr. Usman fell out with Jahanghir when the latter failed to pay him the agreed surveillance fee on his return from Pakistan. Mr. Usman told me that Jahanghir had told him that he was an equal partner in the takeaway businesses. I have little doubt that Jahanghir could be a braggart, and see no reason to disbelieve Mr. Usman. But whether what Jahanghir may have told others was always truthful, is a question one has to approach with a good deal of scepticism.

96. It is not possible to begin to put a reliable figure on how much cash Jahanghir might have received in respect of his efforts in the supermarket and takeaway businesses over the period 1983-1997 (or until the last takeaway finally closed). The very limited accounting evidence put before me showed that the supermarket's annual turnover was in the low £1000s, and the takeaway businesses' annual turnover was in the low £10,000s. An accountant's letter dated 11th September 1995 addressed "To whom it may concern", stated that no annual accounts had yet been prepared for either the supermarket or fast food businesses (I cannot understand how this was possible given the partners' obligations to make tax returns), but according to the VAT records "the net earnings will be around £10,000".

97. The financial evidence was thus sadly very limited and unimpressive. And, as Saleem candidly said, it reflected what the business' accountants were told, which may not have been the truth. In the light of the views I have formed about the honesty of Nasir, Jahanghir and Saleem as witnesses, I would be very surprised if the accountants were told the whole truth. Indeed Nasir, as I have already recorded, gave oral evidence which contradicted the documents, saying that in their heyday the takeaway businesses were each making in excess of £30,000 profit per year.

98. The Defendants not having put before me evidence from which I can draw any reliable conclusion as to the monies which Jahanghir may have received from the businesses, it would be wrong for me to make any findings other than that he did receive cash from them from time to time.

99. In addition to maintaining his family of 8, Jahanghir also had other outlets for his money. Jahanghir "liked his cars", according to Shakeel. He was, so Shakeel said, particularly fond of Audis and Volkswagens, and Jahanghir and Shakeel would attend car auctions at which Jahanghir would occasionally purchase a car

for £2-3,000. As this evidence was contradicted by nobody, I see no reason not to accept it. Jahanghir also told me that he returned to Pakistan from time to time (at a cost which he said Naim met).

100. The Defendants also scoffed at the evidence of Naim that he used to give money to help feed and clothe Jahanghir's family: it appeared that from their perspective the family were well enough fed and clothed with what Jahanghir himself was able to provide (this of course is not inconsistent with Naim having advanced money to Jahanghir unbeknown to the Defendants).

101. In this connection, however, it is significant that in his first witness statement, Shakeel acknowledged that Jahanghir often did not have sufficient money of his own to fund expenditure which was required: Shakeel said that whenever something big needed to be purchased, "*my father would ask his brothers to help him out when they could*". This evidence would tend to suggest that Jahanghir did not have a secret hoard of money to which he could himself resort as and when he needed to do so.

102. As I have already recorded, 133 Springfield Road was purchased in 1990 for £58,000, with the benefit of a mortgage advance of £43,000. The balance of the purchase money (and costs), ie over £15,000, was undoubtedly funded from Naim's account with Hill Samuel in Jersey. The allegation of the Defendants that that £15,000 represented money which Jahanghir had salted away in Naim's name is not only bereft of evidential support, it is counter-intuitive. It defies belief that Jahanghir would have secretly saved that amount of money.

103. I have also calculated that over the next 10 years a further £50,000 or thereabouts was invested in 133 Springfield Road. The notion that Jahanghir could have financed that amount of an investment is again bereft of evidential support and counter-intuitive.

104. By the time 637 Shirley Road was purchased in 2001, Jahanghir's moonlighting days for his brothers had concluded, and nobody has suggested that he obtained work with anyone else. The Defendants nonetheless suggest that the monies to fund the transactions in 2001 were provided by Jahanghir. To recap, that means that, according to the Defendants, Jahanghir provided the £25,000 deposit loan to Shakeel, the £13,500 payment on account to Cunningtons on 30th January 2002, and the balance of £28,742.64 paid on 7th February 2002; in short, in excess of a further £67,000 (in addition to the £65,000 previously outlayed on 133 Springfield Road). It is not credible that Jahanghir could have saved that large amount of money.

105. And then there are the payments for the substantial works of improvement over the course of the next two years: they cost a further £45,000+. Again, I do not believe that Jahanghir could have financed any significant part of that expenditure.

106. The Defendants' case, in short, has no evidential foundation and is unbelievable. Whilst Jahanghir may have boasted to his wife and children that he was able to afford and was paying for all the expenditure with his own monies, and they, credulously, may have believed him, in my judgment it is not possible that he was doing so.

107. In contrast, everyone is agreed that Naim is very wealthy. The notion that Naim could afford to make these investments, and did make them, is the obvious answer to the financing conundrum. I therefore accept the Claimant's evidence that Naim made the capital investments in 133 Springfield Road and in 637 Shirley Road from his own funds, and I find that Naim was the sole beneficial owner of the former property until Shakeel's purchase of it in 2002, and the sole beneficial owner of the latter property on its purchase in 2002.

108. My decision means that until 2002, 133 Springfield Road was held on trust by Saleem – the registered owner – for Naim as sole beneficiary. Saleem, the trustee, denies that Naim was the beneficiary. Ordinarily, one would expect a trustee to know the identities of his beneficiaries, especially in an apparently close-knit family such as the Mirzas.

109. It is possible that Saleem did at all times know that Naim was the beneficial owner and that his evidence to me was simply untruthful. I have already recorded that he freely asserts that he was prepared to put himself forward as the owner of 133 Springfield Road to the Leamington Spa Building Society (and subsequently the Bradford and Bingley) and to the conveyancing solicitors involved, in order to enable Jahanghir to continue with his benefits frauds.

110. Another possibility is that Saleem was simply manipulated by his brothers, agreed to do whatever any of them asked him to do, without asking any questions and without giving the matter any deep thought, because it was for the general good of the family, as he saw it. I have a suspicion that this is likely to be a more accurate explanation of the position.

111. Apart from the beneficial ownership issues, a number of other points in Saleem's evidence were clearly wrong. His assertion that Jahanghir and perhaps also Nasir gave Naim £10,000 for the deposit on the Shoreham property in the late 1970s was contrary to the evidence of Naim and not supported by any

witness or any document. His further assertion in his second witness statement that the proceeds of sale of Buller Road (£15,000) belonged to Jahanghir and remained available to Jahanghir 4 years later when 133 Springfield Road was purchased, is also not supported by any other witness and is counter-intuitive: why would Jahanghir have waited for 4 years before putting that amount of capital to use in the purchase of a home for his family? It is noteworthy that later in the same paragraph of his second witness statement, Saleem makes the contradictory assertion that the deposit on 133 Springfield Road actually came out of money which Jahanghir had accumulated in Naim's name from his earnings in the supermarket; and that in the third paragraph of his third witness statement, Saleem claims that the proceeds of sale of the Buller Road property were invested in the supermarket business.

112. Whatever the explanation for these inconsistencies and discrepancies, I reached the firm view, having seen and heard the witnesses and studied the documentation available to me, that Saleem's evidence could not be taken to be reliable where it contradicted the evidence of Naim.

The claim to an interest in 637 Shirley Road post-purchase

113. During the course of the proceedings Tahira, Shakeel and Haleema have each counterclaimed to own a beneficial interest in 637 Shirley Road.

114. Tahira's claim was to "a matrimonial interest in [Jahanghir's] property .. by virtue of her being his spouse". That claim was misconceived and was rightly abandoned before the trial commenced.

115. The counterclaim of Shakeel and Halema was pleaded on the following bases:

(a) because they obtained a loan of £70,000 on 133 Springfield Road in order to assist Jahanghir to purchase 637 Shirley Road and because "the money was provided by ... Shakeel and Haleema on the understanding that the property at 637 Shirley Road was being purchased as a home for [Jahanghir and Tahira] and their children";

(b) because the works of renovation undertaken at 637 Shirley Road were undertaken with the assistance of monies obtained on loan by Shakeel and Haleema.

116. Oddly, and tellingly, in neither his first witness statement made on 4th August 2005 nor his second witness statement made 3 years later on 27th August 2008, did Shakeel assert that either he or Haleema had a beneficial interest in 637

Shirley Road, though he did claim that Tahira had a beneficial interest in that property.

117. The first of these bases of claim is clearly unsustainable. Whilst it is true that the £70,000 flowed through from the sale of 133 Springfield Road into the purchase of 637 Shirley Road, that money was paid by Shakeel and Haleema in respect of their acquisition of 133 Springfield Road. Save (perhaps) in a case of fraud, the same payment cannot represent the acquisition of an interest in the property intended to be acquired, and also (presumably by way of some form of tracing) an acquisition of an interest in whatever asset the vendor decides to apply the proceeds of sale to.

118. The second of these claims also cannot be sustained. There is evidence that Haleema obtained a loan (of £10,000), at least some of which she says she applied in respect of the cost of renovations to 637 Shirley Road, at the request of Jahanghir. There is no corroboration for this evidence and I am not prepared to accept it on the strength of Haleema's say-so alone. Naim's evidence, which I do accept, is that he paid for the works at 637 Shirley Road.

119. In any event, whilst it is not clear whether Haleema intended these payments to be a gift to her father or a loan, what is clear is that Haleema did not make the payments on the basis of any understanding, whether pursuant to anything said by her father or anyone else (least of all Naim or Nasir), that by making the payments she would become entitled to a beneficial interest in 637 Shirley Road. Indeed, in the witness box Haleema said that she did *not* expend the money with an expectation of acquiring an interest: she borrowed it in order to assist her father.

120. On that basis, the claim to a beneficial interest in the property cannot succeed. An interest under a resulting or constructive trust of the type claimed is not a default mechanism which springs into operation when no other viable means of repayment of funds is evident: the claim must have some foundation in the actual, inferred or imputed intentions of the parties (see ***Lloyds Bank plc v. Rosset*** *[1991] 1 AC 107* and ***Stack v. Dowden*** *[2007] 2 WLR 831*, per Lord Walker of Gestingthorpe at para. 18 et seq and per Lady Hale at para. 60).

121. The reliance on the decision in ***Hussey v. Palmer*** *[1972] 1 WLR 1286* is misplaced. In that case the Court of Appeal (by a majority) reversed the trial judge and found that an elderly widow's payment for the extension to her son-in-law's home was not intended as a gift (as contended for by the son-the-law) and it was not a loan (in his defence the son-in-law had denied that the payment was by way of loan, asserting instead that it was part of a "family

arrangement"). Lord Denning MR (with whom Phillimore LJ agreed) likened the case to one where a person acquires an equitable interest in a property by payment of part of the purchase price: an equitable interest can also be acquired by payment for an extension to the property (see p. 1290 E-F).

122. In ***Stack v. Dowden*** *(loc cit)* at para. 70, Lady Hale acknowledged that parties' intentions as to their beneficial interests in a property may change post-acquisition, for instance "where one party has financed ... an extension or substantial improvement to the property". However, the subsequent decisions of the Court of Appeal in ***James v. Thomas*** *[2007] EWCA 1212* and ***Morris v. Morris*** *[2008] EWCA 257* demonstrate that in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition.

123. In my judgment, there is nothing in this case which would justify a finding that Naim had any intention to dispose of any part of his beneficial interest in 637 Shirley Road to either Shakeel or Haleema at any stage. There is no evidence that Naim, the sole beneficial owner was even aware that Shakeel or Haleema were making funds available to Jahanghir, and no evidence that those funds were used to meet the costs of any of the refurbishments. For similar reasons I reject the alternative claim to a beneficial interest pursuant to a proprietary estoppels: there is no evidence of any relevant representation, encouragement or understanding.

124. I therefore dismiss the counterclaim of Shakeel and Haleema to a beneficial interest in 637 Shirley Road. I also dismiss their counterclaim to "damages" to reflect Naim's "unjust enrichment" arising from their allegations of contributions to the purchase and improvement of 637 Shirley Road. If Shakeel or Haleema have any valid claims against anyone in that regard, those claims could only be personal claims against their father Jahanghir.

125. It follows that there is no defence to Naim's claim for a declaration that he is the sole beneficial owner of 637 Shirley Road, nor to the Claimants' claim to possession of 637 Shirley Road. I shall therefore make those orders, postponing the date for possession by consent by 6 weeks, pursuant to Section 89 of the Housing Act 1980.

126. I shall also make an order against Jahanghir, the erstwhile tenant, for the payment of the arrears of rent, together with interest as appropriate. He did not contend that the tenancy agreement was a sham, and I do not find that it was. Whilst the motivation for the grant may have been to put Jahanghir in a position

in which he could make a claim for housing benefit, that motivation does not mean that the parties did not intend their arrangement to be any different from what it appeared to be on the face of the document relied upon, see ***Snook v. London and West Riding Investments Ltd*** *[1967] 2 QB 786* per Lord Diplock at p. 802 C-F. Indeed the reverse is true: if the arrangement was not a valid lease, the parties intentions would doubtless have been thwarted because no housing benefit would have been payable.

127. As regards mesne profits since the end of the tenancy, I shall make an order against Tahira alone, since no order is sought against Jahanghir, together with interest as appropriate. Whilst this may seem harsh on Tahira, she has been on notice since October 2004 that possession was required to be given up on 30th April 2005, she had solicitors advising her at the time, and her request through those solicitors for a fresh grant in her own name was rejected. She cannot reasonably have expected to remain in occupation rent-free if her and her children's claims failed, and her own abortive application for housing benefit in summer 2005 would tend to suggest that she did not.

The sale of 133 Springfield Road to Shakeel

128. My general preference for the evidence given by Naim over the evidence of Shakeel and Saleem leads me to prefer Naim's account of the arrangement reached regarding Shakeel and Haleema's purchase of 133 Springfield Road, with one substantial reservation. I summarised that account in para. 48 above. Essentially, according to Naim, he agreed on a sale to Shakeel and Haleema for £95,000 plus a further payment of £50,000 on the property's eventual sale; the immediate price was to be paid as to £70,000 obtained pursuant to a mortgage and the balance (initially thought likely to be £25,000, but in the event it was £26,496.62), was to be advanced by way of a loan by Naim, repayable "as soon as Shakeel and Haleema were financially more stable".

129. My reservation concerns the further payment of £50,000 on the eventual sale of the property. No proper valuation evidence was put before me. Whilst I believe that I can take judicial notice of the fact that UK residential property prices increased significantly in the period 1991-2001, a total purchase price of £145,000 looks to me to be on the high side, and not what one would have expected in a transaction between close family members who at the time were favourably disposed towards each other. The Defendants called Mr. White, who lives at 135 Springfield Road (ie next door to 133), and (in cross examination) he said that he believed his property was worth about £170,000 at the time of the trial in October 2008; that too would tend to suggest that a price of £145,000 for

133 Springfield Road in late 2001 would have been an unduly generous one (in favour of Naim).

130. It is perhaps needless to say that the notion that the total purchase price was actually £145,000 rather than £95,000 finds no support in any contemporaneous documentation. Stamp duty, as I have pointed out, was calculated on the basis of a purchase price of £95,000, and the building society mortgagee and the conveyancing solicitors were informed that the purchase price was £95,000.

131. In these circumstances I find that, whatever Naim's aspirations at the time, he is mistaken in his recollection of what was actually agreed between himself and Shakeel: the only loan he made to Shakeel and Haleema was as regards the funds necessary to complete the purchase at the price of £95,000. I therefore reject his claim to a declaration that Shakeel is obliged to pay him a further £50,000 when 133 Springfield Road is sold.

132. Very belatedly, I permitted Shakeel and Haleema to allege that the agreement relied on by Naim (if, contrary to their principal submissions, I found it was made), was unenforceable because it was a contract for the sale or disposition of an interest in land which was not made in writing, contrary to Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 and/or Sections 52 and 53 of the Law of Property Act 1925. I was not asked to find that the agreement, or any alleged term, was too uncertain to be enforced.

133. Naim's pleaded claim is for the repayment of the £26,496.62 together with interest since the date it was demanded and a declaration that he has a beneficial interest in 133 Springfield Road based on his contribution (of £26,496.62) to the purchase price.

134. If the loan arrangement is enforceable by Naim, I have no hesitation in rejecting the latter claim (and to be fair to Naim, in closing submissions the claim, as a standalone claim, was abandoned): on that basis Naim did not make a "contribution" to the purchase price of the property, he made loans to Shakeel and Haleema. Again, the reliance on ***Hussey v. Palmer*** *(loc cit)* would in my judgment be misplaced.

135. Is the loan arrangement invalidated by any of the statutory provisions relied upon?

136. Section 52 of the 1925 Act avoids conveyances of land or of interests in land for the purposes of conveying or creating a legal estate unless they are

made by deed. That section has no application in this case because the issue is not whether the legal estate of 133 Springfield Road has been validly conveyed.

137. Section 53 of the 1925 Act provides that dispositions of interests in land or of equitable interests must be in writing. This section may have been relevant had Naim refused to proceed with his agreement to dispose of his (beneficial) interest in 133 Springfield Road to Shakeel and Haleema. But he did proceed with it and in consequence Shakeel and Haleema acquired the full legal and beneficial interest in the property. I do not understand them to be contending that their acquisition should be reversed (which in my judgment the provisions of section 53 would not require or justify, in any event).

138. Section 2(1) of the 1989 Act provides that 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 in each document where contracts are exchanged). Section 2(3) provides that the document must be signed by or on behalf of each party.

139. It is clear that the arrangement reached between Naim and Shakeel and Haleema for the sale of 133 Springfield Road did not comply with Section 2 of the 1989 Act: it was entirely oral. But so far as Naim is concerned, he has performed his part of the agreement: 133 Springfield Road was transferred to Shakeel and Haleema; they became the registered proprietors and as such charged the property by way of mortgage to the building society; and Naim advanced the loan of the monies required for completion by payment to the solicitors instructed by Shakeel and Haleema. A ruling now that the loan aspect of the arrangement was unenforceable by Naim would seem unjust, unless Shakeel were to be required to transfer 133 Springfield Road back to Naim (a result for which Shakeel certainly does not contend).

140. I was referred to two authorities on this part of the argument. ***Tootal Clothing Ltd v. Guinea Properties Ltd*** *(1992) 64 P & C R 452*, was a case involving two written agreements, one for a lease and the other (referred to as a supplemental agreement) for a contribution by the landlord to works of improvement. The lease was granted, the works of improvement were carried out, but the landlord refused to pay the contribution provided for in the supplemental agreement, relying on section 2 of the 1989 Act. The landlord's argument was that the whole transaction was a land contract which did not comply with section 2 because it was contained in two separate documents (notwithstanding that both documents had been signed by both parties). The landlord succeeded at first instance but the tenant's appeal was allowed by the Court of Appeal.

141. The ratio of the Court of Appeal's decision is that Section 2 of the 1989 Act was not relevant to the tenant's claim. Scott LJ said at p. 455:

"... section 2 is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2."

Scott LJ also observed at p. 456:

"I am of the opinion, speaking for myself, that even before completion of the lease agreement ..., section 2 would not have prevented the enforcement of the lease agreement. If parties choose to hive off part of the terms of their composite bargain into a separate contract distinct from the written land contract that incorporates the rest of the terms, I can see nothing in section 2 that provides an answer to an action for enforcement of the land contract, on the one hand, or of the separate contract on the other hand. Each has become, by the contractual choice of the parties, a separate contract."

142. The second case I was referred to was the decision of Lewison J in ***Kilcarne Holdings Ltd v. Targetfellow (Birmingham) Ltd*** *[2004] EWHC 2547.* The Judge was referred to the decision in ***Tootal*** and at para. 198 of his judgment, he said this:

*"What **Tootal** appears to me to decide is that section 2 applies only to an executory contract for the sale or disposition of an interest in land; and that once all the land elements of an alleged contract have been performed, the remaining parts of the alleged contract can be examined without reference to section 2."*

143. In the present case, all the land elements of the agreement between Naim and Shakeel and Haleema have been performed: the legal and beneficial title to 133 Springfield Road vested in Shakeel and Haleema, and the purchase price was either paid or provided for. What remains to be performed is the obligation to repay the loan created to facilitate the sale. If the loan agreement had been set out in a separate document from the sale agreement, there can be no doubt, applying the ***Tootal*** decision, that it would be enforceable notwithstanding section 2. Does it make a difference if no part of the parties' agreement was set out in writing, especially when the land elements of the parties' arrangement have been performed? In my judgment, following the guidance given by Lewison J in the ***Kilcarne Holdings*** case, it does not.

144. I therefore find that the financing aspect of the arrangement is binding on Shakeel and Haleema. It follows that I do not need to investigate whether, in the event that the financing aspect was unenforceable, Naim would be viewed as having made a contribution to the purchase price and therefore entitled to a beneficial interest in the property under a resulting trust.

145. Is the £26,496.62 now due to be repaid? As I have already recorded, the loan was agreed to be repaid "as soon as Shakeel and Haleema were financially more stable". I have heard no evidence that the present circumstances of Shakeel and Haleema are such that they may be said to be "financially more stable" than they were in 2002. It follows that whilst I have found that the loan is binding on Shakeel and Haleema and will if required so declare, I must reject Naim's present claim for its repayment.